In the Matter of a Dispute Resolution Proceeding before Eli Gedalof pursuant to Article 6 of the Memorandum of Agreement

B E T W E E N :

THE UNIVERSITY OF TORONTO

(the “University”)

- and -

THE UNIVERSITY OF TORONTO FACULTY ASSOCIATION

(the “Association”)

UNIVERSITY’S REPLY BRIEF

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INTRODUCTION AND OVERVIEW

1. The University is in receipt of the Association's Arbitration Brief ("brief" or the "Association's Brief") dated August 19, 2022. The submissions set out below constitute the University's reply thereto. The University reserves the right to address any further submissions made in the Association's Reply Brief.

2. Following the parties' exchange of Arbitration Briefs on August 19, 2022, an interim award was issued on September 15, 2022 which ordered a 1% ATB salary increase effective July 1, 2022 and an increase to the minimum per course stipend and overload rate from $18,255 to $18,438. A copy of this interim award is attached to the University's Reply Brief at **Tab 1**. Consequently, the proposals regarding these matters that were included in the parties' earlier briefs need not be further addressed.

3. In addressing the Association's proposals for increases to: (a) Psychology and Mental Health Benefits (UTFA Proposal 9), (b) Paramedical Services Benefits (UTFA Proposal 13), and (c) Vision Care Benefits (UTFA Proposal 15), counsel for the University and counsel for the Association agreed that they could refer to and rely upon the costing methodologies that were prepared and exchanged during their earlier without prejudice mediation process in the course of this arbitration proceeding. In accordance with this agreement, the Association's summary of its key costing assumptions regarding these proposals is attached to this Reply Brief at **Tab 2**. The University's summary of its key costing assumptions regarding these proposals is attached to this Reply Brief at **Tab 3**. The Association's response to the University's key costing assumptions is attached to this Reply Brief at **Tab 4**. The University's revised costing of the Association's proposed improvements to its Paramedical Services Benefits, reflecting a lower estimated cost to the University of $200,100 is attached to this Reply Brief at **Tab 5**.

4. Counsel for the Association has also advised counsel for the University that the Association will not be pursuing at arbitration its proposed improvements to dental benefits. Accordingly those proposals in the Association's Brief (Proposals 16(A) and 16(B)) are not addressed in the University's Reply Brief.

5. As noted in the September 15, 2022 Interim Award, the temporal scope of this proceeding covers July 1, 2022 to June 30, 2023 only. This period of time is the third year of the moderation period imposed by Bill 124, during which time increases in "compensation" as broadly defined in Bill 124 are expressly limited, regardless of the impact, if any, of external economic factors. In these circumstances, the Association's submissions regarding "cost of living" found at paragraphs 27 through 30 of its brief are, in the University's submission, not relevant to this proceeding.

6. The University's Reply Brief is comprised of two main parts. The first part includes the University's reply to the more general assertions made in the Association's Brief, or which impact more than one of the Association's proposals. The second part sets out the University's reply to each of the proposals made by the Association.

PART I – REPLY TO THE ASSOCIATION'S GENERAL ASSERTIONS

7. The arguments that the Association has advanced in support of its position and specific proposals are fundamentally flawed, for the following reasons:

(a) In its positions and proposals regarding workload, the Association misapplies the concepts used in the Progress-through-the-Ranks process (the "PTR Process"), which are entirely unrelated and inapplicable to workload matters.

(b) The Association seeks to improperly extend earlier arbitral observations regarding the University's place at the "top of the market", with regard to salaries paid in the university sector, to workload matters.

(c) The Association regularly cites the terms and conditions of employment of purported "comparators" that are not large, research-based universities, and relies on a rotating slate of "comparators" on a proposal-by-proposal basis.

(d) The Association has incorrectly described the duties and responsibilities of Teaching Stream faculty members, by claiming that they are "required to engage in scholarship".

(e) The Association regularly references anecdotal information, as well as results from prior surveys which are either more than ten years old, or which should not be automatically applied to the University's complement of faculty members and librarians as a whole.

(f) The Association requests that the arbitrator acting in lieu of an Article 6 Dispute Resolution Panel be endowed with ongoing and indefinite jurisdiction to address issues that may flow from the possibility that Bill 124 might someday be found unconstitutional, despite the clear language in Article 6 that prohibits this type of jurisdictional extension. The University submits that the arbitrator, acting in lieu of a Dispute Resolution Panel, has no jurisdiction under Article 6 of the Memorandum of Agreement to unilaterally grant to himself any form of indefinite jurisdiction following the issuance of his award, including any jurisdiction that could somehow be exercised beyond the one year period from July 1, 2022 to June 30, 2023 at issue under Article 6 of the Memorandum of Agreement.

A. THE ASSOCIATION'S MISAPPLICATION OF THE PTR PROCESS TO WORKLOAD

8. At paragraphs 9, 38 and 69 of its brief, the Association describes its workload proposals, including those that seek the imposition of university-wide workload formulae and an intrusive and costly University-wide cap on the teaching workload assigned to Teaching Stream faculty as "basic protections against excessive and inequitable workload" and as "modest" forms of "incremental change." These descriptions of the Association's workload proposals are not accurate. The Association's workload proposals portend a drastic overhaul of existing and freely negotiated collegial workload arrangements which have been in place at the University for over a decade.

9. In defence of its workload proposals, the Association has conflated concepts related to workload with separate concepts that have meaning and application solely within the PTR Process. A summary of the University's PTR Process is found at paragraphs 169 through 183 of the University's Arbitration Brief. The University repeats and relies on these submissions in response to the Association's submissions, particularly its request for the imposition of entirely new and rigid workload quantification requirements (Association Proposal 1(J)) into the Workload Policy and Procedures (the "WLPP")[1] and its renewed insistence on the imposition of a University-wide cap on the teaching workload that can be assigned to Teaching Stream faculty members (Association Proposal 1(K)).

[1] A copy of the WLPP is at **Tab 13** of the University's Book of Documents and Authorities.

10. Throughout its submissions, the Association makes references to the components of workload and to the PTR Process which are either incomplete or inaccurate. The first such examples are found at paragraphs 145 and 148 of the Association's Brief. These two paragraphs of the Association's Brief are reproduced below:

> 145. University policy recognizes that there are three principal components of a faculty member's appointment. As the PTR section of the Administration's *Academic Administrative Procedures Manual* ("AAPM") recognizes, for example: The PTR scheme allows each unit to determine the balance amongst the **three principal components** of a faculty member's activities, teaching, research and service" (emphasis added).[32] The WLPP similarly provides: "individual units shall determine the balance amongst the **three principal components** of a faculty member's activities: teaching, research, and service" (emphasis added). All faculty appointments, whether in the Tenure Stream or Teaching Stream, consist of these same three principal components.
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> …
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> 148. Importantly, the three activities or responsibilities comprising workload - teaching, research and service – are referred to as the "three principal components" which means that each activity is both principal (i.e. first in order of importance or main) and a component (i.e. a separate part). This is reflected in the PTR section of the AAPM, which requires that the three principal components of workload for Teaching Stream faculty be evaluated separately:
>
> > Importantly, the three activities or responsibilities comprising workload - teaching, research and service – are referred to as the "three principal components" which means that each activity is both principal (i.e. first in order of importance or main) and a component (i.e. a separate part). This is reflected in the PTR section of the AAPM, which requires that the three principal components of workload for Teaching Stream faculty be evaluated separately:
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> [Emphases in the Association's Brief]

11. The Association's submissions fail to recognize that there are clear differences between the roles and responsibilities of Teaching Stream faculty members and Tenure Stream faculty members. In the specific context of workload, the unique roles and responsibilities of Teaching Stream Faculty members are addressed in Articles 7.1 and 7.2 of the WLPP, which are reproduced below:

> 7.1 The duties of faculty members in the Teaching Stream normally consist of teaching students who are in degree programs or access programs, and related professional and administrative activities. Teaching stream faculty may have independent responsibility for designing and teaching courses or significant components of courses within their departmental and divisional curricula. While the patterns of these duties may vary from individual to individual, these duties, namely: Teaching and related Administrative Responsibilities; Scholarship, and Service, constitute the principal obligations of faculty members in the Teaching Stream.
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> 7.2 **Scholarship in the Teaching Stream**. Scholarship refers to any combination of discipline-specific scholarship in relation to or relevant to the field in which the faculty member teaches, the scholarship of teaching and learning, and creative/professional activities. Teaching Stream faculty are entitled to reasonable time for pedagogical/professional development in determining workload as set out in paragraph 30(x)(b) of the PPAA.
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> *e.g. discipline-based scholarship in relation to, or relevant to, the field in which the faculty member teaches; participation at, and contributions to, academic conferences where sessions on pedagogical research and technique are prominent; teaching-related activity by the faculty member outside of his or her classroom functions and responsibilities; professional work that allows the faculty member to maintain a mastery of his or her subject area in accordance with appropriate divisional guidelines.

12. The provisions of the *Policies and Procedures on Academic Appointments* (the "PPAA")[2] which set out the requirements used in the respective search processes for Tenure Stream faculty positions and Teaching Stream faculty positions, further confirm that contrary to the Association's submissions, "the same three principal components" are not used in both the Tenure Stream and the Teaching Stream.

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[2] A copy of the PPAA is at **Tab 4** of the University's Book of Documents and Authorities, which was filed with the University's Arbitration Brief.

13. In instances where the University wishes to fill a Tenure Stream appointment, section 5(ii) of the PPAA requires that:

> (ii) All documentation for candidates must be obtained in writing. The documentation for each candidate should include a current curriculum vitae and several letters of recommendation indicating the candidate's capacity for **scholarship as evidenced by teaching and research**.
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> [Emphasis added]

14. In contrast, when the University wishes to fill a Teaching Stream appointment, section 30(ii) requires that:

> (ii) All documentation for candidates must be obtained in writing. The documentation for each candidate should include a current curriculum vitae and several letters of recommendation indicating the candidate's capacity for **scholarship as evidenced by teaching and related pedagogical/professional development.**
>
> [Emphasis added]

15. As outlined in paragraphs 10 through 16 of the University's Arbitration Brief, the ways in which Tenure Stream and Teaching Stream faculty are assessed during their initial appointments and during the tenure/continuing status review processes are not based on "the same three principal components." The differences in these two streams of faculty appointment continue to be used during the promotion and PTR processes. Here again, different criteria are used to assess the work of Tenure Stream faculty members and Teaching Stream faculty members. The relevant provisions of the Academic Administrative Procedures Manual (the "AAPM")[3] provide that:

> Normally, for professorial faculty the portion of the total PTR allocated to teaching and research/scholarship (which can also take the form of creative professional activity) is approximately equal, but in a limited number of cases, an argument might be made that an atypical weighting of all three areas of activity.

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[3] The relevant part of the University's Academic Administrative Procedures Manual can be accessed online at: https://www.aapm.utoronto.ca/academic-administrative-procedures-manual/academic-salary-administration/#evaluation. A copy of the relevant part of the AAPM which includes the paragraphs excerpted above is at **Tab 6** of the University's Reply Brief.

> A separate weighting of teaching, pedagogical/professional development and service should be made for teaching-stream faculty. Teaching stream faculty members shall be evaluated on their pedagogical and/or discipline-based scholarship in relation to the field in which they teach and/or creative/professional activity that allows the faculty member to maintain a mastery of their subject area and this evaluation will be appropriately weighted in the PTR assessment.

16. As set out in more detail below, the PTR process is fundamentally different from, and cannot be confused or conflated with, the processes used to assign workload.

17. Within the PTR process, the purpose underlying each academic unit's balancing of teaching, research and service for Tenure Stream faculty members or teaching, pedagogical/professional development and service for Teaching Stream faculty members is to establish what aspects of their work will be assessed and to assign a relative value to each aspect of their work in order to create a methodology that is then used to determine which faculty members will receive a PTR award each year. Faculty members can then use this methodology to decide for themselves, how to maximize their efforts in pursuit of a PTR award.

18. Once an academic unit has determined its PTR methodology, each Tenure Stream faculty member's achievements in research, teaching and service, and each Teaching Stream faculty member's achievements in teaching, pedagogical/professional development and service, as set out in their Annual Activity Reports, is then evaluated against that methodology to determine how the relevant PTR funds will be disbursed in a given year. The purpose of this evaluation is not to measure workload. The evaluation is intended to determine which faculty members will receive a PTR award in any given year, and to help determine the amount of each such award.

19. Importantly, even when an academic unit applies its PTR methodology, adjustments can be made in advance of the assessment period to place a temporary increased emphasis on a specific component of the PTR assessment structure, which for Tenure Stream faculty members would be either research, teaching, or service, and for Teaching Stream faculty members would be either teaching, pedagogical/professional development or service. These flexible aspects of the PTR Process are expressed

openly, including in the *Best Practice Guidelines* found at **Tab 24** of the University's Book of Documents and Authorities, which are cited at paragraph 182 of the University's Arbitration Brief.

20. The balancing of the primary duties and responsibilities of faculty members and the evaluation of their achievements in these same areas that occur within the PTR Process are entirely unrelated to issues of workload. These aspects of the PTR Process are used as a way to explain the relative value that will be assigned to the performance of these duties and responsibilities in order to determine how and to whom the merit-based PTR awards will be disbursed each year. The PTR process cannot and does not seek to measure the amount of time or effort that faculty members spend carrying out their duties and responsibilities.

21. In this regard, the University denies the Association's assertions, made at paragraphs 152, 159 and 160 of its Arbitration Brief, that "as reflected in University policy – it is commonly understood that workload generally follows a "40/40/20" distribution of effort for Tenure Stream faculty" and that "describing a member's workload in distribution of effort (DOE) terms is already a wide-spread, common practice within the University." These assertions deliberately confuse two entirely separate processes: (a) the workload process and (b) the methodology used by some academic units to calculate PTR entitlements. Aside from the PTR methodology that some academic units have decided to develop, there is no reference in any University policy to a "distribution of effort" workload quantification for Tenure Stream faculty members, or any other faculty members or librarians. Notably, even if the University's PTR model has any application to workload issues, which is not admitted and expressly denied, PTR determinations, including determinations as to which methodology to use to determine PTR awards, are determined locally, by each academic unit, and not on a University-wide basis.

22. Faculty members exercise a great deal of autonomy in determining how they spend their time in order to ensure that they complete their duties and responsibilities. The University has not and would not agree to the type of unduly prescriptive "distribution of effort" workload formula that the Association requests. Far from constituting "basic protections against excessive and inequitable workload", as the Association suggests, the Association's demands for homogenous University-wide limits and requirements constitute a radical departure from and an attempt to irreparably alter the collegially-determined workload policies and practices that have been in place for over a decade.

23. At no time has the University prescribed that Tenure Stream faculty members must spend the equivalent of two days per work week throughout the entire year (or even during each of the terms in which teaching is assigned), on the performance of teaching-related work. As noted above, the "40/40/20" formula referenced by the Association is used by some academic units within the PTR Process for Tenure Stream faculty members. At the University, the "40/40/20" formula has no meaning or application outside of the PTR Process in those academic units. It is not a workload concept and should not be contorted into one.

24. The Association's attempt to transplant concepts and measurements that are used exclusively by some academic units in the PTR Process as a basis to support its workload proposals underscores the fact that there is no objective evidence that supports the awarding of these proposals. They cannot be justified using the established principles of replication, gradualism or demonstrated need.

B. THE ASSOCIATION'S MISAPPLICATION OF THE UNIVERSITY'S "TOP OF THE MARKET" SALARY STATUS TO WORKLOAD ISSUES

25. In addition to misapplying concepts restricted to the PTR Process to workload matters, the Association has also sought to superimpose earlier arbitral comments regarding the University's place at the "top of the market" pertaining to salary levels onto workload considerations. Not only has the Association taken these earlier arbitral comments drastically out of context, there is no arbitral principle which suggests that any

employer is required to establish and maintain "top of the market" status for salary and workload terms and conditions.

26. The first arbitral observation that the University occupies a place at the "top of the market" concerning the salaries paid to faculty members and librarians was made by Justice Winkler in *Governing Council of the University of Toronto and UTFA* (2006 – University's Book of Documents and Authorities, **Tab 12**). At paragraph 20 of his decision, Justice Winkler noted that:

> In essence, the University has staked out a position at the top of the relevant market or "industry segment". It implicitly admits that maintaining that position depends to a large degree on maintaining the quality of its faculty and librarians. That in turn requires, leaving aside the intangibles, ensuring that the total compensation package available to those faculty members and librarians is sufficient to place them at the top of the market as well.

27. In his decision of October 5, 2010, Arbitrator Teplitsky (**Tab 22** of the University's Book of Documents and Authorities) recognized that Justice Winkler's comments regarding the University's "top of the market" position were limited to an assessment of how the salaries are paid to its faculty and librarians compared to the salaries paid by faculty, and librarians at other universities. Arbitrator Teplitsky's narrow and specific application of Justice Winkler's "top of the market" observation is evident from the following excerpts of his decision:

> **Salaries**
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> **I accept, as Chief Justice Winkler concluded, that UTFA's members should be "at the top of the market." They clearly are**. To the extent that comparative total compensation can be determined by me on the available evidence, **the average faculty salary at the U of T is significantly higher than at other comparable Universities**. Additionally, UTFA members make smaller pension contributions than other comparables.
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Private and Public Sector Settlements

To recognize the principle that the public does not have to subsidize public sector employees, it is necessary to examine what the private and public sector have achieved in wage increases over the relevant period. Ministry of Labour Statistics for 2009 show wage increases for all settlements of 2.1%. For 2010, the overall average is 2.3%. Obviously, the Faculty's demands, if given effect to would result in the public subsidizing the award. Equally "0's" as sought by the University would result in UTFA subsidizing the public.

In this context, I need to address a submission made by Mr. Sack. As Canada's leading practitioner in interest disputes on the Union side, his submissions are entitled to great weight. However, I find myself on this rare occasion unable to agree with him. Mr. Sack submitted that rather than examining private sector settlements broadly, I should consider those sectors which provide services akin to those supplied by UTFA's members; professional and technical services, management of companies and enterprises, educational services, health care and social assistance and public administration. These sectors achieved wage gains in the 2009 fiscal year between a low of 3.9% and 7.8%.

In my respectful opinion, these groups and these statistics are not helpful. Comparables are usually examined for two different reasons. One reason is to determine whether the principle of equal pay for equal work is being followed. Ordinarily, persons living and working in the same general area performing the same work should receive more or less the same compensation. UTFA's members enjoy the highest average total compensation in the University sector. Any award I will make will continue their position at the "top of the market". How the equal pay for equal work principle applies to these other groups is impossible to determine because there is no evidence of what the average earnings in these other sectors are or how these sectors actually compare to a university settling which research intensive.

Another use of comparables is to determine a wage increase in any particular year. Mr. Sack submits that if a firefighter or police officer in City X received a 3% increase, a firefighter in City Y should receive the same increase; so too in the university sector. What this analysis omits is that this approach only applies if a firefighter in City Y had a historical relationship of approximate parity with either the firefighter or the police officer in City X. **UTFA is at the top of the market. It has never been in a position of approximate parity with other universities. Its position at the top of the market will not be disturbed with an increase less than that achieved at other universities where faculty are likely seeking catch-up increases with UTFA. UTFA is driven to argue that its relative position at the top of the market must continue with no change. There**

> **is no arbitral authority for this proposition of which I am aware.** Moreover, such a principle would stultify bargaining. Indeed, UTFA would be hostage to the bargains of its colleagues at other institutions. As opposed to being an important factor in wage determination, these results would be controlling. Moreover, in the context of the U of T which is at the "top of the market" being chased by the rest of the sector, the inevitable result would be "whipsawing." [Emphases added]

28. The terminology used by both Justice Winkler and Arbitrator Teplitsky in their respective awards demonstrate that their respective descriptions of the University's faculty and librarians being at the "top of the market" was specific to compensation only, and salaries specifically. In no way did these observations relate to workload matters.

29. Despite Arbitrator Teplitsky's recognition that there is no arbitral authority for the proposition that faculty members and librarians at the University are entitled to perpetually retain their "top of the market" status relative to the applicable comparators with no change, the Association has now asserted that faculty members and librarians ought to enjoy "top of the market" status with respect to their compensation/salary and their workload. This proposition is unprecedented and unsupportable.

30. In support of its novel and unsupported assertion that faculty members and librarians must attain and retain "top of the market" status for all forms of compensation in addition to salary as well as workload, the Association claims at paragraph 35 of its brief that "there is a close relationship between workload and compensation." In making this claim, the Association has overlooked the following facts:

(a) the starting salary for newly appointed faculty members is dictated more by the "market" specific to each academic discipline, and not by the workload they are assigned, and the starting salary for newly appointed librarians is based on the job market for their specialty and skills, not their assigned workload;

(b) in the absence of compensation restraint legislation, the across-the-board increases and improvements in benefits that have been agreed to between these parties or awarded through the Article 6 dispute resolution process have not been driven by workload considerations; and

(c) PTR, described at paragraphs 170-183 of the University's brief, is based entirely on merit and not on workload.

31. While the articulation of the "top of the market" concept by earlier interest arbitrators has been confined to matters of compensation/salary and not to any consideration of workload matters, the University submits that a "top of the market" workload policy has already been in place at the University for many years. The current workload policy, freely negotiated and agreed to by both the University and the Association, offers rich and diverse flexibility at the academic unit level. In contrast, the Association's proposals seek to have a formulaic approach to workload imposed across the entire University, not by means of an agreement with the University, but rather through a dispute resolution process which would eschew this well-established notion of academic autonomy at the academic unit level.

C. THE ASSOCIATION'S UNEVEN USE OF INFORMATION FROM NON-COMPARATOR UNIVERSITIES

32. Throughout its brief, the Association refers to the terms and conditions of employment of faculty members employed at universities that are in no way comparable to the University. This approach is especially prevalent in the Association's various workload proposals. At paragraph 46 of its brief, the Association claims that measures including teaching load caps, explicit distribution of effort language, and minimum entitlements to TA/Marker/Grader supports have been in place at various universities which the Association describes as "comparator institutions." The University disputes the accuracy of the Association's assertion. There are fundamental differences between structure, focus, operations, and objectives of large research-focused universities, of which the University is the largest in Canada, and smaller universities which are not research-focused and instead focus on the delivery of undergraduate-level academic programming, which are regularly mischaracterized by the Association as "comparator institutions".

33. The fundamental differences in structure, focus, operations and objectives that exist between these fundamentally different types of institutions are reflected in the different terms and conditions of employment that these different institutions provide to their respective faculty members and librarians. The comparison of the terms and conditions of employment of the faculty and librarians at the University, with the terms

and conditions of employment of their counterparts in much smaller, undergraduate-focused universities does not, in the University's view, provide much if any information relevant to this proceeding. This is especially the case where the Association's purported comparators vary widely from proposal to proposal.

34. The differences between faculty members employed at the University and faculty members employed elsewhere are made apparent when the salaries earned by faculty members at the University are compared with the salaries earned by faculty members elsewhere including by faculty members employed at many of the universities referenced in the Association's Brief. The tables below show that the salaries paid by the University to its faculty members at the ranks of Professor, Associate Professor and Assistant Professor are significantly higher than the salaries paid by the universities that the Association has mischaracterized as appropriate comparators.

35. Tables from the Statistics Canada University and College Academic Staff System ("UCASS") survey of university academic staff for 2019-2020 are set out on the following pages of these submissions, along with graphs comparing the average salaries of full-time professors, associate professors, assistant professors, and all three ranks combined at Ontario universities and non-Ontario large research-focused universities within the "U-15" group. These data show the following:

(a) In 2019-20, the average salaries of the University's faculty are more than their peers at other Canadian universities.

(b) The average salary of University of Toronto's professors exceeds the mean by 21.9%, that of associate professor by 17.2%, and assistant professor by 15.7%.

(c) Average salaries of all three ranks combined (professor, associate professor, assistant professor) is 7.9% more than their comparators at the next highest paid university in Canada.

Age/Salary Comparison of Full-Time Faculty, Fall 2019: Professors

University (sorted aphabetically)	Less than 30			30 to 34			35 to 39			40 to 44			45 to 49			50 to 54			55 to 59			60+			Total		
	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank
Toronto							3			51	202,825	1	108	198,700	1	150	209,800	1	150	220,725	1	387	228,450	1	855	218,050	1
Alberta										45	154,500	11	84	161,075	15	132	180,525	9	153	186,550	9	207	204,375	5	621	185,525	9
Brock										6	155,575	10	30	162,000	14	33	171,875	12	33	180,800	11	69	197,525	7	171	181,725	11
Calgary										6			39	149,825	21	57	162,025	20	69	172,750	18	162	182,000	20	333	172,075	20
Carleton										9	143,550	15	36	152,325	20	39	161,450	21	57	173,100	17	99	179,750	22	240	169,975	22
Dalhousie										6	143,100	16	42	155,550	18	33	158,200	22	36	169,075	22	90	185,725	18	207	170,325	21
Guelph										9	148,400	14	39	162,275	13	51	171,300	13	57	176,300	14	99	191,700	14	252	178,400	15
Lakehead													9	148,200	22	27	156,700	23	15	159,400	23	39	181,575	21	90	166,550	23
Laurentian													6	155,925	17	24	163,775	18	21	172,675	19	54	182,600	19	105	174,300	17
Laval										48	124,275	19	72	131,975	26	93	141,050	26	108	144,400	27	159	144,250	27	477	139,775	27
Manitoba										12	134,300	18	30	140,450	24	45	144,625	25	57	151,200	26	126	160,900	25	270	152,650	25
McGill										12	167,450	9	42	163,275	12	51	163,375	19	45	171,975	20	174	177,550	23	324	172,325	19
McMaster										9	176,725	5	33	187,200	4	48	192,050	4	51	196,325	5	111	206,275	4	252	197,800	3
Montréal										30	135,925	17	81	147,550	23	99	155,125	24	132	158,375	24	231	163,800	24	579	157,200	24
Nipissing													9	138,650	25	3			9	153,850	25	12	159,350	26	36	148,150	26
OCAD																						27	133,500	28	33	135,200	28
Ottawa										30	168,925	7	69	174,800	7	93	184,700	8	102	190,300	7	150	195,725	9	447	187,075	8
Queen's										6	168,400	8	33	166,675	11	48	166,350	16	69	178,525	13	123	187,600	16	282	178,725	14
Ryerson													30	184,625	5	45	188,300	6	51	191,225	6	108	204,150	6	240	194,750	6
Saskatchewan										24	184,300	4	33	188,525	3	57	185,050	7	60	188,975	8	141	194,750	12	312	190,475	7
Trent													12	155,450	19	12	163,975	17	15	170,325	21	27	185,975	17	63	172,700	18
UBC										48	196,600	3	111	190,800	2	123	198,725	3	138	207,050	2	327	194,800	11	747	197,250	4
UOIT										3						6	172,750	11	6	181,825	10	18	194,900	10	39	180,950	13
Waterloo										21	170,725	6	81	181,050	6	60	190,825	5	96	200,075	4	153	207,875	3	411	196,400	5
Western										9	150,675	13	39	173,750	8	63	176,650	10	69	179,825	12	117	194,425	13	297	183,250	10
Wilfrid Laurier										6	151,050	12	15	167,025	10	24	168,425	14	27	174,375	15	48	189,050	15	123	177,225	16
Windsor										3			15	160,475	16	33	167,575	15	39	173,825	16	81	195,875	8	171	181,300	12
York										9	198,275	2	18	172,300	9	45	199,325	2	75	204,075	3	171	211,075	2	315	205,725	2
UofT Rank											1			1			1			1			1			1	
Count								3			402			1,116			1,494			1,740			3,510			8,292	
Mean excl UofT											$154,407			$165,297			$172,944			$179,968			$187,627			$178,902	
% Diff Between																											
UofT & Average											31.4%			20.2%			21.3%			22.6%			21.8%			21.9%	
UofT & Highest											n/a			n/a			n/a			n/a			n/a			n/a	
UofT & Second											2.3%			4.1%			5.3%			6.6%			8.2%			6.0%	

Source: Statistics Canada, Full-Time University and College Academic Staff System (FT-UCASS). Excludes Medicine and Dentistry and those with Sr Administrative Duties. Includes faculty with tenure, in the tenure stream, and contractually limited term appointments (non-teaching stream). Statistics Canada suppresses salary figures in cases where the unrounded staff count is less than 6.

Age/Salary Comparison of Full-Time Faculty, Fall 2019: Associate Professors

University (sorted aphabetically)	Less than 30			30 to 34			35 to 39			40 to 44			45 to 49			50 to 54			55 to 59			60+			Total		
	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank
Toronto							66	163,100	2	126	164,950	1	144	168,775	1	102	169,725	1	69	175,975	1	66	185,900	1	573	170,200	1
Alberta							51	127,025	16	105	132,850	17	78	130,875	21	60	141,225	19	51	138,300	21	36	140,225	20	384	134,500	21
Brock							12	125,900	17	36	136,975	14	51	148,675	10	45	150,600	15	33	160,100	9	48	183,325	2	222	154,875	7
Calgary							27	125,250	18	57	124,675	23	54	125,975	23	63	132,275	23	42	131,775	25	45	135,950	23	288	129,350	23
Carleton							27	119,875	20	69	129,625	18	90	141,250	17	48	152,075	12	42	158,800	12	66	170,800	7	342	146,325	18
Dalhousie							18	128,925	15	39	127,300	21	39	133,275	19	33	138,400	22	15	143,750	20	24	149,400	19	171	135,625	20
Guelph							24	123,225	19	60	135,575	15	81	145,300	12	69	156,125	7	54	160,325	8	39	169,250	8	330	149,500	13
Lakehead							6	119,475	21	30	124,950	22	21	129,700	22	15	139,350	20	21	145,100	19	24	155,525	17	117	137,250	19
Laurentian							3			21	132,925	16	24	141,175	18	18	151,325	14	15	159,600	10	30	167,625	9	114	149,750	12
Laval							48	104,100	24	57	110,175	27	36	117,275	26	21	123,125	26	15	126,125	27	18	127,100	27	195	113,925	27
Manitoba							21	113,900	23	48	113,700	26	69	117,100	27	42	120,425	27	36	127,300	26	54	129,875	26	270	120,725	26
McGill							36	133,400	12	102	128,475	19	108	131,275	20	69	138,700	21	54	136,550	22	75	133,475	25	447	133,175	22
McMaster							12	145,050	4	36	142,050	9	45	166,750	2	36	166,950	2	27	171,075	3	30	172,475	6	183	162,050	3
Montréal				6			45	115,200	22	111	121,650	24	90	124,625	24	63	129,350	25	42	133,075	24	39	135,325	24	396	125,250	25
Nipissing										12	121,525	25	15	122,675	25	15	130,400	24	9	135,550	23	12	138,150	22	66	128,800	24
OCAD										3			9	102,250	28	9	106,275	28	6	116,475	28	24	119,925	28	54	112,050	28
Ottawa							36	138,100	10	120	147,825	6	105	154,950	6	60	158,475	6	57	160,925	6	45	160,600	14	426	153,225	8
Queen's							15	165,100	1	36	159,325	3	54	155,375	4	36	154,925	10	24	160,725	7	30	165,075	10	198	158,900	5
Ryerson							15	143,325	5	63	146,400	8	69	155,375	4	60	162,150	4	57	172,325	2	84	174,350	5	348	161,825	4
Saskatchewan							15	143,125	6	48	149,200	4	45	149,350	9	27	153,550	11	36	156,175	14	45	156,450	16	213	151,975	9
Trent										6	127,700	20	18	141,575	16	18	146,800	18	15	159,575	11	15	158,375	15	72	148,600	15
UBC							42	145,725	3	111	161,475	2	102	151,775	8	78	148,550	17	84	146,225	18	123	138,750	21	543	149,175	14
UOIT							9	129,900	14	21	141,975	10	12	143,400	15	15	150,450	16	15	154,775	15	12	163,450	11	81	147,650	17
Waterloo							48	140,175	7	108	149,175	5	81	158,475	3	48	163,425	3	42	171,075	3	42	179,225	3	372	157,675	6
Western							24	138,950	9	51	141,175	11	93	144,050	14	60	155,475	9	57	152,100	17	42	152,875	18	327	147,825	16
Wilfrid Laurier							15	139,800	8	54	140,775	12	48	148,550	11	60	156,050	8	30	153,950	16	30	162,850	13	240	150,625	10
Windsor							9	132,750	13	21	138,550	13	39	144,925	13	39	151,375	13	36	156,750	13	30	163,100	12	174	150,400	11
York							24	137,075	11	69	147,250	7	114	154,250	7	90	160,350	5	69	165,725	5	165	179,175	4	531	162,875	2
UofT Rank								2			1			1			1			1			1			1	
Count								648			1,620			1,734			1,299			1,053			1,293			7,677	
Mean excl UofT								$129,548			$137,216			$142,639			$148,405			$152,231			$157,330			$145,272	
% Diff Between																											
UofT & Average								25.9%			20.2%			18.3%			14.4%			15.6%			18.2%			17.2%	
UofT & Highest								-1.2%			n/a			n/a			n/a			n/a			n/a			n/a	
UofT & Second								n/a			2.2%			1.2%			1.7%			2.1%			1.4%			4.5%	

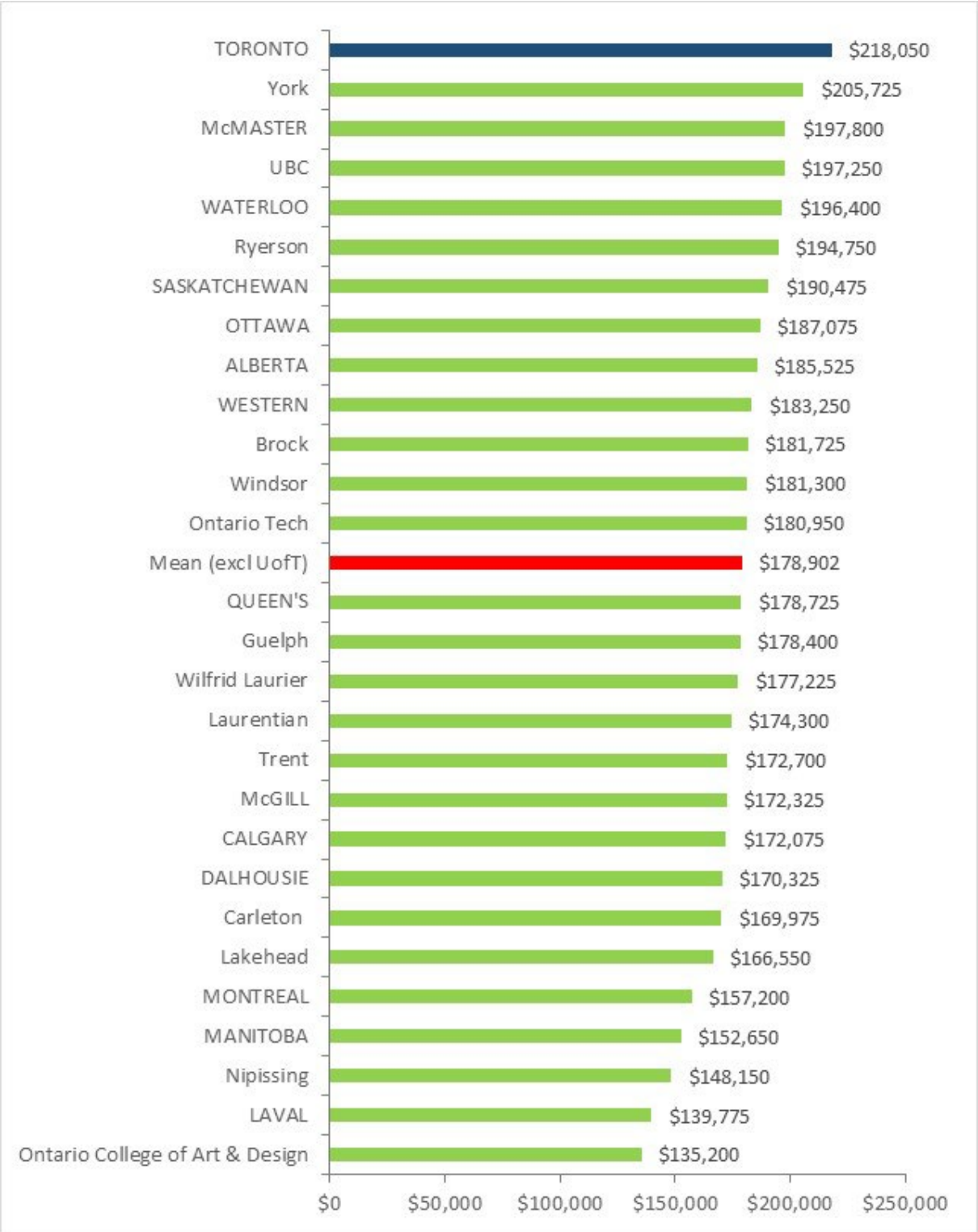
Source: Statistics Canada, Full-Time University and College Academic Staff System (FT-UCASS). Excludes Medicine and Dentistry and those with Sr Administrative Duties. Includes faculty with tenure, in the tenure stream, and contractually limited term appointments (non-teaching stream). Statistics Canada suppresses salary figures in cases where the unrounded staff count is less than 6.

Age/Salary Comparison of Full-Time Faculty, Fall 2019: Assistant Professors

University (sorted aphabetically)	Less than 30			30 to 34			35 to 39			40 to 44			45 to 49			50 to 54			55 to 59			60+			Total		
	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank	N	Average	Rank
Toronto	9	156,125	1	135	142,150	1	204	130,400	2	114	130,175	3	45	130,675	3	12	127,000	9	12	132,325	4				528	133,750	2
Alberta	3			51	109,425	13	99	112,125	15	63	107,625	23	27	110,375	19	12	129,225	7	3						258	111,075	17
Brock				21	103,675	19	30	111,025	16	15	108,325	20	9	104,275	26	6	115,050	15	6	127,900	7	9	112,175	12	99	109,900	21
Calgary				33	107,450	16	66	108,425	19	39	107,875	22	27	121,600	10	15	104,475	19	6	111,350	14	6			195	110,125	20
Carleton				21	108,650	15	51	112,550	14	36	122,475	8	12	134,400	2	9	129,800	6	6	128,325	5	6			147	118,225	11
Dalhousie				24	101,475	20	45	105,400	21	21	108,050	21	15	113,200	17	18	114,525	16	6	124,475	8	15	121,075	9	153	109,800	22
Guelph				39	112,875	9	60	113,600	11	30	116,850	12	18	114,775	14	9	111,425	17	6	137,450	3	6	154,025	3	168	116,525	12
Lakehead				9	103,850	18	15	104,275	22	21	109,000	19	12	109,250	20	6	119,200	14	3			3			72	110,575	18
Laurentian				6			9	94,950	25	15	118,525	11	12	126,925	6	9	141,375	2	12	153,800	1	12	161,875	2	69	130,550	3
Laval				33	88,125	25	54	93,250	26	24	98,500	26	6	107,125	22	3									129	94,850	27
Manitoba				27	96,525	23	60	95,200	24	48	99,550	25	30	99,900	27	15	104,425	20	9	93,975	16	9	102,650	14	192	98,100	26
McGill	6			57	114,750	8	111	112,675	13	54	110,775	17	15	107,500	21	9	92,300	22	3						252	111,900	15
McMaster	9	97,675	3	51	100,075	22	81	110,400	17	30	115,350	14	18	114,275	15	12	123,825	10	9	118,475	9	9	141,900	4	219	110,475	19
Montréal				54	100,575	21	93	105,450	20	54	105,975	24	18	106,400	25	6	102,300	21							231	104,650	25
Nipissing										9	94,425	27	9	106,725	23	6			6	114,175	12	9	110,400	13	42	105,250	24
OCAD				6			9	89,600	27	9	91,325	28	6	92,125	28							6	100,800	15	39	93,025	28
Ottawa				27	112,100	10	57	120,100	7	45	125,275	6	30	130,400	4	18	144,675	1	6			12	138,450	5	195	125,700	5
Queen's	3			36	133,150	2	81	135,350	1	33	137,425	1	12	137,675	1	12	139,375	3	3						183	135,550	1
Ryerson				30	109,600	12	75	114,000	10	42	120,400	9	15	115,100	13	12	123,575	12	9	116,575	11				186	115,550	13
Saskatchewan				24	109,375	14	45	117,050	8	57	116,800	13	27	124,325	8	15	130,425	5	15	128,100	6	15	128,225	7	198	119,500	10
Trent				9	95,800	24	27	103,250	23	15	109,875	18	12	106,550	24	6	107,300	18	12	113,825	13	6	117,900	10	87	106,875	23
UBC				105	130,350	3	138	127,225	3	78	126,250	5	24	113,975	16	12	133,500	4	9	107,325	15	12	114,125	11	381	126,325	4
UOIT				12	117,250	6	21	122,000	6	6	123,325	7	9	120,450	11										48	121,150	9
Waterloo	6	122,025	2	57	122,775	4	90	123,250	5	39	130,825	2	9	127,650	5										207	124,525	7
Western				39	117,100	7	54	124,675	4	42	126,700	4	30	125,150	7	9	121,950	13	15	143,750	2	12	121,875	8	204	124,775	6
Wilfrid Laurier				18	111,475	11	24	113,175	12	18	113,775	15	12	117,425	12				3						81	111,825	16
Windsor				21	105,275	17	33	109,400	18	24	111,825	16	18	110,575	18	6	123,725	11	9	116,875	10	9	130,025	6	123	112,475	14
York				42	118,650	5	63	115,800	9	48	118,850	10	21	124,050	9	15	128,025	8	3			6	165,625	1	201	121,800	8
UofT Rank		1			1			2			3			3			9			4			0			2	
Count		36			987			1,695			1,029			498			252			171			162			4,887	
Mean excl UofT		$59,675			$110,801			$114,081			$115,655			$116,564			$117,696			$105,222			$115,925			$115,563	
% Diff Between																											
UofT & Average		161.6%			28.3%			14.3%			12.6%			12.1%			7.9%			25.8%			n/a			15.7%	
UofT & Highest		n/a			n/a			-3.7%			-5.3%			-5.1%			-12.2%			-14.0%			n/a			-1.3%	
UofT & Second		27.9%			6.8%			n/a			-0.5%			-2.8%			-10.2%			-7.9%			n/a			n/a	

Source: Statistics Canada, Full-Time University and College Academic Staff System (FT-UCASS). Excludes Medicine and Dentistry and those with Sr Administrative Duties. Includes faculty with tenure, in the tenure stream, and contractually limited term appointments (non-teaching stream). Statistics Canada suppresses salary figures in cases where the unrounded staff count is less than 6.

Fall 2019 Full-Time Faculty Salaries – Professor

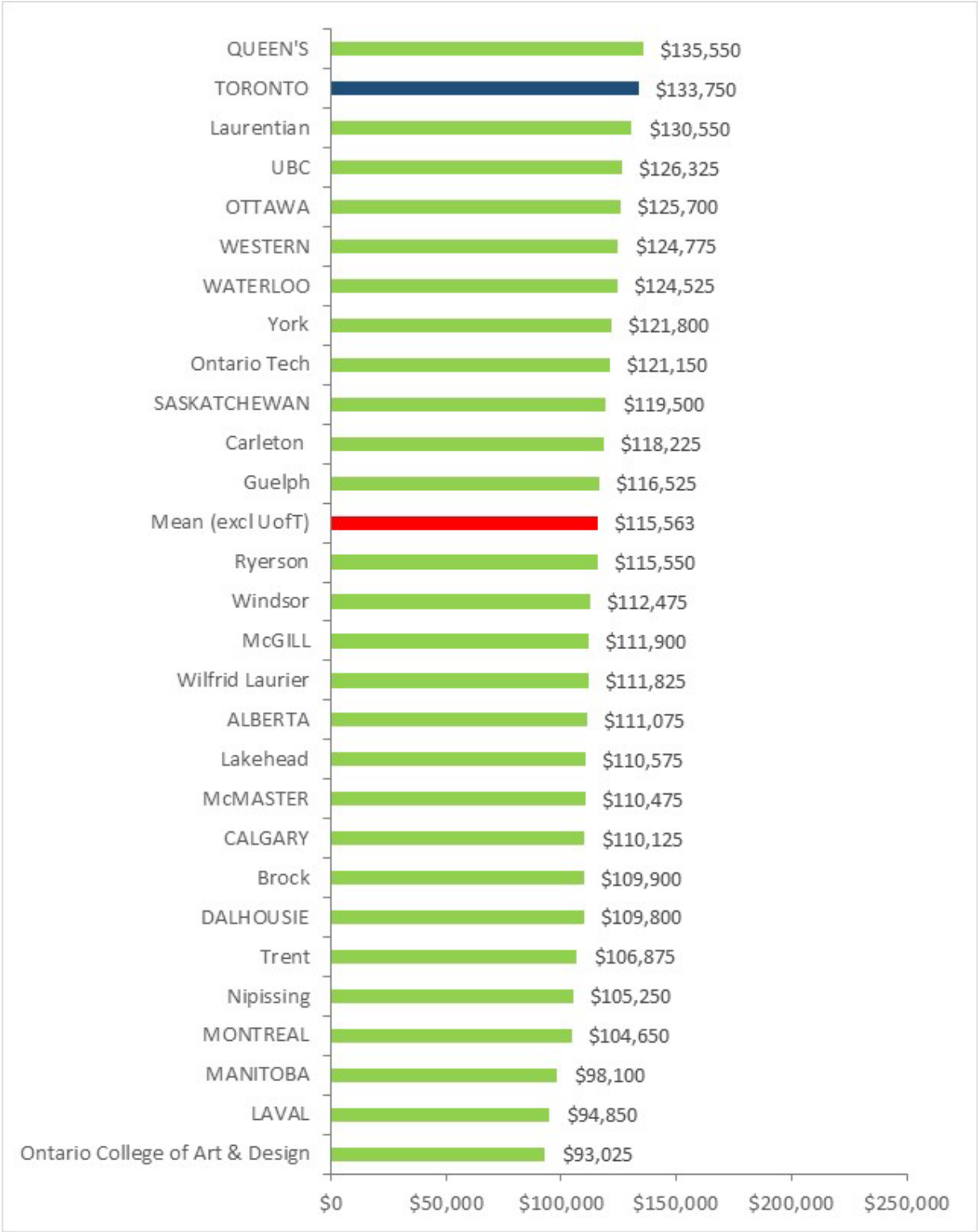


Source: Statistics Canada UCASS 2019-20. Research intensive institutions (U15) are in caps. Includes tenured, tenure stream, and contractually limited term appointments (non-teaching stream).

Fall 2019 Full-Time Faculty Salaries – Associate Professor

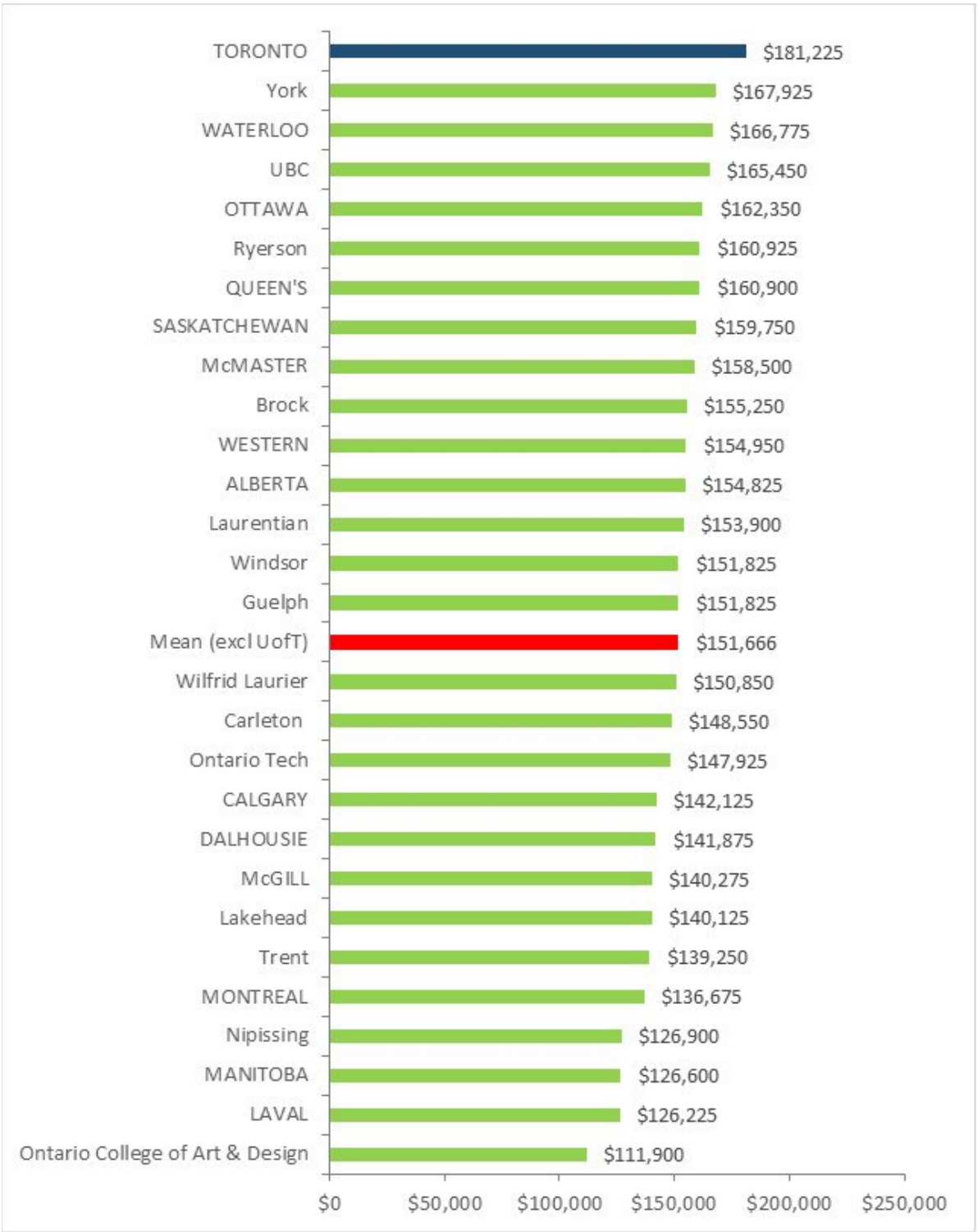
Source: Statistics Canada UCASS 2019-20. Research intensive institutions (U15) are in caps. Includes tenured, tenure stream, and contractually limited term appointments (non-teaching stream).

Fall 2019 Full-Time Faculty Salaries – Assistant Professor



Source: Statistics Canada UCASS 2019-20. Research intensive institutions (U15) are in caps. Includes tenured, tenure stream, and contractually limited term appointments (non-teaching stream).

Fall 2019 Full-Time Faculty Salaries – All Ranks Combined
(Professor, Associate Professor, Assistant Professor)



Source: Statistics Canada UCASS 2019-20. Research intensive institutions (U15) are in caps. Includes tenured, tenure stream, and contractually limited term appointments (non-teaching stream).

36. When viewed against this comparative backdrop, the fact that faculty at one or more other universities may have one or more term or condition of employment which, when viewed in isolation, may be perceived as different from or superior to that which is provided by the University, diminishes in significance. There is no interest arbitration principle which requires that one university must make upward adjustments to all terms and conditions of employment for faculty members and librarians on the basis that certain isolated and otherwise dissimilar universities have already attained such improvements during the course of separate negotiation processes, with separate priorities, governed by entirely different circumstances.

37. As set out in the table below, a more global assessment of the Association's use of "purported comparators" shows that there is no unifying or consistent principle governing their utilization within the Association's Brief. Instead, the Association has made selective and inconsistent use of a rotating group of alleged "comparators", on a proposal-by-proposal basis. No principle of interest arbitration countenances this selective utilization of dissimilar institutions as comparators.

Proposal	1(B)	1(D)	1(G)	1(H)	1(I)	1(J)	1(K)	1(L)	1(M)	4(A)	8	9	10	11(B)	12	13	14	15	16	16(B)	17	18	20
Algoma	X	X																					
Brescia								X															
Brock					X	X	X	X								X							
Carleton							X					X											
Guelph	X	X			X	X	X	X															
Huron	X					X	X	X															
King's								X															
Lakehead							X	X															
Laurier							X																
Laurentian		X			X	X	X									X							
Nipissing							X	X															
Northern Ontario S.M.						X																	
McMaster						X					X				X								
Mount Allison															X								
OCAD U		X				X	X																
Ottawa	X	X					X																
Queen's	X						X	X							X								
Renison								X															
St. Jerome's		X						X															
St. Michael's		X																					
St. Paul's		X						X															
TMU		X						X								X		X	X	X			
Trent	X				X		X												X				
UOIT						X	X	X															
Victoria						X																	
Waterloo						X	X									X							
Western	X				X	X													X				
Wilfrid Laurier		X					X								X	X							
Windsor		X					X												X				
York	X				X		X					X			X	X		X	X	X			

D. THE ASSOCIATION INCORRECTLY DESCRIBES THE DUTIES AND RESPONSIBILITIES OF TEACHING STREAM FACULTY

38. At paragraph 147 of its Arbitration Brief, the Association asserts that:

> 147. In particular, it is significant that the policies governing the conferral of continuing status and promotion to Professor, Teaching Stream (the *Policies and Procedures on Academic Appointments* and the *Policies and Procedures on Promotion in the Teaching Stream*, respectively), **both require that Teaching Stream faculty engage in scholarship**. In other words, a Teaching Stream faculty member will not have their contract renewed or be given permanent employment status, or advance further in their career, if they do not engage in a meaningful way in scholarly activities. Furthermore, these policies specifically define scholarship to include pedagogical/professional development, creative professional activities, and/or disciplined-based scholarship in relation to, or relevant to, the field in which the faculty member teaches.
>
> [Emphasis added]

39. The University submits that neither the PPAA, which is found at **Tab 4** of the University's Book of Documents and Authorities, nor the *Policy and Procedures Governing Promotions in the Teaching Stream* which is attached at **Tab 7** of the University's Reply Brief "require that Teaching Stream faculty engage in scholarship", as the Association has claimed. Rather, as noted in paragraph 14 of the University's Arbitration brief, during a Teaching Stream faculty member's initial appointment, their performance will be assessed on teaching effectiveness and pedagogical/professional development related to teaching duties, as prescribed by section 30(vi) of the PPAA. The PPAA does not include any requirement that Teaching Stream faculty "engage in scholarship" during their initial appointment. Similarly, the *Policy and Procedures Governing Promotions in the Teaching Stream* requires an assessment of a candidate's teaching, educational leadership and/or achievement, and ongoing pedagogical/professional development.

40. The term “pedagogical/professional development” cannot and should not be synonymized with the phrase “scholarship” as the Association has utilized that term in its brief. When a Teaching Stream faculty member’s initial appointment has been renewed and they apply for continuing status, the PPAA does not “require that Teaching Stream faculty engage in scholarship.” Instead, section 30(x) of the PPAA provides that:

> 30(x) A positive recommendation for continuing status **will require the judgment of excellence in teaching and evidence of demonstrated and continuing future pedagogical/professional development**.
>
> (a) Excellence in teaching may be demonstrated through a combination of excellent teaching skills, creative educational leadership and/or achievement, and innovative teaching initiatives in accordance with appropriate divisional guidelines.
>
> (b) Evidence of **demonstrated and continuing future pedagogical/professional development may be demonstrated in a variety of ways** e.g. discipline-based scholarship in relation to, or relevant to, the field in which the faculty member teaches; participation at, and contributions to, academic conferences where sessions on pedagogical research and technique are prominent; teaching-related activity by the faculty member outside of his or her classroom functions and responsibilities; professional work that allows the faculty member to maintain a mastery of his or her subject area in accordance with appropriate divisional guidelines.
>
> [Emphasis added]

41. Far from “requiring that Teaching Stream faculty engage in scholarship”, the PPAA requires that for continuing status to be granted, a Teaching Stream faculty member must first demonstrate that they have met the standard of excellence in teaching. They must also provide evidence of demonstrated and continuing future pedagogical/professional development. A Teaching Stream faculty member *may*, but is not required to, include examples of any discipline-based scholarship in relation to, or relevant to, the field in which the faculty member teaches, as evidence of their demonstrated and continued future pedagogical/professional development. Any Teaching Stream faculty member may choose a myriad of other examples listed in the PPAA to show their demonstrated and continued future pedagogical/professional development and no Teaching Stream

faculty member is required to provide examples of discipline-based scholarship in relation to, or relevant to, the field in which the faculty member teaches.

42. In section 30(6) of the PPAA and section 10 of the *Policy and Procedures Governing Promotions in the Teaching Stream,* which mirrors section 30 (x)(6) of the PPAA, discipline-based scholarship is included within the examples of the "evidence of demonstrated and continuing future pedagogical/professional development" requirement for continuing status. Contrary to the assertions included in paragraph 147 of the Association's Arbitration Brief, "pedagogical/professional development" is not a subcategory of "scholarship", for Teaching Stream faculty members. Any Teaching Stream faculty member may choose to pursue discipline-based scholarship in order to meet the requirement of demonstrated and continuing future pedagogical/professional development, but they are not required to do so.

43. This mischaracterization by the Association of the role that "scholarship" plays in the duties, responsibilities and performance of Teaching Stream faculty members further undermines the validity of its assertion that Teaching Stream faculty members require "protected time for research".

E. THE ASSOCIATION'S RELIANCE ON SURVEY DATA AND ANECDOTAL INFORMATION MUST BE PROPERLY CONTEXTUALIZED

44. At **Tab 23** of its Book of Documents, the Association has reproduced selective questions and responses from the University's "Speaking Up" and "Speaking Out" surveys from 2006, 2010, 2014 and 2020. The University circulates these surveys on a quadrennial basis. The University submits that the survey responses cited by the Association should not be automatically applied to the University's complement of faculty members and librarians as a whole.

45. The University further submits that the relevance of information gleaned from survey exercises that were completed more than ten years ago has decreased over time. As the Association has itself acknowledged, there have been significant changes at the University since 2014, including the incorporation of the Teaching Stream into the PPAA.

Data derived from these more dated sources should, therefore be reviewed and considered with heightened caution and care.

46. The University is not aware of the specific questions, methodology (including response rate), representativeness of the respondents and/or data from the Association's surveys. This information does not appear in the Association's Brief. Accordingly, the University submits that little if any reliance and/or weight should not be assigned to the references to the information from these surveys that appear throughout the Association's submissions.

F. THE ASSOCIATION'S REQUEST FOR A BROAD AND INDEFINITE EXTENSION OF THIS DISPUTE RESOLUTION PANEL'S JURISDICTION

47. At paragraph 14 of its brief, the Association states that:

> 14. Finally, UTFA proposes that, in the event that Bill 124 is found to be unconstitutional or is otherwise modified or repealed, this Board of Arbitration is seized to make whatever award on salary and compensation matters that it would have made had Bill 124 not been in effect at the time of the interest arbitration award, or that is otherwise necessary to remedy the unconstitutionality of Bill 124.

48. The University submits that the Association's proposal that the arbitrator acting in lieu of a Dispute Resolution Panel under Article 6 of the Memorandum of Agreement can unilaterally decide to grant to himself indefinite jurisdiction, pending the outcome of ongoing constitutional litigation and the disposition of any related appeals constitutes an impermissible expansion of the jurisdiction granted to a Dispute Resolution Panel under Article 6 of the Memorandum of Agreement.

49. Bill 124 imposes a "moderation period" of three years beginning on July 1, 2020 and ending on June 30, 2023 during which no agreement between the University and the Association or any award may provide for an annual increase of greater than one percent (1%) to either the salary rates or existing compensation entitlements enjoyed by faculty members or librarians.

50. Paragraph 5(a) of the January 25, 2022 Memorandum of Settlement states that the temporal scope of this dispute resolution proceeding is confined to the one year period of July 1, 2022 to June 30, 2023. This is the third year of the moderation period applicable to these parties, as prescribed by Bill 124. The parties have agreed that for the purpose of the one percent (1%) cap on compensation increases during this one year period, the "residual" amount available for any non-salary compensation increases that may be awarded in this dispute resolution proceeding is now $297,060 in total.

51. Following Bill 124's enactment, several interest arbitrators or arbitration boards have issued awards purporting to declare themselves seized for the purpose of determining compensation issues that may arise if Bill 124 were to be declared unconstitutional, or modified or repealed with retroactive effect. The jurisdictional principles used by these arbitrators or arbitration boards to conclude that they could somehow unilaterally give this kind of conditional and indefinite jurisdiction to themselves are far from clear. It may be that these arbitrators or interest arbitration boards felt that such jurisdiction had been conferred on them by the statute from which their decision-making authority is derived. For example, subsection 9(1) of the *Hospital Labour Disputes Arbitration Act*[4], expressly requires interest arbitration boards appointed under that statute to:

> examine into and decide on matters that are in dispute **and any other matters that appear to the board necessary to be decided in order to conclude a collective agreement between the parties**, but the board shall not decide any matters that come within the jurisdiction of the Ontario Labour Relations Board.
>
> [Emphasis added]

52. With respect, it is not at all clear that this statutory description of jurisdiction supports the proposition that remaining seized to address a possible amendment, repeal or declaration of unconstitutionality of Bill 124 is a matter that can reasonably be construed as "necessary in order to conclude a collective agreement between the parties" and therefore within an interest arbitration board's jurisdiction. Such matters can readily

[4] R.S.O. 1990, c. H-14, as amended.

and easily be addressed by the parties in future negotiations or interest arbitration proceedings if and when they arise.

53. In any event and more importantly, in the present proceeding, the Memorandum of Agreement does not confer any broad grant of jurisdictional authority to a Dispute Resolution Panel established pursuant to Article 6. Indeed, the limiting language in Article 6(19) demonstrates that the University and the Association have not empowered a Dispute Resolution Panel to embark on the broader lines of inquiry that may be permitted under a liberal interpretation of the jurisdiction that may be conferred on an interest arbitration board under subsection 9(1) of the *Hospital Labour Disputes Arbitration Act* or a similarly-worded statute or collective agreement.

54. There is no language in the Memorandum of Agreement that empowers a Dispute Resolution Panel to retain jurisdiction in a manner that would allow it to re-open a final and binding award issued under Article 6(22) in order to address events and circumstances that extend or occur beyond the term of its appointment. Indeed, such an interpretation would be entirely inconsistent with the structure of the negotiation, mediation and dispute resolution process under Article 6, which are to occur on an annual basis unless otherwise agreed to by the parties.

55. As noted above, the sole arbitrator appointed in lieu of a Dispute Resolution Panel pursuant to the January 25, 2022 Memorandum of Settlement has jurisdiction to determine the unresolved matters concerning salary, benefits and workload for the period of time between July 1, 2022 and June 30, 2023. There has never been an agreement that this fixed jurisdictional scope could be expanded to address events that may arise at some indeterminate point in time outside of this fixed term, including the enactment of legislative changes or judicial pronouncements on the constitutionality of what is currently a validly enacted statute applicable to the dispute at issue, which is limited to the period July 1, 2022 to June 30, 2023.

56. The limits on a Dispute Resolution Panel's jurisdiction under the Memorandum of Agreement and the January 25, 2022 Memorandum of Settlement do not support the Association's position that a Dispute Resolution Panel can retain jurisdiction for an indefinite period of time for the purpose of revisiting the terms of its final and binding award in the event that Bill 124 is declared unconstitutional, or is repealed or modified with retroactive effect. Once a unanimous Dispute Resolution Panel has issued its final and binding award under Article 6(22) in respect of the applicable term, it is *functus officio*, and cannot make further determinations or awards based on potential events that have yet to occur.

57. The doctrine of *functus officio* and its application to administrative tribunals was addressed by the Supreme Court of Canada in *Chandler v. Alberta Association of Architects*[5]. In *Chandler*, Justice Sopinka wrote that:

> there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, **once such a tribunal has reached a final decision in the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances**. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J.O. Ross Engineering Corp, supra*.[6] [In this earlier decision, the Court found that the doctrine of *functus officio* did not apply where there had been an error in writing the decision at issue, or where the decision-maker had made an error in expressing its "manifest intention".]
>
> [Emphasis added]

58. The doctrine of *functus officio* was applied to an interest arbitration proceeding in *St John's (City) v. I.A.F.F. Local 1075.*[7] In this decision, a board of arbitration appointed pursuant to a provincial statute authorizing the use of interest arbitration within the municipal sector determined that once it had issued an award that addressed all of the

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[5] [1989] 2 S.C.R. 848 ["*Chandler*"] University's Reply Brief, **Tab 8**.

[6] *Ibid*., at 861.

[7] 2007 CarswellNfld 415 ["*St. John's*"] University's Reply Brief, **Tab 9**

issues that were properly before it and over which it had jurisdiction, it was *functus officio* and could not entertain submissions on other issues.[8]

59. In *I.M.P Group Limited v. P.S.A.C*[9]., the Federal Court of Canada applied the doctrine of *functus officio* to an interest arbitration proceeding. Consistent with the Supreme Court of Canada's decision in *Chandler*, it found that the jurisdiction of an interest arbitrator must be rooted in the statute and/or agreement under which the interest arbitrator was appointed, and that an interest arbitrator could not themselves retain or expand jurisdiction simply by reserving to themselves the authority to issue further awards, if the interest arbitrator was otherwise *functus officio* at that time.[10]

60. More recently, the interest arbitration award in *Rainbow Concrete Industries Ltd.*[11] considered and applied these earlier decisions as follows:

> *Chandler* stands for the proposition that the doctrine of *functus officio* must be applied less technically and with due regard to the process in administrative law matters. This does not mean that the doctrine does not apply when an administrative tribunal has made a complete decision within its jurisdiction. In such a case the tribunal is *functus*. *I.M.P. Group* does not stand for the proposition that an interest arbitrator's jurisdiction continues until the parties have signed a collective agreement. That may be but is not necessarily the case. Where the parties have not signed a collective agreement during or after an interest arbitration proceeding the question is whether the arbitrator has issued a complete decision within jurisdiction. If the arbitrator has done so the arbitrator is, as the decision in *St. John's (City)* illustrates, functus.[12]

61. Finally, the Association's suggestion that there must be continued and open-ended jurisdiction afforded to address the possibility of Bill 124 being found unconstitutional does not properly recognize how the continued operation of the Article 6 negotiation, mediation and dispute resolution process contrasts with the procedures applicable to the

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[8] *St. John's (City) v. I.A.F.F. Local 1075 supra* at paras. 10-13.

[9] 2007 FC 517 ["*I.M.P. Group*"] University's Reply Brief, **Tab 10**

[10] *Ibid*., at para. 38.

[11] 2011 CarswellOnt 5942 (Surdykowski). University's Reply Brief, **Tab 11**

[12] *Ibid*., at para. 12.

constitutional litigation referenced in the preamble to the January 25, 2022 Memorandum of Settlement.

62. At this point in time it is not known when a decision from the Superior Court of Justice on the *Charter* challenge to Bill 124 will be issued. Further, and significantly, whatever the outcome of the proceedings before the Superior Court of Justice, the unsuccessful party has a right of appeal without leave to the Court of Appeal for Ontario. Thereafter, the unsuccessful party in the Court of Appeal for Ontario can seek leave to appeal to the Supreme Court of Canada. In these circumstances, there is no prospect that the *Charter* challenge to Bill 124 and any related appeals will be exhausted anytime soon and likely not for years to come.

63. As the lengthy constitutional litigation concerning Bill 124 continues, the annual negotiation, mediation, and dispute resolution process under Article 6 of the Memorandum of Agreement will also continue. The continuation of the Article 6 process may result in the completion of one or more agreements or Dispute Resolution Panel decisions, before the constitutionality of Bill 124 is finally determined. In this context, it is inconsistent with the scheme and language of the Memorandum of Agreement that one Dispute Resolution Panel, appointed pursuant to and in accordance with Article 6, for an express purpose and only for a defined period of time, can or ought to retain jurisdiction to determine exactly how Bill 124's potential unconstitutionality would impact the specific negotiation, mediation and dispute resolution process at some later point in time, which would intersect with a subsequent Article 6 process. Such an approach could and likely would require that Dispute Resolution Panel to reach across the terms of one or more subsequent agreements or Dispute Resolution Panel awards in order to do so – something which Article 6 does not contemplate or permit.

64. Instead of having this arbitrator, appointed in lieu of a Dispute Resolution Panel purport to retain jurisdiction to address issues regarding the impact of a possible striking down, repeal or amendment of Bill 124 as they pertain to the negotiation, mediation and dispute resolution process under the Memorandum of Agreement, for the period July 1, 2022 to June 30, 2023, such issues can if necessary be addressed in the Article 6

negotiation, mediation and/or dispute resolution process underway at the time that Bill 124's constitutionality is fully and finally determined following the exhaustion of all appeals. Under this approach, the Association's ability to make submissions at all stages of the Article 6 process as to how its interests were impacted by an unconstitutional statute, and the University's ability to respond to such submissions, would not be prejudiced, as both parties would have access to the data relevant to addressing the monetary impact, if any, associated with the passage of time between the award concerning the period July 1, 2022 to June 30, 2023 and the time if and when Bill 124 is declared unconstitutional.

65. For these reasons, and contrary to the proposal made by the Association in paragraph 14 of its brief, the University submits that in this proceeding, the arbitrator appointed in lieu of a Dispute Resolution Panel under Article 6 of the Memorandum of Agreement cannot unilaterally grant to himself over the University's objection indefinite jurisdiction to determine whether or not any additional changes to salary or benefits for the period of July 1, 2022 to June 30, 2023 should eventually be considered if Bill 124 is ultimately declared unconstitutional following the exhaustion of all appeals. Furthermore, and in the alternative, should the arbitrator acting in lieu of an Article 6 Dispute Resolution Panel determine that he does have jurisdiction to make such a determination, which is not admitted and expressly denied, he should decline exercise such jurisdiction in view of the form and content of Article 6 which contemplate the continuation of an annual negotiation, mediation and dispute resolution process which is well-suited to make any such determinations that may be required at the appropriate time.

PART II –UNIVERSITY'S RESPONSE TO THE ASSOCIATION'S PROPOSALS

UTFA PROPOSAL 1(D) – WORKLOAD – T.A. SUPPORT

PRELIMINARY ISSUE – THE ASSOCIATION'S AMENDED AND LATE-FILED PROPOSAL SHOULD BE DISMISSED

66. In the January 25, 2022 Memorandum of Settlement, the parties agreed on the proposals that would be referred to and determined by this dispute resolution process. The relevant provisions of the January 25, 2022 Memorandum of Settlement which gave clear effect to this specific agreement are reproduced below:

> **5. Year 3 Interest Arbitration for Salary, Benefits and Workload for the Period July 1, 2022 to June 30, 2023**
>
> 5(a) Pursuant to and in accordance with paragraphs 13 to 28 of Article 6: Negotiations of the MOA the parties agree to refer salary, benefits and workload matters for the one year period July 1, 2022 to June 30, 2023 as set out in Schedules A and B attached hereto to an interest arbitration dispute resolution process on the terms and conditions set out below.
>
> 5(c) UTFA's proposals for the one year period July 1, 2022 to June 30, 2023 in the proceedings before the DRP are attached hereto as Schedule A.
>
> **Schedule A – Association Proposals**
>
> All other proposals are withdrawn on a without prejudice basis.
>
> 1. Workload
>
> D. TA Support
>
> Amend the WLPP to establish:
>
> 1. Minimum standards that apply University-wide for access to TA support based on class size, i.e. establish upper limits on the size of courses delivered without access to TA support
>
> 2. Scaled hours of TA support in relation to total number of students in a class using a common, University-wide formula.
>
> 3. A requirement that each Division establish a process for increased and equitable distribution of TA support to members with enrolment above the minimum standard (limit) consistent with D(2).

67. The proposal included at page 27 of the Association's Brief is materially different than the proposal it included at paragraph 1(D) in Schedule A to the January 25, 2022 Memorandum of Settlement. Instead of reproducing this earlier proposal in its brief, as required by paragraphs 5(a) and (c) of the Memorandum of Settlement, the Association has attempted to significantly amend and expand the scope of this proposal from the proposal that was referred to interest arbitration. The Association's amended and expanded proposal is also a very late-filed proposal where there has been no changed circumstances since the Memorandum of Settlement was entered into up to the present that might support consideration of the Association's late-filed proposal in these proceedings. The new and late-filed proposal, with its newly-proposed language highlighted in yellow is below.

1. Workload

D. TA Support

Amend the WLPP to establish:

> 1. A requirement that members shall at a minimum be assigned 1.5 hours of TA support per student for courses with 30 or more students.
>
> 2. A requirement that each Department/Division establish a minimum standard for access to TA support that is no lower than the University-wide minimum standards in D(1).
>
> 3. A requirement that each Division establish a process for increased and equitable distribution of TA support to members with enrolment above the minimum standard (limit) consistent with (D1).

68. Not only does the introduction of new proposals at this late stage of this proceeding contradict the express provision of the January 25, 2022 Memorandum of Settlement, it also contradicts the requirements that apply to the negotiation, mediation and dispute resolution process set out in Article 6 of the Memorandum of Agreement. Paragraph 2 of Article 6 of the Memorandum of Agreement requires both parties to meet within 4 weeks after the giving of notice to negotiate and to exchange their respective proposals on those matters that each party seeks to amend, add or modify. The Association did not present the proposal it has now included in its brief at the outset of bilateral negotiations under

Article 6, nor did it advance this proposal at any time thereafter over the course of some 19 bilateral negotiation meetings between May 2020 and June 2021, nor during the extended mediation process that led to the January 25, 2022 Memorandum of Settlement.

69. Neither the Memorandum of Agreement, nor the January 25, 2022 Memorandum of Settlement permit a party to make new proposals at this late stage of the dispute resolution process. Neither the Memorandum of Agreement nor the January 25, 2022 Memorandum of Settlement permit a dispute resolution panel to consider or award such proposals. Consequently, the University submits that a Dispute Resolution Panel appointed under Article 6 of the Memorandum of Agreement does not have jurisdiction to entertain or award this amended and late-filed proposal under either Article 6 of the Memorandum of Agreement or the January 25, 2022 Memorandum of Settlement. In the alternative, if the arbitrator sitting in lieu of an Article 6 Dispute Resolution Panel does have the discretion to entertain this late-filed proposal, he should decline exercise discretion to do so in these circumstances.

70. Collective bargaining is normally evolutionary. Proposals that are not advanced and/or which are not the subject of any meaningful discussions in collective bargaining negotiations in one round can be tabled during a subsequent round of bargaining. The process of bargaining in any one round should not be prejudiced by the introduction and adjudication of late-tabled proposals. Arbitrator Burkett adopted this analysis in *Ontario Cancer Institute (Princess Margaret Hospital)*[13] by emphasizing that:

> When the Union argues that there would be no prejudice to the Hospital [in responding to a late-tabled proposal] it misses the point. The framework for collective bargaining is established with the initial exchange of the bargaining agenda and the subsequent exchange of proposals and counter-proposals. The concessions made by one side are in response to and conditioned upon the position taken by the other side. There is obvious prejudice to the party that has relied upon the framework established by the orderly exchange of proposals if the other party is allowed to table a fresh set of demands at the last minute.[14]

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[13] 1989 CarswellOnt 5229. University's Reply Brief, **Tab 12**

[14] *Ibid.*, at para. 8.

71. Furthermore, and in the further alternative, the University has not had sufficient time to assess the financial and operational implications of the Association's late-filed proposal. The parties do not dispute that, at present, decisions concerning the assignment allocation of Teaching Assistant resources are made within each academic unit. Forcing the University to adopt the minimum standard included in paragraph 1 of the Association's new proposal would have a significant financial impact on the University. The decentralized way in which decisions regarding Teaching Assistant assignments and allocations make it impossible for the University to prepare any costing data that would properly detail the scope of this proposal's financial impact.

72. The exercise of determining how the Association's new formula might affect the way in which Teaching Assistant resources are currently assigned and allocated would be extremely time consuming and resource intensive. This exercise may have been possible to complete if the Association would have made this proposal at the outset of negotiations as Article 6 of the Memorandum of Agreement requires. However, it is now impossible for the University to complete this exercise in the comparatively short time that has been provided. Put simply, even if it is determined that the Association's belated presentation of this proposal does not contravene Article 6 of the Memorandum of Agreement and/or the January 25, 2022 Memorandum of Settlement, which is not admitted and expressly denied, the University's ability to respond to this proposal has been seriously prejudiced as a result of its late filing and should be dismissed on this basis.

FORCING FACULTY MEMBERS TO SUPERVISE TEACHING ASSISTANTS UNDERMINES ACADEMIC FREEDOM AND PEDAGOGICAL AUTONOMY

73. The Association's submissions in support of this proposal suggest that the assignment of one or more Teaching Assistants to specific courses will necessarily result in a net reduction of a faculty member's teaching workload in respect of these courses. This suggestion runs contrary to section 4.2 of the WLPP, which states that one of the factors that can impact a faculty member's teaching workload is the "supervision of teaching assistants or equivalent." This section of the WLPP recognizes that the utilization of one or more Teaching Assistants is not a one-way delegation of teaching

work from a faculty member to their Teaching Assistants. Rather, faculty members are expected to actively supervise the work that their Teaching Assistants perform and to provide them with clear and fair guidance on how and when that work is to be performed.

74. The proposed "requirement that faculty members shall at a minimum be assigned 1.5 hours of TA support per student for courses with 30 or more students" would require all faculty whose courses met or exceeded this seemingly arbitrary enrolment requirement to take on the work of supervising at least one Teaching Assistant, even if their own pedagogical approaches led them to conclude that they did not need or perhaps did not wish to do so.

75. The University disputes the Association's assertion, made at paragraph 89 of its brief, that a formula used to allocate Teaching Assistant support based solely on the number of students enrolled in a course results in an equitable allocation of these supports. A course with 30 students that has a large experiential component where much of the instruction and evaluation of these students is based on their performance in practical settings; a course with 30 students that is delivered through didactic lectures and evaluated through the use of multiple choice quizzes and tests; and a course with 30 students that has a laboratory or tutorial component that requires the engagement of several Teaching Assistants will all require very different levels of Teaching Assistant support, despite the fact that each course has the same enrolment level. It also ignores the fact that faculty instructors have significant academic freedom in determining their approaches to course design and evaluation. The adoption of the unifactorial approach to the assignment and allocation of Teaching Assistant resources will not create the equitable outcomes that the Association has referenced.

THE UNIVERSITY HAS NOT WITHHELD INFORMATION REGARDING TEACHING ASSISTANT SUPPORTS AND IS NOT REQUIRED TO COMPILE IT

76. At paragraph 86 of its brief, the Association alleges that the University "has been unwilling or unable to provide UTFA with information about the level of [Teaching Assistant] supports available to units, the criteria for allocating supports, or measures taken to ensure that resources are equitably and consistently allocated." The University denies that it has been unwilling to provide the Association with this information. Rather, the University is unable to meet the Association's demand for this information on a University-wide basis.

77. At paragraph 84 of its brief, the Association suggests that "the Administration" determines which faculty members will receive Teaching Assistant support and the level of supports that will then be provided. It also speculates that there may be some inequity between Faculties as to how Teaching Assistant resources are allocated. These suggestions and speculations are without merit. The way in which Teaching Assistants are assigned in the Faculty of Engineering may be entirely different from the way in which those decisions are made within a Humanities or Social Sciences department in the Faculty of Arts and Science and "the Administration" has not and would not seek to impose a standardized approach on these Faculties or any other Faculties.

78. The level of Teaching Assistant supports and the criteria that are used to make decisions concerning the allocation of these supports are made within each academic unit. Compelling the University to collect this information from each academic unit in order to disclose it to the Association, as requested in the final bullet point of the Association's "alternative proposal" set out in paragraph 92 does not accord with Article 11 of the Memorandum of Agreement, which provides that:

> This Article shall not be construed to require the University of Toronto (a) to compile information and statistics in particular form if such data are not already compiled in the form requested or (b) to provide information relating to any individual.

79. In the University's view the jurisdiction of the arbitrator acting in lieu of a Dispute Resolution Panel under Article 6 regarding unresolved salary, benefit and workload issues does not include or extend to an arbitration award that would be tantamount to a production order. Further, ordering the University to provide "University-wide data regarding the provision and allocation of TA support over the past five academic years, broken down by unit and division" in the manner demanded by the Association is antithetical to the limits placed on the University's requirement to provide information to the Association under the Memorandum of Agreement. Its "alternative proposal" should therefore be dismissed.

UTFA PROPOSAL 1(G) – WORKLOAD – MANDATORY WORKLOAD POLICY FACTORS

THE EXISTING LANGUAGE IN AND UTILIZATION OF THE TEACHING WORKLOAD FACTORS IN ARTICLE 4.2 OF THE WLPP IS SUFFICIENT

80. The University disputes the accuracy of the assertions found in paragraphs 97 and 98 of the Association's Brief. Far from setting out "hollow" or underinclusive protections, the WLPP sets out a clear and unambiguous list of factors that academic units should consider when determining the teaching component of faculty members' workload, if applicable. Each academic unit then has the autonomy to decide for itself how best to consider the applicability of these factors and/or any other factors which it considers to be applicable. Decisions on which specific factors to use when determining the teaching component of workload are determined collegially by faculty colleagues in each academic unit who know and understand the workload dynamics within their academic unit. These decisions are made by interested and informed colleagues. They should not be second-guessed by those who have no involvement in or experience with these unit-specific dynamics.

81. The Association claims, at paragraph 99 of its brief, that "the WLPP currently lacks any requirements that units address in their respective workload policies the most significant factors that affect the weight of workload, such as class size, new/alternative/short-notice preparation, or level of TA support." The University's response to this claim is twofold. First, as the Association subsequently acknowledges

at paragraph 104 of its brief, each of these same factors are included in the list of factors found in Article 4.2 of the WLPP which an academic unit may choose to consider if applicable when determining the teaching component of workload.

82. Second, the application of the principles of replication, gradualism and demonstrated need would not be served by the University-wide prioritization of three isolated factors that may be relevant to the teaching component of workload. A longstanding feature of the WLPP is that any prioritization of or increased weight assigned to one or more of these workload factors is to be left to each academic unit to determine. This is precisely the "latitude" that should remain in place within each academic unit, which the Association purports to respect and acknowledge at paragraph 98 of its brief.

83. The University offers this same response to the assertions included in paragraph 103 of the Association's Brief. If "the vast majority of unit workload policies at the U of T currently define workload norms in very general, broad terms, without addressing any of the factors that most significantly impact the weight of assigned teaching and service responsibilities", as the Association claims, then each academic unit is empowered, under the current WLPP, to determine for itself, through the required collegial processes, what the "factors that most significantly impact the weight of assigned teaching and service responsibilities" are, and to address those factors as those within the unit themselves determine.

THE RELATIONSHIP BETWEEN WORKLOAD AND CLASS SIZE IS NEITHER LINEAR NOR EXCLUSIVE

84. The examples proffered by the Association in paragraph 106 of its brief are another example of the Association's attempt to draw a linear and exclusive link between the teaching component of workload and the single factor of class size, accompanied by the self-serving assumption that a hypothetical faculty member who is assigned four courses with 300 students in each course without any Teaching Assistant support, should have their teaching workload compared with that of a colleague who teaches the same number of courses with only 30 students per course.

85. The Association's examples make no mention of the structure of any of these hypothetical courses, the presence or absence of laboratory or tutorial components, the hours of in-person instruction associated with each course, the methods of student evaluation that are used, or the extent to which certain courses may be longstanding, established courses, while others may be newly-developed. All of these factors, many of which are within the control of a faculty instructor, and many others, can have significant impacts on the assessment of workload for courses with 300 students as well as courses with 30 students. The Association's example, however, does not address any of them.

86. This unrealistic and incomplete hypothetical example offered by the Association in support of this proposal does not detract from the fact that the assessment of the teaching component of workload must be based on more than a tally of the student's enrolled in each course.

THE "ADDITIONAL EFFORT" ASSOCIATED WITH DELIVERING ONLINE COURSES CAN NO LONGER BE PRESUMED

87. At paragraph 117 of its brief, the Association claims that the performance of online teaching "requires additional effort at all stages (designing and creating content for the course, delivering the course itself, and conducting assessment/evaluation of students." It also asserts at paragraph 194 of its brief, that the circumstances that have impacted the performance of teaching in recent years have caused significant increases in work related to teaching. The University acknowledges that the immediate need to shift to an online-only teaching environment in March 2020 and the subsequent adjustments that needed to be made to the delivery of courses in the 2020-2021 and 2021-2022 academic years was regularly accompanied by an increased workload. The University and the Association addressed these workload realities in section 3.0 of the freely bargained COVID LOU, found at **Tab 2** of the Association's Brief. More specifically, sections 3.4 through 3.9 of the COVID LOU set out specific workload adjustments that were made in direct response to the difficulties wrought by the pandemic. These specific paragraphs are reproduced on the following page:

3.4 In assigning workload for 2021-22 for faculty and librarians, the increased workload involved in teaching certain courses and instructional sessions in certain formats in the context of the COVID-19 pandemic will be taken into account by unit heads. Any significant increases in assigned service workloads associated with the COVID-19 pandemic will also be taken into account. Such increased workload may be addressed in a range of different ways including but not limited to, decreasing the number of courses and sessions an individual faculty member or librarian is assigned to teach, providing additional teaching supports and resources such as increased TA hours, implementing co-instructors for courses, introducing or modifying enrollment caps and/or teaching overload stipends.

3.5 Any faculty member who was assigned and taught: a) six or more unique half course equivalents, in each case requiring the development of a new online or dual delivery/hy-flex, or b) an aggregate enrolment of 1000 or more students in the 2020-21 academic year, shall receive or shall have received, a one half-course release, or credit to be taken within the next three academic years. For clarity the parties' intention is that if a faculty member has already received a one half-course or greater release or credit for COVID-related reasons from their academic unit, this would satisfy the obligation under 3.5 above – i.e., only faculty members who meet the criteria in (a) or (b) above and who have not already received a one half- course or greater release or credit would be entitled to receive a one half-course credit to be taken with the next three academic years.

For clarity, courses taught on overload and for which an overload stipend was paid shall not be considered in determining whether the faculty member's teaching load has met the criteria above. For the purpose of determining eligibility under a) and b) above, enrolment shall be prorated among faculty who co-teach a course.

3.6 For any pre-tenure and pre-continuing status faculty members who have not yet completed their interim or probationary review, the criterion for entitlement to the one half-course credit outlined in 3.5 will be reduced to five or more unique half course equivalents, in each case requiring the development of a new online or dual delivery/hy-flex.

3.7 In determining workloads for the 2021-22 academic year, supervisors and other library administrators shall discuss with pre-permanent status librarians the changing nature of their work during the COVID-19 pandemic and take this information into account in determining workloads to ensure they are fair, reasonable and equitable.

3.8 Any individual faculty member or librarian who believes their workload is not fair, reasonable and equitable, or is inconsistent with their unit workload policy or the WLPP may file a workload complaint in accordance with 10.1 of the WLPP.

> 3.9 If the University's operations continue to be limited or impacted by COVID protocols that prohibit or limit indoor gatherings beyond December 31, 2021 the parties shall meet to discuss whether and on what terms there should be any mutually agreed Workload provisions in addition to the above for the 2021-22 academic year.

88. At present, the majority of courses that were delivered online for reasons related to the pandemic are now being delivered in person. Courses that are currently being taught online reflect the pedagogical decisions of individual instructors based on their teaching experience. The University denies the Association's assertion that the teaching of an online course necessarily requires more effort at all stages of the course's delivery, than the teaching of that same course in person. A much more fact-specific analysis is required when making these comparisons, which is entirely consistent with the University's longstanding approach to workload issues.

89. There is no evidence that suggests that the continued delivery of online courses in the present circumstances is accompanied by additional effort at all stages of the course's preparation and delivery. Once a course has been developed and delivered online, it may require significantly less effort to continue to deliver that same course in that same format year over year. Overall, the sweeping generalizations in the Association's Brief that seek to tie issues of workload to a course's mode of delivery cannot be substantiated.

THE LEVEL AND/OR HOURS OF SUPPORT FOR LIBRARIANS' PROFESSIONAL PRACTICE ARE SUFFICIENT

90. The Association suggests, at paragraph 126 of its brief, that in order for librarians to provide instructors and students with the information they need for online teaching and research, they "must be intimately familiar with all the different software programs used by instructors and critically understand them as information systems." The University submits that librarians do not need to have this deep understanding of any and all software programs used by all instructors. Rather, the most relevant software for online teaching is Quercus, the University's Learning Management System.

91. Librarians currently have regular access to a comprehensive array of Quercus training and support resources. The University's Centre for Teaching Support and Innovation ("CTSI") provides these resources to faculty members and librarians alike. In addition University of Toronto Libraries has a Teaching and Learning Committee that supports the work of those engaged in both in-person and online teaching as well as a Teaching & Engagement Unit, which provides pedagogical support to librarians, including Quercus help. University of Toronto Libraries also has a Scholarly Communications and Copyright Office to support faculty in integrating information content into Quercus, including copyright clearing permissions. In this regard, both UTM and UTSC offer similar services managed by librarians who are experts in the use of Quercus and in addressing copyright issues.

92. In addition to Quercus, librarians use other software tools which provide access to the library's collections and electronic resources which are used in teaching, learning and research activities. Examples of these software tools include Geographic Information tools to allow digitized map collections and Omeka, an open-source web publishing program to enable easy display of images and other library collections in an exhibit. Librarians offer many workshops on the use of such tools. Those who attend these workshops, including librarians and library staff, complete these workshops as part of their regular workload or as professional development. If and when upgrades to these library software programs are released and related training is required, that training is normally delivered by the librarian(s) who have primary responsibility for the software tool at issue, as part of their workload.

93. On rare occasions, University of Toronto Libraries will replace an existing library information technology system with a new one. For example, the recent replacement of the Library Management System ("LMS") took approximately four years to complete and included the hiring of a CLTA librarian whose primary responsibility was managing the extensive training that was delivered by external experts and librarians alike.

94. Finally, with regard to the licensing of new software or new resources with a more narrow scope, the external vendors from whom such products are acquired, or external experts with existing familiarity with these products often offer “train the trainer” sessions which the library uses to build in-house expertise regarding these projects.

95. Overall, the training described above is already part of a librarian’s workload, whether they are delivering the training or being trained. It is, therefore, unclear, what if any need is met by requiring consideration of the “level and/or hours of support for professional practice” as a factor that must be considered in the Workload Policy for Librarians.

96. Save and except for their work with faculty members on Quercus, the University is not aware of any circumstances where librarians would work with faculty members on the use of other software products in the classroom. The Association’s Brief provides no examples of such work being undertaken. The involvement of librarians in the use of such software would be very discipline-specific and very rare, if such work does, in fact, exist.

UTFA PROPOSAL 1(H) – WORKLOAD – EQUITABLE COURSE RELEASE

97. The University disputes the assertion at paragraph 134 of the Association’s Brief that the current practice of assigning teaching releases is “opaque” and that the assignment of teaching releases somehow remains unknown. The current language in section 2.17 of the WLPP allows for any member in an academic unit to review the workload assignments of their colleagues in that same unit. These workload letters will show which faculty members have received course releases, as those faculty members will either have their teaching release information documented on their workload letter, or they will have fewer classroom teaching assignments listed on their workload letters. Moreover, the University’s proposal in response to UTFA Proposal 1(i) would ensure that secure access to workload assignments within each unit would continue. For ease of reference, the University’s proposal, which is found at paragraph 159 of its Arbitration Brief, is reproduced below:

2.17 **Written assignments of workload.** Each member will be provided with a written assignment of their workload duties on an annual basis that includes the member's percentage appointment and details of teaching and service or, in the case of librarians, professional practice and service, by no later than June 30th. Where an individual member's assignment is materially different from the unit's workload norms, standards, or ranges, the variation and the reason for it should be identified in the individual member's written assignment of workload, subject to any accommodation agreements. All written assignments for each Unit will be made available for review by any member of the Unit or the Association in a Unit specific password protected electronic/on-line format approved by the Office of the Vice-President & Provost, subject to any confidential accommodation agreements. ~~collected in the Office of the Unit Head and made readily available for review at the request of any member of the Unit or the Association. Provided it is technologically practical to do so, the University and UTFA will discuss in Joint Committee and endeavour to agree on copies being posted on a unit internet site or other password-protected website, accessible to UTFA and its members in the applicable unit, subject to any confidential accommodation agreements, with a target implementation date of January 1, 2020.~~

UTFA PROPOSAL 1(I) – WORKLOAD – ANNUAL WORKLOAD DOCUMENTS

THE ASSOCIATION'S PROPOSAL ARBITRARILY PRIORITIZES CERTAIN FACTORS AND ARRANGEMENTS

98. Consistent with the University's reply submissions concerning UTFA Proposals 1(D) and 1(G), this proposal is another example of UTFA's attempt to arbitrarily prioritize certain factors thar are used to assess teaching workload (class size, mode of delivery, level and/or hours of TA support) on a University-wide basis, which should be dismissed as antithetical to the interest arbitration principles of replication, gradualism and demonstrated need. This arbitrary prioritization is also evident in the Association's proposal that teaching releases, as a distinct form of accommodating a faculty member's teaching or service responsibilities, must be documented as well. This proposal overlooks the fact that a faculty member may have negotiated other arrangements to deal with their workload concerns, including the provision of Research Assistant support, or the provision of a reduced teaching or service load in one or more subsequent years. None of these arrangements are addressed in the Association's proposals, which means that the suggestion that these proposals would generate meaningful transparency is misplaced. Forcing the University to prepare the documents described in the

Association's proposal would require a great deal of administrative work, with little to no accompanying benefit.

CURRENT WORKLOAD DOCUMENTS PROVIDE SUFFICIENT INFORMATION

99. The University denies that the workload letters provided to faculty members are unacceptably vague, or that the absence of the granular details that the Association now requests renders these letters "almost meaningless." Not only has the University increased the level of detail included in these workload letters, the availability of all written workload assignments within an academic unit for review by any member of that academic unit (and the Association), provides additional details and transparency in a manner consistent with the established interest arbitration principles of replication, gradualism and demonstrated need.

100. The University denies that the details provided in workload letters are unreasonably vague. Any faculty member whose workload is materially different from the unit's workload policy's norms, standards or ranges is already entitled to receive additional particulars concerning any such variation and the accompanying reasons. Moreover, as demonstrated by the sample workload letters attached at **Tab 13** of this Reply Brief, workload letters can provide information beyond the names and codes of the courses that faculty members have been assigned and a summary of their known service obligations. Within individual academic units, decisions have been made to include the following information in workload letters:

(a) specific teaching responsibilities and team teaching arrangements within a particular course (Department of Chemistry);

(b) specific references to a course release that has been granted and the reason for the course release (Department of Philosophy); and

(c) how a faculty member's support for other units is quantified (UTM, Institute for the Study of University Pedagogy).

101. In terms of the ability of faculty members or librarians within a unit to review the workload assignments made within that unit, the University's proposal, made at paragraph 159 of its Arbitration Brief and reproduced at paragraph 96 of this Reply Brief, is directly responsive to the Association's claims at paragraph 64 and 143 of its brief that individual faculty members and librarians need information about their colleagues' workload as a basis for comparison, and that "many members will be reluctant to request the review of individual workload letters of other colleagues, which may appear to be uncollegial or a sign of complaint." The University's proposal would allow for such reviews to occur without the requirement of a formal request, using a password-protected electronic database.

THE FACT THAT THERE HAVE BEEN NEXT TO NO WORKLOAD COMPLAINTS SHOULD NOT BE DISREGARDED

102. Finally, the Association claims, at paragraphs 62, 65 and 66 of its brief that the extremely low number of workload complaints that have been filed should not be taken as evidence that the current workload process has worked effectively and equitably because:

(a) "members are very reluctant to file a workload complaint or grievance, particularly where they experience more precarity in their employment";

(b) "UTFA is also aware of cases where members have grieved at Step 1 by raising a concern (often informally) with their Chair, sometimes without UTFA's knowledge, and the matter is resolved through a partial and unsatisfactory remedy, which the member is reluctant to dispute at Step 2 of the grievance process because this would require them to directly challenge their Chair's decision-making"; and

(c) "Members are also reluctant to bring a workload complaint precisely because the language in the WLPP itself is ambiguous and unclear" and that doing so might bring them into conflict with their Chair's conceptualization and computation of their workload.

103. The University's response to the Association's claims are threefold. First, the extremely low number of workload complaints that have been advanced in any forum does support the University's position that concerns and complaints about workload are not as pervasive as the Association suggests. Second, the Association's claims are extremely vague and self-serving. For example, the informal resolution of workload complaints at Step 1 of the grievance process, by arriving at a compromise solution rather than continuing the grievance at Step 2 is not *prima facie* evidence that this process is generating "unsatisfactory" outcomes, or that workload grievances are not pursued to Step 2 out of a "reluctance" to challenge a Chair's decision making. The fact that complaints are sometimes resolved informally at an early stage of grievance procedure should not be mischaracterized as a procedural deficiency. Instead, the resolution of workload complaints at an early stage of this mutually agreed-to grievance procedure is evidence that this process is working as intended. Third, it is unclear how the Association's proposals will make it more comfortable for any faculty member or librarian, including those whom the Association has described as "its most precarious members" to challenge their workload assignment. Whether such challenges proceed through the WLPP's specialized dispute resolution process, or the grievance process under the Memorandum of Agreement (without prejudice to any position that the University may take concerning the arbitrability of any such grievance), any such challenge will involve a disagreement between a faculty member or librarian and their chair or supervisor regarding their workload that requires resolution.

THE TIMING OF THE ASSOCIATION'S PROPOSED OBLIGATIONS DOES NOT WORK

104. The Association emphasizes, at paragraph 142 of its brief, that "the June 30 deadline" by which every unit across the University would need to provide all of the information that this proposal demands, "is important because the 'Unit Workload Document' will provide members with access to information they need in order to make decisions about whether to file a workload complaint, which must be within 20 working days of the date members know (or reasonably ought to know) their workload assignments." This is not a workable timeline. Enrolment levels for all courses, a factor on which the Association continues to place outsized emphasis, are not all known by June

30. Similarly, not all service assignments will be known by June 30 of any year. For example, search committees and tenure committees are not staffed at that point in an academic year.

UTFA PROPOSALS 1(J) AND 1(K) – WORKLOAD – DISTRIBUTION OF EFFORT IN UNIT WORKLOAD POLICIES AND WORKLOAD LETTERS & TEACHING STREAM COURSE LOAD

THE ASSOCIATION'S REQUEST FOR A UNIVERSITY-WIDE "DISTRIBUTION OF EFFORT" SCHEME IS UNFOUNDED

105. The University disputes the assertions, made at paragraphs 35 and 151 of the Association's Brief, that faculty members do not currently have clear, fair and equitable workload policies and that "the failure to articulate a clear distribution of effort between the three principal components of workload is a serious gap in the regulations that govern the workload of faculty members", and that the imposition of a "distribution of effort" model is somehow necessary to enforce the WLPP's commitment to equitable workload.

106. The University submits that faculty members and librarians do have workload policies that are clear, fair and equitable. The workload provisions in Article 8 of the Memorandum of Agreement and the provisions of the WLPP are the outcomes of free collective bargaining and mutual agreement between the University and the Association, augmented on occasion by minor and gradual change by a Dispute Resolution Panel, for example, the minor changes to the WLPP awarded by Arbitrator Kaplan in his June 29, 2020 award, found at **Tab 9** of the University's Book of Documents and Authorities. These documents are augmented by workload policies that are developed within each academic unit through a collegial process, which are themselves clear, fair and equitable.

107. In contrast, the University-wide strictures which the Association seeks to have imposed through an arbitral award, are entirely unnecessary and at odds with a workload structure founded upon the principles of autonomy at the academic unit level and an enforcement mechanism that invites meaningful comparisons between individual workloads within these units. The ability to assign and enforce equitable workloads within the University's existing workload constructs is well established and leaves decisions concerning a faculty member's "distribution of effort" to each individual faculty member.

108. In support of its proposed imposition of a University-wide “40/40/20 distribution of effort” scheme, the Association draws upon language found in the collective agreements of a small number of universities including Brock University, Laurentian University, and Huron University College, OCAD University and Ontario Tech. The University submits that there is no objective basis upon which the terms and conditions of employment of faculty and librarians at the University can be compared with those of the faculty and librarians in these smaller, undergraduate-focused institutions. Moreover, it must be emphasized that the workload provisions found in the other collective agreements referenced in the Association’s Brief were reached through free collective bargaining. They were not imposed by an interest arbitrator.

109. In response to the Association’s claim that the proposed importation of its “distribution of effort” scheme should extend to librarians, the University emphasizes that the fundamentally different terms and conditions of employment of librarians and faculty members do not support such an approach. Librarians have less autonomy than faculty members to determine their hours of work and should not be subject to an organizing principle that is applied to those who do not have these same scheduling requirements strictures. Applying these concepts to librarians would constitute a radical change to the way in which workload issues have been determined by and amongst this specialized group of University employees for over a decade.

110. When the Association claims at paragraph 154 of its brief that “some Teaching Stream faculty are misunderstood to be teaching-only” and mentions that “in some units, Teaching Stream faculty are assigned 200 -300% of the normal teaching load for Tenure Stream faculty in the same unit”, its comparison is limited to the FCE courses that Tenure Stream and Teaching Stream faculty members are assigned to teach in these academic units. The Association does not in any way account for the graduate supervisory work that Tenure Stream faculty members regularly perform. In many of the units referred to in the Association’s list of examples, Tenure Stream faculty members are regularly assigned lab-based teaching, graduate student supervisory work, and graduate student funding requirements that are not reflected in the FCE component of teaching workload.

111. The supervision of graduate students by Tenure Stream faculty members is considered when they are evaluated for tenure. In this regard, the assessment of a Tenure Stream candidate's teaching under section 13(b) of the PPAA begins with the following statement:

> 13(b) Effectiveness in teaching is demonstrated in lectures, seminars, laboratories and tutorials as well as in more informal teaching situations such as counselling students **and directing graduate students in the preparation of theses**.
>
> [Emphasis added]

112. The University further disputes the assertion, made at paragraph 167 of the Association's Brief, that the Workload Policy for Librarians includes a "normative DOE". The workload categories of professional practice, research and scholarly contributions and service that apply to librarians are non-exclusive. Many of the activities that librarians perform can reasonably fit into more than one of these workload categories. Moreover, the addition of a prescribed "distribution of effort" scheme to the Workload Policy for Librarians is at odds with the fact that the allocation of time to a librarian's three workload categories depends on factors which regularly change, including the needs of library users, the needs of colleagues and a librarian's own interests, expertise and professional needs. Librarians at different career stages, ranks and levels of administrative responsibility may wish to seek different workload allocations.

THE FINANCIAL CONSEQUENCES OF IMPOSING THE ASSOCIATION'S PROPOSED "TEACHING CAP" ARE GREATER THAN FIRST ESTIMATED

113. At paragraphs 202 and 203 of its Arbitration Brief, the University described the additional financial costs to the University that would accompany the awarding of the Association's proposed cap on the teaching workload for Teaching Stream faculty members. The University set out the following facts, about which there is no material dispute:

(a) the fact that many academic units in the University have assigned teaching workload to Teaching Stream faculty members that currently exceeds 150% of the teaching workload assigned to Tenure Stream faculty members in the same academic unit;

(b) if the Association's proposed cap on the teaching workload for Teaching Stream faculty members were to be awarded, it would require the reduction of the workload assigned to any and all Teaching Stream faculty members whose teaching workload was currently above 150% of the teaching workload for Tenure Stream faculty members in the same academic unit; and

(c) any and all teaching assignments that would be taken away from Teaching Stream faculty members as a result of the Association's proposed cap would then need to be performed by others.

114. The University initially estimated that an additional 197 full-time equivalent Teaching Stream faculty members would need to be hired in order to perform the surplus teaching work that would result from the imposition of the Association's proposed teaching workload cap. The University estimated that this hiring exercise would generate additional costs of approximately $9.9 million.

115. Since preparing this additional estimate, the University has determined that it underestimated the financial costs that it would incur if this proposal were to be awarded. The University's initial estimate only considered Teaching Stream faculty members who had already received a continuing status appointment. It did not consider Teaching Stream faculty members who have not yet attained continuing status. In academic units that would be impacted by the Association's proposed cap on teaching workload for Teaching Stream faculty members, both Teaching Stream faculty members with and without a continuing status appointment would have their workloads reduced.

116. By updating its estimate to include Teaching Stream faculty members who have attained continuing status and those members of the Teaching Stream faculty who have not yet done so, the University now estimates that an awarding of the Association's proposal would require the hiring of 292 full-time equivalent Teaching Stream faculty members, with an accompanying cost of approximately $14.3 million.

117. In support of its updated estimate, the University has included an updated cost summary document, which is attached at **Tab 14** of the University's Reply Brief. This updated cost summary document confirms that:

(a) the information used to prepare this updated estimate is based on information from September 2021;

(b) only departments that include Teaching Stream faculty appointments have been included;

(c) any Teaching Stream faculty members who are currently in receipt of long term disability benefits or benefits under the *Workplace Safety and Insurance Act, 1997* have been excluded from the estimate. Teaching Stream faculty members who are absent due to any other leave of absence have not been excluded; and

(d) the University's estimated replacement cost is calculated as the new hire cost to the academic unit, divided by the Association's proposed limit on the teaching load of Teaching Stream faculty members of 1.5 times the teaching load of Tenure stream faculty within the same academic unit.

118. This updated information further demonstrates that the Association's proposed cap on the teaching workload of Teaching Stream faculty members cannot and should not be awarded. These estimated cost increases eclipse the limits established by Bill 124 which apply to this proceeding. Furthermore, and in the alternative, the financial consequences of awarding this proposal are objectively far beyond any cost increase that could be supported by the applicable interest arbitration principles of replication, total compensation, gradualism, and demonstrated need.

THE PROPOSED IMPOSITION OF TEACHING CAP ON TEACHING STREAM FACULTY IS NEITHER NEW NOR FLEXIBLE

119. At paragraph 172 of its brief, the Association suggests that its current proposal for a cap on the teaching component of workload for Teaching Stream faculty members is "distinct from that proposed before Arbitrator Kaplan in 2020." The University disagrees. The central feature of both proposals is the Association's demand for a strict cap on the teaching that can be assigned to Teaching Stream faculty members. The different ways in which the Association has chosen to express this cap on teaching workload are immaterial.

120. When the Association pursued this objective before Arbitrator Kaplan in 2020, its proposal did not express the strict cap as a "limit [applicable to] Teaching Stream teaching load relative to Tenure Stream teaching load within a unit to not more than 150%." It instead set out a proposed workload formula that arrived at the same result. The Association's 2020 teaching cap proposal required an equivalency to be drawn between the service and pedagogical/professional development components of a Teaching Stream member's workload. When viewed in tandem with its earlier "distribution of effort" proposal, which Arbitrator Kaplan also rejected, it became evident that the Association was seeking a 60/20/20 "distribution of effort" for Teaching Stream faculty members, and a 40/40/20 "distribution of effort" for its Tenure Stream members, thereby attempting to establish a cap on the teaching component of a Teaching Stream faculty member's workload that was calculated at 150% of a Tenure Stream faculty member's teaching workload. The differences in form between these two proposals should not detract from their common objective – one that Arbitrator Kaplan decisively rejected as failing to meet the interest arbitration test of replication, gradualism or demonstrated need.

121. The University also disputes the Association's suggestion that there are any meaningful commonalities between its teaching cap proposal and the recent amendments to Article 9.1 of the WLPP. These recent amendments to the WLPP established a comparability between the teaching load of a CLTA faculty member and a "comparably situated member in the same continuing track (i.e. Tenure Stream or Teaching Stream)." These amendments did not contemplate the comparison of workload across different

streams. Such a comparison would disregard the fundamental differences between the work of faculty members in these two different steams.

122. Paragraphs 173 and 191 of the Association's Brief characterize Brock University, Carleton University, Huron University College, Lakehead University, Laurentian University, Nipissing University, OCAD University, Ontario Tech University, Toronto Metropolitan University, Trent University, Wilfrid Laurier University, Windsor University and York University as comparators to the University for the purpose of the Association's proposed cap on teaching workload for Teaching Stream faculty members. The University denies that these universities are appropriate comparators, and that the workload provisions in place at these institutions should have any bearing on the University's workload provisions. More specifically, the only two universities which the Association references as having "limits on teaching load for Teaching Stream faculty relative to non-Teaching stream faculty" are Carleton University and Trent University. Neither of these universities can objectively be treated as a comparator to the University.

123. At paragraph 179 of its brief, the Association lists 14 academic units within the University which have apparently opted to place some type of quantitative limit on the teaching component of workload for their Teaching Stream faculty members. However, a closer review of these workload policies shows that in many instances, they have used language that is distinguishable from the strict cap on teaching that the Association has proposed.

(a) Department of Anthropology Workload Policy (Arts & Science) – refers to a "standard teaching load" and not a hard cap on teaching workload;

(b) Department of Applied Psychology and Human Development (OISE) – the term "normally" is used to qualify the setting of teaching workloads for Tenure Stream and Teaching Stream faculty;

(c) Department of Cinema Studies (Arts & Science) – refers to a "standard teaching load" and not a hard cap on teaching assignments. This workload policy also recognizes that Tenure Stream faculty members may take on "supervision and committee duties related to the PhD program", which is not undertaken by the majority of Teaching Stream faculty members;

(d) Department of Curriculum, Teaching and Learning (OISE) – describes a "normal course load" and not a hard cap on teaching workload. It also recognizes that "supervising graduate thesis students" is a component of the teaching workload of Tenure Stream faculty that is not generally performed by Teaching Stream faculty;

(e) Centre for French and Linguistics (Arts & Science) – states that "annual variances from this norm can be agreed upon by the Director and the faculty member. This flexibility is important for recognizing different demands that unit members experience from year to year in balancing the domains of workload." It also uses the phrase "normal annual teaching load", and includes no reference to a strict cap on teaching workload;

(f) Department of Italian Studies (Arts & Science) – uses of the phrase "standard teaching load", in recognition of the fact that there is no hard cap on this component of workload. It also states that "in addition to annual graduate teaching, graduate faculty are expected to participate in supervisory and committee duties related to the graduate program, including supervision of doctoral dissertations and graduate research papers, and membership on graduate examination and supervisory committees. Graduate faculty are also expected to serve occasionally as Chairs on external dissertation defence committees as needed."

(g) Department of Leadership, Higher, and Adult Education (OISE) – uses the phrase "normal course load" to describe the teaching component of workload. It also states that "the Chair and a faculty member can agree upon annual variances to the norm to recognize that different demands that unit members experience from year to year in balancing the different aspects of workload", and that "teaching assignments may also be changed at the discretion of the Chair in consideration of other aspects of teaching such as but not limited to those listed in Section 4.2 of the WLPP."

(h) Department of Linguistics (Arts & Science) – uses the phrase "normal annual teaching load" to describe the teaching component of workload, and not a fixed cap on teaching. It also states that "in addition to annual graduate teaching, graduate faculty are expected to participate in supervisory and committee duties related to the graduate program, including supervision of doctoral dissertation, general papers, and MA forum papers. Graduate faculty are also expected to serve occasionally as Chairs on dissertation defence committees for other units."

(i) Department for the Study of Religion (Arts & Science) – describes the annual teaching loads for Tenure Stream and Teaching Stream faculty as "normal teaching loads" and uses the terms "standard" and "normal" when referring to the quantitative components of faculty members' annual teaching workloads.

In particularizing the teaching workload of Tenure Stream faculty members, this workload policy also specifies that "[I]n addition to annual graduate teaching, graduate faculty are expected to participate in supervisory and committee duties related to the graduate program, including supervision of doctoral dissertations and graduate research papers, and membership on graduate examination and supervisory committees. Graduate faculty are also expected to serve occasionally as Chairs on external dissertation defence committees as needed."

(j) Department for Social Justice Education (OISE) – this workload policy uses the term "normal annual course load" to describe the teaching component of workload assigned to Tenure Stream and Teaching Stream faculty members. Instead of imposing any type of cap on teaching, this workload policy recognizes that "the Chair and a faculty member can agree upon annual variances from the norm in light of programmatic, disciplinary, and other needs of the department and individual work profiles may vary from year to year."

This workload policy also confirms that Tenure Stream faculty members are expected to supervise graduate students and that "[i]t is recognized that doctoral and master's supervisions and thesis committee work are a normal part of faculty teaching workload."

(k) Women & Gender Studies Institute (Arts & Science) – this workload policy describes the teaching load assigned to Tenure Stream and Teaching Stream faculty members as being a "standard teaching load" from which annual variances can be made, "to recognize the different demands that unit members experience from year to year in balancing the domains of workload." There is no fixed and immutable cap on the teaching workload that can be assigned to Teaching Stream faculty members in this unit.

124. As it did with the academic units cited at paragraph 154 of its brief, the Association's attempt to compare the treatment of teaching workload in the academic units listed in paragraphs 179 and 180 of its brief focuses only of the "FCE course load" component of teaching workload. The "FCE course loads" taught by Tenure Stream and Teaching Stream faculty in these different academic units is only one component of the teaching component of workload. As noted above, the Association again disregards the supervision of graduate students and the teaching responsibilities related thereto as a component of workload that differs considerably between Tenure Stream faculty members and Teaching Stream faculty members, with Tenure Stream faculty members regularly performing the bulk of this work in each academic unit. A restrictive comparison of the "FCE course loads" taught by Tenure Stream and Teaching Stream faculty in these

academic units overlooks the fact that other components of teaching are relevant to the determination of the teaching workload of Tenure Stream faculty, particularly in the academic units referenced in paragraph 180 of the Association's Brief, where there are a significant number of courses offered at both the undergraduate and graduate levels, with a significant amount of graduate supervisory work performed by the Tenure Stream faculty appointed therein.

125. When these other components included within the teaching workload of Tenure Stream faculty are considered, it can and does close the perceived "gap" that the Association has attempted to create between Tenure Stream and Teaching Stream faculty when their respective "course loads" are compared in isolation.

126. At paragraph 185 of its brief, the Association claims that in the case of Tenure Stream faculty members, there is a clear separation between the performance of the teaching component of their workload and the performance of research and that, the Association then claims that Teaching Stream faculty members are expected to "bundle" the performance of their pedagogical/professional development work with their course assignments. The Association then asserts that "it is simply not possible to be teaching and conducting scholarship at the same time." The University rejects this assertion. The performance of these two components of workload are not and never have been hermitically sealed from one another. Tenure Stream faculty members and Teaching Stream faculty members can and do engage in teaching and scholarship at the same time. In this regard, Teaching Stream faculty members can base their scholarship on "teaching and related pedagogical/professional activities", as section 30(ii) of the PPAA. makes clear.

127. The hypothetical examples included in paragraphs 180 through 185 of its brief do not show that the Teaching Stream faculty members "do not receive equal credit for doing the same work." It is beyond dispute that Tenure Stream faculty members and Teaching Stream faculty members have different roles and the "credit" they receive for performing their duties and responsibilities is assessed differently, both in respect of determining whether tenure or continuing status will be awarded, and as part of the annual PTR

process. The Association's hypothetical examples ignore these important and well-established distinctions between faculty members employed in these two distinct streams.

UTFA PROPOSAL 1(L) – WORKLOAD – TEACHING AND SERVICE RELEASE

128. At paragraphs 197 and 198 of its brief, the Association acknowledges that some academic units at the University have chosen, through the collegial decision-making processes in the WLPP, to extend course releases to newly-appointed faculty members and that others have not. The University submits that this exercise of collegial decision-making at the local level and the different outcomes it generates need not be overtaken by the global requirement that each academic unit provide at least some teaching and service release to all faculty members prior to their interim reviews. The University submits that newly-appointed faculty members can and often do meet with leadership in their academic units to discuss and address these issues.

129. The University has adopted, through the PPAA, a formula which provides a teaching release to faculty members at a time that is closer to their tenure/continuing status reviews, rather than earlier in their academic careers. The fact that other universities, such as those cited by the Association in the table at paragraph 202 of its brief have decided to provide these entitlements at earlier times in a faculty member's initial appointment reflects the different choices these other universities have made on this issue and do not support the Association's request that additional teaching and service release be mandated in the first several years of a faculty member's appointment.

1(M) – WORKLOAD – LIBRARIAN RESEARCH AND SCHOLARLY CONTRIBUTIONS

130. In reply to the Association's submissions in support of this proposal, the University repeats and relies on the submissions included at paragraphs 227 through 234 of the University's August 19, 2022 Arbitration Brief.

131. The University denies the allegation, made at paragraph 207 of the Association's Brief, that it has "refused UTFA's proposal to include [a reference to a librarian's self-directed research] in the WLPP". In fact, the University has made a proposal that includes such language which is found at page 92 of its Arbitration Brief. The University has

proposed that the reference to a librarian's self-directed research be included in the WLPP using language that is more accurate and precise than the Association's proposal. The University's proposal is found at page 92 of its Arbitration Brief and is reproduced below, for ease of reference:

> Amend Article 8.1(b) of the WLPP as follows:
>
> "Research and scholarly contributions, including those academic, professional and pedagogical contributions or activities that are self-directed.

UTFA PROPOSAL 8 – PREGNANCY AND PARENTAL LEAVE AND ADOPTION / PRIMARY CAREGIVER LEAVE ACCESSIBILITY

132. The University maintains that the Association's proposal does not fit within the scope of proposals that can be awarded as part of the Article 6 dispute resolution process under which this proceeding is being conducted and that a Dispute Resolution Panel, appointed under Article 6 of the Memorandum of Agreement lacks jurisdiction to award this proposal.

133. Furthermore, at paragraph 219 of its brief, the Association has proposed, for the first time, that the University "establish a $500,000 fund to which faculty members can apply to support the cost of hiring personnel to provide assistance and support during a period of parental leave." This monetary request was not included in the proposals that the Association presented to the University at the outset of the Article 6 negotiation process and as required by Article 6(3) of the Memorandum of Agreement, nor was this request addressed in the bilateral negotiations and mediated discussions that followed. In these circumstances, it is simply too late for the Association to make this significant monetary request at this stage of the proceedings, and a Dispute Resolution Panel appointed under Article 6 of the Memorandum of Agreement does not have jurisdiction to consider this late-filed request.

134. The University's position that the Association's late-filed request for the creation of a $500,000 fund falls outside the jurisdictional scope of this process is further supported by the language in paragraphs 5(a), 5(c) and Schedule "A" of the January 25, 2022 Memorandum of Settlement. The parties agreed that the Association would be permitted to advance the proposals set out in Schedule "A" to the January 25, 2022 Memorandum of Settlement to this dispute resolution proceeding. There is no reference the proposed expenditure of $500,000 included in Schedule "A" to the January 25, 2022 Memorandum of Settlement, and a request for such an expenditure cannot now be made.

135. Moreover, the Association's request that the University create a $500,000 fund to which faculty members can apply to hire personnel who will support their work during a period of leave meets the definition of "compensation" found in Bill 124. For ease of reference, this definition is set out below:

> "compensation" means anything paid or **provided, directly or indirectly**, **to or for the benefit of an employee**, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments

136. The provision of a $500,000 fund, accessible to eligible employees, which is intended to provide support to those employees while they are on leave is something that is "provided….directly or indirectly… to or for the benefit of an employee". In a proceeding where the parties have now agreed that the available "residual" for the period July 1, 2022 to June 30, 2023 is limited $297,060.00, the monetary amount of this proposal means that it cannot be awarded.

UTFA PROPOSAL 9 – PSYCHOLOGY AND MENTAL HEALTH BENEFITS

137. In support of a further request for improvements to these benefits, beyond the agreed-to increase of the maximum annual reimbursement limit for psychology and mental health benefits form $3,000.00 to $5,000.00, and the agreed-to increase of the reasonable and customary amounts related to these benefits, which took effect earlier this year, the Association references its own survey results, which apparently showed that "roughly one quarter of members have reported that their mental health needs have increased in recent years."

138. In agreeing to the aforementioned improvements to the psychology and mental health benefits provided to faculty members and librarians, the University acknowledged the importance of addressing issues related to mental health. Despite an agreement on the importance of addressing mental health issues, as reflected in the agreed-upon improvements to these benefits, the information provided by the Association in its brief does not support its request for a further increase.

139. If one quarter of the respondents to the Association's recent surveys have reported an increase in their mental health needs, the evidence regarding the usage of these benefits shows that the current level of these benefits is responsive to these needs. As set out in paragraph 256 of the University's brief, only 1.14% of eligible plan members and dependents utilized the full $5,000.00 of psychology and mental health benefits available to them in the most recently completed benefit year. This evidence demonstrates that the current level of this benefit has responded to the increase in mental health needs that the Association has referenced in its brief.

140. At paragraph 229 of its brief, the Association claims that the awarding of its proposal would result in a cost to the University of $75,000. The University disputes the accuracy and sufficiency of the Association's estimate of the cost of this proposal and maintains that this proposal, if awarded, would generate an additional cost of $145,000 for active employees only. If this benefit increase were applied to retired faculty members and librarians, which the University continues to oppose, an added cost of $5,200 would be generated.

141. The costing of this proposed increase was provided to the University by its benefits provider Green Shield Canada ("Green Shield"). The assumptions used by Green Shield to prepare this costing are set out below:

(a) Green Shield relied on the claims experience for this benefit for the time period between July 1, 2021 and May 31, 2022.

(b) A total of 3,037 individuals submitted claims for paramedical benefit services. Green Shield assumed that claimants who had reached the newly-increased annual maximum benefit level of $5,000 which took effect in 2022 would reach the Association's proposed increased annual maximum benefit level of $7,000, along with claimants whose benefit claims in 2022 totalled $3,800. This group represents 6.5% of individuals who claimed this benefit.

Due to the timing of the annual benefit increase in 2022, claimants who reached the newly-increased maximum benefit level of $5,000 or who exceeded the prior maximum benefit level of $3,000 did so in 4 months. It is therefore reasonable to assume that this same group would reach the Association's proposed increase to the maximum benefit level of $7,000 within the 8 month period now at issue.

(c) Green Shield determined that active faculty members and librarians received a total of $2,218,058 in psychology and mental health benefits for the period ending May 31, 2022. This increased to $2,405,794 as of June 30, 2022.

(d) Green Shield anticipated a claims increase of $168,000 for active employees and increased that amount by 15% to account for the applicable premium tax (2%), Provincial Sales Tax (8%) and administrative fees, for a total of $193,200.

(e) As the cost sharing arrangement for psychology and mental health benefits is 75% / 25%, the estimated cost for this benefit increase to the University is $145,000.

142. If the Association's benefit proposal is awarded, the University requests that it be applied on a prospective basis only, with no retroactive effect.

UTFA PROPOSAL 10 – ELDERCARE AND COMPASSIONATE CARE LEAVES

143. In reply to the Association's submissions in support of this proposal, the University repeats and relies upon the submissions at paragraphs 260 through 269 of its August 19, 2022 Arbitration Brief, including its preliminary submission that a Dispute Resolution Panel appointed under Article 6 of the Memorandum of Agreement does not have jurisdiction to award this proposal, as it does not pertain to salaries, benefits or workload.

UTFA PROPOSAL 11(B) – PHD TUITION WAIVER

144. For the reasons already set out in paragraphs 270 through 274 of its brief, the University denies the Association's assertion that it has improperly imposed a "cap" on the tuition waiver benefit program. The University's approach to the administration of this benefit has been entirely consistent with the language that the parties have negotiated and amended over time, including the most recent amendments which formed part of the Memorandum of Settlement for the period July 1, 2014 to June 30, 2017, found at **Tab 29** of the University's August 19, 2022 Arbitration Brief.

145. In response to the Association's characterization of the Flex-Time PhD program, found at paragraphs 237 and 238 of its brief, the University has consistently characterized this program as a full-time PhD program that allows students to complete its requirements on a more flexible schedule. The tuition applicable to this full-time program, with a more flexible time window for completion have always been set at a full-time rate for the first 4 years or 12 sessions of the academic program. The agreement to extend the University's tuition waiver benefit to "pursuit of a part-time or flex-time U of T PhD" did not require the University to adjust the structure of this existing academic program to make it anything other than a full-time PhD program with a more flexible time-to-completion, nor did it apply an increased monetary commitment to fund this type of program.

146. The Association's proposal seeks to require the University to fully subsidize the completion of all masters and doctoral degrees, regardless of any existing fee structures that the University has established with respect to these programs. That objective has never been the purpose or intention of the University's tuition waiver program and would

constitute a marked departure from the established structure and functioning of this program.

147. The University denies that the negotiated extension of the University's tuition waiver program to include "pursuit of a part-time or flex-time U of T PhD" was somehow intended to apply to any and all doctoral-level programs, in addition to PhD programs. The University acknowledges that new doctoral-level programs have been established since the agreed-to extension took effect which are not PhD degrees. However, at the time that the parties agreed to extend the University's tuition waiver program "to include pursuit of a part-time or flex-time U of T PhD", there were other doctoral-level programs already in place including the Doctor of Laws (S.J.D.) degree which were clearly separate and distinguishable from the PhD degrees that the parties agreed to include within the tuition waiver program.

148. Finally, the University disputes the Association's assertion that an individual's utilization of the tuition waiver program for the pursuit of a doctoral degree "can only enhance a member's professional contributions to the University." An individual's access to the University's tuition waiver program has not been restricted to applicants who seek a degree that is in line with their existing appointment at the University. The vast majority of faculty members have already completed at least one terminal degree in their field of study. The University's tuition waiver program was intended to provide some financial relief to faculty members and librarians who wish to pursue additional studies outside of their employment, whether or not those studies relate directly to their work at the University.

UTFA PROPOSAL 12 – LIBRARIANS' SALARIES & RESEARCH AND STUDY DAYS

149. At paragraph 249 of its brief, the Association claims that librarians employed by McMaster University have 20 research days. A review of Articles 23.17 and 23.18 of the collective agreement between McMaster University and the McMaster University Academic Librarians Association the ("McMaster Librarians' Collective Agreement"), which is attached at **Tab 15** of the University's Reply brief confirms that what the Association has described as 20 research days for McMaster University's librarians is

actually a discretionary “Short-Term Leave”, which is the subject of an application and approval process that is fundamentally different from how the University manages the research and professional development days provided to its librarians.

150. Article 23.17(a) of the McMaster Librarians’ Collective Agreement provides that:

> Short Term Professional Development Leave is available to an eligible employee for a maximum of 4 weeks per fiscal year. This category of leave is intended to provide employees with opportunities to enhance their academic and professional competence.

151. Under Article 23.18 of the McMaster Librarians’ Collective Agreement, a librarian who wants to apply for Short-Term Leave must submit a written application that includes an outline of the research or other scholarly activity that they intend to pursue during their leave. They must also explain how their activities during their leave will benefit themselves, the profession, McMaster Libraries, or McMaster University. All applications for Short-Term Leave are considered by the University Librarian or the Director, Health Sciences Library, who have discretion to grant or deny each application. Put a different way, no librarian employed by McMaster University is entitled to a Short-Term Leave.

152. In contrast, librarians at the University are entitled to use up to 14 research and professional development days with the prior approval of their supervisor and the University Chief Librarian or designate. Librarians are not required to submit the same type of written application that is required by the McMaster Librarians’ Collective Agreement. This difference underscores the fact that the Short-Term Leave option available to librarians at McMaster University serves a narrower purpose than the more flexible research and professional development leaves provided by to librarians employed by the University. Leaves that are ordinarily scheduled in week-long increments are not used for attendance at conferences or workshops that may occur over one or two days, as the University Libraries’ research and professional development days often are.

153. For these reasons, the fact that librarians at McMaster University may apply for a discretionary short-term research leave does not provide any support for the Association’s proposal to further increase the research and professional development leaves available to the University’s librarians.

UTFA PROPOSAL 13 – PARAMEDICAL SERVICES BENEFITS

154. At paragraph 257 of its brief, the Association claims that the awarding of its proposal would result in a cost to the University of $97,500. The University disputes the accuracy and sufficiency of this Association's estimate. The University submits that this proposal, if awarded, would generate an additional cost to the University of $200,100 for active employees only. This estimated cost is based on a revised costing estimate, attached to this Reply Brief at **Tab 5**, which includes a costing estimate that is substantially lower than its initial estimate of $311,000. The University further estimates that the costs associated with this proposed benefit improvement would increase by a further $61,000 if it were made available to retired faculty members and librarians, which the University continues to oppose.

155. The costing of this proposed increase was provided to the University by Green Shield. The assumptions used by Green Shield to prepare this costing are set out below:

(a) Green Shield relied on the claims experience for this benefit for the time period between July 1, 2021 and May 31, 2022.

(b) Green Shield's assumptions only reflect the additional claims individuals will incur above the current maximum of $2,500. There were 62 active employees whose usage of these benefits reached the $2,000 level following the agreed-to increase of the maximum benefit level to $2,500 in 2022. Assuming an average for additional claims of $2,060, this creates an increase of $128,000 in claims.

(c) Green Shield assumed that claimants who had received between $1,500 and $2,000 in paramedical services benefits would increase their usage of these benefits above the maximum benefit level of $2,500 by $680. There were 153 claimants whose claims fit within this range, which generated a further increase of $104,000 in claims.

(d) Green Shield has estimated an increase in paramedical services benefits claims of $232,000 in claims for active employees only if the Association's proposal is awarded. It increased this amount by 15% to account for the applicable premium tax (2%), Provincial Sales Tax (8%) and administrative fees, for a total of $267,000.

(e) As the cost sharing arrangement for paramedical services benefits is 75% / 25%, the estimated cost to the University for this benefit increase is $200,100.

156. If the Association's benefit proposal is awarded, the University requests that it be applied on a prospective basis only, with no retroactive effect.

UTFA PROPOSAL 14 – REASONABLE AND CUSTOMARY

157. The University reiterates its preliminary objection that a Dispute Resolution Panel appointed under Article 6 of the Memorandum of Agreement does not have jurisdiction to award this proposal.

158. The University submits that the arbitration decisions cited by the Association at paragraph 261 of its brief do not support the Association's broad and unsubstantiated demand that the University prepare an annual audit and report on the benefit claims filed by faculty members and librarians against Green Shield Canada's "reasonable and customary" limits.

159. Arbitrator Schmidt's decision in *Arterra Wines Canada* is a rights arbitration decision concerning a grievance that a unilateral adjustment to the amount of a benefit claim that is defined to exceed the "reasonable and usual rates in the locality where the services and supplies are provided" constituted a violation of the collective agreement at issue. Arbitrator Schmidt's comment that "an outrageously low [reasonable and usual] limit is subject to arbitral review" did not impact her overall analysis. Neither that particular excerpt from arbitrator Schmidt's decision, nor her decision as a whole, supports the proposition that an employer is somehow obligated to regularly audit employee benefit claims as against the "reasonable and customary" benefit limits in effect from time to time, as the Association is proposing.

160. Similarly, Arbitrator Parmar's comments in *Trillium Health Partners*, confirmed that when a "reasonable and customary" limit is chosen by an insurer, that limit must be supported by objective data. It does not subject an employer to ongoing policing and reporting obligations regarding these limits as they apply to benefit claims made by employees. If specific individuals have specific questions or complaints regarding specific benefit claims which they feel were improperly denied or not fully or appropriately paid, such questions or complaints can be addressed within the specific factual matrix in which

they arise, without imposing the type of ongoing administrative burdens inherent in the Association's proposal.

UTFA PROPOSAL 15 – VISION CARE

161. At paragraph 268 of its brief, the Association claims that its proposal would result in a cost to the University of $75,000. However, the projected costs prepared by the Association were erroneously based on the assumption of a 50% / 50% cost sharing arrangement for the vision care benefit. In fact, the actual cost sharing arrangement for this benefit requires the University to pay for 75% of the related costs, with the claimant responsible for the remaining 25% of the cost. Using the Association's own assumptions related to its projected cost of $75,000, which was based on the incorrect assumption of a 50% / 50% cost sharing arrangement, the University estimates that the project cost of this proposed increase, using the Association's own assumptions, but applying the correct 75% / 25% cost sharing arrangement would be approximately $112,500.

162. Given the University's estimate of the cost of this proposal, if awarded, would generate an additional cost of $85,000 for active employees only, which is less than the Association's own assumptions costs using the correct 75 % / 25 % cost sharing arrangement split, the Association's claim that the assumptions used by Green Shield, outlined below, are "very aggressive" is unsupported. If this proposed increase to this benefit is extended to retired faculty members and librarians, which the University continues to oppose, it would generate an increased cost of $32,300.

163. The costing of this proposed increase was provided to the University by Green Shield. The assumptions used by Green Shield to prepare this costing are set out below:

(a) Green Shield relied on the total claims experience for this benefit for the time period between July 1, 2021 and May 31, 2022.

(b) Green Shield assumed that each of the 494 claimants who received $450.00 or more in vision care benefits over the past year would receive an additional $100 in claims, which would account for an increased cost of $49,400.

(c) More recently, there are 865 additional claimants who have already claimed at least $450 in vision care benefits in 2022. Consistent with its earlier assumption, Green Shield has assumed that each of these claimants would also receive an additional $100 in claims, accounting for an additional cost of $86,500.

(d) As of May 31, 2022, the value of all vision care benefits submitted was $683,840.40.

(e) Based on the assumptions set out above, Green Shield estimates a total increase in claims of $98,400 for active employees only. To this amount, Green Shield added 15%, to account for the applicable premium tax (2%), Provincial Sales Tax (8%) and administrative fees, for a total of $113,160.

(f) As the cost sharing arrangement for vision care benefits is 75% / 25%, the estimated cost to the University for this benefit increase is $85,000.

164. If the Association's benefit proposal is awarded, the University requests that it be applied on a prospective basis only, with no retroactive effect.

UTFA PROPOSALS 16(A) AND 16(B) – DENTAL CARE BENEFITS

165. The Association informed the University that it has withdrawn these proposals. Consequently, the University will not address either of these proposals in its Reply Brief.

UTFA PROPOSAL 17 – RETIREE BENEFITS

166. The Association claims, in footnote 46 of its brief, that "the cost of retiree benefit improvements does not apply against the Bill 124 compensation cap and, therefore does not "count" against the parties' agreed to residual amount" of $297,060. In support of its claim, the Association cites Arbitrator Stout's decision in *Independent Electricity System Operator v. Society of United Professionals*. For ease of reference, the analysis provided by Arbitrator Stout in support of his determination that the benefits provided to retirees are not to be counted against the compensation constraints established by Bill 124 are reproduced on the following page:

[33] The IESO insisted that benefits provided to retirees and pensioners are to be included in the total compensation costing. The Society disagrees pointing to the following provisions of *Bill 124*, which they say provides clear direction:

> **Interpretation**
>
> 2. In this Act,
>
> …
>
> "compensation" means anything paid or provided, directly or indirectly, to or for the benefit of an employee, and includes salary, benefits, perquisites and all forms of non-discretionary and discretionary payments; ("rémunération")
>
> **Application to employees**
>
> 6(1) This Act applies to the employees of the employers to whom this Act applies.
>
> **Exceptions**
>
> (2) This Act does not apply to such employees or classes of employees as may be specified by a Minister's regulation.

[34] I agree with the Society that the ordinary and grammatical meaning of the language found in *Bill 124* reflects the intention of the legislature to restrict the application of the Act to "employees" and the compensation that is constrained means compensation paid to employees. The language is absolutely clear and there is no ambiguity. A retiree or pensioner is not an employee they are former employees, see *Re Liquor Control Board of Ontario et al. and Ontario Liquor Board Employees' Union et al.* (1980), 29 O.R. (2d) 705 (Ont. Div. Crt.). While pensioners or retirees are not employees under a collective agreement, it is recognized that unions can and frequently do bargain on behalf of retired workers, see *Dayco (Canada) Ltd. v. CAW-Canada* [1993] 2 S.C.R. 230.

[35] In my view, if the legislature wished to apply the compensation constraints in *Bill 124* to pensioners and retirees, then they would have used either much more specific language that specifically included such persons or more broadly drafted language to capture such persons such as any amounts paid to or for the benefit of "any person". In the context of the well-established collective bargaining landscape, I cannot believe the legislature would have somehow unintentionally failed to address benefits that are provided to pensioners and retirees. In my view, it must have been the intention of the legislature not to include benefits paid to retirees or

> pensioners who generally are not actively employed and live on fixed incomes.
>
> [36] I acknowledge the IESO's argument that the scheme of *Bill 124* is wage and compensation constraint for certain employees employed in the broader public sector. However, I do not believe the exclusion of retirees and pensioners undermines the intent, scheme, or spirit of the Act. In this case the benefits provided to the pensioners and retirees are directly tied to those paid to employees and any increase to those benefits are constrained by *Bill 124*. While it might be imaginable that unions could make proposals to increase compensation to retirees and pensioners that exceeds that provided to employees, the reality is that no employer would agree to such a proposal and no interest arbitrator would entertain such a proposal in the context of having wage restraint legislation, such as *Bill 124*, applying to collective bargaining and interest arbitration.

167. The University respectfully submits that Arbitrator's Stout's interpretation of Bill 124 is incomplete and flawed. His conclusion that the cost of benefits provided to retirees somehow falls outside of the Bill 124 compensation restraint framework should not be followed. Arbitrator Stout's analysis does not accord with the established principles of statutory interpretation, which are that:

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[15]

168. In determining that "the ordinary and grammatical meaning of the language found in Bill 124 reflects the intention of the legislature to restrict the application of the Act to "employees" and the compensation that is constrained means compensation paid to employees", Arbitrator Stout overlooked several components expressly included in Bill 124's definition of "compensation". This statutory definition of "compensation" does not just cover "compensation paid to employees", as Arbitrator Stout suggested. Rather, the definition of "compensation" covers a far broader scope of matters, including "anything paid or provided, directly or indirectly, to or for the benefit of an employee."

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[15] *Rizzo & Rizzo Shoes Ltd.* 1998 CanLII 837 at para 21 (SCC). University's Reply Brief, **Tab 16**

169. A requirement that an employer continue to provide the same benefit increases to a group of retirees in lockstep with the benefit improvements provided to a group of active employees necessarily means that any improvement to retiree benefits that all current employees who eventually retire will enjoy and benefit from is something "paid or provided, directly or indirectly, to or for the benefit of an employee" under Bill 124. For example, an active employee who is 60 years of age and plans to retire on their 62nd birthday would derive a direct benefit from any negotiated or awarded increase that enhances retiree benefits at any point during his active employment. If that employee ultimately decided to remain actively employed until age 65, they would continue to derive a direct benefit from any further negotiated or awarded increases to retiree benefits that were put in place during his extended active employment.

170. In the example set out above, the fact that this employee would not begin to enjoy these benefits until their retirement is immaterial from a Bill 124 costing perspective. It cannot be realistically disputed that the object of Bill 124 is the implementation of compensation restraint measures within a specific three-year moderation period, which is calculated on a case-by-case basis. The cost of any "compensation" under Bill 124 paid by an employer is measured within each 12-month period of the moderation period, and the fact that an employee may not personally capitalize on the benefit improvements negotiated or awarded during the moderation period does not detract from the fact that the cost of those benefits to the employer must still be costed within the Bill 124 framework at the time that those costs were incurred.

171. At paragraph 282 of its brief, the Association acknowledges that active faculty members and librarians "understand that they have 'paid for' their retiree benefits by accepting in many cases and for many years a lower level of benefits than those available at other universities in the province." Without in any way accepting the accuracy of that statement, since universities that provide different levels of benefit coverage for retirees cannot objectively be compared to the University, which makes no such differentiation, the Association's statement confirms that the benefits that active members continue to receive after retirement is clearly a component of compensation that is provided indirectly to active employees, from which they ultimately benefit as retirees.

172. For the foregoing reasons, the University submits that the costs that are incurred during the period July 1, 2022 to June 30, 2023 in respect of improvements to retiree benefits do meet the definition of "compensation" under Bill 124 and must therefore be included in the agreed-upon "residual" of $297,060.

UTFA PROPOSAL 18 – HEALTH AND SAFETY

173. Without prejudice to the University's position that a Dispute Resolution Panel appointed under Article 6 of the Memorandum of Agreement lacks jurisdiction to award this proposal, the creation of the Central Health and Safety Committee as a body that was distinct from a Joint Health and Safety Committee under the *Occupational Health and Safety Act* was a central component of the Memorandum of Settlement between the University and the Association that is referenced in paragraph 334 of the University's Arbitration Brief, and which is attached at **Tab 45** of the University's Book of Documents and Authorities. Prior to executing the Memorandum of Settlement that established the Central Health and Safety Committee both the parties and their counsel were fully aware that they were agreeing to a Central Health and Safety Committee similar to the University and USW Central Health and Safety Committee which was also not a Joint Health and Safety Committee under or for the purposes of the *Occupational Health and Safety Act*. The Association cannot now complain about this result, which it freely agreed to, and it cannot now seek to undermine the terms of this settlement through this separate proceeding.

174. The University further submits that the Association's characterization of the dialogue that occurred between the University and the Association in respect of "Special Informational Request #253" referenced at paragraph 293 of the Association's Brief is not accurate.

175. The Association raised "Special Information Request #253" in two letters to the University dated August 4 and 20, 2020 respectively. Copies of these letters are attached at **Tab 17**. In these letters, the Association requested information, including "details of specific testing that was conducted, and steps that were taken, to verify that the building mechanical systems meet or exceed ASHRAE standards and other relevant standards in

buildings where in person activities will be held." The Association requested the production of records of these testing and verification processes. The Association also requested particulars of the "vetting process that was used in deciding to provide non-medical masks to faculty" and the details of any consultation with faculty regarding the choice of a mask vendor and mask configuration.

176. Contrary to the Association's claims, the University's response did not include only a "small amount of information". A copy of the University's response is attached at **Tab 18**. In response to the Association's request for details of specific building tests and records of the testing and verification processes, the University provided details of the steps it had taken to review the ventilation systems in its buildings. It also provided the Association with samples of the records associated with its monitoring of building ventilation systems. In doing so, the University reminded the Association that:

> It is important to note that our building records are paper based, and as such it would be difficult and time-consuming to compile, reproduce and provide a copy of all records.

177. The University denies that it has refused to share the records that the Association has requested on the basis that these requests have been made through the Central Health and Safety Committee. Rather, the University decided not to carry out specific tests when the value or applicability of these requested tests was unclear.

UTFA PROPOSAL 20 – MAINTENANCE OF SALARIES, BENEFITS AND WORKLOAD DURING BARGAINING

178. The University maintains that a Dispute Resolution Panel appointed under Article 6 of the Memorandum of Agreement is without jurisdiction to award the Association's proposal as it falls outside the ambit of matters that can be addressed through this process. Without limiting the generality of the University's position in this regard, the Association's proposal amounts to an attempt to have the arbitrator amend Article 6 of the Memorandum of Agreement which is something only the parties themselves can do by mutual agreement.

179. The Association has not offered any evidence as to why the negotiation, mediation and dispute resolution framework set out in Article 6 must be altered to mirror a component of the collective bargaining regime included in the *Labour Relations Act, 1995*, especially in circumstances where the Memorandum of Agreement was entered into as an express alternative to this statutory collective bargaining regime.

180. At paragraphs 310 to 312 of its brief, the Association has mischaracterized the University's management of the PTR Process. The University did not "refuse to pay PTR in the ordinary course" in 2020. It chose to continue the underlying Article 6 negotiation process, within which the calculation and payment of PTR compensation was under discussion.

181. This conclusion was accepted by Arbitrator Kaplan when he dismissed the Association's claim that the approach taken by the University in these earlier circumstances was in any way improper. A full review of Arbitrator Kaplan's award of January 4, 2021 (which is at **Tab 46** of the University's Book of Documents and Authorities) undermines the Association's assertions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

TAB 1

In the Matter of an Arbitration Regarding Salary, Benefits, and Workload Under Article 6 of the Memorandum of Agreement

BETWEEN:

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO

(the "University")

AND

THE UNIVERSITY OF TORONTO FACULTY ASSOCIATION

(the "Association)

BEFORE: Eli A. Gedalof, Sole Arbitrator

INTERIM AWARD

1. In accordance with a January 25, 2022 Memorandum of Settlement (the "MOS"), I have been appointed as interest arbitrator with respect to salary, benefits and workload matters under Article 6 of the Memorandum of Agreement between the parties, for the period July 1, 2022 to June 30, 2023.

2. There is no dispute that the period July 1, 2022 to June 30, 2023 constitutes the third and final year of the "moderation period" mandated by the *Protecting a Sustainable for Future Generations Act, 2019* (referred to as "Bill 124"). The maximum annual salary increase permitted under Bill 124 during the moderation period is 1%. Without prejudice to either party's position with respect to the constitutionality of Bill 124 and the ongoing litigation in that regard, the parties agree that I ought to issue an award in this case. Having regard to the fact that a new school year has begun and this matter is not scheduled to commence hearing for several weeks, I find it appropriate to order the following increases on an interim basis:

- Effective July 1, 2022—1% ATB salary increase;

- Effective September 1, 2022—Increase minimum per course stipend and overload rate from $18,255 to $18,438.

3. I remain seized in accordance with the terms of the MOS.

Dated at Toronto, Ontario, this 15th day of September 2022.

"*Eli Gedalof*"

_____
Eli A. Gedalof
Sole Arbitrator

TAB 2

WITHOUT PREJUDICE

Summary of Key Assumptions re UTFA Benefit Costings for Year 3

Psychology and mental health benefits

- **Proposal**: To increase the maximum annual reimbursement for psychology and mental health benefits from $5000 to $7000 per person
- **Projected cost**: $75,000
- **Assumptions**:
    - The mental health benefit was increased from $3,000 to $5,000 as part of the Jan 24, 2022 settlement
    - 412 people represented 61% of total claims cost in 2021
    - In the most recent plan year data ending June 2021, there were 1,095 claimants of which 20% hit the plan max of $3,000 representing 36% of total claims cost. Another 95 claimants (9%) were within 10% of the current plan max representing 14% of claims cost. Another 9% of people were within $1,000 of the current plan max representing 11% of total cost
    - Increasing the benefit max to $7,000 will not necessarily drive costs much beyond the cost associated with the most recent increase to $5,000. Based on the Ontario Psychological Association estimate of 12 to 20 sessions for typical Cognitive Behaviour Therapy cases the benefit increase in Jan 2022 to $5,000 would have absorbed the costs associated with CBT for the vast majority of the claimants in need who either reached or were close to the old plan max of $3,000
    - Assuming 20% of those that hit the current plan max fully utilize the additional $2,000 benefit increase
    - Assuming an expense factor of 3.42% of paid claims plus 2% taxes and estimating an additional stop-loss pooling charge
    - The projected cost reflects the cost to the Employer, assuming a 75/25 split for extended health benefits
    - The projected cost reflects the cost for actives only (i.e., not retirees)

Paramedical

- **Proposal**: To increase the annual combined cap from $2500 to $5000
- **Projected cost**: $97,500
- **Assumptions**:
    - Claims experience since March 2020 is the least reliable given the impact of COVID on utilization
    - 390 active claimants reached or were within 10% of the plan max in June 2021
    - HCSA absorbed $200,000 to $300,000 per year in paramedical claims costs from 2019 to 2021 and this cost will be absorbed by the traditional plan with the benefit increase to $2,500 in 2022
    - Assume 20% of high cost claimants continue to utilize the plan at an

increased rate with a much smaller percentage nearing or hitting the new plan max of $5,000
    - Assuming an expense factor of 3.42% of paid claims plus 2% taxes and estimating an additional stop-loss pooling charge
    - The projected cost reflects the cost to the Employer, assuming a 75/25 split for extended health benefits
    - The projected cost reflects the cost for actives only (i.e., not retirees)

Vision

- **Proposal**: To increase the maximum for vision care from $700 to $800 every 24 months
- **Projected cost**: $75,000
- **Assumptions**:
    - Vision claims in excess of the traditional plan max of $450 in the plan yr ending June 2021 were being charged to the HCSA in the amount of $210 - $265k
    - Increasing the traditional plan benefit to $700 in Jan 2022 will have the effect of transferring this cost from the HCSA for actives to the traditional plan
    - Avg claim cost driven by the proposal to increase the benefit to $800 will likely inflate 10% to 20%
    - The Jan 24, 2022 settlement would drive most of the increased cost of claims to the current plan year of which there was no data supplied to gauge the impact so costs were estimated for that last plan increase
    - Assuming an expense factor of 3.42% of paid claims plus 2% taxes and estimating an additional stop-loss pooling charge
    - The projected cost reflects the cost to the Employer, assuming a 50/50 split for vision
    - The projected cost reflects the cost for actives only (i.e., not retirees)

TAB 3

August 31, 2022

CONFIDENTIAL AND WITHOUT PREJUDICE

Summary of University Key Assumptions Re: UTFA Benefit Costings for Year 3 – Provided in the Context of a Mutually Agreed Confidential and Without Prejudice Mediation Process Regarding Spending the Remainder of the "Residual" for Year 3 of $297,060

Mental Health $5K to $7K = $168K in additional claims GSC

a. Green Shield's numbers looked at the most current experience at the time ending May 31 2022 vs UTFA that looked at data ending June 2021.
b. Green Shield included in their assumption those who hit the $5K mark and given that the benefit moved from 3K to 5K last year, those that had yet fully capitalized on the increased max. Hence they looked at those at $3,800 to utilize the full benefit and they represent 6.5% of the group.
c. When Green Shield takes their same logic and applied it to the data from June 2021 they too would have got $70K @ as UTFA did, but their data is understated.
d. Mental Health claims for BD 26096 (i.e. active population only):
    i. Ending July 31 2022 = $2,468,695 - current
    ii. Ending May 31 2022 = $2,218,058 – GSC analysis
e. With an anticipated increase of $168,000 in claims, 15% is added to cover Green Shield Admin fees & taxes (noting UTFA added 2% for tax which covers just the premium tax but not the 8% for PST). The total projected costs is then multiplied by 75% to get the estimated employer cost given the 75/25 split for extended health benefits.

Combined maximum for Chiropractor, Physiotherapist, Registered Massage Therapist, Osteopath, Acupuncturist, Dietitian, Occupational Therapist, Chiropodist from $2,500 per benefit year to $5,000 = $470K in additional claims GSC ($360K for actives + $110K for retirees)

a. Green Shield's numbers looked at the most current experience at the time ending May 31 2022 vs UTFA that looked at data ending June 2021.
b. Green Shield assumed that those who hit $2,000 in Parameds would use $2,500 (there were 73 claimants which means $182,500 in claims). Green Shield also assumed that those who hit between $1,500 and $2,000 would use $1,500 more (there were 192 claimants in this category so an additional $1,500 in claims means an additional $288,000). There are a total of 3,037 claimants who have had claims for parameds.
c. The total paramed claims ending May 31 2022 = $2,052,137. Hence Green Shield assumed a 22% increase for allowing the coverage to increase by 100%.
d. UTFA assumed only 20% of those who hit the maximum would go beyond. It appears they assumed that a +4.6% increase would suffice even though the change is increasing the maximum by 100% for 8 parameds. Claims data coming off of Covid is not appropriate as we know it resulted in lower claims.
a. With an anticipated increase of $360,000 in claims for active employees only, 15% is added to cover Green Shield Admin fees & taxes (noting UTFA added 2% for tax which covers just the premium tax but not the 8% for PST). The total projected costs is then multiplied by 75% to get the estimated employer cost given the 75/25 split for extended health benefits.

Vision maximum from $700 per 24 month benefit year to $800 = $136K in additional claims GSC ($98,400 for actives + $37,500 for retirees)

a. The Vision care benefit has moved from a $450 maximum last year to a $700 maximum earlier this year. It is now proposed to be moving to an $800 maximum.

b. Green Shield had costed an additional $100 for any member who had reached $450 in Vision claims in the past year. This amounted to 494 members ($49,400).
c. There were 865 more claimants who already claimed Vision claims this year over $450 ($86,500).
d. Total claims as of May 31, 2022 is $683,840.40
a. With an anticipated increase of $98,400 in claims for active employees only, 15% is added to cover Green Shield Admin fees & taxes (noting UTFA added 2% for tax which covers just the premium tax but not the 8% for PST). The total projected costs is then multiplied by 75% (noting UTFA indicated applying 50%) to get the estimated employer cost given the 75/25 split for extended health benefits.

TAB 4

~~August 31, 2022~~

September 8 2022

CONFIDENTIAL AND WITHOUT PREJUDICE

Summary of University Key Assumptions Re: UTFA Benefit Costings for Year 3 – Provided in the Context of a Mutually Agreed Confidential and Without Prejudice Mediation Process Regarding Spending the Remainder of the "Residual" for Year 3 of $297,060

***Comments from UTFA's benefits consultants are in blue**

Mental Health $5K to $7K = $168K in additional claims GSC

a. Green Shield's numbers looked at the most current experience at the time ending May 31 2022 vs UTFA that looked at data ending June 2021.
b. Green Shield included in their assumption those who hit the $5K mark and given that the benefit moved from 3K to 5K last year, those that had yet fully capitalized on the increased max. Hence they looked at those at $3,800 to utilize the full benefit and they represent 6.5% of the group.

- UTFA costed the proposals at $75,000 for actives; UofT Administration costed the proposal at $145,000, resulting in a difference of $70,000.

- The Administration relied on 2022 data but only disclosed 2021 data to UTFA.

- The Administration applied very aggressive assumptions about take-up rates for the proposed benefit improvement. First, the Administration assumed that everyone who hit the maximum of $5,000 in the period ending May 2022 would also utilize the full $2,000 increase (or $7000) — a 100% take-up assumption. Second, the 2022 data is only for a partial year. The Administration also assumed that everyone who used over $3,800 in 2022 would, in a normal year, have reached the $5,000 maximum in that year, and thus are assumed to utilize the full $2,000 increase. I.e. the Administration makes two 100% take-up assumptions. First that people at $3,800 or higher are actually using $5,000 (the maximum) and therefore should be assumed to utilize the full $2,000 increase as well. Again, this is a very aggressive assumption.

- UTFA assumed that the 224 people who hit the plan max in 2021 used $4,500 under the new plan max in 2022 (20 hr@ $225/hr for CBT. Note clinical range for a course of treatment is 12-20 hours so we assumed the highest end of the range.) This would have accounted for $1,008,000 in claims in 2022. We also added the 95 people who were at $2,500-$2,999 in 2021 claims and assumed that they too would have used the same $4,500 cost for CBT representing $427,500 in claims in 2022. The combination of both of these groups totaled $1,435,500. We therefore assumed that the increase in the plan benefit to $5,000 would cover the vast majority of the cost. That was baked into UTFA's cost assumption for 2023.

- Based on the actual claims cost of $2,218,058 to May 2022 by Green Shield (which data has not been produced to UTFA) and trending that forward for one more month to $2,343,058 at the end of the plan year in June which would have represented an increase of $601,545 in claims cost vs 2021 or +34%. Using the UTFA assumptions listed above for the two high cost claimant cohorts, their combined claims cost for 2022 estimated at $1,435,500 would have represented 83% of the actual claims cost increase in 2022 which is reasonable. The question for 2023 then was what percent of high cost claimants would have required more than the 20 sessions for CBT? UTFA used 20% of those who hit the max and conservatively added the full extra $2,000 in benefit for 44 people. That represented $88,000 in cost to which we added a 13% cost factor for expenses on claims coming to a $100,000 cost estimate.

- Note that UTFA's costings took into account 13% for taxes/fees, including the 8% PST (as compared to the Administration's 15%). The document UTFA previously provided to the Administration did not set out the full listing of all the taxes/fees that were applied, so this costing assumption may not have been clear to the Administration.

- The claims data directionally tells us that the current plan max of $5,000 should cover most of the need. The Administration's costing assumes that 37% of claimants will utilize a $7000 benefit, which is unduly aggressive. (The Administration estimate of $168,000 in claims = 84 people x $2,000pp. Once you add their +15% expense factor their estimate of total cost is $193,500 x 75% or $145,000.)

- By comparison, UTFA's costing assumes that 20% of claimants who hit the max will also claim the $2000 additional benefit.

c. When Green Shield takes their same logic and applied it to the data from June 2021 they too would have got $70K @ as UTFA did, but their data is understated.

    - For clarity as described above this is not how UTFA calculated the 2023 cost.

d. Mental Health claims for BD 26096 (i.e. active population only):
    i. Ending July 31 2022 = $2,468,695 - current
    ii. Ending May 31 2022 = $2,218,058 – GSC analysis

e. With an anticipated increase of $168,000 in claims, 15% is added to cover Green Shield Admin fees & taxes (noting UTFA added 2% for tax which covers just the premium tax but not the 8% for PST). The total projected costs is then multiplied by 75% to get the estimated employer cost given the 75/25 split for extended health benefits.

    - UTFA did not understate taxes. As set out above, UTFA assumed an expense factor of 13% to account for taxes/fees vs the Administration use of 15%. (Again, this may not have been entirely clear to the Administration from the previous document UTFA sent.)

Paramedical: Combined maximum for Chiropractor, Physiotherapist, Registered Massage Therapist, Osteopath, Acupuncturist, Dietitian, Occupational Therapist, Chiropodist from $2,500 per benefit year to $5,000 = $470K in additional claims GSC ($360K for actives + $110K for retirees)

a. Green Shield's numbers looked at the most current experience at the time ending May 31 2022 vs UTFA that looked at data ending June 2021.
b. Green Shield assumed that those who hit $2,000 in Parameds would use $2,500 (there were 73 claimants which means $182,500 in claims). Green Shield also assumed that those who hit between $1,500 and $2,000 would use $1,500 more (there were 192 claimants in this category so an additional $1,500 in claims means an additional $288,000). There are a total of 3,037 claimants who have had claims for parameds.
c. The total paramed claims ending May 31 2022 = $2,052,137. Hence Green Shield assumed a 22% increase for allowing the coverage to increase by 100%.
d. UTFA assumed only 20% of those who hit the maximum would go beyond. It appears they assumed that a +4.6% increase would suffice even though the change is increasing the maximum by 100% for 8 parameds. Claims data coming off of Covid is not appropriate as we know it resulted in lower claims.
a. With an anticipated increase of $360,000 in claims for active employees only, 15% is added to cover Green Shield Admin fees & taxes (noting UTFA added 2% for tax which covers just the premium tax but not the 8% for PST). The total projected costs is then multiplied by 75% to get the estimated employer cost given the 75/25 split for extended health benefits.

- UTFA costed the proposals at $97,500 for actives; UofT Administration costed the proposal at $311,000, resulting in a difference of $213,500.

- The Administration's costing assumptions are significantly flawed and again include a very aggressive take-up assumption. Specifically, the Administration's costing assumes that everyone who hits $2,000 in paramedical claims will utilize the full $2,500 increase in the maximum. i.e;. everyone who claimed $2,000 or more is assumed to claim $5,000.

- By contrast, it is clear from the historical claims data that the cost when the benefit was an aggregate cap of $1,250 for all services, including mental health, were relatively flat. The claims cost was $1,237.2mm in 2019, $1,285.8mm in 2020, and $1,333.9mm in 2021. In each of those three years there was an additional cost of $300k charged to the HCSA for these services.

- The number of high cost claimants that hit the $1,250 plan max was 219 in 2019, 149 in 2020 and 231 in 2021 (Note: in the first COVID year the number of claimants hitting the plan max increased.)

- The Administration's assertion that the COVID year should be discounted because utilization dropped is not fully supported by the numbers. In fact the next tier of claimants that claimed between $1,000 and $1,249.99 was 177 in 2019, 136 in 2020 and increased to 160 in 2021 leading one to conclude that those that needed the services used them even in a COVID year. The claimants that reduced their claiming activity during COVID were the light users which is the biggest cohort. By year, those claimants that claimed between $0-$499.99 were 1,317 in 2019, 1,434 in 2020 and dropped significantly to 1,027 in 2021. That is the group that reduced their activity during COVID, but they are the

light users and will not be influenced by any increase to the plan benefit as they exhibit very low utilization.

- Now that we have received some limited data from Green Shield for the plan year 2022 which is the first year that the benefit plan increased coverage from $1,250 to $2,500, it is not surprising to see the claims experience jump to $2,052mm to the end of May 2022. The increased cost in 2022 of $718k is likely absorbing the full $300k in HCSA claims that were previoulsy charged to the plan to cover the over plan max claims of the heavy users. If you assume that the tier of claimants that were within $500 of the old plan max of $1,250 max increased their usage then it is probable that this group of 160 claimants could have contributed a further $300k in cost. There may have been some increased usage from the other cohorts particularly the light users as conditions improved for visiting paramedical providers for service in the second year of COVID so the claim data is not surprising but explainable.

- Increasing the benefit max from $2,500 to $5,000 will not influence the majority of the membership to use some or all of the available paramedical services. We have not received the 2022 claims data to determine the actual number of claimants that hit the new plan max of $2,500, but given that this number was hovering around 200 people for the three prior years it is not unreasonable to assume that in 2022 we are looking at roughly 200 people again that hit the plan max.

- In the UTFA cost estimate for the impact of moving the plan max from $2,500 to $5,000 the only logical cohort of users that would benefit from this increase is the current high cost user that hit their plan max. Given that the 2022 traditional plan increase actually absorbed the full HCSA of an average $300k per year from these high cost users it is not evident that they will all claim a further $2,500 in paramedical services. This is where UTFA applied a probability of 20% of these users accessing partial to all of the new plan max and projected a cost of $130,000 (including an expense factor of 13%).

- It is notable that the Administration data in point (b) states that only 73 claimants hit $2,000 and 192 were between $1,500 - $2,000. For the three years prior to this we were seeing 300-400 people near or at the old plan max of $1,250. That means that in the year 2022 when the plan max increased to $2,500 we had **fewer** people approaching that plan max. It is therefore not reasonable to conclude that higher numbers of heavy users will surface to max out as the plan increases the benefit level.

Vision maximum from $700 per 24 month benefit year to $800 = $136K in additional claims GSC ($98,400 for actives + $37,500 for retirees)

a. The Vision care benefit has moved from a $450 maximum last year to a $700 maximum earlier this year. It is now proposed to be moving to an $800 maximum.
b. Green Shield had costed an additional $100 for any member who had reached $450 in Vision claims in the past year. This amounted to 494 members ($49,400).
c. There were 865 more claimants who already claimed Vision claims this year over $450 ($86,500).
d. Total claims as of May 31, 2022 is $683,840.40
a. With an anticipated increase of $98,400 in claims for active employees only, 15% is added to cover Green Shield Admin fees & taxes (noting UTFA added 2% for tax which

covers just the premium tax but not the 8% for PST). The total projected costs is then multiplied by 75% (noting UTFA indicated applying 50%) to get the estimated employer cost given the 75/25 split for extended health benefits.

- The Administration's costing implicitly assumes that everyone who claimed $450 or more would claim $800 if it was available. That is a very aggressive take-up assumption.
- Vision claims charged to the HCSA averaged $200/claimant so an increase in the plan benefit from $450 to $700 in 2022 will likely result in the traditional plan absorbing the full HCSA allocation.
- The data provided by the Administration is incomplete and difficult to cost any differently than we have already done. They did not indicate if any vision claims in 2022 were also applied to the HCSA to see the total cost.
- Vision claims come in two-year waves as the benefit max is every 24 months. 2019 and 2021 have more claimants than 2020 and 2022. Quoted costs for 2022 are +22% higher than the traditional plan cost in 2020 but close to the 2020 traditional plan plus HCSA indicating that the current $700 plan max is likely meeting the majority of claimants needs.

TAB 5

September 21, 2022

CONFIDENTIAL AND WITHOUT PREJUDICE

Summary of University Key Assumptions Re: UTFA Benefit Costings for Year 3 – Provided in the Context of a Mutually Agreed Confidential and Without Prejudice Mediation Process Regarding Spending the Remainder of the "Residual" for Year 3 of $297,060

Mental Health $5K to $7K = $168K in additional claims GSC

a. Green Shield's numbers looked at the most current experience at the time ending May 31 2022 vs UTFA that looked at data ending June 2021.
b. Green Shield included in their assumption those who hit the $5K mark and given that the benefit moved from 3K to 5K last year, those that had yet fully capitalized on the increased max. Hence they looked at those at $3,800 to utilize the full benefit and they represent 6.5% of the group.
c. When Green Shield takes their same logic and applied it to the data from June 2021 they too would have got $70K @ as UTFA did, but their data is understated.
d. Mental Health claims for BD 26096 (i.e. active population only):
    i. Ending July 31 2022 = $2,468,695 - current
    ii. Ending May 31 2022 = $2,218,058 – GSC analysis
e. With an anticipated increase of $168,000 in claims, 15% is added to cover Green Shield Admin fees & taxes (noting UTFA added 2% for tax which covers just the premium tax but not the 8% for PST). The total projected costs is then multiplied by 75% to get the estimated employer cost given the 75/25 split for extended health benefits.

Combined maximum for Chiropractor, Physiotherapist, Registered Massage Therapist, Osteopath, Acupuncturist, Dietitian, Occupational Therapist, Chiropodist from $2,500 per benefit year to $5,000 = $232K in additional claims GSC for active employees only

a. Green Shield's numbers looked at the most current experience at the time ending May 31 2022 vs UTFA that looked at data ending June 2021.
b. Green Shield assumptions only reflect the additional claims individuals will incur above the current $2,500 maximum.
c. Hence, for the 62 active employees over $2,000 their average for additional claims is $2,060 more and for the 153 active employees between $1,500 and $2,000 their average for additional claims is $680.
d. UTFA assumed only 20% of those who hit the maximum would go beyond. It appears they assumed that a +4.6% increase would suffice even though the change is increasing the maximum by 100% for 8 parameds. Claims data coming off of Covid is not appropriate as we know it resulted in lower claims.
a. With an anticipated increase of $232,000 in claims for active employees only, 15% is added to cover Green Shield Admin fees & taxes. The total projected cost of $266,800 is then multiplied by 75% to get the estimated employer cost of $200,100 given the 75/25 split for extended health benefits.

Vision maximum from $700 per 24 month benefit year to $800 = $136K in additional claims GSC ($98,400 for actives + $37,500 for retirees)

a. The Vision care benefit has moved from a $450 maximum last year to a $700 maximum earlier this year. It is now proposed to be moving to an $800 maximum.
b. Green Shield had costed an additional $100 for any member who had reached $450 in Vision claims in the past year. This amounted to 494 members ($49,400).

c. There were 865 more claimants who already claimed Vision claims this year over $450 ($86,500).
d. Total claims as of May 31, 2022 is $683,840.40
a. With an anticipated increase of $98,400 in claims for active employees only, 15% is added to cover Green Shield Admin fees & taxes (noting UTFA added 2% for tax which covers just the premium tax but not the 8% for PST). The total projected costs is then multiplied by 75% (noting UTFA indicated applying 50%) to get the estimated employer cost given the 75/25 split for extended health benefits.

TAB 6

Administration of the PTR/Merit Scheme

The purpose of this section is to clarify and provide guidance on the administration of the PTR scheme to make certain that the career progress of faculty members and librarians is recognized and enhanced, and to ensure that meritorious performance is appropriately recognized. Section 5 provides details on the assessment of research, scholarship, teaching, and service contributions.

The Evaluation Process and Criteria Used in the Assessment

The evaluation process for PTR awards, including internal policies and procedures for the assessment of PTR, shall be clearly communicated in writing to all faculty and librarians. This means both that the procedures used to arrive at a judgment about each individual's PTR award and the nature of the merit-driven career progress scheme are communicated to all academic staff. Ideally, this information should be provided at the beginning of the academic year, discussed with academic staff and reiterated at the time of evaluation.

It is essential that academic staff understand that PTR increases are relative to the performance of colleagues in the same pool — below the breakpoint and above the breakpoint. Inform academic staff that the make up of the pools changes from year to year with the addition of new colleagues and the movement of colleagues upwards from one pool to another. This aspect of the PTR scheme seems to be misunderstood by many academic staff. For example, a below-average increase should not necessarily be interpreted as a negative evaluation. It may only reflect the outstanding performance of some colleagues in a particular year.

Material Provided by Faculty and Librarians

The Annual Activity Report and Updated CV

The evaluation of an individual's performance requires that the activities of the individual be fully set out in an Annual Activity Report and that an updated CV be provided. The completion of the Activity Report is the responsibility of the faculty member or librarian, although heads of academic units must provide guidance on what should appropriately be included in the Annual Activity Report.

The Activity Report should be more than just a listing of an individual's research and scholarship, teaching and service contributions. In assembling the information for the activity report, individuals should be clear on the changes in activity from the previous year and should be asked to articulate the progress made in the year on work-in-progress if it has not appeared in the year. Individuals should comment on the significance of their activities, where needed. The report may be supplemented with other evidence of the significance of the activities such as reviews of monographs, or a well-developed research plan that may have been part of a grant submission. An individual should also include information on the direction of his or her research, where needed. Materials on teaching activity should include course outlines and evaluations,

and can include curricular innovation and a teaching dossier. The development of a teaching dossier is to be encouraged for all faculty (further details of the kinds of contributions which might be taken into account in the assessment of an individual's research and scholarship, teaching and service contributions is covered in Section 5).

Faculty on research and study leave must also provide an annual activity report that gives details of their progress in relation to the research and study leave proposal which was submitted prior to the approval of their leave.

Divisions should set clear guidelines on the period of reporting for the activity report. Some divisions have used July 1 to June 30 as the reporting period, with the work for the balance of the year being estimated. Others have set a different 12-month period. The reporting period should be clearly indicated and the process by which it is determined should include appropriate consultation.

Paid Activities Report

Paid Activities Report form

The University's Policy on Conflict of Interest — Academic Staff (June 1994) requires that, as part of the Annual Activity Report, every faculty member submit a Paid Activities Report.

Normally, no PTR award should be given if the individual has not supplied the appropriate information. Chairs in multi-departmental Faculties are required to provide the Dean with a statistical summary of paid activities undertaken in their department.

Procedure for Evaluation

The Use of Committees

The Dean or Chair/Director is responsible for making PTR recommendations. This responsibility cannot be delegated; however, advice can be sought from individuals in the unit. It is recommended that the Dean or Chair/Director has an advisory committee(s) to review the activity reports. Best practice can include having separate advisory committees for teaching and scholarship. Advisory committee(s) should evaluate performance only, members shall not have access to salary information of their colleagues nor should they be informed of the actual dollar amount of individual awards. The Dean or Chair/Director is responsible for allocating the actual dollar awards.

Statement from Unit Head Regarding Procedure and Advisory Committee Membership

Each unit head must provide the unit's faculty members with a clear statement outlining the procedure to be followed for the evaluation of PTR. The statement should include a description of the mandate and membership of any advisory committees used. Further, the unit head shall communicate, in writing, to each faculty member of the unit, the relative weight of the various activities of teaching, research and service, the format to

be used for the Activity Report, as well as any unique aspects of the evaluation process for the unit.

The University Chief Librarian or their designate will provide each librarian with a clear statement outlining the performance assessment procedures that will be followed including the format for the activity report, and the rating scale that will be used for the evaluation of PTR. A librarian's supervisor will recommend the rating for the librarian for PTR purposes. For librarians in the central library system, at UTM and at UTSC, ratings will be reviewed for consistency by review committees in each of those units. For librarians outside of the central library system, UTM or UTSC, ratings will be decided by the unit head. The membership of the review committees will be announced.

This communication shall be distributed to the members of the unit at the beginning of the academic year (i.e. July 1st).

Consultation With Other Unit Heads and/or Graduate Chairs

In cases where faculty are cross-appointed to another department/division or where they hold their graduate appointment outside their primary unit, consultation with other unit heads and/or graduate chairs is a critical element of the information gathering process for PTR assessments and shall be undertaken. Such consultations may assist you in assessing the faculty member's activities in relation to others in their field. Similarly they may provide an important perspective on a faculty member's graduate teaching and supervision, particularly if this takes place on another campus.

In cases where a librarian is appointed in more than one library or library department, both supervisors should have input on the performance appraisal for PTR purposes.

The Balance of Teaching, Research, and Service

The PTR scheme allows each unit to determine the balance amongst the three principal components of a faculty member's activities, teaching, research and service. This flexibility is important for recognizing the unique missions of units and the differences in agreed upon activities of individuals.

Normally, for professorial faculty the portion of the total PTR allocated to teaching and research/scholarship (which can also take the form of creative professional activity) is approximately equal, but in a limited number of cases, an argument might be made that an atypical weighting of all three areas of activity.

A separate weighting of teaching, pedagogical/professional development and service should be made for teaching-stream faculty. Teaching stream faculty members shall be evaluated on their pedagogical and/or discipline-based scholarship in relation to the field in which they teach and/or creative/professional activity that allows the faculty member to maintain a mastery of their subject area (1) and this evaluation will be appropriately weighted in the PTR assessment.

Weighting of faculty members on research and study leave should reflect the research or pedagogical/professional development and/or discipline-based scholarship in relation to the field in which they teach and/or creative professional activity that allows the faculty member to maintain a mastery of their subject area (2) and service duties undertaken during their leave.

Librarians should be assessed on the variety of activities undertaken (professional practice including teaching, if applicable; research and scholarly contributions; and service).

A change of the balance in duties requires the approval of the unit and division heads. Such an adjustment must be made at least a year in advance of the application of a modified weighting of responsibilities to the person's Annual Activity Report. In no circumstances should a tenure stream faculty member be fully relieved of either teaching or research activities and there should always be a service component for each individual. Such arrangements should be for a fixed period with a review of their appropriateness at the end of the period.

(1) See PPAA section 30(x)(b): "…e.g. discipline-based scholarship in relation to, or relevant to, the field in which the faculty member teaches; participation at, and contributions to, academic conferences where sessions on pedagogical research and technique are prominent; teaching-related activity by the faculty member outside of his or her classroom functions and responsibilities; professional work that allows the faculty member to maintain a mastery of his or her subject area in accordance with appropriate divisional guidelines."

(2) *Ibid*

Point Systems and the Evaluation

Some units have employed a ten-point scheme as a model, based, for the non-teaching stream professorial faculty, on four points for teaching, four points for research (and scholarship, which can also take the form of creative professional activity), and two for service. Point schemes will be varied for teaching stream faculty. A rating scale will be used for librarians whose evaluation criteria will be different.

While a point scheme has a number of positive aspects there have been some untoward effects of the scheme on awards. An arithmetic evaluation of a positive score where an individual is not meeting his or her responsibilities is inappropriate. The range of points awarded should use the full scale. For example, the award of 2 on a 0 to 4 scale for teaching performance that is barely acceptable by the standards of the unit would be an inappropriate evaluation. While a score of zero points is expected to be rare, use of the full 0 to 4 scale is equally as appropriate in the evaluation of teaching as it is in the evaluation of research. It is important to use the full range of scores so that the application of the scale does not inadvertently bias the recognition of one activity over another.

While point schemes are useful indicators, they should not replace the judgment of the Dean or appropriate administrative head on the overall performance of the individual. If a point system is used, it should be indicative of a relative level of performance, not an absolute value that is translated arithmetically into the PTR award. Where a point system is not used, the Dean or appropriate administrative head must still document the criteria for evaluation.

TAB 7

UNIVERSITY OF
TORONTO

University of Toronto
Governing Council

Policy and Procedures Governing Promotions in the Teaching Stream

Effective January 1, 2021

To request an official copy of this policy, contact:

The Office of the Governing Council
Room 106, Simcoe Hall
27 King's College Circle
University of Toronto
Toronto, Ontario
M5S 1A1

Phone: 416-978-6576
Fax: 416-978-8182
E-mail: governing.council@utoronto.ca
Website: http://www.governingcouncil.utoronto.ca/

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Policy and Procedures Governing Promotions in the Teaching Stream

Introduction

1. The University policy with respect to academic promotions in the teaching stream is setout in the following paragraphs as approved by the Governing Council on December 15, 2016.
2. The awarding by the University of a given rank confers a status which, in a general way, is acknowledged and respected both inside and outside the academic community. There is a need to protect the qualifications for the rank in order that the status not be regarded as empty, once attained. These considerations require that the diversity of promotion practices among the various disciplines across the University be kept within reasonable limits. However, it is not necessary that all disciplines be forced into an absolute lockstep in their promotion policies. The policy herein allows for some degree of leeway in determining the point in a career when promotion is appropriate to permit flexibility in responding to competitive pressures for outstanding teaching stream faculty members. It includes sufficiently broad criteria to allow a discipline to bring into play, in the assessment of its teaching stream faculty, attributes which it considers particularly relevant for performance of its own academic role.
3. In general terms the goal is to ensure, as far as is possible in a diverse community, that persons of a given rank may fairly be taken to possess certain attributes in common although not necessarily always in the same proportions. In what follows these attributes, and how the promotion process can be structured to safeguard the interests of both the individual teaching stream faculty member and the University community, are discussed.
4. Individual promotion decisions should not be influenced by preconceptions about a desirable pattern of rank distribution. A discipline should not be alarmed at there being an unprecedented proportion of senior ranks among its faculty. This is exactly what a discipline blessed with a strong faculty should be experiencing, and any tendency to protect some historical distribution pattern should be resisted. Promotion to Professor is not automatic, but it is expected that the majority of teaching stream faculty at this University will attain this rank.
5. This policy applies to full-time continuing status teaching stream faculty members as of January 1, 2016, including those who opted to convert to Assistant Professor, Teaching Stream or Associate Professor, Teaching Stream following amendments to the *Policy and Procedures on Academic Appointments* June 2015. This policy also applies to part-time teaching stream faculty members as of January 1, 2021. For greater clarity, this policy does not apply to the following categories: contractually-limited term appointments, Athletic Instructors, Senior Athletic Instructors, those holding the rank of Lecturer or Senior Lecturer, and those holding rank of Tutor or Senior Tutor.

Criteria for Promotion and Their Assessment

Professor, Teaching Stream

6. Promotion to Professor, Teaching Stream will be granted on the basis of excellent teaching, educational leadership and/or achievement, and ongoing pedagogical/professional development, sustained over many years, outlined more fully below in paragraphs 8, 9, and 10 and recommendation on their assessment are set forth in paragraph 11. Administrative or other service to the University and related activities will be taken into account in assessing candidates for promotion, but given less weight than the main criteria: promotion will not be based primarily on such service. The criteria and procedures for promotion through the ranks for part-time teaching stream faculty shall be the same as for full-time faculty members with an appropriately reduced expectation as to the quantity of work.

Associate Professor, Teaching Stream

7. The same criteria apply to the promotion from Assistant Professor, Teaching Stream to Associate Professor, Teaching Stream, with a lesser level of accomplishment to be expected. Because the criteria for the granting of continuing status and the promotion to Associate Professor, Teaching Stream are so similar, and because the two decisions are usually made so closely in time, the granting of continuing status should be accompanied by promotion to Associate Professor, Teaching Stream. The only exception to this policy is promotion to Associate Professor, Teaching Stream prior to the continuing status review. Proposals for promotion to Associate Professor, Teaching Stream prior to the continuing status review should be approved only in exceptional circumstances and must be justified in writing to the Dean of the Faculty in multi-departmental divisions and in all cases to the Vice-President and Provost. For promotion to Associate Professor, Teaching Stream not linked with a continuing status review (ie., early promotions), the procedures followed should be those outlined below for promotion to Professor, Teaching Stream in order to ensure an equivalent level of assessment of a candidate's abilities. The criteria and procedures for promotion through the ranks for part-time teaching stream faculty shall be the same as for full-time faculty members with an appropriately reduced expectation as to the quantity of work.

Attributes of Excellent Teaching

8. Excellent teaching may be demonstrated through a combination of excellent teaching skills, creative educational leadership and/or achievement, and innovative teaching initiatives, all in accordance with appropriate divisional guidelines.

   Teaching includes lecturing, activity in seminars and tutorials, individual and group discussion, laboratory teaching, thesis and/or research supervision, and any other means by which students derive educational benefit.

   Teaching effectiveness is demonstrated by the degree to which the candidate for promotion is able to stimulate and challenge the intellectual ability of students, to communicate academic material including professional knowledge effectively, and to maintain a mastery of his or her subject areas. It also involves maintaining accessibility to students, and the ability to influence the intellectual and scholarly development of students.

Attributes of Educational Leadership and/or Achievement and Ongoing Pedagogical/Professional Development

9. Sustained over many years, educational leadership and/or achievement is often reflected in teaching-related activities that show significant impact in a variety of ways, for example: through enhanced student learning; through creation and/or development of models of effective teaching; through engagement in the scholarly conversation via pedagogical scholarship, or creative professional activity; through significant changes in policy related to teaching as a profession; through technological or other advances in the delivery of education in a discipline or profession.

10. Evidence of continuing future pedagogical/professional development may be demonstrated in a variety of ways e.g., discipline-based scholarship in relation to, or relevant to, the field in which the faculty member teaches, participation at, and contributions to, academic conferences where sessions on pedagogical research and technique are prominent, teaching-related activity by the faculty member outside of his or her classroom functions and responsibilities, and professional work that allows the faculty member to maintain a mastery of his or her subject area in accordance with appropriate divisional guidelines.

    Candidates will be assessed on educational leadership and/or achievement and ongoing pedagogical/professional development in accordance with section 9 and 10 and divisional guidelines.

Assessment of the Promotion Criteria

11. Confidential written assessments of the candidate's teaching, educational leadership and/or achievement, and ongoing pedagogical/professional development, should be obtained from specialists in the candidate's field from outside the University and whenever possible from inside the University. When a teaching stream faculty member is or recently has been cross- appointed to another division, assessments should be sought from the other division. The candidate will be invited to nominate several external referees. The Dean or Chair and the Promotions Committee (see paragraph 20) will whenever possible add to the list of referees. The Dean or Chair will solicit letters from at least three external referees and where possible these should include at least one referee suggested by the candidate and one referee suggested by the Promotions Committee. Where the Chair solicits the letters, the referee should send a copy of the response to the Dean.
These referees should be invited to assess the candidate's work against the Divisional Guidelines and advise whether or not the candidate's work demonstrates the achievement of excellent teaching, educational leadership and/or achievement, and ongoing pedagogical/professional development, sustained over many years. All referees' letters will be transmitted to the Promotions Committee and held in confidence by its members.

    Written assessments of the candidate's teaching effectiveness will be prepared, in accordance with guidelines approved for the relevant department or division, and presented to the Promotions Committee. These guidelines specify the manner in which the division will provide the committee with evidence from the individual's peers and from students, and will offer the candidate the opportunity to supplement his or her file. Changes to divisional guidelines must be approved by the Vice-President and Provost and reviewed by Academic Board.

Attributes of Service

12a. *Service to the University and Similar Activities.* Service to the University means primarily administrative or committee work within the University. Consideration will also be given to activities outside the University which further the scholarly and educational goals of the University. Such activities might include service to professional societies directly related to the candidate's discipline, continuing-education activities, work with professional, technical or scholarly organizations or scholarly publications, and membership on or service to governmental committees and commissions. Outside activities are not meant to include general service to the community unrelated to the candidate's scholarly or teaching activities however praiseworthy such service may be.

Assessment of Service

12b. When appropriate, written assessments of the candidate's service to the University and to learned societies or professional associations which relate to the candidate's academic discipline and scholarly or professional activities will be prepared and presented to the Promotions Committee. When a candidate for promotion is or has been cross-appointed, assessments will be sought from all of the divisions in which the candidate has served and should be taken fully into account by the Promotions Committee.

Documentation

13. The fullest possible documentation should be made available to the Promotions Committee for each candidate to be given detailed consideration (see paragraphs 18 and 19). The responsibility for assembling the documents will be taken by the Chair of the department in multi-department divisions, otherwise by the Dean of the Faculty. The candidate, with appropriate assistance from the division or department head, will prepare a dossier in accordance with Divisional Guidelines and this Policy for submission to the Promotions Committee.

The dossier should include a statement of teaching interests and teaching philosophy, and teaching awards received, if any. The dossier should also include a list of all courses taught by the candidate during at least the preceding five years and a description of teaching methods and samples of course outlines, where appropriate. If the candidate has had major responsibility for the design of a course, this should be stated. A list of students whose research work has been supervised should be included, together with their thesis topics and the dates of the period of supervision.

Documentation may include, but is not limited to, publications in a variety of media including but not limited to, scholarly and professional journals, non-peer-reviewed or lay publications, books, CDs, online publications, invited lectures and presentations given at conferences, design of and contribution to academic websites, examples of professional work, and any other evidence of professional development.

Curriculum Vitae

14. The preparation of a curriculum vitae will be the responsibility of the candidate. The curriculum vitae should include:
    (a) The academic history of the candidate giving a list of all teaching appointments held, other relevant experience and achievements, and a list of all research or other contracts and grants obtained during the preceding five years, at minimum. Part-time teaching stream faculty members should include their percentage appointment during at least the preceding five years.
    (b) a list of the candidate's scholarly and/or creative professional work. This should include books, chapters in books, research papers, articles, and reviews, including work published, in press, submitted for publication, completed but not yet published, and in progress. It should also include such scholarly or creative professional work as the presentation of papers at meetings and symposia, original architectural, artistic or engineering design, or distinguished contributions to the arts or in professional areas.
    (c) A list of creative professional activities including one or more of the following: professional innovation; creative excellence; exemplary professional practice; contributions to the development of the profession/discipline.
    (d) A list of all courses taught by the candidate during at least the preceding five years. If the candidate has had major responsibility for the design of a course, this should be stated. A list of students whose research work has been supervised should be included, together with their project or thesis topics and the dates of the period of supervision.
    (e) A list of administrative positions held within the University, major committees and organizations in which the candidate has served within or outside the University, and participation in learned societies and professional associations which relate to the candidate's academic discipline and pedagogical or professional activities or educational leadership. The list should indicate in each case the period of service and the nature of the candidate's participation.

Procedural Matters

Responsibility for Recommendations

15. Initiation of the promotional review of a teaching stream faculty member will be the responsibility of the division in which the individual holds his or her primary appointment. Chairs and Deans must ensure that Promotions Committees are established and consulted as described below. Paragraphs 16 through 22 below are written for Chairs in the multi-departmental faculties. In divisions without a departmental structure the Dean will have the responsibilities described. In these instances, Faculty should be read for Department and Vice-President and Provost should be read for Dean.

Curriculum Vitae on File

16. Each Department will maintain a curriculum vitae file for each teaching stream faculty member who has continuing status or is in the continuing status stream. Chairs should remind faculty members to revise their curricula vitae annually. It is thus a joint responsibility of the Chair and the teaching stream faculty member to ensure that this file is kept current. A teaching stream faculty member may revise his or her curriculum vitae at any time.

Promotions Committee

17. There will normally be a single departmental Promotions Committee to review candidates for promotion in the teaching stream and in the tenure stream. However, the membership of the Promotions Committee considering a teaching stream candidate will consist of at least five tenured or continuing status faculty at the rank of Professor, and/or Professor, Teaching Stream, with at least one faculty member at the rank of Professor, Teaching Stream.[1] Normally the Chair of the Promotions Committee will be the Chair of the department or his or her designate. A committee member who is being considered for promotion will withdraw from that part of any meeting in which he or she is being discussed. The membership of the Promotions Committee will be made known to the teaching stream faculty members of the Department and where possible should change in membership over the years. The deliberations of the Committee, and the appraisals presented to it, will remain confidential. In non-departmental divisions the Promotions Committee will be augmented by the appointment of a non-voting assessor appointed by the Vice-President and Provost. In multi-departmental divisions this assessor will be added to the Decanal Committee referred to in paragraphs 23 and 24 below. In Tri-campus departments, the Chair of the Promotions Committee may be the Graduate Chair.

    A clear written record shall be kept by all promotions committees of the basis for each recommendation.

Annual Consideration

18. Each year the Department Chair will place before the Promotions Committee for preliminary consideration the names of all part-time Assistant Professors, Teaching Stream with continuing appointments and all Associate Professors, Teaching Stream in the Department, together with their curricula vitae. The Committee will advise the Chair as to which faculty members should receive more detailed consideration for promotion.

Requests for Consideration

19. Associate Professors, Teaching Stream may request that they be considered for promotion in any given year. Such requests are to be made in writing to the Chair of the department on or before October 15 of the calendar year preceding the possible promotion. In this case, the Promotions Committee is obliged to give the faculty member detailed consideration along with any other candidates under consideration.

Assembling of Information

20. When a candidate is to receive detailed consideration for promotion, it is the responsibility of the Chair in multi-departmental faculties to provide the Dean of the Faculty with a list of external referees. The Dean or Chair will then solicit the appraisals. Where the Chair solicits the appraisals the referee should send a copy of the response to the Dean. It is also the responsibility of the Chair to assemble information as described in paragraph 11. When a candidate is cross-appointed to another division of the University, the Chair of the home division will solicit the list of external

[1] Until a sufficient number of teaching stream faculty members have attained this rank, this requirement shall be waived and the full committee shall be constituted by five (5) tenured faculty at the rank of Professor.

referees from the Chair of the other division to which the candidate is appointed.

Submission of Recommendation

21. The Departmental Promotions Committee will recommend candidates for promotion to the Chair of the Department, who is responsible for making recommendations with respect to promotions to the Dean of the Faculty. Along with the names of those recommended for promotion, the Chair will forward the files on which the Departmental decision was based. If the Chair of the Department does not follow the recommendations of the Promotions Committee in submitting his or her recommendations to the Dean, the Chair must report the reasons in writing to the members of the Promotions Committee and to the Dean. A substantial disagreement within the Promotions Committee concerning the recommendation forwarded from the Committee will also be reported to the Dean. The submissions must be made at least five months before promotion is intended to take place. The Dean will then forward the divisional recommendations to the Vice-President and Provost as described in paragraph 24 below.

Informing Candidates

22. Each candidate who was given detailed consideration by the Departmental Promotions Committee will be informed by the Chair of the Department of the recommendation in his or her case. Candidates who received detailed consideration and who were not recommended for promotion will be given the reasons. If the Chair did not accept a positive recommendation from the Promotions Committee, the candidate shall be informed of this fact.

Decanal Committee

23. Paragraphs 23 and 24 apply only to multi-departmental faculties. The Dean of such a faculty, in consultation with Chair, will establish annually a Decanal Promotions Committee to consider recommendations for promotion under this Policy and the Policy and Procedures Governing Promotions. The membership of the Decanal Promotions committee will be made known to the academic staff of the Faculty. The Decanal Promotions Committee may obtain additional information about or appraisals of the candidates as it deems necessary. The deliberations of the Committee and the appraisals will remain confidential except among the Vice-President and Provost, the Dean and the Chair of the candidate's Department. The Decanal Promotions Committee is advisory to the Dean. Where a candidate for promotion has his or her primary academic appointment in a Tri-campus department, the Chair of the Decanal Promotions Committee may be the Dean of the School of Graduate Studies.

Decanal Recommendations

24. The Dean will inform the Chair of the Departments of the names of those to be recommended for promotion. Department Chairs have the right to appear before a subsequent meeting of the Decanal Committee to support the case of any candidate they have recommended but who has not been included in the Dean's recommendations. The Dean will submit to the Vice-President and Provost the names of all those he or she is finally recommending for promotion and will inform his or her Promotions Committee and the Departmental Chair of these recommendations. The Chair will inform the candidates who were considered by the Decanal Promotions Committee of the Dean's recommendations. The Chair will be given the reasons for decanal decisions not to recommend promotions which were recommended by the Chair and the Chair in turn will inform the candidate of the reasons. The Dean's recommendations for promotions must be forwarded to the Vice-President and Provost at least three months before promotions are to take place. The Dean will make available to the Vice-President and Provost upon request any information used in reaching the decisions to recommend at the departmental and faculty levels.

Provost's Review

25. The Vice-President and Provost, advised by the Decanal Promotions Committee assessors, will examine all recommendations to ensure that a reasonable and equitable standard for promotion is applied across the University, taking into account the differing patterns of activity which characterize each division. The extent of the review at the Provostial level may vary and may be more extensive for candidates who have not already been considered by both Departmental and Decanal Committees. If the Vice-President and Provost does not approve a recommendation for a promotion, the reasons shall be given to the Dean who in turn will inform the Chair of the Department and the candidate. Recommendations approved by the Vice-President and Provost will be reported to Academic Board for information. The promotion will take effect July 1 following the approval unless otherwise specified by the Vice-President and Provost and the new rank will apply to all academic appointments held by the individual in the University.

Appeal Procedures

Grounds for Appeal

26. Appeals against the denial of promotion may be launched on either or both of two grounds:
    (a) that the procedures described in this document have not been properly followed, or
    (b) that the candidate's accomplishments in excellent teaching, educational leadership and/or achievement, and ongoing pedagogical/professional development have not been evaluated fully or fairly.

Appeal for Reconsideration

27. Appeals against the denial of promotion will follow the Grievance Procedure set forth in the Memorandum of Agreement between the Governing Council of the University of Toronto and The University of Toronto Faculty Association as amended from time to time, except as follows: at Step No. 2 and Step No. 3, the Dean and the Vice-President and Provost respectively will have thirty (30) working-days to notify the grievor in writing of the decision; if a grievance which involves promotion contains issues other than promotion, these other issues will also be subject to the time limit of 30 working-days at both the decanal and Provostial levels. Appeals against the denial of promotion at the departmental level will commence at Step No. 1 of the Grievance Procedure; those against denial at the faculty level at Step No.2; and those against denial at the Provostial level at Step No. 3.

Approved by the Governing Council on December 15, 2016.
Effective on December 16, 2016.

Section 5 was amended to include part-time teaching stream faculty following facilitated negotiations with UTFA as approved by Governing Council October 29, 2020.

RELATED DOCUMENTS (Added for reference by the Secretariat, March 6, 2020)

Memorandum of Agreement between the Governing Council of the University of Toronto and The University of Toronto Faculty Association

Policy and Procedures on Academic Appointments

TAB 8

IN THE MATTER of an application for an order for prohibition;

AND IN THE MATTER of the *Architects Act*, being chapter A-44.1 of the Revised Statutes of Alberta, 1980, as amended;

AND IN THE MATTER of the Practice Review Board of the Alberta Association of Architects;

between

Sheldon Harvey Chandler, S. H. Chandler Architect Ltd., Gordon Gerald Kennedy, G. G. Kennedy Architect Ltd., Brian William Kilpatrick, Brian W. Kilpatrick Architect Ltd., Peter Juergen Dandyk and Peter J. Dandyk Architect Ltd. *Appellants*

v.

Alberta Association of Architects, the Practice Review Board of the Alberta Association of Architects, Trevor H. Edwards, James P. M. Waugh and Mary K. Green *Respondents*

INDEXED AS: CHANDLER *v.* ALBERTA ASSOCIATION OF ARCHITECTS

File No.: 19722.

1989: January 30; 1989: October 12.

Present: Dickson C.J. and Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Administrative law — Boards and tribunals — Jurisdiction — Continuation of original proceedings — Functus officio — Inquiry into the practices of a firm of architects — Board conducting a valid hearing but issuing ultra vires findings and orders — Board's findings and orders quashed — Board failing to consider whether it should make recommendations as required by legislation — Whether Board empowered to continue original proceedings — Architects Act, R.S.A. 1980, c. A-44.1, s. 39(3) — Alberta Regulation, 175/83, s. 11(1).

Pursuant to s. 39 of the *Architects Act*, the Practice Review Board of the Alberta Association of Architects conducted a hearing to review the practices of a firm of

DANS L'AFFAIRE d'une demande d'ordonnance de prohibition;

ET DANS L'AFFAIRE de l'*Architects Act*, chapitre A-44.1 des Revised Statutes of Alberta, 1980, et modifications;

ET DANS L'AFFAIRE de la Practice Review Board de l'Alberta Association of Architects;

entre

Sheldon Harvey Chandler, S. H. Chandler Architect Ltd., Gordon Gerald Kennedy, G. G. Kennedy Architect Ltd., Brian William Kilpatrick, Brian W. Kilpatrick Architect Ltd., Peter Juergen Dandyk et Peter J. Dandyk Architect Ltd. *Appelants*

c.

Alberta Association of Architects, la Practice Review Board de l'Alberta Association of Architects, Trevor H. Edwards, James P. M. Waugh et Mary K. Green *Intimés*

RÉPERTORIÉ: CHANDLER *c.* ALBERTA ASSOCIATION OF ARCHITECTS

N° du greffe: 19722.

1989: 30 janvier; 1989: 12 octobre.

Présents: Le juge en chef Dickson et les juges Wilson, La Forest, L'Heureux-Dubé et Sopinka.

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit administratif — Commissions et tribunaux administratifs — Compétence — Continuation des procédures initiales — Functus officio — Enquête sur les pratiques d'un cabinet d'architectes — La Commission a tenu une audience valide mais a formulé des conclusions et des ordonnances ultra vires — Annulation des conclusions et ordonnances de la Commission — La Commission a omis de se demander si elle devait faire des recommandations comme l'exige la loi — La Commission a-t-elle le pouvoir de continuer les procédures initiales? — Architects Act, R.S.A. 1980, chap. A-44.1, art. 39(3) — Alberta Regulation, 175/83, art. 11(1).

Conformément à l'art. 39 de l'*Architects Act*, la Commission de révision des pratiques de l'Association des architectes de l'Alberta a tenu une audience en vue

architects which went bankrupt and issued a report. Although the hearing was intended to be a practice review, the Board, in its report, made 21 findings of unprofessional conduct against the firm and six of the architects, levied fines, imposed suspensions and ordered them to pay the costs of the hearing. The Court of Queen's Bench allowed appellants' application for *certiorari* and quashed the Board's findings and orders. The Court of Appeal upheld the decision holding that the Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Under s. 39(3) of the Act, the Board is simply responsible for reporting to the Council of the Alberta Association of Architects and for making appropriate recommendations.

The Board notified the appellants that it intended to continue the original hearing to consider whether a further report should be prepared for consideration by the Council and whether the matter should be referred to the Complaint Review Committee. The Court of Queen's Bench allowed appellants' application to prohibit the Board from proceeding further in the matter. The court found that the Board had completed and fulfilled its function and that it was therefore *functus officio*. The Court of Appeal vacated the order of prohibition. It held that s. 39(3) of the Act and s. 11(1) of the Regulations require the Board to consider whether or not to make recommendations to the Council or the Complaint Review Committee. The Board did not do so and therefore did not exhaust its jurisdiction.

Held (La Forest and L'Heureux-Dubé JJ. dissenting): The appeal should be dismissed.

Per Dickson C.J. and Wilson and Sopinka JJ.: The Board was not *functus officio*. As a general rule, once an administrative tribunal has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip in drawing up the decision or there has been an error in expressing the manifest intention of the tribunal. To this extent, the principle of *functus officio* applies to an administrative tribunal. It is based, however, on the policy ground which favours finality of proceedings rather than on the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. Its application in respect to administrative tri-

de réviser les pratiques d'un cabinet d'architectes en faillite et a présenté un rapport. Même si l'audience devait constituer une révision des pratiques, la Commission, dans son rapport, a tiré 21 conclusions de conduite contraire à la profession à l'encontre du cabinet et de six de ses architectes, imposé des amendes et des suspensions et leur a ordonné de payer les frais de l'audience. La Cour du Banc de la Reine a accueilli la demande de *certiorari* des appelants et a annulé les conclusions et ordonnances de la Commission. La Cour d'appel a confirmé la décision et a conclu que la Commission n'avait pas compétence pour formuler des conclusions ou des ordonnances en matière de discipline ou de frais. En vertu du par. 39(3) de la Loi, la Commission est tenue simplement de rendre compte au Conseil de l'Association des architectes de l'Alberta et de faire les recommandations qui s'imposent.

La Commission a avisé les appelants qu'elle avait l'intention de poursuivre l'audience initiale afin de décider s'il y aurait lieu de rédiger un nouveau rapport à l'intention du Conseil et de renvoyer toute l'affaire au Comité d'examen des plaintes. La Cour du Banc de la Reine a accueilli la demande des appelants visant à interdire à la Commission de poursuivre l'affaire. La cour a conclu que la Commission s'était acquittée de sa fonction et qu'elle était donc *functus officio*. La Cour d'appel a annulé l'ordonnance de prohibition. Elle a conclu que le par. 39(3) de la Loi et le par. 11(1) du Règlement imposent à la Commission l'obligation d'envisager la possibilité de faire ou non une recommandation au Conseil ou au Comité d'examen des plaintes. La Commission ne l'a pas fait et, par conséquent, elle n'a pas épuisé sa compétence.

Arrêt (les juges La Forest et L'Heureux-Dubé sont dissidents): Le pourvoi est rejeté.

Le juge en chef Dickson et les juges Wilson et Sopinka: La Commission n'est pas *functus officio*. En règle générale, lorsqu'un tribunal administratif a statué définitivement sur une question dont il est saisi conformément à sa loi habilitante, il ne peut revenir sur sa décision simplement parce qu'il a changé d'avis, parce qu'il a commis une erreur dans le cadre de sa compétence, ou parce que les circonstances ont changé. Il ne peut le faire que si la loi le lui permet ou si un lapsus a été commis en rédigeant la décision ou s'il y a eu une erreur dans l'expression de l'intention manifeste du tribunal. Le principe du *functus officio* s'applique dans cette mesure à un tribunal administratif. Cependant, il se fonde sur un motif de principe qui favorise le caractère définitif des procédures plutôt que sur la règle énoncée relativement aux jugements officiels d'une cour de justice dont la décision peut faire l'objet d'un appel

bunals which are subject to appeal only on a point of law must thus be more flexible and less formalistic.

Here, the Board failed to dispose of the matter before it in a manner permitted by the Act. The Board conducted a hearing into the appellants' practices but issued findings and orders that were *ultra vires*. The Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly. It did not consider making recommendations as required by the Regulations and s. 39(3) of the Act. While the Board intended to make a final disposition of the matter before it, that disposition was a nullity and amounted in law to no disposition at all. In these circumstances, the Board, which conducted a valid hearing until it came to dispose of the matter, should be entitled to continue the original proceedings to consider disposition of the matter on a proper basis. On the continuation of the original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulations.

Per La Forest and L'Heureux-Dubé JJ. (dissenting): When an administrative tribunal has reached its decision, it cannot afterwards, in the absence of statutory authority, alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission. In this case, the Board was *functus officio* when it handed down its decision. Its function was completed when it rendered its final report. The fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of *functus officio*.

If the Board had discretion to consider making recommendations, and chose not to do so, it should be the end of the matter. There is no authority in the Act that permits the Board to change its mind on its own initiative. Furthermore, once a board acts outside its jurisdiction it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters. Finally, as a general rule, a tribunal should not

en bonne et due forme. Son application doit donc être plus souple et moins formaliste dans le cas des tribunaux administratifs dont les décisions ne peuvent faire l'objet d'un appel que sur une question de droit.

En l'espèce, la Commission n'a pas statué sur la question dont elle était saisie d'une manière permise par la Loi. La Commission a tenu une audience valide au sujet des pratiques des appelants, mais elle a formulé des conclusions et des ordonnances qui étaient *ultra vires*. Ayant cru erronément qu'elle était investie des pouvoirs du Comité d'examen des plaintes et ayant agi en conséquence, la Commission n'a pas envisagé de faire les recommandations requises par le Règlement et le par. 39(3) de la Loi. La Commission a voulu statuer sur la question de façon définitive, mais sa décision est nulle de nullité absolue, ce qui équivaut en droit à une absence totale de décision. Dans ces circonstances, la Commission, qui a tenu une audience valide jusqu'au moment de statuer sur la question, devrait pouvoir continuer les procédures initiales afin d'examiner la possibilité de trancher la question d'une façon appropriée. Cependant, à la continuation des procédures initiales, chaque partie devrait pouvoir compléter la preuve et présenter d'autres arguments pertinents aux fins de régler l'affaire conformément à la Loi et au Règlement.

Les juges La Forest et L'Heureux-Dubé (dissidents): Sans autorisation de la loi, un tribunal administratif ne peut modifier sa décision après l'avoir rendue, sauf afin de rectifier des fautes matérielles ou des erreurs imputables à un lapsus ou à une omission. En l'espèce, la Commission était *functus officio* lorsqu'elle a prononcé sa décision. Elle avait complété sa fonction quand elle a rendu son rapport final. Le fait que la décision initiale soit erronée ou que le tribunal ait agi sans compétence ne revêt aucune pertinence en ce qui a trait à la question du *functus officio*.

Si la Commission pouvait à sa discrétion envisager de faire des recommandations et qu'elle a choisi de s'en abstenir, l'affaire s'arrête là. La Loi n'autorise aucunement la Commission à changer d'avis de sa propre initiative. En outre, une fois qu'une commission excède sa compétence, elle ne devrait pas pouvoir corriger les déficiences de sa décision selon son bon vouloir. Les normes de constance, de certitude et de caractère définitif des décisions doivent être préservées si on veut assurer l'efficacité du système complexe des tribunaux administratifs au Canada. De deux choses l'une: ou bien une commission est tenue d'agir de la manière prescrite ou bien il lui est interdit d'agir. Permettre à la Commission de rouvrir l'audition, sans que la loi habilitante ne le prévoie expressément, serait de nature à créer une confusion considérable dans le droit en ce qui concerne les

be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations once it had made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

If the Board had a duty to consider making recommendations which it failed to fulfill, it could, depending on the circumstances of the case, be directed to review the entire matter afresh, and could be required to conduct a new hearing. Any re-examination, however, should not be construed as a "continuation of the Board's original proceedings". It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. It would also erode the protection of fairness and natural justice which is expected of administrative tribunals. In the particular circumstances of this case, a rehearing would not be appropriate.

The Court of Appeal erred in applying the principles of mandamus to the present situation.

Cases Cited

By Sopinka J.

Referred to: *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186; *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Ridge v. Baldwin*, [1964] A.C. 40; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577.

By L'Heureux-Dubé J. (dissenting)

Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417; *Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463; *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152; *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162; *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214; *Lodger's International Ltd. v.*

pouvoirs qu'ont les tribunaux administratifs de réentendre ou de décider à nouveau une affaire. Enfin, en règle générale, il ne devrait pas être loisible à un tribunal de réserver pour une date ultérieure l'exercice de ses autres pouvoirs. Une fois prononcée son ordonnance définitive, la Commission ne pouvait tenter de conserver son pouvoir de faire des recommandations, car les parties n'auraient jamais eu la certitude que la décision rendue avait déterminé leurs droits respectifs de façon définitive.

Si la Commission a omis de remplir une obligation qui lui incombait de faire des recommandations, il peut lui être ordonné, selon les circonstances de l'espèce, de reprendre l'examen de toute l'affaire et elle peut alors être tenue de procéder à une nouvelle audition. Cependant, tout réexamen de l'affaire ne devrait pas être considéré comme «la continuation des procédures initiales par la Commission». Ce serait là créer un précédent dangereux que d'étendre les pouvoirs des tribunaux administratifs au-delà du texte ou de l'intention de leur loi habilitante. De plus, ce serait de nature à éroder la garantie d'équité et de justice naturelle dont on s'attend de la part des tribunaux administratifs. En l'espèce, il ne conviendrait pas d'ordonner la tenue d'une nouvelle audience, vu les circonstances particulières de cette affaire.

La Cour d'appel a commis une erreur en appliquant les principes du *mandamus* au présent cas.

Jurisprudence

Citée par le juge Sopinka

Arrêts mentionnés: *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] R.C.S. 186; *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Ridge v. Baldwin*, [1964] A.C. 40; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Posluns v. Toronto Stock Exchange*, [1968] R.C.S. 330; *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577.

Citée par le juge L'Heureux-Dubé (dissidente)

Re V.G.M. Holdings, Ltd., [1941] 3 All E.R. 417; *Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463; *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152; *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162; *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214; *Lodger's International*

O'Brien (1983), 45 N.B.R. (2d) 342; *Slaight Communications Inc. v. Davidson*, [1985] 1 F.C. 253 (C.A.), aff'd [1989] 1 S.C.R. 1038; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577; *Cité de Jonquière v. Munger*, [1964] S.C.R. 45; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635; *Karavos v. Toronto*, [1948] 3 D.L.R. 294.

Statutes and Regulations Cited

Alberta Regulation, 175/83, s. 11.
Architects Act, R.S.A. 1980, c. A-44.1, ss. 9(1)(j.1) [ad. 1981, c. 5, s. 6], 39 [am. 1981, c. 5, s. 16].
Labour Relations Code, S.A. 1988, c. L-1.2, s. 11(4).
National Telecommunications Powers and Procedures Act, R.S.C., 1985, c. N-20 [formerly *National Transportation Act*], s. 66.
Ontario Municipal Board Act, R.S.O. 1980, c. 347, s. 42.

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Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing Co., 1979, "*functus officio*".
Jowitt's Dictionary of English Law, 2nd ed. By John Burke. London: Sweet & Maxwell, 1977, "*functus officio*".
Pépin, Gilles et Yves Ouellette. *Principes de contentieux administratif*, 2e éd. Cowansville, Qué.: Éditions Yvon Blais Inc., 1982.

APPEAL from a judgment of the Alberta Court of Appeal (1985), 67 A.R. 255, allowing respondents' appeal from a decision of the Court of Queen's Bench[1], granting appellants' application for an order for prohibition against the Practice Review Board. Appeal dismissed, La Forest and L'Heureux-Dubé JJ. dissenting.

W. E. Code, *Q.C.*, and *B. G. Kapusianyk*, for the appellants.

No one appearing for the respondents.

[1] Alta. Q.B., No. 8501-19113, October 8, 1985 (Brennan J.)

Ltd. v. O'Brien (1983), 45 R.N.-B. (2e) 342; *Slaight Communications Inc. c. Davidson*, [1985] 1 C.F. 253 (C.A.), conf. [1989] 1 R.C.S. 1038; *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577; *Cité de Jonquière v. Munger*, [1964] R.C.S. 45; *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637; *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232; *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635; *Karavos v. Toronto*, [1948] 3 D.L.R. 294.

Lois et règlements cités

Alberta Regulation, 175/83, art. 11.
Architects Act, R.S.A. 1980, chap. A-44.1, art. 9(1)j.1) [aj. 1981, chap. 5, art. 6], 39 [mod. 1981, chap. 5, art. 16].
Labour Relations Code, S.A. 1988, chap. L-1.2, art. 11(4).
Loi nationale sur les attributions en matière de télécommunications, L.R.C. (1985), chap. N-20 [auparavant la *Loi nationale sur les transports*], art. 66.
Loi sur la Commission des affaires municipales de l'Ontario, L.R.O. 1980, chap. 347, art. 42.

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Black's Law Dictionary, 5th ed. St. Paul, Minn.: West Publishing Co., 1979, «*functus officio*».
Jowitt's Dictionary of English Law, 2nd ed. By John Burke. London: Sweet & Maxwell, 1977, «*functus officio*».
Pépin, Gilles et Yves Ouellette. *Principes de contentieux administratif*, 2e éd. Cowansville, Qué.: Éditions Yvon Blais Inc., 1982.

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (1985), 67 A.R. 255, qui a accueilli l'appel interjeté par les intimés à l'encontre d'une décision de la Cour du Banc de la Reine[1], qui avait accueilli la demande des appelants visant à obtenir une ordonnance de prohibition contre la Practice Review Board. Pourvoi rejeté, les juges La Forest et L'Heureux-Dubé sont dissidents.

W. E. Code, *c.r.*, et *B. G. Kapusianyk*, pour les appelants.

Personne n'a comparu pour les intimés.

[1] B.R. Alb., nº 8501-19113, 8 octobre 1985 (le juge Brennan).

The judgment of Dickson C.J. and Wilson and Sopinka JJ. was delivered by

SOPINKA J.—The issue in this appeal is whether the Practice Review Board of the Alberta Association of Architects was *functus officio* after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group. The Alberta Court of Appeal allowed an appeal from the decision of the Alberta Court of Queen's Bench granting the appellants' application for an order prohibiting the Practice Review Board from proceeding on the grounds that the Board no longer had jurisdiction to deal with the matter and was *functus officio*.

Facts

As a result of the Chandler Kennedy Architectural Group filing for voluntary insolvency in June 1984, the Practice Review Board of the Alberta Association of Architects decided on its own initiative pursuant to s. 39(1)(b) of the *Architects Act*, R.S.A. 1980, c. A-44.1, to undertake a review of the practice of the Group and a number of the individual members of the Group. Hearings were commenced on August 14, 1984 and continued for a total of eighteen days. Final submissions were heard on December 17, 1984 and the report of the Board was issued on March 6, 1985.

The 71-page report made 21 specific findings of unprofessional conduct against the firm and several of the partners. Fines totalling $127,500 were imposed upon six members of the firm. The same six partners were also issued suspensions from practicing architecture for periods from six months to two years. As well, the appellants were required to pay the costs of the hearing, approximating $200,000.

Proceedings in the Courts Below

The appellants filed notice of intention to appeal the decision of the Board to the Council of the Alberta Association of Architects pursuant to s. 55

Version française du jugement du juge en chef Dickson et des juges Wilson et Sopinka rendu par

LE JUGE SOPINKA—Dans ce pourvoi, il s'agit de déterminer si la Practice Review Board (la «Commission de révision des pratiques «) de l'Alberta Association of Architects («l'Association des architectes de l'Alberta») était *functus officio* après avoir établi un rapport sur les pratiques ayant entraîné la faillite du Chandler Kennedy Architectural Group. La Cour d'appel de l'Alberta a accueilli l'appel interjeté contre la décision de la Cour du Banc de la Reine de l'Alberta qui avait accordé l'ordonnance de prohibition, demandée par les appelants, visant à interdire à la Commission de poursuivre l'affaire, pour le motif que la Commission n'avait plus compétence et qu'elle était *functus officio*.

Les faits

En juin 1984, le Chandler Kennedy Architectural Group s'est déclaré insolvable. La Commission de révision des pratiques de l'Association des architectes de l'Alberta a alors décidé, de sa propre initiative, de procéder à une révision des pratiques du groupe et d'un certain nombre de ses membres, conformément à l'al. 39(1)b) de l'*Architects Act*, R.S.A. 1980, chap. A-44.1. Les audiences ont débuté le 14 août 1984 et se sont poursuivies pendant dix-huit jours. Les dernières plaidoiries ont été entendues le 17 décembre 1984 et la Commission a présenté son rapport le 6 mars 1985.

Le rapport de 71 pages comportait 21 conclusions précises de conduite contraire à la profession à l'encontre du cabinet et de plusieurs de ses membres. Des amendes s'élevant à 127 500 $ ont été imposées à six membres du cabinet. Ces mêmes six membres ont également été suspendus de l'exercice de la profession d'architecte pour des périodes de six mois à deux ans. De même, les appelants devaient payer les frais de l'audience, soit environ 200 000 $.

Les tribunaux d'instance inférieure

Les appelants ont déposé un avis d'intention d'interjeter appel contre la décision de la Commission auprès du Council of the Alberta Association

of the *Architects Act*. However, prior to the commencement of the appeal, the appellants brought an application before the Alberta Court of Queen's Bench for an order in the nature of *certiorari* to quash the findings and order of the Practice Review Board. Kryczka J. granted the order requested and held that the failure to inform the appellants that they were facing any charges or allegations of unprofessional conduct offended the principles of natural justice. Kryczka J. held that the comments of the Chairman of the Board clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

This decision was appealed by the Alberta Association of Architects to the Alberta Court of Appeal. In the Court of Appeal (1985), 39 Alta. L.R. (2d) 320, Prowse J.A. speaking for the court, upheld the decision of Kryczka J. but on different grounds. Prowse J.A. held that the Practice Review Board lacked jurisdiction to make findings or orders relating to disciplinary matters or costs. Disciplinary powers were said to be reserved for another body within the Alberta Association of Architects, the Complaint Review Committee. Under s. 39(3) of the *Architects Act* the Board is simply responsible for reporting to the Council and making whatever recommendations it feels are appropriate. Therefore, the Court of Appeal dismissed the appeal on the grounds that the *Architects Act* did not give to the Board the powers it purported to exercise.

A month after the decision of the Court of Appeal, the Practice Review Board gave notice to the appellants that it intended to continue the original hearing in order that consideration could be given to preparing a further report to the Council of the Alberta Association of Architects and consideration could also be given to referring the matter to the Complaint Review Committee.

of Architects («Conseil de l'Association des architectes de l'Alberta»), conformément à l'art. 55 de l'*Architects Act*. Toutefois, avant même l'audition de l'appel, les appelants ont présenté à la Cour du Banc de la Reine de l'Alberta une requête visant à obtenir une ordonnance tenant d'un *certiorari* qui annulerait les conclusions et l'ordonnance de la Commission de révision des pratiques. Le juge Kryczka a accordé l'ordonnance demandée et conclu que l'omission d'aviser les appelants qu'ils faisaient l'objet d'accusations ou d'allégations de conduite contraire à la profession contrevenait aux principes de justice naturelle. Le juge Kryczka a statué que les commentaires du président de la Commission indiquaient clairement que les audiences devaient constituer une révision des pratiques plutôt qu'une enquête portant sur des allégations de conduite contraire à la profession.

L'Association des architectes de l'Alberta a interjeté appel de cette décision devant la Cour d'appel de l'Alberta. Dans l'arrêt de la Cour d'appel (1985), 39 Alta. L.R. (2d) 320, le juge Prowse a maintenu, au nom de la cour, la décision du juge Kryczka, en se fondant toutefois sur des motifs différents. Le juge Prowse a conclu que la Commission de révision des pratiques n'avait pas compétence pour formuler des conclusions ou des ordonnances en matière de discipline ou de frais. Il a estimé que les pouvoirs disciplinaires étaient conférés à un autre organe de l'Association des architectes de l'Alberta, savoir le Comité d'examen des plaintes. En vertu du par. 39(3) de l'*Architects Act*, la Commission est tenue simplement de rendre compte au Conseil et de faire les recommandations qu'elle juge appropriées. Par conséquent, la Cour d'appel a rejeté l'appel pour le motif que l'*Architects Act* ne conférait pas à la Commission les pouvoirs qu'elle prétendait exercer.

Un mois après la décision de la Cour d'appel, la Commission de révision des pratiques a avisé les appelants qu'elle avait l'intention de poursuivre l'audience initiale afin d'envisager la possibilité de rédiger un nouveau rapport à l'intention du Conseil de l'Association des architectes de l'Alberta et de renvoyer toute l'affaire au Comité d'examen des plaintes.

The appellants then brought an application before the Court of Queen's Bench to prohibit the Board from proceeding further with the continuation of the matter. Brennan J. held that the Board had completed and fulfilled the function for which it was constituted and it was therefore *functus officio* and lacked jurisdiction to continue its hearing. This decision was also appealed to the Alberta Court of Appeal.

The Court of Appeal (1985), 67 A.R. 255 allowed the appeal and vacated the order of prohibition. Kerans J.A. for the court held that s. 39(3) of the *Architects Act* and Regulation 175/83, s. 11(1) impose on the Board the duty to consider whether or not to make a recommendation. Kerans J.A. held that the Board did not consider whether to make a recommendation that the matter be referred to the Complaint Review Committee and therefore it did not exhaust its jurisdiction. *Functus officio* was held not to apply here as there was a failure to consider matters which were part of the Board's statutory duty. It is from this decision that the present appeal arises.

Statutory Powers of the Board

In order to determine whether the Board was empowered to continue its proceedings against the appellants it is necessary to examine the statutory framework within which it operates. The Act does not purport to confer on the Board the power to rescind, vary, amend or reconsider a final decision that it has made. Such a provision is not uncommon in the enabling statutes of many tribunals. See *Labour Relations Code*, S.A. 1988, c. L-1.2, s. 11(4); *Ontario Municipal Board Act*, R.S.O. 1980, c. 347, s. 42; and *National Telecommunications Powers and Procedures Act*, R.S.C., 1985, c. N-20, s. 66 (formerly the *National Transportation Act*). It is therefore necessary to consider (a) whether it had made a final decision, and (b) whether it was, therefore, *functus officio*.

Les appelants ont alors soumis une requête à la Cour du Banc de la Reine en vue d'interdire à la Commission de poursuivre l'affaire. Le juge Brennan a conclu que la Commission s'était acquittée de la fonction pour laquelle elle avait été constituée, qu'elle était donc *functus officio* et n'avait pas compétence pour poursuivre l'audience. Cette décision a également fait l'objet d'un appel à la Cour d'appel de l'Alberta.

La Cour d'appel (1985), 67 A.R. 255 a accueilli l'appel et annulé l'ordonnance de prohibition. Le juge Kerans a conclu, au nom de la cour, que le par. 39(3) de l'*Architects Act* et le par. 11(1) du règlement 175/83 imposaient à la Commission l'obligation d'envisager la possibilité de faire ou non une recommandation. Le juge a statué que la Commission n'avait pas envisagé de recommander le renvoi de l'affaire devant le Comité d'examen des plaintes et que, par conséquent, elle n'avait pas épuisé sa compétence. On a jugé que le principe du *functus officio* ne s'appliquait pas dans ce cas puisque la Commission avait omis d'examiner des questions qu'elle avait le devoir d'examiner en vertu de la loi. C'est cette décision qui fait l'objet du présent pourvoi.

Les pouvoirs conférés à la Commission par la Loi

Pour déterminer si la Commission avait le pouvoir de poursuivre les procédures engagées contre les appelants, il est nécessaire d'examiner le contexte légal dans lequel elle fonctionne. La Loi n'a pas pour objet de conférer à la Commission le pouvoir d'abroger, de réviser ou de modifier une décision définitive qu'elle a rendue, ni de revenir sur une telle décision. Une telle disposition est courante dans les lois habilitantes de nombreux tribunaux. Voir le *Labour Relations Code*, S.A. 1988, chap. L-1.2, par. 11(4), la *Loi sur la Commission des affaires municipales de l'Ontario*, L.R.O. 1980, chap. 347, art. 42, et la *Loi nationale sur les attributions en matière de télécommunications*, L.R.C. (1985), chap. N-20, art. 66 (auparavant la *Loi nationale sur les transports*). Il convient donc de décider a) si elle avait rendu une décision définitive et b) si elle était, par conséquent, *functus officio*.

The Board on its own initiative launched an inquiry into the practices of the appellants pursuant to s. 39 of the Act which provides:

39(1) The Board

(a) shall, on its own initiative or at the request of the Council, inquire into and report to and advise the Council in respect of

(i) the assessment of existing and the development of new educational standards and experience requirements that are conditions precedent to obtaining and continuing registration under this Act,

(ii) the evaluation of desirable standards of competence of authorized entities generally,

(iii) any other matter that the Council from time to time considers necessary or appropriate in connection with the exercise of its powers and the performance of its duties in relation to competence in the practice of architecture under this Act and the regulations, and

(iv) the practice of architecture by authorized entities generally,

and

(b) may conduct a review of the practice of an authorized entity in accordance with this Act and the regulations.

(2) A person requested to appear at an inquiry under this section by the Board is entitled to be represented by counsel.

(3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.

(4) If it is in the public interest to do so, the Council may direct that the whole or any portion of any inquiry by the Board under this section shall be held in private.

It is apparent that s. 39 does not deal with discipline but rather with practices in the profession with a view to their improvement. If, however, in the course of the inquiry into practices it appears to the Board that a matter may require investigation by the Complaint Review Committee, provision is made for referral of that matter to that Committee. Section 9(1)(j.1) of the Act empowers the Council to make regulations:

La Commission a entrepris, de sa propre initiative, une enquête sur les pratiques des appelants, conformément à l'art. 39 de la Loi dont voici le texte:

[TRADUCTION] **39**(1) La Commission

a) doit, de sa propre initiative ou à la demande du Conseil, enquêter, faire rapport au Conseil et le conseiller au sujet de

(i) l'évaluation des normes actuelles et l'élaboration de nouvelles normes en matière de formation et d'expérience préalablement nécessaires à l'obtention et au maintien de l'enregistrement en vertu de la présente loi,

(ii) l'évaluation des normes de compétence souhaitables pour les entités autorisées en général,

(iii) toute autre question que le Conseil juge nécessaire ou appropriée en rapport avec l'exercice de ses pouvoirs et l'exécution de ses fonctions relativement à la compétence dans l'exercice de la profession d'architecte, en vertu de la présente loi et des règlements, et

(iv) l'exercice de l'architecture par des entités autorisées en général,

et

b) peut procéder à la révision des pratiques d'une entité autorisée, conformément à la présente loi et aux règlements.

(2) Toute personne citée à témoigner par la Commission, lors d'une enquête tenue en vertu du présent article, peut y être représentée par un avocat.

(3) Après chaque enquête tenue en vertu du présent article, la Commission doit soumettre un rapport écrit au Conseil et peut lui faire les recommandations motivées qu'elle juge appropriées en rapport avec l'affaire en cause.

(4) Le Conseil peut ordonner qu'une enquête tenue par la Commission en vertu du présent article ait lieu à huis clos, en totalité ou en partie, s'il est dans l'intérêt public de le faire.

Il est évident que l'art. 39 porte non pas sur la discipline mais bien sur les pratiques ayant cours au sein de la profession et vise l'amélioration de celles-ci. Toutefois, si dans le cours d'une enquête sur les pratiques, la Commission estime qu'une question devrait être confiée au Comité d'examen des plaintes, la Loi prévoit le renvoi de cette question à ce comité. L'alinéa 9(1)j.1) de la Loi confère au Conseil le pouvoir d'adopter des règlements:

(j.1) respecting the powers, duties and functions of the Practice Review Board including, but not limited to, the referral of matters by that Board to the Council or the Complaint Review Committee and appeals from decisions of that Board;

Section 11 of Regulation 175/83 passed pursuant to s. 9(1)(j.1) provides as follows:

11(1) The Board may shall [*sic*] make one or more of the following directions or recommendations:

(a) make one or more recommendations to the authorized entity or licensed interior designer, the subject of a practice review, respecting desired improvements in the practice reviewed;

(b) direct that a reviewer conduct a follow-up practice review to determine whether or not the Board's recommendations have been adopted and whether they have resulted in the desired improvements being made in the practice of the entity concerned;

(c) if it considers any one or more of the following matters to be of a sufficiently serious nature to require investigation by the Complaint Review Committee, direct that the matter be referred to the Complaint Review Committee for investigation:

(i) the unco-operative manner of an authorized entity or licensed interior designer in the course of a practice review or a follow up review;

(ii) a failure to comply with the Act, Professional Practice Regulation, Code of Ethics, Interior Design Regulation or General By-laws;

(iii) a failure to adopt and implement the recommendations respecting desired improvements in the practice of the entity concerned;

(iv) any apparent fraud, negligence or misrepresentation, or any disregard of the generally accepted standards of the practice of architecture or practice of licensed interior designers;

(d) if the Board determines in the course of its practice review that the conduct of an authorized entity or licensed interior designer constitutes

(i) unskilled practice of architecture or unprofessional conduct or both, or

(ii) unskilled practice of interior design or unprofessional conduct, or both

[TRADUCTION] j.1) concernant les pouvoirs, obligations et fonctions de la Commission de révision des pratiques, dont le renvoi de questions par la Commission au Conseil ou au Comité d'examen des plaintes, et les appels interjetés à l'encontre de décisions rendues par la Commission;

L'article 11 du règlement 175/83 adopté en vertu de l'al. 9(1)j.1) prévoit que:

[TRADUCTION] 11(1) La Commission peut doit (*sic*) formuler une ou plusieurs des directives ou recommandations suivantes:

a) faire une ou plusieurs recommandations à l'entité autorisée ou au dessinateur d'intérieurs agréé dont les pratiques font l'objet d'une révision, au sujet des améliorations qu'il est souhaitable d'apporter à la pratique qui fait l'objet d'une révision;

b) ordonner qu'un réviseur assure le suivi de la révision des pratiques afin de déterminer si les recommandations de la Commission ont été adoptées et si elles ont entraîné les améliorations souhaitées dans les pratiques de l'entité en cause;

c) si, à son avis, l'une des questions suivantes est assez grave pour que le Comité d'examen des plaintes fasse enquête, ordonner que la question soit renvoyée au Comité d'examen des plaintes pour fins d'enquête:

(i) manque de collaboration d'une entité autorisée ou d'un dessinateur d'intérieurs agréé dans le cadre d'une révision des pratiques ou d'un suivi;

(ii) manquement à la Loi, au Règlement sur l'exercice de la profession, au Code de déontologie, au Règlement sur le dessin d'intérieurs ou aux règlements généraux;

(iii) défaut d'adopter et d'appliquer les recommandations relatives à l'amélioration souhaitée des pratiques de l'entité en cause;

(iv) toute apparence de fraude, négligence ou fausses déclarations, ou tout manquement aux normes généralement acceptées pour l'exercice de la profession d'architecte et de la profession de dessinateur d'intérieurs;

d) si, dans le cadre de sa révision des pratiques, la Commission estime que la conduite d'une entité autorisée ou d'un dessinateur d'intérieurs agréé constitue

(i) un manque de compétence dans l'exercice de la profession d'architecte ou une conduite contraire à la profession, ou les deux à la fois,

(ii) un manque de compétence dans l'exercice de la profession de dessinateur d'intérieurs ou une conduite contraire à la profession, ou les deux à la fois,

the Board shall deal with the matter in accordance with sections 50 to 53 of the Act;

(e) indicate that it has no recommendations to make or that the practice reviewed is satisfactory;

(f) comment on a practice maintained at a high standard and with the consent of the authorized entity or licensed interior designer concerned, publicize the high standard and the persons concerned;

(g) make recommendations to the Council with a view to the establishment of new standards related to specific or general areas of the practice of architecture.

(2) The Board shall not impose any sanction under subsection (1)(d) unless the authorized entity or professional interior designer concerned

(a) has made representations to the Board, or

(b) after a notice under section 42 of the Act has been given, fails to attend the hearing or does not make representations.

The Board's inquiry proceeded as an inquiry into practices in accordance with the Act. The following statements made by the Chairman during the course of the inquiry aptly describe the nature of the inquiry:

The first thing that I would like to make very clear and I believe that you alluded to this in the beginning, that this is not a complaint review, this is a practice review, and as a result we are not dealing with a specific case of wrongdoing which I think you are alluding to and you are obviously experienced in the court. We are dealing with a review of the practice of the various authorized entities and that means a total review. So, as a result, the entire course of this Hearing has been to review the total practice. It has not been a process of reviewing specific points. The Board has been concerned to develop a full and as broad an understanding of the practice of the various entities as is humanly possible under the circumstances.

As a result of the review of those authorized entities, it is our responsibility and our duty to make recommendations and to make findings and we of course are going to be doing that following this.

. . .

Following each and every individual, we have provided an opportunity for questioning. The Board will have to take into consideration all of the evidence that has been put before it and has been spending a great deal of time in making certain it is listening and trying to understand

la Commission procédera conformément aux articles 50 à 53 de la Loi;

e) indiquer qu'elle n'a aucune recommandation à faire ou que la pratique faisant l'objet d'une révision s'est avérée satisfaisante;

f) faire des commentaires sur le maintien d'un idéal élevé de pratique et, avec le consentement de l'entité autorisée ou du dessinateur d'intérieurs agréé en cause, faire connaître cet idéal élevé ainsi que le nom des personnes visées;

g) faire au Conseil des recommandations visant l'élaboration de nouvelles normes dans des domaines précis ou généraux de l'architecture.

(2) La Commission ne peut imposer de sanction en vertu de l'alinéa (1)d) que si l'entité autorisée ou le dessinateur d'intérieurs professionnel en cause

a) a présenté ses arguments à la Commission, ou

b) n'a pas assisté à l'audience ni présenté d'arguments, après avoir reçu un préavis donné en vertu de l'article 42 de la Loi.

La Commission a procédé à une enquête sur les pratiques conformément à la Loi. Au cours de l'enquête, le président a fait les observations suivantes qui décrivent bien la nature de l'enquête:

[TRADUCTION] J'aimerais tout d'abord établir très clairement, et je crois que vous y aviez fait allusion au début, qu'il s'agit non pas de l'examen d'une plainte mais bien d'une révision des pratiques et que, par conséquent, nous ne sommes pas saisis d'un cas précis d'actes répréhensibles, ce à quoi vous faites allusion, je crois, et pour lesquels vous avez beaucoup d'expérience devant les tribunaux. Il s'agit de la révision des pratiques des diverses entités autorisées et donc, d'une révision complète. Par conséquent, cette l'audience a uniquement pour but de réviser les pratiques dans leur ensemble. Il ne s'agit pas de réviser des points précis. La Commission a voulu comprendre entièrement et de façon aussi globale que possible, dans les circonstances, les pratiques de ces diverses entités.

À la suite de la révision de ces entités autorisées, il nous incombe de faire des recommandations et de tirer des conclusions, ce que nous allons faire ci-après.

. . .

Après chaque témoignage, nous avons permis que le témoin soit questionné. La Commission devra tenir compte de toute la preuve qui lui a été soumise et elle a consacré beaucoup de temps à s'assurer qu'elle écoutait et essayait de comprendre tout ce qui s'était passé. Mais

everything that has taken place. But again, as I said to your counsel, a few minutes ago, this is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result of the fullest extent of which has taken place, make findings and recommendations to the profession. [Emphasis added.]

Nevertheless, when it came to issue directions and recommendations, instead of proceeding under s. 39(3) of the Act as amplified by s. 11(1)(a), (b), (c), (e), (f) or (g) of the Regulation, the Board proceeded under s. 11(1)(d) of the Regulation, a provision that the Court of Appeal in the first appeal held to be *ultra vires*. The Court of Appeal held that ss. 50 to 53 deal with disciplinary matters which are beyond the competence of the Board. This decision of the Court of Appeal has not been challenged. Accordingly, the result of the decision of the Court of Appeal is that the Board conducted a valid hearing into the appellants' practice but issued findings and orders that were *ultra vires* and have been quashed.

In view of the fact that the Board erroneously thought it had the power of the Complaint Review Committee and proceeded accordingly, it did not consider recommendations under s. 39(3) of the Act or under s. 11(1)(a), (b), (c), (e), (f) or (g), and in particular (c), of the Regulation.

Kerans J.A. based his conclusion that the Board was not *functus officio* on the ground that the Board had a duty to consider whether to make a recommendation. He stated, at p. 257:

> While the board has, under s. 39(3) and perhaps also the regulations, a discretion whether to make any recommendation, we think that the section imposes upon the board the duty to consider whether to make a recommendation. The report does not say that the board did so. If the board did not so consider, then, contrary to the finding of the learned Queen's Bench judge, the board has not exhausted its jurisdiction.

In view of the inexplicable use of "may/shall" in Regulation 11(1), it is difficult to determine precisely what the Board was obliged to do. Certainly

encore une fois, comme je l'ai dit à votre avocat il y a quelques minutes, il ne s'agit pas d'un examen de plaintes où nous essayons de déterminer la faute ou la culpabilité à l'égard de plaintes précises. Il s'agit d'une révision des pratiques et, en conséquence, il nous incombe de tenter de revoir et de comprendre le mieux possible ce qui s'est passé et, par conséquent, de tirer des conclusions et de faire des recommandations à la profession. [Je souligne.]

Néanmoins, lorsque vint le temps de donner des directives et de faire des recommandations, la Commission a procédé en vertu de l'al. 11(1)d) du Règlement, que la Cour d'appel a jugé *ultra vires* dans le premier appel, au lieu d'agir sous le régime du par. 39(3) de la Loi, précisé par les al. 11(1)a), b), c), e), f) ou g) du Règlement. La Cour d'appel a statué que les art. 50 à 53 portaient sur des questions disciplinaires qui outrepassent la compétence de la Commission. Cette décision de la Cour d'appel n'a pas été contestée. Par conséquent, il en résulte que la Commission a tenu une audience valide sur les pratiques des appelants, mais qu'elle a formulé des conclusions et des ordonnances qui étaient *ultra vires* et qui ont été annulées.

Ayant cru erronément qu'elle était investie des pouvoirs du Comité d'examen des plaintes et ayant agi en conséquence, la Commission n'a pas envisagé de faire des recommandations en vertu du par. 39(3) de la Loi ou des al. 11(1)a), b), c), e), f) ou g), et en particulier de l'al. c), du Règlement.

Le juge Kerans a conclu que la Commission n'était pas *functus officio* parce qu'elle avait l'obligation d'envisager la possibilité de faire une recommandation. Voici ce qu'il a affirmé à la p. 257:

> [TRADUCTION] Même si la commission a, en vertu du par. 39(3) et peut-être également du règlement, le pouvoir discrétionnaire de faire ou non une recommandation, nous estimons que cette disposition impose à la commission l'obligation d'envisager la possibilité de faire une recommandation. Le rapport n'indique pas que la commission l'a fait. Si la commission n'a pas envisagé cette possibilité alors, contrairement à ce que le juge de la Cour du Banc de la Reine a conclu, elle n'a pas épuisé sa compétence.

Étant donné l'emploi inexplicable de l'expression «peut/doit» au par. 11(1) du Règlement, il est difficile de préciser ce que la Commission était

it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations, either to the parties or to Council, or to consider a referral to the Complaint Review Committee. Therefore, I agree with Kerans J.A. that the Board had the duty to consider making recommendations pursuant to the Regulation and s. 39(3) of the *Architects Act*.

I am, however, of the opinion that the application of the *functus officio* principle is more appropriately dealt with in the context of the following characterization of the current state of the Board's proceedings. The Board held a valid hearing into certain practices of the appellants. At the conclusion of the hearing, in lieu of considering recommendations and directions, it made a number of *ultra vires* findings and orders which were void and have been quashed. In these circumstances, is the decision of the Board final so as to attract the principle of *functus officio*?

Functus Officio

The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:

1. where there had been a slip in drawing it up, and,

2. where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186.

In *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, Martland J., speaking for himself and Laskin J., opined that the same reasoning did not apply to the Immigration Appeal

tenue de faire. Il serait pour le moins étrange que la Commission ait le pouvoir de procéder à une révision détaillée des pratiques sans qu'elle soit tenue d'envisager la possibilité de faire des recommandations, que ce soit aux parties ou au Conseil, ou d'envisager un renvoi au Comité d'examen des plaintes. Par conséquent, je souscris à l'opinion du juge Kerans selon laquelle la Commission était tenue d'envisager la possibilité de faire des recommandations, conformément au Règlement et au par. 39(3) de l'*Architects Act*.

J'estime cependant qu'il faut plutôt traiter de l'application du principe *functus officio* dans le contexte de la qualification suivante de l'état actuel des procédures devant la Commission. La Commission a tenu une audience valide au sujet de certaines pratiques des appelants. À la fin de l'audience, au lieu d'envisager de formuler des recommandations et des directives, elle a formulé un certain nombre de conclusions et d'ordonnances *ultra vires* qui étaient nulles et qui ont été annulées. Dans ces circonstances, la décision de la Commission est-elle définitive, ce qui justifierait l'application du principe du *functus officio*?

Functus officio

La règle générale portant qu'on ne saurait revenir sur une décision judiciaire définitive découle de la décision de la Court of Appeal d'Angleterre dans *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. La cour y avait conclu que le pouvoir d'entendre à nouveau une affaire avait été transféré à la division d'appel en vertu des *Judicature Acts*. La règle ne s'appliquait que si le jugement avait été rédigé, prononcé et inscrit, et elle souffrait deux exceptions:

1. lorsqu'il y avait eu lapsus en la rédigeant ou

2. lorsqu'il y avait une erreur dans l'expression de l'intention manifeste de la cour. Voir *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] R.C.S. 186.

Dans *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577, le juge Martland s'exprimant en son propre nom et en celui du juge Laskin, s'est dit d'avis que le même

Board from which there was no appeal except on a question of law. Although this was a dissenting judgment, only Pigeon J. of the five judges who heard the case disagreed with this view. At page 589 Martland J. stated:

> The same reasoning does not apply to the decisions of the Board, from which there is no appeal, save on a question of law. There is no appeal by way of a rehearing.
>
> In *R. v. Development Appeal Board, Ex p. Canadian Industries Ltd.*, the Appellate Division of the Supreme Court of Alberta was of the view that the Alberta Legislature had recognized the application of the restriction stated in the *St. Nazaire Company* case to administrative boards, in that express provision for rehearing was made in the statutes creating some provincial boards, whereas, in the case of the Development Appeal Board in question, no such provision had been made. The Court goes on to note that one of the purposes in setting up these boards is to provide speedy determination of administrative problems.

He went on to find in the language of the statute an intention to enable the Board to hear further evidence in certain circumstances although a final decision had been made.

I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, *supra*.

raisonnement ne s'appliquait pas à la Commission d'appel de l'immigration dont les décisions ne pouvaient faire l'objet d'un appel que sur une question de droit. Même s'il s'agissait d'une opinion dissidente, seul le juge Pigeon, parmi les cinq juges ayant entendu l'affaire, n'y a pas souscrit. Le juge Martland affirme, à la p. 589:

> Le même raisonnement ne s'applique pas aux décisions de la Commission, dont il n'y a pas d'appel, sauf sur une question de droit. Il n'y a pas d'appel par voie de nouvelle audition.
>
> Dans *R. v. Development Appeal Board, Ex p. Canadian Industries Ltd.*, la Chambre d'appel de la Cour suprême de l'Alberta a exprimé l'avis que la législature albertaine reconnaissait l'application de la restriction énoncée dans l'affaire *St. Nazaire Company* aux commissions administratives puisque des dispositions expresses prévoyant une nouvelle audition avaient été insérées dans les lois établissant certaines commissions provinciales, tandis que, dans le cas du Development Appeal Board en question, il n'y en avait pas. La Cour a poursuivi en signalant que l'un des buts de la création de ces commissions était d'arriver rapidement au règlement de problèmes administratifs.

Il a ensuite conclu que le texte de la loi exprimait l'intention d'habiliter la Commission à entendre d'autres éléments de preuve, dans certains cas, même si une décision définitive avait été rendue.

Je ne crois pas que le juge Martland ait voulu affirmer que le principe *functus officio* ne s'applique aucunement aux tribunaux administratifs. Si l'on fait abstraction de la pratique suivie en Angleterre, selon laquelle on doit hésiter à modifier ou à rouvrir des jugements officiels, la reconnaissance du caractère définitif des procédures devant les tribunaux administratifs se justifie par une bonne raison de principe. En règle générale, lorsqu'un tel tribunal a statué définitivement sur une question dont il était saisi conformément à sa loi habilitante, il ne peut revenir sur sa décision simplement parce qu'il a changé d'avis, parce qu'il a commis une erreur dans le cadre de sa compétence, ou parce que les circonstances ont changé. Il ne peut le faire que si la loi le lui permet ou s'il y a eu un lapsus ou une erreur au sens des exceptions énoncées dans l'arrêt *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, précité.

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, *supra*.

Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.)

In this appeal we are concerned with the failure of the Board to dispose of the matter before it in a manner permitted by the *Architects Act*. The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision. In *Re Trizec Equities Ltd.*

Le principe du *functus officio* s'applique dans cette mesure. Cependant, il se fonde sur un motif de principe qui favorise le caractère définitif des procédures plutôt que sur la règle énoncée relativement aux jugements officiels d'une cour de justice dont la décision peut faire l'objet d'un appel en bonne et due forme. C'est pourquoi j'estime que son application doit être plus souple et moins formaliste dans le cas de décisions rendues par des tribunaux administratifs qui ne peuvent faire l'objet d'un appel que sur une question de droit. Il est possible que des procédures administratives doivent être rouvertes, dans l'intérêt de la justice, afin d'offrir un redressement qu'il aurait par ailleurs été possible d'obtenir par voie d'appel.

Par conséquent, il ne faudrait pas appliquer le principe de façon stricte lorsque la loi habilitante porte à croire qu'une décision peut être rouverte afin de permettre au tribunal d'exercer la fonction que lui confère sa loi habilitante. C'était le cas dans l'affaire *Grillas*, précitée.

De plus, si le tribunal administratif a omis de trancher une question qui avait été soulevée à bon droit dans les procédures et qu'il a le pouvoir de trancher en vertu de sa loi habilitante, on devrait lui permettre de compléter la tâche que lui confie la loi. Cependant, si l'entité administrative est habilitée à trancher une question d'une ou de plusieurs façons précises ou par des modes subsidiaires de redressement, le fait d'avoir choisi une méthode particulière ne lui permet pas de rouvrir les procédures pour faire un autre choix. Le tribunal ne peut se réserver le droit de le faire afin de maintenir sa compétence pour l'avenir, à moins que la loi ne lui confère le pouvoir de rendre des décisions provisoires ou temporaires. Voir *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214 (C.A.F.)

Dans l'affaire qui nous intéresse, la Commission n'a pas statué sur la question dont elle était saisie d'une manière permise par l'*Architects Act*. La Commission a voulu rendre une décision définitive, mais cette décision est nulle de nullité absolue, ce qui équivaut en droit à une absence totale de décision. Traditionnellement, le tribunal dont la décision est nulle a été autorisé à réexaminer la question dans son entier et à prononcer une déci-

and Area Assessor Burnaby-New Westminster (1983), 147 D.L.R. (3d) 637 (B.C.S.C.), McLachlin J. (as she then was) summarized the law in this respect in the following passage, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid.
>
> There is no complaint made by Trizec Equities Ltd. with respect to the hearing held on March 19th. Accordingly, while the court exceeded its jurisdiction by purporting to increase the assessments on the morning of March 17, 1982, its subsequent decision of March 19, 1982, stands as valid.

If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases such as *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.); *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (S.C.B.C.) and *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal was bound to start afresh in order to cure the defect.

In this proceeding the Board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition on a proper basis and

sion valide. Dans la décision *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (C.S.C.-B.), le juge McLachlin (maintenant de notre Cour) a résumé le droit applicable à ce sujet dans le passage suivant, à la p. 643:

> [TRADUCTION] Je suis convaincue, tant sur le plan logique que sur celui de la doctrine et de la jurisprudence, que le tribunal qui, dans le cadre présumé de l'exercice de sa compétence, rend une décision annulée par la suite, peut ensuite tenir une audience régulière et rendre une décision valide: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] R.C.S. 330. Dans ce dernier arrêt, la Cour suprême du Canada a cité les motifs du jugement prononcé par lord Reid dans *Ridge v. Baldwin*, [1964] A.C. 40 à la p. 79, où il affirme:
>
> > Je ne doute point que dans l'éventualité où un fonctionnaire ou un organisme se rend compte qu'il a agi précipitamment et réexamine la question dans son entier, après avoir accordé à la personne intéressée la possibilité suffisante de faire valoir son point de vue, la seconde décision qu'il rendra sera valide.
>
> Trizec Equities Ltd. n'a formulé aucune plainte à l'égard de l'audience du 19 mars. Par conséquent, même si la cour a outrepassé sa compétence en prétendant augmenter les cotisations le 17 mars 1982 au matin, sa décision subséquente, rendue le 19 mars 1982, demeure valide.

Si l'erreur qui a pour effet de rendre nulle la décision entache la totalité des procédures, le tribunal doit tout recommencer. Les arrêts *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.), *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.), et *Posluns v. Toronto Stock Exchange*, [1968] R.C.S. 330, se situent dans cette catégorie. Dans chaque cas, il s'agissait d'un déni de justice naturelle qui avait pour effet de vicier toute l'instance. Le tribunal était tenu de tout recommencer afin de remédier à ce vice.

En l'espèce, la Commission a tenu une audience valide jusqu'au moment de trancher la question. Elle a alors prononcé une décision qui est nulle de nullité absolue. Elle n'a pas envisagé de régler la

should be entitled to do so. The Court of Appeal so held.

On the continuation of the Board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter in accordance with the Act and Regulation. This will enable the appellants to address, frontally, the issue as to what recommendations, if any, the Board ought to make.

In the result, the appeal is dismissed, but without costs. The respondents neither appeared on the argument nor filed a factum.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

L'HEUREUX-DUBÉ J. (dissenting)—I must respectfully disagree with my colleague Justice Sopinka's disposition of this appeal.

The issues which arise in this appeal are:

(1) Was the Practice Review Board ("Board") of the Alberta Association of Architects *functus officio* after delivering a report on the practices leading to the bankruptcy of the Chandler Kennedy Architectural Group?

(2) If the Board was not *functus officio*, does it have the jurisdiction to continue the original hearing against the appellants to consider making recommendations to the Complaint Review Committee?

(3) Did the Court of Appeal err in its consideration and application of the principles relating to mandamus?

The first two, closely related issues, turn on the construction of s. 39 of the *Architects Act*, R.S.A. 1980, c. A-44.1, and Regulation 175/83 (passed under authority of the Act), which establish the Board and define its powers.

question de façon appropriée, ce qu'elle devrait pouvoir faire maintenant. C'est ainsi qu'en a décidé la Cour d'appel.

Cependant, à la continuation des procédures initiales par la Commission, chaque partie devrait pouvoir compléter la preuve et présenter d'autres arguments pertinents aux fins de régler l'affaire conformément à la Loi et au Règlement. Cela permettra aux appelants d'aborder directement la question des recommandations que la Commission devrait faire, le cas échéant.

En définitive, le pourvoi est rejeté, mais sans dépens. Les intimés n'ont pas présenté de plaidoirie ni déposé de mémoire.

Les motifs des juges La Forest et L'Heureux-Dubé ont été rendus par

LE JUGE L'HEUREUX-DUBÉ (dissidente)—Avec égards, je ne puis souscrire à la conclusion à laquelle en arrive mon collègue le juge Sopinka.

Les questions en litige dans ce pourvoi sont les suivantes:

1) La Practice Review Board («la Commission») de l'Alberta Association of Architects («l'Association des architectes de l'Alberta») était-elle *functus officio* après avoir établi un rapport sur les pratiques qui ont entraîné la faillite du Chandler Kennedy Architectural Group?

2) Si la Commission n'était pas *functus officio*, a-t-elle compétence pour poursuivre l'audience initiale, à l'encontre des appelants, afin d'envisager la possibilité de faire des recommandations au Comité d'examen des plaintes?

3) La Cour d'appel a-t-elle commis une erreur en examinant et en appliquant les principes relatifs au *mandamus*?

Les deux premières questions sont étroitement liées et portent sur l'interprétation de l'art. 39 de l'*Architects Act*, R.S.A. 1980, chap. A-44.1, et du règlement 175/83 (adopté en vertu de la Loi), qui créent la Commission et en définissent les pouvoirs.

Section 39(3) of the *Architects Act* provides:

(3) The Board shall after each inquiry under this section make a written report to the Council on the inquiry and may make any recommendations to the Council that the Board considers appropriate in connection with the matter inquired into, with reasons for the recommendations.

The disputed text is found in Regulation 175/83, s. 11(1):

11(1) The Board may shall [*sic*] make one or more of the following directions or recommendations:

. . .

(c) ... direct that the matter be referred to the Complaint Review Committee for investigation: ...

The confusion emanates from the inclusion of both the permissive, discretionary term "may", and the affirmative, mandatory term "shall", without any indication as to which prevails. However, while I shall discuss the implications of both interpretations, in my view the appeal should be allowed on either construction.

(1) *Functus Officio*

When the Board first undertook to reopen the hearing, appellants sought an order for prohibition, which was granted by Brennan J. In granting the order, the chambers judge of the Court of Queen's Bench stated:

Unfortunately, the Practice Review Board proceeded to set itself up as having disciplinary functions and made findings and assessed penalties. Mr. Justice Kryczka declared these Findings and Orders a nullity, which decision was upheld by the Alberta Court of Appeal.

In my view, the Practice Review Board has completed and fulfilled the function for which it was appointed and therefore it is *functus officio*. Such being the case, it had no jurisdiction to continue with any function. Accordingly, the application is granted for an Order to prohibit the Board from proceeding further against these Applicants, and in particular, the Board is hereby prohibited from proceeding with any further hearings on this matter.

This decision was reversed by the Alberta Court of Appeal: (1985), 67 A.R. 255. According to Kerans J.A., for the court, the Board was not

Le paragraphe 39(3) de l'*Architects Act* dispose:

[TRADUCTION] (3) Après chaque enquête tenue en vertu du présent article, la Commission doit soumettre un rapport écrit au Conseil et peut lui faire les recommandations motivées qu'elle juge appropriées en rapport avec l'affaire en cause.

Le texte contesté en l'espèce figure au par. 11(1) du règlement 175/83:

[TRADUCTION] 11(1) La Commission peut doit (*sic*) formuler une ou plusieurs des directives ou recommandations suivantes:

. . .

c) ... ordonner que la question soit renvoyée au Comité d'examen des plaintes pour fins d'enquête ...

La confusion tient à la juxtaposition des termes facultatif «peut» et impératif «doit», sans priorité apparente. Cependant, même si je me propose d'examiner les conséquences des deux interprétations, j'estime que le pourvoi devrait être accueilli de toute façon.

1) *Functus officio*

Lorsque la Commission a voulu rouvrir l'enquête pour la première fois, les appelants ont demandé une ordonnance de prohibition qui leur a été accordée par le juge Brennan, juge en chambre de la Cour du Banc de la Reine, qui a affirmé en rendant l'ordonnance:

[TRADUCTION] Malheureusement, la Commission de révision des pratiques a agi comme si elle avait des fonctions disciplinaires, en tirant des conclusions et en imposant des peines. Monsieur le juge Kryczka a jugé que ces conclusions et ordonnances étaient nulles, ce qui a été confirmé par la Cour d'appel de l'Alberta.

À mon avis, la Commission de révision des pratiques s'est acquittée des fonctions pour lesquelles elle a été constituée et elle est donc *functus officio*. Par conséquent, elle n'avait pas compétence pour poursuivre l'exercice de quelque fonction que ce soit. La demande d'ordonnance de prohibition interdisant à la Commission de poursuivre l'affaire contre les requérants est donc accueillie et il est notamment interdit à la Commission de tenir d'autres audiences sur cette question.

Cette décision a été infirmée par la Cour d'appel de l'Alberta: (1985), 67 A.R. 255. Selon le juge Kerans, s'exprimant au nom de la cour, la Com-

functus officio, and should be allowed to "voluntarily . . . do the right thing" (at p. 257):

[T]he board, having mistaken[ly] decided that it had itself the power to deal directly and finally with discipline questions, too quickly rejected any consideration of making recommendations to other bodies. We think that the board, persuaded by its mistaken assumption of these other powers, made such an egregious error about the significance of its powers of recommendation that it cannot be said that it has exercised that jurisdiction.

Jowitt's Dictionary of English Law (2nd ed. 1977) defines *functus officio* as "having discharged his duty"; an expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted. The holding of Morton J. in *Re V.G.M. Holdings, Ltd.*, [1941] 3 All E.R. 417 (Ch. D.), is well summarized in the headnote:

Where a judge has made an order for a stay of execution which has been passed and entered, he is *functus officio*, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay. The only means of obtaining any variation is to appeal to a higher tribunal.

An editorial note added that:

This is a practice point. It is well-settled that the court can vary any order before it is passed and entered. After it has been passed and entered, the court is *functus officio*, and can make no variation itself. Any variation which may be made must be made by a court of appellate jurisdiction.

Black's Law Dictionary (5th ed. 1979) defines *functus officio* as "a task performed":

Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired and who has consequently no further official authority; and also to an instrument, power, agency, etc., which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

mission n'était pas *functus officio* et il devrait lui être loisible de [TRADUCTION] «procéder de la bonne façon [. . .] volontairement» (à la p. 257):

[TRADUCTION] [A]près avoir décidé erronément qu'elle avait le pouvoir de traiter directement et définitivement de questions disciplinaires, la Commission a rejeté trop hâtivement toute possibilité de faire des recommandations à d'autres organismes. Nous pensons que la Commission, convaincue erronément d'être investie de ces autres pouvoirs, a commis une erreur si énorme quant à la portée de ses pouvoirs de recommandation que l'on ne peut conclure qu'elle a exercé cette compétence.

L'expression *functus officio* est définie par [TRADUCTION] «qui s'est acquitté de sa fonction» dans le *Jowitt's Dictionary of English Law* (2e éd. 1977). Cette expression s'applique à un juge, magistrat ou arbitre qui a rendu une décision ou prononcé une ordonnance et a ainsi épuisé sa compétence. La conclusion à laquelle est arrivé le juge Morton, dans *Re V.G.M. Holdings, Ltd.*, [1941] 3 All E.R. 417 (Ch. D.), est bien résumée dans le sommaire:

[TRADUCTION] Lorsqu'un juge a décrété un sursis d'exécution qui a été prononcé et inscrit, il devient *functus officio* et ni lui ni aucun autre juge de même juridiction n'a le pouvoir d'en modifier les modalités. L'appel devant une instance supérieure est alors le seul moyen d'obtenir une modification de l'ordonnance.

La mention suivante a été ajoutée par l'arrêtiste:

[TRADUCTION] C'est une question de pratique. Il est bien établi que la cour peut modifier une ordonnance avant de la prononcer et de l'inscrire. Une fois que l'ordonnance est prononcée et inscrite, la cour est *functus officio* et ne peut la modifier elle-même. Seule une juridiction d'appel peut procéder à la modification de l'ordonnance.

Dans le *Black's Law Dictionary* (5e éd. 1979), *functus officio* est défini ainsi: [TRADUCTION] «une fonction remplie»:

[TRADUCTION] Ayant rempli sa fonction, s'étant acquitté de sa charge ou ayant réalisé son objectif et n'ayant donc plus aucun pouvoir ni compétence. S'applique à un fonctionnaire dont le mandat est expiré et qui n'a donc plus de pouvoir officiellement; également à un acte, à un pouvoir, à un organisme, etc., qui a atteint l'objectif visé lors de sa constitution et n'a donc plus aucun autre effet.

The doctrine of *functus officio* states that an adjudicator, be it an arbitrator, an administrative tribunal, or a court, once it has reached its decision cannot afterwards alter its award except to correct clerical mistakes or errors arising from an accidental slip or omission (*Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463 (B.C.S.C.)) "To allow adjudicator to again deal with the matter of its own volition, without hearing the entire matter 'afresh' is contrary to this doctrine" (appellants' factum, at p. 19).

In *Re Nelsons Laundries Ltd.*, Verchere J. cited *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152 (B.C.C.A.), at p. 154:

> The question then is, when is an award made? In my opinion, when the arbitrator has done all that he can do, namely, reduce it to writing, and publish it as his award.

In *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162 (Nfld. C.A.), Morgan J.A. stated that (at p. 163):

> Whether or not the trial judge was in error in the first instance in declaring the proceedings a nullity, and ordering the Writ of Summons and Statement of Claim to be struck out, is not relevant to the issue now before us. The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it .... Clearly then the learned judge was functus officio and without jurisdiction to hear the matter.

Treatise authors dealing with administrative law issues have been surprisingly frugal in their treatment of the *functus officio* doctrine. Perhaps the most concise statement of the doctrine can be found in Pépin and Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 221:

> [TRANSLATION] In the case of quasi-judicial acts, the courts have held that decisions made in due form are irrevocable. To some extent the approach taken has been that once a government body has granted or recognized the rights of an individual, they cannot be challenged by the power of review: individuals are entitled to legal security in decisions. Once the decision is made, the file

En vertu du principe du *functus officio*, une instance décisionnelle, qu'il s'agisse d'un arbitre, d'un tribunal administratif ou d'une cour de justice ne peut modifier sa décision après l'avoir rendue, sauf afin de rectifier des fautes matérielles ou des erreurs imputables à un lapsus ou à une omission (*Re Nelsons Laundries Ltd. and Laundry, Dry Cleaning and Dye House Workers' International Union, Local No. 292* (1964), 44 D.L.R. (2d) 463 (C.S.C.-B.)) [TRADUCTION] «Permettre à l'instance décisionnelle de se pencher encore sur la question de sa propre initiative, sans réentendre toute l'affaire est contraire à ce principe» (mémoire des appelants, à la p. 19).

Dans la décision *Re Nelsons Laundries Ltd.*, le juge Verchere cite l'arrêt *Lewis v. Grand Trunk Pacific Railway Co.* (1913), 13 D.L.R. 152 (C.A.C.-B.), à la p. 154:

> [TRADUCTION] Il s'agit donc de déterminer à quel moment la décision a été rendue. À mon avis, c'est lorsque l'arbitre a tout fait ce qu'il pouvait faire, c'est-à-dire lorsqu'il a consigné sa décision par écrit et l'a publiée à ce titre.

Dans l'arrêt *M. Hodge and Sons Ltd. v. Monaghan* (1983), 43 Nfld. & P.E.I.R. 162 (C.A.T.-N.), le juge Morgan affirme (à la p. 163):

> [TRADUCTION] La question de savoir si le juge de première instance a commis une erreur au départ en déclarant que l'instance était nulle et en ordonnant la radiation du bref d'assignation et de la déclaration n'est pas pertinente en l'espèce. L'ordonnance prononcée était définitive de par sa nature même et, quoiqu'elle fût erronée, le juge qui l'a prononcée ne pouvait la modifier. De toute évidence, le juge était dès lors functus officio et n'avait pas compétence pour entendre l'affaire.

Les auteurs de traités de droit administratif sont étonnamment parcimonieux lorsqu'ils parlent du principe du *functus officio*. L'ouvrage de Pépin et Ouellette, intitulé *Principes de contentieux administratif* (2e éd. 1982), contient peut-être l'énoncé le plus concis de ce principe, à la p. 221:

> Dans les cas des actes quasi judiciaires, la jurisprudence considère que les décisions régulièrement rendues sont irrévocables. On veut en quelque sorte que les droits accordés ou reconnus aux administrés par l'Administration ne puissent être remis en cause par le biais d'un pouvoir de reconsidération; les administrés ont droit à la sécurité juridique des décisions. Une fois la décision

is closed and the government body is "functus officio". The legislature will often also take the trouble to specify that the decision is "final and not appealable". The rule that quasi-judicial decisions are irrevocable also seems to apply to domestic tribunals. However, there may be exceptions to the rule when the initial decision is vitiated by a serious procedural defect, such as failure to observe the rules of natural justice.

In line with that doctrine, if the Board had discretion to consider making recommendations, and chose not to, that should be the end of the matter. The finality of the Board's decision can be ascertained from its own language when it made its orders. The actual report of the Board reveals that the hearings concluded on December 17, 1984. The Board members signed the report under the heading "Conclusions". Furthermore, given that the Council of the Alberta Association of Architects issued a notice of hearing of an appeal from the decision rendered by the Board, it too must have considered the hearing complete. In the actual findings of the Board, they imposed suspensions, effective immediately. The report is entitled "Report of the Practice Review Board", the rendering of which is the function of that tribunal. All these factors indicate that the Board had completed its function and had rendered its final report.

It seems to me that there is a fundamental flaw in the reasoning of the Alberta Court of Appeal. If the Board was not *functus officio* after handing down its decision, at what point does it become so? In this case an appeal was filed, though not heard because the original ruling was quashed. If the Board is not *functus officio* when the decision is handed down, it must certainly be so by the time an appeal is filed. If not, then the logical conclusion would be that the Board could sit again to redetermine a matter even after an appeal had been heard, for there is no principled basis on which to say that at some point after the decision has come down the Board becomes *functus officio*, and there seems no way to rationally define an exception for the rare circumstance where the Board fails to consider the exercise of a discretion-

rendue, le dossier est fermé et l'Administration est «functus officio». Souvent d'ailleurs, le législateur prendra la peine de préciser que la décision est «finale et sans appel». La règle de l'irrévocabilité des décisions à caractère quasi judiciaire semble s'appliquer également aux tribunaux domestiques. Cependant, la règle pourra souffrir des exceptions lorsque la décision initiale est entachée d'un vice de procédure grave comme l'inobservance d'un principe de justice naturelle.

Suivant ce principe, si la Commission pouvait à sa discrétion envisager de faire des recommandations et qu'elle a choisi de s'en abstenir, l'affaire s'arrête là. Le caractère définitif de la décision de la Commission peut s'inférer du langage qu'elle emploie dans ses ordonnances. Le rapport de la Commission indique que les audiences ont pris fin le 17 décembre 1984. Les membres de la Commission ont signé le rapport sous la rubrique «Conclusions». De plus, vu que le Conseil de l'Association des architectes de l'Alberta avait déposé un avis d'appel contre la décision rendue par la Commission, lui aussi doit avoir considéré que l'audition était terminée. Dans sa décision, la Commission a imposé des suspensions exécutoires immédiatement. Le rapport est intitulé [TRADUCTION] «Rapport de la Commission de révision des pratiques». Il a été rendu dans l'exercice des fonctions de ce tribunal. Tous ces facteurs révèlent que la Commission avait complété sa fonction et rendu son rapport final.

Le raisonnement de la Cour d'appel de l'Alberta me semble entaché d'un vice fondamental. Si la Commission n'est pas *functus officio* après le prononcé de sa décision, quand le devient-elle? En l'espèce, un appel a été interjeté bien qu'il n'ait jamais été entendu puisque la décision initiale a été annulée. Si la Commission n'est pas *functus officio* lorsqu'elle prononce sa décision, elle doit certainement l'être au moment où cette dernière est portée en appel. Sinon, il faudrait logiquement conclure que la Commission pourrait siéger de nouveau pour réexaminer une affaire même après l'audition de l'appel. Aucun principe en effet ne permet d'affirmer que la Commission devient *functus officio* à un certain moment après le prononcé de sa décision, et il semble rationnellement impossible de faire une exception pour le rare cas

ary duty. In my view, this point should be fatal to the respondents.

If a tribunal has discretion, i.e., if it may consider making recommendations, and chooses not to, there is no authority in the *Architects Act* that permits it to change its mind on its own initiative. Furthermore, once a board acts *ultra vires*, it should not be allowed to rectify the infirmities of its disposition according to its own predilections. Standards of consistency, certainty, and finality must be preserved for the effective development of the complex administrative tribunal system in Canada. Either a board is compelled to act in a prescribed manner, or it is prohibited from so acting. Allowing the Board to reopen the hearing, without an explicit provision in the enabling statute, would create considerable confusion in the law relating to powers of administrative tribunals to rehear or redecide matters.

In most administrative decisions, the tribunal does not address the fact that it has considered all of its discretionary powers but has elected to invoke only a few of those powers. I agree with the holding in *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.), that a tribunal should not be allowed to reserve the exercise of its remaining powers for a later date. The Board could not attempt to retain jurisdiction to make recommendations to Council once it has made a final order, as the parties would never have the security of knowing that the decision rendered has finally determined their respective rights in the matter.

There are, of course, exceptions to the general rule that an arbitrator who has reached a final decision becomes *functus officio* and cannot afterwards alter his award. For example an adjudicator may correct clerical mistakes or errors arising from an accidental slip or omission (*Lodger's International Ltd. v. O'Brien* (1983), 45 N.B.R. (2d) 342 (N.B.C.A.); *Re Nelsons Laundries Ltd.*, *supra*). However, the Board in the present case is

où la Commission fait défaut de considérer l'exercice d'un pouvoir discrétionnaire. À mon avis, ce point devrait être fatal aux intimés.

Si un tribunal détient un pouvoir discrétionnaire, c.-à-d. s'il peut envisager de faire des recommandations et s'il choisit de ne pas le faire, l'*Architects Act* ne l'autorise aucunement à changer d'avis de sa propre initiative. En outre, une fois qu'une commission agit de façon *ultra vires*, elle ne devrait pas pouvoir corriger les déficiences de sa décision selon son bon vouloir. Les normes de constance, de certitude et de caractère définitif des décisions doivent être préservées si on veut assurer l'efficacité du système complexe des tribunaux administratifs au Canada. De deux choses l'une: ou bien une commission est tenue d'agir de la manière prescrite ou bien il lui est interdit d'agir. Permettre à la Commission de rouvrir l'audition, sans que la loi habilitante ne le prévoie expressément, serait de nature à créer une confusion considérable dans le droit en ce qui concerne les pouvoirs qu'ont les tribunaux administratifs de réentendre ou de décider à nouveau une affaire.

Dans la plupart des décisions administratives, le tribunal ne s'arrête pas à la question de savoir s'il a considéré tous les pouvoirs discrétionnaires dont il est investi, mais a choisi de n'en exercer que quelques-uns. Je suis d'accord avec l'arrêt *Huneault c. Société centrale d'hypothèques et de logement* (1981), 41 N.R. 214 (C.A.F.), portant qu'il ne devrait pas être loisible à un tribunal de réserver pour une date ultérieure l'exercice de ses autres pouvoirs. Une fois prononcée son ordonnance définitive, la Commission ne pouvait tenter de conserver son pouvoir de faire des recommandations au Conseil, car les parties n'auraient jamais eu la certitude que la décision rendue avait déterminé leurs droits respectifs de façon définitive.

Il y a évidemment des exceptions à la règle générale portant qu'un arbitre ayant prononcé une décision définitive devient *functus officio* et ne peut modifier cette décision par la suite. Par exemple, une instance décisionnelle peut corriger des erreurs matérielles ou des fautes imputables à un lapsus ou à une omission (*Lodger's International Ltd. v. O'Brien* (1983), 45 R.N.-B. (2e) 342 (C.A.N.-B.); *Re Nelsons Laundries Ltd.*, précité).

not seeking to correct a slip or clerical error. If it had the option to consider making recommendations, and yet chose not to, that choice does not detract from the finality of the decision.

When a decision is rendered with nothing to be completed, there is no doubt that the adjudicator is *functus officio*: any further action would be entirely without authority (*Slaight Communications Inc. v. Davidson*, [1985] 1 F.C. 253 (C.A.), affirmed [1989] 1 S.C.R. 1038). Hence, if the Board is seen as having discretion whether or not to consider making recommendations, and the Alberta Court of Appeal decision is left undisturbed, the doctrine of *functus officio* would be rendered nugatory.

In *Lodger's International Ltd.*, *supra*, the New Brunswick Court of Appeal dealt with a series of orders by the New Brunswick Human Rights Commission. The Commission first ordered an employer to compensate two employees. When the employer did not comply, the Commission renewed the order with a time limit for payment. Section 21(2) of the *Human Rights Act* provided that the orders were "final". The court held that the second order was improper and that the Commission was *functus officio* after the first order, because s. 21 did not authorize subsequent orders. La Forest J.A. (now of this Court), writing for the court, addressed the issue of whether the Commission was empowered to make such a series of orders and concluded that (at p. 352):

> It would take strong words indeed to convince me that the legislature ever intended to give this kind of power to an administrative body, however lofty its goals and however liberally we are expected to construe the statute to facilitate the achievement of these goals.

Unlike the enabling statute in *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, where the Immigration Appeal Board had statutory jurisdiction to hold a rehearing under

En l'espèce, toutefois, la Commission ne tente pas de corriger un lapsus ou une erreur matérielle. Si elle avait la possibilité d'envisager de faire des recommandations et a choisi de ne pas le faire, ce choix n'altère en rien le caractère définitif de la décision.

Lorsqu'une décision est rendue et qu'il ne reste rien à compléter, l'instance décisionnelle est incontestablement *functus officio*: toute mesure additionnelle serait prise en l'absence de toute compétence (*Slaight Communications Inc. c. Davidson*, [1985] 1 C.F. 253 (C.A.), confirmé par [1989] 1 R.C.S. 1038). Donc, si la Commission est perçue comme ayant discrétion pour décider de faire ou non des recommandations et si l'arrêt de la Cour d'appel de l'Alberta est maintenu, le principe du *functus officio* serait privé de tout effet.

Dans l'arrêt *Lodger's International Ltd.*, précité, la Cour d'appel du Nouveau-Brunswick était saisie d'une série d'ordonnances prononcées par la Commission des droits de l'homme du Nouveau-Brunswick. La Commission avait d'abord ordonné à un employeur d'indemniser deux employés. L'employeur ne s'étant pas exécuté, la Commission a renouvelé l'ordonnance en l'assortissant d'un délai de paiement. Le paragraphe 21(2) de la *Loi sur les droits de l'homme* prévoit que les ordonnances sont «définitive[s]». La cour a statué que la seconde ordonnance était irrégulière et que la Commission était *functus officio* après avoir rendu la première ordonnance, parce que l'art. 21 ne l'autorisait pas à rendre d'autres ordonnances. S'exprimant au nom de la cour, le juge La Forest (maintenant de notre Cour) a abordé la question de savoir si la Commission avait le pouvoir de prononcer une telle série d'ordonnances et a conclu ce qui suit (aux pp. 352 et 353):

> Il faudrait des arguments bien solides pour me convaincre que la Législature a jamais eu l'intention de conférer ce genre de pouvoir à un organisme administratif, si nobles que soient ses objectifs et si libérale que soit l'interprétation escomptée de la loi pour faciliter la réalisation de ces objectifs.

Contrairement à la loi habilitante en cause dans *Grillas c. Ministre de la Main-d'Oeuvre et de l'Immigration*, [1972] R.C.S. 577, où, en vertu de l'art. 15 sur la *Loi sur la Commission d'appel de*

s. 15 of the *Immigration Appeal Board Act*, there is no authority in the *Architects Act* for the Board to hold a rehearing. *Cité de Jonquière v. Munger*, [1964] S.C.R. 45, also supported a policy favouring the finality of decisions unless the statute dictates otherwise. Upholding the unanimous decision of the Quebec Court of Appeal, Cartwright J., for the Court, held that (at p. 48):

> I am satisfied that the council had the right to interpret the award but not to amend it. This does not mean, however, that it did not have the right to correct a simple clerical error. Anybody having quasi-judicial powers must have such a right, otherwise the consequences of a simple slip in drafting an award might be disastrous.

Furthermore, I agree with the holding in *M. Hodge and Sons Ltd.*, *supra*, that the fact that the original decision was wrong or made without jurisdiction is irrelevant to the issue of *functus officio* (at p. 163):

> The order given was, by its very nature, final, and even if made in error it could not be amended by the judge who gave it.

(2) The Board's Jurisdiction to Rehear

The Alberta Court of Appeal interpreted the *Architects Act*, and Regulation 175/83, as imposing a duty on the Board to consider whether to make a recommendation to the Governing Council or Complaint Review Committee.

Despite the ambiguous language, my colleague, Sopinka J., concludes that the Act imposes a duty on the basis that "it would be strange if the Board were empowered to conduct a lengthy practice review and had no duty to consider making recommendations" (p. 860). Given that "the Board conducted a valid hearing until it came to dispose of the matter" (p. 863), my colleague suggested that "[o]n the continuation of the Board's original proceedings ... either party should be allowed to supplement the evidence and make further representations which are pertinent to disposition of the matter" (p. 864). Hence, while it would

l'immigration, la Commission d'appel de l'immigration avait compétence pour procéder à une nouvelle audition, l'*Architects Act* n'autorise aucunement la Commission à réentendre ainsi une affaire. L'arrêt *Cité de Jonquière v. Munger*, [1964] R.C.S. 45, confirme également que les décisions doivent être définitives à moins que la loi ne prévoie le contraire. En confirmant l'arrêt unanime de la Cour d'appel du Québec, le juge Cartwright statue au nom de la Cour (à la p. 48):

> [TRADUCTION] Je suis convaincu que le conseil avait le droit d'interpréter la décision mais non de la modifier. Cela ne signifie pas toutefois qu'il n'avait pas le droit de corriger une simple erreur d'écriture. Toute entité dotée de pouvoirs quasi judiciaires doit avoir ce droit, sinon la moindre petite erreur de rédaction pourrait avoir des conséquences désastreuses.

De plus, je souscris à la conclusion de la cour dans l'arrêt *M. Hodge and Sons Ltd.*, précité, selon laquelle le fait que la décision initiale était erronée ou que la cour a agi sans compétence ne revêt aucune pertinence en ce qui a trait à la question du *functus officio* (à la p. 163):

> [TRADUCTION] L'ordonnance prononcée était définitive de par sa nature même et, quoiqu'elle fût erronée, le juge qui l'a prononcée ne pouvait la modifier.

2) La compétence de la Commission pour réentendre une affaire

Dans son interprétation de l'*Architects Act* et du règlement 175/83, la Cour d'appel de l'Alberta a conclu que ces textes imposaient à la Commission l'obligation d'envisager si elle devait faire une recommandation au Conseil ou au Comité d'examen des plaintes.

Malgré le langage ambigu de ces textes législatifs, mon collègue le juge Sopinka conclut que la Loi impose une telle obligation parce qu'«[i]l serait pour le moins étrange que la Commission ait le pouvoir de procéder à une révision détaillée des pratiques sans qu'elle soit tenue d'envisager la possibilité de faire des recommandations» (p. 860). Étant donné que «la Commission a tenu une audience valide jusqu'au moment de trancher la question» (p. 863), mon collègue postule qu'«à la continuation des procédures initiales par la Commission, chaque partie devrait pouvoir compléter la preuve et présenter d'autres arguments perti-

provide for the presentation of supplementary evidence, the rehearing itself would not be conducted afresh, but rather as a "continuation of the Board's original proceedings".

This analysis does have a certain intuitive appeal: given that a Practice Review Board does exist, and has a certain function to fulfill, it should be allowed, or rather required, to perform that function. However, the issue here is precisely that the Board did exercise that function, albeit illegally.

There is no dispute that when making the final orders it did, the Board clearly exceeded its jurisdiction. The Chairman of the Board himself set out the Board's functions and explicitly recognized that:

> [T]his is not a complaint review where we are trying to find fault or guilt on specific complaints. This is a practice review, and as a result we are given the responsibility of trying to review and understand at the fullest extent possible what has taken place, and as a result if the fullest extent of which has taken place, make findings and recommendations to the profession.

Following this introduction, the Board embarked on an adjudicatory path which the courts found to be wholly *ultra vires*. If it had a duty to consider whether to make a recommendation to the Complaint Review Committee, it did not do so.

Even though the Board was wrong in its initial decision, the question is whether that precludes the Board from now attempting to correctly carry out its function. According to my colleague, as the Board's disposition was a nullity, it amounts to no disposition at all in law: "a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision" (p. 862) (emphasis added), relying on *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R.

nents aux fins de régler l'affaire» (p. 864). Par conséquent, même si la nouvelle audition permettait aux parties de présenter des éléments de preuve additionnels, cette audition ne constituerait pas un réexamen de la question dans son entier mais plutôt la «continuation des procédures initiales par la Commission».

Intuitivement, cette analyse offre un certain attrait: étant donné que la Commission de révision des pratiques existe et qu'elle a une certaine fonction à remplir, elle devrait être autorisée à exercer cette fonction ou plutôt y être tenue. En l'espèce, cependant, le litige porte précisément sur le fait que la Commission a bel et bien exercé cette fonction, même si elle l'a fait dans l'illégalité.

Il est admis que lorsqu'elle a prononcé ses ordonnances définitives, la Commission a clairement outrepassé sa compétence. Le président de la Commission a lui-même décrit les fonctions de la Commission et reconnu explicitement que:

> [TRADUCTION] [I]l ne s'agit pas d'un examen de plaintes où nous essayons de déterminer la faute ou la culpabilité à l'égard de plaintes précises. Il s'agit d'une révision des pratiques et, en conséquence, il nous incombe de tenter de revoir et de comprendre le mieux possible ce qui s'est passé et, par conséquent, de tirer des conclusions et de faire des recommandations à la profession.

Après cette introduction, la Commission s'est engagée dans un processus décisionnel que les tribunaux ont ensuite jugé entièrement *ultra vires*. Si elle avait l'obligation d'envisager de faire des recommandations au Comité de révision des plaintes, elle ne l'a pas fait.

Même si la Commission a commis une erreur en prononçant sa décision initiale, il s'agit de déterminer si cela l'empêche de tenter cette fois d'exercer correctement sa fonction. Selon mon collègue, comme la décision de la Commission était nulle de nullité absolue, ce qui équivaut en droit à une absence totale de décision: «le tribunal dont la décision est nulle a été autorisé à réexaminer la question dans son entier et à prononcer une décision valide» (pp. 862 et 863) (je souligne), s'appuyant sur la décision *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637 (C.S.C.-B.), où le juge

(3d) 637 (B.C.S.C.), where McLachlin J. (now of this Court) wrote, at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid. [Emphasis added.]

These precedents distinctly indicate that whenever special circumstances do warrant reconsideration by an administrative tribunal, such is to take place "afresh", not merely as a continuation of the tainted process now sought to be corrected.

Furthermore, *Re Trizec* dealt with a procedural error by the Court of Revision. While acting wholly within the domain of its substantive jurisdiction, the Court of Revision increased an assessment against a taxpayer before allowing the taxpayer to be heard. Two days later, at the request of the taxpayer, the court reconvened and a hearing was conducted. Hence, this case is distinguishable on at least three grounds:

(1) the court in *Re Trizec* was instructed to consider the matter afresh and conduct a proper hearing; the Alberta Court of Appeal in *Chandler* allowed the Board to continue its original proceeding;

(2) the court, acting within its jurisdiction, made a procedural error which it subsequently corrected; the Board in *Chandler* was not

McLachlin (maintenant de notre Cour) écrit à la p. 643:

> [TRADUCTION] Je suis convaincue, tant sur le plan logique que sur celui de la doctrine et de la jurisprudence, que le tribunal qui, dans le cadre présumé de l'exercice de sa compétence, rend une décision annulée par la suite, peut ensuite tenir une audience régulière et rendre une décision valide: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] R.C.S. 330. Dans ce dernier arrêt, la Cour suprême du Canada a cité les motifs du jugement prononcé par lord Reid dans *Ridge v. Baldwin*, [1964] A.C. 40, à la p. 79, où il affirme:
>
> > Je ne doute point que dans l'éventualité où un fonctionnaire ou un organisme se rend compte qu'il a agi précipitamment et réexamine la question dans son entier, après avoir accordé à la personne intéressée la possibilité suffisante de faire valoir son point de vue, la seconde décision qu'il rendra sera valide. [Je souligne.]

D'après cette jurisprudence, il est clair que lorsqu'en raison de circonstances particulières, un tribunal administratif est justifié de réexaminer une affaire, ce dernier doit procéder à un réexamen de la question dans son entier et non à la simple continuation du processus vicié que l'on tente maintenant de corriger.

En outre, dans la décision *Re Trizec*, il s'agissait d'une erreur de procédure commise par la Cour de révision. Tout en respectant les limites de sa compétence sur le plan du fond, la Cour de révision avait augmenté une cotisation établie à l'encontre d'un contribuable avant même d'entendre ce dernier. Deux jours plus tard, à la demande du contribuable, la cour a été convoquée de nouveau et a tenu une audition. Cette affaire doit être distinguée sur au moins trois aspects:

(1) dans *Re Trizec*, on a ordonné à la cour de réexaminer l'affaire et de procéder à une audience régulière; dans *Chandler*, la Cour d'appel de l'Alberta a permis à la Commission de continuer ses procédures initiales;

(2) la cour, agissant dans les limites de sa compétence, a commis une erreur de procédure qu'elle a ensuite corrigée; dans *Chandler*, la

empowered at the substantive level to make any of the findings it did; and

(3) the taxpayer itself requested a hearing, whereas the Board in *Chandler* reopened the proceedings on its own initiative.

The issues in *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.), relied upon in *Re Trizec*, were almost identical. A teacher was dismissed on three grounds of misconduct, yet was heard on only two of those grounds. He was then heard on the third ground and the dismissal was upheld.

The suggestion that the Board's original proceedings be continued is especially disturbing. It would set a dangerous precedent in expanding the powers of administrative tribunals beyond the wording or intent of the enabling statute. Furthermore, it would erode the protection of fairness and natural justice which every citizen of this country has a right to expect from administrative tribunals. The original hearing was conducted under the mistaken belief by the Board that it could make certain orders, despite the Chairman's introductory words. The Chairman's comments, reproduced above, clearly indicated that the hearings were intended to be a practice review rather than an inquiry into allegations of unprofessional conduct.

Kryczka J. of the Alberta Court of Queen's Bench held that, given the failure to inform the appellants that they were facing any such discipline charges or allegations, "it is difficult for me to conceive how the eventual result could be characterized as anything other than a travesty of justice". It might be that the appellants would have entered into a different course or line of defense at the hearing had they suspected that they were being investigated with respect to matters entirely outside the scope of the Board's jurisdiction. Unaware and not informed of the discipline charges that were in fact contemplated by the Board, appellants were not legally in a position

Commission n'avait pas le pouvoir, sur le plan du fond, de formuler les conclusions en cause; et

(3) le contribuable a lui-même demandé une audience alors que dans *Chandler*, la Commission a rouvert l'instance de sa propre initiative.

Les questions en litige dans l'arrêt *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (C.S.C.-B.), invoqué dans *Re Trizec*, étaient presque identiques. Un professeur avait été congédié pour trois motifs d'inconduite mais n'avait pu témoigner qu'à l'égard de deux d'entre eux. Par la suite, il avait pu se faire entendre au sujet du troisième motif et le congédiement avait été confirmé.

La suggestion que les procédures initiales puissent être continuées est particulièrement inquiétante. Ce serait là créer un précédent dangereux que d'étendre les pouvoirs des tribunaux administratifs au-delà du texte ou de l'intention de leur loi habilitante. De plus, cela serait de nature à éroder la garantie d'équité et de justice naturelle à laquelle chaque citoyen de ce pays est en droit de s'attendre de la part des tribunaux administratifs. La Commission a tenu l'audience initiale en croyant à tort qu'elle pouvait prononcer certaines ordonnances, malgré les propos préliminaires tenus par le président. Les commentaires du président que j'ai déjà reproduits indiquent clairement que les audiences devaient constituer une révision des pratiques plutôt qu'un examen des plaintes portant sur la conduite non professionnelle.

En Cour du banc de la Reine de l'Alberta, le juge Kryczka a statué que, compte tenu de ce que les appelants n'ont pas été avisés qu'ils faisaient face à des accusations ou allégations de nature disciplinaire, [TRADUCTION] «il m'est difficile d'imaginer que le résultat éventuel puisse être considéré comme autre chose qu'un simulacre de justice». Les appelants auraient peut-être agi différemment ou présenté un autre genre de défense à l'audience s'ils avaient soupçonné qu'ils faisaient l'objet d'une enquête sur des questions excédant totalement la compétence de la Commission. Puisqu'ils n'étaient pas au courant ni informés des accusations de nature disciplinaire que la Commis-

to prepare a full defense to the allegations and orders ultimately made against them.

Appellants further contend that, if upheld, the decision of the Alberta Court of Appeal must be taken as overturning the judgment of the same court in *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635, cited with approval in *Grillas*, *supra*, at pp. 588-89. *Canadian Industries* dealt with a board that held a hearing without giving notice to the appellant who was entitled to such notice as an interested party. The Board then held a rehearing of which proper notice was given, and decided, after hearing submissions, that its previous order should not be changed. Johnson J.A., for the Court of Appeal held that both orders had to be set aside. The first was a nullity as the appellant was not notified. The second was a nullity as well in the absence of clear statutory authority to conduct a rehearing.

As mentioned previously, there is no clear statutory language enabling the Board to conduct a rehearing. If the Board has a duty which it failed to fulfill, it can, depending on the circumstances of the case, be directed to review the entire matter afresh, and can be required to conduct a new hearing. *Re Trizec* and *Lange*, *supra*. However, if it sets out to do one thing and winds up doing something entirely different, any reexamination should not be construed as a "continuation of the Board's original proceedings".

I would like to briefly address the *prima facie* apprehension that a direction to the Board to conduct a new hearing is tantamount to "double adjudication". That would be a valid concern if the Board is seen as having discretion. It would then be making orders subsequent to its being rendered *functus officio*. However, if it has an imposed duty, a rehearing would only be required if the original hearing is determined to be a total nullity,

sion envisageait de porter, les appelants n'étaient pas légalement en mesure de préparer une défense pleine et entière à l'égard des allégations et des ordonnances dont ils ont finalement fait l'objet.

Les appelants ajoutent que s'il est confirmé, l'arrêt de la Cour d'appel de l'Alberta devra alors être considéré comme renversant l'arrêt de la même cour dans *Canadian Industries Ltd. v. Development Appeal Board of Edmonton* (1969), 71 W.W.R. 635, qui a été cité avec approbation dans l'arrêt *Grillas*, précité, aux pp. 588 et 589. L'arrêt *Canadian Industries* portait sur une audience tenue par une commission sans avis préalable à l'appelant, qui avait droit à un tel préavis en tant que partie intéressée. Après avoir donné les avis appropriés, la Commission a procédé à une nouvelle audition de l'affaire et a décidé, après avoir entendu les arguments, de ne pas modifier son ordonnance antérieure. Le juge Johnson a statué, au nom de la Cour d'appel, que les deux ordonnances devaient être annulées. La première était nulle parce que l'appelant n'avait pas été avisé. La deuxième était tout aussi nulle, parce que la loi n'autorisait pas clairement la tenue d'une nouvelle audition.

Comme nous l'avons déjà mentionné, aucun texte de loi n'habilite clairement la Commission à tenir une nouvelle audition. Si la Commission a omis de remplir une obligation qui lui incombe, il peut lui être ordonné, selon les circonstances de l'espèce, de reprendre l'examen de toute l'affaire et elle peut alors être tenue de procéder à une nouvelle audition. *Re Trizec* et *Lange*, précités. Cependant, si elle se propose de faire une chose et qu'en fin de compte elle fait quelque chose de tout à fait différent, tout réexamen de l'affaire ne devrait pas être considéré comme la «continuation des procédures initiales par la Commission».

J'aimerais aborder brièvement la question de la crainte *prima facie* que le fait d'ordonner à la Commission de tenir une nouvelle audition équivaille à une «double décision». Cette crainte pourrait être justifiée si l'on estimait que la Commission détient un pouvoir discrétionnaire. Elle prononcerait alors des ordonnances après être devenue *functus officio*. Cependant, si elle était dans l'obligation d'agir, la tenue d'une nouvelle

and the case so warrants. In that case, the apprehension of allowing a tribunal to make a series of orders, *Lodger's International Ltd.*, *supra*, would not arise. In the particular circumstances of this case, a rehearing would not be appropriate in my view.

(3) *Mandamus*

As the Court of Appeal twice referred to the principles of mandamus, I will address them as well. However, I agree with appellants that these principles have nothing to do with this appeal.

Laidlaw J.A. set out the requirements for mandamus in *Karavos v. Toronto*, [1948] 3 D.L.R. 294 (Ont. C.A.), at p. 297:

> Before the remedy can be given, the applicant for it must show (1) "a clear, legal right to have the thing sought by it done, and done in the manner and by the person sought to be coerced" . . . ; (2) "The duty whose performance it is sought to coerce by mandamus must be actually due and incumbent upon the officer at the time of seeking the relief . . .»; (3) That duty must be purely ministerial in nature, "plainly incumbent upon an officer by operation of law or by virtue of his office, and concerning which he possesses no discretionary powers"; (4) There must be a demand and refusal to perform the act which it is sought to coerce by legal remedy . . . .

Hence, mandamus appears to be a remedy that would apply against a tribunal or authority, and not one to be invoked by it. If the Board declined to exercise jurisdiction, then mandamus would lie. However, that is not the case here. Quite the contrary; the Board took it upon itself to exercise more jurisdiction than in fact it had. That alone would undermine the Court of Appeal's application of mandamus to this case. Furthermore, if we are to follow the requirements set out above, none appear to be satisfied by the facts here:

audition ne s'imposerait que si l'audience initiale était jugée nulle de nullité absolue et si les circonstances le justifiaient. Dans ce cas, il n'y aurait pas lieu de craindre de permettre au tribunal de prononcer une série d'ordonnances, *Lodger's International Ltd.*, précité. À mon avis, en l'espèce il ne conviendrait pas d'ordonner la tenue d'une nouvelle audience, vu les circonstances particulières de cette affaire.

3) *Mandamus*

Puisque la Cour d'appel s'est référée à deux reprises aux principes du *mandamus*, j'en traiterai également. Je conviens toutefois avec les appelants que ces principes n'ont rien à voir avec le présent pourvoi.

Dans l'arrêt *Karavos v. Toronto*, [1948] 3 D.L.R. 294 (C.A. Ont.), le juge Laidlaw décrit les conditions applicables à l'obtention d'un *mandamus*, à la p. 297:

> [TRADUCTION] Pour être en mesure d'obtenir ce redressement, le requérant doit démontrer (1) «qu'il a le droit, clairement prescrit par la loi, d'obtenir que la chose qu'il demande soit faite et ce, de la façon demandée et par la personne en cause» . . . ; (2) «la fonction dont on demande l'exercice par voie de *mandamus* doit réellement incomber au fonctionnaire en cause, au moment où le redressement est demandé» . . . ; (3) cette fonction doit être de nature purement ministérielle et «incomber directement à un fonctionnaire en vertu de la loi ou de la nature de son poste; il ne doit jouir d'aucun pouvoir discrétionnaire à cet égard»; (4) il doit y avoir eu demande et refus d'accomplir l'acte que l'on veut faire accomplir par voie judiciaire . . .

Il appert donc que le *mandamus* s'applique à l'encontre d'un tribunal ou d'une autorité et qu'il ne peut être invoqué par ceux-ci. Si la Commission avait refusé d'exercer sa compétence, il y aurait lieu de délivrer un *mandamus*. Toutefois ce n'est pas le cas ici. C'est plutôt le contraire: la Commission a pris sur elle d'exercer des pouvoirs plus étendus que ceux qui lui étaient conférés. Ce seul fait militerait à l'encontre de l'application du *mandamus* à l'espèce par la Cour d'appel. En outre, si nous respectons les conditions susmentionnées applicables à l'obtention d'un *mandamus* les faits de l'espèce ne semblent satisfaire à aucune de celles-ci:

(1) There is no clear legal right in issue.

(2) The Board may have had discretion whether or not to make recommendations.

(3) Whether or not the Regulation confers discretion upon the Board is still an open question, and if the Board has a duty to consider making recommendations, it certainly has discretion whether or not to make them, and which ones to make, if any.

(4) There has been no demand by the appellants or refusal by the Board to perform, as is required by mandamus.

(4) Conclusion

On either interpretation of the ambiguous language in the Regulation, I am of the view that the appeal should succeed. If the Board had discretion, and decided to act in a certain manner, it is now *functus officio*. If it had an imposed duty which it did not perform, it cannot continue with a tainted hearing. For the reasons discussed above, mandamus is not a controlling factor in this appeal.

Therefore, I would allow the appeal, vacate the order of the Court of Appeal and restore the judgment of Brennan J. prohibiting the Board from acting any further in this matter, the whole with costs throughout.

Appeal dismissed, LA FOREST *and* L'HEUREUX-DUBÉ JJ. *dissenting.*

Solicitors for the appellants: Code Hunter, Calgary.

1) Aucun droit clairement prescrit par la loi n'est en cause.

2) La Commission pouvait avoir le pouvoir discrétionnaire de décider de faire ou non des recommandations.

3) La question de savoir si le règlement confère un pouvoir discrétionnaire à la Commission demeure ouverte; si la Commission a le devoir de considérer de faire des recommandations, elle a certainement le pouvoir discrétionnaire de décider de les faire ou non, et de choisir la recommandation appropriée, le cas échéant.

4) Les appelants n'ont pas demandé qu'un acte soit accompli et la Commission n'a pas refusé de le faire, comme le requiert le *mandamus*.

4) Conclusion

Peu importe la façon dont on interprète le langage ambigu du règlement, j'estime que le pourvoi doit être accueilli. Si la Commission avait le pouvoir discrétionnaire d'agir et a décidé d'agir d'une certaine façon, elle est maintenant *functus officio*. Si elle avait le devoir d'agir et qu'elle ne l'a pas fait, elle ne peut poursuivre une audience viciée. Pour les motifs qui précèdent, le *mandamus* n'est pas un facteur déterminant en l'espèce.

Par conséquent, je suis d'avis d'accueillir le pourvoi, d'annuler l'ordonnance de la Cour d'appel et de rétablir le jugement du juge Brennan interdisant à la Commission de poursuivre l'affaire, le tout avec dépens dans toutes les cours.

Pourvoi rejeté, les juges LA FOREST *et* L'HEUREUX-DUBÉ *sont dissidents.*

Procureurs des appelants: Code Hunter, Calgary.

TAB 9

2007 CarswellNfld 415
Newfoundland and Labrador Arbitration

I.A.F.F., Local 1075 v. St. John's (City)

2007 CarswellNfld 415, 169 L.A.C. (4th) 236, 92 C.L.A.S. 346

In the Matter of an Interest Arbitration Dispute

International Association of Firefighters, Local 1075, (hereinafter called the "Association") and City of St. John's, (hereinafter called the "Employer" or the "City")

J.C. Oakley Chair, L. Powell Member, M.F. O'Dea Member

Judgment: December 20, 2007
Docket: None given.

Counsel: Sean P. McManus, for Association
Dennis Mahoney, for Employer

Subject: Labour; Public

Decision of the Board:

Background

1 This Supplementary Award addresses the jurisdiction of the Board of Arbitrators (the "Board") to reconvene and make a determination on the issue of retroactivity of enhancements to annual leave provisions in the Collective Agreement.

2 The Board issued an Interest Arbitration Award dated August 12, 2005, following a hearing conducted on June 14, 15 and 16, 2005. The parties agreed that the Board was properly constituted pursuant to Section 340.19 of the *City of St. John's Act*, RSNL 1990, c. C-17 (the "*Act*"), which states as follows:

> Board of Arbitrators
>
> 340.19 (1) Where, after bargaining under section 353.17, the city negotiator or the bargaining committee is satisfied that an agreement cannot be reached, he or she or the committee may by written notice to the other party require all matters in dispute to be referred to a board of arbitrators, and those matters shall be settled by arbitration under this section.

3 Pursuant to the *Act*, the parties agreed that matters in dispute were referred to the Board to be settled by arbitration. In the Award, the Board noted that the parties had met and bargained collectively and settled several matters. The Award noted that by agreement of the parties, the Board attached as Schedule "A" to the Award, the "sign off sheets" for those matters agreed by the parties. Attached as Schedule "A" to the Award were the "sign off sheets", signed by the City and the Association and dated with the date of signing. One of the "sign off sheets" contained enhancements to the annual leave provisions in Article 15 of the Collective Agreement. The Award stated at page 4 "the parties signed off on a number of items and the remaining matters in dispute were referred to the Board of Arbitrators". The Award stated at page 9 "The issues that have been settled by the parties are set out in the sign off sheets attached as Schedule "A". The issues that were referred to the Board of Arbitrators are long term disability, captains, training, Goulds fire station, wages, and duration."

4 In the Award the Board reviewed the submissions by the parties on each of the issues in dispute, set out the Board's analysis of the issues in dispute and issued a decision on each issue. At page 19, the Board set out its decision with respect to each of the issues and also retained jurisdiction in the event the parties did not agree on the interpretation of the Award. The order of the Board stated as follows:

> The Board orders as follows:
>
> (1) Long term disability - The issue of long term disability is referred to the Joint Insurance and Benefits Committee.
>
> (2) Captains - The Board does not make any order with respect to the selection of Captains for the Central Fire Station positions or the selection of Captains for training.
>
> (3) Training - The Board does not make any order with respect to compulsory attendance at training.
>
> (4) Goulds Fire Station - The Board does not make any order with respect to the Goulds Fire Station.
>
> (5) Wages - The Board orders the following wage increases:
>
> | | |
> |---|---|
> | December 31, 2004 | 4% |
> | July 1, 2005 | 2% |
> | December 31, 2005 | 2% |
> | July 1, 2006 | 2% |
> | December 31, 2006 | 1.5% |
>
> (6) Wage increases shall be retroactive and shall apply to former employees.
>
> (7) Duration - The term of the Collective Agreement shall be for 3 years from January 1, 2004 to December 31, 2006.
>
> The Board retains jurisdiction in the event the parties do not agree on the interpretation of the Award.

5 The Award discussed the issue of retroactivity under the heading of "Wages". The submission of the Association, that former employees were entitled to retroactive wage settlements, was accepted. The Award stated that wage increases shall be retroactive and shall apply to former employees. The Award stated that "former employees should not be prejudiced as a result of the length of time it takes to complete negotiations and the arbitration process". The Award did not make any comment on retroactivity with respect to any other issue.

6 By letter dated December 18, 2006, Counsel for the Association requested that the Board make a determination on the issue of retroactivity of annual leave entitlement. By letter dated January 15, 2007, Counsel for the City notified the Board of the City's objection to the jurisdiction of the Board on the grounds that the Board was *functus officio*. The Board subsequently advised the parties that it would receive written submissions and make a determination on its jurisdiction to consider the issue raised by the Association, prior to receiving any submissions on the merits of the issue raised by the Association. The Board received written submissions from the parties on May 18, 2007 and received rebuttal submissions from the parties on June 8, 2007.

Employer Submission

7 The Employer submitted that the parties had agreed to submit six issues to the Board and the Board had jurisdiction to deal only with those issues. The "sign off sheets" were attached to the Award with the intent to acknowledge the matters that were agreed. The Award deciding the six issues in dispute together with the "sign off sheets" formed the basis for the new Collective Agreement. The issue now raised by the Association is a

new issue over which the Board does not have jurisdiction. The Board was never asked to consider annual leave entitlement. The retroactivity of annual leave entitlement was not a "matter in dispute" within the meaning of Section 340.19 of the *Act*. The Board does not have jurisdiction to address a new issue that is not addressed in the Award (*Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.), *St. Michael's Hospital v. Brewery, General & Professional Workers' Union*, [2000] O.L.A.A. No. 918 (Ont. Arb.) (Beck)). The Arbitration Board cannot be reconvened to issue a supplemental award on such a new issue. Neither the parties nor the Board intended that the Board retain jurisdiction to address retroactivity of the items in the "sign off sheets". The question of retroactivity was considered by the Board only in relation to the issue of wages. It must be presumed that retroactivity does not apply to the other items. The City did not intend, by making submissions on the issue of retroactivity of wages, that all agreed items would be applied retroactively. The Board is *functus officio*. When the Board issued its Award on the six issues referred to the Board, the Board fulfilled its mandate and exhausted its jurisdiction, except to the extent necessary to correct clerical mistakes or accidental omissions, to clarify the decision to reflect the manifest intent of the Board, pursuant to any jurisdiction retained by the Board, or where authorized by statute. The request by the Association did not relate to an error in the Award or clarification of the manifest intent of the Board. Any variation in the substance of the Award that results in a revision of the Award, is prohibited by the doctrine of *functus officio*. If the Board could inquire into and interpret the language agreed by the parties, as set out in the "sign off sheets", the result would be instability in labour relations between the parties. The issue in dispute related to retroactivity was properly the subject of a rights arbitration under the Collective Agreement. The Association had filed a grievance and the availability of the grievance and arbitration procedure meant that the parties had an alternate remedy available. The request by the Association was filed extraordinarily late after the date of the Award. There was an unreasonable delay. To reopen such an issue some 22 months after the date of the Arbitration Award was not in the interests of stable labour relations. The parties were entitled to have finality from the Award. The Employer requested that the Board dismiss the Association's request due to lack of jurisdiction.

Association Submission

8 The Association submitted that the parties agreed to changes in annual leave enhancements but did not address the issue of retroactivity. That issue was left to the Board to implement in the usual course. The Board set a three year term for the Collective Agreement from January 1, 2004 to December 31, 2006, and did not order any changes to the way in which retroactivity is normally addressed. The Board expressly reserved its jurisdiction, for the duration of the Collective Agreement, to resolve any interpretation issues relating to the Award. The Association requested that the Board resolve the disagreement between the parties concerning the Award's interpretation. The Board had retained jurisdiction for that purpose. The Board was in the best position to advise the parties on the intent of the Award. The Board ordered that wage adjustments for former employees be made retroactive to January 1, 2004 and rejected the Employer's submission on that issue. The Employer's submission on retroactivity of wage adjustments was an acknowledgement that other items would be retroactive. The Board has the inherent jurisdiction to clarify its Award and to give effect to its intent (*N.S.G.E.U. v. Capital District Health Authority* (2006), 153 L.A.C. (4th) 1 (N.S. C.A.)). The Board's statement that "employees should not be prejudiced as a result of the length of time it takes to complete negotiations or the arbitration process", indicated that the intent of the Board was that issues such as enhancements to annual leave were to be applied retroactively. The Board was not *functus officio* for the purpose of clarifying the Award. It would be unnecessary to present any new evidence on the merits of the issue. The request was not untimely. There was no language in the Board's reservation of jurisdiction stating any time limit. The filing of a grievance by the Association on the issue of retroactivity was done for the purpose of preserving time limits and was not an admission by the Association that the interest arbitration Board did not have jurisdiction. The Association requested that the Board find that it had jurisdiction to decide the issue of retroactivity of annual leave entitlements.

Considerations

9 The Board has identified the following issues: (1) What retained jurisdiction does an interest arbitration board have, following the issuance of the award, according to arbitral, statutory and common law authority? (2) What were the issues over which the Board had jurisdiction when it issued the Award? (3) What is the effect of the Board attaching the "sign off sheets" to the Award? (4) Does the Board have jurisdiction in this case, according to the applicable principles? (5) Is the Board *functus officio* as a result of delay by the Association before it made the request to the Board? (6) What is the effect of the Association filing a rights grievance on the same issue?

10 Upon issuing the Arbitration Award, the Board of Arbitrators is *functus officio*, meaning that the Board has exhausted its jurisdiction, and cannot alter or add to the Award, subject to recognized exceptions. The Board retains jurisdiction, based on arbitral and common law authority, to correct clerical mistakes, to correct errors arising from accidental slips or omissions or to clarify the Award where it does not reflect the manifest intention of the Board (Brown & Beatty, *Canadian Labour Arbitration*, 4 th edition, paragraph 1:5600 and *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.)). The Board also has jurisdiction by arbitral and common law authority to complete the award, where the Board has not addressed one of the issues over which it has jurisdiction. The Board also may be granted jurisdiction by statute following the issuing of the award. The Board also may expressly retain jurisdiction for certain purposes. In the Award, the Board expressly retained jurisdiction and stated that it "retains jurisdiction in the event the parties do not agree on the interpretation of the Award".

11 The issue raised by the Association is not an issue of correction of a clerical mistake or an error arising from an accidental slip or omission. Also there is no statutory provision for retained jurisdiction. The Association submits that the Board has jurisdiction on three grounds namely, (1) the implied retention of jurisdiction to clarify the Award to express the manifest intention of the Board, (2) the implied jurisdiction to complete the Award, or (3) the expressly stated jurisdiction to interpret the Award where the parties do not agree on its interpretation.

12 What were the issues over which the Board had jurisdiction? Do those issues include the issue of retroactivity of enhancements to annual leave provisions in the Collective Agreement? The Board has jurisdiction, pursuant to Section 340.19 of the *City of St. John's Act* over the "matters in dispute ...referred to a board of arbitrators". At the commencement of the arbitration hearing, the parties identified six issues in dispute upon which the Board was requested to make a determination, namely, long term disability, captains, training, Goulds Fire Station, wages and duration. The enhancements to the annual leave provisions were not expressly identified by the parties as an issue in dispute. It was a matter that was agreed by the parties and set out in one of the "sign off sheets" attached as Schedule "A" to the Award.

13 The Association submits that retroactivity of the annual leave enhancements, and retroactivity generally, was a matter in dispute referred to the Board. The Board addressed the issue of retroactivity with respect to the issue of wages, which was one of the six issues in dispute before the Board. However, the issue of retroactivity generally was not an issue in dispute. The Board was asked to decide whether wage increases applied retroactively and whether retroactive wage increases applied to former employees who had retired or otherwise left the employ of the Employer. The Board decided, having regard to the authority in *Moose Jaw Firefighters Association, Local No. 553 ad City of Moose Jaw*, unreported, March 27, 2002 (Priel) (the "*Moose Jaw*" award), that the increases in wages ought to be applied retroactively and paid to former employees. While the Board applied the general principles on retroactivity stated in the *Moose Jaw* award, the order of the Board on retroactivity was made solely in relation to the issue of wages. Retroactivity was not a separate issue in dispute between the parties. It was considered as part of the issue of wages. The Board was not asked to make any ruling on retroactivity of any other provision of the Collective Agreement, including retroactivity of annual leave enhancements. The Board was also asked to decide the duration of the Collective Agreement. However, in deciding the issue of duration, there was no disagreement with respect to the starting date of the Collective Agreement. The starting date was immediately upon expiry of the preceding collective agreement. The dispute between the parties with respect to duration concerned the expiry date of the Collective Agreement and the length of time that the Collective Agreement would be in effect. When

it decided the issue of the duration of the Collective Agreement, the Board was not required to address any issue of retroactivity. Therefore, the issue of retroactivity did not become an issue before the Board. The retroactivity of annual leave enhancements was not one of the issues referred to the Board. Enhancements to the annual leave provisions was not a "matter in dispute" under the *Act*.

14 What is the effect of attaching the "sign off sheets" as Schedule "A" to the Award? As noted in the Award, the parties agreed on various matters during collective bargaining, and these were signed off by the parties on separate sheets. One of the "sign off sheets" set out the agreement of the parties on Article 15 pertaining to enhancements to the annual leave provisions. The Board attached this sheet and other "sign off sheets" to the Award as Schedule "A". The matters that were agreed in the "sign off sheets" were not issues presented to the Board for decision. At the request of the parties, the Board attached the "sign off sheets" in order to include in the Award the agreements made by the parties that were part of the new Collective Agreement. The Board did not give any consideration, nor was the Board asked to give consideration, to the contents of the "sign off sheets". The effect of attaching the "sign off sheets" was not to grant to the Board a retained jurisdiction to interpret, or clarify anything contained in the "sign off sheets". Attaching the "sign off sheets" does not give the Board jurisdiction over any issue of retroactivity concerning the items set out in the "sign off sheets".

15 The Board has considered the *Moose Jaw* award, and finds that it does not operate to give the Board jurisdiction over the issue raised by the Association. In the *Moose Jaw* award, the arbitration board awarded benefits to be applied retroactively. However, the arbitration board did not state whether the retroactive benefits were to be extended to former employees. The *Moose Jaw* award considered that, where a benefit was made retroactive, it was properly an issue of clarification as to whether the retroactive benefits applied to former employees. However, in this case, the Board has not made any order with respect to retroactivity of benefits, specifically, retroactivity of annual leave enhancements. If the Board had made an order on retroactivity of annual leave enhancements, then, based on the authority of the *Moose Jaw* award, the Board could consider whether the retroactive benefits applied to former employees.

16 Does the Board have jurisdiction in this case? The Board did not make any order in the award on annual leave enhancements. The issue of annual leave enhancements was not an issue in dispute before the Board. The Board cannot clarify its manifest intent on an issue that was not addressed by the Board, and the Board does not have jurisdiction on that basis. The Board does not have jurisdiction on the basis of interpreting the Award because the Board did not make an award on that issue. The Board does not have jurisdiction on the basis of completing the Award because the issue was not referred to the Board by the parties as an issue in dispute. Therefore, the Board does not have jurisdiction based on the applicable principles.

17 Is the Board *functus officio* as a result of delay before the request was made to the Board? The jurisdiction retained by the Arbitration Board in the Award is not expressly stated to have any time limit, and there is no automatic loss of jurisdiction based on expiry of a stated time limit. It is in the discretion of the Board to find that it is *functus officio* on the grounds of delay. However, because the Board has found that it lacks jurisdiction over the issue of retroactivity of enhancements to annual leave provisions, it is unnecessary to make any finding on the issue of delay.

18 What was the effect of the Association filing a rights grievance on the same issue? The Board finds that the filing of a rights grievance does not have any effect on the Board's jurisdiction.

19 The Board finds that it does not have jurisdiction over the question of retroactivity of annual leave enhancements. This was not one of the issues referred to the Board by the parties, and it was not one of the issues on which the Board made an order in the Award. The Board does not have jurisdiction to interpret retroactivity of a provision that was agreed by the parties and was attached to the Award as one of the "sign off sheets".

Decision

20 The Board does not have jurisdiction over the issue of retroactivity of enhancements to annual leave provisions. The request by the Association is denied.

***M.F. O'Dea Member*:**

21 In its decision dated August 12, 2005, this interest Arbitration Board (the "Board") retained "jurisdiction in the event that the parties do not agree on the interpretation of the award".

22 The parties had agreed to changes to Article 15 of the Collective Agreement concerning enhanced annual leave entitlements, and remitted this change to the Board for inclusion in its award. This agreed upon item was included in Schedule A of the Award.

23 It became obvious to the parties by June, 2005 that they disagreed on the retroactivity of this amended Article. The Association was of the view that it was intended that this article be retroactive to te beginning of the three year Collective Agreement term, commencing January 1, 2004 and that it applied to former employees who were not employed on August 12, 2005. The City disagreed.

24 Thus, the Association applied to the Board for the Board's interpretation. The City submitted that the Board did not have the jurisdiction over the question of retroactivity of annual leave enhancements.

25 The majority of the Board agreed with the City's position on lack of jurisdiction.

26 I would respectfully disagree for the following reasons.

27 The Board's jurisdiction included the determination of the duration of the new Collective Agreement which it set on January 1, 2004 to December 31, 2006.

28 Inherent in the duration issue is the issue of retroactivity, i.e. the provision for retroactivity of at least some of the provision of the Agreement.

> The purposes of the duration clause would appear to be several, and to include (a) the establishment of continuity as between successive agreements (b) the establishment of equally-spaced termination dates and hence of equally spaced periods of negotiations, and (c) the provisions for retroactivity of at least some of the provisions of the Agreement.

Brown & Beatty 4:1610 Canadian Labour Arbitration, 4:160

29 I submit that if the parties had realized, prior to the conclusion of the hearings on June 16, 2005, that they were not in agreement on the retroactivity of the enhanced annual leave "signed off article, the Board would have found it had the jurisdiction to deal with that issue. I would conclude that the jurisdiction of the Board then is the same jurisdiction it now has since the Board retained that jurisdiction in the event that parties did not agree on the interpretation of the award.

30 In the Moose Jaw Supplementary Award the Board stated at Page 2:

> We are of the opinion that it is the obligation of a Board of arbitrators to direct its efforts in the arbitration process to produce an award which is final, binding and enforceable on the parties. Enforcement of a decision of a Board of Arbitration is basic to that process, in the words of Arbitrator Hope, at p. 118 of the Insurance Corporation of British Columbia case:
>
> > An integral part of the process is a right in either party to seek clarification of an award and a jurisdiction in an Arbitrator to provide clarification so that the scheme of the Act and the rights of the parties are not defeated by imprecision in the rendering of a decision.,

31 I do appreciate the reasoning of the majority that under s. 340.19 of the City of St. John's Act the Board was only asked to deal specifically with six issues and that did not include changes to the Collective Agreement language concerning annual leave entitlement and retroactivity thereof; but that was because the parties did not learn until later that they were not ad idem. I would repeat that the Board certainly had jurisdiction then to decide that issue - a jurisdiction the Board retained.

32 We are not asked for an interpretation of the new Article 15. I agree that the Board could hardly be asked what it intended with the new language since the Board did not write it.

33 However, the Board did deal with retroactivity and decided in general terms that former employees were entitled to retroactive wage and benefit settlements and specifically ordered that wage settlements were to be retroactive and applied to all former employees. It was not known at the time that there was any disagreement as to enhanced of annual leave article and its retroactive effect.

34 The board at page 19 of the August 12, 2005 Award stated:

> with respect to retroactivity, the Board accepts the observations in the Moose Jaw Award and the Board finds its to be reasonable that former employees be entitled to retroactive wage or benefit settlements. The former employer should not be prejudiced as a result of the length of time it takes to complete negotiations and the arbitration process. Wage increases shall be retroactive and shall apply to former employees.

35 We have to ask ourselves what was the manifest intent of the Board on the question of retroactivity. The Board accepted the observations of the *Moose Jaw Award*. This Supplementary Award reads at p. 6:

> **Paragraph 1**
>
> **The Employer takes the view that it is only those employees on staff at the time our decision was made, i.e. February 14, 2002 who are entitled to the benefits of the award. The union takes the view that the award benefits all employees covered by the Collective Bargaining Agreement who were employees during the term of the Agreement, i.e. January 1, 1999 and after, even though some of those employees subsequently ceased to be employees.**

36 The Board concludes at Paragraph 4:

> The Board is unanimously of the view that current Arbitral jurisprudence does not support the Employee's position. Rather, it supports the Union's position. Reason and logic also support the Union's position.

37 In the case before us the Award together with all items in schedule A formed the Collective Bargaining Agreement and it benefits all employees covered by the Collective Bargaining Agreement from January 1, 2004 to December 31, 2006, down to the time that the employee ceased to be an employee, if indeed that occurred.

38 The principle of functus officio holds that a tribunal cannot revisit a matter which it has finally decided. However, there were some exceptions. One is that a tribunal can revisit a matter if that is necessary to give effect to its "manifest intent".

39 One must determine what the manifest intent was in reference to all benefits and then whether the language gave effect to that intent. To the extent that the language may have been deficient in expressing the manifest intent the Board has inherent jurisdiction to effect language clarifications to ensure that the language of the Award gives effect to its manifest intent.

40 *N.S.G.E.U. v. Capital District Health Authority* (2006), 153 L.A.C. (4th) 1 (N.S. C.A.)

41 I think that the Board dealt fully with the retroactivity issue and clearly determined that former employees were entitled to retroactive wage and benefit settlements. It is true that the formal Order on retroactivity only referred to wages because the parties had not addressed the issue of retroactivity of benefits such as the enhancement of annual leave. It seems to me that the City in submitting and arguing that wage adjustments should not be made retroactively, was acknowledging that all other changes in benefits to the Collective Agreement would be treated in the usual course as commencing from the start date of the Collective Agreement. This was reflected in the Board's Order setting a three year duration for the Collective Agreement, without any changes to the normal way in which retroactivity is addressed.

42 The Board certainly had the jurisdiction to decide the retroactivity of benefits, which jurisdiction it still has, and the Association has the right to seek specific clarification of what appears to be the manifest intention of the Board, which clarification would require few words.

43 "Reason and logic" support the Association's position. The Board has already adopted the position taken in the Moose Jaw Supplementary Award, and indeed that of most arbitrators, that wages, benefits and other forms of remuneration are presumed to be retroactive to the date on which agreement was made effective and not to the date when it was signed. This enhanced annual leave article is a benefit/remuneration item and why would we not simply state that it falls in the same category as wages and as such is retroactive. It seems to me that we have already decided the issue and we should now express it.

End of Document

TAB 10

Date: 20070515

Docket: T-2126-06

Citation: 2007 FC 517

Ottawa, Ontario, May 15, 2007

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

I.M.P. GROUP LIMITED,
AEROSPACE DIVISION (COMOX)

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

1. Introduction

[1] This application involves a labour dispute between the Applicant, I.M.P. Group Limited, Aerospace Division (Comox), a division of I.M.P. Group Limited (IMP or the Employer), and certain of its employees whose bargaining agent is the Respondent, the Public Service Alliance of Canada, UNDE Local 1018 (PSAC or the Union). The Applicant seeks judicial review of the interest arbitration award of Arbitrator Vincent L. Ready, dated May 24, 2006.

[2] IMP is a federal undertaking by reason of its aviation and aerospace operations. Accordingly, for labour relations purposes, it is governed by the provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the *Code*).

2. Factual Background

[3] I begin by outlining the history that gave rise to this application.

[4] On July 7, 2003, PSAC was certified under the *Code* as the bargaining agent for IMP employees working at CFB Comox, Hanger 14, Lazo, British Columbia with the exception of the Site Manager, Deputy Site Manager and Crew Chief positions. Between October 20, 2003 and December 3, 2003, the parties unsuccessfully attempted to negotiate a first collective agreement. Eventually, the Union and the Employer entered into an arbitration agreement whereby the remaining items in dispute would be decided by way of a final and binding interest arbitration (the Arbitration Agreement).

[5] Pursuant to the Arbitration Agreement, which is specifically authorized by subsection 79(1) of the *Code*, Mr. Vincent Ready was appointed to decide the remaining terms of the parties' first collective agreement. The following sets out the chronological sequence of events.

1. Award #1: Following an oral hearing on August 12, 2004, Arbitrator Ready published an arbitration award on September 17, 2004 (Award #1) in which he ruled on the issues in dispute between the parties, save for one item (the addition of the Crew Chief and Training

Instructor positions to the bargaining unit) which was the subject of another proceeding before the Canada Industrial Relations Board (the CIRB). In his Award #1, Arbitrator Ready retained jurisdiction as an interest arbitrator to settle the terms and conditions in the event that any of these positions were found to be in the bargaining unit. In addition, Arbitrator Ready, on his own motion, stated that he retained jurisdiction to resolve any issues arising out of the implementation of Award #1.

2. Award #2: On October 1, 2004, the CIRB held that the Crew Chief position was to be included in the bargaining unit. As a result of the inclusion of the Crew Chief position in the bargaining unit, Arbitrator Ready received and considered submissions on the Crew Chief's wage rate. On December 20, 2004, Arbitrator Ready issued a further arbitration award (Award #2), addressing the issues of the Crew Chief's wage rate, and several other issues.

3. Award #3: On January 27, 2005, the Union wrote to Arbitrator Ready requesting that he reconsider the wage rates for the Crew Chief position and order that the wage grid be made retroactive. After consideration of submissions, on March 15, 2005, Arbitrator Ready issued a further arbitration award on the issues of the Crew Chief's correct wage rate and on retroactivity (Award #3).

4. Collective Agreement: Based on the three arbitration awards of Arbitrator Ready, the Union and the Employer prepared and signed their first collective agreement on March 15,

2005 (the Collective Agreement). The Collective Agreement contains a grievance procedure (Grievance Procedure).

5. Grievance: Soon after the signing of the Collective Agreement, the parties realized that they differed significantly in their understanding of Arbitrator Ready's award with respect to Crew Chief premiums and acting pay. A group grievance was filed by the Union on April 7, 2005.

6. PSAC Approach to Arbitrator Ready: The parties agreed on a grievance arbitrator to hear the arbitration (Mr. Brian Foley) and were in the process of negotiating dates for the arbitration when, on January 5, 2006, the Union requested that, even though grievances had been filed on the issues of the Crew Chief's premium pay and retroactive pay, Arbitrator Ready nevertheless rule on these matters.

7. Award #4: By letter dated February 8, 2006, Arbitrator Ready informed the parties of his conclusion that the matters fell within the ambit of implementation of his previous awards and requested written submissions from the parties on the issues. After further submissions, on May 24, 2006, Arbitrator Ready issued an arbitration award (Award #4) in which he again dismissed the Employer's objections to his jurisdiction. Further, he ordered that the Applicant's Crew Chiefs be paid premiums and ordered that acting pay be paid retroactively, for all hours where an employee performs the duties and responsibilities of a higher position, without a waiting period.

[6] It is Award #4 that is the subject of this judicial review.

3. Issues

[7] This dispute revolves around the authority of Arbitrator Ready to issue Award #4, given that the Collective Agreement was in place. As I understand the submissions, the Employer does not, in this application, address the merits of Award #4. Thus, the determinative issue is:

> Was Arbitrator Ready *functus officio* once the Collective Agreement was signed or was he able to rely on one of the exceptions to *functus officio*?

4. Jurisdiction of the Federal Court

[8] Since the Federal Court does not often deal with labour disputes of this nature, I turn to the jurisdiction of the Federal Court to hear this application. Jurisdiction pursuant to s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, depends on whether the body which made the decision obtains its source of jurisdiction and powers from an Act of Parliament. In this case, Mr. Ready purports to exercise his authority under s. 79 of the *Code*. That provision states that:

79. (1) Despite any other provision of this Part, an employer and a bargaining agent may agree in writing, as part of a collective agreement or otherwise, to refer any matter respecting the renewal or revision of a collective agreement or the entering into of a new collective agreement to a person or body for final and binding determination.	79. (1) Par dérogation aux autres dispositions de la présente partie, l'employeur et l'agent négociateur peuvent convenir par écrit, notamment dans une convention collective, de soumettre toute question liée au renouvellement ou à la révision d'une convention collective, ou à la conclusion d'une nouvelle convention collective à une personne ou un organisme pour décision définitive et exécutoire.

(2) The agreement suspends the right to strike or lockout and constitutes an undertaking to implement the determination.	(2) L'entente suspend le droit de grève ou de lock-out et constitue l'engagement de mettre en oeuvre la décision.

[9] In this case, the parties had proceeded to finalize the terms of their collective agreement through the use of what is commonly referred to as "interest arbitration", pursuant to s. 79 of the *Code*. The parties agree that the Federal Court has jurisdiction to judicially review the decision of Mr. Ready.

[10] It is interesting and, in this case, very relevant to note that the *Code* explicitly excludes Federal Court jurisdiction for some arbitration decisions made under the *Code*. Sections 56 to 69 of the *Code*, which deal with the "Content and Interpretation of Collective Agreements", provide a comprehensive scheme for dealing with issues that arise under existing collective agreements. This includes provisions that deal with the role and appointment of arbitrators to settle "any difference that arises between parties to a collective agreement" (s. 57). Subsection 58(3) provides that:

58. (3) For the purposes of the *Federal Courts Act*, an arbitrator appointed pursuant to a collective agreement or an arbitration board is not a federal board, commission or other tribunal within the meaning of that Act.	58. (3) Pour l'application de la *Loi sur les Cours fédérales*, l'arbitre nommé en application d'une convention collective et le conseil d'arbitrage ne constituent pas un office fédéral au sens de cette loi.

[11] Thus, if the parties had proceeded with arbitration of their differences under the terms of their Collective Agreement, the decision of the arbitrator would not be reviewable by the Federal

Court. A provincial superior court would have had jurisdiction. This type of arbitration is often referred to as “grievance arbitration” or “rights arbitration”. (For a description of the difference between these two types of arbitration, see *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28 at para. 53.)

5. Arbitrator Ready’s decision to assume authority for Award #4

[12] I turn now to the decision in question in this application. As noted earlier, the dispute about Crew Chief premiums and retroactive pay arose subsequent to the execution of the Collective Agreement. The Union asked Arbitrator Ready to rule on these issues.

[13] The opposition of the Employer to the authority of Arbitrator Ready to issue Award #4 was made very clear to Arbitrator Ready in written submissions. The initial response, dated February 8, 2006, from Arbitrator Ready was simply that “both of these matters fall within the ambit of implementation of my awards” and were, hence, “within my jurisdiction”. An expanded explanation of this response was contained in Award #4:

> While [the February 8, 2006] ruling provides a full and complete answer to the Employer’s submission, I will take the time to elaborate further that the matters being brought before me in this case are “clarification” issues relating to the implementation of the awards dated September 17 and December 20, 2004 and March 15, 2005.
>
> The matter of Crew Chief premiums finds roots in my ruling in the latter two decisions [Award #2 and Award #3] that:
>
> > In addition to the wage rates set out above, I award that the applicable premiums be paid.

> The present dispute relates to what was intended by "applicable premiums". The resolution of that dispute falls squarely within my retained jurisdiction as an interest arbitrator.
>
> Turning to the matter of the retroactive pay/acting pay, I dealt with these issues in my September 17, 2004 award [. . .]
>
> In addition to expressly retaining jurisdiction, again the issue in dispute here is a matter of clarification of the above as it relates to the timing and payment of acting pay.

6. Analysis

6.1 *Standard of Review*

[14] The jurisprudence is clear that, in assessing Arbitrator Ready's decision, I must conduct a pragmatic and functional analysis to determine the appropriate standard of review (in the area of labour relations, see, for example, *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, 238 D.L.R. (4th) 217, 318 N.R. 332, [2004] S.C.J. No. 2 at para.15). As stated by Justice Major in *Voice*, above at para. 15, "The purpose is to ascertain the extent of judicial review that the legislature intended for a particular decision of the administrative tribunal".

[15] The pragmatic and functional approach involves the consideration of four contextual factors: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question -- law, fact or mixed law and fact.

[16] The requirement that a pragmatic and functional analysis be undertaken in every case emphasizes the importance of identifying the particular question at issue in the decision under review in any given case (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, 263 D.L.R. (4th) 113, 344 N.R. 257, [2005] F.C.J. No. 2056 at para. 50 (F.C.A.) (QL)). In this case, the determinative question in issue is whether, given the existence of the Collective Agreement between the parties, Arbitrator Ready was *functus officio*. I note that this is a threshold question. If Arbitrator Ready was *functus officio*, he was without authority to consider the correct interpretation of the provisions of his earlier awards on the matters of the Crew Chiefs' premiums and retroactive pay.

(a) Privative Clause

[17] There is no privative clause in the *Code* with respect to the decision of a "person or body" selected under s. 79(1) of the *Code*. Nevertheless, the words "final and binding determination", in s. 79(1), appear to suggest some degree of deference.

[18] With respect to the use of the words "final and binding", I note that such language was considered by the Supreme Court in *Voice Construction*, above at paras. 25-26, where the words "final and binding" were included in the collective agreement and the word "final" was used in a relevant statutory provision. In Justice Major's view, these provisions did not constitute full privative protection; however, he stated that "they suggest that increased consideration be given to the decisions of labour arbitrators" (at paras. 25-26).

[19] For purposes of my analysis, it is significant that a “person or body” performing an arbitration under s. 79 is not included in the definition of “arbitrator” under the *Code* (s. 3). Section 58 of the *Code* applies to an arbitrator, as defined in the *Code*, and provides as follows:

58. (1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.	58. (1) Les ordonnances ou décisions d’un conseil d’arbitrage ou d’un arbitre sont définitives et ne peuvent être ni contestées ni révisées par voie judiciaire.
(2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of their proceedings under this Part.	(2) Il n’est admis aucun recours ou décision judiciaire — notamment par voie d’injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l’action d’un arbitre ou d’un conseil d’arbitrage exercée dans le cadre de la présente partie.
(3) For the purposes of the *Federal Courts Act*, an arbitrator appointed pursuant to a collective agreement or an arbitration board is not a federal board, commission or other tribunal within the meaning of that Act.	(3) Pour l’application de la *Loi sur les Cours fédérales*, l’arbitre nommé en application d’une convention collective et le conseil d’arbitrage ne constituent pas un office fédéral au sens de cette loi.

[20] Thus, while the decision of an “arbitrator” is protected by a very strong privative clause, no similar privative clause is in place for Arbitrator Ready.

[21] The failure to include a privative clause for decisions by a “person or body” under s. 79 must be presumed to have been an intentional omission by Parliament (*Ruth Sullivan, Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths Canada Ltd. 2002) at 162-163).

[22] Thus, I conclude that the lack of a privative clause indicates that less deference is owed to a "person or body" acting pursuant to s. 79.

(b) Expertise

[23] There is no question that Arbitrator Ready is extremely well-qualified and experienced in labour relations matters. As typified by the comments of Justice Major in *Voice Construction*, above at para. 27, arbitrators, "who function within the special sphere of labour relations, are likely, in that field to have more experience and expertise in interpreting collective agreements". However, the question in this case is not one that, in my view, relies on Arbitrator Ready's expertise in labour negotiations. In addressing the threshold question of whether or not he retained the authority to issue Award #4, I believe that the Court is in as good a position as Arbitrator Ready. This suggests less deference.

(c) Purpose of the legislation and s. 79 of the *Code*

[24] In general, the purpose of the *Code* is to foster good industrial relations between unionized employees and their employers. In the particular context of this application, s. 79 provides the parties with a mechanism for finalizing a collective agreement. The role of the "person or body", acting under s. 79, is to resolve a two-party dispute. This is not an example of "polycentric" decision. This does not suggest an increased level of deference.

(d) Nature of question

[25] The final factor relates to the nature of the question. Is this a question of law, of fact, or of mixed fact and law? The issue of whether Arbitrator Ready was entitled to rely on the exception to *functus officio* is a question of mixed fact and law. It is mixed fact and law because he must apply the general principles of *functus officio* to the particular facts of this case.

[26] In dealing with the issue of whether an interest arbitration board's supplemental award gave effect to its intent manifest in the earlier main award, the Nova Scotia Court of Appeal pointed out that this question was at the fact intensive end of the spectrum of questions of mixed law and fact (*Capital District Health Authority v. Nova Scotia Government and General Employees Union*, 2006 NSCA 85, [2006] N.S.J. NO. 281 at para. 50 (N.S.C.A.) (QL)). Thus, the Nova Scotia Court of Appeal found that this supports giving some deference to interest arbitration board (*Capital District*, above at para. 50). However, I note that the Court in *Capital District* was not faced with a completed collective agreement. Thus, in this case, while acknowledging that there is some factual content to the decision, my view is that the question is more heavily weighted to a question of law.

[27] In conclusion on the issue of standard of review, I find that the decision of Arbitrator Ready on the question of whether he was *functus* is reviewable on a standard of correctness.

[28] My conclusion is consistent with the views of Justice LeBel in *Isidore Garon Ltée v. Tremblay*, 2006 SCC 2, 262 D.L.R. (4th) 385, 344 N.R. 1, [2006] S.C.J. No. 3 at para. 90. Speaking

for the minority (the majority not expressing a view on the standard of review) and without conducting a pragmatic and functional analysis, Justice LeBel stated that:

> This appeal raises the question of whether the arbitrator had the power to apply arts. 2091 and 2092 *C.C.Q.* to decide the grievances. This is a question of law relating to the arbitrator's jurisdiction. Accordingly . . . the applicable standard of review is correctness. [Citations omitted.]

6.2 *Principles of Functus Officio*

[29] The rule described as *functus officio* is intended to provide finality to decisions. In general, once a tribunal – be it a court or administrative tribunal – has rendered its decision, it cannot reopen the matter.

[30] The leading case dealing with this legal rule in the context of administrative decision makers is *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577, 99 N.R. 277. The Supreme Court affirmed that an administrative tribunal may only reopen a decision if authorized by statute or if there was an error in expressing the "manifest intention" of the court (*Chandler* at 860, citing *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186). Justice Sopinka, speaking for the majority at paras. 21-23, provided the following rationale and guidance:

> [In the context of administrative tribunals, the principle of functus officio] is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. […]
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. […]

[31] In sum, the rule of *functus officio* must be applied with some flexibility to ensure that justice is done between the parties. This, in my view, requires a review of the circumstances surrounding the role and function of Arbitrator Ready. I will begin with the basic question of the mandate (under statute and the Arbitration Agreement) of Arbitrator Ready. I will then consider the role of the Grievance Procedure in the Collective Agreement. Finally, I will consider whether, in spite of the analysis, Arbitrator Ready should be permitted to provide the parties with Award #4 on the basis of the "manifest intention" exception to the rule of *functus officio*.

6.3 *Mandate of Arbitrator Ready*

[32] The authority of Arbitrator Ready arises from the provisions of the *Code* and of the Arbitration Agreement. Although referred to by the parties and in these reasons as "arbitrator", Arbitrator Ready is not an "arbitrator" as defined in the *Code*; rather, he is a "person" who has been selected by the parties for the limited purpose defined by s. 79(1) of the *Code*.

[33] In my view, there are a number of factors that arise from the *Code*, the Arbitration Agreement and the actions of the parties that support a conclusion that the role of Arbitrator Ready was completed as of the signing of the Collective Agreement. The basis of my conclusion is based on three such factors:

- The words of s. 79(1);

- The intent of the Arbitration Agreement as indicated by the parties and recognized by Arbitrator Ready; and

- The lack of agreement by the Employer to the continued mandate beyond the Collective Agreement.

None of these relevant factors were considered by Arbitrator Ready in reaching his decision to issue Award #4.

[34] Pursuant to s. 79(1) of the *Code*, an employer and a bargaining unit may agree in writing "to refer any matter respecting the renewal or revision of a collective agreement or the entering into of a new collective agreement to a person or body for final and binding determination" [emphasis added]. Under this provision, Arbitrator Ready's authority was directed to the entering into of the first collective agreement between the parties. On its face, s. 79(1) indicates that the mandate of the

"person or body" selected is limited to the entering into of the collective agreement. It follows that, once the collective agreement has been signed by the parties, his mandate expires.

[35] I also note that s. 79 provides a voluntary process; neither party is obligated to pursue this avenue to resolve their dispute. Thus, it is important that any interpretation of the interest arbitrator's authority does not extend beyond that agreed to by the parties.

[36] I turn now to the Arbitration Agreement dated March 4, 2004. There is no reference whatsoever in this agreement to a "collective agreement". The closest that I have are the two recital clauses that provide as follows:

> WHEREAS the parties are unable to resolve certain issues arising from collective bargaining.
>
> AND WHEREAS the parties have agreed that there will be final determination of the remaining issues in dispute by binding arbitration.

[37] The clauses of the agreement focus on the procedure to be followed for this "binding arbitration" and do not address when the mandate of Arbitrator Ready is to end. However, the lack of reference to the Collective Agreement does not, in my view, leave the arbitration mandate open-ended. Arbitrator Ready, in Award #1, clearly describes his task as follows:

> On July 30, 2003, the Public Service Alliance of Canada (PSAC) served I.M.P. with Notice to Bargain. The parties met in Comox, British Columbia on October 20-28 and December 1-3, 2003 for the purposes of negotiating a first Collective Agreement. Although substantial progress was made on a number of matters, the parties were not able to reach an agreement on all outstanding issues.

> The parties participated in conciliation sessions from March 2-4, 2004. At the conclusion of this process, the parties were still far apart on wages and other matters. They agreed to proceed by interest arbitration to settle the outstanding issues. These are now before me.

[38] Arbitrator Ready left open the possibility of further arbitration awards in Award #1 where he stated, “I shall retain jurisdiction to resolve any issue(s) arising out of the implementation of this award.” Using this self-proclaimed authority, Arbitrator Ready proceeded to deal with further questions on the Crew Chief Position and the retroactive wages and to issue Award #2 and Award #3, the substance of which were incorporated into the Collective Agreement. Neither party disputed the authority of Arbitrator Ready to continue his role up to the time that the Collective Agreement was signed. However, once the Collective Agreement was in place, it is obvious that the Employer was of the view that the tasks defined by s. 79(1) of the *Code* and the Arbitration Agreement had been completed. In effect, there was no agreement for the continued actions by Arbitrator Ready; it is therefore arguable that none existed. Nor could Arbitrator Ready’s claim of continued jurisdiction protect Award #4 if he was otherwise *functus*. As noted above, *Chandler* makes it clear that reserving a right to render further decisions does not necessarily preserve jurisdiction.

[39] Finally, I note that, upon Arbitrator Ready’s interpretation, his authority would never end. Once again, that cannot have been the intention of the parties to the Arbitration Agreement or of s. 79(1) of the *Code*.

[40] In conclusion on this point:

- s. 79(1) of the *Code* limits the mandate of Arbitrator Ready to resolving disputes prior to the entering into of the collective agreement;

- the intent of the parties to the Arbitration Agreement was for Arbitrator Ready to finalize a Collective Agreement, which task was completed upon its signing; and

- there was no consent by the parties to allow Arbitrator Ready to provide "clarification" once the Collective Agreement was signed.

[41] Accordingly, when Arbitrator Ready determined that he was not *functus* and that he could exercise his authority in respect of these alleged matters of "clarification", he erred. In light of these factors, Arbitrator Ready was without authority to issue Award #4.

6.4 *Arbitration Provisions of the Collective Agreement*

[42] While the principles of *functus officio* are flexible, I do not believe that the flexibility can reasonably be applied to the circumstances of this application. Beyond the factors that point to an end to Arbitrator Ready's mandate once the Collective Agreement was in place, there are broad policy and contextual factors that militate against continued authority.

[43] The Union submits: "If there is a dispute over what the Collective Agreement meant, who better than the person who created it?" I acknowledge that Adjudicator Ready has the background knowledge to undertake the task that he performed. But, the fact that he could provide an

interpretation of terms of the Collective Agreement does not mean that he was correct to impose his interpretation upon the parties as part of the exercise of his mandate under the Arbitration Agreement. In my view, Arbitrator Ready's earlier role in assisting the parties in finalizing the Collective Agreement is simply insufficient justification for assuming a continued authority over its interpretation. The main impediment to the Union's argument is the presence of a grievance procedure in the Collective Agreement.

[44] In general, the substantive rights and obligations of an employer and bargaining unit are set out in a collective agreement. Of course, not everything is set out in a collective agreement. For instance, the agreement usually does not define the general law concepts upon which the agreement is based; recourse to general law principles is relevant for the purposes of interpreting the conditions of employment contained in the agreement (*Isidore Garon*, above at para. 28). However, where a collective agreement provides for a mechanism for interpreting the terms of the agreement, that is where the parties should first go to resolve their disputes. Only if the agreement does not provide a mechanism for resolving a particular matter or question should the parties resort to alternative means. I see no reason why an interest arbitrator's authority should change merely because the interest arbitrator had the knowledge to provide an interpretation of the provisions of the Collective Agreement.

[45] In light of this overview of the role of a collective agreement, there are three main problems with the decision by Arbitrator Ready to continue his authority beyond the signing of the Collective Agreement:

- The codification of a grievance procedure in the Collective Agreement;

- The potential for conflicting or duplicative decisions on the substance of the dispute; and

- The potential for duplication of and conflicting decisions due to judicial oversight by two different courts.

[46] The first problem with Arbitrator Ready's decision is that he fails to have regard to the existence and terms of the Grievance Procedure in the Collective Agreement. There is no question that the issues addressed by Arbitrator Ready could have been addressed through the application of Article 29 of the Collective Agreement - the Grievance Procedure.

[47] Of particular relevance to this application, under Article 29.01, the parties recognize that grievances may arise "by the interpretation or application of . . . a provision of this Agreement". The final step of the Grievance Procedure is set out in Article 29.08 and 29.09 of the Collective Agreement, which state as follows:

> 29.08 If the grievance is not satisfactorily settled at Level 3, the grievance may be referred to arbitration, within fifteen (15) working days after the decision received at Level 3.
>
> 29.09 The parties agree that grievances will be heard by a single arbitrator who will be mutually agreed upon by the parties. If mutual agreement is not reached by the parties to choose a single arbitrator within thirty (30) calendar days from the date that either party receives notification of a wish to proceed to arbitration, the Minister of Labour shall be asked to appoint an arbitrator. This appointment shall be accepted by both parties.

> The Arbitrator has all the powers granted to arbitrators under the Canada Labour Code, in addition to any powers which are contained in this Agreement but shall not have the authority to alter or amend any of the provisions of this Agreement nor to substitute any new provisions in lieu thereof, nor to render any decision contrary to the terms and provisions to this Agreement, nor to increase or decrease wages.
>
> The Employer and the Union shall each pay one half of the remuneration and expenses of the Arbitrator and each party shall bear its own expenses of every arbitration. The decision of the Arbitrator will be binding on both parties.

[48] Indeed, the parties had already proceeded through the levels of grievance provided for in the Collective Agreement and had gone so far as to select a grievance arbitrator. Arbitrator Foley was ready, willing and able to conduct the grievance arbitration; all that was left was for the parties to agree to hearing dates. In oral argument before me, counsel for the Union did not disagree that the Union could have proceeded to have its rights determined on the same issues through the grievance procedures in the Collective Agreement.

[49] The consequences of the assumption of authority in circumstances such as these are readily apparent. First, there is the appearance of “arbitrator shopping”; that cannot have been the intent of the Arbitration Agreement or the Collective Agreement.

[50] There is also the possibility of two different – and possibly conflicting – outcomes. This situation could arise as follows. Although the Employer has agreed, for the time being, to a stay of the grievance arbitration, let us assume that either the Employer or the Union does not agree with the interpretation of the Collective Agreement provided by Arbitrator Ready with respect to the issues in question. The unsuccessful party could take the position that it still has a grievance that has

arisen “by interpretation or application of a provision of this Agreement” (Article 29.01(a)(ii)). In such a situation, I cannot see how a party to the Collective Agreement could refuse to follow the Grievance Procedure with final resort to arbitration as set out in Articles 29.08 and 29.09 of the Collective Agreement. Thus, even with Award #4 in place, I am not persuaded that the Employer would be precluded from accessing the Grievance Procedure under the Collective Agreement. By assuming authority for Award #4, Arbitrator Ready has put in motion the possibility of conflicting awards and a duplicative process. Surely, that cannot have been the intent of the Arbitration Agreement.

[51] Further, there is the question of judicial oversight. As noted earlier, the Federal Court only has jurisdiction to review decisions of interest arbitrators. Once the Collective Agreement is in place and grievances are commenced, the Supreme Court of British Columbia would be the forum for judicial review. By pursuing arbitration under the Arbitration Agreement rather than under the Collective Agreement, the possibility of conflicting or, at best, duplicative judicial decisions exists. Surely, that cannot have been the intent of the parties. Even if it had been the intent, it is a serious abuse of scarce judicial resources.

[52] The Union relies on the decision of the Nova Scotia Court of Appeal in *Capital District Health Authority v. Nova Scotia Government and General Employees Union*, above. In that decision, the Court held that an interest arbitration board was not *functus officio*, even though it had issued an earlier award. The Court concluded, at para. 61, as follows:

> In my view, the board reasonably concluded that the language in the main award by which it described eligibility for catch-up increases did not give effect to the manifest intent of that award. Having made that finding, the board was entitled under the relevant legal principles to issue its supplemental award to clarify this issue, as it did.

In other words, the board was not *functus*.

[53] The key distinction between the situations faced by the Court in *Capital District Health Authority* and that before me is the existence of the Collective Agreement. In *Capital District Health Authority*, there was no collective agreement referred to. The principles relied on by the Nova Scotia Court of Appeal could, arguably, have applied to the issuance of Awards #2 and #3 which were completed prior to the execution of the Collective Agreement. In my view, however, the decision in *Capital District Health Authority* does not assist the Union with respect to the decision to issue Award #4 after the signing of the Collective Agreement.

[54] In summary on this matter, I conclude that the circumstances of this case preclude the application of an exception to the rule of *functus officio*, primarily due to:

- The existence of the Grievance Procedure in the Collective Agreement; and

- The potential for conflicting arbitration and judicial decisions.

6.5 *Manifest Intention*

[55] As noted above, a tribunal may rely on an exception to the *functus* rule "where there has been error in expressing the manifest intention of the court" (*Chandler*, above). It was on this basis that the court in *Capital District Health Authority* permitted a further interest arbitration award.

[56] In this case, the Union argues that Award #4 falls within the "manifest intention" exception to the rule of *functus*. I do not agree.

[57] Whether there has been an error in expressing the "manifest intention" of Arbitrator Ready must be determined on the facts of this case.

[58] After considering the circumstances of this application, I am of the view that there was no "manifest" error to be corrected. The Collective Agreement, as signed, addresses the issues of the Crew Chief's premium pay and retroactive pay. Further, there appears to be no argument that the Collective Agreement, as far as it went with respect to the issues, was a misrepresentation of the earlier awards. Rather, as acknowledged in Award #4, Arbitrator Ready was providing clarification of issues that he had already addressed in Awards #2 and #3. Nowhere in his reasons does he state that the Collective Agreement did not express his manifest intention. In effect, he was augmenting his reasons. This type of correction does not, in my view, fall within the exceptions to the rule of *functus officio*.

[59] Also important to this question is the fact that the parties felt that they had enough information upon which to conclude the Collective Agreement. Since the parties did finalize a Collective Agreement after Award #3, we cannot say that they were prevented from implementing the arbitration decisions contemplated by the Arbitration Agreement. Just because, subsequently, the parties found that they did not agree on the interpretation of the terms of the Collective Agreement does not mean that the Collective Agreement did not express the manifest intention of Arbitrator Ready.

[60] Even if I assume that the clarification undertaken by Arbitrator Ready rose to the level of "manifest intention", I would still conclude that Arbitrator Ready was *functus* after the signing of the Collective Agreement. A determination of Arbitrator Ready's continued authority must be made only after consideration of all of the circumstances. In the face of a reasonable interpretation of s. 79(1) of the *Code*, the Arbitration Agreement and the Collective Agreement, this is a situation where the principle of *functus* should apply.

7. Conclusion

[61] For these reasons, I conclude that Arbitrator Ready was not correct in assuming authority to issue Award #4. Once the awards were crystallized in the Collective Agreement, Arbitrator Ready's job was done. The application for judicial review will be allowed, with costs to IMP, and Award #4 quashed.

[62] As described earlier, the Union is not without recourse: they may still pursue their grievance through the terms of the Collective Agreement.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is allowed, with costs to the Applicant; and

2. Award #4 of Arbitrator Ready is set aside.

"Judith A. Snider"

_____

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-2126-06
STYLE OF CAUSE:	I.M.P. Group Limited et al v. Public Service Alliance of Canada
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	April 24, 2007
REASONS FOR ORDER AND ORDER:	SNIDER J.
DATED:	May 15, 2007

APPEARANCES:

Mr. Geoffrey J. Litherland	FOR THE APPLICANT
Mr. Andrew Raven	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Harris & Company Vancouver, British Columbia	FOR THE APPLICANT
Raven, Cameron, Ballantyne & Yazbeck LLP Ottawa, Ontario	FOR THE RESPONDENT

TAB 11

2011 CarswellOnt 5942
Ontario Arbitration

Rainbow Concrete Industries Ltd. v. I.U.O.E., Local 793

2011 CarswellOnt 5942, 107 C.L.A.S. 147, 209 L.A.C. (4th) 294

In the Matter of an Arbitration (Under the Ontario Labour Relations Act, 1995)

Rainbow Concrete Industries Limited, (the "Company") and
International Union of Operating Engineers, Local 793, (the "Union")

In the Matter of an arbitration of the first collective agreement between the parties, pursuant to the provisions of section 43 of the Labour Relations Act, 1995

George T. Surdykowski Chair, Michael Quinn Member, Walter Thornton Member

Heard: December 8, 2010
Judgment: April 9, 2011
Docket: MPA/Z001749

Counsel: Jack Braithwaite, Pamela Shin, for Company
Melissa Atkins-Mahaney, for Union

Subject: Labour; Public

***George T. Surdykowski Chair*:**

1 This interest Board of Arbitration (the "Board") awarded a first collective agreement between the parties in a 45 page (133 paragraphs) Award dated January 20, 2011.

2 By letter dated March 23, 2011, the Union wrote to the Board, in part, as follows:

> Further to paragraphs 132 and 133 of the Board of Arbitration's Award dated January 20, 2011, the Union has prepared a collective agreement which reflects the Award. A copy of the collective agreement prepared by the Union is attached at Tab 1. The Union forwarded a copy of this collective agreement to the Company on or about January 26, 2011.
>
> The collective agreement prepared by the Union consists of the items agreed to by the parties before the Arbitration hearing as they were set out in the Union's brief, plus the finally agreed on or ordered language of each of the 10 collective agreement items which remained in dispute at the time of Arbitration, as agreed to by the Company and as confirmed by the Board at paragraph 32 of the Award.
>
> I am writing now to advise that the Employer has refused to sign the attached collective agreement. Employer counsel has not responded to my queries regarding this refusal.
>
> I have been advised this past week through my client that the Employer has advised that it will not sign the collective- agreement with the inclusion of the Letter of Understanding dealing the process of awarding driver's bonuses. This refusal to sign is apparently based on the absence of explicit reference to the Letter of Understanding in the Award, and is being made notwithstanding the inclusion of the Letter of Understanding in the documents provided by the Union to the Employer on November 18, 2010 and its inclusion in Union's

brief, and in the absence of any notice from the Employer at any time that it considered, this Letter of Understanding to be still a matter in dispute going into arbitration.

For the reasons that follow, the Union requests this Board Order the Employer to forthwith sign the attached collective agreement.

Alternatively, if this Board determines there was a misunderstanding between the Parties as to whether the Letter of Understanding in the attached form was an issue in dispute at the time of Arbitration, the Union requests this Board orders the Employer to provide written submissions on this matter and provide the Union with the opportunity to reply.

(Emphasis added.)

(The letter continues with several pages of history and submissions, with referenced to documents, including a draft collective agreement which includes the referred to Letter of Understanding, attached.)

3 The Company responded by letter dated March 30, 2011, as follows:

The following is Rainbow Concrete Industries Limited's Response to the Union's submissions dated 23 March, 2011.

The Union submits that;

1) The Employer has refused to sign the collective agreement;

2) That the collective agreement is inclusive of a Letter of Understanding inserting a Driver Bonus

The Employer submits that although it is true that the Employer has not signed the collective agreement, it is stated that the Employer is under no obligation to sign the collective agreement to the extent that the agreement was arbitrated and ordered.

In addition, the Employer submits that the terms of the award were incorporated into the collective agreement and as such, the Board's jurisdiction is *functus officio*.

Further, the Employer submits that to the extent that the parties disagree as to whether the collective agreement includes a Driver Bonus is a matter of dispute arising from the collective agreement and should be properly brought as a rights arbitration before a differently constituted Board and cannot be characterized as a replication issue that falls within the jurisdiction of the Interest Arbitration Board. Specifically, the matter before the Board cannot be characterized as a clerical mistake, an error arising from an accidental slip or omission and/or for that matter an error of a merely technical nature justifying a replication issue.

In any event, the Employer disagrees with the facts as presented by the Union and asserts that the issue of Driver Bonus was an issue that was never agreed to at the negotiation table. The issue was never put forth as an agreed item; the issue was not addressed at anytime by either party at the interest arbitration.

The Employer reiterates in its submission that the Interest Arbitration Board is not seized of this matter and its jurisdiction ended on issuing the Order. The Board is *functus officio*.

The matter, if there is any substance to the Union's allegations, should be properly brought before a rights arbitrator. If the Board should determine that it has any jurisdiction to hear the matter, we reserve our right to make counter submissions to the Union's submissions related to the history and interpretation of the Parties' proposals and/or any other issues this Board may wish that we address.

(Emphasis added.)

4 By letter dated April 4, 2011 in reply, the Union submits that this Board has issued a final decision binding on the parties "based on the provisions agreed to by the parties prior to the hearing and the provisions ordered by the Board", that the Company is therefore obliged to sign the collective agreement, and that the Company's "failure" to sign:

> ... fails to recognize the authority and jurisdiction of this Board, much the same as the fact that the Employer has not followed any of the terms and conditions required of it pursuant to the collective agreement and this Board's Order. This is totally unacceptable.

The Union further submits that this Board is *not functus officio* because the Board's jurisdiction does not "conclude" until it finally determines the matters submitted to it, and that the Driver Bonus Letter of Understanding remains in dispute and is properly before this Board, both as such, and as an issue of implementation or administration. The Union refers to the decisions in Re *I.A.F.F., Local 1075 v. St. John's (City)* (2007), 169 L.A.C. (4th) 236 (N.L. Arb.) (Oakley, Chair - NL); *I.M.P. Group Ltd. v. P.S.A.C.*, 2007 FC 517, 312 F.T.R. 297 Eng. (F.C.); and, *Chandler v. Assn. of Architects (Alberta)*, [1989] 2 S.C.R. 848 (S.C.C.) in support of is reply submissions.

5 Paragraphs 132-133 are the last paragraphs of the January 20, 2011 Award and read as follows:

> 132. The Board hereby awards a first collective agreement between the parties containing the provisions agreed to by the parties prior to the December 8, 2010 hearing or as referenced in this Award, and the provisions awarded herein as aforesaid.
>
> 133. The parties are obliged to prepare and sign a collective agreement document which reflects the Award herein. **THE BOARD SO ORDERS.**
>
> 133. This Board of Arbitration shall remain seized for the purposes of rectification, and to deal with any disputes concerning the implementation or administration of this Award.
>
> (Emphasis supplied.)

5 To reiterate, the Union seeks an Order requiring the Company to sign the collective agreement document that it has submitted to the Company for signature. This document includes the disputed Driver Bonus Letter of Understanding. However, the Union also implicitly acknowledges that the Board's January 20, 2011 Award may not cover the disputed Letter of Understanding, the Union submits that the Board has jurisdiction to and should find that the disputed Letter of Understanding forms part of the collective agreement between the parties and order the Company to sign a collective agreement which includes it.

6 The Company's position is that the collective agreement awarded by this Board does not include the disputed Letter of Understanding, that it is not obliged to sign any purported collective agreement which includes it, and that this Board is *functus* and without jurisdiction to do anything that the Union requests.

7 This Board has already ordered the Company to sign the collective agreement determined by the January 20, 2011 Award (paragraph 133). There is no reason to do so again. To the extent that the Company asserts that it is under no obligation to sign the collective agreement determined by this Board it is quite wrong. The Board has so ordered and the Company must comply. *However, the Company is not obliged to sign a collective agreement that has not been awarded by this Board*.

8 The Union's request raises a potentially two-part question. That is, has the Board awarded a collective agreement that includes the Driver Bonus Letter of Understanding, or is the Board's work in that respect incomplete such that the Board should determine whether the disputed Letter of Understanding is included in the collective agreement between the parties?

9 I believe that the often cited decision in *Chandler v. Assn. of Architects (Alberta)*, *supra*, remains the leading case on the application of the doctrine of *functus officio* to administrative tribunals. In that case the Practice Review Board of the Alberta Association of Architects made findings and orders which it had no jurisdiction to make, while failing to do what it was supposed to; namely, conduct a practice review and report to the Association with or without recommendations in that respect. When its "decision" was quashed the Practice Review Board sought to reconvene in order to what it should have done in the first place. The subjects of the proceedings objected on the basis that the tribunal was *functus officio*. The Alberta Court of Appeal and the Supreme Court of Canada both disagreed, concluding that although the decision that had been quashed was a nullity (i.e. was no decision at all), the Practice Review Board had made no decision with respect to the matter that had been remitted to it and therefore remained seized and entitled to proceed to inquire into it. Speaking for the majority (at page 862 of the Supreme Court of Canada decision), Sopinka J. wrote as follows with respect to the administrative law application of the doctrine of *functus officio*:

> ... Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, *supra*, [1934] S.C.R. 186].
>
> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, *supra*.
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp.* (1981), 41 N.R. 214 (F.C.A.)

As I read this excerpt, the point is that the doctrine of *functus officio* should not be applied in a manner which would prevent an administrative tribunal from exercising or completing its jurisdiction, or deny the parties of the benefit of a decision within the tribunal's jurisdiction.

10 In *St. John's (City)*, *supra*, dealt with a union's request that an interest board of arbitration determine an issue of retroactivity of annual leave entitlement. The employer objected that the board of arbitration was without jurisdiction to do so because it was *functus officio*. The majority of the board of arbitration applied *Chandler*, and in effect concluded that once an interest arbitrator has issued a final decision its jurisdiction is exhausted and it cannot alter or add to that decision, except to correct an inadvertent error or omission (i.e. to complete the decision) or to clarify the decision to the extent that its manifest intention is unclear.

11 *I.M.P. Group Ltd.*, *supra*, concerned the effect of the signing of a collective agreement on an interest arbitrator's jurisdiction. In that case, the parties signed a collective agreement after the interest arbitrator issued three awards. The union then sought to return to the interest arbitrator to resolve a dispute about one of the items that had been awarded. The Federal Court held that once the collective agreement was signed the interest arbitrator was *functus* and had no jurisdiction to determine the interpretation dispute between the parties.

12 I respectfully agree with these decisions, and am in any event bound by the Supreme Court of Canada's decision in *Chandler*. A labour relations interest board of arbitration is an administrative tribunal. *Chandler* stands for the proposition that the doctrine of *functus officio* must be applied less technically and with due regard to the process in administrative law matters. This does not mean that the doctrine does not apply when an administrative tribunal has made a complete decision within jurisdiction. In such a case the tribunal is *functus*. *I.M.P. Group Ltd.* does not stand for the proposition that an interest arbitrator's jurisdiction continues until the parties have signed a collective agreement. That may be but is not necessarily the case. Where the parties have not signed a collective agreement during or after an interest arbitration proceeding the question is whether the arbitrator has issued a complete decision within jurisdiction. If the arbitrator has done so the arbitrator is, as the decision in *St. John's (City)* illustrates, *functus*.

13 These decisions serve to demonstrate that once an administrative tribunal has issued a final decision within jurisdiction which determines all of the issues put before it, the tribunal is *functus officio*. That is, its jurisdiction is spent except for the limited purposes of correcting editing or clerical errors, or correcting an obvious error or oversight so that the decision accurately reflects the tribunal's actual reasoning or determination (i.e. for the purposes of rectification), or in order to provide necessary clarification of its decision. These are powers that every statutory or consensual tribunal has, and are quite different from the power of reconsideration which no tribunal has unless the applicable legislation (or contract) specifically so provides. This Board has no jurisdiction to reconsider its January 20, 2011 Award.

14 Upon applying the principles in those decisions I am constrained to conclude that the Company's position must be sustained. I am satisfied that this Board is *functus* except with respect to questions of rectification, implementation, administration, or clarification, and that the Union's request(s) do not raise any issue that falls within any of those categories.

15 The Board's task was to settle the first collective agreement between the parties on the basis of the evidence and representations of the parties. The parties had a full opportunity to present their respective cases at the hearing held on December 8, 2010 (supplemented by the post-hearing written submissions as referred to in the January 20, 2011 Award). Section 43(18) of the *Labour Relations Act, 1995* requires a first collective agreement board of arbitration to accept "matters agreed to be the parties, in writing" without amendment. It is true that the document that the Union submitted as being the collective agreement it was prepared to agree to as part of the interest arbitration process included the disputed Letter of Understanding, and that that Letter of Understanding was not identified as being a matter in dispute in either party's hearing brief, or during the hearing itself. However, neither was (or is) there any evidence that it was a matter actually agreed to, either in writing or at all. The parties did not put anything before the Board which identified the matters agreed to, whether or not in writing. Accordingly, the Drivers Bonus Letter of Understanding was not before this Board in any way; that is, as either an agreed to or as a disputed matter - and the Board made no determination in that respect. The parties chose to proceed by identifying the matters that remained in dispute between them when the hearing was convened on December 8, 2010 and in effect asked the Board to determine those matters. By doing so, the parties at least implicitly agreed that that would "settle" their first collective agreement and fulfill the Board's statutory mandate under s. 43 of the Act. That is precisely what the Board did in the January 20, 2011 Award. The Board's Award is a complete final and binding determination of all of the first collective agreement issues remitted to it, and must be taken as written.

16 The issue raised by the Union's request was not raised at any time before the Board issued the January 20, 2011 decision. It is a new issue which was never before the Board. Accordingly, the issue was not, and could not have been, addressed in the Board's Award. Therefore, the Union's request does not raise a point of clarification. It raises an issue of interpretation, which is *prima facie* for a rights arbitrator to determine.

17 Although there are some editing errors in paragraph 11 of the January 20, 2011 Award, there is no obvious error in either the reasoning or the result arrived at in the decision. Nor does the Union suggest any such error. That is, there is no substantive error or omission to rectify.

18 Because the Board has already ordered the Company to sign the collective agreement settled by the Board, the Company's failure to sign a collective agreement document raises an enforcement issue, not an implementation or administration issue. If the Union considers it appropriate and necessary, the January 20, 2011 Award must be enforced through the mechanism provide by the *Labour Relations Act, 1995*. The Company is bound by the collective agreement awarded by this Board whether or not it signs any document in that respect (per s. 43(10) which specifies that s. 48(18) of the Act applies).

19 The Union's request is therefore denied. If the Union wishes to pursue the matters raised it must do so in another forum or forums.

20 Since, this Supplementary Award has had to be written in any event, I will take this opportunity to correct the minor editing errors in paragraph 11, of the January 20, 2011 Award so that it reads as follows (the corrections consisting of deleting the word "the" in one location, and using the word "the" to replace the word "which" in two locations):

> 11. I note that the Union did not file its arbitration brief until late in the day (after normal business hours) on December 6, 2010, subsequently amending same the following day. The Company did not provide the Union or this Board with its arbitration brief until after the hearing began on December 8, 2010 - the start of which was delayed by the late arrival of the Company representative who was tasked with bringing copies of that brief to the hearing. When it appeared that the Union and the Company both intended to complain about the late delivery of the other's brief, I indicated that I would have none of it. Although it is customary for the parties to an interest arbitration proceeding to exchange briefs a reasonable time prior to the hearing, and to argue the case on the basis of those briefs, in this case the parties had neither made any agreement, nor asked the Board of Arbitration to fix a filing date in that respect. To the extent that the parties were handicapped in their ability to respond to each other's briefs, that was a situation of their own making. In any event, neither party was prejudiced in its ability to put its own case forward.

***Walter Thornton Member*:**

I Agree

***Michael Quinn Member*:**

I Agree

TAB 12

1989 CarswellOnt 5429
Ontario Arbitration

Ontario Cancer Institute and ONA, Re

1989 CarswellOnt 5429

In the Matter of an Interest Arbitration between Ontario Cancer Institute (Princess Margaret Hospital) and Ontario Nurses' Association

In the Matter of the Hospital Labour Disputes Arbitration Act

Kevin M. Burkett Chair, W.J. Whittaker Member, Donald C. Mayne Member

Judgment: June 19, 1989
Docket: None given.

Counsel: Brian O'Byrne, for Hospital

Subject: Labour; Public

***Kevin M. Burkett Chair*:**

1 We have been appointed as an Arbitration Board under the *Hospital Labour Disputes Arbitration Act* to determine the terms of a collective agreement between these parties. The parties have put a preliminary matter before us pertaining to a series of demands first tabled by the union on March 2, 1989. The Hospital takes the position that these demands are not properly before us. The union, on the other hand, asserts that they are and argues that under our statutory mandate we are required to consider them as matters in dispute and adjudicate their resolution. The parties have filed written submissions which we have fully considered.

2 Before detailing the submissions of the parties it is necessary to establish the factual framework. The relevant facts, as ascertained from the written submissions of the parties, are:

- The union was certified on June 10, 1987 and served notice of its intention to bargain on June 17, 1987. Bargaining commenced on October 2, 1987. This bargaining was conducted separate and apart from the central bargaining engaged in by some 150 hospitals across the province.

- A central agreement was concluded on December 14, 1987, ratified in January, 1988, to be effective to March 31, 1991.

- After a number of bargaining sessions and the appointment of a conciliation officer a "no board" report was issued on May 9, 1988 in this matter, thereby removing the legal impediments to the establishment of this Board. Bargaining continued between the parties up to February 21, 1989.

- Throughout the period of bargaining up to February 21, 1989 the consistent position of the union was that it wished an agreement identical in all material respects to the central agreement concluded in December, 1987. The Hospital sought certain deviations from that agreement up to February 21, 1989 at which time it modified its position such that the issues in dispute were narrowed considerably. Suffice it to observe that the issues in dispute were narrowed to the utilization of sick credits, retroactivity for part-time salaries and retroactivity in respect of the percentage of salary in lieu of fringe benefits for part-time nurses. With the exception of these issues the terms of the central agreement were to be applied.

• It has been recognized, at least since early 1988, that there is a shortage of nurses in this jurisdiction that is causing many hospitals to either operate below full complement or operate with the use of an increasing number of "agency nurses".

• This hospital announced on December 29, 1988 that it would not reopen 33 beds following the Christmas holidays because of a shortage of nurses.

• In early 1989 the Premier announced that the provincial government would attempt to have the central agreement reopened. This approach was rejected by the Ontario Hospital Association. The matter of the nursing shortage became a subject of further public discussion in January, 1989.

• The use of agency nurses at this hospital has increased since January, 1989.

• The union submitted substantially revised proposals on March 2, 1989. These proposals included amendments to: (1) Articles 8.02, 8.03, Orientation; 2) Article 11.09, Education Leave; 3) Article 14.07, Standby Pay; 4) Article 14.10, Shift Premium; 5) Article 14.15, Weekend Premium; 6) Article 14.16, Permanent Shift premium; 7) Article 17.01, Group Life Insurance; 8) Article 17.01 Dental Plan; 9) Article 19.01, Salary Schedule; 10) Article 19.04, Responsibility Pay; 11) Article 19.04, Group, Unit or Team Leader Pay; 12) Article 19.05, Credit for Prior Experience; and 13) Education Allowance.

• Items 1, 2, 3, 4, 7, 8, 9, 10, 11 and 12 had been agreed between the parties in bargaining prior to the tabling of the union's new demands on March 2, 1989.

3 Sections 4 and 9 of the *Hospital Labour Disputes Arbitration Act* provide:

Section 4

Where the Minister has informed the parties that the conciliation officer has been unable to effect a collective agreement, the matters in dispute between the parties shall be decided by arbitration in accordance with this Act.

Section 9

(1) The Board of Arbitration shall examine into and decide on matters that are in dispute and any other matters that appear to the Board necessary to be decided in order to conclude a collective agreement between the parties, but the Board shall not decide any matters that come within the jurisdiction of the Ontario Labour Relations Board.

(2) The Board of Arbitration shall remain seized of and may deal with all matters in dispute between the parties until the collective agreement is in effect between the parties.

4 The Hospital objects to the tabling of these demands at this juncture in the bargaining. The Hospital argues, firstly, that in respect of the aforementioned items that had been agreed between the parties there is nothing in dispute upon which to adjudicate. Furthermore, in respect of the other three items the Hospital submits that in that the union was seeking terms identical to those found in the central agreement and because it concurred with this general request these, too, are no longer matters in dispute. The Hospital argues, secondly, that pursuant to Section 4 of the *Hospital Labour Disputes Arbitration Act* the date for determining the issues in dispute that may be referred to arbitration is the date that the conciliation officer reports that he/she has been unable to effect a settlement. Finally, the Hospital argues that, in any event, the alteration of a party's bargaining position at a late stage in the bargaining constitutes bargaining in bad faith within the meaning of Section 15 of the *Labour Relations Act. Graphic Arts International Union and Graphic Centre (Ontario) Inc.* (1976) CLLC 16,401 is cited in support of this position.

5 The Association argues, firstly, that under Sections 9(1) and (2) of the *Hospital Labour Disputes Arbitration Act* we are required to decide any and all issues ".... that appear to the Board necessary to be decided in order to conclude an effective agreement...". The Association relies on *Regional Municipality of Waterloo (Sunnyside) and Ontario Nurses' Association*, unreported, January 17, 1985 (Ord); and *Regional Municipality of Peel (Peel Manor and Sheridan Villa Homes for the Aged) and Ontario Nurses' Association*, May 9, 1985 (Swan) in support of its position that we have a statutory duty to inquire into and decide the issues raised by the union on March 2, 1989. The union argues, secondly, that there has been a material change in circumstances in this case, within the ratio of both the *Regional Municipality of Peel* award of Arbitrator Swan (supra) and the award in *Toronto General Hospital and Canadian Union of Public Employees* (May 30, 1986) unreported (Burkett). The material change in circumstances that the union relies upon is the nursing shortage at the Princess Margaret Hospital as evidenced by the closing of 33 beds, the number of full-time vacancies (i.e., 46 full-time vacancies in the in-patient area) and the use of agency nurses to cover some 559 shifts between December 13, 1988 and March 29, 1989. The union asserts that its new proposals address nurses' concerns with respect to pay, premium for shift and weekend work, recognition of educational qualifications, etc., and if accepted will serve to stop the outflow of nurses and at the same time make it easier to recruit. The union maintains that if it was not bound by law to proceed to arbitration these matters would be dealt with before any collective agreement was signed. The union argues, thirdly, that the Hospital will suffer no prejudice if the demands tabled on March 2, 1989 are entertained by us in that the hospital will have ample time to prepare its submissions in response. Finally, the union argues that having tabled its initial demands under the express caution that it reserved the right to add to or amend its proposals it cannot now be denied from doing so.

6 We start by confirming that our view with respect to the extent of the matters that may properly be put before an arbitrator under the *Hospital Labour Disputes Arbitration Act* coincides with that of Arbitrator Swan as expressed in *The Municipality of Peel* (supra) award. Arbitrator Swan, in dealing with essentially the same issue as is before us, stated:

> In our view, the employer is correct about the effect of Section 4. Both on a strict reading of the terms of the legislation, and on the very important policy issues involved, we think that it was not intended that matters that had not been part of the notice to bargain, the negotiation process or the conciliation process could arise for the first time before a Board of Arbitration. That would be precluded, in our view, by the establishment of our jurisdiction based upon the matters in dispute between the parties; any other conclusion would further lead to the result that the negotiation and conciliation process would become meaningless and might fall into desuetude, were it to be so easily bypassed.

The award went on to reject the conclusion reached by Judge Ord, serving as an arbitrator, in the *Regional Municipality of Waterloo (Sunnyside)* (supra) case. In further support of the conclusion reached by Arbitrator Swan we refer to the decision of the Ontario Labour Relations Board in re *Graphic Arts International Union and Graphic Centre* (1976) CLLC, 16,041. In that case it was found that an attempt by a party to collective bargaining to add items to the bargaining agenda after the scope of the dispute has been defined, absent "compelling evidence that would justify such a course", constituted bargaining in bad faith. Given the importance of collective bargaining and the labour relations policy considerations that dictate that bargaining be conducted in an orderly fashion it is not surprising that the conduct of a party that undermines the framework of negotiations, absent some compelling justification, would be found not to be in good faith. The bargaining in good faith provision contained in the *Labour Relations Act* applies to collective bargaining conducted under the *Hospital Labour Disputes Arbitration Act*. There can be no doubt when these two statutes are read together that Arbitrator Swan's interpretation of Sections 4 and 9 of the *Hospital Labour Disputes Arbitration Act* is correct, as was mine in *Toronto General Hospital and C.U.P.E.* (supra).

7 The union in this case maintains that there exists a compelling justification for what it did in that there was a material change in circumstances during the course of the bargaining. The union asserts that the preconditions

laid down by Arbitrator Swan (a material change of circumstances, the tabling of an issue necessarily incidental to the conclusion of a new collective agreement) are satisfied in this case. We disagree. In deciding whether or not there has been a material change in circumstances as would justify overturning the orderly framework of collective bargaining established through the extensive exchange of proposal and counter-proposal reference must be had to whatever other alternatives exist. Surely the undermining of the bargaining process must be as a last resort. Even if we accept that an acute nursing shortage suddenly developed in early 1989 the fact remains that the union tabled a whole new slate of demands after extensive bargaining and the exhaustion of the conciliation process and, assuming that this matter can be expeditiously disposed of, immediately upon commencement of a fresh round of bargaining. Given that a fresh round of bargaining will commence upon the release of our award on the merits we are strongly of the view that. whatever the change in circumstances the union has"' not made out a case for the undermining of the bargaining structure in this round of negotiations and, therefore, these other demands (not in dispute when this matter was referred to arbitration) are not, in the opinion of the Board, necessary to be decided in order to concluo a collective agreement. If the union wishes to address the question of a nursing shortage at the hospital in collective bargaining, as is its right, it can do so immediately upon release of our award in this matter. If those discussions do not prove fruitful from the union's perspective it is within its power to accelerate the pace of those negotiations by applying for the appointment of a conciliation officer and requesting the filing of a "no board" report if the negotiations do not progress. Accordingly, even if we accept that there has been a material change in circumstance, it is not a material change in circumstance that justifies overturning the framework for bargaining that has been established between the parties in this round of bargaining.

8 When the union argues that there would be no prejudice to the hospital it misses the point. The framework for collective bargaining is established with the initial exchange of the bargaining agendas and the subsequent exchange of proposals and counterproposals. The concessions made by one side are in response to and conditioned upon the position taken by the other side. There is obvious prejudice to the party that has relied upon the framework established by the orderly exchange of proposals if the other party is allowed to table a fresh set of demands at the last minute. Whereas these demands would surely evoke a series of different responses the party relying on the established framework has already exposed bargaining limits that go beyond.

9 Finally, the union relies upon the caveat that it attached to its initial demands that it reserved the right to add to, amend or delete proposals. Firstly, the union cannot contract out of the statutory framework for orderly collective bargaining. More importantly, however, the inclusion of this type of caveat has never been taken to mean that fresh demands can be added at will at any time. The caveat means that if through inadvertence or error a proposal was overlooked it may be added. However, as the bargaining progress and the framework takes shape the parties, through the conduct of exchanging proposals, impliedly waive the caveat so that after there has been substantive bargaining between the parties it can no longer be said to exist.

10 Having regard to all of the foregoing we hereby find that we are without jurisdiction to entertain the fresh demands of the union that were tabled on March 2, 1989. Accordingly, we hereby find that the matters in dispute within the meaning of Sections 4 and 9 of the *Hospital Labour Disputes Arbitration Act* are those that were outstanding between the parties prior to March 2, 1989.

***W.J. Whittaker Member*:**

I concur

***Donald C. Mayne Member*, Dissent:**

I am not in agreement with the disposition of this preliminary issue.

The tabling of the new demands by the Association certainly does not fit the pattern of bargaining that Boards of Arbitration can expect. The Board, however, does not have a mandate to protect a pattern of bargaining. The

Board's mandate, according to Section 9 of the *Hospital Labour Disputes Arbitration Act*, is to, "examine into and decide on matters that are in dispute and any other matters that appear to the Board necessary to be decided in order to conclude a collective agreement between the parties." The new matters in dispute arose from significant events occurring since bargaining commenced. The new demands are simply a response to matters that have necessarily become part of the dispute between the parties. There have been very dramatic developments at this hospital in the last six months. These developments have been labelled by the Association as being the compelling reasons for their new demands. It is my respectful view that the *Hospital Labor Disputes Arbitration Act* contemplates the possibility of there being new matters in dispute due to there being new developments. The Act specifically mandates the Board to deal with, "any other matters that appear to the Board necessary to be decided in order to conclude a collective agreement between the parties." This mandate is over and above the matters in dispute referred to in Section 4 of the Act.

How is it possible for bargaining in the private sector to ignore a plant closure in the midst of bargaining? Similarly, how is it possible for these parties to ignore a major bed closure in the middle of bargaining here? The reasons for the bed closures go to the very root of the bargain that these parties are attempting to reach. The reason was clearly stated in a memo dated December 29, 1988 from the hospital that, "due to a *serious* shortage of nursing staff, 33 beds would not be reopened after the Christmas holidays" (Exhibit 5).

We are told by the Association that approximately one-third of the full-time nursing positions are currently vacant at the hospital. This too goes to the very root of the bargain that the parties are attempting to reach. In my mind, it is a matter which has become necessary to be decided in order to conclude a collective agreement between the parties. The demands which arose as a result of this most serious matter would be part and parcel of this material change in circumstance since bargaining commenced. We as a Board have a mandate not to ignore it but rather to decide it.

We have been told that the hospital has covered approximately 560 shifts with agency nurses over a 3 and 1/2 month period. These nurses are not part of the bargaining unit but rather are hired on a contract basis. This is an incredible statistic and one which undercuts the very essence of the bargain which is being made between the union and the employer. The dramatic extent in which agency nurses are being used at this hospital during a period of time when there is a high level of bed closures is obviously a matter necessary to be decided in order to conclude a fair collective agreement between the parties. The Act mandates that our Board decide that and by turning that matter over to the next round this Board is not fulfilling its mandate.

The recruitment campaign initiated by the hospital is certainly something that has developed since the initial tabling of demands. An employee can win up to $3,000.00. Surely the response illicited by that campaign in the form of a new demand should be listened to by the Board.

The study by the Goldfarb Corporation commissioned by the Ontario Nurses' Association revealed a serious problem province-wide. Many knew that there was a problem, few knew that there was such a serious problem. The problem came to the forefront in the Spring of 1989 when the government of the day sought to have the nurses' contract reopened. Since the government is the ghost at this bargaining table, such a a new position from the government will certainly elicit a change in bargaining posture. It does not surprise me that it has become a matter which is now necessary to be decided in order to conclude a collective agreement between these parties.

The rational used in the *Toronto-General Hospital and the Canadian Union of Public Employees, Local 2001*, May 30, 1986 requires that there be, "a compelling justification for the failure to have raised these issues at the outset of bargaining." Certainly at the outset of bargaining between these parties there was no expectation that the beds would be closed. The vacancy rate at these staggering heights could not have been contemplated. The government's attitude that the central settlement should be reopened could not have been contemplated. The state of the world for these parties has shifted dramatically and the new demands of the Association are simply a response

to the new state of the world. This Board can hardly say that an agreement concluded based on the old state of the world is all that is necessary to be decided.

By deferring the matter to the next round, the parties will ultimately have to face this new senerio, however, it is my view that the reality of today must be faced today if it exists today. In the private sector, where there are no bounds as to the duration of a collective agreement in dispute., the bargaining, or in fact the strike, would not be deferred until the next round. The bargaining or the strike would continue until the real dispute is resolved. This should be a factor which should weigh heavily in this Board's mind to decide these issues today. A failure to decide the real disputes (albeit new disputes) would leave the parties with an unmeaningful collective agreement. None of the new development would be addressed. The nurses would never conclude a collective agreement on those terms. The Board should not impose one.

With respect to the issue of prejudice to the hospital, I am in partial agreement with the Chair. I do not, however, feel that prejudice takes the matter entirely out of the Board's hands. I believe that this Board can craft a solution which eliminates much of the prejudice to the hospital.

With respect to the caveat which the union placed on its initial demands, I agree that it does not cover this circumstance. The material changes in circumstances are sufficient in my mind to give authority to the tabling of new demands.

Finally, I share the Chair's optimism that these parties can accelerate the pace of the next set of negotiations. Historically, however, attempts at acccelerating the interest arbitration process have for the most part been unsuccessful. Each one that is accelerated is usually done at the expense of putting other matters aside. The tragedy of the delays in this process cannot be overstated. Had the present dispute been decided shortly after the Board was constituted in September of 1988, then none of the new developments which gave rise to the new set of demands would have been known to the parties. These issues would never have arisen.

In conclusion, I would find that the recent major developments have created new matters which are now necessary to be decided in order to conclude a collective agreement between the parties. I would have considered all the new demands with a view towards concluding a meaningful collective agrement that responds to today's reality.

***Kevin M. Burkett Chair*:**

I have had an opportunity to read the dissenting opinion of the union nominee. I reject any suggestion that this Board has in some way refused to fulfill its statutory mandate. Under Section 4 of the *Hospital Labour Disputes Arbitration Act* "where the Minister has informed the parties that the conciliation officer has been unable to effect a collective agreement the matters in dispute between the parties shall be decided by arbitration". We are prepared to decide all matters in dispute as of the Minister's notice to the parties that the conciliation officer has been unable to effect a settlement. Furthermore, insofar as Section 9 of the *Hospital Labour Disputes Arbitration Act* requires us to go beyond the matters in dispute and decide "any other matters that appear to the Board necessary to be decided in order to conclude a collective agreement" we have given full consideration to the fresh matters raised by the union and have concluded that in all the circumstances these do not appear to us as matters necessary to be decided in this round of bargaining.

End of Document

TAB 13

Chemistry
UNIVERSITY OF TORONTO
Office of the Chair

June 30, 2022

[redacted]
Department of Chemistry

Dear [redacted]:

In accordance with Article 2.17 of the *Workload Policy and Procedures for Faculty and Librarians*, I am writing to provide details of your assigned duties in teaching and service for the 2022-23 academic year.

Teaching:

- CHM1401H Fall 2022 (Course-Coordinator, co-teaching with Hui Peng, Frank Wania & Derek Muir)
- CHM1415H Fall 2022
- CHM 197H Fall 2022
- CHM 415H Winter 2023

Service:

- Colloquia and Seminars Committee
- Departmental Advisory Committee
- PTR Committee (Research) *Please note that this year the membership of the PTR committees has been expanded.*Please note that this year the membership of the PTR committees has been expanded.
- Promotions Committee
- Undergraduate Studies Committee

Please note that additional service duties—such as participation on Search Committees, Interim Review Committees, Continuing Status Review Committees, Tenure Committees, Promotion Committees, and Advancement Committees for Sessional Lecturers—may be assigned during the course of the year.

Yours sincerely,

[redacted]
Professor and Chair

[redacted]

Philosophy
UNIVERSITY OF TORONTO

June 30, 2022

Professor [redacted]
Department of Philosophy
University of Toronto

Dear Professor [redacted],

In accordance with Article 2.17 of the *Workload Policy and Procedures for Faculty and Librarians,* I am writing to provide details of your assigned duties in teaching and service for the 2022-23 academic year.

Teaching (undergraduate):
PHL401H1F
PHL381H1S
(Reduced teaching due to a 0.5FCE teaching reduction granted by the President's office for service to the central administration)

Teaching (Graduate):
PHL2097S

Service:
Promotions & Awards Committee
Planning & Policy Committee
Tenure Committee
SG Ethics Search Committee

Please note that additional service duties – such as participation on Admission Committees, Search Committees, Interim Review Committees, Continuing Status Review Committees, Tenure Committees, Promotion Committees, and Advancement Committees for Sessional lecturers, and Workload Policy Committees – may be assigned during the course of the year.

Yours sincerely,

[redacted]

[redacted]
Professor and Chair, Department of Philosophy

FACULTY OF ARTS & SCIENCE
Jackman Humanities Building, 170 St. George Street, Room 400, Toronto, ON M5R 2M8 Canada
Tel: +1 416 978-3313 • Fax: +1 416 946-7436 • chair.philosophy@utoronto.ca • www.philosophy.utoronto.ca

Institute for the Study of University Pedagogy
UNIVERSITY OF TORONTO
MISSISSAUGA

July 4, 2022

[redacted]
Assistant Professor, Teaching Stream
Institute for the Study of University Pedagogy
University of Toronto Mississauga

Dear [redacted]:

In accordance with Article 2.11 of the Workload Policy and Procedures for Faculty and Librarians, I am writing to provide details of your assigned duties in teaching and service for the 2022-2023 academic year.

As outlined in ISUP's Workload Policy, the normal course load for teaching stream faculty members is 3.5 full course equivalents (FCEs). Your assigned duties for 2022-2023 will be as follows:

Teaching

Courses (0.5 FCE/section):

ISP100: 2 Fall sections; 3 Winter sections

Support for departments/other units, development and delivery of programming through RGASC (0.5 FCE = approx. 120 hours):

0.5 FCE for course-based writing support

Note: Details and scheduling for courses will be determined in consultation with ISUP's Associate Director, Curriculum; details and scheduling for work through the RGASC will be determined in consultation with the RGASC's Director.

Service

• ISUP Curriculum Committee

Please note that additional service duties (e.g., participation on Search Committees, Interim and Probationary Review Committees, Tenure Committees, Promotion Committees, and Advancement Committees for Sessional Lecturers) may be assigned during the course of the year.

Sincerely,

[redacted]
[redacted]
Director, Institute for the Study of University Pedagogy

TAB 14

Faculty	Home Org	Department	(1) Prof Tenure Strm FTE	(2) All Teaching Stream FTE	(3) Tenure Stream Load	(4) Teaching Stream Load	(5) Proposed Teaching Stream load (1.5 x (3))	(6) Addnl FCE ((5)-(4))*(2) or zero whichever is greater	(7) Cost (new hire cost / (5)*(6)
DALLA LANA SCHOOL OF PUBLIC HEALTH	190	Dalla Lana School of Public Health	27	4.3	1.5	2.25	2.25	0	$0
	189	Inst of Health Policy, Mgmt & Evaluation	17	3.8	#N/A	#N/A	#N/A	#N/A	#N/A
FACULTY OF APPLIED SCIENCE & ENGINEERING	225	Dept of Electrical & Computer Eng	71.95	5	1.5	2.5	2.25	1.25	$57,222
	641	Inst Studies in Eng Education & Practice		15	#N/A	#N/A	#N/A	#N/A	#N/A
	220	Institute of Biomedical Engineering	15	2	1.5	3	2.25	1.5	$68,667
	223	Dept of Chemical Eng.& Applied Chemistry	27.85	3	1.5	3	2.25	2.25	$107,000
	227	Dept of Materials Science & Engineering	15.6667	1.76	*	2.5	#VALUE!	#VALUE!	#VALUE!
	219	Inst for Aerospace Studies	17	2	1.5	3	2.25	1.5	$68,667
	226	Dept of Mechanical & Industrial Eng	55.8	6	1.5	Not included	2.25	#VALUE!	#VALUE!
FACULTY OF ARCHITECTURE, LANDSCAPE & DESIGN	25	Daniels Faculty of Arch., Land & Design	30.5	24.95	2.2	3.2	3.3	0	$0
FACULTY OF ARTS & SCIENCE	44	ARTSC: Ofc of the Dean	5	3.5	#N/A	#N/A	#N/A	#N/A	#N/A
	48	Dept of Chemistry	32	6	2.25	1	3.375	0	$0
	527	Cell and Systems Biology	26.667	4.5	*	2.5	#VALUE!	#VALUE!	#VALUE!
	50	Dept of Computer Science	45.7	14.667	1	3	1.5	22.0005	$1,980,045
	63	Dept of Philosophy	28.75	3.35	2	3.5	3	1.675	$48,375
	57	Dept of Germanic Languages & Literatures	8	3	2	3.5	3	1.5	$51,500
	65	Dept of Political Science	41	2.45	2	3.5	3	1.225	$42,058
	61	Dept of Mathematics	41	11.95	1.5	3.5	2.25	14.9375	$785,602
	399	Munk Sch Global Affairs & Public Policy	12.5	3.3	2	3.5	3	1.65	$60,500
	238	Ctr of Criminology	7	1.75	2	3.5	3	0.875	$30,042
	62	Dept of Near & Middle East.Civilizations	17	4.6	2	3.5	3	2.3	$70,278
	69	Dept of Sociology	24	2	2	3.5	3	1	$39,000
	526	Ecology and Evolutionary Biology	23	1.75	1	4	1.5	4.375	$300,417
	64	Dept of Physics	39.5	4.5	1.5	3	2.25	3.375	$182,500
	56	Department of Earth sciences	15	1.6	1	0	1.5	0	$0
	244	Ctr for Medieval Studies	4	1	2	N/A	3	#VALUE!	#VALUE!
	76	Innis College Prog	1	1	#N/A	#N/A	#N/A	#N/A	#N/A
	54	Dept of French	8.8	5.1	2	3	3	0	$0
	74	Dept of Economics	39	9	2	3.5	3	4.5	$176,250
	45	Dept of Anthropology	24.16	2.75	2	3	3	0	$0
	52	Dept of English	42.25	1	2	3.5	3	0.5	$17,167
	71	Department of Statistical Sciences	19.6	12.75	1.625	3	2.4375	7.171875	$298,095
	67	Department for the Study of Religion	21	4.5	2	3	3	0	$0
	248	Inst for Hist & Phil of Sci & Tech	11	0.75	2	N/A	3	#VALUE!	#VALUE!
	70	Dept of Spanish & Portuguese	13	2.5	*	4	#VALUE!	#VALUE!	#VALUE!
	512	Women and Gender Studies Institute	8	2	2	3	3	0	$0
	55	Dept of Geography	29	2	2	3	3	0	$0
	68	Dept of Slavic Languages & Literatures	9	3	2.5	3	3.75	0	$0
	239	Centre for Drama, Theatre, Performance	5	5.95	2	0	3	0	$0
	49	Dept of Classics	16	1.5	2	2.5	3	0	$0
	241	Ctr for Industrial Relations	6	0.75	2	3.5	3	0.375	$12,875
	597	Cinema Studies	5	2	2	3	3	0	$0
	66	Dept of Psychology	26.67	7	1.5	3.5	2.25	8.75	$350,000
	77	New College Prog	1	3.5	#N/A	#N/A	#N/A	#N/A	#N/A
	247	Ctr for European, Russian&Eurasian Stds		1	#N/A	#N/A	#N/A	#N/A	#N/A
	46	Dept of Astronomy and Astrophysics	15	1	#N/A	#N/A	#N/A	#N/A	#N/A
	78	University College Prog	1	3.05	N/A	3.5	#VALUE!	#VALUE!	#VALUE!
	51	Dept of East Asian Studies	14	7	2	2.5	3	0	$0
	60	Dept of Linguistics	11.38	4	2	3	3	0	$0
	59	Dept of Italian Studies	4	3	2.5	3.5	3.75	0	$0
	36	School of the Environment		3	N/A	3	#VALUE!	#VALUE!	#VALUE!
	517	Centre for Study of United States		0.6	#N/A	#N/A	#N/A	#N/A	#N/A
	408	Centre for Indigenous Studies		0.75	0	0	0	0	#DIV/0!
FACULTY OF DENTISTRY	12	Faculty of Dentistry	35.35	23.75	2	3.5	3	11.875	$445,313
FACULTY OF INFORMATION	19	Faculty of Information	27.45	8	2	3	3	0	$0
FACULTY OF KINESIOLOGY & PHYSICAL EDUCATION	31	Faculty of Kinesiology & Physl Ed	24.25	8.25	1.5	3	2.25	6.1875	$266,750
FACULTY OF LAW	18	Faculty of Law	45.45	1	2	4	3	1	$34,333
FACULTY OF MANAGEMENT	235	Joseph L. Rotman School of Management	112.25	22.5	2.5	4	3.75	5.625	$173,753
FACULTY OF MEDICINE	474	Donnelly Centre	18		Subject to Workload of unit	N/A	#VALUE!	#VALUE!	#VALUE!
	169	Dept of Molecular Genetics	21	4	0.75	2	1.125	3.5	$320,444
	186	Dept of Occupational Science & Therapy	15.5	7.933	1.5	2.5	2.25	1.98325	$86,431
	173	Dept of Physiology	14	3	1	2	1.5	1.5	$103,000
	177	Dept of Family & Community Medicine		1.75	N/A- clinical faculty only	"up to 1.0 "	#VALUE!	#VALUE!	#VALUE!
	213	Dept of Physical Therapy	11	6.15	1.5	3	2.25	4.6125	$235,750
	400	Division of Anatomy	5	4.35	#N/A	#N/A	#N/A	#N/A	#N/A
	183	Dept of Lab. Medicine & Pathobiology	13.6	1.25	1.5	3	2.25	0.9375	$42,917
	167	Dept of Biochemistry	16.5	4	1	2	1.5	2	$137,333
	199	Dept of Immunology	9	2.95	1	2.5	1.5	2.95	$186,102
	192	Dept of Speech-Language Pathology	7	2	1.5	3	2.25	1.5	$68,667
	172	Dept of Pharmacology and Toxicology	10.5	4.5	1	2	1.5	2.25	$154,500
FACULTY OF MUSIC	23	Faculty of Music	34	18.65	2	4	3	18.65	$640,317
FACULTY OF NURSING	13	Lawrence S. Bloomberg Faculty of Nursing	22	14.4	1.5	2.5	2.25	3.6	$174,532
FACULTY OF PHARMACY	14	Faculty of Pharmacy	26	15.57	1.5	3	2.25	11.6775	$555,286
FACULTY OF SOCIAL WORK	24	Faculty of Social Work	31	3.75	2	3.5	3	1.875	$64,375
INNIS COLLEGE	30	Innis College		4.33	N/A	3	#VALUE!	#VALUE!	#VALUE!
NEW COLLEGE	28	New College		7.55	N/A	3	#VALUE!	#VALUE!	#VALUE!
	586	Human Biology		9.75	N/A	3	#VALUE!	#VALUE!	#VALUE!
OISE/UT	176	Department of Social Justice Education	13	1	2	3	3	0	$0
	366	Dept. of Appld Psychology & Human Devt.	24.5	13.58	2	3	3	0	$0
	365	Dept of Curriculum, Teaching & Learning	35.5	11.5	2	3	3	0	$0
	356	Dept of Leadership, Higher & Adult Educ.	22	5.92	2	3	3	0	$0
SCHOOL OF GRADUATE STUDIES	515	SGS: Graduate Ctr for Acad Communication		3	#N/A	3	#N/A	#N/A	#N/A
UNIVERSITY COLLEGE	83	UC: Ofc of the Principal		1.5	#N/A	#N/A	#N/A	#N/A	#N/A
UofT MISSISSAUGA	499	UTM: Biology	30.5	10	1.5	2	2.25	0	$0
	497	UTM: Dept. of Language Studies	15	7.58	2	3.5	3	3.79	$121,912
	501	UTM: Chem/Phys. Sciences	17.76	6.35	1.5	2.5	2.25	1.5875	$75,259
	502	UTM: Math/Comp. Sciences	22.7	30.25	1.25	3	1.875	34.03125	$1,945,561
	601	UTM: Inst. for Management & Innovation	4	4.5	#N/A	#N/A	#N/A	#N/A	#N/A
	584	UTM:RG Academic Skills Centre		4	N/A	3.5	#VALUE!	#VALUE!	#VALUE!
	505	UTM: Economics	17.75	4	2	4	3	4	$153,333
	507	UTM: Political Science	16	2.67	2	3.5	3	1.335	$45,835
	494	UTM: CCIT	17	7	2	3.5	3	3.5	$114,722
	496	UTM: Historical Studies	27	6.57	2	3.5	3	3.285	$107,067
	500	UTM: Psychology	19	4	1.5	3	2.25	3	$137,333
	503	UTM: Anthropology	18.5	5.42	2	3	3	0	$0
	504	UTM: Management	27	8.75	2	4	3	8.75	$300,417
	498	UTM: Philosophy	14	1.95	2	3.5	3	0.975	$28,600
	506	UTM: Geography	14	5.67	2	3	3	0	$0
	495	UTM: English & Drama	16	3.5	2	3.5	3	1.75	$59,500
	577	**UTM: Visual Studies**	**11**	**1.75**	2	3.5	3	0.875	$27,708
	668	UTM:Inst. Study of Univ Pedagogy	2	10.5	2	3.5	3	5.25	$184,264
	508	UTM: Sociology	27	5.428	2	3.5	3	2.714	$82,100
UofT SCARBOROUGH	485	UTSC:Dept-Computer & Mathematical Sci	22.2	20.34	1.25	*	1.875	#VALUE!	#VALUE!
	539	UTSC:Dept-Psychology	28	11	1.5	3	2.25	8.25	$357,789
	104	UTSC:Dept-Physical & Environmental Sci	28	16.23	1.25	3	1.875	18.25875	$964,763
	578	UTSC:Dept-English	12	9.72	2	3.5	3	4.86	$234,900
	123	UTSC:Dept-Management	34	16.43	2	3.5	3	8.215	$282,048
	593	UTSC:Dept-Political Science	15	4.23	2	3.5	3	2.115	$65,105
	471	UTSC:Dept-Global Development Studies	4.51	2	2	3.5	3	1	$34,333
	589	UTSC:Dept-Language Studies	8	10	2	3	3	0	$0
	102	UTSC:Dept-Biological Sciences	26	5.67	1	2.75	1.5	7.0875	$486,675
	470	UTSC:Dept-Health & Society	11	5.09	#N/A	#N/A	#N/A	#N/A	#N/A
	588	UTSC:Dept-Historical & Cultural Studies	18	2.8	0	0	0	0	#DIV/0!
	590	UTSC:Dept-Arts, Culture & Media	20	8.86	2	3	3	0	$0
	594	UTSC:Dept-Sociology	13	3.44	2	3.5	3	1.72	$53,909
	591	UTSC:Dept-Human Geography	16	3.34	2	3	3	0	$0
	592	UTSC:Dept-Anthropology	14	2.25	2	3	3	0	$0
	579	UTSC:Dept-Philosophy	6.5	3.39	2	3.5	3	1.695	$50,262
	430	UTSC:Ctr-Teaching & Learning		6.01	3	3	4.5	0	$0
VICE-PRESIDENT & PROVOST	276	Transitional Year Program	1.76	1.74	#N/A	#N/A	#N/A	#N/A	#N/A
WOODSWORTH COLLEGE	29	Woodsworth College		4	N/A	3.5	#VALUE!	#VALUE!	#VALUE!
Total								292.48	$14,349,458

Notes:
Faculty FTE are as of Sept 2021
Only departments with teaching stream appointments are included
Tenure Stream and Teaching Stream Load as per workload documents (most recent documents used)
Cost is based on recent teaching stream hires (2020 and 2021) hires in each department or $103K where no new hires have been made.
note: average teaching stream hire in 2021 was 103k
Course cost calculated as teaching stream salary divided by proposed courseload
#N/A - workload policy not available
#VALUE! - workload policy not a straight application of FCE

TAB 15

COLLECTIVE AGREEMENT

Between

McMaster University

and

McMaster University Academic Librarians Association

2021 – 2024

Collective Agreement

between

McMASTER UNIVERSITY

and

McMASTER UNIVERSITY ACADEMIC LIBRARIANS' ASSOCIATION

Expiry Date: July 31, 2024

TABLE OF CONTENTS

PURPOSE / PREAMBLE

The general purpose of this Agreement is to establish an orderly collective bargaining relationship between McMaster University and its employees represented under this Agreement by the McMaster University Academic Librarians' Association, to ensure the timely handling and disposition of complaints and grievances and to set forth an Agreement covering rates of pay and terms & conditions of employment.

The parties agree to work together to achieve a climate of mutual respect to promote and enhance a professional working relationship appropriate for the promotion of excellence at McMaster University.

The parties agree to conduct their employment relations involved in the administration of this Agreement in good faith.

ARTICLE 1 – TERM OF AGREEMENT

1.1 This Agreement shall be effective from August 1, 2021 and shall continue in effect until and including July 31, 2024.

1.2 This Agreement shall continue automatically thereafter for annual periods of one year, unless either party notifies the other in writing, within a period of 120 calendar days immediately prior to the expiration date, that it desires to amend or terminate this Agreement.

1.3 If notice to bargain is given by either party, the parties shall meet within 21 days, or as otherwise agreed by the parties, for the purpose of commencing negotiations.

ARTICLE 2 – RECOGNITION

2.1 The University recognizes the McMaster University Academic Librarians' Association as the sole and exclusive bargaining agent for all academic librarians employed by McMaster University in the City of Hamilton, save and except students, persons directly employed in support of grant- funded or contract funded-research projects, Associate University Librarians, the University Librarian, the Director, Health Sciences Library, persons above the rank of Associate University Librarian, the University Librarian and Director.

Clarity Note: Students includes Librarian Co-Op students.

2.2 For the purposes of this Article 2, "persons" shall be defined as all other employees of the University who are not included in the bargaining unit.

2.3 Persons whose positions are not in the bargaining unit shall not perform duties normally assigned to employees in the bargaining unit if the act of performing the work reduces the regular working hours of employees in the bargaining unit.

ARTICLE 3 – DEFINITIONS

3.1 In this Agreement, the following terms shall be defined as set out in this Article, unless a contrary intention is expressly provided for elsewhere in this Agreement.

"Agreement" or **"this Agreement"** means the collective agreement between McMaster University and McMaster University Academic Librarians' Association.

"bargaining unit" is defined as set out in Article 2.

"**bargaining unit member**" or "**employee**" means a person employed by the University in the bargaining unit defined in Article 2.

"day" means calendar day unless otherwise specifically stipulated.

"department" means the department, division, academic unit or work area, as the context may require.

"designate" means an individual authorized to act on behalf of an officer of the University, or, an individual named to represent an employee, group of employees or the Union.

"E/LR Representative" means a member of the Employee/Labour Relations Unit or a Human Resources Consultant in the University's Department of Human Resources Services who is authorized to represent the University in any communications and/or meetings convened pursuant to this Agreement.

"employee" means an employee of McMaster University who is in the bargaining unit defined in Article 2.

"Health Sciences Library" – means the Library that reports to the Faculty of Health Sciences, and is located in the McMaster University Health Sciences Centre.

"holidays" are paid days away from work as specified by statute or this Agreement and may also be called "specified holidays".

"the parties" means McMaster University and the McMaster University Academic Librarians' Association.

"Pension Plan" means the *Contributory Pension Plan for Salaried Employees of McMaster University Including McMaster Divinity College, 2000.*

"probationary period" means the first 12 months of active employment in the bargaining unit.

"professional service and professional activity" refer to employees' contributions to the Library, the University and the Profession over and above the responsibilities set out in their Position Responsibility Statement. In evaluating professional service and professional activity emphasis is placed on: (a) the level of the employee's personal contribution to the specific service or activity; and, (b) the value of the service or activity to the librarian's professional advancement, the Library and the broader library and research community.

"professional service" includes active membership on, or chairing, committees, professional association boards or committees, task forces or projects over and above the responsibilities set out in their Position Responsibility Statement.

"professional activity" includes research and publication (writing, editing, refereeing or reviewing books, articles, or reports); grant preparation; participation at conferences (contribution through presentations to professional or scholarly associations/meetings); conference management (planning, organizing or conducting professional programs, workshops, seminars or conferences); teaching (over and above the teaching or instruction responsibilities set out in their Position Responsibility Statement); and, consulting for external organizations. (Consulting for external organizations for compensation over and above normal salary is excluded.)

"**spouse**" means either of two persons who:

(a) are married to each other, or

(b) are not married to each other and are living together in a conjugal relationship,

i. continuously for a period of not less than 1 year; or

ii. of some permanence, if they are the natural or adoptive parents of a child, as parents is defined in Section 1 of the *Family Law Act*, R.S.O. 1990, c. F.3.

and includes a same sex partner.

"**steward**" or "**Union steward"** means an employee who has been elected or appointed from within the bargaining unit, in accordance with the Union's by-laws and/or constitution to represent bargaining unit members in matters pertaining to the application or administration of this Agreement.

"supervisor" means the person who directs an employee's work or to whom an employee normally reports. This person may also be referred to as "Manager".

"the University" means McMaster University, and its designates, the Board of Governors of McMaster University, or any officers authorized to act on behalf of the Board.

"University Library" – means any or, as applicable all, of the following: Mills Memorial Library, Innis Library and H. G. Thode Library of Science and Engineering.

3.2 Types of Employees:

(a) **"full-time employee"** means an employee who works a standard work week in accordance with Article 15.05.

(b) **"part-time employee"** means an employee who works less than a 35-hour work week, unless otherwise specifically stipulated.

(c) **"continuing employee"** means an employee who is employed in a position for which no end date was stated at the time of the employee's hiring.

(d) **"contractually limited employee"** means an employee who is employed in a position where an end date has been determined such that the appointment is for a minimum of 4 months but no longer than 30 consecutive months. It is understood that there is no employment commitment beyond the specified end date.

(e) **"sessional employee"** means an employee who is either full-time or part-time and works in a position with a minimum term of 6 months each calendar year, with annually scheduled start and end dates.

(f) **"probationary employee"** means an employee who is serving the probationary period.

ARTICLE 4 – MANAGEMENT RIGHTS

4.1 Management Rights

(a) The Union acknowledges that it is the University's right to manage and operate the business of the University in all aspects subject to the terms and conditions of this Agreement and that all rights of the University shall be reserved to it. Without limiting the generality of the above, these management rights include, but are not limited to, the University's right to:

(i) maintain order, discipline and efficiency, including the right to plan, direct and control the workforce, and otherwise generally manage the University;

(ii) hire, select, locate, classify, promote, demote, transfer, retire, layoff, or recall employees;

(iii) discharge, suspend or otherwise discipline employees, recognizing that an employee's claim of unjust discipline or discharge may be the subject of a grievance and will be dealt with as hereinafter provided;

(iv) assess and manage employee performance, including the discharge of an employee for unsatisfactory performance;

(v) transfer or cease any position, department, programme operation or service; and,

(vi) establish, enforce and alter from time to time reasonable policies, procedures, guidelines, rules and regulations to be observed by employees.

(b) Each current Policy, Directive, Guideline, Practice and Procedure that addresses terms and conditions of employment specific to Librarians is superseded by this Agreement unless otherwise expressly preserved herein.

(c) In the event that it is alleged that the University has exercised any of the foregoing rights contrary to the provisions of this Agreement, the matter maybe the subject of a grievance and will be dealt with as hereinafter provided.

4.2 The University agrees that it will not exercise its functions as set out in this Article in a manner inconsistent with the express provisions of this Agreement, and reiterates its commitment to administer this Agreement reasonably such that its decisions will not be arbitrary, discriminatory or made in bad faith.

ARTICLE 5 – UNION REPRESENTATION

5.1 Union Representation

(a) The University agrees to recognize 1 Union steward in the University Library and 1 Union steward in the Health Sciences Library.

(b) The Union will provide to the University a list of the names of all Union Executives and Union stewards, including their titles and library in which they work, if applicable. The Union shall notify the Director, Employee/Labour Relations, or their designate, of any change to the list prior to the change taking effect.

5.2 Negotiating Committee

(a) The University will recognize a Union Negotiating Committee that includes up to 3 employees as determined by the Union.

(b) Employees on the Union Negotiating Committee shall not suffer any loss of regular pay or benefits for the days of negotiations with the University up to and including conciliation.

5.3 Union Release Time

(a) It is acknowledged by the parties that all Union stewards and other Union representatives have regular duties to perform as employees of the University. Therefore, Union stewards and other Union representatives will not leave their duties without first obtaining the permission of their supervisor, or designate. Requests for Union Release Time, paid or unpaid, shall not be unreasonably denied. Notwithstanding the foregoing, the Parties recognize that from time to time minor issues that require only a few minutes of the Union stewards' or other Union representatives' attention will arise and/or that there will be circumstances where an employment supervisor is not available; in such cases employees will exercise reasonable judgment having regard for the needs of their work and their immediate responsibilities before deciding to leave their duties.

(b) Subject to Article 5.03(a), release time shall be granted, with no loss of regular pay or benefits, from regularly scheduled hours, for the following purposes:

(i) to represent the Union on committees and task forces that are created at the invitation of the University;

(ii) to participate in Labour Management Committee meetings;

(iii) to represent employees in grievances, including the investigation of a complaint;

(iv) to attend meetings with the University; and,

(v) the attendance of 1 delegate at the semi-annual meetings of CAUT Council.

(c) Subject to Article 5.03(a), any release time required by a Union steward or other Union representative to attend to Union business other than for the purposes outlined in Article 5.03(c) will, if granted, be without pay or will be granted with an agreement that the time absent will be worked at a later date. The agreement will be between the employee and t heir supervisor and will be in writing, specifying the details of the time and date the missed work will be performed.

(d) All employees shall be entitled to 1 one hour leave without loss of pay each fiscal year for the purposes of attending the annual General Meeting of the Union.

(e) The Union shall provide the University with written notification of the date and time of its annual General Meeting 30 days in advance. Employees who plan to attend shall provide reasonable notice to their supervisor.

5.4 Agreement Compliance

Except as otherwise expressly provided in this Agreement, the University shall not bargain with or enter into any agreement regarding terms and conditions of employment with an individual employee or group of employees other than the Union President, or those designated by the Union President. The President of the Union shall provide the Director, Employee/Labour Relations or their designate, with the names of any person designated by the Union President for the purposes of this Article 5.04.

5.5 Union Membership and Dues

(a) Subject to the understanding that the rate structure of the Union dues shall not require deductions that are incompatible with the University's payroll system, the University will deduct Union dues from the pay of each employee in the bargaining unit, in the amount specified in writing by the Union, and shall remit same to the Union as soon as practicable and not later than 15 working days following the pay period end date.

(b) When the amounts specified under Article 5.05(a) are remitted, the University will inform the Union in writing of the names of employees from whose pay Union dues have been deducted and the amount of dues deducted from each employee's pay.

(c) The Union shall advise the University in writing at least 30 days in advance of any change in the amount of its Union dues.

(d) The Union agrees to indemnify and save the University harmless from any claims or any liability in any way related to the deduction of dues under this Article, except for any claim or liability arising out of an error made by the University. This indemnification relates to claims or liability arising out of the deduction of dues prior to and following the effective date of this Agreement. In the event that the University makes an error in the deduction of dues from a member of the bargaining unit the University will correct such failure during the next following pay period.

(e) The University agrees to continue to comply with Canada Revenue Agency (CRA) rules and regulations requiring the amount of Union dues to be recorded on each employee's annual T-4 slip.

5.6 Services

(a) The Union shall have use of the internal Campus mail service for Association business, without charge, subject to availability.

(b) The Union shall have access to meeting rooms (including audio-visual equipment) on Campus through the University's room booking offices for Union business, according to normal booking procedures, at the rate for internal users.

ARTICLE 6 – COMPLAINT/GRIEVANCE AND ARBITRATION PROCEDURE

6.1 (a) The Parties agree to make every reasonable effort to settle all complaints and grievances promptly.

(b) There shall be no discrimination, harassment or coercion practiced against any person involved in the Grievance and Arbitration procedure, or against any employee who elects not to pursue a grievance.

(c) The Union shall have carriage of all grievances. The University shall deal only with the Union with respect to a grievance.

(d) No technical violation or irregularity occasioned by clerical, typographical or technical error in the written specification of the grievance shall prevent the substance of a grievance from being heard and judged on its merits.

(e) If a grievance is settled at any stage in the grievance process, such settlement shall be reduced to writing and countersigned by the Union representative and the Employer

representative within 10 working days of the meeting at which the settlement was reached, or within such other time frame as the parties agree.

6.2 Grievance Definition

A grievance is any difference arising out of the interpretation, application, administration or alleged violation of the provisions of this Agreement. Any reference in any Article to the right to grieve by an employee or by the Union is solely for the purpose of emphasis.

6.3 Types of Grievances

(a) Individual Grievance - a grievance alleging a violation of this Agreement affecting one employee. An individual grievance will commence at Step 1 of the grievance procedure.

(b) Group Grievance - a grievance alleging a violation of this Agreement affecting more than one employee. A group grievance will commence at Step 1 of the grievance procedure. A group grievance must be signed by each employee who is grieving and by a Union steward.

(c) Policy Grievance – a grievance arising directly between the University and the Union alleging a violation of this Agreement in whole or in part and for which no part of the requested remedy is particular to any one employee or group of employees. A policy grievance will commence at Step 2 of the grievance procedure. A policy grievance by the Union must be signed by the President of the Union, or their designate and must be submitted to the Director, Employee/Labour Relations. A University policy grievance must be signed by the Director, Employee/Labour Relations or their designate and must be submitted to the Union President.

6.4 Informal Resolution

It is the mutual desire of the parties that complaints of employees be addressed as quickly as possible and it is understood that an employee will normally, in good faith, first give their immediate supervisor an opportunity to address the complaint. An employee may, if they choose, invite a Union steward to participate in this initial informal resolution process, in which case the supervisor may similarly invite the assistance of an E/LR Representative.

6.5 Grievance Procedure

Step 1

(a) The written, dated and signed grievance, will be delivered to either the University Librarian or the Director, Health Sciences Library within 20 working days after the Union became aware, or ought reasonably to have become aware, of the incident or circumstances giving rise to the grievance.

(b) The grievance will identify the nature of the grievance, including the Article alleged to have been violated, and the remedy sought.

(c) Not later than 10 working days following the receipt of the grievance the University Librarian / Director, Health Sciences Library shall arrange to meet with the grievor. The grievor shall be accompanied by a Union steward. The University Librarian / Director, Health Sciences Library may be accompanied by an E/LR Representative.

(d) The Union will be given a written reply to the grievance within 15 working days following the Step 1 grievance meeting.

Step 2

(a) If an individual or group grievance is not resolved at Step 1, the Union may, within 10 working days of the date on which the University Librarian's / Director, Health Sciences Library's reply was or should have been given, deliver the written grievance to the Provost or to the FHS Associate Vice-President, Academic in the Faculty of Health Sciences, as appropriate.

(i) Not later than 15 working days following the receipt of the grievance, the Provost/ FHS Associate Vice-President, Academic, or designate, shall arrange to meet with the grievor and the University Librarian / Director, Health Sciences Library to discuss the merits of the grievance. The grievor shall be accompanied by a Union steward. The University Librarian / Director, Health Sciences Library may be accompanied by an E/LR Representative.

(ii) The Provost / FHS Associate Vice-President, Academic, or designate, shall give their reply in writing to the Union within 15 working days following the Step 2 grievance meeting.

(b) A policy grievance shall be initiated within 20 working days after the Union became aware, or ought reasonably to have become aware, of the circumstances giving rise to the grievance.

(i) Not later than 15 working days following the receipt of the grievance, the Assistant Vice-President, Human Resources Services, or designate, shall arrange to meet with the Union President to discuss the merits of the grievance.

(ii) The Assistant Vice-President, Human Resources Services, or designate, shall give their reply in writing to the Union within 15 days following the Step 2 grievance meeting.

6.6 Arbitration

(a) Failing a satisfactory settlement at Step 2 the grievance may be referred to arbitration within 10 working days of the date on which the reply to Step 2 was, or should have been, given, but, subject to Article 6.07(a), not thereafter.

(b) No grievance may be submitted to arbitration that has not been properly carried through the Grievance Steps except as permitted by Section 49 of the *Ontario Labour Relations Act, 1995*.

(c) When either party to this Agreement requests that a grievance be submitted to arbitration under Article 6.06(a), they shall make such request in writing addressed to the other Party. The University and the Union shall, by agreement, select one person as Arbitrator to whom such grievance may be submitted for arbitration. Failing agreement, the parties shall select a name from the list below to act as a sole arbitrator on a rotational basis:

1. Rick MacDowell
2. Paula Knopf
3. Kevin Burkett

By mutual consent, the Parties may select a listed arbitrator out of sequence or select and Arbitrator who is not listed above.

(d) The arbitrator shall hear and determine the matter in dispute, and issue an award which shall be final and binding upon the parties to the Agreement, subject to either party's right to seek judicial review of the arbitrator's decision. The arbitrator shall have no authority to add to, subtract from, or alter any provision of this Agreement, or make an award which has such effect.

(e) The arbitrator has all the duties and powers of an arbitration board as stated in the *Ontario Labour Relations Act, 1995* ("*OLRA")*, as amended from time to time. In accordance with the *OLRA*, the arbitrator may extend the time for the taking of any step in the grievance procedure under Article 6.05, notwithstanding the expiration of such time, where the arbitrator is satisfied that there are reasonable grounds for the extension and that the opposite Party will not be substantially prejudiced by the extension.

(f) The Union and University will share equally the fees and expenses of the Arbitrator. Employees who are called as witnesses at an arbitration hearing shall be given release time from their regular duties with no loss of regular pay and benefits. Each party shall bear the expenses of its representatives and participants and for the preparation and presentation of its own case.

6.7 General

(a) The parties may agree in writing to extend the time limits for any Step of the grievance procedure, or to waive any Step in the grievance procedure, under Article 6.05.

(b) In the event that a party fails to reply in writing within the time limits prescribed in the grievance procedure, the other party may submit the matter to the next Step as if a negative reply or denial had been received on the last day for the delivery of such reply. When no action is taken to submit the matter to the next Step within the time limits set out in Article 6.05, the grievance will be deemed to have been withdrawn or settled, as the case may be.

(c) A claim of unjust discipline, except cases of disciplinary suspension or discharge will be submitted to the grievance procedure under Article 6.05 within 20 working days from the date on which notice of the discipline was delivered to the Union President. In all such cases the burden of proof shall be on the Employer to establish its case.

(d) All claims of unjust disciplinary suspension and discharge will commence at Step 2 and must be submitted to the Provost or to the FHS Associate Vice-President, Academic, as appropriate, within 5 working days from the date on which the notice of disciplinary suspension or discharge was delivered to the Union President. In all such cases the burden of proof shall be on the Employer to establish its case.

ARTICLE 7 – NO STRIKES OR LOCKOUTS

7.1 There shall be no strike or lockout during the term of this Agreement. The words "strike" and "lockout" shall be as defined in the *OLRA.*

7.2 In the event that any person represented by a trade union and employed by the University, other than those in this bargaining unit, engages in a lawful strike or is lawfully locked out, an employee covered by this Agreement will not be required to perform work normally done by that person.

7.3 An employee who, in the performance of their job, encounters a picket line at a workplace other than the University and who feels that they cannot complete their assigned duties as a result, shall contact their supervisor.

ARTICLE 8 – RESPECTFUL WORKPLACE

8.1 The Parties agree that all employees shall be entitled to a respectful workplace free of discrimination, sexual harassment and workplace harassment.

8.2 Discrimination

(a) The Parties agree that there will be no discrimination, interference, restrictions, coercion, or intimidation exercised on or practised by the University or the Union in regard to any matter associated with the terms and conditions of employment of employees by reason of age, ancestry, citizenship, colour, creed, ethnic origin, family status, disability, language, marital status, nationality, place of origin, religious affiliation, race, receipt of public assistance, record of offences, gender identity, gender expression, sex, sexual orientation, same sex partnership, nor by any other ground prohibited by the *Ontario Human Rights Code;* nor by reason of membership or non-membership or activity or lack of activity in the Union, nor by reason of the employee's political belief or affiliation, the employee's academic orientation or school of thought.

(b) The University recognizes that the work of employees supports the academic mission of the University. The parties agree that employees enjoy freedom of speech and freedom of thought. The parties also agree that the diversity of traditions across disciplines necessitates that an employee's freedom to pursue their own direction of research will vary according individual supervisor/employee arrangements. The parties also agree that no employee will be disciplined for the fact of exercising reasonable intellectual discretion pursuant to, and within the parameters of, the principles described in Article 8.02(a) above and within the scope of the provisions of Article 4 of this Agreement.

8.3 Sexual Harassment

Sexual Harassment is comments or conduct of a sexual nature directed at an individual or group by another individual or group where it is known, or ought reasonably to be known, that the comments or conduct are unwelcome.

8.4 Workplace Harassment

Harassment in the workplace includes intimidation that is repeated and/or unwelcome, threats or a pattern of aggressive, or insulting behaviour by a person in the workplace, where the person knows or reasonably ought to know that this behaviour is likely to create an intimidating or hostile workplace environment or is an abuse of authority over an employee.

8.5 If a complaint arises in respect of any matter covered by Article 8 the grievance procedure as set out in Article 6 is to be used. Nothing in this Article prevents an employee from filing a complaint with the Ontario Human Rights Tribunal.

8.6 General

(a) An employee is not required to perform any duties of a personal nature not connected with the approved operations of the University.

(b) Reprisals, retaliation, or threats of reprisals against any employee for pursuing their rights under this Article, for having participated in the procedures, or for acting in any role under these procedures are prohibited.

8.7 Complaints

(a) Employees alleging a violation of any of Articles 8.01 – 8.06 may file a grievance in respect of such violation, and in such case, the University's Discrimination, Harassment,

and Sexual Harassment: Prevention and Response Policy (the "Policy") shall be considered inapplicable in its entirety.

(b) Employees alleging a violation of the Policy may engage any of the options or processes set out in, and as permitted by, the Policy, and in such case, Articles 8.01 – 8.06 shall be considered inapplicable in their entirety.

(c) An employee may not engage both the Policy and any of the Articles 8.01 – 8.06 for the same matter.

ARTICLE 9 – CORRESPONDENCE AND INFORMATION

9.1 All correspondence between the University and the Union relating to matters covered by this Agreement, except as otherwise specified in this Agreement, will pass between the President of the Union and the Director, Employee/Labour Relations or their designates.

9.2 Where written notice is specified in this Agreement, e-mail will be deemed adequate means, unless otherwise specified in this Agreement.

9.3 The University will provide the Union with the following information in electronic form:

(a) annually on or before the 15th of January in each year:

(i) a listing containing the names of all employees in the bargaining unit including their job title, Librarian level, employee type (per Article 3.02, Types of Employees), employee identification number, department, campus address, gender, employment start date, home address, home telephone number, workplace email address, gross annual salary, and latest hire date, if applicable;

(ii) a listing of all new hires and their employee type (per Article 3.02), terminations, including resignations and retirements, and leaves per Article 17, Leaves of Absence and Article 23, Organizational and Professional Development; and,

(iii) a listing of all employees who are currently on, or have been on, salary continuance or long term disability (per Article 16, Absence Due to Illness/Injury), in the previous 12 months;

(b) notification of deaths of any current employee; and,

(c) such other information as may be set out elsewhere in this Agreement that is required to be provided.

9.4 The University will provide the Union with copies of appointment letters for all new employees.

9.5 The Union agrees to provide the University with the following information in electronic form:

(a) a listing of the Union Executive members and Union Stewards in accordance with Article 5.01(b), Union Representation; and,

(b) such other information as may be set out elsewhere in this Agreement that is required to be given.

9.6 The Parties are relieved of their respective obligations in Articles 9.03, 9.04 and 9.05 to the extent that the relevant information is readily accessible to the other Party electronically.

ARTICLE 10 – HEALTH AND SAFETY

10.1 General

(a) The parties are committed to providing and maintaining healthy and safe working and learning environments for all employees, students, volunteers and visitors. This is achieved by observing best practices which meet or exceed the standards to comply with legislative requirements as contained in the *Ontario Occupational Health and Safety Act* ("*OHSA*"), *Environmental Protection Act*, *Nuclear Safety and Control Act* and other statutes, their regulations, and the policy and procedures established by the University. To support this commitment McMaster University, its employees and the Union are responsible jointly to implement and maintain an Internal Responsibility System directed at promoting health and safety, preventing incidents involving occupational injuries and illnesses or adverse effects upon the natural environment.

(b) The University is responsible for the provision of information, training, equipment and resources to support the Internal Responsibility System and ensure compliance with all relevant statutes, this policy and internal health and safety programs.

(c) Managers and supervisors are accountable for the safety of workers within their area, for compliance with the statutory and University requirements, and are required to support Joint Health and Safety Committees ("JHSCs").

(d) Employees are required to work in compliance with statutory and University requirements, and to report unsafe conditions to their supervisors.

(e) The Parties shall comply in a timely manner with their respective obligations under the *Occupational Health and Safety Act, R.S.O. 1990, c.0.1*, as amended, (*the Act*), its regulations, codes of practice, and guidelines and all relevant environmental laws, regulations, codes of practice and guidelines. All standards established under these laws along with the McMaster University Workplace & Environmental Health & Safety Policy, which shall be in compliance with these laws, shall constitute minimum acceptable practice.

(f) The Union has the right to appoint 1 bargaining unit member from the University Library to the *Libraries and Museum Joint Health and Safety Committee* and to continue to have 1 bargaining unit member from the Health Sciences Library sit as a member of the *Faculty of Health Sciences Joint Health and Safety Committee.* An employee will suffer no loss of remuneration for time required to carry out their responsibilities, if any, on the *Libraries and Museum Joint Health and Safety Committee* and on the *Faculty of Health Sciences Joint Health and Safety Committee.*

10.2 Right to Refuse

An employee has the right to refuse unsafe work in accordance with the *OHSA*.

10.3 No Disciplinary Action

No employee shall be discharged, penalized or disciplined or threatened for acting in compliance with the *OHSA*, its regulations and codes of practice and environmental laws, regulations or codes of practice.

10.4 Education and Training

(a) The Employer agrees to pay the cost of certification training for employees who are appointed to a JHSC or CJHSC and who are designated to attend such training.

(b) No employee shall be required or permitted to work on any job or operate any piece of equipment until they have received proper education, training and instruction.

(c) The University will ensure that all employees receive training in accordance with requirements outlined in the Risk Management Manual, Health and Safety Training Program, and training matrices.

10.5 Disclosure of Information

(a) The University shall disclose information in accordance with the *OHSA* and related University policies and programs.

(b) In accordance with the *OHSA*, the University shall notify the Union of all hazardous substances and processes to be introduced, by their chemical and trade names, noting potentially harmful effects, their maximum allowable levels, and what kinds of precautions will be taken.

10.6 Ergonomics

Administration of ergonomic concerns will be in accordance with McMaster University's Ergonomic Safety Program.

10.7 First Aid/CPR Certification

The University will continue to provide access to its First Aid/CPR training and recertification training at no cost to employees. In choosing the session to attend, employees will consult with their immediate supervisor and exercise reasonable judgment having regard for the needs of their job responsibilities.

ARTICLE 11 – EMPLOYEE INFORMATION

11.1 Personnel Files

(a) The University and the Union agree that the University shall maintain personnel records. It is the responsibility of the employee to ensure that the information on file with Human Resources Services is up-to-date and includes a current address and telephone number.

(b) The personnel file for the employee shall include items concerning the record of employment including, but not limited to, the original application form, Position Responsibility Statement, salary history, as well as any documentation in accordance with Article 12 and Article 13, all of which shall be copied to the employee concurrent with their addition to the file.

(c) Employees have the right to examine their personnel file in the presence of a member of Human Resources Services staff, by appointment. Upon request and within a reasonable time following the request, employees will be provided with a photocopy of specified documents from their file. The employee is free to point out any alleged factual errors and proven errors will be corrected.

(d) Employees will notify Human Resources Services of changes in information related to spouses and dependents necessary to administer benefits.

(e) Subject to legal and/or statutory requirements, when Human Resources Services receives requests from an external agency for personal or employment related information regarding an employee, it will confirm employment only. Additional information shall only be divulged with the written authorization of the employee.

(f) An employee may submit document(s) to their supervisor with a request that such document(s) be included in their personnel file. Such request will not be unreasonably denied.

(g) Anonymous material will not be included in an employee's personnel file nor shall it be relied upon by the University in making formal employment-related decisions.

11.2 Access to Personnel Files

Personnel files of employees shall be confidential. Access to personnel files will be limited to:

(a) the employee, and/or their designate, with written authorization of the employee;
(b) the employee's supervisor;
(c) staff in Human Resources Services; and
(d) other authorized University personnel as permitted or required by law.

11.3 Employee Health / Return-to-Work Files

(a) All Employee Health / Return-to-Work files will be kept in an area separate from all other personnel files and under secure conditions.

(b) Access will be limited to the employee and authorized persons within HR who have a legitimate reason to access such files, it being understood that such persons may be required to supply information from those files to:

(i) the employee's Supervisor to facilitate return to work, and where relevant, accommodation, excluding information disclosing diagnosis, the designation of a medical specialist or the treatment type;

(ii) the Employer's authorized agents to administer the disability insurance program; or

(iii) the Workplace Safety and Insurance Board (WSIB).

Access to any other persons will only be provided with the prior written authorization of the employee or their Power of Attorney.

11.4 Employee Medical Files

(a) An employee's Medical File shall be maintained by the Office of the Occupational Health Nurse and Occupational Physician in an area separate from all other personnel files and under secure conditions. This file may contain an employee's personal medical information.

(b) Access will be limited to the employee and the Offices of the Occupational Health Nurse and Occupational Physician who have legitimate reason to maintain and access such files. Access to any other persons will only be provided with the prior written authorization of the employee or their Power of Attorney.

(c) The Office of the Occupational Health Nurse and Occupational Physician may supply information from the medical files to authorized persons within Human Resources Services to facilitate employee return to work or accommodations. The Offices will not disclose an employee's medical condition including diagnosis, medical specialist or treatment type without written authorization of the employee or their Power of Attorney.

ARTICLE 12 – PROGRESSIVE DISCIPLINE AND DISCHARGE

12.1 In most cases, it is expected that informal discussions will be sufficient to resolve problems and concerns and discipline will be preceded by non-disciplinary counselling. The University shall discipline or discharge an employee only for just cause.

12.2 The value of progressive discipline, with the aim of being corrective in application, is recognized by both parties. Discharge shall be for just cause and will normally be preceded by a documented record of non-disciplinary counselling, warnings (written or oral) and/or suspension.

12.3 Disciplinary Process

(a) Prior to disciplining an employee, the University will meet with the employee and a Union Representative. At this meeting, the University will advise the employee of the alleged offence and provide the employee with an opportunity to respond.

(b) Within 5 working days of the meeting referenced in 12.03(a) or any additional meeting that the University may require, the University will decide whether or not discipline is to be imposed, and if so, at what level. This decision will be communicated orally and in writing at a meeting with the employee and a Union Representative. A copy of the written decision will be provided to the Union President.

12.4 Immediate Non-Disciplinary Leave Pending Investigation

(a) In cases where it is necessary to remove an employee from the workplace immediately, such as those which involve serious insubordination, a threat to the safety of a person, assault, or any incident requiring an immediate investigation, an employee may be immediately placed on non-disciplinary leave without loss of pay pending further investigation and Article 12.03 shall not apply. The University shall notify the Union President or designate of a non-disciplinary leave as soon as possible.

(b) As soon as reasonably practicable, the University will inform the Union of the nature of the allegations made against the employee, if any.

(c) If, following the investigation, the Employer intends to discipline the employee, the disciplinary process set out in Article 12.03 shall then apply.

12.5 A letter of warning or reprimand may only be issued by administrative officers designated by the University who are not themselves members of the bargaining unit.

12.6 Dismissal for cause means the termination of an appointment by the University.

12.7 The University bears the onus of proving that any disciplinary action taken was for just cause.

12.8 Failure to renew a limited-term contract or failure to grant a Continuing Appointment shall not constitute discipline.

12.9 Subject to Article 12.04 disciplinary action shall be initiated only after completion of a preliminary investigation, conducted in accordance with the principles of procedural fairness, and shall not be based on anonymous information.

12.10 Any record of discipline shall be removed from an employee's personnel file after a period of 24 months from the date of the alleged infraction provided that no subsequent infractions have occurred within that period.

ARTICLE 13 - PROBATIONARY EMPLOYMENT

13.1 A newly-hired employee will normally be on probation for the first 12 calendar months of active employment in the bargaining unit.

13.2 At the time of their appointment, the employee will be advised, in writing, of the position-related requirements set out in the Position Responsibility Statement and the University's expectations of successful job performance that they must meet by the end of probation.

13.3 Progress and Performance Reviews

(a) **(i)** No later than the end of the 4th and 8th completed month of active employment, the progress and performance of an employee will be reviewed based on the Position Responsibility Statement and the University's expectations of successful job performance as provided to the employee pursuant to Article 13.02.

(ii) The reviews referenced in Article 13.03(a)(i) will be the subject of meetings between the employee and their supervisor and will be communicated to the employee in writing within 2 weeks of each meeting. The written performance review will include, where necessary, specific steps the employee must take to improve their performance.

(b) If in the University's opinion, the employee's performance and progress does not meet the job requirements, but may by the end of an extended probationary period, or if there has been insufficient opportunity to assess the employee's performance during the initial probationary period, the University may extend the probationary period for a further period of 6 months.

(c) In the event the University requires more than 2 reviews of the employee's progress and performance during the probationary period, the Union will be notified of subsequent reviews.

13.4 At the end of the probationary period or the extended probationary period, as applicable, if performance is deemed to be satisfactory, the employee's appointment as a continuing employee will be confirmed in writing.

13.5 Termination of Employment

(a) Notwithstanding Articles 12.02 and 12.07, termination of employment of a probationary employee is non-disciplinary and need not be for just cause.

(b) Article 6.07(d) shall not apply to the termination of a probationary employee and a grievance alleging that such termination was improper shall not give rise to a reverse onus on the University.

(c) The Union shall be invited to attend the meeting at which the employee is advised of the University's decision.

ARTICLE 14 – SENIORITY

14.1 Definition and Calculation of Seniority

(a) Seniority is the length of continuous service in the employ of the University and shall be calculated from the employee's most recent date of such employment.

(b) For clarity, where there has been previous employment in the bargaining unit, it will be acceptable to have a maximum 13-week gap in employment when calculating the seniority date.

(c) Seniority will continue to accrue and will not be affected by absence resulting from any approved leave of absence as provided for in this Agreement.

(d) Where seniority dates are the same, the following order of criteria will be used to make a distinction:

(i) Hire Date
(ii) Offer Letter Date
(iii) Employee Number

14.2 Seniority List

(a) The University will maintain a seniority list and will provide a copy of the seniority list to the Union annually on or before January 15th of each year.

(b) Upon completion of their probationary period, an employee will be added to the seniority list.

(c) The seniority list will be used to determine seniority for the purposes of this Agreement. The seniority list shall be deemed correct until such time as the Union brings an error to the University's attention, and any amendment will not be retroactive if such amendment would require a change to a University decision based on the earlier seniority list.

14.3 Loss of Seniority

An employee will lose their seniority and will be deemed to have terminated their employment with the University for any of the following reasons:

(i) they are discharged for just cause and not reinstated;

(ii) they resign or retire; an employee can resign at any time by means of written notice to their supervisor.

(iii) they are absent from work without authorization from their supervisor and without reasonable justification for 5 consecutive working days; or,

(iv) they receive severance pay.

ARTICLE 15 – WORKLOAD AND HOURS WORKED

15.1 The University shall assign workload in a manner consistent with the principles set out in Article 4.02. An employee will not be required to work evenings or weekends unless specified in their Position Responsibility Statement.

15.2 An employee's workload consists of position-related responsibilities, as outlined in their Position Responsibility Statement, professional service and professional activity, including goals set out in the Annual Activity Report as per Article 24. As per Article 25.03, the normal distribution among the 3 activities will be 75% position responsibilities and 25% professional service and professional activity, combined.

15.3 The Parties recognize employees as professional academic librarians such that they have a degree of autonomy in managing their workload and hours worked.

15.4 An employee and their supervisor are encouraged to work collaboratively with other employees and supervisors to ensure equitable workload and hours worked.

15.5 An employee's workload shall be such that the required position-related responsibilities, professional service and professional activity can reasonably be expected to be performed within a 35 hour work week, averaged over the year.

15.6 In no case shall an employee be required or permitted to work more than 48 hours in any one week as stipulated by the *Employment Standards Act, 2000*.

15.7 The Parties recognize that there must be some flexibility with respect to the hours demanded by each employee's work to allow employees and supervisors to tailor employees' workload and hours worked to the specific needs of position-related responsibilities, professional service and professional activity. The exercise of this flexibility may result in corresponding fair and reasonable adjustments of workload or hours worked. The Parties recognize that such flexibility is mutually beneficial for both employees and supervisors.

15.8 The Parties recognize that professional service and professional activity responsibilities may require employee attendance at conferences/seminars/workshops. Attendance at such conferences/seminar/workshops will normally be at the employee's initiative, as per Articles 23.01 and 23.05 Organizational and Professional Development. When the employer requires the employee to attend a conference/seminar/workshop, the employer will reimburse the employee in accordance with University policies and procedures.

15.9 Working from Home Arrangements

The University recognizes that employees may work from home on occasion. If employees request to work from home on a continuing basis the following conditions shall pertain:

(i) the employee will remain responsible for fulfilling all their on-campus commitments;

(ii) the employee and their supervisor must both agree to the arrangement;

(iii) the arrangement will be reviewed by the supervisor to determine continuing operational feasibility;

(iv) the arrangement must be documented in writing; and,

(v) no continuing arrangement will be longer than one year in duration, but may be renewed with the agreement of the employee and their supervisor.

ARTICLE 16 – ABSENCE DUE TO ILLNESS/INJURY

16.1 General Provisions and Periodic Absences

In the event of periodic personal illnesses or injuries that are anticipated to cause an absence from work of less than 10 working days, an employee is required to notify their supervisor or designate by telephone before the beginning of the work day or as soon as possible thereafter. The employee shall inform their supervisor or designate of the expected date of their return to work, and must provide a phone number where they may be reached in their absence. Should the employee's condition change during the absence such that there is a change to their expected date of return, they must notify their supervisor or designate as soon as such anticipated change is known to them.

16.2 Short-Term Disability – "Salary Continuance"

(a) In the event of any personal illness or injury that is anticipated to cause a continuous absence from work of 10 working days or more, the employee shall advise their supervisor at the commencement of such absence, or as soon thereafter as the employee becomes aware that their absence is anticipated to be 10 working days or more, and will be required to maintain communication with their supervisor as well as Employee Health Services throughout the period of absence.

(b) Following an employee's completion of their probationary period, subject to their provision of satisfactory medical evidence and provided that the employee has complied with the requirements of Article 16.02 (a), each employee is entitled to a total of 6 months of full salary continuance for periods of absence due to illness or injury that result in the employee being totally disabled from performing their job for 10 continuous working days or more.

(c) Eligibility for the full 6-month period of salary continuance will be restored in respect of a subsequent absence(s) due to total disability only if the employee's initial return to work is followed by a period of regular and continuing attendance at work at least equal to the period of the initial absence. In all other cases of subsequent absence(s) salary continuance entitlement will be limited to the remaining unused balance of the initial 6-month period.

16.3 Coordination with Other Benefits

(a) If, during any period of absence from work under Article 16.01 or during any period of absence from work under Article 16.02, the employee qualifies for *Workers' Compensation Act* benefits or for disability benefits under the Canada Pension Plan, or for any similar private or government benefits, the employee will remain entitled to full pay in accordance with Article 16.01 or 16.02(b) as applicable only if all other benefits payments are assigned directly to the University, otherwise the employee's pay will be reduced by the amount of such benefits.

(b) It is the employee's responsibility to report receipt of any such benefits to their supervisor and to Employee Health Services. Failure to do so will be considered misconduct.

16.4 Long Term Disability

(a) The University agrees to continue to provide a Long Term Disability Plan (the "LTD Plan"), for the duration of this Agreement.

(b) Participation in the LTD Plan is a condition of employment and each eligible employee will pay, via payroll deduction, 100% of the premium costs of the LTD Plan.

(c) An employee who has not completed their probationary period is not an eligible employee under the LTD Plan and shall not pay LTD premiums.

(d) Participation in the LTD Plan and entitlement to any benefit thereunder shall be governed by the terms and conditions set by the LTD Plan Provider.

16.5 Return to Work

(a) The parties recognize the importance of early and safe return to work and acknowledge their respective roles in facilitating such returns and in accommodating employees in their return to work. The Union and the employees will fully cooperate in the arrangement of any required accommodations.

(b) In fulfilling its duty to accommodate, the University recognizes its responsibility to make reasonable efforts to provide, at the appropriate time, suitable modified work or available alternate work to employees who are temporarily or permanently unable to return to their regular duties, as a result of an injury or illness. Depending on the circumstances, this may include the modification of work stations, equipment, or elements of the job, in keeping with the employee's medical restrictions and functional abilities, providing that such accommodation does not create undue hardship to the University.

ARTICLE 17 – LEAVES OF ABSENCE

17.1 Bereavement

An employee is entitled to bereavement leave without loss of regular pay and benefits in the event of a death in their family as follows:

a) Where the death is of the employee's spouse, common law spouse, same-sex partner, child, spouse's child, common law spouse's child, step-child, ward, sibling, parent, step-parent, parent-in-law, sibling-in-law, child-in-law, grandparent, spouse's grandparent, or grandchild the bereavement leave shall be up to 5 consecutive working days.

b) If, during a bereavement leave, attendance at a funeral requires extensive travel, an additional 2 days' leave, may be granted by arrangement with the employee's supervisor to accommodate travel. Such additional leave will not be unreasonably denied.

c) Should the employee require accommodation related to family, religious and cultural practices, then alternate arrangement shall be considered. Alternate arrangements shall not be unreasonably denied.

d) Effective August 1, 2023
If bereavement leave is required in the event of the death of a person significant to the employee and not specifically named in Article 17.01(a), it may be granted up to a maximum of 3 days by arrangement with the employee's supervisor. Such requests will not be unreasonably denied.

e) If an employee's scheduled vacation is interrupted due to a death of a member of their family, the employee shall be entitled to bereavement leave in accordance with Article 17.01(a) and the portion of the employee's vacation that is deemed to be bereavement leave will be rescheduled in accordance with Article 18.02, or with the consent of the employee's supervisor the employee's scheduled vacation may be extended by the period of the bereavement leave.

17.2 Jury Duty / Court Service

(a) Paid leave will be granted to an employee who is required, under summons or subpoena, to serve as a juror or witness in a court proceeding.

(b) The employee shall provide their immediate supervisor with a copy of the summons or subpoena, which indicates the period of jury duty or witness service required, as soon as possible after receipt of same.

(c) Any payment received by the employee for service as a juror or as a witness will be assigned directly to the University; otherwise the employee's pay will be reduced by the amount of such payment(s).

(d) It is the employee's responsibility to report receipt of any such benefits to their supervisor. Failure to do so will be considered misconduct.

(e) Paid leave shall not be granted when the employee is a party to the court proceeding.

17.3 Unpaid Personal Leave

(a) An unpaid personal leave may be granted for a variety of reasons for a period of up to 12 months at the discretion and the approval of the supervisor and subject to operational requirements. Such requests will not be unreasonably denied. During such leave, the employee may continue to participate in the University benefit plans, provided they pay both the employee and the University benefit plan premiums in advance. An employee may, in circumstances permitted by the Pension Plan, choose to continue to accrue Pensionable Service (as that term is defined in the Pension Plan) during an Unpaid Personal Leave. In such case the employee must elect to do so in writing and must make arrangements to pay their employee contributions for the duration of the leave in advance, in which case, employer contributions to the pension plan will similarly continue.

(b) Upon return to work from an unpaid personal leave, the employee will resume their prior position so long as the position has not been declared redundant pursuant to Article 20, with full corresponding salary and benefits. If the employee's prior position is declared redundant during their unpaid personal leave, the employee will receive notice under Article 20 at the time of the redundancy but the period of paid notice provided for by Article 20 shall begin at the scheduled conclusion of the employee's Unpaid Personal Leave.

17.4 Pregnancy and Parental Leaves and Eligibility

All employees are entitled to pregnancy and parental leaves in accordance with the *Employment Standards Act, 2000* (the "ESA").

For all pregnancy and parental leaves beginning on or after January 1, 2020, the employee shall be entitled to financial benefits, as follows:

(a) Financial Benefits - Pregnancy Leave

For each week of leave up to the 11th week, inclusive, the University will pay 95% of the base salary they otherwise would have received, less the maximum amount of weekly pay any individual is eligible to receive in accordance with the EIA (the "EI Max"), regardless of whether or not such amount is actually received by the employee. If the employee provides proof that their EIA entitlement is less than the EI Max, their weekly payment from the University will be 95% of base salary they otherwise would have received less the amount of their EIA entitlement.

(b) Financial Benefits - Parental Leave

(i) OPTION A

For each week of leave up to the 19th week, inclusive, the University will pay 95% of the base salary they otherwise would have received, less the maximum amount of weekly pay any individual is eligible to receive in accordance with the EIA (the "EI Max"), regardless of whether or not such amount is actually received by the employee. If the employee provides proof that their EIA entitlement is less than the EI Max, their weekly payment from the University will be 95% of base salary they otherwise would have received less the amount of their EIA entitlement.

OR

(ii) OPTION B

For the first 4 weeks of leave, the University will pay 100% of the base salary they otherwise would have received.

(c) It is understood that top-up under Article 17.04(a) and 17.04(b) is calculated based on a standard, not extended, parental leave.

(d) Pregnancy and Parental Leave Combined

The total period of eligibility for financial benefits through a combination of pregnancy leave and parental leave is 30 weeks (11+ 19). Subject to Article 17.04(f), below, if an employee takes both pregnancy leave and parental leave for the same child (or children, in the case of multiples), the employee will have the option to elect that the period of eligibility be combined and financial benefits be administered without interruption (i.e. to receive an advance of parental leave benefits).

(e) Parental Leave Combined With Any Other Statutory Leave

Subject to Article 17.04(f), below, an employee taking any other statutory leave immediately preceding a parental leave will have the option to elect that the period of eligibility be combined and any financial benefits be administered without interruption (i.e. to receive an "advance" of parental leave benefits).

(f) Administrative Details Regarding "Advance" of Parental Benefits

i. An employee who elects to receive an "advance" of their parental benefits while on another statutory leave of absence will not receive more than 95% of their base salary while in receipt of those benefits;
ii. If an employee who elects to receive an "advance" of their parental benefits does not ultimately take parental leave in a duration equivalent to the benefits so received, they will be required to repay any excess benefits;
iii. McMaster is not liable if an employee's choice to elect an "advance" negatively impacts their Employment Insurance benefits.

(g) Other Benefits

(i) An employee who takes a pregnancy and/or parental leave pursuant to this Article 17.04 is entitled to continue to participate in all pension and health benefits plans, as may be applicable, including Extended Health, Dental and Basic Group Life, for the duration of the leave(s), provided the employee continues to contribute their normal share of the cost of these benefits, including pension contributions.

(ii) Any employee wishing to continue participation in any of the Employee-paid benefits, as may be applicable, such as Long-Term Disability (LTD), Optional Life insurance, and Accidental Death & Dismemberment (AD&D) insurance, must notify Human Resources Services of this decision in advance of the commencement of the leave and arrange for the payment (e.g. payroll deduction) of the Employee's normal share of benefit premiums.

(iii) Vacation shall continue to accrue during all pregnancy and parental leaves.

(iv) An employee who has unused vacation time when their pregnancy or parental leave commences may take such vacation during the twelve months following the end of the pregnancy or parental leave.

(v) An eligible employee who commences pregnancy or parental leave during the notice period under Article 20 or 21 may elect to suspend the notice period for purposes of Article 20 or 21 until the date their leave is scheduled to end, following

which the balance of their notice period will resume.

(vi) Upon return to work from pregnancy and/or parental leave, the employee will resume their prior position so long as the position has not been declared redundant pursuant to Article 20, with full corresponding salary and benefits. If their prior position is declared redundant during their pregnancy and/or parental leave, the employee will receive notice under Article 20 at the time of the redundancy but the period of paid notice provided for by Article 20 shall begin at the scheduled conclusion of the employee's pregnancy or parental leave.

(vii) An employee's pregnancy or parental leave may overlap the period of an approved Professional Development Leave under Article 23. The unused portion of the Professional Development Leave may be taken immediately following the end of the pregnancy or parental leave, or some other time as mutually agreed. Pregnancy and/or parental leave shall count as "consecutive full time service" for the purposes of Articles 23 (Professional Development Leave).

17.5 Family Medical Leave

(a) An employee may take a leave of absence, without pay, for up to 8 weeks to provide care or support to a seriously ill family member. Family Medical Leave shall be taken pursuant to the provisions of Section 49.1 of the ESA.

(b) Financial Benefits

For each week of leave up to the 8th week, inclusive, the University will pay 90% of regular salary, less the maximum amount of weekly pay any individual is eligible to receive in accordance with the EIA (the "EI Max"), regardless of whether or not such amount is actually received by the employee. If the employee provides proof that their EIA entitlement is less than the EI Max, their weekly payment from the University will be 90% of regular salary less the amount of their EIA entitlement.

(c) Other Benefits

An employee who takes a Family Medical Leave pursuant to this Article 17.05 shall be entitled to maintain all prescribed benefits as outlined in the ESA.

17.6 Public Service Leave

(a) Campaign

An employee seeking public office may make application for a leave of absence, at full salary, during the campaign for election on the following basis:

(i) for election to the Parliament of Canada; leave for the equivalent of up to 30 days;

(ii) for election to the Legislature of Ontario, leave for the equivalent of up to 30 days;

(iii) for election to Municipal, Regional or County Office or Board of Education; leave for the equivalent of 5 to 10 days depending upon the nature of the office being sought.

The period of leave in each case need not be taken on consecutive days or necessarily in whole days. Entitlement to a period of leave beyond three campaigns in a 10 year period is subject to the approval of the appropriate Vice-President.

(b) Election

If the employee is elected, they shall, while serving in the office to which elected, be

entitled to leave of absence on the following basis:

(i) Parliament or Provincial Legislature; leave of absence without pay for a period of up to 5 years;

(ii) Municipal, Regional or County Office or Board of Education; subject to the work requirements of the department, leave of absence for attendance at sittings of the Council or Board. If the length of time involved is significant, such absences will be subject to a pro rata reduction in salary;

(iii) For full-time elected positions, leave of absence, without pay, for a period of up to 5 years.

(c) There will be no guarantee that an employee will be returned to their former position after expiry of the term of public service. Every attempt will be made to return an employee to a position at the same level and with duties as similar as possible to those of the position occupied prior to the leave of absence. Should this not be possible, the employee will be entitled to severance in accordance with Article 20. The employee, upon return to the University, will retain their original seniority date.

(d) Should the employee continue to serve in public office beyond the 5 years referenced in Article 17.06(b), then their employment relationship will be terminated at the end of the 5 year period. In the event of the employee's subsequent return to employment in the bargaining unit after a leave of more than 5 years the employee will be considered to be a 'new hire' for purposes of all entitlements under this Agreement.

ARTICLE 18 – VACATIONS

18.01(i) Employees shall be entitled to annual paid vacation at their regular rate of pay based on full-time service at June 30 each year. For part-time service vacation time will be appropriately pro-rated. The following schedule shows the vacation entitlement for the current benefit year for full-time service in the most recent 12 months to June 30.

Less than one year (expressed in working days per completed months of service)	1.92 days
1 but less than 17 years' service	23 days
17 but less than 18 years' service	24 days
18 but less than 30 years' service	25 days
30 or more completed years	30 days

18.01(ii) Notwithstanding Article 18.01(i), employees on leaves of absence shall accrue vacation pay based on their earnings, subject to Articles 18.01(iii), (iv), and (v).

18.01(iii) Supplemental Unemployment Benefits (SUB) received during a pregnancy, parental, or family medical leave shall be deemed to be earnings for the purpose of Article 18.01(ii), and shall be deemed to be earned at 100% of the employee's regular base salary (irrespective of the actual SUB and/or Employment Insurance Benefits received during such leaves).

18.01(iv) Salary Continuance received in accordance with Article 16.02 shall be deemed to be earnings for the purposes of Article 18.01(ii).

1**8.01(v)** Notwithstanding Article 18.01(ii)-(iv), an employee will accrue vacation pay at a rate of 100% for up to the first 12 months of a combined pregnancy and parental leave. For any portion of the combined pregnancy and parental leave in excess of 12 months will continue to accrue vacation time but not vacation pay.

18.2 All vacation days must be approved by the employee's supervisor, which approval will be subject to operational requirements. Employees must submit vacation requests as far in advance as possible. A scheduling conflict between 2 or more vacation requests from employees will be resolved based on the respective dates on which such requests were submitted.

18.3 Vacation days taken must not exceed vacation days earned. For example, on January 1st (half-way through the benefit year) an employee would be eligible for half of their full vacation entitlement. For example, if the full entitlement were 24 days (at June 30), they would be eligible for 12 days on January 1st of the same calendar year.

(a) Each employee should take their full amount of vacation entitlement within a calendar year. A supervisor and an employee must make every effort to ensure the employee takes their full entitlement of vacation within the calendar year. Notwithstanding the above, carryover of vacation to the following calendar year may occur if:

(i) the supervisor grants an employee's request for carryover of up to 5 days or in extraordinary circumstances, up to 10 days; or

(ii) operational necessities identified by the supervisor prevent the scheduling of vacation days.

(b) Vacation days carried to a subsequent year will be scheduled at the outset of that year by mutual agreement between the employee and their supervisor.

ARTICLE 19 – PAID HOLIDAYS

19.1 Employees are entitled to paid holidays in accordance with the *Holiday Schedule for Salaried Employees* as currently published on the University's Human Resources Services website.

19.2 An employee must have approval in writing from their supervisor prior to working on any public or paid holiday.

ARTICLE 20 – REDUNDANCY

20.1 A position in the bargaining unit may be declared redundant for *bona fide* operational reasons, including financial/budgetary constraints, loss of funding for the position, elimination of the organizational role, or reduction in volume of work.

20.2 Prior to notifying an employee that they are subject to a layoff in accordance with Article 20.04 the University will meet with the Union and will inform the Union of the University's intentions including identification of the affected employee(s) and the reason for the redundancy. At this meeting the Parties may discuss and agree to alternative arrangements, including re-assignment, that meet the University's operational needs and eliminate, or limit the impact of, the layoff(s).

20.3 When a position is declared redundant that position will not be posted for at least 12 months, without the position first being offered to the redundant employee.

20.4 When a position is declared redundant, the employee in that position will be given not less than 3 months' notice of the redundancy, or at the University's discretion compensation in lieu thereof.

20.5 If the employee is not reassigned during the notice period, the employment will end at the conclusion of the notice period and the employee will be entitled to a severance payment, in the form of salary continuance, in an amount equivalent to 2 weeks' compensation for each year of employment or part thereof, based on the employee's seniority date, with a minimum payment equivalent to 13 weeks' compensation and a maximum payment equivalent to 52 weeks compensation. For the purposes of this Article "compensation" shall include: (i) the employee's

gross monthly salary immediately preceding the date on which notice of redundancy was issued, subject to all applicable deductions and remittances; (ii) extended health benefits, group life plan participation, dental benefits and, pension plan participation, on the same terms as such plans are offered to all other employees, during the severance pay period; and, (iii) shall not include short and long-term disability plan participation or access to PDA funds.

20.6 In the event that a new librarian position is created or an existing librarian position becomes available within 12 months following the declaration of a redundant librarian position, the initial competition for the vacancy will be limited to applications from librarians already holding a continuing librarian position and to applications from the librarian(s) who received notice of redundancy. If, in the judgment of the University Librarian or the Director, Health Sciences Library as applicable, it is believed for good reason that a competition should not be held, they may seek the Union's consent to waive the competition.

20.7 If, in the initial competition, no candidate is identified who, in the opinion of the University, possesses the requisite qualifications, skills, ability and relevant experience to perform the duties of the new or vacant position the University may expand the competition in accordance with Article 22.08(c).

20.8 An employee who has been given a notice of redundancy, but who subsequently returns to employment in the bargaining unit, shall have previous employment in the bargaining unit recognized for purposes of service-related calculations such as vacation entitlement, seniority, etc. but if the employee is subject to any subsequent redundancy, the severance payment referenced in Article 20.05 shall be calculated based on the employee's service since their most recent date of return to the bargaining unit.

20.9 In any situation where an employee has been given notice of redundancy, but subsequently returns to employment in the bargaining unit before the completion of the severance pay period, the salary continuance under Article 20.05 shall end and any severance pay previously paid to the employee shall be deducted from any subsequent calculation of severance pay under Article 20.05.

20.10 The provisions of Articles 20.01 – 20.05 shall not apply to a probationary employee.

20.11 An employee who terminates their employment subsequent to receiving notice of redundancy will be deemed to have abandoned any rights under Articles 20.03 - 20.09.

20.12 Termination of an employee's employment as a result of the application of the provisions of this Article 20 shall not constitute a discharge for the purposes of Article 6.07(d) or Article 12.

ARTICLE 21 – REORGANIZATION/ RE-ASSIGNMENT

21.1 When positions and/or work are reorganized, positions may be revised to include new and/or different accountabilities. This flexibility will enable the Libraries to optimize the use of human resources.

21.2 If there is a reorganization that results in re-assignment requiring an employee(s) to acquire significantly different qualifications or skills, the employee(s) will be informed of the pending change(s) at least 3 months prior to the scheduled re-assignment in a meeting with the employee's supervisor. At this meeting, the employee will be provided with a revised Position Responsibility Statement. The affected employee may agree in writing to accept the change before the end of the

3-month notice period, after having had an opportunity to consult with the Union.

21.3 Prior to notifying an employee that they will be subject to a re-assignment in accordance with Article 21.02, the University will meet with the Union and will inform the Union of the University's intentions including identification of the affected employee(s) and the reason for the re- assignment. At this meeting the Parties may discuss and agree to alternative arrangements that meet the University's operational needs and eliminate, or limit the impact of, re-assignment.

21.4 In the event of a re-assignment under Article 21.02, then not later than 1 month after the meeting referenced in Article 21.02 and following discussion with the employee, the supervisor will finalize a training plan, which will then be implemented. The training plan will include at least 2 scheduled reviews of the employee's performance and progress, which will be provided to the employee in writing. The University will pay 100% of the cost of approved training initiatives.

21.5 An employee who is reassigned shall not be subject to any reduction in benefits, rank, salary, or seniority.

21.6 An employee subject to re-assignment under Article 21.02 who would be eligible to retire under the terms of the Pension Plan as at the effective date of the re-assignment may choose retirement rather than re-assignment. The employee must advise the University of this decision within 2 weeks following the meeting referenced in Article 21.02.

21.7 Within 1 month following a successful retraining period the employee and their supervisor will meet to review, and if necessary revise, the employee's goals that were set in the process under Article 24.

21.8 If, subsequent to undergoing retraining as provided for in Article 21.04, an employee has been unable to demonstrate to the University the requisite qualifications, skill and ability to fulfill duties and responsibilities of the reassignment, the employee's employment may be severed and the employee shall be entitled to severance pay in accordance with Article 20.05.

ARTICLE 22 – APPOINTMENT AND PROMOTION

Appointments

22.1 The minimum qualifications for appointment as a librarian will include a graduate degree from an ALA-accredited school of library and information science or its equivalent.

22.2

The parties affirm that Employment Equity is a key part of progress towards inclusivity in the employment relationship and that the hiring process shall reflect this affirmation. The University encourages applications from all qualified candidates including women, persons with disabilities, Indigenous Peoples (First Nations, Métis and Inuit persons), members of racialized communities and 2SLGBTQ+ identified persons.

22.3 Librarian appointments in the bargaining unit will be made by the University at one of the following ranks: Librarian I, Librarian II, Librarian III or Librarian IV. The University will consider time on research leave and employment as a librarian at another university library or equivalent experience elsewhere when determining the rank at which a librarian appointment will be made.

22.4 At the direction of the University Librarian or the Director, Health Sciences Library, as applicable, the University will strike a search committee, with the ability to make a hiring recommendation to the University Librarian or the Director, Health Sciences Library, as applicable, and that will include:

(a) the Supervisor of the posted position, who shall serve as Chair of the search committee;

(b) at least 2 employee(s), provided they have completed their probationary period, and provided the number of employees represents at least one-third of the total number of members on the search committee. Where possible, at least one such employee will be

selected based on their expertise in the area of the search;

and, depending on the position, that may include:

(c) other members, such as, without limitation, faculty member(s), and/or representatives from a related funding agency;

(d) a Human Resources professional may be invited to attend as an ex-officio and to act as a resource, and will not count towards the ratio referenced in 22.03(b) above.

22.5 Vacancies will be posted for a period of at least 10 working days.

22.6 The job posting shall include the following information:

(a) job title, department and description of the position;
(b) required qualifications, skills, ability, and relevant job experience;
(c) normally scheduled weekly hours of work;
(d) the current employment category of the job – *i.e.*: continuing, full-time, part-time, contractually limited, or sessional;
(e) the anticipated start date for the position;
(f) closing date of the posting;
(g) the restriction of applications to current employees, if applicable;
(h) the position is in the McMaster University Academic Librarians' Association bargaining unit; and,
(i) the position rank(s) and salary range(s)

22.7 For posted positions, copies of the current Position Responsibility Statement will be made available to applicants for their review in the appropriate Human Resources Services Area Office.

22.8 The University may determine that a vacancy which has been posted will not be filled.

22.9 Application Process

(a) Applicants are required to submit an updated *Curriculum Vitae* with their application letter as per the instructions on the posting notice.

(b) All applications will be considered in confidence.

(c) All employee applicants to the posted vacancy who may be qualified for the position and who apply within the initial 10 working day posting period will be considered. Subject to the requirements of Article 20.06 employees who, in the opinion of the University, are most qualified will be interviewed first. Subject to the requirements of Article 20.06, after completing any internal interviews, the University retains the discretion to consider and interview external applicants in the selection process, along with the internal employee applicants who have already received interviews, in order to determine who is the best qualified candidate.

22.10 Selection of Successful Candidate(s)

(a) The University will base its selection of the successful applicant to fill a posted vacancy on the applicants' overall qualifications, skill, ability, experience and other criteria/attributes that the University deems relevant for the position. If the selection is to be made from two or more applicants whose qualifications, skill, ability, experience and other relevant criteria/attributes are considered to be equal, subject to consideration given to Employment Equity, the employee with the greater seniority shall be selected.

(b) The University will notify the successful applicant. The Union will be notified of the name of the successful applicant.

(c) The successful applicant will receive an offer of employment, which will indicate, among other things:

(i) the department or unit in which the appointment is being offered;
(ii) the name of the immediate supervisor of the position;
(iii) the rank and salary being offered;
(iv) the type of appointment being offered;
(v) the duration of the probationary period, if applicable;
(vi) reference to documents that provide information about the benefits associated with the position being offered;
(vii) a statement that the *McMaster University Academic Librarians Association* will be the sole and exclusive bargaining agent for the candidate if they accept the offer of appointment;
(viii) a statement that the appointment being offered is subject to the terms of this Agreement, along with a reference advising the candidate how they can access a copy of this Agreement; and,
(ix) the date of the commencement of the appointment and where applicable the end date of the appointment.

22.11 If no suitable candidate is found, the University Librarian or the Director, Health Sciences Library, as applicable, will have the right to cancel or reinstitute the search for a suitable candidate.

22.12 At the conclusion of the selection process, the University will notify all those interviewed of the conclusion of the competition. Employees who applied and were unsuccessful may request a follow-up meeting with the hiring supervisor for the purpose of receiving feedback on their application.

22.13 In the event that the position becomes vacant again within 3 months of the hire date, the University may elect to reconsider the original applicants without re-posting the position and will so advise the Union.

22.14 No employee will be required to accept a position outside of the bargaining unit without that employee's consent.

Promotions

22.15 A librarian may apply for promotion once they have completed the probationary period, if any. An application for promotion may be made only once in a 12-month period, unless a significant change in position responsibilities has occurred.

22.16 A librarian who wishes to apply for promotion from one Level to the next will submit an application for promotion either to the University Librarian or the Director, Health Sciences Library, as applicable, and the application will contain the following documentation:

(i) a brief cover letter outlining the applicant's case for promotion;
(ii) an updated *Curriculum Vitae;*
(iii) a reference letter/letter of support from the librarian's current or recent supervisor, which must include a substantive consideration of the applicant's work performance and/or the applicant's 3 most recent performance evaluations;
(iv) if the applicant chooses to submit them, peer review statement(s); and,
(v) such other documentation the librarian considers relevant to, or supportive of, their application.

22.17 The University Librarian or the Director, Health Sciences Library, as applicable, may request such additional information from the applicant that they deem necessary or relevant to make a decision on the application.

22.18 In making the decision on the application, the University Librarian or the Director, Health Sciences

Library, as applicable, will consult with the librarian's supervisor, with each individual, if any, who submitted a peer review statement, and any other individual who, in the view of the University Librarian or the Director, Health Sciences Library, would have information relevant to the application. In the event that the University Librarian or Director, Health Sciences Library consults persons other than those submitting documents in the application, the person consulted must submit a written substantive consideration of the merits of the application. Following such consultation, the University Librarian or the Director, Health Sciences Library, as applicable, will discuss the application with the applicant. If the University Librarian or the Director, Health Sciences Library received negative feedback during the course of their consultations that they consider relevant to the application, that information will be disclosed to the applicant and the applicant will be given an opportunity to respond, before a decision on the application is made.

22.19 The decision on the application will be made by the University Librarian or the Director, Health Sciences Library, as applicable, having regard for the criteria set out in the Librarian Classification Level descriptions and will be communicated in writing to the applicant within 45 days of the application being submitted to, and accepted by, the University Librarian or the Director, Health Sciences Library as applicable.

22.20 Librarian Classification Level descriptions will be reviewed and published by the University annually on or before the commencement of each salary year and thereafter will be fixed for that salary year. Changes, if any, to the Librarian Classification Level descriptions will be disclosed by the University at LMC meetings and will not become effective until the later of the commencement of the salary year following their disclosure or 6 months following their disclosure. No employee will have their Classification Level reduced as a result of changes to the Classification Level descriptions.

22.21 If approved, an employee's promotion will be effective on the date that the University Librarian or the Director of the Health Science Library receives and accepts the application.

22.22 If approved, an employee's promotion will involve an increase to their base annual salary of at least 5%.

22.23 On May 1 of every year the University Librarian and the Director, Health Sciences Library will issue to all members of the bargaining unit an annual report specifying the number of applications for promotion received in the prior 12 months, and indicating the name(s) of the successful applicants.

ARTICLE 23 – ORGANIZATIONAL AND PROFESSIONAL DEVELOPMENT

23.1 Employees are encouraged to be proactive and to avail themselves of professional development opportunities that may be of value to their current positions and/or that may facilitate their career progress.

Professional Development Allowance

23.2 All continuing employees will be eligible for a Professional Development Allowance ("PDA") each fiscal year (May 1-April 30). Contractually limited employees are not eligible for a PDA.

23.3 An employee with a continuing appointment that is part-time will receive a pro-rated PDA.

23.4 The PDA will be pro-rated in the first year of employment based on the employee's hire date.

23.5 Expenses covered by this allowance must be directly related to the librarian's professional development.

23.6 Eligible expenditures must be supported by original receipts or invoices and it is the responsibility of each employee to ensure that expenses to be charged to their PDA account are eligible expenses incurred for their professional development prior to incurring such expenses. Ineligible expenses will not be processed for payment.

23.7 In the case of travel expenses charged against the PDA, the policies and procedures in the *McMaster University Travel Expenses Policy and Procedures* will apply. In the case of expenditures for other than travel purposes, signing authority will be in accordance with other applicable University policies.

23.8 All goods purchased with PDA funds are and remain the property of McMaster University but are available for the use of the individual employee for professional development activities while the employee is employed by the University. Disposal of such goods is at the discretion of the University Librarian or the Director, Health Sciences Library, as applicable.

23.9 PDA accounts will be adjusted to budget on April 30 each year. If a librarian does not spend all of their PDA funds in a given fiscal year the unspent balance will remain available to the employee in the following 2 fiscal years, subject to the limitation that no more than two times the current annual PDA amount will be held in an employee's PDA account at any given time.

23.10 Employees may borrow against future PDA funds for up to two years with the approval of the University Librarian or the Director, Health Sciences Library, as applicable. Deficits are to be the first charge against future PDA funds and unspent balances in excess of the maximum carry-forward revert to the University Librarian or the Director, Health Sciences Library, as applicable.

23.11 If a librarian ceases to be employed by the University for any reason, any unspent balance of a PDA will revert to the University Librarian or the Director, Health Sciences Library, as applicable.

23.12 Any deficit in a librarian's PDA account on the date that the librarian ceases to be employed by the University for any reason will be deducted from any final payment of wages owing to the employee.

23.13 **Annual PDA Amount:** $2,325.00
Effective May 1, 2022 $2,425.00
Effective May 1, 2023 $2,500.00

Professional Development Leave

23.14 Professional Development Leave is designed to contribute to the professional resources and effectiveness of employees, and to the value of their subsequent service to the University community.

23.15 Professional Development Leave may be granted to employees in accordance with the principles outlined in Articles 23.01 and 23.14 above.

23.16 Every request for Professional Development Leave under this Article shall be subject to the operational and budgetary feasibility of granting leaves.

23.17 Availability and Duration of Leave

(a) **Short Term Leave:** Short Term Professional Development Leave is available to an eligible employee for a maximum of 4 weeks per fiscal year. This category of leave is intended to provide employees with opportunities to enhance their academic and professional competence.

(b) **Extended Leave:** An Extended Professional Development Leave is available to an eligible employee for a maximum of 52 weeks. After the first 6 years of consecutive full- time service at McMaster University, a full-time librarian is entitled to apply for an Extended Professional Development Leave. A librarian approved for an Extended Professional Development Leave will receive 100% of, the salary they would have otherwise received if such leave is the first such leave in their career as a Librarian at McMaster University; otherwise the leave will be considered a "subsequent" Extended Professional Development Leave and pay for such leave will be in accordance with Article 23.17(c) below.

(c) **Subsequent Extended Professional Development Leave:** After 6 additional years of consecutive full-time service, a full-time Librarian is entitled to apply for a subsequent Extended Professional Development Leave as follows:

(i) An Extended Professional Development Leave for 6 months or more, to a maximum of 52 weeks, paid at 90% of the salary they would have otherwise received. Under this option, leave will usually begin on July 1st.

(ii) An Extended Professional Development Leave for less than 6 months, paid at 100% of the salary they would have otherwise received. Such a leave may begin on either July 1st or January 1st.

(d) **Alternative Subsequent Extended Leave:** As an alternative to waiting until the completion of a further 6 years of service, after 3 additional years of consecutive full-time service, a full-time Librarian may apply for a subsequent Extended Professional Development Leave of less than 6 months, paid at 90% of their regular salary as it exists on the date the leave commences. A Librarian choosing the option under this Article 23.17(d) will be eligible for such a leave twice in a seven-year period.

(e) **Special Leave:** This category of Leave is intended for use by an employee to complete professional activities that are underway when they join McMaster. In exceptional cases, when an employee may have served less than the required number of years of service, Special Leave may be approved in this category on the same financial conditions described in (c) above. Only 1 such Leave may be approved in any one fiscal year. This Leave, if granted, will be counted as an Extended Professional Development Leave for the purpose of determining an employee's eligibility for a subsequent Extended Professional Development Leave.

(f) No Librarian will be entitled to more than twelve months of Professional Development Leave in a seven-year period. The first such seven-year period commences on the date of hire as a Librarian.

(g) Professional Development Leave for a sessional employee will be granted only during the employee's normal working period and the length of the Leave will be a pro-rated portion of the employee's full time equivalent.

(h) If an employee holds an appointment that is less than full-time, the length of Professional Development Leave will be a pro-rated portion of the employee's full time equivalent.

23.18 Application Procedure and Review Mechanism

(a) Applications for professional development leave will be made in writing. The application will include:

(i) the starting and ending date of the proposed leave, and the phasing, if proposed;
(ii) an outline of the activity proposed;
(iii) a statement of how the proposed activity will benefit the employee, the profession, the Library and/or the University;
(iv) a current curriculum vitae;
(v) disclosure of any external funding received or applied for in support of the activity; and,
(vi) any other information the applicant wishes to be considered.

(b) Librarians will submit their completed applications to the University Librarian or the Director, Health Sciences Library, as applicable. The University Librarian or the Director, Health Sciences Library will ask the librarian's supervisor for comment on the value of the proposal and the department's operational requirements.

(c) The University Librarian or the Director, Health Sciences Library, as applicable, will consider each application against the following criteria:

(i) the value of the project to the librarian, the Library, the University and the broader library and research community;

(ii) the Library's operational requirements.

(d) The University Librarian or Director, Health Sciences Library will communicate its decision to the applicant in writing within a reasonable timeframe.

(e) Applications may be submitted at any time.

ARTICLE 24 – ANNUAL ACTIVITY REPORT, GOAL SETTING AND PERFORMANCE EVALUATION

24.1 For an employee to develop professionally, and for their activities to be evaluated, consideration must be given to the employee's multi-faceted work as a whole. The evaluation process will be undertaken no less than annually on the basis of the employee's Annual Activity Report described in Article 24.06 below.

24.2 The Review Year shall be May 1 to April 30.

24.3 Continuing employees will participate in the evaluation process in accordance with Articles 24.04 – 24.08. Continuing employees include probationary employees.

24.4 Continuing employees hired between January 1 and April 30 shall participate in the evaluation process the following Review Year.

24.5 Performance Review Process

(a) The diversity of professional interests and expertise among employees requires that they have the freedom to pursue developments and opportunities in self-directed professional service and professional activity. In exercising this freedom the employee will take into account the value of these pursuits to their professional advancement, the Library and the broader library and research community.

(b) The evaluation process will involve a meeting or series of meetings between the employee and their supervisor to review:

(i) the employee's position-related activities, professional service and professional activity, of the Review Year;

(ii) an evaluation of performance measured in the context of goals set for the Review Year; and,

(iii) goals for the coming Review Year. The position-related goals must align with the strategic direction of the library as determined by the University Librarian or the Director, Health Sciences Library, as applicable.

(c) The employee's Annual Activity Report, completed in accordance with Article 24.6, must be submitted to their supervisor no later than the end of the Review Year (May 7th).

(d) Once received, the employee's supervisor will provide a written performance evaluation reflecting the supervisor's assessment of the employee's job performance, professional service and professional activity, no later than June 15th. The employee may respond in writing to the supervisor's comments. This response will be appended to the supervisor's evaluation.

(e) The Annual Activity Report will be used both as a working document and a final submission. Changes may be made to the initial Annual Activity Report submitted by the employee as a consequence of discussions between the employee and the supervisor.

24.6 The Annual Activity Report submitted by the employee must include the following:

(a) A review of the employee's position-related activities during the Review Year in the areas outlined in the Position Responsibility Statement and a self assessment of those activities in the context of goals set for the period under review;

(b) A review of the employee's professional service and professional activity during the Review Year and a self assessment of those activities in the context of goals set for the Review Year; and,

(c) A statement of the employee's proposed goals for the coming Review Year in the following areas:

(i) job performance vis-a-vis the employee's Position Responsibility Statement;
(ii) professional service; and
(iii) professional activity.

24.7 Employees are invited to submit an up-to-date Curriculum Vitae, peer input, client acknowledgements and similar information as part of the Annual Activity Report.

24.8 The supervisor will consider the Annual Activity Report and performance evaluation in determining a recommended Performance Rating. The supervisor will submit the Annual Activity Report and their performance evaluation along with their recommended Performance Rating to the University Librarian or the Director, Health Sciences Library as applicable, who will determine the employee's Performance Rating, and merit pay award, if any, in accordance with Appendix III; in doing so, the University Librarian, or the Director, Health Sciences Library as applicable, may conduct additional consultations with the employee's supervisor and/or other senior leaders as they deem appropriate. Performance Ratings will be determined based on the following categories:

1: "unsatisfactory performance";
2: "marginal performance";
3: "good performance";
4: "consistently superior performance"; and,
5: "consistently outstanding performance".

24.9 Once the University Librarian, or the Director, Health Sciences Library as applicable, has signed the performance evaluation and assigned a final Performance Rating and merit pay award, the employee's Annual Activity Report, updated Curriculum Vitae (if applicable) and the supervisor's performance evaluation will be submitted to the appropriate Human Resources Department for inclusion in the employee's personnel file.

ARTICLE 25 – POSITION RESPONSIBILITY STATEMENTS

25.1 Librarians provide academic support for the teaching, learning, research and service missions of the University. Librarians collaborate with faculty, staff and students to maintain and enhance the quality of instruction, research, and service. Librarians contribute to the intellectual and cultural life of the University through stewardship of the University's resources and through supportive services. Librarians help foster students' critical thinking about information sources and systems. As information professionals librarians maintain a leadership role among libraries and archives in the province, throughout Canada and internationally.

25.2 Each position will have a Position Responsibility Statement. A copy of each Position Responsibility Statement shall be kept on file with Human Resources Services and will be provided to the Union

electronically.

25.3 Position Responsibility Statements will be developed by the University and will include a statement of responsibilities and reporting structure. Librarian responsibilities will be a combination of position-related responsibilities, professional service, and professional activity. While not stated in the Position Responsibility Statements, the normal distribution among the above 3 activities will be: 75% job responsibilities, 25% professional service and professional activity, combined.

25.4 Position Responsibility Statements will be provided to new employees upon their commencement of employment and will be reviewed with them by their supervisor.

ARTICLE 26 – BENEFITS

26.1 **(a)** The Union recognizes the Employer's right to change the provider of the Benefits Plans.

(b) The terms of the Extended Health Plan, Dental Plan, and Group Life Insurance Program may not be materially changed without the agreement of the Union.

26.2 Extended Health Plan

(a) The University will continue to pay 100% of the billed rates of premium for all eligible employees participating in the Extended Health Plan, provided by the insurance carrier.

(b) Subject to 26.01(c), participation in the Extended Health Plan is a condition of employment. Eligible employees who opt for family coverage must enroll their eligible family members before benefits are provided.

(c) Employees who work less than 17.5 hours per week are not eligible for 100% of premium paid by the University and participation is optional. If the employee opts to participate the employee will be responsible, via payroll deduction, for a pro rata share of the applicable premium amount.

26.3 Dental Plan

(a) The University will continue to pay 100% of the billed rates of premium for all eligible employees participating in the Dental Plan, provided by the insurance carrier.

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(b) Participation in this program is a condition of employment. However, employees who have coverage through their spouse or who work less than half time may opt not to participate. Eligible employees who opt for family coverage must enroll their eligible family members before benefits are provided.

26.4 Group Life Insurance Program

(a) The University will continue to pay 100% of the billed rate of premiums for employees for Basic Coverage in accordance with the Group Life Insurance Plan, provided by the insurance carrier.

(b) Employees may elect to take additional coverage at their own expense in accordance with the provisions and regulations governing optional coverage as specified in the Group Life Insurance Plan provided by the insurance carrier.

(c) Participation in Basic Coverage under the Group Life Insurance Plan is a condition of employment.

(d) Group Life Insurance Plan coverage will cease on the earlier of: (i) the date on which the employee ceases to be employed by the University; (ii) December 1st in the year the

employee reaches age 69; or (iii) the first day of retirement; at which time coverage will convert to the retiree life insurance benefit.

26.5 Accidental Death and Dismemberment Plan

The University will continue to make an Accidental Death and Dismemberment Plan available to eligible employees. An employee who elects to participate in the available plan will pay 100% of the billed rate of premium.

26.6 Post-Retirement Benefits

(a) Subject to Article 26.06(b) and (c), an employee and their eligible dependents at their retirement date are eligible to participate in the then current Extended Health, Dental and Group Life Plans for retired staff, provided:

(i) the employee is eligible to collect and elects to collect an immediate and unreduced pension on the date they retire, or, is eligible to receive and elects to be paid the commuted value of their immediate and unreduced pension on the date they retire. The employee's election must be submitted within 90 days after the retirement date;

(ii) the employee and their eligible dependents are enrolled in the Extended Health, Dental and Group Life Plans for active employees on the day immediately preceding the employee's retirement date; and,

(iii) the employee and their eligible dependents remain eligible to participate in a provincial healthcare plan.

(b) Eligibility for benefits post-retirement is limited to:

(i) employees hired before March 16, 2010;

(ii) employees hired between March 16, 2010 and May 5, 2011, who have at least 10 years of service with the University at the date of retirement; and,

(iii) employees hired after May 5, 2011, in accordance with the terms of Appendix V.

(c) Benefits post-retirement are provided in accordance with the applicable post-retirement benefit plans and, for each eligible retiree, are limited to those benefits in which the retiree participated as an active employee on the day immediately preceding their retirement date.

26.7 Eligibility for all benefit plans is subject to any additional eligibility requirements set by the insurance carrier.

ARTICLE 27 – PENSION AND GROUP RRSP

27.1 Subject to Article 27.02, eligible employees shall participate in the *Contributory Pension Plan for Salaried Employees of McMaster University Including McMaster Divinity College, 2000* (the "Pension Plan").

27.2 Employees hired on or after March 16, 2010, shall participate in the Group Registered Retirement Savings Plan described in Appendix IV.

27.3 Subject to Article 27.04, the University shall administer the Pension Plan in accordance with the terms and conditions of the Pension Plan text.

27.4 Employee contributions to the Pension Plan shall be in accordance with the Schedule of Employee Contributions set forth in Appendix II.

ARTICLE 28 – UNION ORIENTATION

28.1 Human Resources Services will provide names of new members of the bargaining unit to the Union President prior to their first day of employment.

28.2 Union Information and Orientation for New Employees

(a) Each new bargaining unit member will be provided with access to an electronic copy of this Agreement and contact information (name, phone extension and campus address) for their Union Steward and the Union President.

(b) Each new bargaining unit member will be entitled to meet with their Union Steward and/or Union President without loss of regular pay.

ARTICLE 29 – LABOUR/MANAGEMENT COMMITTEE

29.1 This Committee will review matters of concern, arising from the application of this Agreement but will not discuss any matter related to the specifics of a current grievance.

29.2 The Labour/Management Committee will be composed of at least 2 members of the bargaining unit, of whom one shall be the Union President, or such designate as the President may appoint, and at least 2 representatives of the University, of whom one shall be the University Librarian or the Director, Health Sciences Library, or designate. A quorum will be 4 members, provided that 2 representatives of each Party are present. Each Party will appoint 1 of its Committee members to serve as Co-Chairs; these individuals will be responsible for preparing agenda items and for presiding over meetings on an alternating basis.

29.3 The University and the Union will provide administrative support to the Committee on an alternating basis to circulate notices of meetings and agendas, and to take notes of the meetings. The notes shall consist of action items only.

29.4 The Committee will approve the meeting notes and will post meetings agendas and notes. Agendas will be posted at least 7 days prior to the date of each meeting.

29.5 The Committee, when it reaches a decision to make a recommendation, will forward such recommendation to their respective principles.

29.6 The Committee will meet at least quarterly each calendar year, or more often as may be agreed between the Union and the University. A scheduled meeting shall be cancelled if there are no agenda items. The Parties may also agree to cancel or re-schedule any scheduled meeting.

ARTICLE 30 – COPIES OF THE COLLECTIVE AGREEMENT

30.1 Within 60 days of ratification, the University will provide an electronic copy of this Agreement to each bargaining unit member.

30.2 The University will provide an electronic copy of this Agreement to each newly hired bargaining unit member upon commencement of their employment.

APPENDIX I – TERMINATION/CONVERSION OF CERTAIN BENEFITS

For those employees who continue to work past the age of 65, the following provisions will apply:

(i) The Group Life benefit extends to December 1 of the calendar year in which the employee attains the age of 69, at which point it will convert to the retiree life insurance benefit ($5000 lump sum policy) for eligible employees.

(ii) The LTD coverage ends on June 30 following the date on which the employee turns the age of 65 (less the elimination period). The employee's LTD premium payment will end on this date minus the length of the applicable elimination period (salary continuance). These dates correspond to the current contractual language as it relates to mandatory retirement.

(iii) The Out-of-Province Emergency Medical coverage will continue until December 1 of the calendar year in which the employee attains age 69, at which point it will convert to the retiree Out-of-Province Emergency Medical benefit ($10,000 lifetime) for eligible employees.

APPENDIX II – PENSION PLAN CONTRIBUTIONS

The University will increase the employee contribution rates for Librarians under the *Contributory Pension Plan for Salaried Employees of McMaster University Including McMaster Divinity College, 2000* as follows:

		Employee Contribution Rate on Regular Annual Salary	
		Up to YMPE*	**In Excess of YMPE**
1.	**Current**	7.00 % of Regular Annual Salary	10.00 % of Regular Annual Salary
2.	**Effective October 6, 2019**	8.00 % of Regular Annual Salary	11.00 % of Regular Annual Salary

* "YMPE" – Yearly Maximum Pensionable Earnings

The above noted employee contributions to the *Contributory Pension Plan for Salaried Employees of McMaster University Including McMaster Divinity College, 2000* shall be deducted from employees' bi-weekly pay.

APPENDIX III – WAGES

1. The "Floor" and "Ceiling" amounts for annual salaries in each of the IV Levels shall be as follows:

	Level I		Level II		Level III		Level IV	
Effective Date	Floor	Ceiling	Floor	Ceiling	Floor	Ceiling	Floor	Ceiling
1-Aug-21	$ 60,436.38	$ 87,078.16	$ 65,930.78	$ 97,266.03	$ 71,425.18	$ 107,964.96	$ 76,918.57	$ 123,133.14
1-Aug-22	$ 61,040.74	$ 87,948.94	$ 66,590.09	$ 98,238.69	$ 72,139.43	$ 109,044.61	$ 77,687.76	$ 124,364.47
1-Aug-23	$ 61,651.15	$ 88,828.43	$ 67,255.99	$ 99,221.08	$ 72,860.83	$ 110,135.06	$ 78,464.63	$ 125,608.12

***NOTE*: Prior to the application of ATB increases in accordance with paragraph 2 of this Appendix III, any salary that is below the applicable Floor on the Effective Date shall be increased to the Floor.**

2. Employees shall receive Across-the-Board ("ATB") increases to their salaries as follows:

Year	ATB Amount	ATB Application Date
Year 1	1.0%	August 1, 2021
Year 2	1.0%	August 1, 2022
Year 3	1.0%	August 1, 2023

***NOTE*:**
An individual's ATB and merit amount to be calculated on their base annual salary as at August 1, and shall not be compounded. The application of ATB increases shall occur after any salary increase in accordance with paragraph 1 of this Appendix III.

3. Merit Program for Librarians:

The University uses an annual merit award program in conjunction with performance management to provide monetary reward to Librarians in recognition of their prior year's performance. A merit pay award is allocated based on the employee's Performance Rating in relation to specific, pre-defined objectives. The components of the merit award program are as follows:

(i) Subject to (ii) to (vi) below, Librarians who receive a Performance Rating of 3 or better will receive a merit award as part of the annual Performance Evaluation pursuant to Article 24 of the collective agreement. Individual merit awards will be a percentage of base annual salary, as follows:

Performance Rating	Merit Award
3	1.5%
4	2.4%
5	3.0%

(ii) Merit awards will be applied to base annual salary on August 1, 2021, August 1, 2022 and August 1, 2023.

(iii) Merit awards for Librarians who have not held a Librarian position for the full salary year, will be pro-rated to reflect the portion of that salary year for which they were employed in a Librarian position.

(iv) If the amount of an employee's merit award will cause the employee's base annual salary to exceed the ceiling amount for the employee's Level, the excess shall be paid as a one-time, lump sum.

(v) The process outlined in Article 24 must be completed in order for a Librarian to be eligible to receive a merit award.

(vi) Notwithstanding (i) and (v), an employee on leave in accordance with Articles 17.02 (Jury Duty), 17.04 (Pregnancy and Parental Leave) and 17.05 (Family Medical Leave), as of April 30, and who has not submitted the Annual Activity Report, will receive the same Performance Rating as they received in the previous Review Year.

(vii) Merit awards will be pro-rated based on the period worked in the Review Year, with the exception of leaves taken in accordance with Article 17.04 (Pregnancy and Parental Leave).

APPENDIX IV – GROUP REGISTERED RETIREMENT SAVINGS PLAN

ELIGIBILITY

- Mandatory enrolment for full-time, permanent employees in the McMaster University Academic Librarians' Association ("MUALA") bargaining unit whose initial date of hire is on or after March 16, 2010;
- Mandatory enrolment for full-time employees hired for a period of greater than 12 months in the MUALA bargaining unit whose initial date of hire is on or after March 16, 2010;
- Those full-time employees hired for a period of less than 12 months shall be enrolled on the day, if any, following 12 months of continuous employment.

WAITING PERIOD BEFORE ENROLMENT

- After expiry of probationary period.

CONTRIBUTIONS FOR SPECIFIC SITUATIONS

- Active (regular) employment – Employee deductions at 3.5% of base pay up to the YMPE[3]; 7% of base pay in excess of YMPE and up to 2x the YMPE; and, 10.5% of salary in excess of 2x the YMPE, on a bi-weekly basis ("Required Contributions").
- Employee option to contribute while on pregnancy leave, parental leave, Family Medical leave and WSIB, at the same rate as active employee Required Contribution rates, with University matching contributions based on active employment rules;
- No option for employees to contribute while on Unpaid Leave of Absence or Unpaid Sick Leave;
- Voluntary additional contributions, to the Canada Revenue Agency maximum total annual contribution level ("Voluntary Contributions").

UNIVERSITY CONTRIBUTION FORMULA

- University will match employee Required Contributions; there will be no University match on employee Voluntary Contributions.

COVERED PAY

- Regular base earnings.

PAYMENT OF FEES

- Paid from the Plan.

INVESTMENT

- The employee will have options to invest their Required Contributions, the University's matching contributions, and their Voluntary Contributions through a variety of investment options representing the following bases: (i) conservative; (ii) moderate; and, (iii) aggressive. The amount of the contributions and the performance of the investment will determine the amount accruing to the employee at the point of retirement. As the employee is enrolled in the Group RRSP, the employee will have access to investment information with respect to the investment options.

[3] YMPE means the year's maximum Pensionable earnings as defined by the Canada Revenue Agency. For 2015, the YMPE is $53,600.00 and will increase on a calendar basis.

- Employees considering retirement have access to pre-retirement planning seminars.

FLEXIBILITY

In the event that the employee leaves the employ of the University prior to retirement, the employee's portion of the Group RRSP (including employee and Employer contributions to the date of leaving) will be converted to an individual RRSP that the employee takes with them on leaving the University's employment.

APPENDIX V – POST RETIREMENT BENEFIT CO-PAY PROGRAM

1. Employees hired on or after May 5, 2011, shall be eligible for post retirement benefits so long as they qualify pursuant to Article 26.06 and:

(a) have completed the required years of continuing service as at the date of their retirement in accordance with the table below, and have participated in the extended health and dental benefit plans available to employees during that period; and

(b) have attained a minimum age of 60 as at the date of retirement;

2. Upon retirement, eligible retirees may elect to participate or not in the Co-Pay Program. Retirees who elect to participate shall contribute a percentage of the yearly cost of post-retirement benefits to the University, in accordance with the table below. Contributions shall be made on a monthly basis.

3. The yearly cost of post-retirement benefits to the University shall be determined by the University in the fall of each year, to be effective the following May 1. Retirees who elected to participate in the post-retirement benefit plan may permanently opt-out at any time thereafter, effective the first of a month.

Years of Continuing Service Percentage of Yearly Cost	**Percentage of Yearly Cost Payable by Retirees**	**Percentage of Yearly Cost Payable by University**
30 or more	25	75
25 or more but less than 30	50	50
20 or more but less than 25	75	25
10 or more but less than 20	100	0

APPENDIX VI – ADDITIONS TO EMPLOYEE BENEFITS

Effective August 1, 2019, the Extended Health, Dental and Optional Life Insurance benefits will be modified as follows:

Extended Health:

- Increase:
  - *Mental Health specialist coverage*: maximum coverage of $3,000 per person per benefit year in total for services received by registered psychologists, social workers, and psychotherapists.
  - *Hearing Aids* coverage of 80% of the costs of hearing aids prescribed by an ear, nose, and throat specialist, up to a maximum of $1,500 per person per ear, over a period of 3 benefit years. Repairs are included in the maximum.
- Add:
  - *Continuous Glucose Monitor (CGM)*: receivers, transmitters or sensors for persons diagnosed with Type 1 diabetes, up to a combined maximum of $4,000 per person per benefit year. Sun Life must be provided with a doctor's note confirming the diagnosis.

Dental:

- Add:
  - *Assignment of Dental Claims*: allow assignment of dental claims to the dental office so that Sun Life confirms the amount payable under the McMaster plan and pays the dental office that amount on behalf of the McMaster employee. The Employee will only need to pay the dentist for the difference between the total bill and the amount paid by the McMaster plan. This enhancement will enable a more convenient employee experience.

    Note that Sun Life has advised that there are dental offices who do not accept assignment of benefits, they insist that their patients pay for their treatment up-front. In such situations, Employees can continue to submit their dental claim online or through the mobile application and receive their reimbursement within 24 to 48 hours.
- Amend Fee Guide:

  "The plan will not cover more than the fee stated in the Dental Association Fee Guide for general practitioners of the province of Ontario, regardless of where the treatment is received.

  If services are provided by a board qualified specialist in endodontics, prosthodontics, oral surgery, periodontics, paedodontics or orthodontics whose dental practice is limited to that speciality, then the fee guide approved by the provincial Dental Association for that specialist will be used."

Optional Life Insurance:

- Increase:
  - *Insurable annual basic earnings* of $100,000 multiplied by increments of 25% up to 1000% (increase from 500%) inclusive, subject to the maximum of $1,000,000 (increase from $500,000)

LETTER OF UNDERSTANDING

Between McMaster University

And

McMaster University Academic Librarians' Association

Regarding

POLICIES AFFECTING TERMS AND CONDITIONS OF EMPLOYMENT

Subject to Article 4.01(b), University Policies, Directives, Guidelines, Practices and Procedures affecting general terms and conditions of employment that are not specifically mentioned in this document will continue in force unless they are changed by the University. In those cases where there is a conflict between a Policy, Directive, Guideline, Practice or Procedure and this Collective Agreement, the Collective Agreement shall prevail.

The University will advise the Union a minimum of 15 consecutive calendar days prior to changing a Policy affecting terms and conditions of employment. At the Union's request the University will meet with the Union to discuss such policy change(s). The University shall consider the Union's comments in good faith.

LETTER OF UNDERSTANDING

Between McMaster University

And

McMaster University Academic Librarians' Association

Regarding

PAY EQUITY

This letter confirms the parties' agreement to meet by the end of the 2021 calendar year to discuss Pay Equity maintenance under the *Pay Equity Act*, RSO 1990, c P.7.

TAB 16

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

Nº du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

trarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Cases Cited

Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

Jurisprudence

Distinction d'avec les arrêts: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343; **arrêts mentionnés:** *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. c. Hydro-Québec*,

Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. v. Vasil*, [1981] 1 S.C.R. 469; *Paul v. The Queen*, [1982] 1 S.C.R. 621; *R. v. Morgentaler*, [1993] 3 S.C.R. 463; *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025.

Statutes and Regulations Cited

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40*a*(1) [rep. & sub. *ibid*., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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[1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103; *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986; *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701; *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546; *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1; *R. c. Vasil*, [1981] 1 R.C.S. 469; *Paul c. La Reine*, [1982] 1 R.C.S. 621; *R. c. Morgentaler*, [1993] 3 R.C.S. 463; *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513; *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25; *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025.

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Loi d'interprétation, L.R.O. 1980, ch. 219 [maintenant L.R.O. 1990, ch. I-11], art. 10, 17.
Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi, L.O. 1995, ch. 1, art. 74(1), 75(1).
Loi sur la faillite, L.R.C. (1985), ch. B-3 [maintenant la *Loi sur la faillite et l'insolvabilité*], art. 121(1).
Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5) [abr. & rempl. 1986, ch. 51, art. 2], 40(1) [abr. & rempl. 1987, ch. 30, art. 4(1)], (7), 40*a*(1) [abr. & rempl. *ibid*., art. 5(1)].

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Christie, Innis, Geoffrey England and Brent Cotter. *Employment Law in Canada*, 2nd ed. Toronto: Butterworths, 1993.
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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Raymond M. Slattery, for the respondent.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

The judgment of the Court was delivered by

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Sullivan, Ruth. *Statutory Interpretation*. Concord, Ont.: Irwin Law, 1997.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. nº 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, pour l'intimée.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur. 1

1. Les faits

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la 2

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

40. — (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

2. Les dispositions législatives pertinentes

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la *«LF»*) et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la *«LNE»*). 6

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

> L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

11 Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

12 Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

5. Analysis

The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Les questions en litige

17 Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analyse

18 L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE*.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of "... the interests of employees by requiring employers to comply with

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22 Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23 Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24 Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

[TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

27 À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

28 Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

32 À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

33 Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

This interpretation is also consistent with statements made by the Minister of Labour at the time

34 Cette interprétation est également compatible avec les déclarations faites par le ministre du

he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

36 Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

37 La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

38 Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

41 À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

42 Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Pourvoi accueilli avec dépens.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

TAB 17

UNIVERSITY OF TORONTO faculty ASSOCIATION

720 Spadina Avenue, Suite 419
Toronto, ON M5S 2T9

T 416 978-3351 F 416 978-7061
E faculty@utfa.org / www.utfa.org

August 4, 2020 In Response Please Quote IR # 253

BY EMAIL

Professor Kelly Hannah-Moffat
Vice-President, Human Resources & Equity
27 King's College Circle
Simcoe Hall
Toronto, Ontario M5S 1S8

Dear Professor Hannah-Moffat:

Re: Special Information Request #253

Further to our meeting of July 29, 2020, and to allow UTFA to understand the Administration's Return to Work plans more fully, please provide UTFA with:

1. Details of specific testing that was conducted, and steps that were taken, to verify that the building mechanical systems meet or exceed ASHRAE standards and other relevant standards in buildings where in person activities will be held (i.e., classrooms, research laboratories, etc.). Please provide records of this testing and verification process.

2. Details regarding the vetting process that was used in deciding to procure non-medical masks for use by faculty.

3. Details of any efforts that the University undertook to consult with faculty regarding the choice of a mask vendor, as well as mask configuration.

UTFA requests that these documents be provided as soon as they become available. In other words, please provide documents as they become available, even if other parts of this request will take longer to produce. We look forward to receiving this information.

Sincerely,

Terezia Zoric
President
Email: zoric@utfa.org

cc. Kathy Johnson
Samantha Olexson
Cheryl Wobito

UNIVERSITY OF TORONTO faculty ASSOCIATION

720 Spadina Avenue, Suite 419
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T 416 978-3351 F 416 978-7061
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August 20, 2020 In Response Please Quote IR # 253

BY EMAIL

Professor Kelly Hannah-Moffat
Vice-President, Human Resources & Equity
27 King's College Circle
Simcoe Hall
Toronto, Ontario M5S 1S8

Dear Professor Hannah-Moffat:

Re: Special Information Request #253

I write to further to our letter of August 4, 2020. As we discussed during our July 29th, August 6th, and August 20th meetings, we require this information to confirm that the University's reopening plan is sufficiently safe. Specifically, please provide UTFA with:

1. Details of specific testing that was conducted, and steps that were taken, to verify that the building mechanical systems meet or exceed ASHRAE standards and other relevant standards in buildings where in person activities will be held (i.e., classrooms, research laboratories, etc.). Please provide records of this testing and verification process.

2. Details regarding the vetting process that was used in deciding to procure non-medical masks for use by faculty.

3. Details of any efforts that the University undertook to consult with faculty regarding the choice of a mask vendor, as well as mask configuration.

Can you please reply by end of day tomorrow letting us know when we can expect to receive this information?

Sincerely,

Terezia Zoric
President
Email: zoric@utfa.org

cc. Kathy Johnson
Samantha Olexson
Cheryl Wobito

TAB 18

UNIVERSITY OF TORONTO

OFFICE OF THE VICE-PRESIDENT
HUMAN RESOURCES & EQUITY

August 27, 2020

Terezia Zorić
President
University Of Toronto Faculty Association
720 Spadina Avenue, Suite #419
Toronto, ON M5S 2T9

Dear Terezia,

I am writing in response to your letters of August 4 and 20 enclosing your Special Information Request #253. We are providing this information in the interests of our collegial relationship and our mutual interest in promoting a reasonable and safe return to work, although we do not think these requests fall within the parameters of information that the University is obligated to provide to the Association.

The following is in response to your first question about ventilation, which is but one of a range of measures being taken by the university to support a safe return to work. As explained in our presentation to UTFA at our meeting on August 20, 2020, the university simultaneously uses multiple measures to support the provision of a safe environment, including mask requirements, signage to reinforce the practice of two metre physical distancing, reduced occupancy, de-densification, increased presence of hand sanitizers and wipes, enhanced cleaning, and advising faculty, librarians, students and staff to wash hands frequently and to remain at home if experiencing symptoms.

There is ongoing discussion about airborne transmission of COVID-19, but public health authorities continue to emphasize that close contact (within 2 metres) with a positive case and touching a contaminated surface and then touching your eyes/nose/mouth are the main routes of transmission.

With regards to the ventilation system, a robust review process was implemented consisting of the following:

- A risk assessment was conducted to assess the ventilation systems in line with the ASHRAE position document of April 14, 2020
- In line with the research restart, Building Utilities conducted testing of the ventilation systems with the following items in mind:
    - Verify that the Air Handling Unit is operational, conduct maintenance as required
    - Verify filters are installed correctly.

    - Select filtration levels (MERV ratings) that are maximized for equipment capabilities, use MERV 13 if equipment allows, while assuring the pressure drop is less than the fans' capability. Replacement of filters where necessary.
- Where systems are scheduled, the schedules will be modified to ensure they are operated in occupied mode starting at 6am. This will allow for a 2 hour period before buildings are assumed to begin occupancy at 8am. The majority of spaces were already scheduled to begin on or before 6am.

It is important to note that our building records are paper based, and as such it would be difficult and time-consuming to compile, reproduce and provide a copy of all records. However, the following provides an example of the records associated with the activities above:

- Appendix A – Building Operations record of filter selection
- Appendix B – Building Operations record of maintenance check
- Appendix C – BAS record of schedule adjustments from MSB

We are continuing to follow the guidance from public health and will update our approach as that guidance evolves.

The following is in response to your inquiries about masks.

In May 2020, as a goodwill gesture to promote health and safety, and prior to the advent of mask wearing policies for enclosed public spaces, the University arranged the procurement of 250,000 UofT branded, non-medical, reusable cloth face masks in order to provide two to every student, staff, faculty and librarian member of the UofT community. Faculty members were involved in the review of the finalist mask samples, along with members of EHS, MedStores and Facilities & Services. The specifications of these particular nonmedical masks are as follows:

- Sublimated Reusable Cloth Mask
- 2-Layer.
- 100% Polyester.
- Outer: Polyester Jersey/Inner: White Polyester Jersey
- Washable, Reusable.
- Flexible and Comfortable.
- High quality machine washable fabric.
- Adjustable elastic ear straps.
- Flexible wire frame over the nose for secure _t.
- Size: 9.5"w x 6"h - Adult
- 7.75"w x 5"h - Youth
- Individually polybagged into pairs

The criteria used to select these masks were as follows.

- Health & Safety Requirements & Considerations, meaning the selected product had to meet all EHS criteria which were the most important (e.g., adjustable ear loops, adjustable nose piece) to ensure secure fit.

- **Product quality and durability**, we wanted the selected product samples to be "like new" following washes and most durable of all samples.
- **Pricing and Delivery Timelines:** Product pricing was competitive however, price was not the most important criterion, there were cheaper masks that were of poor quality and conversely masks of similar quality at a much higher price point. In comparison to other vendors, selected vendor was able to commit to reasonable delivery timelines. The use of a Trusted Vendor, which means that UofT has a positive history of working with supplier.

Our community members can, of course, choose to wear these masks, or their own, as they adhere to the provincial, municipal and University mask-wearing requirements. The type of mask an individual choose to wear is a personal choice and not a mandate. Given current provincial and municipal requirements, most individuals will likely already have masks.

There are accommodations, as required for individuals with conditions that impair the use of a face make. Employees are encouraged to contact Health and Well-being Programs and Services at hwb.utoronto.ca

Sincerely,

Kelly Hannah-Moffat
Vice-President Human Resources and Equity

cc. Heather Boon
Vice-Provost Faculty and Academic Life

Scott Mabury
Vice-President Operations and Real Estate Partnerships

Filter thickness	Bldg #	Bldg name	Filter Location #	Part #	Filter Type	Filter Dims	Schedules (changes per year)	Area Manager comment / plan on how to proceed with replacement - Tuesday Jun 2nd	Action	Status
2	82	Gage Institute Bldg. No. 82	5	148-802-863	Megapleat M8	24x24x2	2	Set up SO# for COVVID tracking, SO#1073800	SO# Issued June 5th	Anticipated delivery August 31,2020
2	82	Gage Institute Bldg. No. 82	6	148-802-700	Megapleat M8	20x20x2	2	Set up SO# for COVVID tracking, SO#1073800	SO# Issued June 5th	Anticipated delivery August 31,2020
2	82	Gage Institute Bldg. No. 82	7	148-802-600	Megapleat M8	16x25x2	2	Set up SO# for COVVID tracking, SO#1073800	SO# Issued June 5th	Anticipated delivery August 31,2020
2	82	Gage Institute Bldg. No. 82	8	148-802-500	Megapleat M8	16x20x2	2	Set up SO# for COVVID tracking, SO#1073800	SO# Issued June 5th	Anticipated delivery August 31,2020

Building systems & lighting operation status

Essential service Buildign critical : "In Provost memo of March 17, 2020, we outlined our pledge to deliver three fundamental elements of the University's core mission:

- **ensuring that our students can complete their term,**
- **providing a place to live for those students in residence who are unable to return home, and**
- **supporting the critical COVID-19 and time-sensitive research endeavors of our world-class scholars"**

Area	Building #	Name	System shut down possibile (please describe what systems could be shut down / not started , AHU's, heating, cooling,	Change in Bldg system Operations (yes/No)	**RESUMPTION of BUILDING BUSSINES /FUNCTION status** a. Check if all the setbacks and setup modes are reversed back to normal. b. Check to see that the fans have turned on, and that air is moving in and out of the building. c. Check to make sure the dampers (outside and return) are working properly. d. Check that the filters are still in acceptable condition. Wear appropriate PPE.
C	087	Myhall	HVAC shutdown, AHU LL1-02 - Auditorium-OFF. Reviewing possibility to slow down the other units. LL01 - serve basement - OFF April 10. May 26- start chiller and turned on all AHU. June 26, AHU LL01-02 resume	Yes	June 8th resumptioin. . All units but classroom was running. June 26 -AHU LL1-02 resume to maintain indoor conditions to ensure integirty of the space.
SE	005	MSB	Only : Lecture rooms AH#8 and AH #20 off, labs 100% running, AHU serving permiter / prep labs also 100%. AH#1, , serving office only put on 40% flow.May 28th AH#8 was started due to increaced occupancy in the areas below. AH#1 as of June 22nd running 100%	yes	June 22nd : All units are already running. No changes to HVAC operation.
SW	033	Sidney smith	Yes, Ventilation to classrooms & offices could be shutdown starting April 6th. AH1- AH 15. AH -19 & AH -20 (serving patio / ground floor podium & security guard) will stay on. April 22nd: ah # 17 unit seving offices is off. Started on June 18th a/h13, 14,15,16,8,12,7and 11. AH 1,2, 3 ,4 and 5 serving lecutre rooms and AH#17 serving caffteria are still off.	yes	June 15 start based on PM list.. Getting ready for June 22nd based on RS message: Started AHU 7,8,11,12,13,14,15 and 16 for resumption of building functions (ground and subgorund floors - psychology, 6th floor art library, ground floor linguistic, political science room 3001 and 3002) . AH 1,2, 3 ,4 and 5 serving lecutre rooms and AH#17 serving caffteria are still off.

Time Event Summary (System: 033 AH15)

033 AH15 VR1: (033 AH15)

Mon	Tue	Wed	Thu	Fri	Sat	Sun	HOL
00 : 03 Stop	00 : 03 Stop	00 : 03 Stop	00 : 23 Stop	00 : 03 Stop	00 : 03 Stop	00 : 03 Stop	00 : 03 Stop
06 : 02 Start	06 : 02 Start	06 : 02 Start	06 : 02 Start	06 : 02 Start	06 : 02 Start	06 : 02 Start	08 : 15 Stop
22 : 03 Stop	22 : 03 Stop	22 : 03 Stop	22 : 03 Stop	22 : 03 Stop	22 : 03 Stop	22 : 03 Stop	16 : 55 Stop

033 AH15 VS1: (033 AH15)

Mon	Tue	Wed	Thu	Fri	Sat	Sun	HOL
00 : 03 Stop	00 : 03 Stop	00 : 03 Stop	00 : 03 Stop	00 : 03 Stop	00 : 03 Stop	00 : 03 Stop	00 : 03 Stop
06 : 01 Start	06 : 01 Start	06 : 01 Start	06 : 01 Start	06 : 01 Start	06 : 01 Start	06 : 01 Start	08 : 16 Stop
22 : 03 Stop	22 : 03 Stop	22 : 03 Stop	22 : 03 Stop	22 : 03 Stop	22 : 03 Stop	22 : 03 Stop	16 : 55 Stop

033 AH15 ZD1: (033 AH15)

The point 033 AH15 ZD1 has no time events scheduled to it as of this moment.

Refresh