

IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIVERSITY OF VICTORIA

("University")

AND:

UNIVERSITY OF VICTORIA FACULTY ASSOCIATION

("Faculty Association" or "Association")

RE:

INTEREST ARBITRATION - 2013

COUNSEL:

FOR THE FACULTY
ASSOCIATION:

Allan E. Black, Q.C.

FOR THE UNIVERSITY:

Patrick Gilligan-
Hackett

DATES OF HEARING:

September 24-27, 2013
Victoria, BC

COLIN TAYLOR, Q.C.
Arbitrator

I

[1] This arbitration is constituted under and derives its jurisdiction from the Letter of Understanding (the "LOU") between the parties dated March 26, 2012. The LOU establishes procedures to replace Articles 73 and 80 in the Framework Agreement for the negotiations which commenced in April 2012.

[2] The last round of negotiations ended without achieving a financial settlement between the parties for the two year period July 1, 2012 to June 30, 2014. As a result, the parties entered into mediation in accordance with the LOU. Mediation took place in October 2012 and January 2013 but did not resolve the financial issues between the parties. Non-monetary matters are not subject to arbitration under either the LOU or the Framework Agreement. The Framework Agreement and the LOU require the parties to achieve a financial settlement through interest arbitration.

[3] The University is established pursuant to the *University Act*, R.S.B.C. 1996, c.468.

[4] The Faculty Association is neither certified nor voluntarily recognized under the *Labour Relations Code*, R.S.B.C. 1996 c.244. Instead, the Faculty Association is contractually recognized by the University as the body

with the authority to represent the University's faculty and librarians (sometimes hereafter referred to as "Members") in, among other things, their negotiations with the University to settle their terms and conditions of employment.

[5] The University's position is that the appropriate salary increase is 2% in each year (the precise breakdown is slightly more complex). The Association's position is 2% in each year, plus a "flat lift" of \$1,750 in each of the two years and it has also advanced a number of other salary and benefit proposals. My task is to determine the appropriate award; I am not limited to choosing between the parties' positions.

[6] The parties' agreement with respect to the criteria I am to apply in determining the appropriate award is set out in the LOU. The first criterion is "the University's ability to pay". Before dealing with the remaining criteria, it is convenient to address the parties' evidence with respect to the financial situation at the University and its "ability to pay" an award determined pursuant to the criteria agreed by the parties. The Association argues the University has the ability to pay an award beyond its proposal of 2% and 2% and, in fact, has the ability to pay the Association's proposal. I will go on to address the parties' evidence concerning the University's "ability to pay".

II

[7] The University's calculation of the incremental cost of its salary settlement proposal for year one, compared to academic year 2012, is \$2.1 million. The incremental cost of the University's proposal for year two is \$2.1 million compared to academic year 2013 and \$4.2 million compared to academic year 2012. The Association did not take issue with this costing.

[8] The Association's calculation of the incremental cost of its salary and benefits proposal for year one, when compared to academic year 2012, is \$4.03 million. The incremental cost of the proposal for year two is \$3.89 million when compared to academic year 2013 and \$7.92 million when compared to academic year 2012. The Association did not express the value of its proposal in percentage terms.

[9] The University does not agree with the Association's calculation of its proposal. The University calculates the cost of the Association's proposal to be \$4.79 million in year one and \$3.95 million in year two for a total cost of \$8.74 million. This does not include the cost of the Association's tuition waiver proposal which the University estimates to be \$500,000 in year one. At para.15 of its submission, the University said:

As the University understands the FA's last position during negotiations (and factoring in matters subsequently agreed to at mediation) the FA has proposed financial gains with a total value, expressed in percentage terms, of 7.12% of Members' Big Base in year one and 1.72% of Members' Big Base in year two of a two year settlement.

[10] "Members' Big Base" refers to that portion of salaries and benefit costs for all approved employee positions which is allocated to the payment of salaries and the University's share of benefit costs for all approved faculty and library positions.

[11] The Association disputes the University's costing of the Association's proposal. The accounting experts called by the parties did not express an opinion on this difference.

[12] Mr. Robert J. Sandy is a Chartered Accountant with PricewaterhouseCoopers. He provided expert evidence on behalf of the Association. Mr. Sandy expressed the opinion that the University has the ability to pay the Association's proposed salary and benefits increases. The University's position is that it does not have that ability. Its expert, Mr. Paul McEwen, a Chartered Accountant with Ernst & Young, did not express an opinion on the University's ability to pay the Association's proposal.

[13] The University manages its operations on a fund accounting basis. This is described in the "2012/13 Year End Management Statements and Budget Review" submission to the Board of Governors ("BOG") on June 25, 2013:

To enhance accountability, budgetary control and stewardship of resources, the university maintains separate funds of assets, liabilities, revenues and expenditures for its many activities. Fund accounting is used by the university for its operating budget allocations and to ensure that restricted grants, donations and other contributions are spent only for the purposes intended. These funds are grouped as General Operating, Ancillary Enterprises, Specific Purposes, Sponsored Research, Capital and Endowment funds and are defined as follows:

- The General Operating Fund reports revenue and expense related to the general operations of the university.
- The Ancillary Enterprises Fund reports revenue and expense related to service operations that are expected to function on a self-supporting basis. These operations comprise the bookstore, food services, student residences, parking services, child care services, donated property rental, hotel and brew-pub operations, and the Vancouver Island Technology Park.
- The Specific Purposes Fund accounts for revenue and expense relating to contract services, special projects and endowment funds.

- The Sponsored Research Fund accounts for monies designated for the support of research.
- The Capital Fund accounts for monies designated for the acquisition of capital assets and major renovations. Where monies designated for capital use are received as part of the resources for general operations, ancillary enterprises, specific purposes and sponsored research activities - generally for equipment, furnishings, computer equipment and library holdings - the revenue and expense related to those assets are accounted for in those respective funds.
- The Endowment assets, held as invested principal, comprise the accumulation of endowment contributions and the portion of investment income that is required by the donors and the Board to be added to the fund to offset the eroding effect of inflation.

[14] At page 2 of that document the University describes the accounting treatment of depreciation:

A key feature of fund accounting is that plant or capital assets are recorded on the balance sheet without amortization, unlike the accounting treatment within the external audited financial statements. Treatment within fund accounting is to record, at original cost, buildings, land and site development until disposal while equipment and furnishings are written off after 8 years.

[15] The General Operating Fund ("GOF") reports revenues and expenses related to the general operations of the University. The main revenue components of the GOF are the Government of British Columbia grant and tuition fees which together account for approximately 88% of the University's general operating revenue. The provincial operating grant and tuition fees do not subsidize ancillary operations, i.e. ancillary operations budget to break even, "including a provision for periodic renovation replacement and expansion of its facilities. As such there are appropriated funds from Ancillary operations in order to be able to invest in equipment replacement and capital improvements." (p.4, BOG submission).

[16] It is within that context that I return to the evidence of Mr. Sandy. The basis for his opinion that the University has the ability to pay the Association's salary and benefits proposal is based simply on the performance of the GOF. He demonstrated that for the period 2000 to 2013 the aggregate GOF excess of revenues to expenditures was \$204.6 million. For the period 2009 to 2013 the aggregate was \$73.7 million and for the year 2013 the excess of revenues to expenditures was \$11.9 million. Even if one accepts the accuracy of the University's costing of the Association's proposal (including tuition waiver) it is clear, asserted Mr. Sandy, that what he called the "GOF surplus" was more than sufficient to fund the

Association's proposal and therefore the University has the ability to pay.

[17] The insuperable difficulty with Mr. Sandy's opinion is his use of the word "surplus". He used it in the unqualified sense of an amount left over when requirements have been met, i.e. additional or extra money on which there was no call or demand or requirement. It is correct to say that the GOF in 2013 recorded an excess of revenues over expenditures and to that extent there is a surplus. It is not correct to then *simpliciter* conclude that surplus is available to fund the Association's proposal. It is necessary to go behind the GOF and assess that Fund in relation to the other Funds and University commitments before drawing that or any other conclusion. It is readily apparent, for example, that the GOF expenditures do not include an amount for depreciation.

[18] A cursory review of the publicly available accounting documents reveals that of the \$11.9 million GOF 2013 surplus (used in the strict sense of excess of revenues over expenditures) \$5.1 million was transferred to the other funds to cover the costs of commitments to a variety of capital and other projects and \$6.8 million was transferred to appropriated reserves "bringing the General Operating Fund to zero which is consistent with past practice" (p.8 BOG submission)

[19] The accounting and budget documents show that the 2012-13 appropriated funds (reserve) balance was earmarked as follows:

Capital - 20%

Equipment Replacement 18%

Insurance and Utilities 3%

Library - 2%

Carry Forward 57%

[20] Mr. Sandy made an assumption that the surpluses were available to fund a salary increase. In cross-examination, he said he "missed" the Carry Forward category, the largest allocation of which is 22% for employee obligations including accumulated professional development, leave and other contractual commitments. The next largest allocation is research support (20%) which is generally made up of commitments to individual faculty for research start-up, travel grants, etc. The Island Medical Program accounts for 7% of the Carry Forward and is targeted external specific funding. Other allocations are:

Academic and Administration Programs & Operational Support - 17%

Student Assistance/Financial Aid - 11%

Information Technology/ Tech Support - 11%

Other Committed - 6%

Contingency - 6%

[21] In cross-examination Mr. Sandy did allow that "[i]f the University has committed the surplus it would have trouble spending it on other things". That is the point.

[22] Leaving aside whether the University has the ability to pay the economic increase dictated by the LOU, I conclude that Mr. Sandy's expert report and evidence do not provide a reliable basis for his opinion that the University has the ability to pay the Association's proposal.

[23] The University's expert, Mr. McEwen, did not express an opinion on ability to pay and I do not find it necessary to consider his evidence.

[24] Ms. Kristi Simpson is the Associate Vice President, Financial Planning and Operations at the University. She described the University's budgeting process and the University's audited financial statements prepared in accordance with Public Sector Accounting Standards supplemented with regulations

issued by the Province of British Columbia Treasury Board. Mr. Sandy was critical of the University's budgeting process but he agreed in cross-examination that his experience was in the commercial sector and he was unfamiliar with the university sector.

[25] Ms. Simpson described the principles of Fund Accounting which ensures that restricted grants and donations and other contributions are spent only for the purposes intended. Each of the five separate funds has discrete sources of funding and, in some cases (i.e. Specific Purpose and Sponsored Research) the money in the Fund, whether it represents current or accrued revenue, is held wholly for designated purposes related to the University's core operations under specific or trust-like conditions. In other Funds (i.e. Ancillary Enterprises and Capital) the money in the Fund is held for specific purposes related to the University's core operations typically under specific conditions. The University asserts that revenue in these funds is not generally available to pay Members' salary and benefits. In contrast, money in the GOF represents the University's current discretionary revenue for purposes of funding generally the salaries of all employees.

[26] The majority of the University's committed expenditures relates to the salaries and benefits paid to employees.

[27] Ms. Simpson said the Province ceased funding the University's capital requirements some 5 or 6 years ago and it must now look to the GOF to maintain and fund capital assets. The University does not record depreciation or cost of capital assets in the GOF and if it did, said Ms. Simpson, there would be no surplus. Amortization expense in fiscal 2013 was recorded as \$48.5 million. The Association argued this was offset by new capital and equipment purchases of some \$51 million. Ms. Simpson did not agree with this proposition but did concede that some of that amount could be so attributable but not enough to invalidate her assertion that if depreciation was recorded in the GOF it would eliminate any surplus.

[28] Ms. Simpson testified that the University has significant asset retirement obligations. She referred to an external report which has identified deferred maintenance obligations of \$276 million of which \$230 million must be addressed over the next five years. That is inconsistent with Note 2(1) to the 2013 Consolidated Financial Statements which states:

At this time the University has determined that there are no significant retirement obligations with respect to its assets.

[29] Ms. Simpson said "I don't know what that means", a perplexing statement from the number two financial

officer which does not assist in clarifying the inconsistency.

[30] There is no doubt that the University is in financially strapped times. For both the 2010-2011 and 2011-2012 fiscal years (April 1 to March 31) there was no increase in the Provincial grant. This means there was no increase in the value of over half of the revenue stream in the GOF for those two fiscal years.

[31] The Provincial government's February 21, 2012 Budget and Fiscal Plan announced reductions to post-secondary funding - \$20 million in the 2013-14 fiscal year and a further \$30 million in the 2014-15 fiscal year. The Provincial government has since announced that the \$50 million reduction in post-secondary funding would be implemented over three rather than two fiscal years in tranches of \$5 million in 2013-14; \$20 million in 2014-15 and \$25 million in 2015-16. The University's share of the first reduction is \$478,000.

[32] The Provincial government sets the level of the permitted annual increases in tuition fees at 2%.

[33] Ms. Simpson testified that to deal with the negative impact on its primary source funding the University has implemented a 4% reduction in its expenses which has *inter alia* led to layoffs of 40 employees in the Professional Employees' Association ("PEA") and Canadian Union of Public Employees ("CUPE")

bargaining units. Challenged on this evidence, Ms. Simpson agreed in cross-examination that following the 4% across the board cut, some faculties were granted additional funding and the 40 layoffs did not result in 40 people out the door. Some of the affected employees were moved to new positions. It follows that the 4% cut was not an actual 4% cut and the 40 layoffs were not actually 40 layoffs.

[34] I am unable to accept the position of the Association or the position of the University with respect to ability to pay. Both positions have considerable weaknesses. Clearly, there exists some ability to pay. The University has offered 2% in each of two years. A case can be made for the availability of funding in the Reserve. It contains a Contingency of 6%. There is 6% in "Other Committed". There is no evidence to suggest those priorities could not be re-examined. I will return to this following determination of the appropriate compensation award.

III

[35] The parties' agreement with respect to the factors I am to consider in determining the appropriate award (the "Agreement") is set out in Article 11(q) of their Letter of Understanding. This provision is identical to one in the parties' Framework Agreement that has been

the subject of previous arbitral interpretations, to which I will refer shortly.

[36] The Agreement provides as follows:

In arriving at an Award, the Mediator/Arbitrator must attend to arguments, if any, by both negotiating teams concerning the University's ability to pay, faculty and librarian salary levels at other universities, the level of settlements for other employee groups within the University, inflation levels, and the University's need to attract and retain qualified faculty members and librarians.

[37] The parties disagree over whether this provision is properly characterized as "adjudicative" (the Association's position) or "hybrid" (the University's position). The substance of this disagreement concerns whether the above list of factors is exhaustive, or whether, as the University submits, other factors may also be applied: specifically, the Public Sector Employers Council bargaining mandate ("PSEC mandate") of 2% and 2%. Particularly given the benefit of prior interpretations, rather than discuss the Agreement's general categorization I find it more helpful to go straight to its specific meaning: i.e., its text and how has it been interpreted.

[38] The parties have cited two cases interpreting this provision. Both did so in a different context: final offer selection, in which the arbitrator was bound to

choose one party's position or the other's. In the first case, *University of Victoria and University of Victoria Faculty Assn.*, Award No. A-13/95, [1995] B.C.C.A.A.A. No. 14, arbitrator Munroe held:

The final constraining influence is the list of factors found at Section 14.11 of the Framework Agreement. I think the Association is correct that other factors are not absolutely excluded from consideration. However, it seems clear that the parties intended the factors listed at Section 14.11 to be the predominant points of deliberation. (para.36)

[39] A year later, in *University of Victoria and University of Victoria Faculty Association*, Award No. A-92/96 [1996] B.C.C.A.A.A. No. 162, arbitrator Kelleher stated: "It seems to be common ground that while these factors must be considered I am not constrained by the provision to ignore other factors." (para.20)

[40] The University says arbitrator Kelleher "went further" with this sentence than arbitrator Munroe. I disagree that it was intended to establish any substantial departure from arbitrator Munroe's interpretation. Particularly given that it merely references the parties' "common ground", there was no need to repeat the precise language used by arbitrator Munroe. Had arbitrator Kelleher intended to depart from arbitrator Munroe's interpretation of the same

provision a year earlier, he would have done so expressly and given his reasons.

[41] Like arbitrator Munroe (para.34), arbitrator Kelleher (para.47) expressed a sense of discomfort or constraint with respect to the fact that the final offer selection process requires selection of one party's position, rather than allowing the arbitrator to craft the most appropriate award.

[42] Arbitrator Kelleher chose the University's final offer. He gave a number of reasons for doing so, including the fact that it exceeded the PSEC guidelines. It is useful to set out his treatment of the issue, situated in its surrounding context.

Another compelling factor is the level of other settlements at University of Victoria. The University's final offer for one year is equivalent to what the two locals of the Canadian Union of Public Employees negotiated for two years.

A third factor I have considered is the Public Sector Employers' Act and the guidelines published by the Public Sector Employers' Council pursuant to that Act. Under the guidelines, employees at the salary level of the Faculty Association members are entitled to 0.8 per cent. I do not consider that I am bound by these guidelines. If the criteria in Article 14.11 of the Framework Agreement pointed in favour of an award which exceeded the guidelines, I might well make such an award. (I agree in this regard with Arbitrator Getz in Simon Fraser University -

and- Simon Fraser University Faculty Association, unreported, October 17, 1994 at page 2).

But the guidelines are not irrelevant. Nor is it irrelevant that the University's final offer is itself above 0.8 per cent. This was pointed out in a letter from the Public Sector Employers' Council to the University:

I understand the University made its final offer on the basis of its view of the requirements of the arbitral framework within which you are operating. Nevertheless, even when the offer is discounted by any reasonable estimate of the effect of demographic changes, it is well above the PSEC guideline for 0.8 per cent for high wage groups. The result is unresponsive to the general level of public sector settlements and to the upcoming fiscal circumstances of the University sector.

Finally, I am influenced by the fact that the University offer exceeds any faculty settlement in Western Canada, Ontario and the Atlantic Provinces with the exception of Simon Fraser University.

(paras.51-54)

[43] Accordingly, arbitrator Kelleher held that he was not bound by the PSEC guidelines, but they were "not irrelevant", and in particular it was relevant that the University's offer exceeded them. This was done in a context that expressly recognized the different requirements of the arbitral framework in which these

parties were operating. Those different requirements continue to be in place before me.

[44] With the benefit of these prior awards, which helpfully establish the essential nature of the parties' Agreement, I turn to consider the fundamental issue before me: what influence, if any, the PSEC mandate of 2% and 2% may have in determining the appropriate award pursuant to the parties' Agreement. I note that this issue is not actually resolved by the prior awards, because they did not (as both arbitrators pointed out) involve crafting the appropriate award, but rather concerned final offer selection. That process is amenable to the type of analysis followed in those cases: a particular factor, while not one of the "predominant" ones expressly mentioned, is "not irrelevant", and if it points in one direction or another (as it did in the Kelleher award), that is sufficient for its purpose in that type of analysis.

[45] The process of crafting the appropriate award is different. The parties have set out five factors that must be taken into account in determining the award. They cover a broad range of relevant influences (e.g. salaries at comparator universities, other settlements on campus, the rate of inflation, etc.). On the other hand, there is a circumstance that the parties have not included as a relevant consideration in their Agreement. The issue is whether (and if so, how) such a circumstance should be considered and weighted against

those the parties have agreed, in determining the appropriate amount. (It is clear that the PSEC mandate will be given weight indirectly through the express factor of other settlements on campus; the issue is whether it should also be given further weight as a non-express factor).

[46] I agree with the University that the language of the Agreement is distinguishable from the agreement in *University of British Columbia and Faculty Association of the University of British Columbia (Interest Arbitration 2013)*, July 24, 2013 (Taylor) ("UBC 2013"), which required that the award be "based on" the factors enumerated there, thus precluding other factors. Under this Agreement, other factors are not "absolutely excluded".

[47] On the other hand, I disagree with the University that the Agreement is "more like" the framework in *Nelson (City) and Nelson Professional Firefighters Assn. (Wage Grievance)*, [2010] B.C.C.A.A.A. No. 174 (McPhillips), which included a further provision stating that the arbitrator must have regard to "any other factor that the arbitrator ... considers relevant". The Agreement does not contain such a provision. Such a provision would be a strong signal that when the actual circumstances governing bargaining are different than those the parties have agreed should be considered in interest arbitration, an arbitrator should employ those other factors in a replicative way to determine what would have occurred, in light of those other factors.

[48] That is not the nature of the parties' Agreement; it contains no such provision. There is considerable force to the Association's submission:

[T]he March 2012 LOU makes absolutely no reference to PSEC. If the University wanted the PSEC mandate to be a factor to be considered at this arbitration, it should have negotiated the inclusion of that criterion into Article 11(q).

[49] Alternatively, a provision such as that in *Nelson* would have provided an agreed basis upon which an Arbitrator could counterbalance other factors against those expressly agreed by the parties.

[50] The Association submits that the PSEC mandate is not otherwise relevant. It does not have legislative force. Nor is it synonymous with the University's "ability to pay", which is solely an inquiry into that very question: i.e., does the University have the necessary funds to pay an award determined pursuant to the Agreement. The Association's agreement is with the University. The Association submits: "To our knowledge, no interest arbitrator has felt bound by the PSEC mandate in determining a university's ability to pay", and that is presumably for that reason - i.e., they are different questions.

[51] The University, correctly in my view, has not argued the PSEC mandate in either of the above ways. Rather, as described earlier, it argues it is a separate criterion that should be considered, in addition to those criteria the parties have agreed, which it says are non-exhaustive.

[52] While I agree with the University that other factors such as the PSEC mandate are, to use the language of the prior awards, not "irrelevant" or "absolutely excluded", there is an obvious difficulty in giving such a factor substantial weight so as to arrive at a different result than the factors the parties have agreed. Put differently, it is difficult to see how the agreed factors that the parties knew were "predominant" should be substantially varied by one they knew was not. I would be acting contrary to the parties' Agreement.

[53] The PSEC mandate is neither an esoteric nor unanticipated feature of public sector bargaining in British Columbia. As the Association submits, if the University wanted it to be one of the factors used in determining the appropriate Award, it should have negotiated that. In fairness to the University, the Association is not suggesting it would have been amenable to doing so. But, in any event, my role is to apply the parties' Agreement. I turn next to that task.

IV

[54] The University's position is that the appropriate salary increase for the two-year period July 1, 2012 - June 30, 2014 is 2% in each year. The Association's position is 2% in each year, plus a "flat lift" of \$1,750 in each year. (The Association has also advanced proposals concerning a number of other salary and benefit items.) My role is to determine the appropriate award (which is not limited to the parties' positions), according to the criteria in the parties' Agreement.

[55] As noted earlier, I will return to "ability to pay" after considering the remaining factors in the parties' Agreement. Those factors are: (a) faculty and librarian salary levels at other universities; (b) the level of settlements for other employee groups within the University; (c) inflation levels; and (d) the University's need to attract and retain qualified faculty members and librarians. I will address each in turn.

(a) Faculty and librarian salary levels at other universities

[56] The University uses two groups of Canadian universities as comparators: a group of 13, and a broader group of 21 (which includes those 13).

[57] Using data from 2010-2011 (the latest comprehensive data available), the Association has established that the median salary for faculty at the University was below all other institutions in the group of 13, and third-last in the group of 21. (The mean salary was last among the group of 13, and second-last among the group of 21). Once one considers the settlements since that time, including at the institutions occupying the last two places (University of New Brunswick and University of Manitoba), the Association submits it is highly likely that the University will no longer occupy the third-last spot in the group of 21, but rather the last.

[58] The Association has also demonstrated that, no matter how one slices the data, or which different variables are used, the results are essentially the same. Faculties at the University are substantially behind their peers at other Canadian universities.

[59] It is also clear that this is not commensurate with the relative place of the University among those institutions. For example, the Association cites an October 4, 2012 press release from the University which observed: "The University of Victoria is among the top one per cent of universities in the world and is the top-ranked university in Canada without a medical school in the Times Higher Education's ... annual World University rankings. UVic is among eight Canadian universities in the top 200, ranking 196th worldwide."

In the most recent Maclean's magazine rankings of "comprehensive" Canadian universities, the University ranked second only to SFU, and ahead of Waterloo, the University of New Brunswick, Guelph, Carleton, Memorial, York, Windsor and Wilfrid Laurier (all members of the group of 21 comparators).

[60] Of course, salary *rankings* do not tell the whole story, because they do not indicate the size of the differences. That is addressed by the Association as well. In general terms, the differences are large. In over half of the group of 21 comparators, the median salary is more than \$10,000 higher.

[61] Having said that, an important qualification should be added to the point immediately above: the median salary at SFU is only \$4,000 higher. While that number is hardly insignificant, the difference is not as dramatic as with the other institutions, which are mostly in Ontario and Alberta. SFU's recent increase was 2% and 2%: *Simon Fraser University and Simon Fraser University Faculty Association (Final Offer Selection: 2012 – 2014 Term)*, April 30, 2013 (Taylor).

[62] It is clear that SFU is the University's closest comparator. The fact that the two institutions are both in British Columbia is relevant, given that they share a common government fiscal policy, among other similarities.

[63] Nonetheless, it remains the case that faculty salaries at the University are behind those at SFU, and well behind those at other comparator universities. They are behind the University's relative place in terms of academic excellence, for which the faculty is largely responsible. This central relationship between faculty and academic excellence has been acknowledged in the arbitral case law. It is unnecessary to review this at length because this point, along with the difference between the University's relative standing and its faculty salaries, is concisely and appropriately conceded in the University's submission:

56. The University is a large, established comprehensive university. The University consistently does extremely well on a range of independent measures of achievement and excellence. The University recognizes the critical role which Members, faculty in particular, have played and continue to play in achieving these results.

...

58. The University recognizes and accepts that a comparison between salary levels at the University and those at the identified comparators indicates that there is a greater differential than the University would like between the salaries paid at the University and those paid at the comparator universities. The significance of the salary differential may well be mitigated by [various factors]. However, the University readily accepts that it would be desirable to reduce the acknowledged salary differential on a graduated basis.

[64] I add that I agree that reduction of a salary differential "on a graduated basis" is, generally speaking, the only basis that is possible via interest arbitration. A disparity between salaries at the University and SFU existed as far back as 1995 in the Munroe arbitration (though arbitrator Munroe made clear that his acceptance of the University's position in that case, which had the effect of continuing the disparity, should "not be construed as an acceptance in principle of such disparity": para.33). Whether there should ultimately be parity between the University and SFU is not an issue the parties before me have argued in much detail, because it is not the issue before me: the only issue before me is whether a step should be taken in that direction.

[65] A large salary gap cannot be expected to be overcome in one round of collective bargaining, and that is equally true, if not more so, in interest arbitration, which is a "conservative process": *Nelson, supra* (para.8). Interest arbitration is a substitute for one round of collective bargaining, and if it is not realistic to assume that the parties would eliminate or significantly overcome a large gap in one round of collective bargaining (which it is not), then nor is that the function of interest arbitration. In addition, as will be discussed further below, comparison with faculty and librarian salaries with other universities is just one of the factors the

parties have agreed should apply. Having said that, I also acknowledge the Association's submission that in light of settlements at other universities - in particular the University of Manitoba and the University of New Brunswick, the only two comparators that were behind the University in 2010-2011 - a significant increase would be necessary, not just to reduce the gap, but to prevent the University from falling even further behind.

[66] I have not yet addressed the situation of librarians, who account for a very small proportion of the Association's membership. Librarians fare considerably better than faculty in the comparison with their peers at other institutions. No party has asked me to treat librarians different than faculty, and I do not propose to do so. In view of the far greater number of faculty and the greater disparity with their peers, the situation of faculty weighs more heavily in the analysis.

[67] In conclusion, faculty salaries are substantially behind the vast majority of their comparators, and this factor points toward a step to reduce that gap (or, as the Association points out, at least prevent the University from falling further behind).

- (b) The level of settlements for other employee groups within the University

[68] This factor is relatively straightforward. The University has reached settlements of 2% and 2% with each of the four other organized groups on campus: CUPE Local 951, which represents approximately 781 FTE's in primarily clerical and administrative-clerical positions; CUPE Local 917, which represents approximately 401 FTE's in primarily trade and manual positions; CUPE Local 4163, which represents approximately 395 FTE's in non-faculty teaching positions; and the PEA, which represents approximately 787 FTE's in primarily professional and mid-level administrative positions.

[69] The Association also, however, submits as follows:

3.3.3 ... [T]he Association takes the position that among the other employee groups at the University of Victoria, the group with the greatest similarity to Association members would be the University's senior administrators, who almost without exception have succeeded to these positions after successful academic careers.

3.3.4 Senior administrator salaries are *not bargained collectively but are arrived at through individual negotiation*. Like Association members, the salaries of senior administrators rise as a function of merit increments, analogous to that of UVic FA members.

3.3.4.1 Even though senior administrative salaries are a matter of public record, salary data for the year 2012-2013 have not been released; salary data for 2014 will not be available until the end of that fiscal

year. Publicly available salary data for the years 2010-2012 show that senior administrative salaries rose by an average of 7.95% over that time period; during that same time period Association Member salaries rose by only 1.1% over and above the merit increment and career progress increment awards.

(emphasis added)

[70] The University submits that senior administrators are not organized in any formal sense and, further, they are subject to a salary freeze (partial in the case of associate deans) which was ordered by the Provincial government in October 2012.

[71] Neither of the prior awards between these parties considers senior administrators to be included in the factor of "settlements with other groups" at the University. In my view, the wording of the provision indicates they are not included. As the Association recognizes, senior administrators' contracts are individually negotiated. There is thus no "settlement with a group". Had the parties wished this factor to refer simply to all salary increases, they could have used wording to that effect. Instead they used wording that strongly connotes collective bargaining: "settlements with other groups". I conclude that senior administrators, who do not receive a group settlement but rather negotiate various different individual

contracts, are not intended to be included in this factor.

[72] Had I concluded otherwise, I would not find the Association has presented sufficient reliable information to vary this factor from 2% and 2%, given the overwhelming numbers that agreed to that increase, including the PEA and non-faculty teachers. I note as well that if one were to make a fair comparison with the general salary increase sought by the Association, one would need to isolate that proportion of senior administrators' salary increases that is attributable to a general salary increase, as opposed to merit or career advancement, which is separately accounted for by the Association and not included in the general salary increase that it seeks. That fair comparison, testified Ms. Simpson, reveals that for the relevant time period, senior administrative salaries rose by an average 5.9% compared to 5.5% for Members.

[73] In conclusion, the factor of "settlements with other groups at the University" points toward an increase of 2% and 2%.

(c) Inflation levels

[74] The information submitted by the parties indicates that increases in the Consumer Price Index in Victoria were well below the University's offer of 2% and 2%

throughout the period relevant to this collective agreement.

[75] The Association argues that the increase in the Consumer Price Index from 2002 -2012 exceeds its total salary increases over various collective agreements during that period. While I appreciate why it has done so, that is not the issue at hand. Prior collective agreements are settled between the parties, and reflect their agreement as to the appropriate salary increase, taking into account the prevailing circumstances at the time. The "inflation levels" referenced in the parties' Agreement are those relevant to the current collective agreement at issue in this arbitration.

[76] The Association has also cited the increase in house prices in Victoria from 2002 - 2012. The similar difficulty with that submission is that the information submitted by the parties indicates house prices in Victoria actually *decreased* in both 2011 and 2012.

[77] The extent to which increases in the cost of housing are not included in other measures and should thus be factored separately into "inflation levels" in the parties' Agreement is an open question. (The Association submits that "Statistics Canada Consumer Price Index data do not ... fully factor in the cost of housing"). It is an issue I need not decide here, because increases in the cost of housing over the period relevant to this collective agreement do not

justify a higher increase than other factors, and to the extent that they might justify a lower increase, in my view it would be unfair and anomalous (given the overall increase from 2002 - 2012) to take them into account in that fashion. The University, while noting the recent decrease in house prices, has not pressed such an argument, appropriately in my view.

[78] In conclusion, I have considered the relevant "inflation levels" to be increases in the Consumer Price Index during the period relevant to this collective agreement.

[79] This factor points toward a lower salary increase.

(d) The University's need to attract and retain qualified faculty members and librarians

[80] The University has submitted data that establish that its number of resignations is very small, and that it generally does not have difficulty attracting candidates.

[81] The Association approaches this issue from a number of different angles.

First, it cites two excerpts from the University's Academic Staffing, Recruitment and Vacancies Report, submitted to the Board of Governors September 25, 2012.

Deans were asked whether any specific changes, events or policies affected their ability to retain or successfully recruit new faculty members. In some cases, difficulty obtaining spousal accommodation was mentioned as being problematic. *Salary and research funding levels caused recruitment problems in a number of areas*, and insufficient lab space was another difficulty cited.

...

With respect to faculty who left the university during 2011/12, there were a variety of reasons for their departure. *Better job offers and higher salaries at a different university was the primary reason for a few who left.*

(p.14; emphasis added by Association)

[82] The Association next cites a survey it conducted of its members in the spring of 2012 asking whether they were "considering or actively seeking employment at another university or with another type of employer". Of the 382 who responded to the survey, 342 answered this question; 156 answered "yes", and 95 ranked salary as the first reason.

[83] I note that those who chose to respond represented less than half of the Association's membership, and that the question included not just whether respondents were seeking employment elsewhere, but also whether they were "considering" it. I accept this evidence as relevant, as far as it goes. It is not necessary to describe here the probative limitations of such

evidence, given the identity of the parties and the membership of the Association.

[84] The Association also cites the high housing costs in Victoria. It submits that among 19 comparator real estate markets, Victoria has the second-highest average house price, behind only Vancouver. It adds that "[o]f those cheaper than Victoria, only Burnaby (SFU) and Toronto are within 10% of Victoria's average".

[85] With respect to rental costs, the Association submits Victoria is 6th among 17 rental markets for the University's comparator institutions. When one considers its average salary, this means its members' purchasing power is severely diminished. For example, the Association submits:

3.5.12 As has been explained ... the only two comparator universities whose median salary is below that of the University of Victoria are the University of Manitoba, in Winnipeg, and the University of New Brunswick, in Moncton. The average rental cost in Victoria is 14% higher than in Winnipeg, and 35% higher than in Moncton. These universities ... have agreed to wage increases higher than those offered by the University of Victoria in these negotiations: Manitoba 2.9% for 2012/13, and New Brunswick 3.5% for 2012/13 and 3.5% for 2013/14.

[86] I am sympathetic to the fact that, when one combines high housing costs with low salaries, one is left with even lower purchasing power, and I accept the

Association's point in that regard. However, the criterion I am to apply is not relative purchasing power, and in the absence of evidence of difficulty attracting and retaining qualified candidates, the significance I can attribute to that point is necessarily limited. There is evidently more to candidates' choice than relative purchasing power.

[87] The Association's final argument on this point concerns the University's use of "market supplements" and "retention adjustments". It describes these as follows:

3.5.20 A market supplement is a temporary salary adjustment for a defined period of time. After the term of the supplement expires, it may be renewed by the University but there is no obligation to do so. It is usually applied to incoming faculty as part of an employment offer. A retention adjustment is a permanent upward adjustment in salary offered to an existing Member in order to encourage the individual to stay at the University of Victoria (often in the face of a competing offer).

[88] After setting out the data concerning the number and value of market supplements and retention adjustments, the Association submits:

3.5.22 The Retention Adjustment numbers are cumulative: across 2011/2012 and 2012/13, 96 Retention Adjustments were given out (probably to 96 different individuals, representing over 10% of the Association's

membership). The Market Supplement numbers are not cumulative, but indicate the total number of individuals receiving a defined-term supplement in any given year.

3.5.23 We do not know from the data provided to us by the Administration the extent of overlap between individuals receiving Retention Adjustments and Market Supplements. Assuming that the overlap is fairly minimal, in the period 2011/12 to 2012/13, approximately 180 Members have had salaries sufficiently low that the University has found it necessary to provide some individual adjustment. This represents over twenty per cent of the Association's membership. The extent of the use of Market Supplements and Retention Adjustments is clear evidence that the University is experiencing retention issues.

[89] There is a difference between specifically targeted recruitment and retention measures, and a general need to attract and retain quality candidates (which is the issue addressed by a general wage increase). That said, the Association has a point that these numbers are rather high.

[90] The more fundamental difficulty faced by the Association, which applies to all its arguments under this heading, is the limited nature of this criterion in the Agreement, and thus the limited role it gives to an arbitrator in relation to recruitment and retention. It is to be expected that the University will compete with other institutions for faculty, and that it will face challenges in that regard, and that it would use

tools such as market supplements and retention adjustments to meet those challenges. The criterion to be applied by an interest arbitrator under this Agreement, however, is the need to attract and retain "qualified" faculty members and librarians.

[91] Undoubtedly, the University endeavors to go far beyond that and obtain the very best candidates, but there is no indication that an arbitration board is to insert itself that far into the University's choice of recruitment tools. The Agreement does not, for example, give jurisdiction to an arbitrator to set levels to attract candidates "of the highest caliber": see the agreement in *UBC 2013*, para.4. The University's *objective* is to attract and retain candidates of the highest caliber, but that is the point: the fact that it is engaged in efforts to do so, or faces challenges in doing so, does not necessarily suggest cause for arbitral intervention under this Agreement. The arbitrator's jurisdiction under this Agreement is directed at ensuring qualified candidates. While I do not suggest that is limited to bare threshold qualifications, it is nonetheless an indication that the University is left some scope to pursue the best candidates it can through means that do not engage an interest arbitrator.

[92] Nonetheless, it is clear there is no room for the University to become complacent. While the data submitted by the University establishes that it is

presently generally successful in recruitment and retention, it is also clear that the University's low salaries present a potential risk. The University acknowledges as much in its submission. After pointing to the above-noted data, it adds:

75. Having said this, the University also recognizes that the salary differential acknowledged above is not a competitive advantage and that if the differential continues to increase it has the potential, in turn, to become a competitive disadvantage.

That is clearly accurate.

[93] At present however, given that the data establish that the University is generally successful in attracting candidates, and has very few resignations, it is difficult to justify an increase based on the University's need to attract and retain qualified faculty members and librarians.

[94] On the other hand, given the evidence relied on by the Association, it is clear this factor does not operate in the University's favour either.

[95] On balance, at the present time, this factor is neutral.

V

[96] Above, I have found that: the settlements with other groups point to an award of 2% and 2%; inflation levels justify a lower award; salaries at comparable universities justify a higher award; and the University's need to attract and retain qualified faculty members and librarians is presently met and thus neutral.

[97] The Association submits that I should give these factors unequal weight, and in particular I should give the greatest weight to the factor of salaries at comparable universities. The Association relies on the following passages of *Surrey (City) v. Surrey Fire Fighters Assn. (Wage Grievance)*, [2011] B.C.C.A.A.A. No. 50 (McPhillips):

... [T]here is no weight assigned by the legislature to the factors set out in Section 4(6) of the Act and, therefore, it cannot be concluded that any one of the factors takes precedence over any other. (para.12)

...

[A]ll of the criteria are to be considered and the weight attached to the criteria will depend on the economic and collective bargaining circumstances of the particular dispute at the time of the award. (para.13)

[98] The difficulty with the Association's submission is the second paragraph of that quotation. The "weight

attached to the criteria will depend on the economic and collective bargaining circumstances of the particular dispute at the time of the award."

[99] What are "the economic and collective bargaining circumstances of [this] particular dispute"? The most salient feature of this particular dispute is the PSEC mandate of 2% and 2%. This may well be the point where the PSEC mandate, which is "not irrelevant", comes into play. It is one thing to argue that I should not give effect to the PSEC mandate in applying the Agreement because it is not part of the Agreement; it is quite another to argue that I should consider the actual circumstances of the dispute, but not the PSEC mandate, when the PSEC mandate was clearly a relevant circumstance of the dispute. (It should be recalled that the *Surrey* case, like the *Nelson* case relied on by the University, is one of the cases under the *Fire and Police Services Collective Bargaining Act*, R.S.B.C. 1996, c.142 which applies the "replication" approach.)

[100] Even if I were to disregard the PSEC mandate, I am unable to say that the "economic and collective bargaining circumstances" of this particular dispute would support placing disproportionate weight on the factor of comparability with other institutions. Where the University is in difficult financial circumstances and its funding is being reduced, inflation is low, and the settlements with all other groups on campus have been 2% and 2%, it is unrealistic to assume that the

University would place a greater emphasis than usual on this factor, in this particular round of bargaining, to take extraordinary steps to "catch up".

[101] That said, the disparity is large, and the factor of comparability is thus particularly influential, even without being assigned greater weight than the others.

[102] In weighing the factors, it is convenient to begin with the "level of settlements for other employee groups within the University", which is 2% and 2%.

[103] That should not be considered a baseline from which one can only go upwards. To the contrary, it is merely one of the factors, and the factor of "inflation levels" points to a lower number. This also establishes that, as the University submits, its offer represents real gains.

[104] It is not enough, however, to accommodate the factor of "faculty and librarian salary levels at other universities". Faculty salaries at the University are well behind its comparators across Canada, and behind its closest comparator, SFU. As I have noted, whether the University should ultimately achieve parity with SFU is not before me to decide. Given the realities of collective bargaining and interest arbitration, all that I must decide is whether there should be a step in that direction. Further, given the other factors of inflation levels and settlements with other groups,

that step must necessarily be an incremental one. However, I am persuaded that an incremental step is justified. Accordingly, after weighing this factor against the other factors of inflation levels and settlements with other groups, I find the appropriate award to be a general salary increase of 2% and 2%, plus a lump sum payment of \$1,000 at the beginning of each of the two years of this July 1, 2012 - June 30, 2014 collective agreement. I am awarding the \$1,000 as a lump sum payment in each of these two years (rather than a single \$1,000 increase) solely because it is not clear whether the University will have the "ability to pay" it after the term of this collective agreement ends and that will need to be assessed at that time. My jurisdiction is limited to determining the appropriate award for this collective agreement.

[105] The factor of "the university's need to attract and retain qualified faculty members and librarians", while presenting potential risk in the future (as the University recognizes), is neutral at the present time.

[106] Before returning to the University's "ability to pay", a further discrete issue must be addressed concerning salary while on study leave. This is calculated according to a formula that is based partly on the member's own salary and partly on a fraction of either: (i) the Assistant Professor floor; or (ii) an amount specified in the current Salary Settlement. This is currently an amount specified at \$45,740. The

Association submits I should award the Assistant Professor floor, which is \$70,000, and that this is preferable to the University's proposal, which is a specified amount of \$50,000. Upon assessing the data submitted by the Association, I find the \$50,000 figure would put the University closer to the middle of its comparators than the Association's proposal, and I therefore award that amount. I add that if I had awarded the Association's proposal, its monetary value would have necessitated a corresponding reduction in the general salary increase, where the value is more appropriately directed.

[107] The Association has also asked me to award a number of other proposals in addition to the salary increase. Having considered its arguments for each, I find that these matters are best left to the parties in collective bargaining. Arbitrators are generally reluctant to intervene in such matters absent clear and compelling justification, for precisely that reason. In this regard, I adopt the reasons at paras.128-133 of *UBC 2013*. Like the parties in that case, these are sophisticated parties with a mature bargaining relationship and a commendable record of ordering their own affairs, without the need for a third party to do so. Issues such as whether there is justification for career progress increment differences between faculty and librarians are precisely the sort that the parties are far better positioned than an arbitrator to decide. In addition, the benefits sought by the Association

would require trade-offs in return. Those too are matters best decided by the parties, not an arbitrator. Finally, the value justified by the Agreement in this round is fully accounted for in the general salary increase, and thus any further benefits would have to be traded off against that as well, which in my view would be unwarranted. For each of these reasons, the Association's other proposals are considered and not awarded.

VI

[108] I return to the University's ability to pay. I recognize that these are genuinely challenging financial times for the University.

[109] There is nonetheless obvious merit (as the University's submission essentially recognizes) in the remarks of Justice Winkler in *The Governing Council of the University of Toronto and The University of Toronto Faculty Association*, unreported, March 27, 2006:

This reasoning brings us full circle to revisit the common ground between the parties regarding the commitment to the pursuit of excellence. As both parties are surely aware, more than mere lip service to the ideal is required for the due administration and execution of a commitment to excellence ... (para.18)

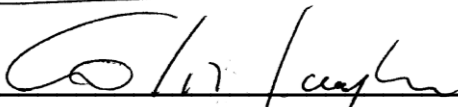
[110] The University, without diminishing the central importance of faculty, points out that a modern university also requires a substantial infrastructure to support it.

[111] Nonetheless, it is clear that faculty are critical to the University's pursuit of excellence and its central mission, and that their compensation has fallen well below the University's comparators and the standards to which the University holds itself generally. These are the sort of circumstances that can justify an institution re-ordering its spending priorities. I accept the University's submission that its ability to do so is limited; however, I am also persuaded it has the necessary ability, within those limitations. I am satisfied the above-noted award falls within the University's ability to pay.

VII

[112] For the foregoing reasons, for the term July 1, 2012 - June 30, 2014, the University's proposal of 2% and 2% is awarded, with the addition of a lump sum payment of \$1,000 in each of the two years.

DATED at Vancouver, British Columbia, this 20th day of November 2013.


Colin Taylor, Q.C.