

IN THE MATTER OF AN ARBITRATION
AND IN THE MATTER OF A GRIEVANCE FILED BY
THE BRANDON UNIVERSITY FACULTY ASSOCIATION
DATED NOVEMBER 20, 2008

BETWEEN:

BRANDON UNIVERSITY FACULTY ASSOCIATION

(hereinafter referred to as "BUFA"),

- and -

BRANDON UNIVERSITY

(hereinafter referred to as the "University").

AWARD

ARBITRATOR

A. Blair Graham, Q.C. - Sole Arbitrator

APPEARANCES

Kathy McIlroy - On behalf of BUFA
Rod Roy - On behalf of the University

AWARD

INTRODUCTION

The hearing of this grievance took place on January 8 and 9, February 4, 5 and 12, and April 20, 24 and 27, 2009. On some of those dates, the hearing proceeded in Winnipeg, but for the most part, the hearing proceeded in Brandon. The parties confirmed at the commencement of the hearing that I had been properly appointed as sole arbitrator of the grievance. However, the University raised a series of jurisdictional objections which were argued before me on January 8 and 9, 2009. Notwithstanding the vigour with which it advanced its jurisdictional objections, the University agreed that the hearing could proceed on the merits of the grievance, subject to its jurisdictional objections, and on the basis that its jurisdictional objections would be considered and determined as part of the Award in these proceedings.

The proceedings were challenging in many respects. Difficulties were encountered with respect to the provision of "particulars", and with respect to documentary production. Some arbitral intervention was required, but the parties were generally able to resolve most of those differences between themselves, enabling the hearing to proceed on the merits.

The grievance is governed by the terms of a collective agreement which is in effect for a three year term, which commenced on April 1, 2008 and will end on March 31, 2011 (the Collective Agreement). The Collective Agreement was not finalized and executed until November 10, 2008, following strike action taken by BUFA which commenced on September 29, 2008, and which ended on October 15, 2008.

As the hearing proceeded on the merits of the grievance, a significant issue arose with respect to the admissibility of certain "extrinsic" evidence relating to the negotiations leading up to the conclusion of the Collective Agreement. Those negotiations commenced on or about April 25, 2008, and were effectively concluded in mid-October, 2008.

Interestingly, both parties asserted that the applicable Collective Agreement provisions, when construed in their proper context, are clear and unambiguous. However, the University argued that in view of the competing, contradictory and incompatible positions of the parties, an arbitrator could conclude that the applicable provisions are ambiguous. The University further argued that in view of the possibility that the applicable provisions of the Collective Agreement could be found to be ambiguous, evidence as to certain aspects of the 2008 negotiations should be heard, because such evidence would be of significant assistance in resolving such an ambiguity.

I decided to permit the parties to call evidence as to negotiating history. That evidence was extensive, involving two witnesses on behalf of BUFA and three on behalf of the University. This evidence was heard, (subject to the objection of BUFA), in the form of a "voir dire", in which the witnesses were examined and cross-examined on their evidence relating to the 2008 negotiations, separate and apart from their evidence, if any, on the other issues in the proceedings. I will comment in more detail on the "voir dire" portion of the proceedings in a separate section of this Award. However, I ultimately concluded that the extrinsic evidence relating to the 2008 negotiations should not be admitted or considered, primarily because the relevant articles in the Collective Agreement are not ambiguous.

On October 15, 2007, the Province of Manitoba enacted the *University Pension Plans Exemption Regulation* (Regulation 14/2007) (the Exemption Regulation)

which was a regulation relating to pension plans at Brandon University, the University of Manitoba, and the University of Winnipeg. Among other things, the Exemption Regulation stipulated that an employer who sponsors a "...university pension plan may, by filing a written election with the plan administrator, elect to be exempt from the solvency and transfer deficiency provisions" contained in, or applicable to any such plan.

This grievance relates to an election, made by the University, being the sponsor of the Brandon University Retirement Plan (the Plan), pursuant to the Exemption Regulation. By virtue of making that election, the University opted to be exempt from the solvency deficiency provisions of the Plan and the *Pension Benefits Act C.C.S.M. c.P32* (the Act), and the *Pension Benefits Regulation (188/87R)*.

BUFA asserts that the University has violated various provisions of the Collective Agreement by making the said election, and particularly Articles F.7.2 and F.7.4(a) of Appendix F (Salaries and Benefits), which stipulate that:

- F.7.2 Employee and Employer contributions to the Pension Plan shall be in accordance with the Plan Document.
- F.7.4(a) No changes or amendments shall be made to the Brandon University Pension Plan or the Trust Agreement for that Plan without the prior approval of BUFA.

BUFA says that the University, by making the election, and becoming exempt from the solvency deficiency payments of the Plan, the Act, and the regulations, has failed to make contributions to the Plan in accordance with the Plan document and has brought about a significant change or amendment to the Plan, without the prior approval of BUFA, and has thereby breached the Collective Agreement.

The parties are in agreement that the contributions which the University would have been required to make, but for the exemption, would have been substantial. The University estimated that the payments could have been between \$8 million and \$10 million over a 5 year period. BUFA did not dispute that estimate.

The University disagrees with BUFA's arguments on many and varied grounds, and states that:

- i) It has properly exercised a right specifically conferred upon it by the Province of Manitoba through the Exemption Regulation, and has not breached the Collective Agreement, and has complied with the Plan, the Act, and the applicable regulations;
- ii) Making the election has not resulted and will not result in a change or amendment to the Plan, or the Trust Agreement of the Plan.

THE UNIVERSITY'S JURISDICTIONAL OBJECTIONS

The University raised 6 jurisdictional objections. Those objections were expressed as follows:

- i) It is not within the competence of an arbitrator to determine whether the University has breached any provisions of the Act, or the regulations thereunder;
- ii) The provisions of the Exemption Regulation supersede any contradictory or inconsistent provisions of the Plan or the Collective Agreement;

- iii) The Exemption Regulation provides that failure to make a special payment (a solvency deficiency payment) as a result of an exemption election is deemed not to be a breach of the regulations under the Act, or of any contractual provision of a university plan;
- iv) The grievance is premature;
- v) The true subject matter complained of in the grievance does not arise out of the interpretation, application, administration or violation of the Collective Agreement;
- vi) The Collective Agreement provisions in question, or some of them, are invalid, void, or unenforceable as a result of being contradictory to or inconsistent with the Plan and/or the Trust Agreement for the Plan.

It is apparent from a review of the above-noted objections that there is some duplication and overlap between them.

The grievance dated November 28, 2008 alleged "that initiating an exemption" violated the Collective Agreement and Section 80 of the *Labour Relations Act*, and the Act and the Exemption Regulation (underlining added).

To the extent that the University thought that the grievance primarily involved alleged breaches of the Act and/or the Exemption Regulation, it was understandable that the University raised jurisdictional objections to the grievance. I derive my authority from the Collective Agreement and I do not have the inherent jurisdiction to interpret the provisions of the Act and the Exemption Regulation, nor to determine whether breaches of the Act or Exemption Regulation have occurred.

However, by the time the parties argued the jurisdictional issues in early January, 2009, it had become clear that BUFA's primary argument in support of the grievance was that the University had breached the Collective Agreement. BUFA alleges that by initiating and pursuing the election process under the Exemption Regulation, the University has failed to make contributions to the Pension in accordance with the Plan document and has brought about a change or amendment to the Plan or the Trust Agreement for the Plan, thereby violating Articles F.7.2 and F.7.4(a) of Appendix F to the Collective Agreement.

In view of that refinement of BUFA's position, and the duplication and overlap between some of the University's objections, the University's substantive jurisdictional objections can be reduced from 6 to 3, namely:

- i) Whether the true subject matter complained of in the grievance arises out of the interpretation, application, administration and/or violation of the Collective Agreement?
- ii) Whether the provisions of the Exemption Regulation supersede any contradictory or inconsistent provisions of the Plan or the Collective Agreement?
- iii) Whether the grievance is premature?

It is clear from the submissions of both counsel that in determining this grievance, whether on jurisdictional grounds, or on its merits, I will have to consider some of the provisions of the Plan, the Act, and the Exemption Regulation, as well as provisions in the Collective Agreement. It is not uncommon for an arbitrator, in the course of his or her duties, to consider and periodically apply the provisions of provincial

legislation and regulations which are not directly related to labour relations or employment standards matters.

Recognizing that the source of my authority is the Collective Agreement, and the *Labour Relations Act*, it is necessary for me to decide at the outset whether the true subject matter complained of in the grievance arises from the interpretation, application, administration, or violation of the Collective Agreement, or whether the grievance instead essentially requires me to interpret and apply the Act or the Exemption Regulation, or to determine whether a violation has occurred of the Act or Exemption Regulation.

I am satisfied on the basis of the submissions made by counsel on the jurisdictional issues, and also by the evidence and arguments I heard on the merits of the grievance, that the true subject matter of the grievance arises out of the interpretation, application, administration, or violation of the Collective Agreement. Central to this case is BUFA's argument that the University's election to be exempt from the applicable solvency deficiency requirements has resulted in the University being able to avoid pension payments required by the Plan text, and has brought about a change or amendment to the Plan, without the prior approval of BUFA, thereby breaching of Articles F.7.2 and F.7.4(a) of Appendix F of the Collective Agreement.

The University has many counter-arguments to rebut BUFA's contention. I acknowledge that those counter-arguments require me to consider and interpret the Plan, the Act, and the Exemption Regulation. However, in considering BUFA's basic argument, and the University's numerous counter-arguments, my fundamental task will be to interpret, and apply Articles F.7.2 and F.7.4(a) of Appendix F of the Collective Agreement, and to determine whether a breach of either of those articles has occurred.

Accordingly, I have concluded that the University's objections, which are based on the argument that I lack the jurisdiction to determine whether the University has breached any provision of the Act or the Exemption Regulation, or that the true subject matter of the grievance does not arise out of the interpretation, application, or violation of the Collective Agreement, cannot succeed.

It is also necessary for me to consider the objection that the provisions of the Exemption Regulation supersede any contradictory or inconsistent provisions of the Plan or the Collective Agreement. This objection is closely related to another of the original 6 jurisdictional objections of the University, namely that the Exemption Regulation provides that a failure to make a special payment as a result of an exemption election is deemed not to be a breach of the regulations under the Act, or of any contractual provision of any University pension plan.

In advancing these particular objections, the University relies heavily on a 1993 decision of arbitrator Freedman, as he then was, in grievance proceedings involving the University and BUFA. Those proceedings related to Bill 22, *The Public Sector Reduced Work Week and Compensation Management Act*, and the University's implementation thereof. Pursuant to that legislation, the University decided that all staff at the University would take a certain number of days off as leave without pay. BUFA grieved the University's action, alleging that pursuant to Bill 22, the University was required to negotiate such leaves in good faith "within the context" of Articles 14 and 15 of the collective agreement then in force. Those articles arguably restricted or prevented the University from requiring staff to take days off as leave without pay.

Bill 22 contained sections which stipulated that the Part of the Bill requiring employees to take days, or portions of days off as leave without pay, "prevail(ed) over every other Act, and every regulation, collective agreement,

employment contract or arrangement, arbitral or other award or decision and every obligation, right, claim, agreement, or arrangement of any kind". (underlining added)

The University objected to the arbitrability of the grievance, on the basis that Bill 22 had overridden the provisions of the applicable collective agreement, and specifically Articles 14 and 15, on which BUFA sought to rely. Arbitrator Freedman accepted the University's arguments, and found that Bill 22 expressly overrode the provisions of the collective agreement, and relieved the University of any obligations which it may have had pursuant to Articles 14 and 15 of the collective agreement.

However, there is one clear and fundamentally important distinction between the Exemption Regulation, involved in this case, and Bill 22. As noted, Bill 22 contained an express stipulation that its provisions relating to unpaid leave prevailed over any potentially applicable collective agreement provisions. There is no similar provision in the Exemption Regulation. If the legislature had intended the Exemption Regulation to prevail over the Collective Agreement, it could have said so, but did not. I consider the fact that the Exemption Regulation contains no such provision to be significant in the context of the University's jurisdictional objections. In the absence of such a specific provision, I am unable to conclude that the legislature intended that the Exemption Regulation would supersede any applicable provisions in the Collective Agreement. The University asserts that the Exemption Regulation confers an "unqualified right" on the University to make the election. However, in the absence of an express stipulation in the Exemption Regulation stating that it prevails over any and all applicable Collective Agreement provisions, it is not self-evident that the right of the University is unqualified.

With respect to the related argument, on the part of the University, that the Exemption Regulation provides that the failure to make a special payment as a result of an exemption election is deemed not to be a breach of the regulations under the Act, or

of any contractual provision of the Plan, I cannot accept that as a valid jurisdictional objection for two reasons:

- i) As noted above, the Exemption Regulation does not expressly excuse a breach of the Collective Agreement, and therefore BUFA's central argument relating to a breach of Article F.7.4(a) of Appendix F of the Collective Agreement must still be considered and determined;
- ii) BUFA's argument related to Article F.7.4(a) is not that the Plan has been breached, but that the Plan has been "amended or changed" by virtue of the fact that certain solvency deficiency payments have not been made.

The University raised a separate jurisdictional challenge on the basis that the grievance was premature. The grievance was filed on November 20, 2008, at which time the exemption election had not been made. As of November 20, 2008, the University had merely provided notice of its intention to make the exemption election. Furthermore, as of November 20, 2008, no solvency deficiency payments were due, and the University had not missed any such payments. The University therefore argued that as of November 20, 2008, no breach of any of its obligations had occurred, and that in the absence of any such breach, no grievable matter had arisen.

The University also emphasized that an arbitrator does not have equitable jurisdiction. According to the University, this means that an arbitrator cannot hear a grievance on purely practical or expedient grounds (i.e. on the basis that the dispute will likely arise in the future in any event), or because it may be just or appropriate to do so (i.e. to have the matter determined before a significant payment has been missed). The

University says that an alleged breach of a collective agreement must have occurred before an arbitrator is able to assume jurisdiction.

The Collective Agreement contains a fairly standard definition of the word "grievance", in Article 6.1. The definition is:

A grievance is any dispute or complaint concerning the meaning, the application, or the alleged violation of one or more articles of this Collective Agreement.

It is true that as of November 20, 2008, the University had simply provided notice of its intention to make an exemption election. The written document by which it did so was dated November, 2008 and was addressed to "members of the Brandon University Retirement Plan and Bargaining Agents" and consisted of 4½ pages organized into several sections, one of which was entitled "The Employer's intention and rationale". The letter was signed by Scott Lamont, in his capacity as Vice-President Administration and Finance of the University. Nowhere in that document was there mention of a requirement to obtain BUFA's approval prior to making the exemption election, nor was there any indication of an intention on the part of the University to obtain BUFA's approval prior to making the exemption election.

By that time, the Exemption Regulation had been in force for over a year. The University had therefore had ample time to consider its rights and obligations under the Exemption Regulation.

A reasonable interpretation of the University's position as outlined in the letter dated November, 2008 was that it believed that it did not require BUFA's approval prior to making the exemption election.

BUFA's position was otherwise, namely that the University, in making an exemption election, and thereby relieving itself of an obligation to make solvency deficiency payments, was effecting a change or amendment to the Plan, which required the prior approval of BUFA pursuant to Article F.7.4(a) of Appendix F of the Collective Agreement.

Therefore, by November 20, 2008, the parties' differing positions were manifest. There was a dispute between the University and BUFA concerning the meaning, application or alleged violation of Article F.7.4(a) of Appendix F of the Collective Agreement.

In those circumstances, the filing of the grievance was not premature. There was a dispute between the parties relating to Article F.7.4(a) of Appendix F of the Collective Agreement, over which an arbitrator could assume jurisdiction.

Another jurisdictional objection (one of the original six) advanced by the University was that the applicable collective agreement provisions are invalid, void, or unenforceable as a result of being contradictory to or inconsistent with the Plan or Trust Agreement. Mr. Roy, on behalf of the University, did not place much emphasis or reliance on this particular objection in either his oral or his written submissions. In her comments, Ms McIlroy, on behalf of BUFA, argued that the provisions of the Collective Agreement do not contradict the Plan or Trust Agreement, and that the Collective Agreement and the Plan are consistent and that they operate together.

The University's argument on this point is simply not strong enough or specific enough to oust arbitral jurisdiction and to prevent BUFA's grievance from being determined on its merits. The argument is better considered in the context of all of the evidence and as part of the overall determination of the grievance.

In the result, I have decided that I am unable to accept any of the University's jurisdictional arguments; the University's jurisdictional objections are therefore denied.

THE EVIDENCE

Apart from the evidence relating to the 2008 collective bargaining negotiations, the evidence in these proceedings consisted of an 11 page "Agreed Statement of Facts" (attached hereto as Appendix A), a book of 8 Agreed Documents filed by consent, 11 additional documents filed by one or other of the parties as the hearing progressed, and the testimony of five witnesses.

Three witnesses were called by BUFA. They were:

- i) Bruce Forrest (Forrest) - the President of BUFA;
- ii) Dennis Oleson (Oleson) - the Vice-President and Grievance Officer of BUFA;
- iii) Gregory Gillis (Gillis) - an actuary with Lawton Partners, engaged by BUFA to provide a report and opinion with respect to certain issues arising in these proceedings in respect of the Plan.

Two witnesses were called by the University. They were:

- i) Scott Lamont (Lamont) - the Vice-President, Administration and Finance of the University;

- ii) Tim McGorman (McGorman) - an Actuary with AON Consulting engaged by the University to provide a report and an opinion with respect to certain issues arising in these proceedings in respect of the Plan.

The evidence will be summarized below. The following summary is intended to outline background facts which are sufficient to provide a factual context for the analysis which follows. The summary will not include the extrinsic evidence relating to the 2008 collective bargaining negotiations, which will be dealt with in a following subsection of this Award.

1. The "Agreed Statement of Facts" is a useful but relatively lengthy document. It is attached hereto and marked as "Appendix A", and therefore will not be reproduced in the body of this Award *in extenso*. Among other things, it sets forth relevant provisions of the Collective Agreement, the Plan, the Act, the Pension Benefits Regulation, and the Exemption Regulation. As noted in the "Agreed Statement of Facts", the Plan is a "defined benefit pension plan", which, under the Act, means "a pension plan under which the pension to which a member is entitled upon retirement in accordance with the pension plan, is prescribed by the terms of the pension plan on the basis of a period of service under the pension plan, or income earned while a member of the pension plan, or during a prescribed period of membership in the pension plan on the basis of both such a period of service and such income earned". A defined benefit plan is in contrast to a "defined contribution pension plan". In a defined benefit plan, the benefit (not the contribution) is defined, whereas in a defined contribution plan, the contribution (not the benefit) is defined.

2. The University is the “sponsor” of the Plan. As Ari Kaplan notes in his text, *Pension Law*, the term “plan sponsor” is not defined in pension legislation in Canada. However, the term “plan sponsor” is widely used to denote the one or more entities that establish a pension plan and to whom is reserved the ultimate power to amend or terminate the plan. In general, pension plans may be sponsored by one or more entities, such as an employer, an employer’s association, a union, a government, or any combination thereof. However, the sole sponsor of the Plan (i.e. the Brandon University Retirement Plan) is the University.

3. The Plan is the only pension plan at the University. It has approximately 700 active and retired members, between 200 and 230 of whom are BUFA members. The remainder of the members of the Plan are either members of the Manitoba Government Employees Union (MGEU), the International Union of Operating Engineers (IUOE), or individuals who are not, and may never have been members of any of the unions at the University.

4. The terms and conditions of the Plan are set forth in a 33 page document sometimes referred to as the Plan text. The Plan is governed under a Trust Agreement between the University and the Pension Trustees of the Plan. There are ten Pension Trustees of the Plan. The ten Trustees consist of:
 - a) two individuals of the University’s choice appointed by the University;

 - b) two individuals nominated by and from BUFA;

- c) two individuals nominated by and from MGEU;
 - d) one individual nominated by and from a particular unit of the IUOE, Local 827 at the University;
 - e) one individual nominated by and from another unit of the IUOE, Local 827 at the University;
 - f) one individual nominated by and from the members of the Plan not belonging to any of the associations or unions at the University; and
 - g) one individual nominated by and from those members of the Plan who are retired and receiving a pension from the Plan.
5. Generally speaking, pension plans are valued periodically on two different bases, a "going concern valuation" and a "solvency valuation". The "going concern valuation" assumes that the plan will remain a going concern and determines whether the plan will have sufficient assets to meet present and future benefit entitlements to members as they become due. A deficiency in this regard is known as an "unfunded liability".
6. The "solvency valuation" is based on the hypothetical assumption that the plan is terminated and that all liabilities become due immediately. If, based on this hypothetical assumption, current assets are insufficient to meet such liabilities then the plan has a "solvency deficiency" which, ordinarily, must be funded by "special payments" over a five year amortization period.

7. In September, 2007, the Government of Manitoba advised the University of its intention to provide the University (and the universities of Winnipeg and Manitoba), with a mechanism in the form of a regulation under the Act, by which the University could elect to be exempt from the solvency deficiency provisions of the Pension Benefits Regulation.

8. On October 6, 2007, Forrest, in his capacity as President of BUFA, wrote to the Deputy Minister of Labour and Immigration of Manitoba. Among other things, Forrest asked questions and raised concerns on behalf of BUFA about the proposed regulation. The Deputy Minister responded to Forrest by letter dated October 12, 2007 providing general information with respect to the proposed regulation. The letter from the Deputy Minister contained the following two paragraphs:

Legislation sets out minimum requirements. Pension plan stakeholders - employers, bargaining agents, members, former members and other persons entitled to benefits under the plan - are able to address, whether under a collective agreement, through collective bargaining or otherwise, issues of concern.

Further, the *Pension Benefits Act* and regulations set out minimum funding requirements. Despite the regulation the employer is not prevented from making a special payment or additional special payment that the employer is not otherwise required to make. Please note, in the event of plan termination and wind-up, under the regulation the employer would be required to fully fund any solvency deficiency over a period of no greater than five years.

The Deputy Minister also referred Forrest to Debbie Lyons (Lyons), the Superintendent of Pensions, if he had further questions.

9. The Exemption Regulation was enacted effective October 15, 2007.

10. Forrest contacted Lyons by e-mail dated October 19, 2007, asking several questions and expressing serious concern "with the manner in which the pension issue has been dealt with", and requesting a copy of the proposed regulation.

11. By a memorandum dated October 30, 2007, Forrest, having reviewed the Exemption Regulation, contacted Lamont, in his capacity as Vice-President Administration and Finance of the University, and referred Lamont to Article F.7.4(a) of the Collective Agreement. In the memorandum, Forrest stated:

Although an election under the Regulation might not contravene the Pension Benefits Act, it would amount to a very significant change to the Plan and would contravene the provisions of the Collective Agreement. BUFA is of the view that any changes to the collective agreement must occur through collective bargaining, not unilaterally by election of the University. If the University purports to make the election, BUFA will take all steps to protect the interests of its members.

12. Lamont communicated with Forrest by an e-mail, indicating he had been "following your questions about the solvency payments election" and the responses Forrest had received. Lamont's e-mail was dated October 29th. That date may be incorrect because his e-mail appears, at least in some respects, to be responding to Forrest's memo dated October 30th. Lamont's e-mail, among other things, stated:

... I certainly agree we need to talk about it. However, to this point, I do not have enough information to know whether the Province intends to provide special powers to the employer only or whether the expectation is that the normal processes

by which the plan is amended is expected to be followed. Frankly, the latter was my expectation and that would provide a natural role for BUFA in the process.

Lamont also suggested deferring further discussion until the next meeting of the Pension Trustees at which time he hoped the Plan's actuary would be able to answer some of the questions which had been raised.

13. By letter dated November 1, 2007, Lyon responded to Forrest's communication of October 19th. In her letter, she stated:

The Exemption Regulation provides that upon meeting certain conditions, the University may elect a permanent exemption from the solvency funding requirements under the Pension Benefits Regulations in respect of the Retirement Plan. The University would no longer be obligated to make special payments in respect of a solvency deficiency arising under the Retirement Plan, except in the event of the termination and wind-up of the Plan when the University would be required to fund any solvency deficiency over a period no greater than five years.

An exemption is neither automatic nor mandatory. Once made however, the election is non-revocable and the exemption is permanent. The University would have to approach government for a change to the Exemption Regulation should it wish to revoke the election.

You advise that the Association's collective agreement with the University contains provisions relating to changes to the Retirement Plan or amendments to the plan text. It should be noted that pension legislation sets out minimum requirements.

Therefore, employers, bargaining agents, members and other persons entitled to benefits are able to address issues of concern, whether under a collective agreement, through collective bargaining or otherwise.

You have asked what the implications are for the Retirement Plan should its solvency ratio fall below 0.9. Section 5 of the Exemption Regulation provides that should a plan have a solvency ratio of less than 0.9, it could not be amended if the amendment would result in an increase in the cost of benefits under the plan. However, subject to the funding requirements under the *Income Tax Act*, the University would not be prevented from making additional payments that are not otherwise required to be made as provincial pension legislation sets minimum requirements.

14. On November 22, 2007, the Board of Trustees of the Plan met. Forrest chaired the meeting. The minutes of the meeting under the heading "New Business" contain the following entry:

5.0 New Business

5.1 University Pension Plan Exemption Regulation 141/2007

...

Bruce Forrest raised the following concerns:

- It is felt that it introduces risk to the plan
- This new regulation would change the set of rules for contributions that are currently in place.
- If the change to the plan were to happen, it would not be beneficial to the members of the plan. Any delay or avoidance of scheduled payments hurt the plan.
- If payments are not made as now scheduled, it will impinge upon future surpluses when interest rates rise again. This will negatively affect the ability to introduce plan improvements.

Mr. Poapst* indicated that it does not introduce immediate risk but it will reduce future surplus that may arise. The risk that the government is concerned with is the plan wind-up. This new legislation has a provision for plan wind-up in that the University is responsible for any deficiency.

The hook is that if the solvency position is worse than 9 then you cannot make improvements to the plan.

Because of the result from our last valuation (December 2006), BU does not need to worry about this right now. Bruce Forrest, wearing his BUFA hat, expressed that if the BU administration decided to move forward with the exemption, BUFA would fight it to the best of its abilities.

BUFA believes that such an election would definitely not be in the best interest of the members of the Plan.

*Mr. Poapst was the actuary for the Plan.

15. During the 2008 negotiations, which ultimately produced the current Collective Agreement between the parties, (and involved strike action by BUFA between September 29 and October 15, 2008), BUFA was successful in negotiating two improvements to the Plan. This resulted in the inclusion of two provisions in Article F.7.4 of Appendix F of the Collective Agreement, which had not been in Appendix F to the previous collective agreement. Specifically, subparagraphs (c) and (d) were included in Article F.7.4. Subparagraph (c) changed the form of pension for BUFA members retiring after the date of signing the Collective Agreement to the form of pension known as the "Mandatory Survivor Pension", and commonly referred to as "joint and 2/3 survivor" for members with an eligible spouse at retirement. The costs associated with that change were funded by the University through an increase in the University's contribution levels under the Plan. Subparagraph (d) stipulated a maximum pension amount per year of service, for all years of service, for BUFA members retiring on or after April 1, 2009. The costs

associated with that change were also funded by the University through an increase in the University's contribution levels under the Plan.

16. The above-noted amendments to the Collective Agreement triggered a valuation of the Plan. This was of concern to the parties, particularly to BUFA, because Section 5 of the Exemption Regulation, states in part:

Plan Amendments

5 If an election under section 12 has been made in respect of a university plan, the plan cannot be amended if the amendment

(a) would result in an increase in the cost of benefits under the plan; and

(b) would have the effect of reducing the plan's solvency ratio to a number that is less than 0.9.

17. On October 23, 2008 (prior to the solvency election being taken by the University), Forrest sent an e-mail to Smith with respect to the improvements to the Plan which reflected BUFA's concerns relating to Section 5 of the Exemption Regulation. Forrest's e-mail, which proposed certain conditions which BUFA wanted the University to accept, stated in part:

...1) that the Employer agrees that it will not elect to be exempt from its solvency and deficiency transfer obligations, pursuant to the University Pension Plans Exemption Regulations at least until such time as the improvements are accepted by the Pension Commission and ...

18. The University did not accept the conditions imposed by BUFA relating to not electing to be exempt from its solvency deficiency obligations until the

negotiated Plan improvements had been accepted by the Pension Commission. The University proceeded to submit the information relating to the negotiated Plan improvements to the Pension Commission/Superintendent, and to make its decisions relating to its possible exemption under the Exemption Regulation as it saw fit, and according to the time table which it thought best advisable. However, in the result, the required materials relating to the negotiated Plan improvements were filed with the Pension Commission/Superintendent on or about December 12, 2008, more than a month prior to the University submitting its exemption election material to the Pension Commission/Superintendent.

19. By the time the hearings in these proceedings were underway, the parties had received a preliminary estimate from the Plan's actuary that the Plan's solvency ratio was 0.92 as at the material date for the negotiated Plan improvements. That date was prior to the severe downturns in the financial markets in the fall of 2008, and before those downturns had had their full impact on the Plan's investment portfolio. If the estimate of the Plan's solvency ratio of 0.92 as at the material date for the Plan improvements proves to be correct, as expected, the Plan improvements will be acceptable, notwithstanding the University's election, and the provision of Section 5 of the Exemption Regulation.

20. Following the 2008 negotiations for a new collective agreement, which took place between April 25, 2008 and October 15, 2008, and the strike action taken by BUFA between September 29, 2008 and October 15, 2008, and the conclusion of the new Collective Agreement (ultimately executed on November 10, 2008), the University issued a Notice of Intention to Exercise Exemption Election on November 19, 2008 to the

“Members of the Brandon University Retirement Plan and Bargaining Agents”, and to the Pension Trustees. The notice was issued pursuant to the Exemption Regulation. Under the heading “The Employer’s intention and rationale”, the University stated:

Brandon University plans to make the election for exemption under the Regulation for two primary reasons.

- The election will not jeopardize the health of the Plan or the benefits to which Plan members are entitled.
- The potential effect on the operating budget of the University could be dire if large solvency deficiency payments are required and the relief available in the Regulation is not utilized.

21. On November 25, 2008, the Pension Trustees under the signature of Dr. Todd Fugleberg, the Chair of the Board of the Pension Trustees, gave notice to all members of the Plan of the University’s intention to elect to be exempt from special payments in respect of solvency deficiencies under the Act. Dr. Fugleberg was one of the individuals nominated by and from BUFA to sit on the Board of Pension Trustees of the Plan. The first paragraph of the notice of November 25, 2008 stated:

The University has advised the Pension Trustees of their intent to elect to be exempt from special payments in respect of solvency deficiencies under the Pension Benefits Act. The Pension Trustees are required to provide this notice to members with respect to this election. ...

22. On or about January 8, 2009, the Board of Governors of the University made a formal decision to make the exemption election. As directed by the University, the Plan Administrator, i.e. the Pension Trustees, filed the documentation and information necessary to make the election with the Superintendent of Pensions on January 19, 2009.

23. In addition to the facts set forth in the "Agreed Statement of Facts", and the chronology of events outlined above, the following additional facts elicited from various witnesses may be relevant to the determination of the issues in this case:
- i) The Pension Trustees of the Plan have the right to recommend amendments to the Plan, but do not have the power to actually make or implement such amendments. The power to make amendments to the Plan is exclusively reserved to the Board of Governors of the University. Similarly, decisions as to what "improvements" to the Plan, if any, will be made in the future, will be made by the Board of Governors of the University.
 - ii) There are several factors which influence whether or not a surplus or surpluses will ever develop or accumulate in the Plan. The most important of those factors are interest rates, the performance of the investments of the Plan, and Plan "experience" (including such things as rate of retirements and the mortality of members). The existence of a surplus within the Plan from time to time does not necessarily result in improvements to the Plan being made. There were periods in the past decade in which the Plan was in a surplus position, but no improvements to the Plan were made during those periods.
 - iii) The decision to make the election to be exempt from the solvency deficiency provisions in the Pension Benefits Regulation was entirely optional on the part of the University. The Exemption Regulation did not compel the University to make the election.

- iv) The fact that the University has made the election does not alter or detract from the University's obligation to make regular contributions to the Plan, nor to meet any "going concern" deficiencies, if any, which may arise in the future.
- v) No change in the Plan text was required in order for the University to make the election to be exempt from the solvency deficiency provisions in the Pension Benefits Regulation.
- vi) Notwithstanding the University's election, if the Plan terminates in the future, the Exemption Regulation requires the University to fund any solvency deficiency which may exist at that time.
- vii) The University's election will have no effect on benefits (present or future) payable under the Plan, except potentially in the event that the University ceases to operate and there are not sufficient assets to fund the benefits.
- viii) Prior to the enactment of the Exemption Regulation, there was no regulatory restrictions on amendments to the Plan based on the Plan's solvency ratio.

The expert evidence

Both parties called actuaries as experts to provide opinion evidence in support of their respective positions. Both actuaries submitted written reports which outlined their conclusions and provided the basis for their conclusions. Those reports were ultimately marked as exhibits in the proceedings.

Mr. Gillis' report, submitted in support of BUFA's case, was dated February 6, 2009. Relevant portions of his report are set forth below.

The Actuarial Valuation

DB plans are required by law to prepare periodic actuarial valuations, which essentially are audits of the plan's activities and an assessment of the progress of plan funding. An actuarial valuation compares the plan assets at the valuation date to the assets the actuary determines the plan ideally should have at that date (called the actuarial liability) to systematically finance the benefits accruing under the plan. If the assets exceed the actuarial liability, the plan is said to have a surplus. If they are less, the plan is said to have an unfunded actuarial liability or a deficit. Deficits typically must be financed by the employer through special funding payments. There are rules regarding the period over which a deficit can be financed, which are discussed later in this report.

When preparing an actuarial valuation, an actuary makes a number of assumptions regarding the rates of return on plan assets, future salary increases, and the incidence of retirement, death and termination at each future age for each member. Although he or she can have some latitude in the choice of assumptions in conducting certain types of valuations (discussed in the "Different Types of Actuarial Valuations" section below), the actuary is bound by professional standards to use reasonable assumptions in the conduct of the valuation.

A surplus or deficit will result from actual plan experience being different than assumed over a given period of time. For example, investment income at a rate higher than assumed may lead to a surplus. Members living longer than assumed may lead to a deficit. I have often noted that the true cost of a defined benefit plan may only be known after the last beneficiary is dead; the periodic actuarial valuations serve to smooth the funding of the cost as best as possible. ...

The Solvency Ratio and its Impact on a Plan

When a Solvency Valuation is performed, the actuary will calculate what is referred to as a "solvency ratio", which is the ratio of the solvency liabilities (plan windup assumptions) to the market-related value of the assets on the valuation date.

...

Ramification of the Different Types of Valuations

If an enterprise is expected to continue in operation forever, a Going Concern Actuarial Valuation should produce funding amounts that are fair and reasonable for the purpose of systematically accumulating assets to meet future obligations. If future experience is expected to change from that assumed, the actuary will alter his or her assumptions when a new valuation is performed. ...

Solvency Valuations are designed to add a layer of protection to the employees, specifically to minimize the consequences to the members should the plan terminate when the employer is insolvent (and thus might be unable to meet the funding requirements to provide full benefits to each member).

In the event of a Solvency Deficiency when a valuation is performed, there are normally a number of consequences:

1. The Solvency Deficiency must be funded over a period of 5 years rather than 15 years for a Going Concern deficit.
2. The plan may be restricted from paying out the entire benefit to a terminating or retiring employee until the Solvency Deficiency is eliminated.
3. The plan may require annual valuations (vs. triennial) until the Solvency Deficiency is reduced to a prescribed level. ...

Is the Solvency Valuation Necessary in All Situations?

The solvency valuation is designed to provide additional protection to employees by reducing the impact of the

employer not being able to finance a deficit upon plan termination. When the Province initiated solvency funding requirements, the rules applied to all provincially regulated plans (except the Teachers' plan and the Provincial Civil Service plan - both of which were not subject to employer funding requirements until pensions were in payment.)

In my opinion, there are circumstances where the solvency requirements are not necessary. The solvency requirements exist to protect employees from the risk of employer insolvency and plan termination. If there is certainty that *some* entity would be there to fund a solvency shortfall should the plan be discontinued, then the solvency rules could be considered redundant in that situation. Examples might include plans sponsored by municipalities, school boards, airports, and universities like Brandon University. Our universities are significantly funded by the Province, and I believe that in the unlikely event that Brandon University ceased to operate, the Province of Manitoba would ensure that all members receive their pension benefits. ...

Other Ramifications of Electing a Solvency Exemption ...

A notable point is that once an election has been made, the plan will forever be restricted from improving the benefits through amendment when the result of the improvement is a solvency ratio of less than 0.9. This may have the effect of preventing or delaying a future negotiated improvement if the improvement puts the solvency ratio below 0.9 and the University cannot or will not at that time add sufficient special funding to bring the ratio above that level.

Gillis' testimony was consistent with the contents of his report. Near the end of his direct examination, he was asked whether the University's election will have any affect on the Plan. He replied that by making the election, the University will not be required to make certain contributions that it would otherwise have been required to make, and that pension plans which are "more funded", are more likely to accumulate surpluses which could be used to fund improvements, or provide for contribution holidays, than pension plans which are funded to a lesser extent. He also noted that by

not making the additional solvency deficiency contributions, which the University would have been required to make, but for the election, the Plan has changed, in the sense that it is different than it was before the election was made.

Near the end of his direct examination, Gillis was also asked: If BUFA wanted to negotiate a change in the contribution cap, would the Exemption Regulation have any impact on BUFA being able to do so? Mr. Gillis replied that the Exemption Regulation could have an impact. He explained that if the solvency ratio is below 0.9 and the University was not prepared to put extra money into the Plan, BUFA would not be able to achieve its objective of changing the contribution cap. Gillis also testified that prior to the enactment of the Exemption Regulation, no such restriction would have applied.

In cross-examination, Gillis agreed that in practical terms, if the solvency ratio of the Plan was less than 0.9, it would be highly unlikely that the University would consider making improvements, even if the Exemption Regulation had not been passed, and the University had not taken the solvency exemption thereunder. Gillis also acknowledged that:

- i) There were certain types of future improvements which could be made to the Plan without having any adverse impact on the solvency ratio;
- ii) Notwithstanding the Exemption Regulation and any election made thereunder, it would be possible for the University and BUFA to negotiate improvements that would otherwise have an adverse effect on the solvency ratio, but which nonetheless could be implemented, provided the University agreed to make a special contribution of sufficient size to the Plan.

McGorman provided two reports, which were submitted as part of the University's case. The first was dated January 27, 2009, and the second, which responded to Gillis' report, was dated February 10, 2009.

McGorman's report of January 27, 2009 was organized so as to provide opinions with respect to three items in respect of the Plan. The items, and portions of McGorman's opinions with respect to each item are set forth below.

Item #1: BUFA contends that Brandon University cannot elect the right to be exempt from the solvency and transfer deficiency special payment obligations under the Regulations without BUFA's approval.

... The making of such an election and the completion of the necessary tasks to effect the election does not require either a change or amendment to either the Brandon University Pension Plan or the Trust Agreement for that Plan. It is an election made external to those documents.

Item #2: I have been asked to confirm whether this election would have any impact on benefits under the plan.

An election by Brandon University to be exempt from the solvency and transfer deficiency provisions of the Regulations will not have any impact on benefits under the plan. There will be no change to any member's benefit under the plan as a result of the election.

Item #3: BUFA's argument is that by not making solvency and transfer deficiency payments the possibility of a surplus developing in the future is reduced and future surplus might have been used for future benefit

improvements. What loss, if any, would be suffered by BUFA or its members even if this argument is correct?

The election by Brandon University does not reduce any benefits under the plan and does not result in any loss to any plan member.

The possibility of the plan developing a surplus is impacted by a number of important factors. The future investment returns on plan assets, the level of future interest rates and the actuarial assumptions used to determine the plan liabilities will impact on whether a surplus arises at any future point in time. It is impossible to say whether or when a surplus might occur or what the magnitude of any such surplus might be, if anything, should it arise.

Finally, if a surplus should arise under the pension plan there is no requirement under the terms of the pension plan that would compel Brandon University to improve benefits under the plan with the surplus proceeds.

In McGorman's report dated February 10, 2009, he responded specifically to various statements made by Gillis in his report. Relevant portions of McGorman's report dated February 10, 2009 are reproduced below.

On the bottom of page 5 and top of page 6 of the Report, Mr. Gillis states that "...the plan will forever be restricted from improving the benefits through amendment when the result of the improvement is a solvency ratio of less than 0.9. This may have the effect of preventing or delaying a future negotiated improvement if the improvement puts the solvency ratio below 0.9 and the University cannot or will not at that time add sufficient special funding to bring the ratio above that level".

...This implies that plan amendments that are prospective in nature and do not impact accrued benefits or the solvency

ratio are permissible. In addition, the University has the option to contribute additional funds to bring the ratio above 0.9. Finally, the solvency ratio is very volatile and is dependent on factors such as government of Canada bond rates, annuity purchase rates in the marketplace, investment returns on plan assets, the date the calculation is being performed and any changes to the calculation methodology for solvency liabilities which are based on recommendations from the Canadian Institute of Actuaries and adopted by the Province of Manitoba.

Thus, the solvency test does not by itself preclude or prevent the University from agreeing to negotiated improvements. In addition, given the speculative and volatile nature of the determination of the solvency ratio it cannot be inferred that the 0.9 solvency ratio will ever impact negotiations.

On page 5 of the Report Mr. Gillis states that one potential consequence of solvency funding is an improved financial position, leading to a higher *likelihood* of future benefit improvements as plans in a surplus position are *generally more likely* to grant improvements than plans in deficit positions.

... As previously addressed in my original submission, the possibility of the plan developing a surplus is impacted by a number of important factors. The future investment returns on plan assets, the level of future interest rates, plan experience (including member transfer elections) and the actuarial assumptions used to determine the plan liabilities are just some of the factors that will impact on whether a surplus arises at any future point in time. It is impossible to say whether or when a surplus might occur or what the magnitude of any such surplus might be, if anything, should it arise.

Finally, if a surplus should arise under the pension plan there is no requirement under the terms of the pension plan that would compel Brandon University to improve benefits under the plan with the surplus proceeds.

Therefore, in light of the above and in light of the speculative nature and various future contingencies associated with such

matters, it is impossible to say whether solvency funding payments (solvency deficiency and transfer deficiency payments) would or would not result in an increased likelihood of future plan improvements. Furthermore, no value could be placed on, and no identifiable loss would be suffered as a result of, any such alleged loss of future benefit improvements in any event.

In McGorman's cross-examination, he replied as follows to various questions put to him by counsel for BUFA:

- i) Question: Once the election (under the Exemption Regulation) has been taken and the solvency ratio is below 0.9, the restriction on being able to make improvements is there, and that will impact on collective bargaining?

Answer: Correct.

- ii) Question: To negotiate an improvement in the salary cap would cost money?

Answer: That would increase the liabilities of the pension plan.

Question: Assuming the solvency ratio was below 0.9 and the University wasn't putting in more money, the parties would be prevented from implementing any improvements in the salary cap?

Answer: Yes.

- iii) Question: Once the election has been taken, any amendment affecting past benefits which would bring the solvency ratio below 0.9 could not be done without additional contributions being made?

Answer: Correct.

Question: But the University having made the election would not be likely to make additional payments?

Answer: I cannot assume that. The consequence of making the election is to relieve them of that obligation, but whether they would never do so in the future is beyond my ability to say.

- iv) Question: There was no 0.9 solvency ratio requirement before the taking of the election?

Answer: Correct.

Question: Therefore, as a result of taking the election, there is a restriction that wasn't there before, namely the 0.9?

Answer: In a manner of speaking, yes, but the election doesn't change benefits in any way.

- v) Question: In your experience, isn't it much more common for plans which are in surplus to make amendments for improvements?

Answer: Perhaps as a general statement that is true, but each case is different. Some employers take contribution holidays when

they have a surplus, or go into less riskier investments. Right now I am working with a plan in a deficit position who is trying to implement improvements.

Extrinsic evidence relating to the 2008 collective bargaining negotiations

The evidence relating to the 2008 collective bargaining negotiations, which was heard (subject to the objection of BUFA) in the form of a voir dire, consisted of 31 exhibits and the testimony of five witnesses.

Two witnesses were called by BUFA on the voir dire. They were:

- i) Forrest;
- ii) Joseph Dolecki (Dolecki) - a member of BUFA. Formerly, Dolecki had been a Vice-President and Grievance Officer, and a President of BUFA. In 2008, he was the Chair of BUFA's negotiating committee and BUFA's Head Negotiator.

Three witnesses were called by the University on the voir dire. They were:

- i) Scott Grills (Grills) - Vice-President Academic Research of the University;
- ii) Lamont;
- iii) Barb Smith - the Director of Human Resources of the University.

Although the evidence on the voir dire was extensive, it primarily dealt with two issues:

- i) The basis upon which BUFA put forward its proposals during the 2008 negotiations.

Specifically, BUFA presented its negotiating proposals, including its proposals relating to Appendix F, accompanied by an express written declaration (commonly referred to by the parties as "the disclaimer"), which stated:

The proposals contained herein are without prejudice. The Union reserves the right to amend, delete or add any proposals.

By making the proposals contained herein, the Union shall not be construed as having made any acknowledgment whatsoever as to the meaning of the current language contained in any of the clauses of the collective agreement. As such, the proposals contained herein shall not be used for the purposes of interpreting the current language of any clauses in the collective agreement. Further, the Union reserves the right to maintain whatever position it sees fit in the future regarding the interpretation of a particular clause, irrespective of these bargaining proposals.

The above-noted disclaimer was included on the front page of BUFA's extensive written proposals, which were presented at the first negotiating meeting between BUFA and University representatives, on April 25, 2008.

The University did not specifically respond to, or comment upon BUFA's disclaimer during the April 25, 2008 meeting, nor in several subsequent negotiating meetings between the parties. However, when the University representatives presented a written response to the BUFA proposals on June 4, 2008, their response was preceded by the following paragraph:

Irrespective of the disclaimer presented by the Union on the first page of the negotiation proposals presented April 25, 2008, the Employer retains all rights and privileges available in law with regard to any proposals.

- ii) The proposals which were put forward by BUFA relating to Article F.7.4 and to the Exemption Regulation.

The first such proposal was included in the set of BUFA proposals presented on the first day of bargaining, April 25, 2008. It suggested an addition of subparagraph (e) to Article F.7.4 of Appendix F to the Collective Agreement. The suggested addition was:

(e) The University agrees that it shall not elect, as per s.3 of the *University Pension Plans Exemption Regulation*, to be exempt from the requirement to make special payments in the event of a solvency deficiency in the Plan.

That proposal was rejected by the University in writing on June 12, 2008 without much, if any comment or discussion. However, the proposal remained on the bargaining table until September, 2008.

On September 22, 2008, BUFA put forward an alternate proposal. It suggested that the parties proceed by way of a Memorandum of Understanding regarding the "exemption" issue, which would state:

Re: University Pension Plans Exemption Regulations

The University agrees that it will not elect to be exempt from its solvency and deficiency transfer obligations, pursuant to the *University Pension Plans Exemption Regulation*.

That proposal was also rejected by the University.

On October 15, 2008, on the last day of negotiations which resulted in the Collective Agreement being finalized, (subject to ratification), and the strike being brought to an end, BUFA presented a further proposal relating to an addition to Article F.7.4. The suggested wording of the addition was:

The University agrees that it will not elect to be exempt from its solvency and deficiency transfer obligations, pursuant to the *University Pension Plans Exemption Regulation*, without the prior written approval of BUFA.

That proposal was not pursued by BUFA and was withdrawn on the day it was presented, namely October 15, 2008.

The University places significant emphasis on both of those aspects of the evidence relating to the 2008 negotiations.

The University argues that BUFA was on notice in June of 2008, that its declaration that by making certain proposals, it was not making any acknowledgments

with respect to the meaning of the language in the previous collective agreement, had not been accepted by the University. According to the University, from that day forward, BUFA was aware, or ought to have been aware, that its proposals in the 2008 negotiations could potentially be used for the purposes of interpreting the meaning of various clauses, particularly any clauses which appeared in both the previous collective agreement, and the current Collective Agreement.

Article F.7.4(a) of the Collective Agreement had been in the previous collective agreement; the language of the article was identical in both collective agreements.

Accordingly, the University maintains that BUFA knew from June, 2008 onwards that it was at risk of having its proposals in the 2008 negotiations relating to Article F.7.4(a) and relating to the Exemption Regulation, used to construe the meaning of Article F.7.4(a) in the current Collective Agreement.

BUFA persisted in putting forward alternate proposals relating to Article F.7.4(a) and the Exemption Regulation after June, 2008, and the University insists that BUFA must accept any adverse consequences of doing so.

Furthermore, the University argues that BUFA continued to put forward proposals relating to Article F.7.4(a) and to the Exemption Regulation for a very important reason. According to the University, BUFA wanted a provision in the Collective Agreement expressly preventing the University from making an exemption election, or at least from making such an election without BUFA's prior approval. According to the University's argument, BUFA knew that the wording of Article F.7.4(a) in the previous collective agreement did not accomplish that purpose. Therefore, BUFA sought to add a subparagraph (e) as noted above to Article F.7.4. When its efforts to do so were unsuccessful, it then proposed a Memorandum of Understanding pursuant to

which the University was asked to agree not to elect to be exempt from its solvency deficiency obligations.

The University insists that BUFA would not have bargained so persistently with respect to those provisions had it believed that Article F.7.4(a) already provided it with sufficient protection against the University making an exemption election pursuant to the Exemption Regulation.

There are factual disagreements between the parties with respect to what occurred during the 2008 negotiations.

BUFA's witnesses testified that they did not specifically turn their minds to the implications of the University's disavowal of the disclaimer which accompanied the April 25, 2008 proposals. BUFA did not obtain legal advice with respect to the University's position and continued to believe their proposals were being presented on a "without prejudice" basis.

BUFA also asserted that the proposals relating to Article F.7.4 and the Exemption Regulation were expressly presented as items of "clarification". According to BUFA, the proposals were put forward in the context of the recently enacted Exemption Regulation, to make clear and explicit what the parties had already agreed to more generally, by virtue of Article F.7.4(a). Forrest and Dolecki, the Union witnesses on the voir dire, both testified that when Dolecki presented the Union's proposals on April 25, 2008, he specifically stated that the proposal with respect to Article F.7.4 was intended merely to "clarify the existing language", or words to that effect. Dolecki testified that he made that statement on one or more occasions during the negotiations. He also testified that he stated that the proposals relating to Article F.7.4 and the Exemption Regulation were being introduced for "clarity", in order to avoid spending large amounts of money on lawyers debating the meaning of Article F.7.4(a).

Those factual assertions by BUFA were strenuously disputed by the University.

However, within the broad context of the evidence relating to the 2008 negotiations, the factual disputes between the parties as to what was said during those negotiations, are less important in determining whether such evidence ought to be admitted and considered, than certain legal principles relating to the admissibility of such extrinsic evidence.

The legal principles which apply most directly to determine the admissibility of the 2008 negotiating evidence are:

- i) The existence of an ambiguity - the provisions of the Collective Agreement must be ambiguous before extrinsic evidence will be admissible as an aid to their interpretation. The ambiguity may be patent (i.e. unclear on its face) or latent (i.e. certain facts relating to its negotiation or its application in a particular set of circumstances reveal a lack of clarity). In the context of this case, in order for the 2008 negotiating evidence to be admitted, Article F.7.2 or Article F.7.4(a) of the Collective Agreement must be found to be ambiguous. The articles are clear on their face, so there is no patent ambiguity. Therefore, the 2008 negotiating evidence will only be admissible if it is determined that either Article F.7.2 or Article F.7.4(a) are latently ambiguous, i.e. if there is a lack of clarity as to the manner in which the articles will apply in the context of the Exemption Regulation, and the University's election to be exempt from the applicable solvency deficiency payment requirements.

- ii) The probative value of the evidence - In view of the labour relations harm which may result from extensive reliance on negotiating history (most notably a potential chill on the presentation and discussion of proposals in collective bargaining negotiations), arbitrators have concluded that evidence of negotiating history will only be admitted if it is of significant probative value. Extrinsic evidence will be of significant probative value if it is clear and unequivocal, and if it demonstrates that a true "meeting of the minds" has been achieved with respect to the meaning and application of a particular provision within a collective agreement.

I agree with the University that the disclaimer which BUFA presented as part of its negotiating proposals, did not provide BUFA with an absolute protection against having the proposals which it made in the 2008 collective bargaining negotiations, used for the purpose of interpreting the current language of various articles in the current Collective Agreement. The BUFA disclaimer was specifically rejected by the University in writing on June 4, 2008 in unequivocal terms. I recognize that BUFA may not have understood the implications of the University's rejection, but nothing prevented BUFA from seeking legal advice on that point had it wished to do so.

However, I do not think a great deal turns on the rejection of the disclaimer because the applicable legal principles relating to the admissibility of extrinsic evidence, as noted above, have the effect of limiting the circumstances in which the negotiating positions of the parties will be admitted and considered in any event.

I have decided that the extrinsic evidence relating to the 2008 collective bargaining negotiations ought not to be admitted or considered in these proceedings, notwithstanding the University's clear rejection of BUFA's declaration/disclaimer.

The primary basis for my decision is that I have concluded that the applicable provisions of the Collective Agreement, namely Article F.7.2 and F.7.4(a) of Appendix F are not ambiguous. As arbitrator Hamilton correctly noted in *New Flyer Industries v. National Automobile Aerospace Transportation and General Workers of Canada (CAW Canada)* [2004] M.G.A.D. No. 5, "It is well accepted that arguability as to different constructions does not create an ambiguity in and of itself thereby allowing the introduction of extrinsic evidence".

Although both parties presented cogent and compelling submissions in support of their respective interpretations of Articles F.7.2 and F.7.4(a), and although their respective interpretations are strikingly different and incompatible, that does not mean that the articles are ambiguous. In my opinion, both articles are capable of being interpreted according to the plain and ordinary meaning of their words, utilizing commonly used rules of construction and interpretation, without the necessity of resorting to extrinsic evidence. My interpretation of those articles is set forth in detail in the "Analysis" portion of this Award.

In reaching the conclusion that Articles F.7.2 and F.7.4(a) are not ambiguous, I specifically considered whether either Article may be latently ambiguous in the specific context of the University's election under the Exemption Regulation. Although the task of interpreting the articles in the context of the exemption election is complex, requiring a consideration not only of Articles F.7.2 and F.7.4(a) of the Collective Agreement, but also the applicable provisions of the Plan, the Pension Benefits Regulation, and the Exemption Regulation, that complexity arises not from any ambiguity in Articles F.7.2 and F.7.4(a), but from the inter-relationship between the various provisions in the Collective Agreement, the Plan, and the regulations.

In the absence of an ambiguity, whether patent or latent, in Articles F.7.2 and F.7.4(a), it is neither appropriate nor necessary for me to consider the extrinsic evidence relating to the 2008 collective bargaining negotiations.

However, in view of the importance which the University attached to their arguments relating to the 2008 negotiating history, I will also comment briefly on the probative value of that extrinsic evidence.

The University stressed that BUFA clearly did not believe Article F.7.4(a) gave it an effective veto over any amendments or changes to the Plan or Trust Agreement, in the context of an election under the Exemption Regulation, or it would not have put forward the various proposals it did, during the 2008 negotiations seeking to explicitly restrict the University's ability to make such an election.

Mr. Roy, on behalf of the University, was very forceful in advancing that argument, and his submissions were ably presented. However, I am mindful of the cautionary observations of many arbitrators who have urged restraint in admitting evidence of negotiating history. Ms McIlroy, on behalf of BUFA, referred me to several authorities in which arbitrators have chosen not to admit or place reliance on negotiating history. The remarks of arbitrator McPhillips in *White Spot Limited and C.A.I.M.A.W. Food and Service Workers, Local 112* (1991) 21 L.A.C. (4th) 421, are particularly apt in the circumstances of this case. Arbitrator McPhillips stated:

There could be serious consequences to the sanctity of the written collective agreement in using extrinsic evidence of this nature to establish rights independent of what the agreement states. For example, if one party thought they were able to do something under a certain clause but wished to make it express, they might nevertheless put clear language to that effect on the bargaining table. If it is later withdrawn, this would not automatically mean they had ceded the right which they

felt they had all along. The reliance on this type of evidence is particularly fraught with danger in cases like this where there is no evidence of any discussions around the proposal and subsequent withdrawals.

In this case, notwithstanding Mr. Roy's emphasis on the fact that two or three different proposals were put forward during the negotiations by BUFA relating to the potential exemption, there was in fact very little discussion relating to the specific proposals. The parties' energies were devoted to resolving other issues in the negotiations. Ms McIlroy's cross-examination of Smith on the voir dire was very effective in establishing that notwithstanding the significant number of negotiating sessions which occurred, there was very little discussion during those sessions about Article F.7.4(a), or about the potential solvency exemption election.

Given the minimal discussion which occurred during the negotiations, I am extremely reluctant to conclude that the evidence of negotiating history is clear and unequivocal, and that a true meeting of the minds was achieved in relation to the meaning of Article F.7.4(a) in the context of the solvency exemption election. I accept the legitimacy of Mr. Roy's argument that a reasonable interpretation of BUFA's behaviour during the negotiations is that it doubted that Article F.7.4(a) would be effective in preventing the University from making a solvency exemption election under the Exemption Regulation. However, a plausible contrary view is that BUFA felt Article F.7.4(a) would be effective in preventing the election, but nonetheless wanted to have more specific and explicit language included in the Collective Agreement in order to remove any doubt, and in order to avoid the risk and expense of an arbitration over that issue.

Accordingly, I am doubtful that the probative value of the evidence as to negotiating history is sufficiently high so as to justify its admission and consideration in these proceedings. Therefore, for all of the foregoing reasons, I have declined to

consider the extrinsic evidence relating to the 2008 collective bargaining negotiations when interpreting and construing Articles F.7.2 and F.7.4(a) of Appendix F to the Collective Agreement.

Similarly, I do not think that BUFA's e-mail of October 23, 2008 (Forrest to Smith) is determinative of the interpretive issues in this case.

The University argues that the e-mail, (which sought the University's agreement not to elect to be exempt from the solvency deficiency transfer obligations, until such time as the 2008 pension improvements had been accepted by the Pension Commission), is evidence that BUFA knew that Article F.7.4(a) did not prevent the University from exercising such an election.

Although that is a reasonable argument, BUFA's explanation of the e-mail is also reasonable. BUFA asserted that it was seeking to delay the University's taking of the exemption election, pending the Pension Commission's approval of the 2008 pension improvements, but was nonetheless planning to challenge the University's ability to take the election later, through arbitration proceedings, once the 2008 pension improvements had been secured.

Therefore, I have not considered the e-mail of October 23, 2008 from Forrest to Smith when interpreting and construing the meaning of Articles F.7.2 and F.7.4(a).

ANALYSIS

BUFA's arguments in support of its grievance are simple and straightforward, but they are nonetheless compelling.

Firstly, BUFA says that by making an exemption election, the University has failed or will fail to make certain contributions required by the Plan, thereby breaching Article F.7.2 of Appendix F to the Collective Agreement, which requires that the University's contributions "shall be in accordance with the Plan Document".

Secondly, BUFA says that by making an exemption election, and failing to make certain contributions required by the Plan, the University has effected a change or amendment to the Plan or the Trust Agreement for the Plan, without the prior approval of BUFA, thereby breaching Article F.7.4(a) of Appendix F to the Collective Agreement.

Article F.7.2 of Appendix F of the Collective Agreement

The Plan outlines the University's contribution obligations in Article 4. The University's contributions are in two categories, "Regular Contributions", which are not in issue in this case, and "Additional Contributions", as described in Article 4.2 of the Plan. Article 4.2 of the Plan states:

4.2 Additional Contributions

In the event that an actuarial valuation of the Plan determines that the Plan has an Unfunded Liability or a Solvency Deficiency as defined under, and using the methods specified in, the Pension Benefits Act, and the contributions specified in Paragraph 4.1 are insufficient to satisfy the funding requirements of such Act, the University shall make additional contributions to satisfy those requirements over a 15 year period in the case of an Unfunded Liability or a 5 year period in the case of a Solvency Deficiency.

Article 4.2 refers to both an Unfunded Liability and a Solvency Deficiency. However, this case deals only with the risk of a Solvency Deficiency.

The Collective Agreement contains no reference whatsoever to a Solvency Deficiency or to solvency deficiency payments. The Plan document refers to additional contributions being required in the case of a solvency deficiency, but the Plan document does not specify the manner in which such additional contributions are to be determined or calculated. In order to ascertain the manner in which the additional contributions are to be determined in the case of a solvency deficiency, it is necessary to refer to the provisions of the Act. Section 26(1) of the Act in turn refers to the test for solvency prescribed by the regulations, which effectively means the Pension Benefits Regulation.

Section 2.2 of the Pension Benefits Regulation provides:

Plan must have funding provisions

2.2 Every plan submitted for registration must include provisions respecting

- (a) the funding of the plan; and
- (b) in the case of a plan that has a defined benefit provision, the obligation of the employer to contribute to the plan in respect of normal actuarial cost and any unfunded liability, solvency deficiency or experience deficiency, as that term is defined in subsection 4(22).

Section 4(3) of the Pension Benefits Regulation states:

Funding of plans

4(3) The employer shall pay into the plan, on at least a quarterly basis, ...

- (c) where the plan has a solvency deficiency, equal payments that are sufficient to amortize the deficiency over a term not exceeding 5