Citation: *University of British Columbia*, 2023 BCLRB 129
(Leave for Reconsideration of 2023 BCLRB 3)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

UNIVERSITY OF BRITISH COLUMBIA

(the "Employer")

-and-

FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

(the "Association")

PANEL:	Jennifer Glougie, Chair Andres Barker, Vice-Chair Carmen Hamilton, Vice-Chair
APPEARANCES:	Jennifer S. Russell, for the Employer Jessica L. Burke, Stephanie T. Mayor, and Grace Lichtenwald, for the Association
CASE NO.:	2023-000335
DATE OF DECISION:	August 14, 2023

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Association applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of 2023 BCLRB 3 (the "Original Decision"). The Original Decision dismisses the Union's application under Section 99 of the Code for review of an arbitration award, Ministry No. A-103/21, issued October 7, 2021 (the "Award"), by Arbitrator Andrew C.L. Sims, K.C. ("the Arbitrator").

II. BACKGROUND

2 The Award decides the parties' dispute about whether Associate Deans at UBC, who are excluded by agreement from the Union's bargaining unit, can participate in consultation procedures set out in the collective agreement which provide for departmental-level input into faculty appointment, reappointment, promotion, and tenure ("ARPT") decisions. The Association argued that, since the ARPT procedures at issue are in the parties' collective agreement, they are presumptively for the benefit of bargaining unit members only, not excluded employees, absent clear language to the contrary. The Association argued that such language did not exist.

3 The Arbitrator did not accept that collective agreement provisions can only apply to bargaining unit members, and parties can never negotiate provisions which also apply to excluded employees (pp. 40-43). The Arbitrator found the parties in this case were thus able to "negotiate ARPT procedures that could apply to all faculty members as defined in the [collective] agreement and not just bargaining unit members" (p. 43), and the question was whether they had in fact done so.

4 The Arbitrator reviewed the collective agreement language, the parties' bargaining history, and the university faculty employment context. He reiterated that the Association "can, in general, and clearly with specific language, negotiate provisions over the ARPT processes that apply to all 'Faculty Members' not just members of the bargaining unit" (p. 71).

5 The Arbitrator noted that in Part 4 of the collective agreement, which contains the ARPT procedures, the parties had adopted a "specific definition" of Faculty Member for purposes of that part (p. 71). He found the Part 4 definition is "basically the *University Act's* definition" of a faculty member, which includes Assistant Deans, and he found "no basis on which to find the mere fact of certification implicitly whittles down the definition of 'Faculty Member' in Part 4 to 'member of the bargaining unit'" (p. 72). The Arbitrator added:

> … I find it can and does refer to all the listed Board of Governors' appointees. It is not expressly or implicitly to be read down by the

> effect of certification or any presumption that the collective agreement only extends benefits to bargaining unit members. If express words are needed, the Part 4 definition suffices for that purpose, subject to what follows.
>
> (p. 72)

6 The Arbitrator then stated that, while the "processes in respect of the tenure and promotion of all Faculty Members is to be that provided in Part 4, without regard to whether the persons are within or excluded from the bargaining unit" (p. 74), Assistant Deans who had "a role in the person's ARPT process at the Dean or Presidential level", were precluded "from participation in the departmental consultation" (p. 79).

III. THE ORIGINAL DECISION

7 The Original Decision notes the Association argued that the Arbitrator "failed to interpret and apply a presumption that a bargaining agent under the Code does not bargain on behalf of excluded personnel, and collective agreement terms do not apply to excluded staff (the 'Presumption')" (para. 27). The Original Decision further notes the Association argued the Presumption "arises from the Code and is a matter of fundamental Code principles that attracts a correctness standard of review" (para. 77).

8 The original panel did not accept the Union's position that a correctness standard of review applied to the Award under Section 99, noting the Arbitrator "considered whether Associate Deans could participate in ARPT Committees under Part 4 [of] the Collective Agreement, with regard to the wording of the Collective Agreement, historical and institutional context, arbitral jurisprudence, and extrinsic evidence such as bargaining notes" (para. 78). The original panel found the Arbitrator's conclusion that the right to participate in ARPT committees was "not exclusive to members of the bargaining unit but also applied to eligible Associate Deans… was a matter of contract interpretation, and as such, the Award is entitled to deference and a sympathetic reading" (para. 78).

9 The Original Decision goes on to address the Association's other arguments that the Award did not meet the Board's deferential "genuine effort" standard of review and that the Arbitrator denied the Association procedural fairness and natural justice in rendering the Award (paras. 79-96). The Original Decision finds the Association "has not established that the Arbitrator failed to make a genuine effort" (para. 85), and "has not established [the Award] is inconsistent with Code principles or that [the Association] was denied a fair hearing" (para. 97). The Original Decision finds the Arbitrator "had regard to the real substance of the matter in dispute and the merits of the parties' respective positions as required by Section 82(2) of the Code" (para. 97). Accordingly, it dismisses the Association's Section 99 application.

IV. POSITIONS OF THE PARTIES

The Association

10 The Association raises two grounds for leave and reconsideration of the Original Decision. First, it says the original panel "failed to address, and misconstrued and/or conflated, central arguments made by the Faculty Association respecting the Arbitrator's interpretation and application of a fundamental labour relations principle under the *Code* and the applicable standard of review". Second, it says the original panel "made palpable and overriding errors in interpreting the Arbitrator's findings that substantively impacted the original panel's analysis".

11 Regarding its first ground, the Association says a central argument it raised in its Section 99 application was "that the Arbitrator failed to interpret and apply a fundamental labour relations presumption that recognizes that: (1) an exclusive bargaining agent does not bargain on behalf of excluded personnel; and (2) collective agreement terms and conditions do not apply to management and/or persons excluded from a bargaining unit (the 'Presumption')". The Association says it submitted to the original panel that the Presumption "arises from matters of statute, as it engages fundamental questions of labour relations arising from the *Code* and thus must be assessed on a correctness standard". The Association claims the Employer "did not substantively dispute" its contention that the Presumption "is a fundamental labour relations principle, subject to a correctness standard".

12 The Association notes the original panel was "unable to agree" (para. 77) with the Association's argument regarding the Presumption and review on a standard of correctness but asserts the original panel "provide[d] no reasoning for its disagreement". The Association notes paragraph 78 of the Original Decision but submits the original panel "fail[ed] to provide any supportable analysis respecting the argument it is purporting to address".

13 The Association acknowledges that the original panel noted the Arbitrator "considered the wording of the Collective Agreement, its context, jurisprudence, and extrinsic evidence in coming to his conclusion". However, the Association submits what the original panel "should have been addressing, independently from how the Arbitrator conceived of the issue, was whether the Presumption was a matter of statute (even if it involved contractual interpretation)", and if so whether the Arbitrator applied it correctly. The Association submits the original panel denied it a fair hearing in failing to answer these questions, and that in deferring to the Arbitrator's consideration of the Association's argument regarding the Presumption, the original panel "arbitrarily read down the Presumption as a fundamental labour relations principle and rendered it a mere tool of contractual interpretation any labour arbitrator could choose to follow or not". The Association says the original panel did not give an adequate explanation for taking this approach to its argument regarding the Presumption.

14 The Association further submits that paragraphs 79-80 of the Original Decision misconstrue or conflate its primary argument regarding the Presumption with its alternative argument that the Arbitrator failed to make a genuine effort to interpret the collective agreement. The Association submits that in doing so, the original panel failed to consider its central argument and thereby denied it a fair hearing.

15 The Association also submits that if the Board were to conclude that arbitrators are entitled to deference respecting their interpretation and application of the Presumption, this would mean that managers and others outside the bargaining unit could access rights and benefits in a collective agreement, which the Association submits "unsettles the very foundation upon which the collective bargaining relationship has been based". The Association says unions would have to state explicitly that collective agreement provisions do not apply to excluded persons, "because it is no longer a statutory presumption underlying each and every round of bargaining and interpretation". The Association says the consequence of the Award and the Original Decision upholding it is that "if there is any ambiguity, parties may find themselves involved in a dispute where heretofore was not in issue due to the existing jurisprudence respecting the Presumption".

16 Regarding its second ground of review, the Association says the Original Decision makes "three significant errors" in analysing the Award, concerning (1) the Arbitrator's interpretation of the term "Faculty Member" in the Collective Agreement; (2) an acknowledged factual error made by the Arbitrator; and (3) the Arbitrator's consideration of a 2011 Memorandum of Agreement. The Association submits these "palpable and overriding errors directly contradict the Original Panel's conclusion that the Arbitrator met the genuine effort test, acted in accordance with natural justice rights, and did not make reviewable errors". The Association asserts the alleged errors are not "minor misstatements" but rather are "palpable and overriding errors affecting the original panel's assessment that the Arbitrator undertook a genuine effort". The Association submits the alleged errors "demonstrate that the Original Panel's conclusions cannot be supported", and it submits this panel should "substitute its own opinion for the conclusions made by the Original Panel".

The Employer

17 The Employer made comprehensive submissions in response to the Association's application for leave and reconsideration of the Original Decision. For purposes of this decision, we find it only necessary to note the following arguments.

18 The Employer says it did not agree that the "Presumption" identified by the Association "existed as asserted by the Association or that it was in fact a fundamental labour relations presumption". The Employer says that instead it "made an alternative argument that assumed, without agreeing, that if such a Presumption applied, the Arbitrator did in fact apply it correctly". The Employer says this "does not amount to an agreement regarding the existence of the Presumption or its relevance (or a failure to take issue with that point somehow amounting to acquiescence)".

19 The Employer says the Original Decision was correct to reject the Association's argument that the Award should be subject to a correctness standard of review, and instead apply the more deferential "genuine effort" standard. The Employer says that, to the extent the original panel focused on the Association's alternative arguments, "this was because it correctly accepted that the genuine effort test was the appropriate standard of review rather than correctness". The Employer says the original panel did not ignore the Association's argument that a correctness standard applied; rather, it expressly rejected the argument because it correctly found the Award involved an issue of collective agreement interpretation and accordingly the standard was genuine effort.

20 The Employer notes that, as set out in the Original Decision, the Board does not review an arbitrator's interpretation of a collective agreement for whether it agrees with the interpretation, but rather whether, on a sympathetic reading of the award, the arbitrator made a genuine effort to interpret the collective agreement. The Employer submits that in this case, the Arbitrator's decision in the Award is "fundamentally one of collective agreement interpretation and is entitled to deference and a sympathetic reading", as the Original Decision finds.

21 With respect to the Association's second ground of review, the Employer submits that none of the alleged errors, if made, have sufficient effect to amount to palpable and overriding errors which would justify granting leave for reconsideration. It provides detailed arguments about each of the errors in that regard.

Association's final reply

22 In its final reply, the Association says that while the Employer "did not explicitly state that they agreed the Presumption is a statutory principle", it "provided absolutely no analysis or reasons for why the Presumption was not a statutory principle". The Association submits that, by not doing so, the Employer did not substantively dispute this point. It says the original panel therefore "found against the Faculty Association on a primary point without rational analysis and without the Faculty Association having any opportunity to respond to arguments or reasons why the Presumption was not a statutory principle", and this was a breach of natural justice.

23 The Association also reiterates its position that the original panel did not provide a reasoned analysis in the Original Decision for why it did not accept the Association's primary argument that the Presumption is a statutory principle and that therefore a correctness standard of review applied to the Award. The Association submits that while it "does not dispute that Arbitrators are deferred to on matters of contractual interpretation, there is no deference owed on questions of the statute (including whether a principle is a matter of statute)". The Association says the Board "has exclusive jurisdiction to bind arbitrators to follow principles of the statute"; that jurisdiction "cannot be delegated to arbitrators"; and the original panel "failed to uphold this distinction and exercise its jurisdiction" when it reviewed the Award on a deferential rather than a correctness standard.

24 With respect to the alleged palpable and overriding errors, the Association says it "does not dispute the standard the Board requires for reviewing factual errors" as stated in the Employer's response but disagrees with the Employer that its arguments do not reach this standard.

V. ANALYSIS AND DECISION

25 An application under Section 141 of the Code must demonstrate a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93) ("*Brinco*"). An applicant must raise a serious question as to the correctness or fairness of the original decision: *Brinco*.

26 The Original Decision decides the Union's application under Section 99 of the Code for review of the Award. As noted in the Original Decision, "the Board's scope of review under Section 99 of the Code is limited to determining whether a party was denied a fair hearing or whether the award is inconsistent with the principles expressed or implied in the Code" (para. 70). The principles the Board applies in reviewing arbitration awards under that provision are well established. As the Original Decision states, Section 99 "is not a full-fledged avenue of appeal" (para. 71).

27 The Original Decision then sets out (at para. 71) the following frequently-quoted passage from *British Columbia Public School Employers' Association*, BCLRB No. B73/99 ("*BCPSEA*") which summarizes the Board's approach under Section 99:

> … The Board does not review an award to determine whether it agrees with the arbitrator's interpretation or not. Rather, the Board will give an award a sympathetic reading and will review an arbitrator's interpretation of a collective agreement on the basis of whether the arbitrator made a genuine effort to interpret the collective agreement provision in dispute: *Lornex Mining Corporation Limited*, BCLRB No. 96/76, [1977] 1 Can LRBR 377. (para. 7)

28 Genuine effort is a highly deferential standard of review. The statutory and policy basis for this approach has been explained many times in the Board's jurisprudence, including recently in *City of Vancouver*, 2020 BCLRB 8 (Leave for Reconsideration of BCLRB No. B84/2019) ("*City of Vancouver*"). As noted in *City of Vancouver,* the Board does not require an arbitrator to expressly address every argument (para. 40) or to "accept a party's formulation of the dispute, even where a party casts it as determinative in its theory of its case" (para. 42). As further stated in *City of Vancouver*, the Code requirement is for arbitrators to "have regard to the real substance of the dispute and the respective merits of the parties' positions, not a particular submission or argument" (para. 39).

29 In the present case, the Association argues that both the Arbitrator and the original panel ignored or erred in failing to give effect to its argument regarding what it asserts is a fundamental labour relations principle (namely, the Presumption). It further submits the original panel did not adequately explain why it did not review the Award on a standard of correctness given that, in the Association's view, the Presumption is a Code principle which the Arbitrator was required to apply correctly.

30 We are not persuaded the Arbitrator erred in his consideration of the Association's argument regarding the alleged Presumption. Nor do we find the original panel erred in applying a standard of genuine effort when reviewing the Award or failed to explain why it did not apply a standard of correctness.

31 The Association says the Presumption is a "fundamental labour relations principle" and therefore a Code principle which the Arbitrator had to apply correctly, though it does not cite any Board decision establishing this. We accept that, generally, unions negotiate collective agreement provisions for the benefit of the members of the bargaining unit they represent. However, we are not persuaded that the Presumption, as the Association articulates it, rises to the level of a Code principle. Therefore, we are not persuaded the original panel erred in reviewing the Award on the deferential standard of genuine effort.

32 Not every general proposition, principle, or alleged presumption having to do with collective agreement interpretation is necessarily a Code principle. As explained in *Wolverine Coal Partnership*, BCLRB No. B204/2014 ("*Wolverine*"):

> Not every legal test or analytical framework applied by an arbitrator in the course of deciding an issue of collective agreement interpretation is "required by the Code" (that is, involves an interpretation of the Code or an application of Code principles). Legal tests and analytical frameworks which evolve out of arbitral jurisprudence and do not involve the interpretation or application of the Code are not reviewable by the Board on a standard of correctness. To the contrary, the Board has made it clear that it will not interfere with the development of such legal tests and analytical frameworks. …
>
> (para. 33)

33 The panel in *Wolverine* went on to quote a passage from *Pirelli Cables & Systems Inc.*/*Cables et Systemes Pirelli Inc.*, BCLRB No. B57/2003 (Leave for Reconsideration of BCLRB No. B256/2002) ("*Pirelli*"), which in turn quoted a passage from one of the seminal Board decisions on review of arbitration awards under the Code, *Andres Wines (B.C.) Ltd.*, BCLRB No. 75/77, [1978] 1 Canadian LRBR 251 ("*Andres Wines*").

34 The passage from *Andres Wines* quoted in *Pirelli* and *Wolverine* draws a distinction between Code principles and the "'common law' of the collective agreement, whose ultimate source is the evolving jurisprudence of Canadian arbitrators" (p. 261). It says that principles emerge from arbitral jurisprudence "only after a long period of gestation, after many arbitrators have examined the problem in a variety of contexts, and after their extended reflection generates some degree of consensus" (*ibid.*). It adds that the "tacit assumption of that process is that the award of one arbitrator influences others through the persuasive force of its analysis, not as a binding precedent" (*ibid.*). *Andres Wines* says it was not the intention of the legislature in enacting Section 99 "to confer any special authority on this Labour Board by which we would mandate those contract principles which would be followed by B.C. arbitrators" (p. 262).

35 The Arbitrator considered the Association's argument regarding the Presumption and commented on the jurisprudence it cited in support of it (pp. 49-54). The Arbitrator accepted that rights and entitlements in collective agreements generally apply to bargaining unit members; however, he added: "To say collective agreements only enshrine employee and bargaining unit rights is an overstatement" (p. 30, emphasis in original). The Arbitrator stated that, in Canada, "labour boards, arbitrators and courts have avoided the rigid view that a Union can (and can only) negotiate terms and conditions of employment for employees" (p. 40). Based on his review of the existing jurisprudence, the Arbitrator found that the parties in this case could have negotiated ARPT procedures for all faculty members, not just bargaining unit members, and the question was whether they had done so, as a matter of collective agreement interpretation.

36 We agree with the Award and the Original Decision that the Presumption is a principle of collective agreement interpretation. That is, we find it falls within the rubric of what the Board in *Andres Wines* called the "common law of the collective agreement" or the "law of the contract", not the "law of the statute" or Code principles. In other words, it is part of the arbitral jurisprudence which arbitrators may consider but are not bound to apply in a particular way. Contrary to the Association's submission, we find the Presumption is the sort of proposition or principle having to do with collective agreement interpretation which the Board should leave to arbitrators to develop and apply as they see fit. We find the Original Decision correctly concludes the Arbitrator was engaged in an exercise of collective agreement interpretation, and accordingly the applicable standard under Section 99 is genuine effort.

37 We are not persuaded this approach causes chaos or difficulty for unions (or employers, for that matter) with respect to collective agreement interpretation. Parties can negotiate provisions which also apply to non-bargaining unit members. Whether they have done so would be a matter of interpretation in each case where the issue arises. The answer would be grounded in an arbitral recognition of the labour relations reality that collective agreement provisions are generally (though not exclusively) intended for the benefit of bargaining unit members. Under the Code, arbitrators are entrusted with collective agreement interpretation and with developing arbitral principles to guide that work. The Board has said that it would only intervene where there was evidence of a systemic problem, and we find that has not been established here. As a

result, while leave is granted on this ground, the application for reconsideration is dismissed.

38 With respect to the remaining grounds for reconsideration, we are not persuaded leave should be granted. Like the original panel, we are satisfied the Arbitrator made a genuine effort to interpret the collective agreement and did not deny either party a fair hearing. As the Presumption is a matter of collective agreement interpretation, not a Code principle, the Arbitrator was entitled to consider the Association's argument that the Presumption was determinative but was not obliged to frame or decide the dispute on that basis. As the Original Decision finds, the Award shows the Arbitrator had regard to the real substance of the dispute and the respective merits of the parties' positions and did not commit any error which would warrant review under Section 99.

39 In particular, we are not persuaded the Original Decision errs in dismissing the Association's argument that the Arbitrator made palpable and overriding errors of fact. Having reviewed the Award and the Association's arguments with respect to alleged palpable and overriding errors of fact, we agree with the Original Decision that the Board's stringent test for overturning an award on the basis of palpable and overriding error of fact is not met in this case. We find the Association's arguments "pull at leaves and branches" of the Arbitrator's analysis of the facts and issues in the Award but do not establish the kind of palpable and overriding error of fact which would cause the "entire tree" of the Award to fall: *The Board of School Trustees of School District No. 8 (Kootenay Lake)*, 2023 BCLRB 26 (Leave for Reconsideration of 2022 BCLRB 137), para. 20, quoting from *Amacon Alaska Development Partnership v. ARC Digital Canada Corp.*, 2023 BCCA 34, para. 46.

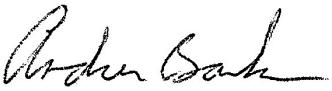
40 The issue before the Arbitrator was one of collective agreement interpretation. While the Association's position on how the collective agreement should be interpreted did not prevail, we are not persuaded it was denied a fair hearing. The Arbitrator was not required to frame the issues the way the Association presented them or address every argument it made. The Original Decision correctly concludes the Arbitrator had regard to the real substance of the matter in dispute and the merits of the parties' respective positions and did not deny the Association a fair hearing.

VI. CONCLUSION

41 For the reasons given, the application is dismissed.

LABOUR RELATIONS BOARD

JENNIFER GLOUGIE
CHAIR



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