

IN THE MATTER OF AN ARBITRATION
BEFORE MARTIN TEPLITSKY, Q.C.

B E T W E E N

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO

(The "Administration")

- and -

THE UNIVERSITY OF TORONTO FACULTY ASSOCIATION

("UTFA")

**UTFA RESPONSE ARBITRATION BRIEF
CONCERNING PENSION PLAN GOVERNANCE**

Dated: July 22, 2009

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Introduction

1. This brief is prepared in response to the Arbitration Brief submitted by the Administration on Friday, July 17, 2009.
2. This submission should be read together with the UTFa Submissions prepared in the Mediation including the Brief of UTFa and the Reply Brief of UTFa as well as all documentation filed in the Mediation.
3. It is agreed that the key issue here is providing an appropriate forum for UTFa to have a voice concerning the governance of the University of Toronto Pension Plan (the "Pension Plan"). Where the parties differ is the establishment of the appropriate forum for governance so that any voice that is given to the plan members through UTFa is a meaningful one and any governing body is independent and properly accountable to all the plan members.

UTFa's Position

4. Both parties are in agreement that a new body must be established to effectively govern the Pension Plan and to provide UTFa a voice in its governance. They differ with respect to the structure and accountability of the body, the extent of the voice of UTFa, and, most importantly, the ability of such a body to act as an independent decision-maker on pension matters.
5. UTFa's submission centres on the establishment of a new governing body for the Pension Plan operated pursuant to the following fundamental key principles:
 - (a) **Independence** – The conflict of the Administration as an employer and pension fund administrator must be recognized. It must also be recognized that the pension funds are not the property of the University (such as its real estate) but a trust held for the benefit of the plan members. Any body governing this trust fund must have independent decision making authority from the Administration, UTFa or any other body;
 - (b) **Accountability to the Plan Members** – The need for a voice for UTFa on the governing body of the Pension Plan centres upon the lack of accountability to the members under the current "corporate" model. Such accountability must be achieved by ensuring that UTFa appoints its nominees and that the obligation of the new governing pension body to the plan members is made clear.

Accountability to the University is achieved through the appointment of nominees of the Governing Council;

(c) **Oversight**

The new pension governing body must have the ability, either through direct authority or delegated authority to fulfill all the functions of an “administrator” contemplated by the *Pension Benefits Act* including:

- (i) all aspects of the administration and investment of the pension fund and application of the Pension Plan rules;
- (ii) a clear mandate setting out the responsibility to select and oversee all employees, delegates and agents, as well as the ability to choose them;
- (iii) availability of the resources of the Pension Fund and the University to cover its operating expenses.

(d) **Equal participation by the Members and providing such Member Representatives resources necessary to carry out their functions.** This has been elaborated in the Mediation Brief of UTFa. Just as importantly it is necessary that member representatives have the ability to obtain expert advice and have access to all necessary information to fulfill their role on any pension plan governing body.

(e) **A plan exclusively for Faculty Members.** This too has been discussed in the original mediation brief and will not be repeated for purposes of this submission.

Below are detailed submissions on each of these points:

INDEPENDENCE

6. It is critical that there be an independent decision-making body with respect to pensions. The Pension trust fund is not an asset of the University and as such is not governed by the typical powers under the *University of Toronto Act* that are given to the Governing Council. Even if it were, the Ontario Superior Court in *Dyck v. Governing Council of the University of Toronto* [1983] O.J. No. 3266 (attached at Tab 1) determined that the general powers of the Governing Council would include the power to delegate its responsibilities to an outside body. In this case, the Governing Council was found to have the power to agree to submit the settlement of both salaries and terms and conditions of employment to binding arbitration. There is no question about the jurisdiction of the Governing Council to agree to create an independent Pension Board. The only issue is how that Board should be structured. Given the existence of other boards, trusts, independent corporations, and entities such as UTAM, it is appropriate that an

independent Board of Trustees for the Pension Fund be created as suggested in the Mediation Brief and that such Board act as “administrator” of the Plan under applicable pension legislation. The Administration Brief points to various “boards” of Governing Council that already exist and there is no reason why a pension board cannot be created as well to hold the pension assets and govern the Pension Plan.

7. It is critical that the Board be an independent decision-making body serving as “administrator” of the Pension Plan for purposes of the PBA or through an irrevocably delegated authority from Governing Council to serve as administrator. The terms of reference of such a Board have already been provided in the Mediation and are attached again at Tab 2 to this Submission.
8. It should be noted that establishing a Pension Board or Committee does not in any way derogate from the Governing Council’s role as a plan sponsor with authority to make amendments to the Plan subject to applicable law and requirements of any applicable collective agreements, agreements with UTFA or arbitration awards.

ACCOUNTABILITY

9. Accountability to the members is critical in respect of the governing structure of any pension plan. It is one of the essential purposes of giving UTFA members a voice. Accountability can only be achieved through the creation of an independent body that has all the duties of an Administrator under the PBA and at best provides reports to the sponsoring organization, namely the Governing Council. Accountability also requires that there be independent resources particularly a chief executive officer of the Pension Fund who is accountable only to the Pension Board and not to the Governing Council or to its Business Board. The role of the Business Board still remains in terms of protecting the financial interests of the University, but the Business Board is in a conflict of interest position in terms of both administration of the Pension Plan on the one hand and administration of the University’s business interest in connection with its pension commitments to its employees. The Business Board should have no role in the administration of the Pension Plan.

OVERSIGHT

10. The most significant role of an independent pension body is to oversee all aspects of the Pension Plan be it administration, investment, selection and supervision of agents, employees or any other aspect of pensions other than bargaining the terms of the Plan which is left for the collective bargaining process. The term “administrator” under the PBA defined in section 8 contemplates such a body (see Tab 3). It is the Administrator under section 19 of the PBA who must ensure compliance with the statute. Section 22 of the Act creates the fiduciary obligations of the “administrator” (also see Tab 3). The difficulty which UTFA has with the Administration’s proposal here is that the definitions and duties of the “administrator” are vague and divided among different bodies. The Administration proposal requires a committee that reports “through the Business Board” to the Governing Council (see para. 4). The delegations are vague as defined at paragraphs 20 and 21 of the Administration proposal and the Delegation of Authority on investments to UTAM under paragraph 22 is also vague. It must be made clear that the new governing body has total jurisdiction over all these matters. It must also be made clear that the new body does not report to the Business Board but is a separate Board created by the Governing Council to act as Trustees of the pension fund.

EQUAL PARTICIPATION BY MEMBERS AND RESOURCES

11. For purposes of accountability of the new pension body, the members must have an equal voice. The Administration proposal would have the numbers outvoted by at least a margin of 10 Governing Council appointees to 6 member representatives. Even the member representatives are appointed by the Governing Council and not by the members themselves or their representatives such as the Unions. Further, no resources are given to the member appointees nor is there any guarantee of access to data. UTFA’s proposal would require equal representation with equal access to legal, actuarial, investment and accounting advice, and equal access to data pertaining to the Pension Plan. All of this would be subject to the appropriate fiduciary and confidentiality protections.

FACULTY PENSION PLAN

12. As noted in the Mediation Brief, the different communities of interest are best achieved through a faculty only plan. However, failing such a structure, UTFA must appoint its representatives through UTFA and not through any other source. Further any disputes regarding the budget of the Pension Committee, the actuarial assumptions and funding decisions must be resolved through arbitration in accordance with the UTFA proposal.

UTAM BOARD

13. UTFA believes that a single appointee to the UTAM Board of Directors is insufficient. Given the levels of responsibility that are involved in being a director and to ensure attendance and continuity, it would be best to have UTFA appoint 2 directors.

CONCLUSION

14. An independent, accountable body is required to govern the Pension Plan with full authority to fulfill the duties of an "administrator" as contemplated under the PBA. The mandate of such body must be clearly defined or the arbitration process will only lead to more confusion and litigation. There should be equal participation on a pension governing body of both representative employees and retirees on one hand, and representatives of the Administration on the other hand. There should also be 2 UTFA appointed directors on the UTAM Board.

All of which is respectfully submitted.

July 22, 2009

Dyck v. Governing Council of the University of Toronto

[1983] O.J. No. 3266

44 O.R. (2d) 317

4 D.L.R. (4th) 62

7 Admin. L.R. 93

23 A.C.W.S. (2d) 135

Ontario
High Court of Justice

Sirois J.

December 12, 1983.

John Sopinka, Q.C., for plaintiff.

Pierre Genest, Q.C., for defendant.

1 SIROIS J.:-- This is a motion brought under Rule 128 of the Rules of Practice, pursuant to which the parties have concurred in stating for the opinion of the court the question of law arising in this action, namely, whether it is within the powers of the Governing Council of the University of Toronto to enter into and implement a revision of art. 6 of the agreement between the University of Toronto Faculty Association and the Governing Council of the University of Toronto. This revision would establish a procedure of binding arbitration for the settlement of salaries and benefits for faculty members and librarians at the University of Toronto.

2 The facts have been agreed upon and are reproduced in the stated case filed herein.

3 The proposed revision of art. 6 of the agreement and procedures referred to therein are set out in app. F of the stated case.

4 The University of Toronto Faculty Association is a voluntary, unincorporated association of faculty members and librarians. It has not been certified under the Ontario Labour Relations Act, R.S.O. 1980, c. 228, but it represents them in the negotiations to fix their salaries and benefits.

5 The Governing Council of the University of Toronto is a corporation continued by the University of Toronto Act, 1971 (Ont.), c. 56, as amended by 1978, c. 88, hereinafter referred to as the "Revised 1978 Act":

2(1) The Governors of the University of Toronto are continued as a corporation under the name "The Governing Council of the University of Toronto".

6 Its powers and duties are described in s. 2(14) and s. 2(14a) as well as s. 2(15) of the Revised 1978 Act which are reproduced hereunder:

(14) The government, management and control of the University and of University College, and of the property, revenues, business and affairs thereof, and the powers and duties of The Governors of the University of Toronto and of the Senate of the University under The University of Toronto Act, 1947 as amended are vested in the Governing Council, and, without limiting the generality of the foregoing, the Governing Council has power to,

(a) appoint the President;

(b) appoint, promote, suspend and remove the members of the teaching and administrative staffs of the University and all such other officers and employees, including pro tempore appointments, as the Governing Council considers necessary or advisable for the purposes of the University or University College, but no member of the teaching or administrative staffs, except the President, shall be appointed, promoted, suspended or removed unless recommended by the President or such other officer or employee of the University designated therefor by the President under subsection 4a of section 5;

(c) fix the number, the duties and the salaries and other emoluments of officers and employees of the University and University College;

(d) delegate such of its powers under clauses b and c as it considers proper to the President or to such other officer or employee of the University as may be designated by the President;

(e) appoint committees and delegate thereto power and authority to act for the Governing Council with respect to any matter or class of matters, provided that where power and authority to act for the Governing Council are delegated, a majority of the members of the committee shall be members of the Governing Council;

(f) establish, change and terminate academic and administrative units within the University and determine the powers and duties of any such unit;

(g) conduct examinations and appoint examiners;

(h) deal with matters arising in connection with the award of fellowships, scholarships, medals, prizes and other awards for academic achievement;

(i) establish, change and, subject to subsection 2 of section 12, terminate councils within the University and determine the composition, powers and duties of any such council;

(j) provide for the granting of and grant degrees, including honorary degrees, diplomas and certificates;

(k) establish, change and terminate chairs and programs and courses of study;

(l) acquire, hold without limitation as to the period of holding, sell, lease or otherwise deal with real property;

(m) borrow from time to time such sums for the use of the University and of University College, and give such security against the assets of the University by way of mortgage or otherwise, as it determines;

(n) determine and regulate the standards for the admission of students to the University, the contents and curricula of all programs and courses of study and the requirements for graduation;

(na) delegate such of its powers under clauses g, h, and n as it considers proper to any academic unit or council;

(nb) determine the manner and procedure of election of its members, including the determination of constituencies, assign students and members of the teaching staff and administrative staff to such constituencies, and conduct such elections, but in the case of election of members by the administrative staff, the teaching staff and the students, or any of them, the elections shall be by secret ballot and no person shall be eligible to cast more than one ballot;

(nc) determine whether any person is a member, or any class of persons are members, of the administrative staff or the teaching staff or the alumni or is or are a student or students, and if a student or students, whether full-time graduate, part-time graduate, full-time undergraduate or part-time undergraduate;

(nd) invest all money that comes into its hands and that is not required to be expended for any purpose to which it lawfully may be applied, subject always to any express limitations or restrictions on investment powers imposed by the terms of the instruments creating any trust as to the same, in such manner as it considers proper and, except where a trust instrument otherwise directs, combine trust moneys belonging to various trusts in its care into a common trust fund;

(o) do all such acts and things as are necessary or expedient for the conduct of its affairs and the affairs of the University and University College.

(14a) A committee appointed under clause e of subsection 14 with power and authority to act for the Governing Council with respect to any of the powers of the Governing Council under clauses g, h and n of subsection 14 may, with the approval of the Governing Council, appoint and delegate such powers to sub-committees, and the majority of the members of such subcommittees need not be members of the Governing Council.

(15) The Governing Council shall pass by-laws regulating the exercise of its powers and the calling and conduct of its meetings and those of committees appointed by it and, subject to subsection 5 of section 3, including the quorum of any such committee, and its decisions shall be made by resolutions passed at its meetings.

7 Counsel for the defendant, the Governing Council of the University of Toronto, states that it would be ultra vires the governing council to delegate its powers under cls. (b) and (c) of s. 2(14) of the Act to a binding board of arbitration for salaries and benefits.

8 Counsel for the plaintiff takes the position that the governing council does have such power and authority by reason of the opening words of s. 2(14) and the broad language in cl. (o) of s. 2(14).

9 Section 2(14) states that the powers and duties of the governors and the senate of the University of Toronto under the 1947 statute entitled the University of Toronto Act, 1947 (Ont.), 112, are vested in the governing council.

10 The University of Toronto Act, 1947 contained 48 pages and 129 sections, whereas the Revised 1978 Act contains only 13 pages and 19 sections.

Powers of the board of governors and senate under the 1947 Act

11 Section 29 of the 1947 Act states that the government of the university is vested in the board of governors and I quote:

29. The government, conduct, management and control of the University and of University College, and of the property, revenues, business and affairs thereof, shall be vested in the Board.

12 Section 30 of the 1947 Act deals with the borrowing powers.

13 Section 31 deals with the powers of the board of governors to make regulations: cl. (a) -- pertaining to the conduct of proceedings; cl. (b) -- providing for the appointment of committees by the board to act for the board with respect to any matter but requiring that a majority of the members be members of the board (it corresponds more or less to s. 2(14) (e) of the Revised 1978 Act); and cl. (d) -- providing for pensions or annuities concerning the teaching staff described in s. 32(a).

14 Section 32 deals with the powers of the board in general and cl. (a) comprises essentially the items now contained in the Revised 1978 Act at s. 2(14)(b) and (c). The opening words of s. 32 of the 1947 Act are repeated in the last two lines of the opening words of s. 2(14) of the Revised 1978 Act.

15 Section 33 of the 1947 Act gives the board power to modify and alter the constitution of any body constituted or continued by the Act of 1947 and to create such new bodies as may be deemed necessary for the purpose of carrying out the objects and provisions of the Act and also to confer upon such bodies such powers as to the board may seem meet, so long as the powers of the senate are not altered.

16 Under s. 40 the board has the power to decide questions of powers and duties of the council of University College or of any faculty.

17 Section 41 of the old Act states that the board has all residual powers:

41. All the powers over, in respect of, or in relation to the University and University College which are not by the terms of this Act directed to be exercised by any other person or body of persons, are hereby, subject to the provisions of this Act, vested in the Board.

18 Sections 42 to 50 deal with the senate, its members and powers.

Powers of the governing council under the Revised 1978 Act

19 In summary therefore, the Revised 1978 Act vests in the governing council:

1. The government, management and control of the university (including that of University College) and of the property, revenues, business and affairs thereof;
2. the powers and duties of the governors of the University of Toronto and of its senate under the 1947 Act; and
3. without limiting the generality of the foregoing, the powers listed in cls. (a) to (o) of s. 2(14).

20 Clause (d) of s. 2(14) specifically refers to the powers of the governing council to delegate its powers to fix the salaries and other emoluments of officers and employees to the president or such other officer or employee of the university as may be designated by the president. Also, s. 5(4a) authorizes the president to delegate his duties concerning the recommendations as to appointments, promotions and suspensions of teachers and administrative staff.

Submissions of counsel for the Governing Council of the University of Toronto

21 Counsel for the university submits that it would amount to unlawful delegation of the governing council's powers for it to agree to a contract binding it to compulsory arbitration.

22 He contends that the governing council may not agree to submit to "interest arbitration". "Grievance arbitration" he defines as the interpretation by an arbitrator of an existing contract. "Interest arbitration", on the other hand, implies that the arbitrator will substitute his own judgment for that of the governing council in fixing salaries and benefits.

23 For the governing council to agree to "interest arbitration" would be to agree to abdicate its responsibility and this conflicts with the principles of non-delegation of the council's authority. Three American cases were referred to in support: *City & County of Denver et al. v. Denver Fire-Fighters Local No. 858, AFL-CIO* (1983), 663 P. 2d 1032 (Colorado Supreme Court en banc); *North Royalton Education Ass'n et al. v. North Royalton Bd. of Education* (1974), 325 N.E. 2d 901 (Court of Appeals of Ohio); *Norwalk Teachers' Ass'n v. Board of Education City of Norwalk* (1951), 83 A. 2d 482 (Supreme Court of Errors of Connecticut).

Submissions of counsel for the University of Toronto Faculty Association

24 Counsel for the University of Toronto Faculty Association contends that the power to fix salaries is administrative and not judicial or quasi-judicial in nature and that the governing council is capable of delegating such power to an arbitrator under its general powers set out in the opening paragraph of s. 2(14).

Finding

25 I do not think that by agreeing to binding arbitration the governing council is delegating its powers to fix salaries and emoluments of its employees. It is only submitting to an arbitration tribunal a problem, which after due mediation, was left unsolved.

26 If I am wrong, if that amounts to a delegation, I find that the governing council, because of its general powers, can so resort to an administrative tribunal (after unsuccessful mediation) for the purpose of assisting it in its responsibility of fixing the salaries to be paid to its employees.

Maxim: *expressio unius est exclusio alterius*

27 In support of his submissions, counsel for the Governing Council of the University of Toronto referred to the rule of construction "*expressio unius est exclusio alterius*" because cl. (d) of s. 2(14) deals specifically with the delegation of the power to fix salaries. He submits that it is conclusive that no other delegation was intended or permitted.

28 Did the Legislature really intend to exclude any other method for the governing council to delegate its powers to fix salaries in view of the general powers it gave council to "govern, manage and control the University and its property, revenues, business and affairs"?

29 Section 10 of the Interpretation Act, R.S.O. 1980, c. 219, requires that each Act be deemed remedial and

10. ... shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

30 In *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, [1929] 4 D.L.R. 1028, 11 C.B.R. 205, the Supreme Court of Canada dealt with the interpretation of s. 75(1) of the Bank Act, R.S.C. 1927, c. 12, which reads as follows:

75(1) The bank may

- (a) open branches, agencies and offices;
- (b) engage in and carry on business as a dealer in gold and silver coin and bullion;
- (c) deal in, discount and lend money and make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign, and other public securities; and
- (d) engage in and carry on such business generally as appertains to the business of banking.

31 Newcombe J. analysed that section at pp. 70-1 S.C.R., pp. 1031-2 D.L.R.:

The argument arises upon the interpretation of s. 75 of the Bank Act, and it is said that, inasmuch as clause (c) of subs. 1 expressly mentions certain securities, including "bills of exchange, promissory notes and other negotiable securities," upon which the bank may lend money and make advances, it could not have been intended that the next following clause (d), of the same subsection, should extend to securities not included in the preceding specific description. But that is practically, and unnecessarily, to limit the generality of the comprehensive power separately defined by clause (d) so as to exclude the lending powers which appertain to banking. The words of the clause are these:

"The bank may ...

- (d) engage in and carry on such business generally as appertains to the business of banking."

The maxim, *expressio unius est exclusio alterius*, enunciates a principle which has its application in the construction of statutes and written instruments, and no doubt it has its uses when it aids to discover the intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context. One has to realize that a general rule of interpretation is not always in the mind of a draughtsman; that accidents occur; that there may be inadvertence; that sometimes unnecessary expressions are introduced, *ex abundantia cautela*, by way of least resistance, to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom is held not be of universal application.

32 In *C.N.R. et al. v. Canada Steamship Lines, Ltd.*, [1945] 3 D.L.R. 417, [1945] A.C. 204, [1945] 2 W.W.R. 100 (P.C.), the Privy Council dealt with the interpretation of s. 35(13) of the Transport Act, 1938 (Can.), c. 53:

35(13) On any application under this section, the Board shall have regard to all considerations which appear to it to be relevant and, in particular, to the effect which the making of the agreed charge or the fixing of a charge is likely to have, or has had, on, --

(a) the net revenue of the carrier; and

(b) the business of any shipper by whom, or in whose interests, objection is made to approval being given to an agreed charge, or application is made for approval to be withdrawn.

33 On an application to the Board of Transport Commissioners for the approval of a charge, is the board limited to the two matters mentioned in particular in s. 35(13): the effect the new charge will have on (a) the net revenue of the carrier, and (b) the business of any shipper objecting to the approval of the charge? Or because of the general wording in the first part "have regard to all considerations which appear to it to be relevant", can the board look at other evidence?

34 Lord MacMillan at p. 420 D.L.R., p. 211 A.C., states:

It would be difficult to conceive a wider discretion than is conferred on the Board as to the considerations to which it is to have regard in disposing of an application for the approval of an agreed charge. It is to have regard to "all considerations which appear to it to be relevant". Not only is it not precluded negatively from having regard to any considerations, but it is enjoined positively to have regard to every consideration which in its opinion is relevant. So long as that discretion is exercised in good faith the decision of the Board as to what considerations are relevant would appear to be unchallengeable. The circumstance that the general words are followed by a specific direction to the Board to have regard in particular to two specified topics in no way derogates from the generality of their discretion. It is not a case to which the *eiusdem generis* rule applies, for the general words do not follow on an enumeration of particular instances ... Nor is the *maxim expressio unius est exclusio alterius* applicable to such a case as the present. In their Lordships' view the mention of the particular matters of (a) the net revenue of the carrier who has agreed the charge, and (b) the business of the objecting shipper, as matters to be considered, does not justify any inference that consideration of the revenue or business of an objecting carrier is excluded.

35 At the completion of the argument, I asked counsel if they had found any authorities dealing with the interpretation of the opening words of s. 91 of the Constitution Act, 1867, formerly the British North America Act, 1867, that could be useful in assisting the court in the interpretation of the opening words of s. 2(14) of the University of Toronto Act, 1971 as amended in 1978. They assured me that they did not.

36 Section 91 of the Constitution Act, 1867 states that the Federal Parliament may make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the subjects assigned exclusively to the Legislatures of the provinces and:

91. ... and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming, within the Classes of Subjects next herein-after enumerated; that is to say:-- ...

37 A reading of s. 91 brings out immediately the difference in the language of its opening words with the language of our s. 2(14). The powers and sovereignty are divided between the federal government in s. 91 and the provinces in s. 92.

38 In our case, the general council has all the powers to govern the university, it does not share any. It is obvious that the words "without limiting the generality of the foregoing, the Governing Council has power to" are not in the same context, although there may be similarities.

39 Our situation however, is very comparable to the ones considered by the Supreme Court of Canada in *Turgeon v. Dominion Bank* and by the Privy Council in *C.N.R. v. Canada Steamship Lines*, supra. The same principles apply to support the conclusion that the governing council is not limited to delegate its powers to fix salaries to the president or such other officer or employee of the university designated by the president under cl. (d) of s. 2(14) but may, under its general powers, agree to refer the matter to arbitration.

40 I was referred to three decisions in three provinces dealing with the interpretation of University Act legislations. The cases are: *National Union of Public Employees, Local 862 v. Board of Industrial Relations and Governors of University of Alberta* (1963), 42 W.W.R. 560, 63 C.L.L.C. 672 (Alta. S.C.), Riley J.; *R. v. British Columbia Labour Relations Board, Ex p. Simon Fraser University* (1966), 58 D.L.R. (2d) 571, 57 W.W.R. 504 sub nom. *Re Labour Relations Board and A.-G. B.C.*, 66 C.L.L.C. 574 (B.C.S.C.), Dohm J.; *Re Faculty Ass'n of University of St. Thomas and St. Thomas' University* (1975), 60 D.L.R. (3d) 176, 11 N.B.R. (2d) 379 (N.B. S.C.A.D.), Hughes C.J.N.B.

41 The University of Alberta case was cited and discussed in both subsequent cases, but not followed.

(1) In the case of the Governors of University of Alberta, the statute being discussed was: the University Act, R.S.A. 1955, c. 351.

42 The Alberta Act has general power clauses similar to those found in the Ontario University of Toronto Act, 1947, and its predecessors. The Alberta s. 23(2) corresponds to our s. 29 in the 1947 Act in which the government, conduct, management and control of the university and of the property, revenues, business and affairs thereof are vested in the board.

43 Their s. 25(1)(b) and (c) correspond to our s. 32(a) of the 1947 Act regarding the power to fix the salaries.

44 Mr. Justice Riley held that the University of Alberta Board of Governors could not enter into collective agreements with its employees. He applied the maxim "generalia specialibus non derogant", i.e., "general provisions will not abrogate specific provisions".

45 He found that the provisions of a previous special Act (the Alberta University Act and its predecessor passed in 1906), could not be changed by a subsequent general Act (the Alberta Labour Disputes Act, 1926), that makes no specific reference thereto (the Alberta University Act).

(2) In the case of Simon Fraser University, Justice Dohm of the British Columbia Supreme Court refused to follow the Alberta case and distinguished it on two grounds:

(i) That in British Columbia, the chronology of the statutes was the opposite and that consequently the maxim did not apply. He stated at pp. 574-5 D.L.R., p. 507 W.W.R.:

A bolder interpretation, and one which I prefer to adopt, is that the Legislature could not intend an interpretation of the Universities Act, which would disregard fundamental principles. The Legislature must have had knowledge of the prior general Act (Labour Relations Act) at the time of enacting the later special Act (Universities Act). I also presume that the Legislature did not intend to make any substantial change in the existing law and policy which gives to all employees in this Province certain rights. It would, in my opinion, require a clear expression to show any contrary intention on the part of the Legislature. The wording of some sections in the Universities Act could be improved but, in my view the employees of the university should not be deprived of any of the protection of prominent legislation in our society because of ill-chosen language in the statute in question.

(ii) The general powers in s. 46(m) and (n) of the British Columbia Universities Act, which correspond more or less to s. 2(14)(o) of the Revised 1978 Act did not appear in the Alberta Act. I reproduce here s. 46(m) and (n) of the British Columbia Act:

- (m) to enter into any agreements or covenants on behalf of the University; and
- (n) to do and perform all other matters and things which may be necessary for the well-ordering and advancement of the University.

Section 2(14)(o) of the University of Toronto Act, 1971, as revised in 1978, reads:

- (o) do all such acts and things as are necessary or expedient for the conduct of its affairs and the affairs of the University and University College.

46 Mr. Justice Dohm, at p. 572 D.L.R., p. 505 W.W.R., refers to the argument that it would be unlawful for the board of governors of Simon Fraser University to delegate any of its statutory powers. He refers to the two most pertinent sections on the unilateral powers of the board: s. 46(d) (which corresponds to s. 32(a) of the Ontario 1947 Act) and to s. 52 (which is identical to our s. 40

in the 1947 Act) giving the board the power to settle the powers and duties of convocation, the faculties and its servants. He then refers to the British Columbia Labour Relations Act and s. 46(m) and (n) of the British Columbia Universities Act which I have previously quoted and concludes at p. 573 D.L.R., p. 506 W.W.R.:

It is clear, however, from s. 46 (m) and (n) that the university board has the power to enter into any agreements.

(3) In *Re Faculty Ass'n of University of St. Thomas and St. Thomas' University*, supra, the New Brunswick Court of Appeal also discussed the 1963 Alberta decision and distinguished it by saying that before the maxim "generalia specialibus non derogant" applies there must be some repugnancy between the provisions of the special Act and the general Act: see p. 183, fourth paragraph.

47 At p. 182 of the same report, the Court of Appeal deals with the argument of the conflict of duties of the university and its obligations under the Industrial Relations Act. At pp. 183-4 it states:

In my opinion the powers conferred on the university by s. 1(d) do not differ in nature from the inherent power of any natural person or group of persons without legal disability to employ others to perform specified duties at compensation fixed by the employer. ... In my view the powers conferred on the university are to be exercised in accordance with the general law applicable to other employers such as laws respecting hours of work, minimum wages, unemployment insurance and industrial relations.

I do not think that the Act of Incorporation either expressly or impliedly confers a power on the university which is incompatible with the coexistence of a collective agreement or with the collective bargaining process.

Conclusion

48 The general powers vested in the governing council under the 1947 Act and the University of Toronto Amendment Act, 1978, as summarized in the five and one-half opening lines of s. 2(14), are made paramount by the words: "without limiting the generality of " such powers. Clause (o) of s. 2(14) simply reiterates that the governing council has power to do all such acts as are necessary or expedient for the conduct of its affairs. That surely gives it power to sign a contract with the plaintiff association in the terms contained in app. F of the stated case.

49 The circumstance, that the general powers and duties are followed by specific directions in certain cases of delegation to the president or committees, in no way derogates from the generality of the governing council's powers and discretion to select a method of fixing the salaries for its employees. To conclude otherwise, would render meaningless the words "without limiting the generality of the foregoing".

50 Therefore, I find that the defendant Governing Council of the University of Toronto has the power to enter into and implement the amendments to art. 6 dated December 15, 1981, set out at app. F of the stated case.

Judgment accordingly.

July 22, 2009

SCHEDULE 1

**TERMS OF REFERENCE OF THE UNIVERSITY OF TORONTO
PENSION COMMITTEE (The “Committee”)**

1. **Pension Committee as Administrator** – The Administrator of the Pension Plan for purposes of the *Pension Benefits Act*, and all other applicable law shall be the Pension Committee constituted under the provisions of the Plan and in accordance with these terms of reference. It shall have all powers and duties that are specified in this document and any other incidental powers and duties necessary to carry out its duties as Administrator of the Plan.
2. **Composition of the Committee** – The Committee shall be composed of the following:
 - (a) 3 members of the University of Toronto Faculty Association to be selected by the Association, one of whom shall be a retired member;
 - (b) 1 appointee selected by the United Steel Workers of America;
 - (c) 1 appointee selected collectively by any other unions or Associations representing employees under the Pension Plan.

Collectively these will be known as the “Employee Representatives”.

3. The Governing Council shall further appoint 5 additional members of the Committee in its discretion to be known as the “Employer Representatives”
4. The Governing Council shall further appoint a neutral Chair of the Committee, whose appointment must be ratified by a two-thirds majority of the combined Employee Representatives and Employer Representatives. Such neutral Chair shall not be a person employed by the University or a pension plan member, shall not serve in any capacity on any Board of the University or any related corporation or on the Governing Council but must be independent of the University.
5. All decisions of the Committee shall be by a majority vote, other than the selection of the neutral Chair. All members shall serve for a 3 year term and may be reappointed if nominated by the party which initially nominated them. Any party nominating a member of the Committee may replace such member at any time on 30 days notice, or in the event of the death or disability of such member. Members of the Committee shall not be paid, other than the neutral Chair whose remuneration shall be determined by the remainder of the Committee.
6. The Committee shall meet at least on a quarterly basis. In addition, the Committee shall hold an annual meeting reserved exclusively for purposes of reviewing investments and meeting with investment managers and advisors.

7. Minutes of the Pension Committee shall be made available to the University and to representatives of all participating unions and employee associations in the pension plan.

POWERS AND DUTIES OF THE PENSION COMMITTEE

1. The Committee shall be responsible for setting all applicable policy for the investment and administration of the pension plan and the management of the pension fund;
2. The Committee shall set the statement of investment policies and procedures;
3. The Committee shall hire an executive director and all delegates and agents of the plan as required from time to time in the appointment or mandate of such firms or individuals.
4. The Committee shall select the Fund Custodian and the Corporate Trustee and shall approve selection of all investment managers recommended by its investment advisor;
5. For the period of the first two years after its inception the Committee shall utilize the services of UTAM as an investment advisor and, where applicable, investment manager. The Committee shall enter into an appropriate agreement with UTAM on behalf of the plan. At all material times that UTAM is investing money of the pension fund or advising on such investments, there shall be at least two members of the Committee appointed as directors of UTAM, one of whom shall be an Employee Representative and one of whom shall be an Employer Representative.
6. The Committee may enter into a cost sharing agreement with the Governing Council in respect of shared costs and, in its discretion, employ University staff as agents;
7. The Committee shall select the plan actuary. The Committee shall establish a funding policy for the plan based on the advice of the plan actuary and participate in the selection of all actuarial assumptions. Such actuarial assumptions and funding policy may be subject to review by the Governing Council and is subject to arbitration as set out below in the event of a dispute;
8. The Committee shall interpret the plan document;
9. The Committee shall select the plan auditor and approve the audited financial statements of the fund. The Committee may have legal counsel;
10. The Committee shall be responsible for all regulatory compliance matters and for communications with members and any other affected third party stakeholders;
11. The Committee shall enter into contracts, may settle any disputes about the pension plan and shall maintain all books of account and records of the pension fund;
12. The Committee may make amendments to the pension plan text to the extent it is necessary to comply with applicable law and shall deal with all regulatory compliance matters with applicable regulators and the Canada Revenue Agency;
13. The Committee shall undertake all acts to protect the pension fund as it deems necessary.

14. The Committee may hire agents, lease premises, direct agents or establish corporations or other entities for the purposes of holding investments.
15. The Committee shall have the duty to ensure that the pension fund is administered properly under the provisions of all applicable legislation;
16. The Committee shall have the duty of communicating all applicable aspects of the pension plan to the members and reporting to the Governing Council and all collective bargaining agents on an annual basis;
17. The Committee shall establish appropriate policies for its operations, including, without limitation, policies respecting conflicts of interest, Committee expenses, monitoring and review of agents and governance matters. The Committee may also establish sub-committees of the Committee as it may require from time to time;
18. The Committee shall ensure that Committee members receive training and education in matters pertaining to the administration and investment of pension plans which shall be funded from the assets of the pension plan. The Committee may also conduct internal educational seminars using such advisors and instructors as it deems appropriate

INDEMNITY OF THE COMMITTEE

The Committee shall be indemnified by the University and out of any pension fund assets for any of its actions taken in good faith. It may further purchase errors and omissions insurance from the pension plan assets. UTFA shall not be liable for any loss or liability incurred in connection with the administration of the Pension Plan or Fund.

EXPENSES AND BUDGET OF THE COMMITTEE

The Committee shall submit an annual budget to the Governing Council with respect to its costs of operation, including costs of the office of the Executive Director of the Pension Plan and such budget shall be approved by the Governing Council, which approval may not be unreasonably withheld. In the event of any dispute with respect to such budget, the matter will be resolved by arbitration in accordance with the arbitration provisions of these terms of reference.

ARBITRATION OF DISPUTES

Any dispute with respect to any actuarial assumption, funding decision or budget of the Pension Committee between the Pension Committee and the Governing Council shall be resolved by final and binding arbitration. Such arbitrator shall be Martin Teplitsky, Q.C., or such other person as may be agreed upon between the Governing Council and a majority of the Employee Representatives. Failing agreement the arbitrator shall be determined by the Chief Justice of Ontario.

PENSION BENEFITS ACT

Section 8

Administrator

8. (1) A pension plan is not eligible for registration unless it is administered by an administrator who is,

- (a) the employer or, if there is more than one employer, one or more of the employers;
- (b) a pension committee composed of one or more representatives of,
 - (i) the employer or employers, or any person, other than the employer or employers, required to make contributions under the pension plan, and
 - (ii) members of the pension plan;
- (c) a pension committee composed of representatives of members of the pension plan;
- (d) the insurance company that provides the pension benefits under the pension plan, if all the pension benefits under the pension plan are guaranteed by the insurance company;
- (e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or a trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants;
- (f) a corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of the pension plan;
- (g) a person appointed as administrator by the Superintendent under section 71; or
- (h) such other person or entity as may be prescribed. R.S.O. 1990, c. P.8, s. 8 (1); 1999, c. 15, s. 1; 2005, c. 31, Sched. 18, s. 2.

Additional members

(2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan. R.S.O. 1990, c. P.8, s. 8 (2).

Affiliate

(3) For the purpose of clause (1) (b), "employer" includes "affiliate" as defined in the *Business Corporations Act*, if the employer is a body corporate. R.S.O. 1990, c. P.8, s. 8 (3).

tion (1) is subject to the right to a hearing under section 89.

Effect of refusal or revocation

(3) A refusal of registration of a pension plan or a revocation of registration of a pension plan operates to terminate the pension plan as of the date specified by the Superintendent.

Idem

(4) A refusal of registration of an amendment to a pension plan or the revocation of an amendment to a pension plan operates to terminate the amendment as of the date specified by the Superintendent.

Wind up

(5) Where registration of a pension plan is refused or revoked, the administrator shall wind up the pension plan in accordance with this Act and the regulations. R.S.O. 1990, c. P.8, s. 18.

Duty of administrator

19. (1) The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with this Act and the regulations.

Application of subs. (1)

(2) Subsection (1) applies whether or not the pension plan is amended to comply with this Act and the regulations.

Idem

(3) The administrator of a pension plan shall ensure that the pension plan and the pension fund are administered in accordance with,

- (a) the filed documents in respect of which the Superintendent has issued an acknowledgment of application for registration or a certificate of registration, whichever is issued later; and
- (b) the filed documents in respect of an application for registration of an amendment to the pension plan, if the application complies with this Act and the regulations and the amendment is not void under this Act.

Application of subs. (3)

(4) Subsection (3) does not apply to enable the administrator to administer the pension plan contrary to this Act and the regulations.

Idem, amendment

(5) The administrator of a pension plan may administer or permit administration of the pension plan and the pension fund in accordance with an amendment pending registration or refusal of registration of the amendment. R.S.O. 1990, c. P.8, s. 19.

Administrator's annual information return

20. (1) The administrator of a pension plan shall file

graphe (1) est assujettie au droit d'être entendu prévu par l'article 89.

Effet du refus ou de la révocation

(3) Le refus d'enregistrement d'un régime de retraite ou la révocation de l'enregistrement d'un régime de retraite a pour effet de mettre fin au régime de retraite à compter de la date précisée par le surintendant.

Idem

(4) Le refus d'enregistrement d'une modification apportée à un régime de retraite ou la révocation d'une modification apportée à un régime de retraite a pour effet de mettre fin à la modification à compter de la date précisée par le surintendant.

Liquidation

(5) Si l'enregistrement d'un régime de retraite est refusé ou révoqué, l'administrateur liquide le régime de retraite conformément à la présente loi et aux règlements. L.R.O. 1990, chap. P.8, art. 18.

Obligation de l'administrateur

19. (1) L'administrateur d'un régime de retraite veille à ce que le régime de retraite et la caisse de retraite soient administrés conformément à la présente loi et aux règlements.

Champ d'application du par. (1)

(2) Le paragraphe (1) s'applique, que le régime de retraite ait été modifié ou non pour assurer sa conformité avec la présente loi et les règlements.

Idem

(3) L'administrateur d'un régime de retraite veille à ce que le régime de retraite et la caisse de retraite soient administrés conformément aux documents suivants :

- a) les documents déposés à l'égard desquels le surintendant a délivré un accusé de réception de la demande d'enregistrement ou un certificat d'enregistrement, selon celui des deux qui est délivré en dernier;
- b) les documents déposés à l'égard d'une demande d'enregistrement d'une modification du régime de retraite, si la demande est conforme à la présente loi et aux règlements et que la modification n'est pas nulle en vertu de la présente loi.

Champ d'application du par. (3)

(4) Le paragraphe (3) n'a pas pour effet de permettre à l'administrateur d'administrer le régime de retraite à l'encontre de la présente loi et des règlements.

Idem, modification

(5) L'administrateur d'un régime de retraite peut administrer le régime de retraite et la caisse de retraite, ou en permettre l'administration, conformément à une modification en attendant l'enregistrement ou le refus d'enregistrement de la modification. L.R.O. 1990, chap. P.8, art. 19.

Déclaration annuelle de l'administrateur

20. (1) L'administrateur d'un régime de retraite dé-

each year an annual information return in respect of the pension plan in the form approved by the Superintendent and shall pay the filing fee established by the Minister. 1997, c. 28, s. 195.

Additional reports

(2) The administrator of a pension plan shall file additional reports at the times and containing the information prescribed by the regulations. R.S.O. 1990, c. P.8, s. 20 (2).

Reciprocal transfer agreement

21. An administrator of a pension plan shall file a certified copy of a reciprocal transfer agreement entered into in respect of the pension plan. R.S.O. 1990, c. P.8, s. 21.

Care, diligence and skill

22. (1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.

Special knowledge and skill

(2) The administrator of a pension plan shall use in the administration of the pension plan and in the administration and investment of the pension fund all relevant knowledge and skill that the administrator possesses or, by reason of the administrator's profession, business or calling, ought to possess.

Member of pension committee, etc.

(3) Subsection (2) applies with necessary modifications to a member of a pension committee or board of trustees that is the administrator of a pension plan and to a member of a board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan.

Conflict of interest

(4) An administrator or, if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administrator of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.

Employment of agent

(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan and in the administration and investment of the pension fund.

Trustee of pension fund

(6) No person other than a prescribed person shall be a trustee of a pension fund.

Responsibility for agent

(7) An administrator of a pension plan who employs an agent shall personally select the agent and be satisfied of the agent's suitability to perform the act for which the

pose chaque année, selon la formule qu'approuve le surintendant, une déclaration annuelle à l'égard du régime de retraite et verse les droits de dépôt fixés par le ministre. 1997, chap. 28, art. 195.

Déclarations additionnelles

(2) L'administrateur d'un régime de retraite dépose des déclarations additionnelles aux moments que prescrivent les règlements et y inclut les renseignements prescrits. L.R.O. 1990, chap. P.8, par. 20 (2).

Accord réciproque de transfert

21. L'administrateur d'un régime de retraite dépose une copie certifiée conforme d'un accord réciproque de transfert conclu à l'égard du régime de retraite. L.R.O. 1990, chap. P.8, art. 21.

Soin, diligence et compétence

22. (1) L'administrateur d'un régime de retraite apporte à l'administration et au placement des fonds de la caisse de retraite le soin, la diligence et la compétence qu'une personne d'une prudence normale exercerait relativement à la gestion des biens d'autrui.

Connaissances et compétences particulières

(2) L'administrateur d'un régime de retraite apporte à l'administration du régime de retraite et à l'administration et au placement des fonds de la caisse de retraite toutes les connaissances et compétences pertinentes que l'administrateur possède ou devrait posséder en raison de sa profession, de ses affaires ou de sa vocation.

Membre d'un comité de retraite

(3) Le paragraphe (2) s'applique avec les adaptations nécessaires à un membre d'un comité de retraite ou d'un conseil de fiduciaires qui est l'administrateur d'un régime de retraite et à un membre d'un conseil, d'une commission ou d'un organisme auquel une loi de la Législature confie l'administration d'un régime de retraite.

Conflit d'intérêts

(4) L'administrateur, ou si l'administrateur est un comité de retraite ou un conseil de fiduciaires, un membre du comité ou du conseil qui est l'administrateur du régime de retraite ne permet pas sciemment que son intérêt entre en conflit avec ses attributions à l'égard du régime de retraite.

Emploi de mandataires

(5) Si cela est raisonnable et prudent dans les circonstances, l'administrateur d'un régime de retraite peut employer un ou plusieurs mandataires pour accomplir les actes nécessaires à l'administration du régime de retraite, et à l'administration et au placement des fonds de la caisse de retraite.

Fiduciaire d'une caisse de retraite

(6) Seule une personne prescrite peut être fiduciaire d'une caisse de retraite.

L'administrateur répond du mandataire

(7) L'administrateur d'un régime de retraite qui emploie un mandataire le choisit personnellement et doit être convaincu de l'aptitude du mandataire à accomplir l'acte