IN THE MATTER OF AN INTEREST ARBITRATION

BETWEEN:

UNIVERSITY OF NORTHERN BRITISH COLUMBIA

(the "Employer")

AND:

UNIVERSITY OF NORTHERN BRITISH COLUMBIA FACULTY ASSOCIATION

(the "Union")

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Patrick Gilligan-Hackett for the Employer
	Allan E. Black, Q.C. for the Union
HEARING:	June 10, October 28 and 29 and November 13, 2013 Prince George and Vancouver, BC
DECISION:	February 4, 2014

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I. INTRODUCTION

This arbitration board was established pursuant to Article 46 of the Faculty Agreement between the University of Northern British Columbia (UNBC or University) and the Faculty Association (FA). Article 46.3 provides as follows:

> 46.3 **Arbitration**
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> If settlement is not reached within sixty (60) days of the date that negotiations commenced, either or both of the Parties may give seven (7) days notice of intent to request referral of any outstanding issues to an arbitration board for resolution. Upon expiry of the notice period, the outstanding issues will be referred to an arbitration board. Where mediation has been agreed to, no request for arbitration may be made until the mediator has submitted recommendations to the Parties.

Uncontested background facts, gleaned from the Employer's submission, include the following:

- The University is a research (as opposed to a special purpose teaching) university established pursuant to the *University Act*, R.S.B.C. 1996, c. 468.
- The FA is neither certified nor voluntarily recognized under the *Labour Relations Code*, R.S.B.C. 1996, c. 244. Instead, the FA enjoys contractual recognition by the University as the body with the authority to represent the University's faculty members, librarians, and senior lab instructors (collectively: "Members") in, among other things, their negotiations with the University to settle their terms and conditions of employment. The University's contractually based recognition of the FA is long-standing.
- On July 1, 2012 the FA represented approximately 233 faculty members, librarians, and senior lab instructors (including 28 limited term appointments and 9 vacancies). In addition, during a given fiscal year, the FA represents approximately 215 part-time instructors.

Negotiations between the parties in the fall of 2012 resulted in agreement on the following amended articles:

Article 4:	Access to Information
Article 12:	General Appointment Procedures
Article 15:	Appointment of Librarians
Article 20:	Personnel Files
Article 21:	Evaluations
Article 27:	Working Conditions
Article 29:	Duties, Rights and Responsibilities of Faculty Members
Article 35:	Duties, Rights and Responsibilities and Teaching Workload of SLIs
Article 43:	Fraud and Misconduct in Academic Research (withdrawn; original article)
Article 44:	Complaints and Grievances
Article 45:	Discipline
Article 51:	Relocation
Article 67:	Association Rights
Article 68:	Association Facilities (withdrawn subject to signed letter)

II. POSITIONS OF THE PARTIES

The University proposes a compensation package with "increases of slightly over 2% of the faculty salary base in each year of a two year Agreement", plus amendments to "two non-monetary articles: 22 (Renewal, Tenure and Promotion of Faculty) and 72 (Program Chairs)."

The Faculty Association proposes compensation changes involving a 3% general wage increase for full-time members in each year of a two year agreement, an increase in remuneration for part-time Instructors, career development increments for full-time members, salary remapping for full-time members, an increase in salary floors/ceilings, and graduated semester contact hour remuneration.

The Association also proposes non-salary amendments to Article 19 Retirement, Resignation, and Alteration of Employment; Article 28 Professional Development Allowance; Article 30 Teaching Workload; Article 50 Pensions and Benefits; Article 54 Sabbatical Leaves; Article 61 Sick Leave; and Article 62 Leave of Absence. Similarly, the University proposes amendments to two non – monetary articles in the agreement: 22 (Renewal, Tenure and Promotion of Faculty) and 72 (Program Chairs).

Mediation hearings were held on June 10, 2014 but the parties were unable to resolve the issues in dispute. I therefore convened an arbitration hearing in Prince George, BC on October 28 and 29, 2013 and November 13, 2013 in Vancouver, BC, during which I heard extensive briefs from both Counsel.

III. EXPERT REPORTS AND WITNESSES

Both parties provided expert witnesses in these proceedings, as to the University's financial situation. Testifying for the Faculty Association was Ms. Eleanor Joy, Associate Partner, Valuations, Modelling and Disputes, PricewaterhouseCoopers LLP, and for UNBC Mr. Paul McEwen, Partner, Valuation and Business Modelling, Ernst & Young LLP.

Ms. Joy's report details the costing amendments of the University's salary and benefit proposals against the FA's salary and benefit proposals for the two years. After evaluating the costing difference, and comparing each to the University's general operating fund, Ms. Joy comes to the conclusion that the University has the ability to pay the FA's proposals for both salaries and benefits in the fiscal years 2013 and 2014. Ms. Joy comes to the following conclusion at p. 6 of her report:

> Based on the scope of our work, assumptions, and the restrictions and qualifications set out in the balance of the Report, in our

> opinion, UNBC has the ability to pay the monetary items proposed by the Association in each of Fiscal 2013 and Fiscal 2014.
>
> The University's expert, Mr. McEwan, outlines the budgeting process and the University's analysis of the general operating fund. The University's expert analysis on the projected costs of the FA's and the University's salary and benefit proposals differs from the FA expert analysis. The University's analysis of the projected association salary and benefit changes from 2012-2016 is detailed in two charts in the report which compare the University's salary and benefits offer and the FA's salary and benefit proposals. The expert report then offers the following analysis of the two graphs at p.5 of his report:
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> > The University's analysis indicates a shortfall in the change in Operating Fund revenues compared to Association salary and benefit costs in each year except the year ending 31 March 2014, and a cumulative shortfall through the year ending 31 March 2016 of $1.3 million based on the University offer and $5.6 million based on the Association Proposal.
> >
> > In the context of the dispute and the University's ability to pay, Counsel has advised that an excess of Operating Fund revenues over Association salary and benefit costs does not directly indicate an ability to pay the indicated salary and a benefits and a shortfall does not directly indicate the lack of an ability to pay.

As documented in the University's expert report, the ability to pay would depend on the salary and benefits awarded in addition to a multitude of other factors.

Ultimately, there is disagreement as to the total cost of the monetary bargaining proposals. The FA does not provide a percentage costing, but states a cumulative end cost of its monetary proposals of $7,590,905 (including benefits). UNBC claims a cumulative cost of the FA's proposals, "over the term of the contract of $8,557,283, representing increases of 14.20% in the first year and 4.45% in the second …". The FA claims UNBC miscalculation of the costs of the FA proposal of "at least $750,000 in 2012 [the first year] alone."

IV. GOVERNING PRINCIPLES

In many interest arbitration cases the arbitration board is provided direction by statute or collective agreement provision as to the governing principles and/or factors to consider in reaching an ultimate decision on the matter(s) in dispute.

Such is not the circumstance in the instant case beyond the generic provisions of Article 46 of the UNBC Faculty Agreement.

This paucity of collective agreement specified arbitral direction notwithstanding, the parties have each provided me their own version of the appropriate framework to apply.

The Faculty Association proposes that I consider:

(a) Salaries and benefits at universities in Canada, including
  (i) average salaries at universities in Canada
  (ii) average salaries at comparator universities in Canada
  (iii) salaries of faculty at various benchmark positions
  (iv) salary floors
  (v) salary ceilings
(b) Recent general wage increases (GWIs) at universities in Canada
(c) The Consumer Price Index
(d) Recent general wage increases (GWIs) in the public sector in Canada.

For its part, the Employer proposes that I consider:

a. the University's economic circumstances;
b. the historical pattern of settlements between the Parties;
c. the cost of living in BC, including, in particular, the cost of housing in Prince George; and the rate of change in that cost of living;

d. recent settlements with other employee groups at the University;
e. recent settlements at other research universities in BC;
f. current and near current settlements within the education, health, and social services sector in Canada; and
g. the University's bargaining mandate from the Public Sector Employers Council ("PSEC").

While there are relevant considerations within each proposal, I consider it appropriate in the circumstances, absent legislated or negotiated direction, to adhere closely to the long-established and accepted principles of replication, which establish the task of an interest arbitrator to attempt, to the extent possible, to divine a collective agreement, that if left to their own devices, the parties themselves would have negotiated in the circumstances: see, for example, *Nelson (City) and Nelson Firefighters Assn. (Wage Grievance)*, [2010] B.C.C.A.A.A. No. 174 (McPhillips) and *Western Canadian Coal and Construction Allies Workers' Union, Local 68* (Collective Agreement Grievance), [2010] B.C.C.A.A.A. No. 127 (Ready).

Expansion and clarification of the replication principle is provided in a number of interest arbitration decisions:

> …An interest arbitration board's impression of what the parties might have eventually settled for, must of necessity depend in large part on the evidence presented in the hearing. With respect to that evidence, the Board must take into account not only the "power" position of the parties and attempt to determine who might prevail if a [sic] unrestricted economic was permitted, but must be guided in large part by the "reasonableness" of the respective positions of the parties. Reasonableness is to be determined in the overall context and economic climate that prevails at the time the dispute is determined. (See: *Halifax (Regional Municipality) and I.A.F.F., Local 268* (1998), 71 L.A.C. (4th), 129 (Kuttner).
>
> In my view, the appropriate replication approach imposes an obligation on the arbitrator to essentially stand in the shoes of the negotiators and pose the question; what settlement is possible in

> the current circumstances? Answering this question requires that the arbitrator view and examine the evidence, as well as examine factors such as current economic conditions, the cost of living index a comparison of other police force settlements, internal comparisons (i.e., settlements between other unions and the same employer) and collective agreements negotiated generally in both the public and private sectors. This, of course, is not a complete list of factors. It is, however, typical of the factors assessed by negotiators representing each side of the bargaining table when the crunch comes and it is time to settle a collective agreement. (See: *Corporation of the City of Regina and the Regina Police Association*, unreported, April 21 1994 (Ready).

As for the "current economic conditions" factor referenced above, I quote with approval from Arbitrator Sims' award in *University of New Brunswick and Association of University of New Brunswick Teachers*, unreported, January 12, 2011:

> …an interest arbitrator when attempting to replicate what the result of collective bargaining would have been must take into account the economic environment, because the parties themselves must do that….The economic environment is relevant, and a factor, and the parties do take those considerations into account.
>
> (emphasis in original)

Outside of the foregoing, I have no intent of either putting a further gloss on the replication theory generally, or of obsessively parsing replication's component parts. I have approached this case with the sole and simple aim of attempting to replicate a likely negotiated outcome, mindful of both external and internal comparators, as well as the general economic environment.

V. PSEC MANDATE

A review of governing principles would be incomplete without reference to the applicability, if any, of the PSEC mandate.

On this point, I find myself in agreement with Arbitrator Taylor in his recent November 20, 2013 interest arbitration decision regarding financial issues between the University of Victoria and that institution's Faculty Association.

In neither that case, nor his earlier *UBC and Faculty Association*, unreported, July 24, 2013 decision did Arbitrator Taylor (when applying collective agreement language with specific identified decision-making factors) feel bound by the PSEC mandate.

Within the University of Victoria decision, Taylor also references a 1996 final offer selection decision by Arbitrator Kelleher – *University of Victoria and University of Victoria Faculty Association* Award No. A-92/96 [1996] B.C.C.A.A.A. No. 162 – in which Kelleher discusses the effect of then-existing PSEC Guidelines in his determinations:

> 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. …But the guidelines are not irrelevant….

Given the lack of collective agreement direction in the instant case, I consider myself even less restricted by the PSEC mandate than was the case in the collective agreement specified decision making processes facing either Kelleher or Taylor.

I do not, however, dismiss the PSEC mandate as irrelevant. Rather, I view it simply as an aspect of the general economic situation facing these and other parties engaged in public sector negotiations throughout the Province of British Columbia.

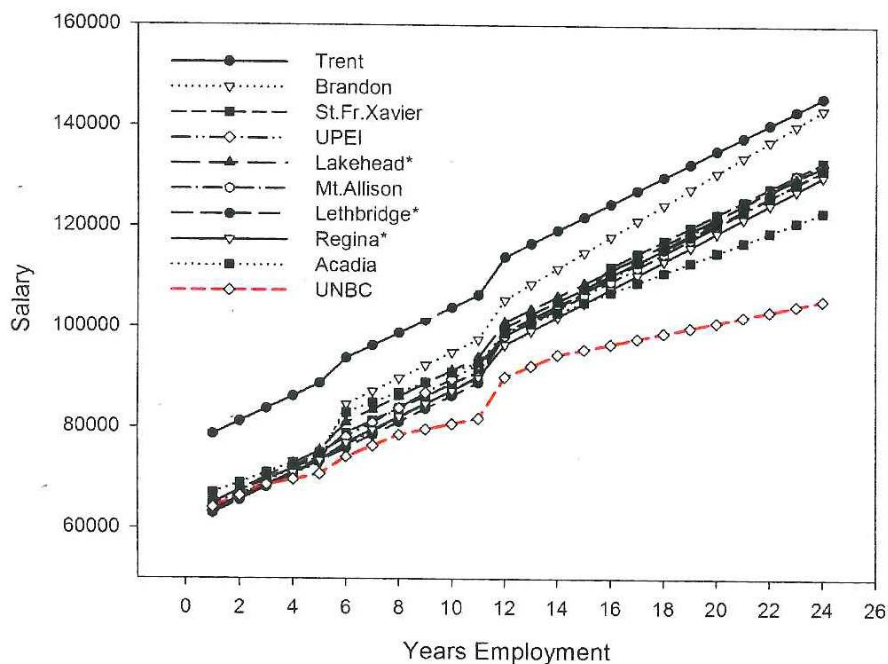
VI. RELEVANT FACTORS

I turn now to individual consideration of the factors I consider most relevant to my determination of an appropriate award.

i. External Comparators

The Association-created table below is persuasive evidence as to the UNBC faculty's low/bottom salary standing relative to the salaries received by faculty at other representative institutions performing similar work (or arguably lesser work in the case of those comparators lacking a research profile or graduate student supervisory responsibilities). The graph is re-produced as follows:

Figure 3. Comparison of faculty salaries at UNBC and comparator universities



This graph depicts faculty salaries (2012) as stipulated by faculty agreements, assuming a starting salary of $62,949 or the salary floor, whichever is higher. The asterisks denote universities that also have merit awards as a part of their compensation structure (not included in the current plot). Thus actual salaries for most faculty at those institutions will be higher than shown.

The University does not dispute the evidence from the FA on the matter of faculty agreements from other similar Canadian Universities. Indeed many institutions on the Association's list of external comparators are drawn from the University Board of Governors' own list, utilized in previous institutional analysis. The University submits, however, that the faculty settlements at other BC research post-secondary institutions are the "most meaningful comparator" as those faculty settlements best reflect the provincial economy and academic marketplace. The University highlights that at SFU the parties negotiated a settlement involving a general wage increase of 2% in each year of a two year deal and at UBC, the parties proceeded to an interest arbitration which resulted in a general wage increase of 2.5% in each year of a two year deal.

I find that both the FA's external comparators and the University's external comparators to be relevant considerations.

ii. Internal Comparators

Consideration of internal equities with other employee groups at the University is hampered by the fact there is, for the effective purposes of this discussion, but one other potentially impacted employee group at the University – CUPE, Local 3799 representing support workers, tradespeople, supervisors and ELS associates, who perform work fundamentally different than that of the members of the Faculty Association.

With that elemental distinction in the type of work performed, there is no real comparative effect of the kind evident when levels or bands of work sharing a hierarchy or commonality of function receive differing wage increases. Although the University's position at the CUPE bargaining table is

worth noting, I place relatively little weight in this process on the internal CUPE comparator in this circumstance.

iii. Economic Environment

Any discussion of the economic environment is inherently inclusive of the provincially prevalent 2% + 2% standard, as well as the specific financial situation of UNBC.

Employer Counsel summarizes UNBC's financial "reality" – as elaborated by Employer witness Paul McEwen, Partner, Valuation and Business Modelling, Ernst & Young – by stating:

> …the University has limited revenue available to increase salary and benefit levels for employee groups including Members and limited flexibility to address cost increases. Reduction in the University's recurring, unrestricted revenue sources loom and existing sources of funding have been fully committed. The University cannot responsibly commit to salary increases beyond the levels it has proposed. Such a commitment would be beyond the University's current ability to pay and would necessarily result in either reductions in staffing levels or a reduction in services to students and others who utilize the University, or both.

I note that, unlike the Collective Agreement language in UBC, there is no specific reference here to the University's "ability to pay". That said, the University submits that an "ability to pay" is a significant factor and should be considered heavily in my decision. Given the language in the UBC Collective Agreement, the "ability to pay" was recently canvassed in UBC *and UBC Faculty Association*, unreported, July 24, 2013 (Taylor).) In that case, Arbitrator Taylor thoughtfully reviews the history between the parties of the interpretation of the "ability to pay" (see paras. 23-62). As was decided by Arbitrator Taylor in that decision, I find that such an analysis engages the "reasonable balance" between faculty salaries and other expenditures at the

University's general operating funds. And, I note that in the instant case the University does not rely on its inability to pay. Rather, it argues it ought to be considered a significant factor in this case.

Beyond the analysis outlined in the UBC and UBC Faculty Association, I also consider the following instructive with respect to the issue of the University's "ability to pay":

> Without more, a budget represents estimates of spending but not ability to spend. One would expect that the ability of an employer to spend would be shown rather by demonstrating that the funding available is limited, that there is no possibility of allocating funds between accounts, that there are no surplus or secret funds available to the employer; that there are no supplementary funds available to the employer and that there is no ability to raise and/or carry a deficit.
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> *Crossroads Treatment Centre Society and HEU, Local 180*, [1983] B.C.C.A.A.A. No.652 (Larson):

After a careful review of the evidence and expert reports in this case, the following is revealed:

- costs and revenues are relatively fixed and predictable with minimal fluctuations;
- there is a history of general operating fund (GOF) surpluses up to and including the present time (albeit mindful of the considerable restrictions on reallocation of same);
- international student tuitions considerably offset domestic under enrollment;
- that allocation of funding to labour costs has decreased over the last five years while salary savings have increased
- the authority to hire and layoff (thereby effectively controlling labour costs) lays within the purview of the University generally;

- the Board of Governors has further specific discretion to move funds to self-determined priorities; and,
- As previously noted in this Award, there are discrepancies between the expert reports respecting the future cost of the bargaining proposals. It is noteworthy that the University expert report makes clear that the costing does not directly correlate to the University's ability or inability to pay the proposed salary and benefit increase.

Such characteristics do not, by any measure, create the impression of a dire financial circumstance, or of a situation preventing the institution from re-ordering its spending priorities.

iv. PSEC

Turning to consideration of the PSEC mandate as a relevant aspect of the economic environment, it is apparent that 2 + 2 is reflective of what the Employer describes as the "current run of public sector settlements in BC", as well as being the result achieved through collective bargaining (strike included) for the only other formally recognized Union employee group at UNBC – CUPE, Local 3799.

As such, 2 + 2 is obviously a real and substantive offer from the Employer. The question to be determined is whether a persuasive argument exists to go beyond the 2 + 2 settlement pattern.

VII. AWARD

The above factors give rise to the central issue before me: whether, on the evidence, there is sufficient justification to warrant a monetary wage settlement of more than the Employer's offer of 2 + 2 by way of an interest arbitration award.

I recognize that it is difficult to say what would have occurred at the bargaining table had the parties proceeded to a strike or lock-out. Considering the able arguments made by the parties and the factors considered above, I find it likely that there would have been some movement on the part of the University on the issue of general wages, given the compelling statistics from other universities in Canada, including those in British Columbia. Returning to the external comparison factor, I am satisfied in reviewing the salary comparator set out in the table above as well as reviewing the salary increases at both UBC and SFU in British Columbia, that there is justification to adjust the present salary scale as a step towards narrowing the existing gap with comparable universities.

At the same time I recognize in granting a wage adjustment over and above the provincial pattern of 2% each year of the Collective Agreement that it must be done by taking into account the current financial status of the university and the bargaining history between the two parties. Though the economic environment, PSEC mandate included, creates a milieu mitigating the kind of substantive increase sought by the Union here, sufficient justification exists for an increase above 2% + 2%.

As such, and relying on the above factors including the extensive comparators advanced by both parties, I award a general wage increase of 2.5% in the first year of the Collective Agreement (effective July 1, 2012) and 2.5% in the second year (effective July 1, 2013).

VIII. OTHER PROPOSALS

As for the Employer's and Faculty Association's non-monetary proposals, and the Faculty Association's monetary proposals other than for a general increase, I embrace the reasoning of Arbitrator Taylor in *UBC, supra,* wherein he states the following regarding proposals additional to a 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….

Further, and most significantly, the parties are a few months away from expiry of the Agreement with which we are currently concerned. With the next round of bargaining imminent, and another opportunity soon at hand for the parties to address these issues themselves, there is, for that reason alone, no clear and compelling reason to address them now.

Finally, I award that all items previously agreed between the parties shall be incorporated into the renewed agreement.

Dated at the City of Vancouver in the Province of British Columbia this 4th day of February, 2014.

Vincent L. Ready