

IN THE MATTER OF: An arbitration of grievances regarding Guidelines for Assignment of Teaching in the Faculties of Education, Architecture and Arts.

BETWEEN:

THE UNIVERSITY OF MANITOBA,

Employer,

-and-

THE UNIVERSITY OF MANITOBA FACULTY ASSOCIATION,

Union.

AWARD

Appearances

Adrian Frost and Miranda Grayson, legal counsel for the Employer.
Garth Smorang, Q.C. and Jason Gisser, legal counsel for the Association.

Hearing dates:

March 1, 2 & 3, 2021 by video conference.

Arbitrator:

Arne Peltz, C. Arb.

Date of issuance:

June 24, 2021

Introduction

1. Three grievances were filed by the University of Manitoba Faculty Association (“UMFA”) alleging that Guidelines for Assignment of Teaching Duties in the faculties of Education, Architecture and Arts violate the collective agreement. The Education grievance was filed on July 19, 2018. The Architecture grievance was filed on June 18, 2018. Pursuant to the 2017-2021 collective agreement, both grievances were referred to me as sole arbitrator on March 18, 2019. The Arts grievance was filed on January 31, 2020, and by agreement of the parties, it was referred to me for hearing with the other two grievances.
2. The duties assigned to a faculty member include a combination of (a) teaching, (b) research, scholarly work and other creative activities, and (c) service. Article 19.A.2.4 provides that “assignment of these duties may vary from individual to individual and from faculty/school to faculty/school as determined by the dean/director in consultation with the faculty member.” Thus, there is broad decanal discretion to assign academic work, subject to other provisions of the collective agreement. Under Article 19.A.1.1.1, teaching duties are assigned following consultation and discussion with the faculty member. In practice, assignment is often handled by the department head, director or coordinator.
3. Each faculty is required to adopt Guidelines for Assignment of Teaching Duties as prescribed by Article 19.A.1.3 (“the Guidelines”). The process is collegial and culminates in a secret ballot vote by Association members in the particular faculty.
4. Under Article 19.A.1.3.5, the Guidelines shall take into consideration the full range of members’ academic work, and specifically the priorities of the faculty’s program; activities required for tenure and promotion; the full range

of demands associated with teaching; supervisory work that is part of teaching; practice of professional skills; research and scholarly work; assigned service; and assigned work performed for other faculties and departments.

5. A central issue in the present case was the setting of teaching workload. The three grievances allege *inter alia* a failure to comply with Article 19.A.1.3.6, which states as follows:

Guidelines of a faculty/school/college shall include a standard teaching workload range, and address the circumstances when the teaching load of a Member shall differ. ...

6. Article 19.A.1.2.1 provides that in assigning teaching duties, the dean/director “shall comply with the Guidelines”. In addition, “Teaching duties shall be assigned reasonably and fairly using a transparent method, equitably among members of a unit ...”. In the Association’s view, the dean’s obligation to comply with the Guidelines qualifies the general discretion granted by Article A.2.4, which existed before the introduction of Guidelines in 2016. In this respect, Article 19.A.1.2.1 is not subordinate to Article A.2.4. For its part, the University had a different approach to these provisions. It read the two clauses as interrelated aspects of the dean’s authority.
7. While there was no dispute about the standard teaching load identified in the Guidelines for Education, Architecture and Arts, the Association said that the University failed to ensure compliance with the proviso in Article 19.A.1.3.6, namely, to address the circumstances when the teaching load of a member shall differ. Too much latitude was given, allowing deans to increase or decrease a faculty member’s teaching load using subjective discretion, according to the Association. In response, the University maintained that the Guidelines as adopted by all three faculties were in conformity with the collective agreement.

Decanal discretion is a central feature in assigning work but always subject to consultation and fairness.

8. Both parties submitted that the collective agreement provisions in issue are clear and unambiguous. The Association also said that bargaining history from the 2016 negotiations may be considered as an aid to interpretation. In that round, the discretion of deans to assign teaching workload was a major issue because the University was under threat of budget cutbacks. The Association feared that teaching load would be increased to maintain programs in the face of reduced financial resources. There was extensive discussion of new contract language including introduction of the Guidelines.
9. UMFA argued that the bargaining evidence strongly supported its interpretation, especially regarding the language in Article A.1.3.6 requiring that Guidelines “address the circumstances when the teaching load of a member shall differ.” After three weeks of strike action, the University gave up the dean’s unilateral right to determine teaching load. Now the University is trying to claw back decanal authority by means of escape clauses in the Guidelines, said UMFA.
10. In response, the University said that bargaining history is only admissible if there is an ambiguity. If received, the evidence should be accorded little or no weight. The predominant reference point is the wording of the agreement. The parties negotiated detailed new provisions for determining teaching load and UMFA made several gains, including collective agreement provisions regarding the Guideline process. However, the dean’s discretion may still be exercised, consistently with the terms of the Guidelines. Nothing in the bargaining history indicates otherwise. The University insisted that the impugned Guideline provisions address the circumstances when a teaching load may differ, as determined by the dean in consultation with the member.

11. Documentary and oral evidence of the 2016 negotiations was heard without objection.
12. The parties filed an agreed book of documents. Professor Mark Hudson (“Hudson”) testified for the Association. He was UMFA President during the 2016 collective bargaining round and strike. Dean Jeffery Taylor (“Taylor”) testified for the University. He has served as Dean of Arts since 2011.

Provisions of the collective agreement

13. The 2016 bargaining round resulted in the following provisions with respect to assignment of teaching duties (with some updates in the 2017-2021 agreement):

19.A.1 Assignment of Teaching Duties

19.A.1.1 Authority to Assign Teaching Duties

19.A.1.1.1 Duties shall be assigned by the dean/director following consultation and discussion with the Member. ...

19.A.1.2 Fairness of Assignment of Teaching Duties

19.A.1.2.1 In assigning teaching duties pursuant to s. 19.A.2.4, the dean/director shall comply with the Guidelines for the faculty/school/college and the limitations on assignment of teaching duties as set out in this Article. Teaching duties shall be assigned reasonably and fairly using a transparent method, equitably among Members of a unit, taking into consideration:

- (i) the full range of academic responsibilities of individual Members, including teaching, research, scholarly work and creative activity, and service;
- (ii) available human resources;
- (iii) the rank and type of appointment (term, contingent, probationary, continuing, tenured, or reduced/half-time) of individual Members; and

(iv) relevant faculty/school/college procedures and guidelines for awarding of tenure, continuing appointments and promotion.

19.A.1.3 **Guidelines for Assignment of Teaching Duties**

19.A.1.3.1 Promptly following November 22, 2016, the dean/director of each faculty/school, and in the case of the Faculty of Health Sciences, the dean of each respective college, shall:

(i) seek the advice of the Members of his/her faculty/school/college meeting in committee for the purpose of establishing of a set of teaching guidelines (the “Guidelines”). This meeting shall include (solely for the purposes of seeking advice) individuals who would be Members but for the provisions of Article 30, providing they hold a primary appointment in the faculty/school/college.

(ii) following receipt of the advice, the dean/director will prepare Guidelines, in consultation with either the Members, or a sub-committee of Members, the majority of whom shall be elected by Members meeting in committee.

(iii) undertake any other consultations they deem advisable in order to better inform the preparation of the Guidelines.

(iv) consider all the input received in preparing the final Guidelines, and prepare a report regarding what he/she decided to include or not include in the final Guidelines. The dean/director’s report will be made available to all Members.

(v) submit the Guidelines to a secret ballot vote of the Members meeting in committee. Only Members shall vote. The results of the vote shall be made known in writing to the Members.

19.A.1.3.2 If a faculty/school/college does not approve the Guidelines by majority vote on its first attempt, the dean/director of the faculty/school/college shall continue working with the Members meeting in committee on the establishment of the Guidelines in accordance with s. 19.A.1.3.1.

19.A.1.3.3 On any subsequent vote to attempt to establish the Guidelines in accordance with s. 19.A.1.3.1, the Guidelines will be established if they are approved by one-third of the Members meeting in committee.

19.A.1.3.4 Until new Guidelines are approved, deans/directors shall continue to follow existing guidelines or past practice where there are no guidelines.

19.A.1.3.5 Guidelines shall take into consideration the full range of academic work of Members, and:

(a) The priorities and integrity of the academic programs of the faculty/school/college;

(b) The range of activities required for the granting of tenure, continuing appointments and promotion;

(c) The full range of demands associated with teaching, including the factors in s. 19.A.2.4.1 and s. 20.A.1.2.2, nature of the course, course level, course enrolment, class size, course preparation, prescribed methods of instruction and evaluation. Faculties/schools/colleges may consider activities such as academic coaching, counseling, and mentoring; consultation with students; curriculum and course development; supervision of teaching assistants and graders/markers; and, where part of a Member's assigned duties, tutorials, and laboratory or clinical demonstration or supervision;

(d) Supervisory work that is part of graduate and undergraduate teaching;

(e) Practice of professional skills;

(f) Research, scholarly work, and creative activities in accordance with s. 19.A.2.4.2 and s. 20.A.1.2.1;

(g) Assigned service, in accordance with s. 19.A.2.4.3 and s. 20.A.1.2.3; and

(h) Assigned work performed for other departments, faculties, schools, colleges, or programs.

19.A.1.3.6 Guidelines of a faculty/school/college shall include a standard teaching workload range, and address the circumstances when the teaching load of a Member shall differ. The Guidelines shall also provide guidance on when a course is cancelled.

19.A.1.3.7 The Guidelines shall be reviewed at least every five (5) years, or no more than once per year upon request of the dean/director or a two-thirds

majority of the Members of the faculty/school/college meeting in committee. Reviews of the Guidelines shall follow the same process as set out in s. 19.A.1.3.1 – s. 19.A.1.3.3.

19.A.1.4 **Limitations on Assignment of Teaching Duties**

19.A.1.4.1 The assignment of teaching shall take into consideration the priorities and integrity of academic programs, teaching space, and the individual preferences of Members.

19.A.1.4.2 All banked teaching credits held by Members as of April 1, 2016 and all teaching credits which come into effect prior to the Guidelines being established by the applicable faculty/school/college shall remain in full force and effect and shall be honoured by the faculty/school/college. Banked teaching credits will not be paid out upon the Member's retirement or departure from the University. Members shall make reasonable efforts to use their banked credits.

19.A.1.4.3 The Guidelines of each faculty/school/college shall contain a provision governing the granting and use of the banked teaching credits earned after the Guideline comes into force and effect.

19.A.1.4.4 The teaching credit/reduction arrangement in place at the time the Member accepts their administrative or service assignment shall apply to the Member for the duration of their assignment. Where the Guidelines established pursuant to this Article revise the teaching credits or reductions, the revisions shall apply to assignments accepted or renewed after the applicable Guidelines come into force and effect.

14. The following provisions regarding faculty duties existed in the collective agreement before the 2016 bargaining round. The typical split for faculty has been 40% teaching, 40% research and 20% service. For instructors, the typical split is 80% teaching and 20% service. Assignment of duties was determined by the Dean in consultation with the faculty member. There was no explicit limit on teaching load increases.

19.A.2 **Faculty Rights, Duties and Responsibilities**

...

19.A.2.3 The duties assigned to a faculty member shall include an appropriate combination of:

19.A.2.3.1 undergraduate and/or graduate teaching;

19.A.2.3.2 research, scholarly work and other creative activities;

19.A.2.3.3 service.

19.A.2.4 The assignment of these duties may vary from individual to individual and from faculty/school to faculty/school as determined by the dean/director in consultation with the faculty member. In carrying out these duties, faculty members shall comply with the University of Manitoba Policy on the Responsibilities of Academic Staff with Regard to Students as of the effective date of this Agreement. In particular, these duties carry with them specific rights and responsibilities as follows:

19.A.2.4.1 **Teaching**

19.A.2.4.1.1 Faculty members have the right and obligation to develop and maintain their scholarly competence and effectiveness as teachers within their area of expertise; conscientiously to prepare and organize their subject matter; and to revise the subject matter on a regular basis as is appropriate for the courses that they teach.

...

19.A.2.4.2 **Research, Scholarly Work and Other Creative Activities**

19.A.2.4.2.1 Faculty members shall be responsible for and have the right and opportunity to carry out a reasonable amount of meaningful research, scholarly work and other creative activities. Faculty members shall endeavour to publish the results of their scholarship. Research, scholarly work and other creative activities conducted by faculty members in the course of their duties shall have as their primary objective the expansion of knowledge and understanding, as well as the improvement of the faculty member's scholarly competence.

19.A.2.4.2.2 Faculty members shall indicate their reliance on the work and assistance of others, if any, and their affiliation with the University in their published work(s).

19.A.2.4.2.3 In the context of this Article, research, scholarly work and other creative activities does not include activities necessary for the immediate and normal preparation for scheduled teaching, except when such activities are judged by peer review to represent an academic advance or a development of clinical or instructional materials or methods of such an innovative type that they have a wider application beyond the faculty member's own scheduled teaching duties.

19.A.2.4.3 **Service**

19.A.2.4.3.1 Service includes those internal and external activities which arise from the research and teaching functions of the University. Consistent with their primary responsibilities in teaching and research, faculty members shall:

19.A.2.4.3.1.1 be responsible for advising students on academic matters, supervision of examinations and assistance at registration and other administrative duties and committee work related to their teaching and research responsibilities. ...

19.A.2.4.3.1.2 participate in the governance of the University through active membership on department and faculty councils and, when called upon, participate to a reasonable extent in other University bodies.

19.A.2.4.3.1.3 have the right and responsibility to engage in community service when related to and appropriate to their discipline and field of expertise. Community service is that work within the community at large that enhances the reputation of the University because the individual faculty member makes an essentially non-remunerative contribution by virtue of special academic competence. ...

19.A.2.4.3.2 Where, in order to fulfill gender-balance requirements on committees, some faculty members are required to assume increased service duties, the University shall implement a reasonable workload adjustment so that the Member's responsibilities under this Article may be fulfilled.

...

The impugned provisions of the Guidelines

Faculty of Education

15. The Faculty of Education Teaching Guidelines (as presented by the Dean and approved in 2017) articulate four basic principles to guide the assignment of teaching in the faculty: fairness, transparency, equity and respect for diversity. Existing teaching load was 15 credit hours (24 for full-time instructors) except that faculty receive a three hour release in the first two years of their appointment. The Guideline introduced a new three credit hour release every third year for all tenured and tenure-track faculty, bringing the typical teaching load to 42 credit hours over three years. In addition, a Course Release Award Fund was established for faculty with a major research project. Members could apply and state the basis for the requested release, and the Dean would exercise their discretion in making any award, subject to budgetary implications. An Award could also be made for significant service roles consistent with the Faculty's Strategic Plan.
16. The Guideline also included a provision permitting the Dean to reassign a member's duties and alter the standard teaching load, as follows (hereafter "the Education Clause"):

Related to the issue of a standard workload range is the assignment of faculty members duties. At the current time, all tenure-track and tenured faculty members are expected to teach, engage in research and scholarly work, and provide service, with each of these areas being more or less equally weighted. I propose that, consistent with Article 19 of the Collective Agreement, we think about a more differentiated approach, which is also found in other faculties and other universities. For example, those who enjoy teaching and do it well but do not do as much research could have their assignment of duties adjusted to reflect their preference for teaching. A discussion of the reassignment of duties could be initiated by faculty members themselves or could be suggested by the dean after reviewing the faculty member's Annual Activity Reports over a period of time. In any case, only after there was a thorough consultation with the faculty

member, would the Dean make a decision regarding the reassignment of duties. In cases that resulted in a reassignment, a rationale for the decision would be provided and the effective date of the change in duties would be clearly documented. Clarity on such matters would be very important, particularly when faculty members apply for tenure and/or promotion. (Emphasis in original)

17. Section 3 of the Guideline is entitled “Circumstances when Teaching Loads Differ from the Standard” and states as follows: “As is currently the case, teaching loads will differ for those faculty members who play administrative roles in the Faculty or who are experiencing extraordinary career circumstances such as being the recipient of a CRC.” Specific credit hour releases are listed for named administrative positions, ranging from 9 to 15 hours. Acting administrative roles and first-time roles receive an additional 1.5 credit hour release to acknowledge the time and effort necessary to learn and manage the role. Also, specified releases apply for advising and seeing PhD and Master’s students through to graduation, ranging from 0.25 to 0.75 credit hours.
18. The Education Clause in the Guideline was specifically challenged in the grievance as a violation of the collective agreement. UMFA argued that the Dean can only increase or decrease a member’s teaching load in accordance with the circumstances outlined in section 3 of the Guideline, as per Article 19.A.1.3.6. of the collective agreement.

Faculty of Architecture

19. The Faculty of Architecture Guidelines for Teaching Assignments (approved November 27, 2017) state that annual teaching assignments are the responsibility of the department head or program chair based on discussion with the individual faculty member. In case of a disagreement, assignments will be decided by the Dean. Teaching assignments may consist of lecture courses, seminars, studios, graduate student thesis or practicum supervision, field trips

or other similar responsibilities. The Guideline provides a long list of considerations in making these assignments.

20. Because of diversity in curricula, the various components of teaching assignments are estimated using the Faculty of Architecture Teaching Loads Matrix. Average teaching load in recent years was expressed as 53 teaching load points. This corresponded to 3-4 full-term studios or courses, advising or supervising a number of theses, chairing or participating in thesis committees, and delivering optional specialized reading courses. The Guideline recognized a goal of reducing average teaching load points from 53 to less than 50, to be reviewed in three years. The normal load for instructor rank faculty is at least four full-term courses or studios.
21. The Guideline further recognizes that “in a single academic year a variety of factors may result in a faculty member teaching more or less than the normal teaching loads.” As a result, cumulative teaching assignments should be discussed “with the aim of developing a teaching plan that over the years between Research Study Leaves, or every six year period, is consistent with these guidelines.” The matrix is used to identify anomalies. It should be unusual for a faculty member to have a teaching load that exceeds 65 points. If that occurs, the member’s teaching assignment should be correspondingly reduced in a future academic year, except in extraordinary circumstances.
22. The Guideline lists deviations from nominal teaching assignments, which could include time on Research Study Leave, cancellation of a course or studio after the registration period and reduced teaching assignments in a member’s first year. Normally there is a 25-30 point load reduction for Program Directors, Department Heads, Associate Heads or others with administrative assignments.
23. A teaching assignment may be varied under the following provision of the Guideline (hereafter “the Architecture Clause”):

Consistent with section 19.A.2.4 of the UMFA/University of Manitoba collective agreement, the extent of a Professor's program of research, scholarly work or creative activities may result in the teaching assignment being increased or decreased outside of the range of these guidelines, but only after consultation between individual Professor, the Department Head/Program Chair, and Dean.

...

A Department Head/Program Chair may recommend to the Dean other exceptions from these guidelines. It will be an objective to maintain flexibility in the assignment of teaching responsibilities consistent with fair, equitable and reasonable workloads to all faculty members, and support of all academic program requirements.

24. The Architecture grievance challenged these provisions as a violation of the collective agreement. Under Article 19.A.1.3.6, the Guideline must include a standard teaching workload range and address the circumstances where teaching load shall differ. The only authority on workload variation is the Guideline. The Dean has no authority to increase or decrease a teaching load without reference to the Guideline, said UMFA.

University response to the grievances

25. At Stage Three, the University denied both the Education and Architecture grievances by letter dated February 13, 2019. Vice-Provost Dr. Diane Hiebert-Murphy concluded that Article 19.A.1.2.1 (the dean/director shall comply with the Guidelines) does not take primacy over the existing language in Article 19.A.2.4 (duties determined by dean/director in consultation with member). All words in the collective agreement must have meaning and be read together. The University's intent in bargaining was to create a transparent process, not certainty. It is unreasonable to expect that deans can create an exhaustive list of circumstances for altering a teaching load. They are called "Guidelines" and

were not meant to become “binding authority.” Article 19.A.1 requires a dean to weigh a number of considerations in the assignment of teaching duties.

Faculty of Arts

26. The Faculty of Arts Teaching Responsibility Guidelines (approved effective July 1, 2020) state that the assignment of teaching, research and service duties may vary from individual to individual and from department to department, as determined by the Dean in consultation with the Head and the member. The Guidelines “are intended to provide a description of the general considerations taken into account in the determination of the teaching component of the overall workload for faculty members and instructors ...”.
27. Section A.1 states that the normal teaching load for a full-time faculty member is 12 credit hours in a one-year period. The normal teaching load for a full-time instructor is 21 credit hours.
28. Exceptions to “the norms” are stated as follows in section A.2 of the Guidelines:
 - a) faculty members with externally funded appointments, such as Canada Research Chairs or endowed and sponsored chairs, when the terms of appointment prescribe limited teaching responsibilities;
 - b) faculty members who have assumed a leading role in major externally funded research projects (see C.5 below);
 - c) new faculty members (see C.6 below);
 - d) tenured faculty members who have been assigned additional teaching responsibility (see C.7 below);
 - e) faculty members and instructors with administrative responsibilities for which they receive course release (see D.1 and D.2 below).
29. The workload exception for major research projects is three credit hours in some instances and case by case for other projects, as stated in section C.5:

Faculty members who play the lead role, usually as Principal Investigator, in a major, multi-year research project funded by SSHRC, NSERC or CIHR administered by the University of Manitoba will receive a release of three credit

hours of teaching for each year of the grant. The release time can only be used during the period of the award, and cannot be banked for future use. The matter of release time for holders of multiple grants, for holders of grants from national foundations other than tri-council agencies, and for leading researchers in major collaborative research programs, or for researchers playing a significant but not a lead role, will be considered on a case by case basis. ... Currently, priority for research-based teaching releases is given to principal investigators holding Tri-Council grants at the University of Manitoba.

30. Section C.6 provides that new probationary assistant professors will be assigned a reduced teaching load consisting of nine credit hours in the first year and 12 hours of teaching in the second year.
31. Section C.7 allows for additional teaching load to be assigned and was the clause specifically challenged in the grievance. While part of the clause deals with a voluntary teaching load increase, the provision also allows a Head or the Dean to assign added load if the member's research or service is judged as not significant ("the Arts Clause"), as follows:

A tenured faculty member who wishes to concentrate more of his or her activities in teaching for a period of time may be assigned a teaching-focussed workload by the Head/Director/Coordinator subject to the approval of the Dean. This would normally involve a three-credit addition in teaching responsibilities and a corresponding reduction in responsibilities for research and/or service. The duration of this work plan will be for a two-year period, after which the faculty member's work plan would be reviewed. As well, tenured faculty members who are not carrying out significant research/creative activity and/or significant service activities may also be assigned additional teaching responsibilities on an annual basis, where appropriate. Under these conditions, the members' satisfactory performance assessment will reflect their new responsibilities. (Emphasis added)

32. Section D.1 to D.4 lists teaching reductions and releases for various administrative responsibilities. The quantum of the reductions is not particularized.

33. The grievance alleged that section C.7 violates Articles 19.A.1.2.1 and 19.A.1.3.6. While the Guidelines do not preclude an increase or decrease in research or service work, changes to standard teaching workload must be outlined in the Guidelines and not left to the discretion of the Dean, according to UMFA.
34. There was no Third Stage grievance response filed in evidence. By agreement, the Arts grievance was referred directly to arbitration.

Evidence of the Association

35. Professor Hudson gave testimony describing the course of events during the bargaining round conducted between April and November 2016. The Association is governed by a 78-member Board of Representatives and an Executive, with a 20-member Collective Agreement Committee (“CAC”) constituted during periods of bargaining. Face to face bargaining with the Employer is handled by a five-member team lead by a Chief Bargainer. In 2016, Professor Robert Chernomas (“Chernomas”) was UMFA’s Chief Bargainer, a position he held in multiple previous rounds. The University’s Lead Bargainer was Greg Juliano (“Juliano”), Vice-President of Human Resources, who was supported by a team of administrators and staff relations representatives.
36. Hudson said that based on member consultations before the start of bargaining, UMFA ranked salary as the top issue for 2016, followed by support, benefits, working conditions and workload. The University of Manitoba placed last in the U13 research intensive university group in Canada. It was an UMFA priority to improve this salary ranking and Hudson said the University also recognized the importance of the issue. Both parties were open to a fast-track process for significant salary and market adjustments. Thus, UMFA put aside

non-monetary issues and proposed both scale and market adjustments in a one-year agreement, with a freeze on layoffs and workload increases and no new performance indicators (referred to as “metrics”).

37. On September 13, 2016, the University tabled and announced a salary offer of 17.5% over four years. UMFA viewed this as promising but in a longer agreement, it would need to address a range of issues beyond money. Three bargaining sessions were held in October and a strike vote was taken with a deadline of October 31, 2016. A mediator was jointly retained by the parties and three day mediation was scheduled to start on October 27, 2016.
38. On the first morning of mediation, at the direction of the Provincial Government, the University announced that it was withdrawing its salary offer and substituting a one-year agreement at zero. Juliano told the meeting that government was interfering in bargaining, but the University was not able to defy government. The mediation failed and a 21-day strike ensued. A settlement was reached in conciliation for a one-year agreement at zero on wages, but with new Article 19 provisions on workload and some other revisions.
39. Hudson testified that while workload was not the top priority when they started, it was nevertheless a concern expressed in all UMFA constituencies. Members reported workload creep, exhaustion and burnout, with no end in sight. Instructor workload in Arts had been raised suddenly from 18 credit hours to 24 credit hours, which set off alarm bells. A similar change was hinted in Science. It was well known that the University faced budget problems and members were worried that the administration would respond by demanding more work from existing employees. Faculty would be the University’s safety valve under financial distress.

40. Hudson reviewed the details and progress of bargaining. At the first negotiation meeting on April 12, 2016, which was still under fast-track mode, a workload freeze was sought, and the following appears in the minutes: “Teaching loads major concern of members, as well as admin loads.” Chernomas stated: “We’re not looking to lower, we’re looking for a ceiling.” Juliano asked for more information and there was discussion of some current practices. (Book of Agreed Documents, hereafter “Documents”, Tab 25).
41. The parties met next on April 16, 2016 and workload was discussed at length. Juliano said that freezing teaching load would be a problem. He noted that the University could not accept both no layoff and no increased workload. Hudson testified that these remarks alarmed the UMFA team. Juliano also asked why deans should not be able to discuss an increased teaching load with a member who was not publishing or doing much research (Documents, Tab 26). This precise issue has emerged in the present grievances.
42. On April 20, 2016, budget and workload issues arose again. UMFA pursued a workload freeze and Chernomas stated: “We are trying to interfere with deans’ discretion, because you have imposed cuts on them and they have no alternative.” Juliano responded, “Workload - these are things of concern, we do want to correct inequities, can’t deny it’s a tool for budgetary purposes. Not a lot of flexibility left with not a lot of money, can’t change programs.”
43. By the time the parties met on May 21, 2016, fast-track bargaining had been abandoned and all issues were on the table. The Association proposed a teaching load freeze and a new process in each faculty to establish a teaching load policy by January 1, 2017 (Documents, Tab 12). The dean would take advice and formulate a policy for approval by the members in a secret ballot. Once the policy was in place, the freeze would end. UMFA further proposed

that the dean's existing discretion under Article A.2.4 to assign duties would be subject to the new teaching load policy.

44. These proposals were presented by Chernomas at the May 25, 2016 bargaining meeting (Documents, Tab 28). He said the concern related to the amount of work as well as distribution of assignments. Deans were assigning more and more work, and the Association wanted a systematic way of determining load. Juliano responded with hesitancy and said that preserving flexibility was the University's goal. It was noted that four units already had written policies.
45. UMFA further developed its workload proposal (Documents, Tab 13) and tabled it at the June 24, 2016 meeting (Documents, Tab 29). Juliano reiterated that the employer needed flexibility. "Your proposal limits our tools to get it done effectively and in response to demands." There was extended discussion and UMFA emphasized its concern with deans trying to fix budget problems by adding workload. Juliano said they should consider how the public would react to a collegial governance system where employees get to say how much work they do. He maintained this would be an unprecedented employment relationship. It would take away management's right to determine the work. It would be a blank cheque.
46. Hudson observed in his testimony that Juliano was wrong. Employees always have a say in their workload by negotiating hours of work. For academic faculty, the workload cannot be set that way, so another approach is needed. However, no employer is allowed to unilaterally increase the employee's workload.
47. On August 24, 2016, UMFA promised more language on workload. It wanted collegial governance with the dean's involvement, where "both sides have power" (Documents, Tab 31). The members and the dean would agree on a standard workload, and thereafter the dean would be bound to follow it. New

language was tabled by UMFA at the August 30, 2016 meeting (Documents, Tab 14). The freeze was deleted but workload would remain the same until a “teaching responsibility policy” was in place. If no majority vote were achieved to approve the policy, the dean would continue efforts to revise the terms and gain approval. No member could be assigned a teaching load in excess of the standard assignment until the policy was approved. Moreover, the policy would address “the conditions precedent to when the teaching workload of a Member shall differ from the standard teaching workload or standard teaching work load range.” The policy would be reviewed at least every five years.

48. The new UMFA language was discussed at length (Documents, Tab 32). UMFA argued that the proposed regime had checks and balances and would not create any public perception problem. Juliano acknowledged improvements in the draft but pointed out there could be a deadlock, in which case March 2016 workloads would continue. The University is obligated to ensure its employees are working as efficiently as possible, he said.
49. The parties met again on September 7, 2016 (Documents, Tab 33) and Juliano repeated that the potential for stalemate in approving a workload policy was a major problem. Reference was made to the detailed nature of the Faculty of Arts policy. Juliano stated that such a policy left little room for a dean or head to use discretion in dealing with individual faculty situations. He also asked how a standard teaching assignment could be defined, given the diversity of classes, labs and field work. How prescriptive would it be? At this meeting, the term “guideline” was suggested in place of “policy”, which denotes a formal Board of Governors or Senate enactment. Chernomas reacted that guideline was too weak and suggested “protocol”.

50. On September 13, 2016, the University tabled a comprehensive settlement proposal (Documents, Tab 15) including language on the assignment of teaching. The proposal expressed a commitment to a reasonable and equitable distribution of teaching work, a transparent process of assignment and flexibility to meet operational requirements. Annually the dean would communicate their approach to assignment and consider each member's preferences prior to finalizing assignments. The dean would consult in accordance with existing Article A.2.4 but retain the ultimate discretion on assignment. The University said that UMFA's proposal had the potential to reduce productivity and substantially increase cost.
51. The Association responded on September 26, 2016 (Documents, Tab 16) adopting the "guideline" descriptor and detailing the collegial discussion and approval process by secret ballot. No new process was offered to resolve a stalemate. The parties met on October 3, 2016 (Documents, Tab 34) and Chernomas stressed that workload was the number one issue raised by UMFA members in constituency meetings. A special general meeting was scheduled for the following day and a strike vote was on the agenda.
52. On October 12, 2016, the parties met again (Documents, Tab 35). The vote results were not yet tabulated. The University denied any intent to increase everyone's workload. It was about flexibility for the deans in making assignments. UMFA responded that there had been increases and mentioned instructor teaching load that went from 18 to 24 credit hours. The concern was real.
53. By October 21, 2016, when the parties met after several deferred sessions, the strike vote had passed for November 1. Juliano stated that there had been high level meetings with government, but he was not at liberty to share any information concerning money issues. Regarding workload, he recognized this

was UMFA's most legitimate concern. He requested a response to the University's September 13 proposals on teaching assignment. He was definitive that the administration did not intend to just increase workload but could not give guarantees. Chernomas responded, "Your saying 'trust us' doesn't work for us." There was discussion but no resolution on how to break a workload deadlock (Documents, Tab 36).

54. On October 25, 2016, UMFA produced another proposal amending existing Article 19.A.2.4 to make the dean's discretion in assigning duties subject to the new provisions for guidelines and standard teaching workload (Documents, Tab 16).
55. Mediation was scheduled for October 27, 29 and 30, 2016 with Larry Steinberg from Toronto. UMFA filed a brief (Documents, Tab 38) attaching its August 30 proposal on workload and citing the Queen's University faculty collective agreement as a precedent. On the first day, the University informed the mediator of government's zero wages-one year directive, and he told the UMFA team. Hudson testified that there was shock and disappointment, as the team felt they had been heading toward a resolution. Since it was clear the University would comply with the directive, and the agreement would be only for one year, UMFA decided to try for non-monetary gains. Salaries would be up for negotiation soon enough, in the spring of 2017.
56. Discussions with the mediator and the University on workload covered familiar territory. UMFA said it had to have a ceiling on workload. Juliano repeated that was a blank cheque. The mediator saw it as a fundamental disagreement and suggested temporary solutions. Hudson said the bottom line was that UMFA needed protection. Juliano warned that he had no idea what a "normal load" meant. It would just generate grievances. At the time, Hudson summarized the UMFA position as follows: "We want a process into the

determination of a normal workload and conditions under which that could vary. With a vote. And if accepted, that's the new workload." He testified that this remains the Association's view today.

57. On October 30, 2016, the last day of mediation, the University proposed a joint working group in each faculty to seek a consensus on appropriate teaching load and processes to determine assignments. The dean would consider the group's recommendations and implement them if they were unanimous. Otherwise, the dean would decide which recommendations to adopt and provide reasons (Documents, Tabs 49 & 50). UMFA rejected the proposal.
58. UMFA presented a final offer on October 30, 2016, open until noon the next day (Documents, Tab 18), with a workload increase pause and language adapted from Western University. In that university's collective agreement, there is a collegial process to establish a normal workload in each unit. If the load is not approved by vote, the dean decides but the workload applies only for two academic years. Hudson testified that UMFA saw this as a compromise it could live with, but the University rejected the proposal.
59. On October 31, 2016, the University made a new offer (Documents, Tab 20) including a letter of commitment that assigned credit hours would not be increased before March 31, 2017, as far as reasonably practical. There was a fund of \$0.5M to address workload concerns. UMFA rejected the proposal and the strike began.
60. A conciliator was appointed and on November 1, 2016, the Association proposed language to resolve a teaching load stalemate (Documents, Tab 21). After two failed secret ballot votes by the members in a faculty, the issue would go to the Vice-President (Academic) and UMFA, who would seek a resolution. After 30 days, the dispute would be referred to binding arbitration under the

grievance article of the collective agreement. Teaching loads would be frozen until a successful vote occurred.

61. On November 2, 2016, Chernomas introduced the latest UMFA proposal, emphasizing that the team was hearing many concerns about workload. “We need something with teeth in it.” Juliano responded that collegial input was good but control was not. He was also worried about shifting the decision outside the University and how long it would take to resolve the issue. He asked how workload became such an issue? Chernomas replied that this was coming up from below and it was not only Arts. “More work and less pay makes people angry.” Juliano insisted “we need an efficient process that preserves the dean’s authority.” In his testimony, Hudson said this was one of the only times the University expressed any doubt that workload was a valid issue.
62. Conciliation continued on November 3, 2016 (Documents, Tab 42). UMFA presented member comments from every faculty about how workload has increased and asserted that “every dean is a problem.” After lengthy discussion, the University stated unequivocally that arbitration was not an option. UMFA replied that deans deciding was not an option. Juliano asked, “Are you still really stuck on taking away the dean’s authority?” He asked for a signal that UMFA might be prepared to move. Chernomas responded, “No movement on our part, we would argue taking away arbitrary power of the administration to keep imposing workload on us.” It appeared to be an impasse.
63. On November 6, 2016, the University tabled another comprehensive proposal (Documents, Tab 22) but the Article 19 language was the same as September 13. The parties met that day and the University offered \$1.5M for support of teaching duties (Documents, Tab 43). UMFA concluded this would have a minimal effect on workload and would fail to address the issues.

64. Conciliation continued on November 10, 2016 (Documents, Tab 44) and Chernomas floated a three-member arbitration board. UMFA would not have control over workload issues, but it would have a say in the matter. Juliano gave a lengthy response addressing budgets and personnel issues, concluding that UMFA still wanted a blank cheque. Collegial input can be improved, he said, but deans need the final say. Chernomas protested that “we are simply saying we need a normal workload ... we are not asking for control of the budget, rather, the results have to be dealt with in a collegial fashion.” Discussion returned to the Western University model to see if it could be made less cumbersome.
65. The parties met again in conciliation on November 12, 2016 as the strike was entering its third week (Documents, Tab 45). Hudson testified that pressure was building for a settlement as spring break was now in jeopardy. He said UMFA’s pickets were stable and there was good support from the community. Even so, he said he was feeling the pressure acutely and suspected the Employer side was felling it as well. Chernomas said UMFA had no wording on workload. “No way of resolving the problem that you want us to trust the deans and we simply don’t. Arts worked through the process you suggested and he said ‘thanks but no thanks’”. This was a reference to the Dean overruling faculty council and imposing 24 credit hours.
66. With the help of the conciliator, progress was made on several points, but workload remained the biggest issue.
67. Conciliation continued on November 16, 2016 (Documents, Tab 46). UMFA made a new proposal withdrawing arbitration as the mechanism to end a stalemate over teaching load and substituting a reduced threshold in a second or subsequent faculty vote on Guidelines (Documents, Tab 52). Unless a two thirds majority rejected the dean’s proposed Guidelines, they would be

accepted. Chernomas observed that while this would allow the Guidelines to proceed, the bar was set so low that the dean would lack moral authority on this basis, in his view. The UMFA proposal also added language stating that the dean shall comply with the Guidelines and limitations on the assignment of duties as set out in the article.

68. The University responded the same day (Documents, Tab 23) adopting the new lower threshold for approval but omitting the express obligation on the dean to comply with the Guidelines. Instead, the dean would take the Guidelines into consideration.
69. Conciliation resumed on November 18, 2016 (Documents, Tab 47). The University conceded a workload freeze until the new Guideline has been adopted. Then on November 20, 2016, the University tabled another proposal (Documents, Tab 24) and UMFA accepted. In his testimony, Hudson pointed to significant movement by the University on key issues. In particular, the Guidelines were no longer a mere “consideration” for the dean in making their decision on assignment of teaching duties. Article 19.A.1.2.1 stated that “the dean/director shall comply with the Guidelines” and the limitations on assignment as set out in the article. To UMFA, this was a huge step forward. The dean’s authority was now limited by collective agreement language.
70. In addition, Article 19.A.1.3.6 appeared in the final text, much as requested by UMFA: “Guidelines of a faculty/school/college shall include a standard teaching workload range, and address the circumstances when teaching load of a Member shall differ.” Hudson testified this meant there must be not only a standard workload range, but also a list of the circumstances when a member’s load may differ. The reasons justifying a different load can be foreseen, said Hudson. An example would be organizing an international conference. With this language, the dean is constrained by what is on the list in the Guidelines.

Arbitrariness is removed when a dean decides to give a member either lower or higher teaching load. These provisions were generally made applicable to instructors by virtue of Article 34.1.1.

71. Hudson testified that his report to the membership covered gains made in some respects on metrics, promotion, tenure and layoff protection. However, the biggest gain was on workload. UMFA could now tell its members that there was protection against the dean increasing a member's workload.
72. The Association grieved the Education Guidelines because the Education Clause opens a mechanism to disregard the Guideline process, potentially altering all members' workloads after "consultation". This could negate the whole fight for new collective agreement language. Similarly, the Architecture Clause allows the dean to decide, unilaterally and subjectively, that a member's research is too limited, such that teaching load will be increased. The converse could also occur. A member's teaching load could be subjectively reduced. The Clause also allows for "other exceptions" to the Architecture Guidelines without elaboration. This is too vague and violates the collective agreement.
73. Hudson was personally involved in the Arts Guideline process. In 2019, he chaired the Dean's Advisory Committee on Teaching Guidelines. He noted that the language of the Arts Clause is subjective: "significant" research/creative activity; additional assigned teaching "where appropriate". The Dean will define these terms. In its report, the Committee advised that these provisions be struck from the Guideline: "Substantively, the language opens a trap door for Deans to disregard the remainder of the guidelines, and goes directly against the intent of language added into the 2016 Collective Agreement to limit unilateral decanal authority to increase teaching workloads." (Documents, Tab 53; October 22, 2019, at p. 4).

74. The Arts Guidelines had been rejected twice in member votes held in April and December 2018. The Dean submitted a revised draft on November 15, 2019 that reduced teaching loads and made other changes. Faculty loads were reduced from 13.5 credit hours to 12 hours (Documents, Tabs 54 & 55). A faculty council meeting was held on November 27, 2019 to reconsider the Guidelines. Dean Taylor was challenged on the Arts Clause and responded that there had been no arbitration reviewing it. He could not say it was offside the collective agreement. He added that it gave him a tool for situations where he sees members who are not productive on the research side. “It’s a tool I want to have,” he stated.
75. Under cross examination, Hudson was taken through the new language negotiated by UMFA in the 2016 bargaining round. Article 19.A.1.1.1 states that duties shall be assigned by the dean following consultation with the member, so authority continues to rest with the dean, he agreed. Duties shall be assigned reasonably, fairly, equitably and transparently. Article 19.A.1.2.1 lists a series of considerations in addition to the Guidelines themselves.
76. The collegial Guideline mechanism was new and was intended for the benefit of the UMFA membership. This includes a secret ballot for UMFA members only. It has “teeth”, to the extent that the dean must obtain the approval of the members, although with a declining bar. That was a compromise at the table. Hudson commented, however, that UMFA wanted to bind the dean with the Guidelines, which was resisted by the University. He acknowledged that much of this was new language.
77. Under Article 19.A.1.3.5, Guidelines shall take into consideration the full range of academic work, as listed in sub-sections (a) to (h). In practice, the dean develops the Guidelines and consults with the members, who must give their approval. The considerations are not prescriptive. There is no

mathematical formula. Hudson agreed that workload varies by faculty given the nature of academic work.

78. Under Article 19.A.1.3.6, the Guidelines shall include a standard teaching workload range, but the workload is to be spelled out in the Guideline. Research and service are both relevant criteria in setting the standard range. Moreover, the Guideline must address the circumstances when the teaching load of a member shall differ. Hudson conceded that Article 19.A.1.3.6 does not specify actual circumstances or limits. The article does not say there is no dean's discretion in this respect. The Guidelines are to address the circumstances where teaching load will differ.
79. Hudson agreed that the Guidelines could provide for adjusted load based on a member's research duties. An example would be a major role in a research project. The same applies in the case of significant service responsibilities.
80. Turning to the Arts Guidelines, Hudson confirmed that there were two unsuccessful attempts to pass them. In the interim, the Dean followed the existing Guidelines and continued to work with the members in committee on the establishment of an acceptable document. The third vote passed with the reduced threshold. This was the collective agreement process. In the result, the standard teaching load was reduced to 12 credit hours from 27 hours over two years. Instructor load changed from 18-24 hours to 21 hours. There were other changes as well (Documents, Tab 55). The member's committee chaired by Hudson had recommended a 12 hour faculty load and 18 hours for instructors.
81. The committee's objection to the Arts Clause (paragraph C.7) was discussed during the meeting with the Dean. The committee recommended striking it out. Hudson confirmed there was open discussion of the issue during the meeting. He stated his concerns. The secret ballot vote result was 57-36 in favour of the

Guidelines. UMFA did not dispute that the Dean's proposal passed but compliance with the collective agreement was still a live issue.

82. Under questioning, Hudson agreed that the first three sentences of paragraph C.7 comply with the collective agreement insofar as this constitutes one of the "circumstances where the teaching load of a Member shall differ" (Article 19.A.1.3.6.). A tenured member who wishes to concentrate on teaching for a period may be assigned a teaching-focussed workload. Normally this will be a three credit hour increase in teaching responsibilities and a corresponding reduction in research or service. Hudson agreed as well that this conforms to Article 19.A.1.3.5 (Guidelines shall take into consideration the full range of academic work) and Article 19.A.1.2.1 (teaching duties shall be assigned reasonably and fairly).
83. Hudson forcefully disagreed that the remainder of C.7 complies with the collective agreement. The impugned language states that "tenured faculty members who are not carrying out significant research/creative activity and/or significant service activities may also be assigned additional teaching responsibilities on the annual basis, where appropriate." This is not a specific circumstance, said Hudson. It is a catch-all. It is a trap door. It includes potentially all circumstances including caprice on the part of the Dean. The Dean could sidestep the entire process and increase teaching load. Hudson conceded that the Dean's decision would still be subject to the requirement that teaching duties be assigned reasonably, fairly and equitably. He also agreed that other provisions in the Guidelines allow for teaching load to be varied. He acknowledged that the impugned language has been part of the approved Arts Guidelines since 2011.
84. Hudson was pressed on the impugned wording of the Architecture Clause and defended the same objection. The Guideline provides that after consultation,

“the extent of a Professor’s program of research, scholarly work or creative activities may result in the teaching assignment being increased or decreased outside of the range of these guidelines ...”. He denied this “addressed the circumstances” where load may differ under Article 19.A.1.3.6. Yes, research is a relevant “circumstance” but like the Arts Clause, this was a catch-all category. The load is whatever the Dean deems. It would function as a trap door. It restores an unfettered discretion that was supposed to be constrained under the newly bargained provisions. Hudson acknowledged that the collective agreement allows for duties to vary and references a variety of considerations in setting teaching load.

85. The same critique applied to the Education Clause. In cross examination, it was put to Hudson that Article 19.A.1.3.6 does not say “address the specific circumstances” where teaching load shall differ. He agreed but maintained the UMFA position. Under the Arts Clause, he said, the Dean need only review the member’s annual activity reports and have a discussion. After that, the Dean would be free to assign an increased load as they see fit. The Education Clause is just a catch-all.
86. Cross examined on the bargaining history, Hudson confirmed that UMFA proposed language that a Guideline must address “the conditions precedent” to when a teaching load shall differ (Documents, Tabs 16, 21 & 23). The phrase “conditions precedent” was never adopted nor was there ever a definition in the collective agreement of what would qualify as conditions precedent. In final form, Article 19.A.1.3.6 stated only that a Guideline must “address the circumstances” when load shall differ. Resolution was reached on this point in conciliation but there was no recorded discussion of what these circumstances might be.

87. UMFA also pursued a preamble statement that the new workload provisions would apply “Notwithstanding any other provision of this Agreement” (Documents, Tabs 21 & 52). This language was never adopted.
88. Hudson clarified that there is an important distinction between teaching duties and teaching load. “Load” is a quantitative term. It refers to the amount of work done in the delivery of teaching. “Duties” are a set of obligations established by policy or as may be assigned. The collective agreement provisions must be read with an understanding of the difference.

Evidence of the University

89. Dean Taylor described the process for assigning teaching responsibilities in the Faculty of Arts. The process is delegated to Heads and Taylor gives the final approval. Timetabling requests begin before Christmas and departments submit their timetables in January. Heads receive requests from members and consider the program, electives to be offered, leaves, the need for sessional instructors and other factors. The Heads submit their proposals and the Dean reviews them. Emails are exchanged and meetings may be held. The assignments are approved and loaded into the system. UMFA representatives ensure the teaching load follows the Guidelines.
90. In November 2019, based on the new collective agreement language, Taylor submitted his report on Revised Teaching Guidelines for the Faculty of Arts (Documents, Tab 55). Taylor had been on leave at the beginning of the process in 2017 and the Acting Dean convened an advisory committee of members. Consultation was conducted throughout the Faculty. Draft Guidelines were presented to the members on April 30, 2018 and December 7, 2018, but on both occasions the Guidelines were not accepted.

91. There was discussion about reducing the teaching load. but the first draft did not include any changes. Taylor testified that reducing the standard teaching load is not an easy thing in the University. By this time, he was back from leave and not surprised by the defeat. Between April and December 2018, the Dean's office continued working on the issue. There was member pressure for a new proposal. However, for administrative and budget reasons, he could not yet move on workload, and the draft Guideline was defeated a second time. Again, Taylor was not surprised.
92. Work continued on the Guidelines and another advisory committee report was prepared. Taylor submitted a new set of recommendations and proposed to reduce the standard faculty teaching load to 12 hours, as recommended by the committee. Instructor teaching load was a complicated issue but in the end Taylor recommended 21 credit hours with a normal service responsibility. There were no changes to directed reading, cancelled courses, teaching and non-teaching terms and student supervision. Some refinements were made to "super-section credits" (large enrolment classes).
93. Hudson's advisory committee report (Documents, Tab 53) agreed with the new faculty teaching load, recommended 18 hours for instructors and advocated striking out section C.7 on the Dean's discretion to add teaching load.
94. The Arts Faculty members' meeting was held on November 27, 2019. Members had all the documents and background. Taylor and Hudson both spoke and there was discussion. Mention was made of the two pending workload grievances in Education and Architecture. Taylor testified that he opposed the deletion of C.7. He told the meeting he had considered the issues and stood by the proposal for increased teaching load in the circumstances covered by C.7. It was a package proposal and he was not making changes. The vote was conducted and the Guidelines passed with 61% approval.

95. In his testimony, Taylor reviewed the exceptions to standard teaching load. Externally funded research is recognized under University guidelines. A Canadian Research Chair gets a 6 credit hour reduction. Tri-Council grants are a three hour release. Other significant research projects are considered case by case by the Dean under section C.5. New faculty receive an annual three hour release for two years. Heads and Associate Heads receive a release. Administrative releases are listed in section D and again the Dean decides.
96. Taylor testified that Section C.7 appeared in the previous Guidelines (Documents, Tabs 57 & 58; 2010 and 2015). Since 2011, he has only used these procedures twice as Dean. Every year, members submit activity reports and Heads respond with a performance memo. A recommendation is made for a half or full increment. As Dean, he reviews the documents. In one case, Professor A had reported no research, publications or conferences for a number of years. He had several unsatisfactory ratings for increments. Taylor said he has had 10-15 conversations with other faculty about similar problems, usually in late career situations. The result is usually increased output or a retirement. In the case of Professor A, there was no improvement after the discussion but the member continued in his position. As a result, Taylor increased the member's teaching load using section C.7 and reduced the research expectation. Taylor said he would not take such action unless the member in question had good teaching abilities. Professor A was a good teacher.
97. In the other case, Professor B was on a 50% appointment when Taylor arrived at the University in 2011. At that time, full load was 27 hours over two years or 13.5 hours per year. However, Professor B was teaching 12 hours as a half time appointment. A previous Dean had increased B's load. Taylor was told there was never any formal agreement or documentation for this arrangement

- and it was treated as service to the department. As a result, Taylor formally reduced the teaching load and treated the excess as banked credits.
98. Taylor testified that the new bargained language obligating the Dean to comply with the Guidelines made no change for him. He followed the Guidelines previously even though it was not a collective agreement issue. The obligation to assign teaching fairly and reasonably also had no impact in practice. He always tries to assign fairly, reasonably, transparently and equitably. He said he believes he has done so. Now these are formal collective agreement matters.
 99. Article 19.A.1.2.1 lists considerations in the assignment of teaching duties. Taylor said he complies in the context of the Guidelines. Research work is part of the full range of academic responsibilities and can lead to an adjusted teaching load. Available human resources are always considered by necessity. The other considerations are followed as well.
 100. Under cross examination, Taylor reiterated that he followed prior versions of the Arts Guidelines even though there was no collective agreement requirement to do so. He described the process followed in 2014 to revise the 2010 Guidelines and adopt the 2015 Guidelines. He took a motion to Faculty Council for feedback, a motion was passed to create an advisory committee and the Executive established the committee. There were five members from UMFA, although not in that capacity, one member from the CUPE bargaining unit and Taylor as Dean. Discussion continued for 18 months until the new Guidelines were adopted on September 2, 2015. Taylor agreed it was his decision ultimately but there were some changes made to the original draft as a result of the consultation process.
 101. Taylor agreed there was no formal duty to consult members at that time. It was good practice. However, failure to do so would have been “political disaster” and would have shortened his term as Dean, he said. When pressed, he

conceded he could have changed his mind at any time and revoked part of the Guideline, but that would trigger a grievance based on past practice, in his view. He rejected the suggestion that the old Guidelines were advisory only, in legalistic terms. He saw them as a document on the terms and conditions of employment with a nexus to the collective agreement. Asked to identify the nexus, Taylor answered that he had grievances filed regarding the application of the Guidelines.

102. He agreed that the legal duty to comply with the Guidelines was new. Previously he had full discretion under Article 19.A.2.4. He agreed the duty to act fairly under Article 19.A.2.2 might be grievable.
103. Taylor testified that at the November 27, 2019 Faculty meeting, he did not recall saying that the C.7 language was “a useful tool” but acknowledged that would be consistent with his thinking.
104. Questioned about the exceptions to teaching load aside from C.7, Taylor agreed that the circumstances are set out in the Guidelines in some cases, whereas other cases are not codified. For research with agencies other than tri-council (C.5), release time is considered case by case. It is virtually impossible to codify. The Dean must exercise discretion in a reasonable manner. In C.7, admittedly the terminology is not defined – “significant research”, “significant service”, “where appropriate.” Taylor testified that “It’s my call as Dean.” There is no explicit obligation in C.7 to consult the member or give reasons, but there is always a duty to be fair. He conceded he has no knowledge of how deans in Education and Architecture use their discretion to add teaching load or how often it arises.
105. Taylor conceded C.7 gives him some flexibility but added that he feels constrained in how he uses it. He agreed that C.7 is different than the other exceptions listed in the Guidelines. The others have terms. “For this one, I

ensure equity and fairness across all faculty members.” During the consultation process from 2017 to 2019, leading to the adoption of C.7 as part of the Guideline, there was no attempt to add structure or criteria to C.7, as far as he knows.

106. In redirect examination, Taylor added that while the terms in C.7 are undefined, he has access to detailed information about the faculty member’s research, service, grants, conferences, publications and work in progress, all of which is included in the annual activity report. The Head assesses the information first and indicates whether there are any concerns, applying standards for the discipline in question. Psychology is different than history. “It’s in the hands of the Heads.” If there are deficiencies, it can trigger an Unsatisfactory rating by the Head. As Dean, Taylor has overall responsibility for assessment of the member.
107. Taylor was directed to the Introduction at page 1 of the Guidelines, which states in part: “The assignment of these duties may vary from individual to individual... as determined by the Dean in consultation with the Head/Director/Coordinator and the faculty member or instructor.” Thus, there is an obligation to consult and Taylor testified he does consult extensively about research activities. Articles 19.A.1.1.1 and 19.A.2.4 also require consultation.

Principles of contract interpretation

108. Both parties referred to the summary of interpretive principles in *Re Parkland Regional Health Authority and MNU*, [2001] M.G.A.D. No. 60 (Hamilton), at paras. 212, 218-220:

Some preliminary remarks on the principles which govern our interpretive tasks are in order because they will provide the relevant benchmarks for assessing the terms of the Agreement. The predominant reference point for arbitrators must be the language used in the Agreement because it is primarily from the written word

that the common intention of the parties is to be ascertained. In this regard, language is to be construed in accordance with its ordinary and plain meaning unless adopting this approach would lead to an absurdity or a repugnancy but, in these latter situations, arbitrators will interpret the words used in a manner so as to avoid such results. However, it must be remembered that these are principles of interpretation to be used in the context of the written Agreement itself. A counterbalancing principle is that anomalies or ill considered results are not sufficient to cause the alteration of the plain meaning of words. Neither is the fact that one interpretation of the collective agreement may result in a (perceived) hardship to one party. ...

Both counsel relied on the well accepted principle that the provisions of the Agreement are to be construed as a whole and that words and provisions are to be interpreted "in context". We accept this approach to interpretation. See Palmer, *Collective Agreement Arbitration in Canada* (3d ed) p. 123, para. 4.141 and the seminal case of *International Union of United Automobile, Aircraft and Agricultural Implement Workers of America, Local 439 and Massey-Harris Company Ltd.* (1947) 1 L.A.C. 68 (Roach) at p. 69:

It is a well recognized rule of construction that words in a document are to be given their ordinary grammatical meaning unless to do so results in an inconsistency or repugnancy. It is also a well recognized rule of construction that where part of a document permits of two interpretations, that meaning is to be attached which best harmonizes with the whole of the document. That latter rule has been expressed thus, namely, that the tribunal charged with the responsibility of interpreting the document must attempt to construe it so that it will be a harmonious whole and effect given to every part of it. (emphasis by Arbitrator Hamilton)

A third basic principle that there is a general presumption against redundancy (see Palmer, *supra*, at p. 126). Put another way, it is to be initially assumed that the parties have not agreed to superfluous or unnecessary wording in crafting their agreement.

If we determine that the [language] is ambiguous then we may have recourse to a past practice as an aid to interpretation. As noted, *supra*, an ambiguity is not established by the mere advancement of different interpretations. Arbitrators have wrestled with what constitutes an "ambiguity" in the arbitral sense. In our view, an "ambiguity" essentially reflects an inability to derive any clear meaning

from language which, on its face, is susceptible of at least two rational constructions. But, if the language is capable of being understood and interpreted, within the structure of the Agreement itself, and there are no references in the Agreement which render comprehension difficult, then the issue is to be resolved as a matter of interpretation.

109. The *Parkland* summary has been endorsed on numerous occasions by arbitrators in Manitoba, including by me in *Re South Eastman Health/Sante Sud-Est Inc. and MGEU*, [2007] M.G.A.D. No. 22 at para. 75 and *Re University of Manitoba and AESES (Severance Pay Grievance)*, [2017] M.G.A.D. No. 3. Substantially the same principles were distilled in *Re Pacific Press and Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637 (Bird) at para. 27, which has also been regularly cited:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

110. The foregoing principles of collective agreement interpretation were originally derived and adapted from the basic tenets of common law contract. Recently in *Sattva Capital Corporation v. Creston Moly Corporation*, [2014] 2 S.C.R.

633 (“*Sattva*”), a commercial arbitration case, there was a shift away from the rules traditionally recited in contract interpretation. The court favoured a practical approach, reading the words in their ordinary sense, consistent with the surrounding context (at paras. 47-48, 57-58):

47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding"... To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed...

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement ...:

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. ...

57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement ... The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract ...

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract ..., that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. ...

111. *Sattva* was considered in a labour context in *Alberta Union of Provincial Employees v. Alberta Health Services*, [2019] ABCA 4 (“*AUPE*”), a decision cited by the present parties. The arbitrator was required to determine whether the words “Operational Restructuring” in a letter of understanding meant the employer’s Operational Best Practices program, which provided for layoff protection sought by the union. The court applied *Sattva* and ruled (at para. 3) as follows:

It was reasonable for the arbitrator to consider the text and the surrounding circumstances. However, most of the evidence of the parties' communications during negotiations was evidence of their subjective intentions about the meaning of "Operational Restructuring". It was unreasonable for the arbitrator to use that evidence to interpret the agreement.

112. The Alberta court observed that labour arbitrators were already following the *Sattva* directive to consider the surrounding circumstances (at para. 37): “It is well accepted in labour law that labour arbitrators should consider evidence of the origin and purpose of the collective agreement, the nature of the relationship created by it and the industry in which the parties are operating, when it considers the general context within which collective agreements are negotiated.” While some authorities have held there must be an ambiguity before extrinsic evidence may be admitted, the court in *AUPE* was clear that “labour arbitrators must consider evidence of surrounding circumstances relevant to interpreting a collective agreement” (at para. 43, emphasis in

original). Finally, said the court, “it is never appropriate to consider the subjective intention of the parties when interpreting a collective agreement” (at para. 44). Before me, both parties relied on the conclusions in *AUPE* regarding the impact of *Sattva*.

113. The University argued that an ambiguity is still necessary to justify arbitral reliance on negotiating history evidence in the present case: *AUPE*, at para. 27. Language is not ambiguous merely because it will bear more than one meaning: *Re Winnipeg Regional Health Authority and MAHCP*, [2016] M.G.A.D. No. 9 (Peltz) at para. 97. By contrast, UMFA characterized the collective bargaining evidence as framing the surrounding circumstances, namely, the Association’s attempt to control teaching load increases by the Employer in a period of acute budgetary pressures. UMFA pressed for binding Guidelines to restrict the discretion of deans in assigning work. The University resisted and tried to retain decanal flexibility.
114. *AUPE* acknowledged that surrounding circumstances and pre-contract negotiations may overlap as categories (para. 27). In the present case, the distinction is blurry. Definitively, evidence of “subjective intention” is not admissible but *AUPE* also notes that “few cases explain its meaning” (at para. 31). At a minimum, a witness may not give evidence that “I think the phrase means X,” or “At the time of negotiations, I thought the phrase meant X.”
115. What about evidence from a witness that “This is the phrase that we proposed” or “This is what we said at the table”? In the present case, this was the nature of the evidence that UMFA adduced, in large measure. To the extent that either Hudson or Taylor made comments about the meaning of collective agreement language, or the meaning of bargaining proposals, it was agreed they were offside as subjective intention.

116. *AUPE* stated that *Sattva* could be read as including all bargaining history within the ambit of “surrounding circumstances,” but the Alberta court chose not to read *Sattva* so broadly (at para. 32). For an arbitrator in Manitoba, the question is not what the Alberta court held but rather what binding directive, if any, might emerge in due course after *Sattva*. In effect, the University’s position was a reiteration of the parol evidence rule. Without ambiguity, no bargaining history may be considered in construing the agreement, only the words of the agreement. However, *Sattva* expressed doubt about the continuing relevance of the parol evidence rule in our law (at paras. 59-61):

59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing ... To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties ... The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract ...

60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

61 Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it ... For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

117. This takes us back to the admonition in *AUPE* that surrounding circumstances must always be considered. In each case, the arbitrator must sift out subjective

intentions and focus on the objective factors that were known to the parties when they formed the contractual provisions in question.

118. As stated in *Re City of Winnipeg and Winnipeg Police Association et al (Pension Plan Grievance)* (2020), 314 L.A.C. (4th) 11 (Werier), “While the normal rule is to look within the four corners of the agreement (when neither party is arguing an ambiguity), evidence outside the agreement can be used to clarify the factual matrix of the context of the words utilized by the parties” (at para. 203). In that case, the factual matrix was “established in the extensive historical chronology” (para. 204), which included the parties’ pension plan bargaining history.
119. In *Re Atlantic Safety Centre and Fish, Food & Allied Workers* (2017), 279 L.A.C. (4th) 422 (Oakley), the arbitrator considered the “surrounding circumstances of the discussions during collective bargaining” in ascertaining the intention of the parties regarding the amount of a bonus payment (at para. 45). In *Re Halton Recycling Ltd. and L.I.U.N.A., Local 183*, [2019] O.L.A.A. No. 56 (Price), the issue was whether the employer had a unilateral right to change benefit plans. After discussing *Sattva* and related labour law decisions, the arbitrator stated (at para. 26):
- As the above-noted authorities establish, evidence of the factual circumstances or context in which particular language was agreed upon is admissible so as to ensure that the arbitrator is in a position to interpret and apply it "within the context of the particular collective bargaining relationship." In my view, the evidence that the Union proposes to lead in this case regarding the circumstances in which article 15.05 was negotiated clearly meets the threshold for admissibility on this basis, even in the absence of any ambiguity.
120. In my view, objective evidence of the issues at play and the proposals made in bargaining, as well as related discussion at the table, is admissible in the present case without a finding of ambiguity. Taking the evidence was not burdensome

to the arbitral process. It would not “overwhelm the contractual language”: *AUPE*, at para. 29. On the other hand, rejecting such evidence could prevent the arbitrator from properly understanding the surrounding circumstances and lead to an erroneous interpretation. As the Supreme Court of Canada cautioned in *Sattva*, “The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. ...” (at para. 48).

121. In conclusion, relevant context must be considered. However, an obvious caveat applies. Context must not be allowed to eclipse text. Ultimately, it is the arbitrator who decides the meaning of the agreement based on the words chosen by the parties, read in light of the surrounding circumstances, applying well established interpretive principles.

Argument of the Association

122. UMFA submitted that the issue in this grievance is teaching load. This means the quantum of teaching work as a percentage of overall academic workload. The norm for faculty in the humanities is 40-40-20, or 80-20 for instructors. Article 19.A.2.3 provides that a member’s duties shall include an appropriate combination of (a) teaching, (b) research, scholarly work and creative activities, and (c) and service. Under Article 19.A.2.4, which pre-existed the 2016 bargaining round, assignment of these duties is determined by the dean in consultation with the member. As a result of collective bargaining, Article 19 now includes language on fairness, Guidelines and limitations. The question for the arbitrator is what restrictions now apply to the dean in determining teaching load?

123. The context for this newly bargained language was not in dispute. Juliano readily acknowledged that the University was experiencing budget cuts, which related to potential workload increases or layoffs or both. He said setting workload is “a tool for budgetary purposes” (Documents, Tab 27, p. 2). He also said the University recognized workload as “one of the most legitimate concerns” (Documents, Tab 36, p. 4). For UMFA, a ceiling on teaching load was a primary issue, even before wages were taken off the table. While Juliano argued repeatedly for maintaining flexibility and opposed any “blank cheque”, Chernomas was clear: “We are trying to interfere with deans’ discretion, because you have imposed cuts on them and they have no alternative” (Document, Tab 27, p. 1). Juliano tried to provide reassurance that there was no plan for a workload increase. Chernomas replied that “trusting you doesn’t work” (Documents, Tab 36). UMFA wanted a freeze until standard teaching loads had been established using a collegial process with a secret ballot.
124. When the government directive was disclosed to UMFA on October 27, 2016 and salaries disappeared as an issue, bargaining reverted solely to contract language. Teaching load was the top UMFA priority. There was protracted negotiation over how to break a stalemate in the collegial process for approving Guidelines. However, little was achieved in mediation. Juliano recognized the distinction between assignment or mix of work and actual teaching load. He said that assignment was an easier issue and UMFA could get a win on it. They could ensure it was fair. He said load is the “harder part, because driven by financial pressures and the nature of the University.” Budgets were tight and getting tighter by the day. He added, “University doesn’t want to see teaching loads go up, but depends how successful we’ll be in rationalizing those academic programs” (Documents, Tab 39, p. 9).

125. Hudson responded that he could not tell the membership they were going back to the bottom of the U15 on salary, plus workload may be cranked up. The bottom line was some kind of protection on workload. “We want a process into the determination of normal workload and conditions under which that could vary. With a vote. And if accepted, that’s the new workload” (Documents, Tab 39, p. 10-11).
126. In its last proposal before the strike began, UMFA proposed a pause on workload and Western University language on a workload process (Documents, Tabs 18 & 19). The University rejected Western and offered a working group, as well as a teaching load freeze “as far as is reasonably practical” (Documents, Tab 20). UMFA rejected the counter offer and a 21 day strike commenced.
127. Active negotiation on workload continued in conciliation. The debate was about flexibility versus certainty. UMFA proposed binding arbitration if the collegial process failed to achieve approval after a second vote. UMFA also introduced language requiring a standard teaching load unless the policy “addresses the conditions precedent to when the teaching workload of a Member shall differ” from the standard (Documents, Tab 21). The University rejected these proposals and offered money for teaching assistants. UMFA refused but on November 16, 2016, UMFA abandoned its arbitration position, and suggested a reduced 1/3 voting threshold for the second vote (Documents, Tab 52). Wording was also added to state the dean shall comply with the guidelines.
128. The University’s counter on November 16, 2016 did not include the standard teaching range and conditions precedent for variations. Guidelines were still just a “consideration” for deans. When this was rejected and the strike continued, the University made a revised proposal on November 20 with

concessions on workload language. Agreement was reached and the strike ended.

129. The Association summarized what was gained and what was foregone in reaching a settlement. There was no freeze on workload, no immovable workload ceiling, no requirement for majority vote and no binding arbitration to settle the Guidelines. However, the gains were significant and relevant to the present grievance. Article 19.A.1.2.1 requires the dean to comply with the guidelines, constraining the previous broad discretion granted by Article 19.A.2.4. All faculties must adopt Guidelines and the status quo applies until this has been done. Most importantly, under Article 19.A.1.3.6, the Guidelines must include a standard workload teaching range and address the circumstances when the teaching load of a member shall differ.
130. UMFA argued that the University struggled not to give up the deans' discretion and flexibility but, in the end, it was bargained away for a settlement. This was the objective context of the agreement that was made by the parties. There was a common understanding that the result would be minimal discretion once the teaching load was set. UMFA noted that the University did not call evidence to dispute the common understanding, even though some members of the University bargaining team were present during the arbitration hearing. Having negotiated away the deans' discretion, the University is now attempting to whittle down the collective agreement constraints by using "trap door" clauses in the impugned Guidelines.
131. The Association submitted that the Education Clause allows teaching load to be varied based on the dean's subjective assessment, limited only by the requirement to review the activity reports and consult the member before changing the standard workload. There are no criteria. No University witness gave evidence to the contrary.

132. The same flaw exists in the Architecture Clause, said UMFA. There are no criteria beyond a bare reference to the extent of the member's research or creative activity. The dean's assessment is entirely subjective. Again, there was no University evidence.
133. In the Arts Clause, the only reference is to not showing "significant" research or service. Teaching load may be varied "where appropriate". Without any criteria or elaboration, these terms are entirely subjective. Taylor admitted under cross examination that C.7 was not like the other enumerated exceptions to standard load. Taylor's testimony that he used C.7 only twice in 10 years establishes that there is no real administrative need for the provision. The dean has other means to deal with underperforming members, including performance evaluation and discipline.
134. UMFA argued that cumulatively, the impugned Guideline clauses are tantamount to saying, "The Dean may assign a greater or lesser teaching load when the Dean believes the circumstances so require." This would render the standard teaching workload meaningless. It would violate the requirement in Article 19.A.1.3.6 that the Guidelines "address the circumstances when the teaching load of a Member shall differ." The context of the 2016 bargaining round was negotiation and agreement that open-ended decanal discretion on teaching load would be ended.
135. During final argument, I asked UMFA counsel whether there could be other wording substituted for the impugned language in the Guidelines, allowing deans to adjust teaching workload in some circumstances where a member's research load justified doing so. After a caucus, UMFA responded that it was not saying there can never be such circumstances. However, UMFA wants certainty and clarity. There must be objective factors listed in the Guidelines. The present language violates the collective agreement.

136. In UMFA's submission, the University understood the implications of eliminating the deans' broad discretion to alter teaching load. For this reason, no settlement could be reached until well into the fall term, when strike pressure was ramping up and the academic schedule was in jeopardy. The issue was vital to both parties. However, UMFA would not budge on the core issue of a binding standard teaching load. Then the University capitulated. These were the surrounding circumstances in which the contract was formed. None of this falls within subjective intention as described in *Sattva* and *AUPE*. These were objective factors known to both parties at the time.
137. While the Association maintained there was no ambiguity in the provisions at issue, in the alternative, it argued that there is at least latent ambiguity in Article 19.A.1.3.6. If so, bargaining history is clearly admissible. As in *Re White River Forest Products and USW, Local 1-2010*, [2018] O.L.A.A. No. 222, 293 L.A.C. (4th) 396 (McNamee), the bargaining evidence supports a conclusion that the settlement was not a worthless one. In *White River*, the following words were added to the article on shift schedules: "It is further understood that any schedule will be mutually agreed to." The union grieved a revised schedule to which consent had not been given. The arbitrator considered the context and the bargaining history evidence in construing these words as referring to any further changes beyond the negotiated schedules, as follows (at para. 47, 49):

47 The evidence of negotiations is somewhat more helpful. The parties are agreed that there was no meeting of the minds as to the meaning of the new language, but the context in which those negotiations took place does have significance. It must be remembered that, when the negotiations took place in the summer of 2013, the employer was intending to start production at a sawmill which had been closed for approximately seven years. All parties agreed that the employer approached negotiations with the objective of increasing its flexibility by the use of different shift arrangements, and that extra flexibility was important to it. The union, whose members were all out of work, had every incentive to reach an agreement. ...

49 If the union's interpretation is to be accepted, the employer entered negotiations seeking greater flexibility, and achieved less than nothing ... because it would not, in future, even be able to adjust its shifts as was permitted under the expired collective agreement ... without union consent. The amendments to create an expanded work week at straight time would, in effect, be window dressing because the union would not approve a schedule which required work on weekends.

138. The Association also cited *Re A&B Rail Services Ltd. and Labourers International Union of North America, Local 837*, [2013] O.L.R.D. 3860 (McLean), where an ambiguous premium provision was interpreted using bargaining history that established the parties' intent.
139. The contextual evidence negates any notion that UMFA settled a lengthy strike and accepted nothing more than "a fancy process" with no real effect on workload. If the dean can still act on undefined, subjective factors and alter a member's load, the negotiation was futile.
140. As relief, the Association requested (a) a declaration that the University violated the collective agreement by allowing Guidelines with the offending provisions, (b) an order that the University provide UMFA with a copy of all Guidelines across the University, (c) an order that any member whose teaching load was increased pursuant to the impugned provisions be reassigned as soon as reasonably possible, and (d) that jurisdiction be retained for implementation and to address any further unresolved issues in the grievances.

Argument of the University

141. The University submitted that on the application of accepted interpretive principles, there was no violation of the collective agreement. The bargained language addresses the assignment of duties and the process was followed. In

each of the three faculties, the dean initiated a collegial process to prepare Guidelines, taking into account the specified considerations, and a secret vote of members was conducted. In each case, the Guidelines established a standard teaching workload range. It is left to the deans and individual members to implement the Guidelines. Contrary to UMFA's argument, the Guidelines do address the circumstances where teaching load shall differ, consistent with Article 19.A.1.3.6. Nothing in the collective agreement prohibits the kind of arrangements established in Education, Architecture and Arts for altering a member's teaching load.

142. The University cited three arbitration decisions on faculty teaching load as illustrative examples, although the facts were not analogous to the present case: *Re York University and York University Faculty Association*, [2002] O.L.A.A. No. 945 (Goodfellow); *Re Carleton University and Carleton University Academic Staff Association*, [2015] O.L.A.A. No. 229 (P. Knopf); *Re Concordia University of Edmonton and Concordia University College of Alberta Faculty Association*, [2018] A.G.A.A. No. 45 (Ponak). These cases show that extrinsic evidence is often led but may not assist the interpretive exercise. In addition, arbitrators demand clear language and cogent evidence to uphold a workload grievance.
143. In *York University*, the collective agreement stated that a normal teaching load would be defined by current practices, and the employer shall not unreasonably alter the load. In exceptional cases, the dean may increase or reduce teaching load or service commitments of a member, "in the light of the individual's research/scholarly/creative and service contributions," as assessed by the academic unit in question (at para. 11). The union grieved that the normal load was 2.5 full course equivalents and the grievors were assigned a load of 3.0. The arbitrator denied the grievance because the union failed to prove that the

normal teaching load was 2.5 courses, but commented that “ongoing differences in research or service obligations between different faculty members” may justify different course loads (at para. 129):

... Article 18.10 appears to contemplate that there will be a normal teaching load per stream within a Faculty or Department and that individuals will be given teaching duties "consistent" with that load. However, Article 18.10 also says that the assignment of teaching duties or teaching loads to individual faculty members must be consistent with "its equitable (*ie.* fair) distribution among members of the unit". This requirement, it seems to me, may open up the possibility for individual faculty members to be given a course load that is outside of the norm for "the stream and the Faculty or Department". Under what circumstances that may occur - *ie.* what equitable considerations would justify a departure from the norm - are not spelled out. However, ongoing differences in research or service obligations between different faculty members attendant upon the nature of their appointments may be the kind of considerations that would matter. It is not at all clear that those types of factors are the exclusive prerogative of Article 18.11 or of the second to last sentence of Article 18.10. Those provisions would appear to be directed at exceptional circumstances that may arise at different points during the course of an individual's career at the University rather than at any ongoing differences that are meant to exist from the outset. In this way Article 18.11 would appear to follow the pattern of the Article as a whole ...

144. In *Carleton University*, new language in the collective agreement set hard caps on faculty and instructor teaching loads (essentially 2.5 and 3.5 credits respectively), but a university policy added a nominal obligation of .4 credits comprised of less formal teaching activities. The union grieved that this raised the workload above the negotiated cap. On the facts, the arbitrator dismissed the grievance. Bargaining history evidence was tendered but it showed that each side left the table with a completely different expectation (at para. 33): “... as is too often the case with extrinsic evidence, it has revealed that there was an unfortunate lack of mutual understanding.”

145. In *Concordia University of Edmonton*, the collective agreement set a 24 hour load for members teaching solely undergraduate programs and 18 hours for members whose teaching included graduate instruction and supervision. The union grieved that faculty who customarily teach graduate students were entitled to the lower load even in a year when they were not assigned any graduate students. The arbitrator found no ambiguity and held that the collective agreement supported the employer position. It would take clearer language to create an entitlement to the lower teaching load even when a member had no graduate student responsibilities (at para. 46) Extrinsic evidence was received but was not helpful.
146. Responding to *White River* and *A&B Rail*, cited by UMFA, the University noted that both cases involved ambiguous collective agreement language. In the present case, ambiguity has not been pled as either party's primary position. *White River* was not decided based on the employer's intent to achieve flexibility in scheduling, as suggested by UMFA. Rather the union's interpretation made the agreement meaningless. The arbitrator agreed with the statement (at para. 52) that "when facing two opposing interpretations of language relating to compensation, of which one would result in a very peculiar result, then common sense dictates the interpretation that should be preferred." In *A&B Rail*, there was a common purpose to retain key employees by paying a premium, and the agreement was interpreted accordingly.
147. Turning to a review of the relevant collective agreement provisions, the University began with Articles 19.A.2.3 and 19.A.2.4. The duties of a faculty member include an appropriate combination of teaching, research and service. Assignment of these duties may vary from individual to individual, and by faculty/school, as determined by the dean in consultation with the member. These provisions pre-existed 2016 collective bargaining. Article 19.A.1.1.1, a

new article, essentially repeats that duties shall be assigned by the dean after consultation with the member.

148. Article 19.A.1.2.1 is also new and requires the dean to comply with the Guidelines and the limitations on assignment. Teaching duties shall be assigned reasonably and fairly using a transparent method, and equitably among members of a unit. A list of considerations follows: the range of academic responsibilities, available human resources, rank and type of appointment, tenure and promotion procedures. The University acknowledged that Article 19.A.1.2.1 was a significant change. There is now a legal requirement that the dean will comply with the Guidelines, and there is a fairness obligation in assigning teaching duties.
149. Thus, there is a connection between Articles 19.A.2.4 and 19.A.1.2.1, but there is no hierarchy of provisions. They must be read together.
150. The other significant collective agreement change was the collegial process for adopting teaching guidelines under Article 19.A.1.3. The steps are prescribed. The dean shall seek advice from the members meeting in committee, prepare a draft, undertake consultations, prepare a report and submit the Guidelines to secret ballot. If they fail to pass, there is a second vote with a reduced threshold of one-third for approval. The University noted that the Guidelines are no longer unilateral. There is significant UMFA member input and a vote at the end of the process.
151. Article 19.A.1.3.5 sets out the considerations in developing the Guidelines. There are factors beyond teaching issues. These include the priorities of the academic program, tenure and promotion issues, practice of professional skills, research and scholarly work, assigned service, and work performed for other departments or faculties. This article does not say how research and service will be taken into consideration, only that they will be.

152. Article 19.A.1.3.6 mandates a standard teaching workload range as part of the Guidelines but without a definition of a standard range. Finally, the article states that the Guidelines shall “address the circumstances when the teaching load of a Member shall differ.” Again, the collective agreement does not define “circumstances”. The standard teaching load range and the circumstances when a load may differ are matters left to each faculty and its collegial process.
153. In his testimony, Hudson acknowledged that a member’s research projects or service work could result in a different teaching load being assigned. Nothing is prescribed or precluded in Article 19.A.1.3.6. There are no words denying the dean a zone of discretion in this regard. It is an accepted principle of interpretation that an important commitment is likely to be clearly and unequivocally expressed: *Pacific Press*, at para. 27. If there was an intention to limit the dean, it would have been stated in clear terms. The overall obligation is to assign teaching duties fairly (Article 19.A.1.2.1) and subject to the negotiated limitations (Article 19.A.1.4). The Association failed to show that the impugned provisions of the Education, Architecture and Arts Guidelines are in violation of the collective agreement.
154. The primary interpretive principle is that the plain and ordinary meaning of the words should be applied by the arbitrator. Article 19.A.1.3.6 requires that the Guidelines “address the circumstances” when teaching load may be varied. All the impugned provisions state these circumstances. The circumstances are considered by the dean and discussed with the member. The University and the Association are sophisticated parties and if they had intended the Guidelines to list details to be followed by the dean, they would have said so in Article 19.A.1.3.6 of the collective agreement.
155. The collegial process for adopting the Arts Guidelines was intensive and resulted in significant changes to the standard workload. This cannot be

ignored, said the University. Clause C.7 was contentious and was raised in Hudson's memorandum. It was discussed during the November 27, 2019 meeting. In the end, the collegial process culminated in a 61% approval of the Guidelines. This was the process sought by UMFA during collective bargaining, as described by Hudson. The Dean was required to comply with the Guidelines and he testified that he has done so.

156. Section 2 of the Arts Guidelines states the exceptions to normal teaching loads. Section 2(a) is specific: "faculty members with externally funded appointments, such as Canada Research Chairs or endowed and sponsored chairs, when the terms of appointment prescribe limited teaching responsibilities." However, section 2(b) is not specific: "faculty members who have assumed a leading role in major externally funded research projects." Section C.5 further addresses this exception but as Taylor testified, it is not possible to list all the possible circumstances that may call for the Dean's discretion. Section C.5 states that faculty playing a lead role, "usually" as Principal Investigator, will receive a three credit hour release. For a variety of other research projects and grants, release time is considered on a case by case basis. "Justification for the role and duties relevant to the overall team duties will be considered ...".
157. Section 2(e) is the exception for administrative duties and is detailed in sections D.1 and D.2. Heads and Directors receive reductions "allocated according to the size of the department/unit in the scope of its programs." Associate Heads, Graduate Chairs and Program Chairs will be included "in some cases". Directors of Centres and Institutes sponsored by the Faculty of Arts and other such units "may receive a reduction in teaching for this work." The Dean decides. Again, discretion is necessary because not all circumstances can be captured in the Guidelines.

158. The University rejected UMFA's description of C.7 as a "trap door." It was approved in a vote by UMFA members. Taylor testified he used it only twice. In 10-15 other cases, he met with members to discuss their insufficient research work, but it was not necessary to alter their teaching load. They responded to the discussion. The University noted there are about 200 members in Arts with research responsibilities, so the Dean's track record over a period of 10 years shows that C.7 has not been a "trap door". Moreover, the Dean always remains subject to the duty to assign work fairly and equitably.
159. As for the Architecture Guidelines, the Dean's discretion to alter load is tied to consideration of "the extent of a Professor's program of research, scholarly work or creative activities", which are relevant as aspects of the "full range of academic work" the Guidelines are to take into consideration: Article 19.A.1.3.5. Like Arts, the Architecture Guidelines were considered in a collegial process and approved by the members. There was no collective agreement violation.
160. The same conclusion applies to the Education Guidelines, said the University. The member's activity reports on research would be reviewed and a thorough consultation would take place with the member. The Guideline does address the circumstances when teaching load shall differ.
161. The University reiterated that there is no ambiguity in Article 19.A.1.3.6 or any of the related provisions on workload. In any event, the collective bargaining history does not provide any insight. The Article 19.A.1.3.6 language in issue ("address the circumstances") appeared at the very end of the negotiations on November 20, 2016 (Documents, Tab 24). In the prior exchange on November 16, 2016, this wording was not used by either party (Documents, Tabs 23 & 52). UMFA was referencing "conditions precedent" and the University had no language on this point. There was no discussion of what exceptions might be

acceptable. The evidence does not reveal any consensus on the meaning of “address the circumstances when the teaching load of a Member shall differ.”

162. The Arts Guidelines were in effect at the time of collective bargaining and were referred to by Juliano on September 7, 2016 (Documents, Tab 33, at p. 3). He described the Arts Guidelines as “detailed” and leaving “little room for the discretion of the department head or dean to deal with individual situations of either the faculty member or the department or the students.” Juliano also asked “How prescriptive are you expecting [the] guideline to be?” If this is deemed to be admissible as part of context, then the parties were aware of C.7, among other provisions, but chose not to limit or eliminate that aspect of decanal discretion. Juliano’s comments show he regarded the existing Arts Guidelines as already being unduly restrictive.

163. In summary, the context evidence reveals this was a difficult bargaining round for the parties. The University gave up some ground, but UMFA did not get everything it wanted. Certainly, the agreement would not be meaningless for UMFA if the impugned clauses in the Guidelines are upheld by the arbitrator. The Association’s members were empowered by the new provisions to craft these Guidelines in a collegial process, including a vote, and the deans were obligated to comply with the Guidelines as approved.

Association reply argument

164. On the relationship between Articles 19.A.2.4 and 19.A.1.2.1, and whether the more recent provision (1.2.1) is dominant, the Association submitted as follows. Article 19.A.1.2.1 constitutes a fettering of a previously unfettered discretion held by deans under Article 19.A.2.4. Previously, there was nothing more than a duty to consult the member. It is undeniable that the dean is now constrained. The Guidelines must address the circumstances when load will

differ, and deans must comply. This is more than an interrelationship of provisions.

165. Regarding the exceptions to standard workload in the impugned Guidelines, UMFA noted that except for C.7 all the Arts exceptions have some language or reference that gives clarity and certainty. C.7 violates the collective agreement. So do the Education Clause and the Architecture Clause. There is nothing in those clauses except open-ended discretion.
166. The Association disputed the University's assertion that the language of Article 19.A.1.3.6 only emerged at the very end of bargaining. On October 29, 2016, during mediation, Hudson articulated the proposal that eventually became Article 19.A.1.3.6: "We want a process into the determination of a normal workload and conditions under which that could vary. With a vote. If accepted, that's the new workload" (Documents, Tab 39, at p. 11).
167. The Association acknowledged that the parties were aware of Section C.7 in the Arts Guidelines. However, C.7 was never accepted as satisfactory under the new collective agreement language. UMFA required the initiation of a collegial process to revise the Arts Guidelines, and C.7 was a live issue. More to the point, the parties bargained the language of Article 19.A.1.3.6, which precludes the continuation of section C.7.

Analysis and conclusions

168. The grievances allege that teaching Guidelines approved in Education, Architecture and Arts violate the collective agreement and, in particular, Article 19.A.1.3.6. In each of these faculties, notwithstanding the collegial process followed to establish a standard teaching workload range, the dean has a discretion to alter an individual member's teaching load. Both parties took the

primary position that there was not an ambiguity in the wording of Article 19.A.1.3.6, the relevant portion of which is reproduced for convenience:

19.A.1.3.6 Guidelines of a faculty/school/college shall include a standard teaching workload range, and address the circumstances when the teaching load of a Member shall differ. ...

169. It is evident that the phrase “address the circumstances when the teaching load ... shall differ” may bear more than one meaning. The Association argued that this language essentially requires a Guideline to list specific situations in which a dean is permitted to alter teaching load. The impugned clauses fail on such a test because they include no lists and leave the dean with unbounded discretion. For its part, the University said the article only requires a Guideline to identify the nature of the issues (“circumstances”) the dean must take into account, while leaving the dean with residual discretion to alter a teaching load. In this case, according to the University, the Guidelines are valid because they do address the circumstances, namely the extent or sufficiency of a member’s research and scholarly work. The dean retains discretion to decide whether teaching load should be increased or decreased in light of the member’s research effort.
170. In *Winnipeg Regional Health Authority*, cited above, it was held that “collective agreement language is not ambiguous merely because it will bear more than one meaning or because the parties disagree about the correct interpretation. If the provision can be construed by reference to the words used, in the context of the agreement as a whole and the factual framework of the dispute, then no resort to extrinsic evidence is necessary” (at para. 97). In my opinion, Article 19.A.1.3.6 can be interpreted and understood in this fashion. It is not patently or latently ambiguous. The agreement as a whole must be considered as well as the context in which the parties negotiated the provision.

171. The court in *AUPE* instructed that “labour arbitrators must consider evidence of surrounding circumstances relevant to interpreting a collective agreement” (para. 43, emphasis in original). Both parties endorsed this proposition. They differed somewhat in characterizing the 2016 negotiating context. UMFA argued that the dispute was about ending open-ended decanal discretion to set teaching workload. The University struggled to maintain management discretion and flexibility, which it viewed as essential to maintaining academic programs in the face of reduced government funding. According to UMFA, the University capitulated under the pressure of job action and accepted binding teaching loads that would be set through collegial process. There would be defined circumstances for any change in a member’s load.
172. The University did not dispute that the teaching load issue was legitimate and important to UMFA. For the Employer, however, it was vital to avoid signing “a blank cheque” by ceding control over workload to the employees. The University described the negotiations and the outcome as more nuanced. Before the 2016 round, deans had broad discretion to set workload and assign duties. The Association made some gains in collective bargaining but there was give and take. Determining academic workload is a multi-faceted process with significant decanal authority and discretion, both before and after the new provisions. Yes, deans have been legally constrained to comply with the Guidelines, whereas before it was a matter of good management practice. However, a faculty member’s workload is always a balance of teaching, research and service, which the dean is obligated to consider fairly and reasonably.
173. Earlier in these reasons (at para. 120), I held that context and negotiating history evidence are admissible in the present case without a finding of ambiguity. The subjective intention of participants, however, is not a proper factor to consider.

Thus, I have not taken into account the expressed opinions of either bargaining team about the meaning and effect of the various proposals that were tabled.

174. The bargaining evidence does help to illuminate the priorities of the parties and the interests at stake. These are objective matters that were known at the time the contract was being formed. The language of the agreement must be construed with an understanding of this context. Decanal discretion over teaching load was constrained. Now there are binding Guidelines established by a collegial process, not a unilateral dean's decision and there are standard teaching workloads set by the Guidelines. Lastly, there is language in the collective agreement requiring the Guidelines to address the circumstances when the teaching load of a member shall differ. As noted earlier, context does not eclipse text. The meaning of Article 19.A.1.3.6 remains to be determined by considering the plain and ordinary meaning of the words chosen, and by applying established principles of interpretation in context.
175. Much was said about hierarchy and whether Article 19.A.1.2.1 ("dean/director shall comply with the Guidelines") overrides Article 19.A.2.4 (duties may vary "as determined by the dean/director in consultation" with the member). I tend to the view expressed by the University that the provisions are inter-related and must be read together. The dean has authority under Article 19.A.2.4 but must exercise that authority lawfully, which includes compliance with the Guidelines. In any event, this question is not central to resolving the grievances.
176. Neither is it necessary or advisable to declare the meaning of Article 19.A.1.3.6 for all purposes. The arbitral mandate is to resolve the substance of the matter in dispute. The grievances allege that the three impugned clauses in the Guidelines violate Article 19.A.1.3.6. of the collective agreement. If this is true, then these and other Faculties will likely wish to revisit the process for

altering a member's teaching load. This award will hopefully provide some guidance, but it will not necessarily answer all possible questions.

177. The predominant reference point for arbitral interpretation is the language used in the agreement. Language is normally construed in accordance with its plain and ordinary meaning: *Parkland Regional Health Authority*, cited above. I find that all the impugned provisions fail to comply with the collective agreement because they lack the specificity implicit in the words "address the circumstances" when the load shall differ.
178. Article 19.A.1.3.6 makes it mandatory for Guidelines to include a standard teaching workload range. The article also enables individual variations. If "address the circumstances" meant no more than "consider the appropriate combination of teaching, research and service", it would essentially be a restatement of the pre-existing deans' authority in Articles 19.A.2.3 and 19.A.2.4. In terms of traditional principles of interpretation, this would violate the rule that meaning and effect should be given to all words used: *Pacific Press*, cited above).
179. Under the *Sattva* contextual approach, the surrounding circumstances of the 2016 round suggest that the parties did not provide for a standard teaching load, only to negate or dilute the thrust of the new arrangement in the next breath. Contracts are not made in a vacuum, as the court said in *Sattva*. The Association wanted a fixed maximum teaching load. The University wanted no restriction on the management right except consultation. The dispute was ultimately settled with a new contractual regime that compromised the two positions. Standard teaching loads would be set collegially (with a lower approval threshold to break a stalemate) but a member's load could be varied if the Guideline addressed the circumstances when the load shall differ. The approach that solved the labour dispute was both prescriptive and flexible.

180. “Address the circumstances” does not mean “provide an exhaustive list”. If that was the intent, the parties could easily have said so. At the same time, it does not invite open-ended discretion. The circumstances that may justify an altered workload must be identified in the Guidelines. Taking into account the context and surrounding circumstances, as well as the language of the collective agreement overall, I find that the phrase “address the circumstances” in Article 19.A.1.3.6 must be read as requiring a structured exercise of decanal discretion regarding teaching load. Most of the exceptions to teaching load or norms in the Guidelines appear to fall within this concept. The impugned provisions do not.
181. The Education Clause refers to “a more differentiated approach” to equal weighting of teaching, research and service, but provides no indication of what circumstances would justify an involuntary change of teaching load. The member’s activity reports would be reviewed and the dean would consult the member. However, the Education Clause does not “address the circumstances” at all. This violates the collective agreement.
182. The Architecture Clause refers to Article 19.A.2.4 of the agreement and baldly states that “the extent of a Professor’s program of research, scholarly work or creative activities may result in the teaching assignment being increased or decreased outside of the range of these guidelines.” With no stated criteria or objective standards, this formulation fails to qualify as a structured exercise of discretion. It does not “address the circumstances”.
183. The Arts Clause comes closest to addressing the circumstances when load shall differ by referencing a lack of “significant” research or service activity. However, there is nothing in the Clause to indicate the basis upon which the dean would assess the significance of a member’s activity. As Taylor testified,

“It’s my call as Dean.” Additional load could be added “where appropriate”, which again is undefined.

184. I agree with UMFA that the Arts Clause is so subjective that it fails to meet the contractual requirement to “address the circumstances”. Moreover, there is no limit to the quantum of teaching load that could be added. By contrast, section C.7 of the Guideline states that a voluntary teaching-focussed workload will normally involve a three credit addition in teaching responsibilities and a corresponding reduction in research and/or service. Other stated exceptions in the Arts Guidelines are specified or reference objective criteria. They do not call for untrammelled discretion by the dean. Taylor conceded under cross examination that section C.7 is different.
185. Dean Taylor’s evidence that the Arts Clause has only been used twice in ten years was not compelling. It does not appear that section C.7 meets a pressing administrative need. In any case, faculty members are subject to performance review and employment discipline if they fail to meet reasonable expectations, including carrying out their research and service obligations.
186. It may be feasible to redraft the impugned Guidelines to comply with the collective agreement. The Association stipulated that it was not denying the possibility, but said the present version cannot stand.
187. In conclusion, I accept UMFA’s argument that cumulatively, the impugned Guideline clauses are tantamount to saying, “The Dean may assign a greater or lesser teaching load when the Dean believes the circumstances so require.” This has the potential to undermine the standard teaching workload range and was not what the parties contemplated in the 2016 settlement.

Award and order

188. The grievances are allowed. It is declared that the Education Clause, the Architecture Clause and the Arts Clause violate the collective agreement.

189. The University will provide the Association with a copy of Teaching Guidelines from all faculties and schools across the University.

190. Jurisdiction is retained to award other consequential relief and generally to implement this award or address unresolved issues.

ISSUED on June 24, 2021.

A handwritten signature in blue ink, appearing to read "A. Pelts", with a long horizontal flourish extending to the right.

ARNE PELTZ, Arbitrator

