Form 7.05

2021 No. 505243

Supreme Court of Nova Scotia

Between:

Dalhousie Faculty Association

Applicant

and

Board of Governors of Dalhousie University and Paula Knopf, an arbitrator appointed pursuant to the *Trade Union Act*, R.S.N.S. 1989, c.475

Respondents

Notice for Judicial Review

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Request for judicial review

The Applicant requests judicial review of the decision dated February 26, 2021 by Paula Knopf, an arbitrator appointed pursuant to the *Trade Union Act*, R.S.N.S. 1989, c.475.

Decision-making authority:
The Decision is dated February 26, 2021.

The Decision was first communicated to the Applicant on February 26, 2021.

The authority under which the Decision is made is the *Trade Union Act*, R.S.N.S. 1989, c.475.

Attached to this notice is a copy of the Decision.

Grounds for review
The applicant seeks review on the following grounds:

1. The Decision is unreasonable because it is not based on an internally coherent and rational chain of analysis, and because it is not defensible in light of the law and the facts.

2. The Arbitrator did not meaningfully address a key argument of the Applicant Dalhousie Faculty Association ("Association"), which was that the unilateral direction of the Board of Governors of Dalhousie University ("Board") to the vast majority of Association members that they work from home for the fall and winter terms of the 2020-2021 academic year was a significant change in general working conditions that could not be made without the agreement of the Association under Article 19.03 of the Collective Agreement.

3. Had the Arbitrator addressed this key issue, she could have and would have found that the unilateral direction of the Board to the vast majority of the Association members that they work from home, in the absence of consent by the Association, was a significant change in general working conditions in violation of Article 19.03 of the Collective Agreement. The Arbitrator found that the phrase "general working conditions" would "certainly" include the specific terms and conditions that are set out in the Collective Agreement. The Collective Agreement includes Article 21 – Off-Campus Teaching, in which the parties have explicitly agreed that the majority of the work of Association members will take place within the campus of the University, and unless off-campus teaching was assigned in accordance with existing arrangements made prior to the signing of the Collective Agreement, any arrangements for assigning off-campus teaching made subsequent to the signing of the Collective Agreement would require the agreement of the member.

4. The Arbitrator concluded that, while the unilateral direction of the Board to the vast majority of Association members that they deliver their courses on-line for the fall and winter terms of 2020-201 was a significant change in general working conditions within the meaning of Article 19.03, in-person delivery of those courses was not "certain" as required by Article 19.03 because "nothing in the Collective Agreement speaks to how courses are to be delivered." This conclusion is inconsistent with the Arbitrator's finding

that the phrase "general working conditions" in Article 19.03 must encompass something broader than the terms of the Collective Agreement, as Article 8.06 of the Collective Agreement already prohibits unilateral amendment of the Collective Agreement.

5. The Arbitrator's conclusion that in-person delivery of courses was not "certain" as required by Article 19.03 is not defensible in relation the undisputed facts, which were that, for decades and likely for the entire history of the University, the vast majority of Association members taught students in-person.

6. The Arbitrator relies heavily on Article 21.01 under Article 21 – Off-Campus Teaching to support her conclusion that because the Board can direct Association members to work off-campus, it can direct them to teach their courses on-line. This is an unreasonable interpretation of Article 21, which explicitly states in Article 21.01 that the majority of work will take place within the University campus, and in Article 21.02 requires the agreement of the member before assigning them to work off-campus, in the absence of a pre-existing arrangement made prior to the signing of the collective agreement, and states that members whose employment includes responsibility for off-campus teaching on a regular or continuing basis shall have such duties set out in their individual letters of appointment.

7. The Arbitrator failed to meaningfully address another key argument of the Association, which was that the parties' Collective Agreement, and in particular Article 21, "occupied the field" in relation to Association members' location of work, and therefore that the Board violated the Collective Agreement when it unilaterally directed the vast majority of the Association's members to work from home during the fall and winter terms of the 2020-2021 academic year. Had the Arbitrator addressed this key issue, she could have and would have found that the unilateral direction of the Board to the vast majority of the Association members that they work from home, in the absence of consent by the Association, was a violation of the Collective Agreement.

8. The Arbitrator's conclusion that the Board must be able to implement emergency plans to protect health and safety without waiting for the Association's consent is not internally coherent or based on a rational chain of analysis, and is not defensible in light of the facts or the law. The Arbitrator found that Article 19.03 prohibits the Board from making significant changes to general working conditions that are reasonable, certain and known, absent mutual agreement of the parties. The Arbitrator found that Article 8.06 prohibits the Board from unilaterally amending the Collective Agreement. The Arbitrator stated elsewhere that "the exercise of management prerogative to implement emergency measures to maintain a safe University environment must not override the Collective Agreement." The position of the Association was that any return to Campus would have to abide by public health orders and be approved by the Province. There was no evidence that it was necessary, for health and safety reasons, for the Board to refuse to comply with Article 19.03 and to refuse to obtain the

agreement of the Association before making significant changes to the general working conditions of Association members.

9. The Arbitrator's obiter comments regarding the appropriate remedy are unreasonable, in light of the Association's right under Article 19.03 to consent to any significant change in general working conditions that are reasonable, certain and known, a different and stronger right than a right to discuss or consult.

10. Such further and other grounds as counsel may advise and that this Honourable Court may permit.

Order proposed

The applicant requests:

1. An Order quashing and setting aside the Decision.

2. A Declaration that the Respondent Board of Governors of Dalhousie University violated the Collective Agreement when it unilaterally, and without the agreement of the Applicant Dalhousie Faculty Association, directed the vast majority of Association members to work from home and to teach remotely for the fall and winter terms of the 2020-2021 academic year and an Order that the Board meet with the Association forthwith to negotiate in good faith and reach agreement with the Association regarding remote work and remote teaching. Alternatively, an Order remitting the grievance to be determined by a different arbitrator.

3. The Applicant's costs.

4. Any other relief or remedy that the Applicant requests and that this Honourable Court considers just in the circumstances.

You may participate

You may participate in the judicial review if you file a notice of participation no more than ten days after the day a copy of this notice for judicial review is delivered to you. Filing the notice entitles you to notice of further steps in the judicial review.

Record to be produced

The Applicant foresees no difficulty obtaining the record. The Applicant will assist the decision-making authority in producing the record and believes it will be delivered to the court and the respondents no later than May 3, 2021. The record will be the will-say statements, documents and written submissions provided to the decision-maker by the parties.

Notice to decision-making authority

The Respondent, Paula Knopf, is required by Civil Procedure Rule 7 – Judicial Review and Appeal to file one of the following no more than five days after the day the decision-making authority is notified of this proceeding by delivery of a copy of this notice for judicial review:

- a complete copy of the record, with copies of separate documents separated by numbered or lettered tabs;
- a statement indicating that the decision-making authority has made arrangements with the applicant to produce the record, providing details of those arrangements, and estimating when the return will be ready;
- an undertaking that the decision-making authority will appear on the motion for directions and will seek directions concerning the record;
- a summary of reasons given orally without a record and your certificate the summary is accurate, if you gave reasons orally and not on record.

If you fail in this regard, a judge may order costs against you including a requirement that you indemnify each other party for any expenses caused by your failure, such as expenses caused by an adjournment if that is the result.

Stay of proceedings or other interim remedy

The Applicant will not make a motion for a stay of the enforcement of the decision under judicial review.

Filing and delivering documents

Any documents you file with the court must be filed at the office of the Prothonotary, 1815 Upper Water Street, Halifax, Nova Scotia (telephone #(902) 424-4900).

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an ex parte motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information

The applicant designates the following address:
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Documents delivered to this address are considered received by the applicant on delivery.

Further contact information is available from the prothonotary.

Motion for date and directions

At 11:00 a.m. on May 11, 2021, the Applicants will appear before a judge in Chambers at the Law Courts, 1815 Upper Water Street, Halifax, Nova Scotia to make a motion for an order giving directions for the judicial review including a date and time for the hearing of it. The judge may make an order or provide directions in your absence if you or your counsel fail to attend, and the court may determine the judicial review without further notice to you.

Signature

Signed at Halifax, Nova Scotia this 30th day of March, 2021.

Gail Gatchalian, Q.C.,
Counsel for the Applicants

Prothonotary's certificate

I certify that this notice for judicial review was filed with the court on March 30 ,2021

Prothonotary

JESSICA BOUTILIER
Prothonotary

Schedule "A"

IN THE MATTER OF AN ARBITRATION

BETWEEN

DALHOUSIE FACULTY ASSOCIATION

(the Association or DFA)

and

THE BOARD OF GOVERNORS OF DALHOUSIE UNIVERSITY

(the Board or the University)

Grievance Re: Existing Practices

A W A R D

Paula Knopf – Arbitrator

Appearances:

For the Board:	Nasha Nijhawan, Counsel Kelly E. McMillan, Counsel Laura Neals, Director, Academic Staff Relations
For the Association:	Gail Gatchalian, Q.C., Counsel June Mills, Counsel Dr. David Westwood, President, DFA Barb MacLennan, Professional Officer, DFA

The hearing of this matter was conducted by way of Written Submissions and a video hearing on January 25, 2021.

1. COVID-19 has had a devastating impact on individuals, our health care systems, our institutions and society as a whole. It has certainly affected universities and changed campus life for faculty, staff and students. The Dalhousie University community is no exception.

2. In the Fall of 2020, Dalhousie University's Board of Governors (the 'Board' or the 'University') announced that the vast majority of the Dalhousie Faculty Association's ('DFA' or the 'Association') Members were required to work from home and teach their courses remotely for the 2020/2021 academic year. Their access to Campus was also significantly restricted. In response, the DFA filed a policy grievance alleging that absent its agreement, the Board was prohibited by the Collective Agreement from making significant changes to the working conditions of DFA Members. The Board defended its actions by asserting that its decisions were reasonable, necessary and in accordance with the Collective Agreement.

3. This Award resolves the issues arising out of the grievance. As the following text reveals, the issues are important and complex. To the Parties' credit, they presented this case on the basis of extensive "witness statements" and written briefs. They clarified their submissions in a hearing that was of great assistance to this Arbitrator. The Parties' agreement to proceed in this manner resulted in an efficient and effective presentation of these significant issues.

I. THE FACTUAL BACKGROUND

4. There is no dispute about the relevant facts. The following summary is based on the witness statements provided by the Parties.

5. Dalhousie University is the largest university in Nova Scotia. It has more than 19,000 students enrolled annually in 13 faculties, with approximately 6,000 staff, including approximately 1,000 Members of the DFA bargaining unit. Dalhousie is the only

university in Nova Scotia with accredited professional programs in Dentistry, Medicine and Law, as well as other health professions such as Nursing.

6. The Dalhousie Faculty Association is the exclusive bargaining agent for the Members of this bargaining unit, consisting of Professors, Instructors, Librarians and Counsellors.

7. The duties of Professors include teaching, research, scholarly, artistic and professional activity, academic administration within the University and professional responsibilities outside the University. Professors' duties are predominantly devoted to teaching and research. The duties of Instructors consist primarily of teaching.

8. Positive evidence of actual achievement and accomplishment in research and scholarly activity is critically important to an academic career. These factors affect appointments to all levels of academic positions, promotions, tenure, applications for research funding and reputations. In the normal course, teaching, research and other scholarly and artistic pursuits are carried out smoothly throughout the calendar year. However, in the early months of 2020, everything changed when COVID-19 arrived in Canada.

9. Along with most schools, businesses and institutions in the country, this University had to shut down in mid-March 2020 because of the need to respond to the global COVID-19 pandemic. In the weeks that followed, academic continuity was maintained for students by switching to remote learning. DFA Members quickly transitioned to remote teaching. Courses were presented "on-line" through various synchronous and a-synchronous methods. All faculty and staff were told to work from home, except for staff considered by the University's Board of Governors to be essential. By the end of March, all on-Campus research was suspended, except research that was time or resource sensitive.

10. In mid-March 2020, Dr. David Westwood, the DFA President, and other Members of the DFA executive and staff started to have weekly meetings with Laura Neals, Director

of Academic Staff Relations, to discuss how the Board's decisions with respect to COVID-19 would impact Members. They met together on March 20, March 27, April 3 and April 17, 2020.

11. The Parties also convene monthly for Association-Board Committee (ABC) meetings. The ABC is the Parties' joint committee, constituted under the Collective Agreement to consider issues relating to the interpretation and application of the Collective Agreement. In April 2020, the DFA began to raise concerns about the Board's approach to COVID-19 and the impact it was having on Members. Some of the issues the DFA raised related to Members' access to Campus and travel budgets and the effect of the situation on sabbatical leaves.

12. As the DFA's COVID-19 concerns mounted, the regular ABC meetings became very hectic and lengthy. As a result, the Parties agreed to hold ABC-COVID-19 meetings between their regular monthly ABC meetings in order to focus only on COVID-19 issues. They discussed the type and level of resources, supports and services that needed to be available to Faculty Members, including:

- Expense reimbursement for conferences cancelled due to COVID-19;
- Expense reimbursement for home office equipment and supports;
- Carrying forward unspent travel funds;
- Supports available to Faculty for on-line teaching, including a process to allow Faculty Members to book space on Campus to record on-line lectures launched by the Board in late June 2020;
- The deferral of sabbaticals;
- The use of student surveys and evaluations ("SRIs") for the purpose of consideration for reappointment, promotion and tenure;
- The process for requesting accommodations, including relating to family status obligations; and
- The process for requesting to carry forward unused vacation time.

13. In May 2020, the Board determined that it would not be possible to "safely" return all students, faculty and instructors to Campus for face-to-face instruction for the Fall 2020 term.

14. On May 21, 2020, the Executive Director of the Environmental Health and Safety department addressed the Environmental Health and Safety Committee advising that it was necessary for all of the University community to stay at home, wherever possible, in order to eliminate the workplace hazards of COVID-19. The same day, the University's President, Dr. Deep Saini, announced that the Fall 2020 term would continue to be predominantly on-line.

15. In response, Dr. Westwood sent a letter to Dr. Saini stating that the DFA considered the Board's announcement to be a significant change in the working conditions of Members of the DFA and that the DFA wanted to negotiate a Letter of Understanding by July 1, 2020 to ensure that its Members' rights and interests were properly reflected in the administration's response to COVID-19. The DFA wanted a commitment to meet and review the Board's announced measures in the event that COVID-19 necessitated the continued cancellation of face-to-face instruction. Efforts to conclude a comprehensive Letter of Understanding within this timeframe were unsuccessful.

16. The Board then moved from what it called a "crisis management approach" to a "recovery plan". It prioritized COVID-19 research and research that was time or resource sensitive that had to continue on Campus, in-person instruction necessary for accredited health professional programs, and the health and safety of the University's essential personnel, including its custodial staff responsible for sanitizing common spaces. The University's stated objective was to remove the hazard of COVID-19 on Campus by keeping as many staff and students at home as possible.

17. On June 9, 2020, Dr. Frank Harvey, Acting Provost and Vice-President Academic, and Ian Nason, Vice-President, Finance and Administration, announced that the return to Campus would occur in a "phased approach". The first phase was limited to individuals required to work on Campus in order to continue operation of their unit or research space. The majority of faculty and staff were told to continue to work remotely. Requests to return to Campus were evaluated by a "Return to Campus Committee". A

Return to Campus Plan and Return to Research Plan were developed to guide decision-making about access to Campus by students, staff and faculty, taking into consideration public health and occupational health and safety requirements. The Return to Campus Committee managed the access requests and returned more than 250 principal investigators to their lab facilities on Campus.

18. The Parties were able to reach some agreements at the ABC-COVID-19 meetings regarding matters with respect to the COVID-19 measures that impacted the operation of the Collective Agreement. In particular, on June 15, 2020, the Parties released a joint memorandum announcing that there would be up to two years' deferral of the timelines relating to Faculty Members' reappointments, tenure, continuing appointments or 'appointments without term' applications. The Parties continued their regular ABC meetings as well as their ABC-COVID-19 meetings and informal discussions until August 2020.

19. There is some dispute about the adequacy of levels of support that were available to Faculty Members during this period and in the months that followed. It is not necessary to decide which of the DFA's or the Board's witnesses' statements are the most reliable. Credibility is not an issue in this case. The statements simply reflect the Parties' witnesses' respective perspectives on the same situation. The Board's witness statements indicate that the Board did try to provide support for academic research through the University's Libraries. Faculty were also given the ability to access Campus spaces to record lectures, or to access their offices, as necessary. The Board also made efforts to anticipate the needs and respond to concerns expressed by Faculty Members. The Board's witness statements described the following measures that were put in place:

- Significant additional financial resources were invested in additional teaching assistant and research assistant supports across faculties;
- Significant additional financial and personnel resources were invested in providing support for on-line course design and delivery, including educational developers and course builders;

- Accommodations for COVID-19 related impacts were offered to more than twice the regular number of faculty and staff through Human Resources;
- Library services were maintained, including document delivery, curbside pickup and in-person access;
- Study and workspaces were offered in flex areas on Campus, including Libraries;
- A system for gaining access to faculty workspaces was offered as far as possible given occupational health and safety and public health restrictions; and
- Reappointment, tenure and promotion timelines were altered and relevant standards and metrics were modified to reflect COVID-19 realities.

20. Juxtaposed to this evidence were the DFA's witness statements outlining the significant amount of frustration and stress experienced by Faculty Members who had to work from home, deliver courses on-line and who were unable to have unrestricted access to their offices or the Campus after March 2020. The DFA witness statements asserted:

- Faculty were working from home, sometimes in their kitchens or living rooms, without proper equipment such as proper chairs or desks, and sometimes without a door to close while living with others such as young children.
- Faculty had to rely on internet access at home, which is not always sufficient or reliable.
- Faculty had to learn new technology and had to troubleshoot technology, without in-person technological support.
- Faculty had to develop new pedagogy.
- Faculty were not permitted, unless individual exceptions were granted, to access the Campus, labs, libraries or their offices.
- The time they spend on their teaching duties increased significantly because of the change to remote teaching from home.
- The time they spend supporting students experiencing difficulties with technology, submitting assignments, and facing stress and anxiety increased significantly.
- Research activities were significantly curtailed or stopped altogether because of restricted access to Campus and because the time they spent on teaching duties due to the change to remote teaching from home increased significantly.
- The time that they spent engaging in academic administration and professional activities was significantly curtailed or stopped altogether.
- They were socially isolated from colleagues and their students.

To illustrate the differences in academic life created by the changes, the DFA witnesses described the working conditions of the vast majority of DFA Members prior to March 2020 as follows:

- They taught students in-person on Campus or on other University sites. The only exception to in-person teaching was if a member was specifically assigned to teach an on-line course, which would be the exception and not the rule.
- They did not have experience with or training to perform remote teaching.
- They were not familiar with and did not have training to use the technology required to deliver remote teaching and had not developed pedagogy for remote teaching.
- They had unrestricted access to Campus, including to their offices, classrooms, research facilities, such as labs and libraries; access to Board-provided equipment, such as computers, software, desks and chairs; the use of Board-provided internet access; and in-person support, such as technical support.
- They were required to dedicate time to research, scholarly activity, and professional responsibilities, such as serving on committees, the vast majority of which took place in-person on Campus.
- Decisions impacting a member's workload would typically involve a discussion between the member and their Department. Typically, a member would not agree to teach an on-line course without participating in discussions as to the support, resources and time they required for such an assignment. On-line education was a planned and well-defined area. The few members who delivered on-line courses recorded their lectures on Campus.

21. Many DFA Members expressed frustration over the amount of time they had to invest in creating on-line course material that failed to work properly or as intended, due to technical difficulties. The time invested in recording and then re-recording lectures meant teaching duties occupied more time than in the past.

22. Further, DFA Members had to develop new ways to create course content in real-time to substitute for activities they would have done in the past by drawing on a whiteboard or a chalkboard. This included having to create and execute new ways to organize course content, such as modules that could stand alone, and to create written materials to accompany video or graphic content. Traditional forms of assignments, such as group assignments, also posed novel problems in the on-line environment.

Members had to devise new ways to evaluate students to account for new risks of cheating in an on-line environment.

23. Members also voiced concern over the fact that their research and scholarly activities were "significantly curtailed" by the changes. They said that they had to devote "substantial" time and effort to prepare applications to return to Campus to resume research work. For some Members, the application to return to Campus was said to take 30 to 40 hours to complete.

24. The Board indicated that it expected on-line course instruction to be delivered in a "highly polished, professional manner". As a result, the DFA complained that many Members did not have the kind of equipment at home that was required to produce highly professional-looking lectures and course materials. Prior to March 2020, DFA Members had on-Campus technical support if they encountered technological issues with respect to course delivery in their classrooms. After March 2020, some Members felt pressure to acquire and master audio visual and information technology equipment on their own. It was said that the pressure to produce highly polished course materials in an on-line setting contributed substantially to Members' workloads.

25. The DFA conducted a survey that canvassed the impact of the changes on Members' workload and work/life balance. The DFA then issued a Survey Report in September 2020 based on responses from 630 Members, or 67% of the membership. The Survey revealed the following:

- 86.25% of respondents indicated that their workload had increased compared to the previous academic year
- 69.55% indicated that their workload had substantially increased
- 86.85% of respondents cited transitioning face-to-face courses to an on-line format has contributed to an increase in work time
- 60.88% cited increased support for students and 83.1% cited time being required to learn to use new technology for remote work as the contributing factors to their increase in work time
- 62.44% indicated that their scholarly productivity had decreased
- 34.16% indicated that their scholarly productivity was substantially lower than the previous year

- 90.41% indicated that their stress level was higher than the previous year
- 60.12% indicated their stress levels were substantially higher
- 78.13% indicated that their ability to maintain a healthy work/life balance has decreased
- 45.87% stated their ability is substantially lower than the last year
- The majority responded that, if they were given the choice to work in their Campus office in the Fall of 2020, they would have done so
- 80% of those whose usual research space is on Campus stated that if they were given the choice to use their usual research space on Campus in the Fall of 2020, they would have done so.

The DFA believes that this information established that there were significant changes in the general working conditions of DFA Members, in terms of the location of their work, the in-person nature of teaching, their access to the University Campus, and their ability to engage in research and scholarly activity.

26. In early July 2020, the DFA pressed for a meeting with Dr. Harvey to discuss plans for the Winter 2021 term and reasserted that the Board was required to obtain the agreement of the DFA before making any significant change to Members' working conditions.

27. Dr. Harvey and Ms. Neals agreed to meet with Dr. Westwood and other DFA staff and representatives for one hour on July 28, 2020. During this meeting, Dr. Westwood stressed that the DFA required an official, formalized role in the discussion of Members' terms and conditions of employment and that the ABC meeting was the appropriate forum for these issues. Dr. Westwood requested that Dr. Harvey respond to the DFA's concerns in writing.

28. On August 12, 2020, Dr. Harvey sent Dr. Westwood a letter addressing the July 28, 2020 meeting. Dr. Harvey denied that the Board's decision to deliver courses predominantly on-line was a wholesale change in the duties of Faculty. Dr. Harvey acknowledged in the letter "that there has been a significant change to our workspaces," but went on to state that these changes were reasonable and necessary. Dr. Harvey

agreed to "discuss possible options" for the Winter term. Unfortunately, those discussions could not be convened before events overtook the Parties.

29. It soon became clear that the pandemic would not be over before the Winter 2021 term and that no vaccine would be available to alleviate the public health concerns.

30. On August 17, 2020, the Board confirmed that it would not relax restrictions on Campus access during the Winter 2021 term. In consultation with the Associate Deans Academic of each Faculty, the Board determined which courses had to be delivered in person to maintain academic continuity and which ones could be delivered on-line. On August 17, 2020, Dr. Harvey announced that the Board's goal for the Winter 2021 term was to provide a mix of on-line and in-person instruction. This memorandum was published without the agreement of the DFA.

31. As a result, in the Fall of 2020, 84 experiential learning courses were delivered in person to 1,600 students in the Faculties of Health, Medicine and Dentistry. In the Winter of 2021, a total of 169 courses were offered on Campus, with additional offerings in the School of Performing Arts, to a total of 2,500 students. The remainder of courses were only offered on-line.

32. On August 17, 2020, the DFA filed an informal policy grievance protesting the Board's unilateral decisions that imposed significant changes to the general working conditions of DFA Members without the agreement of the DFA.

33. On August 21, 2020, Dr. Saini announced that Phase I of Return to Campus was complete and that Phase II was underway. During Phase II, President Saini declared: "Employees who can work from home will continue to work virtually in this phase as we continue to target on-Campus numbers to be under 25% of our population to help limit the potential spread of COVID-19."

34. On October 1, 2020, Dr. Harvey announced that the majority of courses for the Winter term, 2021 would be on-line. On October 13, 2020, the formal grievance that gives rise to this matter was filed.

35. The University maintains that the DFA was consulted and kept informed of the University's decision-making process throughout this period in various forums, including direct communication with leadership, discussions at the Association-Board Committee meetings, the special ABC-COVID-19 meetings, presentations to Senate, and meetings of the joint Environmental Health and Safety Committee. The University also pointed out that the DFA's specific requests relating to COVID-19 supports for DFA Members were addressed in collective bargaining throughout the Fall and resulted in a tentative agreement on January 8, 2021 that has now been ratified by both Parties. Their new Collective Agreement includes a COVID-19 Letter of Understanding (LOU) that addresses, *inter alia*:

- Reimbursement for and access to home office equipment and supports;
- Provision of personal-protective equipment;
- The deferral of applications for reappointment, tenure, continuing appointment, or appointment without term as a result of COVID-19 work disruption;
- Travel funds;
- Academic freedom;
- An extension of the timeline to determine members' workload for the academic year 2020/21, to allow for renegotiations of workload;
- Accommodation requests for members required to work from home;
- Additional vacation time in recognition of the additional demands placed upon members during the COVID-19 pandemic.

II. THE COLLECTIVE AGREEMENT

36. The relevant provisions of the Collective Agreement are as follows:

Article 5: Recognition

5.01 The Board, pursuant to the certification by the Nova Scotia Labour Relations Board, recognizes the Association as *the sole and exclusive bargaining agent for all Members*...

Article 8: Association-Board Relations

8.01 (a) Unless otherwise specifically provided for in this Collective Agreement, the Board shall not enter into any agreement with any Member or group of Members respecting their terms and conditions of employment except as approved by the Association-Board Committee, set up in accordance with Clause 8.04.

...

8.06 The Association-Board Committee shall consider matters referred to it by the Parties, by Members, or as initiated by members of the committee, including questions of interpretation or application of the Collective Agreement. Changes in, or amendments to, this Collective Agreement may be made by written agreement between the Parties on the recommendation by a concurrent majority of the committee. A concurrent majority is reached by the committee when at least two members of the committee from the Association and two members of the committee from the Board vote in favour of a motion. Any agreement reached by the committee, by concurrent majority, on the interpretation or application of this Collective Agreement shall be binding when confirmed in writing and signed by the two co-chairpersons.

Article 12: Instructors

12.06 Instructor Members shall disseminate knowledge and understanding through teaching and shall carry out such other activities as may be defined by the Collective Agreement as well as by the job descriptions for their positions.

Article 15: Tenure, Continuing Appointment and Appointment without Term

15.03 (a) In considering a Member for appointment with tenure, general criteria assessed by the committees and administrative officers responsible include: academic and professional qualifications, teaching effectiveness, contributions to an academic discipline, ability and willingness to work with colleagues so that the academic units concerned function effectively, and personal integrity. The Report on Tenure (approved by Senate Council February 1971 and by the Board September 1971) shall be used for guidance respecting the criteria in considering tenure to the extent it does not conflict with this Collective Agreement.

Article 16: Promotion

16.06 (a) Except for instructor Members, the criteria for promotion of Members of the teaching and research staff shall be the same as those for tenure. Promotion is based upon positive evidence of actual achievement and accomplishment in those duties and responsibilities which, in accordance with Clause 20.04, constitute the individual Member's workload, and not on years of service. Where

promotion is being considered to the rank of Professor, the standards in Clause 16.11 shall also apply.

16.11 ... Subject to Clause 16.06(a), promotion to the rank of Professor shall be recommended only when solid evidence is established that the Member has attained standards of competence in both teaching and scholarship appropriate to a new full Professor and that the Member has attained and is likely to maintain a high level of effectiveness in teaching and/or scholarship and that their teaching or scholarship represents a significant contribution to their discipline or to the University.

Article 17: Rights, Responsibilities and Professional Relationships

Duties
17.08 The duties of Members will, unless otherwise specified in a Member's letter of appointment, normally fall within the following categories:
undergraduate and/or graduate teaching;
research, scholarly, artistic and/or professional activity;
academic administration within Dalhousie University;
professional responsibilities outside Dalhousie University.

Research, Scholarly, Artistic and/or Professional Activity
...
17.18 Unless otherwise specified in a Member's letter of appointment, Members have the right and responsibility to devote a reasonable proportion of their time to research, scholarly, artistic and/or professional activities. Insofar as it is within its power, the University will endeavour to facilitate these activities.

Article 19: Existing Practices

19.01 The Board or its agents shall not unilaterally alter existing practices and processes for decision-making, consultation and recommendation in Departments and similar units, or alter Departmental, Faculty or similar structures which support teaching and research. Changes may be made in accordance with existing processes that are reasonable, certain and known or in accordance with processes for change approved or authorized by the Senate within its statutory jurisdiction.

19.02 The Board acknowledges its responsibility to maintain facilities, services and general working conditions which support the effective discharge by Members of their responsibilities as specified in Article 17. The Board may determine the manner in which, and the level at which, facilities and services are provided to Members, on the understanding that the Board will endeavour to maintain reasonable levels of working space, secretarial and other support services, including telephones, computing, printing, duplicating and library services, technical services and teaching and research assistance. The

reasonableness of levels of services may be measured by consideration of financial resources of the Board and past practice in the provision of such services.

19.03 Any significant change in general working conditions which are reasonable, certain and known may be made by agreement of the Parties through the Association-Board Committee. Any significant change in the levels of facilities and services provided, which levels are reasonable, certain and known, shall be discussed by the Parties through the Association-Board Committee and an opportunity shall be provided for the Association's comments and suggestions about a proposed change to be considered before the change is introduced.

19.04 The onus of establishing a practice or process within the terms of Clause 19.01 or general working conditions or level of facilities and services within the terms of Clauses 19.02 and 19.03 shall rest upon the person or persons alleging its existence and it must be shown that the alleged condition, level, practice or process is reasonable, certain and known by the Board or its agents (including Department Chairpersons or Departments and similar units) and therefore is deemed to have been authorized by the Board.

Article 20: Workload

20.04 A Member's workload normally includes, in varying proportions, the duties indicated in Article 17, namely:
undergraduate and/or graduate teaching;
research, scholarly, artistic and/or professional activity;
academic administration within Dalhousie University;
professional responsibilities outside Dalhousie University.
Unless otherwise indicated in the Member's letter of appointment, or unless this conflicts with established practice within the Member's Department or other unit, (a) and (b) constitute the Member's principal duties.

Article 21: Off-Campus Teaching

21.01 While the Parties recognize that the majority of the work of Dalhousie University will take place within the Campus of the University, including affiliated hospitals, laboratories and other related facilities, the University may schedule instruction in locations other than the regular Campus.

21.02 Off-Campus teaching may be assigned in accordance with existing arrangements within 77 Departments or other teaching units made prior to the signing of this Collective Agreement. Any arrangements for assigning off-Campus teaching responsibilities to Members made subsequent to the signing of this Collective Agreement shall be made within Departments or other teaching units and shall include provision for the agreement of the Member or Members affected. Members whose employment includes responsibility for off-Campus

teaching on a regular or continuing basis shall have such duties set out in their individual letters of appointment.

21.03 Any Member teaching in a location other than the regular Campus and requiring transportation from the regular Campus, shall be reimbursed the actual, reasonable costs of travel as well as other incidental costs arising directly from such travel, on a basis to be agreed in advance between the Member and the Dean or other appropriate administrative officer.

21.04 When a Member teaches in a location other than the regular Campus, any additional commitments of time, such as for travel, shall result in a corresponding reduction of the Member's other duties or in a recognition of overload teaching as provided in Article 20.

21.05 The Parties recognize that the University may enter into agreements with other institutions providing for the sharing of facilities, Programmes, or students, including the admission of students from other institutions to scheduled instruction within Dalhousie University and the assignment of Members to provide instruction within the Campus or facilities of another institution. Members may be assigned teaching responsibilities in another institution in accordance with existing arrangements within Departments or other teaching units made prior to the signing of this Collective Agreement. Any arrangements for assigning teaching responsibilities in another institution to Members made subsequent to the signing of this Collective Agreement shall be made within Departments or other teaching units and shall include provision for the agreement of the Member or Members affected.

21.06 In the case of a Member teaching within another institution, Clauses 21.03 and 21.04 shall apply if travel or relocation is required.

Article 24: Resignation and Retirement

24.07 After retirement, former Members shall have access to Dalhousie University library and other facilities and services on the same basis as full-time Members, provided such access does not seriously disrupt the services provided to continuing Members and students in Programmes.

Article 27: Financial Exigency

27.27 For a period of six years, laid-off former Members shall enjoy full access to University facilities, including library and computing services, under the same conditions as 95 Members. Office and laboratory space shall be provided when the Board judges this would involve no significant cost and the Department or similar unit judges that such access would not inhibit seriously its teaching Programme. Those laid-off former Members who are not in full-time employment, their spouses and dependents shall be eligible for tuition waivers as provided for

through this Collective Agreement, for a period of six years from the date of lay-off.

Article 30: Vacations, Holidays and Leaves

Off-Campus Activities

30.13 Some Members must consult sources outside Dalhousie University, visit libraries, laboratories and other sources of the material necessary for teaching, scholarship, research and related activity, and observations must often be done in the field. Members are expected to be on Campus at times appropriate to meet their responsibilities in teaching, in consulting with students and others, in administrative or committee work in accordance with Article 11, Article 12, Article 13, Article 17 and Article 20. Members have the responsibility of advising their Chairperson, Head, Director or other appropriate administrative officer of the University of their location and the means by which they may be contacted when carrying out their responsibilities elsewhere than on the University Campus. Members who propose to be absent on a regular basis, for other reasons, for one or more days a week or for any period of a week or longer (except for annual vacation) are expected to ensure that their proposed arrangements are acceptable as compatible with their responsibilities and with those of their Department or other such unit.

Article 33: Health and Safety

33.01 The Board, consistent with its rights and obligations in law, recognizes its responsibility to provide a safe environment in which to carry out the University's functions.

33.03 (b) The Environmental Health and Safety Committee shall be empowered to make recommendations to the Board for alterations to physical facilities or actual work practices, if it deems such alterations necessary or desirable for carrying out the University's functions in a safe and healthy manner.

Article 36: Fairness and Natural Justice

36.01 The Parties agree they shall exercise their respective rights under this Collective Agreement fairly and reasonably, in good faith and without discrimination, and in a manner consistent with the provisions of this Collective Agreement.

Article 37: Continuing Education Members

37A.23 For a period of six years, laid-off former Continuing Education Members shall enjoy full access to University facilities, including library and computing services, under the same conditions as Continuing Education Members. Office space shall be provided when the Board judges this would involve no significant

cost and the Centre or similar unit judges that such access would not inhibit seriously its activities. Those laid-off former Continuing Education Members who are not in full-time employment, their spouses and dependents shall be eligible for tuition waivers as provided for through this Collective Agreement, for a period of six (6) years from the date of lay-off.

III. THE SUBMISSIONS OF THE FACULTY ASSOCIATION[1]

37. The Association's grievance challenges the Board's direction to the vast majority of DFA Members to work from home, teach remotely and that restricted them from access to the Campus, their offices and research facilities, for the Fall 2020 and Winter 2021 terms. The DFA asserted that the Board's direction amounted to significant changes to the general working conditions of DFA Members contrary to Article 19.03 because they were made without the consent and agreement of the DFA. It was also asserted that the Board's decision violated the exclusive authority of the DFA to bargain collectively on behalf of its Members, contrary to Articles 5 and 8.01(a) and the DFA's exclusive bargaining authority under s. 27(a) of the *Trade Union Act*, R.S.N.S. 1989, c. 475.

38. The DFA also argued that the Board's unilateral decisions violate the Collective Agreement as a whole because the Parties have "occupied the field" in Article 17.08 (Professors' research and scholarly activity), Article 21 (Off-Campus Teaching), Article 30.13 (Off-Campus Activities), Article 24.07 (retirees' access to University facilities and services) and Articles 27.27 and 37A.23 (laid-off Members' access to University facilities and services) in respect of DFA Members' locations of work; the in-person nature of teaching; their access to the University Campus and resources; and the rights and responsibilities of Members to devote a reasonable proportion of their time to research

[1] Arbitrator's Note: The following is a very lengthy summary of the Parties' submissions. Despite its length, it may not do justice to the depth of their counsel's advocacy. It is simply intended to highlight the essential arguments presented and demonstrate the enormous amount of work that counsel dedicated to assist this Arbitrator with the analysis of these important issues.

and scholarly activities. The DFA also submitted that the Board's unilateral changes are unfair and unreasonable and therefore in violation of Article 36.01.

39. Addressing the interpretation of Article 19 in particular, the DFA relied upon the principles of contract interpretation that prescribed that all words in the Collective Agreement must have meaning, be given their plain meaning and be interpreted in light of the contract as a whole. On this basis, it was said that the proper reading of the first sentence of Article 19.03 prohibits the Board from making changes to the general working conditions of DFA Members without the agreement of the DFA. Support for this was said to be found in Brown and Beatty, *Labour Law in Canada,* 4:2100 and *Ontario Power Generation Inc. and Society of Energy Professionals* (Re Sloan), 2017 CarswellOnt 17689 (Stout). It was submitted that if the Board could make significant changes to general working conditions unilaterally, that would render the first sentence of Article 19.03 meaningless. Accordingly, the DFA argued that "may" in the context of Article 19.03 is "imperative". Relying on *Nova Scotia Teachers Union v. Minister of Education and Early Childhood Development of the Province of Nova Scotia (Special Certificates),* 2019 CanLII 113313 (Slone), the DFA argued that if the Board wants to make significant changes to general working conditions, it may only do so with the agreement of the DFA at ABC meetings.

40. The DFA also argued that the Collective Agreement as a whole provides that unilateral significant changes in general working conditions are prohibited. It was pointed out that the Management Rights clause only acknowledges the Board's right to manage "except as explicitly limited by this Collective Agreement." Further, the DFA relied upon Article 8.01(a) where it prohibits the Board from entering into "any agreement with any Member or group of Members respecting their terms and conditions of employment except as approved by the Association-Board Committee". It was also submitted that the following Articles restrict the power of the Board to make unilateral changes to the working conditions that are said to be at issue in this case: Article 5 (Recognition), Article 21 (Off-Campus Teaching) and Article 30.13 (Off-Campus Activities).

41. The DFA suggested that there are three earlier arbitral decisions on Article 19 that should be considered: *Dalhousie University Faculty Association and Dalhousie University, In the Matter of a Grievance Re Department of Education Appointment of Chairman*, 1986 (Swan) at page 20; *Dalhousie University and Dalhousie Faculty Assn.*, 1990 CarswellNS 669 (Thistle) at para. 95; *Dalhousie University Faculty Association and Dalhousie University, In the Matter of a Grievance Re Discrimination (Social Work)*, 1990 (Brent). The Association also relies on the following authorities for assistance on the issue of interpreting the words "existing practices": York University v. York University Staff Association (1996), 45 C.L.A.S. 170 (Knopf); York University v. York University Staff Association, 1999 CarswellOnt 5928 (Knopf); Treasury Board v. PSAC (1988), 11 C.L.A.S. 14 (Young).

42. In addition, the DFA argued that the Board's unilateral directions regarding the 2020/2021 academic year violated the DFA's exclusive bargaining agency recognized in Article 5, and reinforced in Article 8.01(a). In this regard, the DFA also relied on its statutory right to exclusively represent its Members under s. 27(a) of the *Trade Union Act* and as explained in *Labour Law in Canada*, *supra,* para. 9:1100; *Cape Breton University Faculty Association v. Cape Breton University*, 2016 CarswellNS 973 (NSLB); *University of British Columbia Faculty Association v. University of British Columbia* (2004), 125 L.A.C. (4th) (Dorsey).

43. Further, the DFA argued that the Board could not make any unilateral changes to working conditions already dealt with under the Collective Agreement where the Parties have already "occupied the field" on the subject of Members' location of work, the in-person nature of teaching, Professors' right and responsibility to dedicate a reasonable proportion of their time to research and scholarly activity, and Members' full access to Campus. In support of this proposition, the DFA relied on *University of Western Ontario and UWOFA (Appointments-Librarian)*, Re 2013 CarswellOnt 9028 (Etherington); *Canadian Broadcasting Corp. v. C.E.P.*, 2002 CarswellNat 3270 (Knopf); *BC Public School Employers' Association/Board of Education School District No. 39 (Vancouver)*

and BC Teachers' Federation/Vancouver Teachers' Federation, 2019 CanLII 57041 (Hall).

44. The DFA argued that the evidence from Faculty witnesses established that the Board's "unilateral and significant" changes to DFA Members' working conditions were unfair and unreasonable, in violation of Article 36.01 of the Collective Agreement because they had a "tremendous negative impact on the vast majority Members".

45. The alleged unfairness and unreasonableness of the actions of the Board were said to be exacerbated by the fact that the Board's actions are "out-of-step" with what is happening in other regional educational institutions, and the relatively safe conditions in Nova Scotia compared to other parts of the country. It was asserted that there is no public health impediment to the Board and DFA negotiating enhanced access for DFA Members to Campus, including their offices and research labs, as long as they comply with social distancing and masking requirements. Support for these propositions was said to be found in *Memorial University of Newfoundland v. Memorial University of Newfoundland Faculty Association*, 2020 CanLII 45582 (ON LA) (Knopf).

46. The Faculty Association contends that preventing Members from accessing Campus buildings and resources has had a "potentially devastating" and perhaps permanent effect on Members' research careers. It was said that Members have lost a window of time to devote to research and that Faculty in other universities may now have a competitive edge for research grants. There was also concern expressed about the potential of negative effects on Members' applications for promotion and tenure.

47. The DFA also complained that the Board has not increased Faculty Members' compensation or reduced their workloads in response to the significant increase to the amount of time DFA Members have had to devote to delivering on-line courses or the shift to remote work, coupled with restricted access to Campus.

48. The DFA contends that the Board should have trusted and respected its Members enough to provide them with reasonable access to their offices. It was stressed that DFA Members interpret their being denied access to their own offices as an indication of "a lack of trust and respect". It was emphasised that the vast majority of DFA Members would behave reasonably and would use their access responsibly.

49. The DFA objected to the Board setting up committees outside of the ABC to deal with the COVID-19 issues, such as the Return to Campus Committee, without seeking the agreement or involvement of the DFA. It was said that the Board's decisions conveyed the message that DFA Members' interests "were not worthy of respect and consideration".

50. The DFA acknowledged that Nova Scotia's businesses had to abide by the Chief Medical Officer of Health's orders as set out in the *Health Protection Act Order* (the "Order"). The Order set out general rules regarding physical distancing and mask wearing. However, the DFA also pointed out that under Part IV, Section 8, businesses could continue to operate provided they implemented physical distancing within their workplace and abided by other restrictions. Under Section 13, businesses that continued operations were required to develop a Workplace COVID-19 Prevention Plan. The DFA asserted that these provisions presented no impediment to Members working on Campus, as long as it was done in compliance with public health orders pursuant to a plan that could have been developed and approved by the Province.

51. The DFA also pointed out that two other universities in Nova Scotia returned to in-person classes after submitting Campus re-opening plans to the Province for approval. Further, the public schools in Nova Scotia were opened after September of 2020, with the exception of an extended Christmas break and a handful of schools that closed temporarily due to an identified COVID-19 case. It was suggested that given the small number of reported COVID-19 cases in Nova Scotia since September 2020, the Board could have implemented less restrictive measures that would have enabled Members to return to Campus and/or resume their regular methods of course delivery.

52. The DFA stressed that if the Board had treated the DFA as an equal partner in decision making about general working conditions, the DFA would have advocated for a number of protections and benefits for its Members, including but not limited to:

- Recognition and credit for the extra work and extra time involved in shifting to remote work and on-line teaching;
- Clear protocols for accessing Campus resources;
- Smaller class sizes for some classes;
- The hiring of additional Faculty Members;
- The provision of additional Teaching Assistant support;
- A week-long delay in starting the Winter 2021 semester, which many other universities across Canada adopted.

53. The DFA asked this Arbitrator to issue the following orders:

- A declaration that the Board violated the following Articles of the Collective Agreement when it unilaterally, and without the agreement of the DFA, directed the vast majority of DFA Members to work from home and to teach remotely from home and when it unilaterally, without the agreement of the DFA, made the decision to significantly restrict access of the vast majority of DFA Members to Campus, including their offices and research facilities, for the Fall 2020 and Winter 2021 terms:

  - Article 5 (Recognition)
  - Article 6.01 (Management Rights)
  - Article 8 (Association-Board Relations)
  - Article 19 (Existing Practices)
  - Article 21 (Off-Campus Teaching)
  - Article 30.13 (Off-Campus Activities)
  - Article 36.01 (Fairness and Natural Justice)

- A declaration that the Board was and is prohibited, absent the agreement of the DFA, from unilaterally directing the vast majority of DFA Members to work from home and to teach remotely from home and unilaterally restricting access of the vast majority of DFA Members to Campus.

- An order that the Board meet with the DFA at ABC forthwith to negotiate in good faith and reach agreement with the DFA regarding remote work, remote teaching and access to Campus of DFA Members.

- Any further remedy that may fit the circumstances.

IV. THE BOARD'S EVIDENCE AND SUBMISSIONS

54. The Board asserted that the COVID-19 pandemic required it to act swiftly and decisively to protect the health and safety of the students, faculty and staff while simultaneously maintaining operational and academic continuity. The Board asserted that its decisions were a fair and reasonable exercise of the Board's management rights, in accordance with the Collective Agreement and its statutory obligations with regard to health and safety. The Board acknowledged that its direction to Faculty to deliver courses on-line had an impact on the Association's Members. However, the Board stressed that it has taken "extensive measures to attempt to mitigate the hardship of the pandemic on its faculty and instructors".

55. The Board suggested that this grievance should be dismissed on the basis of "mootness" because the Parties reached agreement about the impact of the COVID-19 measures in their Letter of Understanding on January 8, 2021 (LOU). The Board contends that the LOU gave the Association the substantive remedies it is seeking in this arbitration. The Board pointed out that Article 29.16 of the Collective Agreement provides that only a "difference between the Parties" may be submitted to arbitration. The Board contended that there is no longer any 'difference' that continues to exist between the Parties with respect to COVID-19 measures. Therefore, this Arbitrator was asked to decline jurisdiction on the basis of mootness. In support of this, the Board relied on *Labour Law in Canada*, *supra*, 2:3240; *CUPE Local 3131 v. Cape Breton University*, 2005 CarswellNS 599 (Veniot) at para. 31.

56. The Board specifically cautioned against allowing the DFA to seek further remedies through arbitration that it did not achieve during negations. In this regard, the Board relied on *Thames Emergency Medical Services Inc. v. O.P.S.E.U., Local 147*, 2006 CarswellOnt 11579 (Knopf) at para. 14; *ATU Local 508 v. Halifax (Regional Municipality)*, 2004 CarswellNS 447 (North) at para. 88.

57. In the alternative, the Board turned to the substance of the DFA's submissions and argued that it has complied with the requirements of Article 19 by consulting with the Association throughout its decision-making to the extent possible and reasonable in the exigent circumstances. It was submitted that Article 19.03 only confers a right of discussion and does not provide the Association with a "veto" over any Board decision that could result in a significant change to general working conditions – least of all changes mandated by health and safety obligations.

58. Further, the Board submitted that the DFA has not met its evidentiary onus of establishing "general working conditions" that are "reasonable, certain and known" as required by Article 19.04. It was submitted that Article 19.02 imposes a limited substantive obligation on the Board to maintain facilities, services and general working conditions that support the effective discharge by Members of their responsibilities as specified in Article 17. The Board submitted that it has retained the authority to determine the level of services provided to Members and cites the following case as supportive authority: *Dalhousie University and Dalhousie Faculty Assn.* (Thistle), *supra*. It was acknowledged that Article 19.03 confers to the Association a right to discuss significant changes in working conditions or levels of facilities or services with the Board at ABC. However, the Board argued that Article 19.03 does not require the Association's agreement to implement these changes.

59. It was submitted that the word "may" in Article 19.03 merely permits or empowers the Parties to agree to significant changes in working conditions through the ABC and does not require or mandate an agreement before changes can be made. It was suggested that the Association's interpretation of "may" as mandatory would effectively amend Article 19.03 to read "may <u>only</u>", "shall", or "must" be made by mutual agreement. It was also submitted that if the Parties had intended to prohibit the Board from unilaterally altering existing working conditions as alleged by the Association, they would have used the same formulation in Article 19.03 as they did in Article 19.01. In support of this, the Board relied on *Labour Law in Canada*, *supra,* at 4:2151; *Interpretation Act*, RSNS 1989, c 235, s. 9(3); *Ontario Power Generation Inc. and*

Society of Energy Professionals, *supra*, at para. 37, citing *Ontario Power Generation and Society of Energy Professionals* (OPGN-2010-5 706/1538), 2013 CarswellOnt 17912 (Surdykowski); *Nova Scotia Teachers' Union v. Minister of Education and Early Childhood Development of the Province of Nova Scotia (Special Certificates)*, *supra,* at para. 133, citing *Court v Insurance Corp of British Columbia*, 1995 CanLII 296 (BCSC), citing *Julius v. Bishop of Oxford* (1880), 5 AC 214 (Lord Cairns), as well as Arbitrator Thistle's Award between these parties, *supra*.

60. Similarly, the Board submitted that the Parties' use of the word "shall" in the second sentence of Article 19.03 does not support the Association's position that the word "may" in the first sentence should be interpreted as mandating agreement. The Board also suggested that the Parties did not intend the nearly identical language in Articles 19.03 and 8.06 to mandate that their agreement was required for all changes on matters brought to the ABC. Given that the same words in a contract are presumed to have the same meaning, it was said that Article 8.06 strongly supports only a permissive and empowering interpretation of Article 19.03.

61. The Board also submitted that the effect of the Management Rights clause is that it would take clear and unambiguous language in the Collective Agreement to curtail the Board's right to manage the workplace. Support for this was said to be found in *Brookfield Management Services Co. and CUOE*, 1999 CarswellOnt 7375 (Davie), at para. 66.

62. Relying on Article 19.04 and *Dominion-Consolidated Truck Lines Ltd. v. I.B.T., Local 141*, 1980 CarswellOnt 1247 (Adams), the Board argued that the Association has not discharged its onus of establishing a significant change to any "reasonable", "certain" or "known" working condition. It was pointed out that Faculty Members have enjoyed considerable freedom to work off-Campus provided they attended "Campus at times appropriate to meet their responsibilities…", Article 30.13. Further, conditions have been changed in the past by the Board's Crisis Management Plan and Policy on University Closure or Class/Examination Cancellation that have closed the Campus in

response to weather and other emergencies. In-person teaching was also said to be something other than a "general working condition" because Senate policies authorized the on-line mode of course delivery well before COVID-19 struck. Further, it was pointed out that in the year preceding the pandemic, 135 course sections were conducted on-line in the Fall of 2019 and 136 were planned to be on-line in the Winter of 2020. The Board also pointed to Article 17.12 and submitted that Faculty Members do not have the right to determine how or where their teaching responsibilities will be met. Support for this was said to be found in *Dalhousie Faculty Association v Board of Governors of Dalhousie University (Re: Grievance of Dr. Jolanta Pekacz*) (Ashley) (18 Sept 2008) at para. 22.

63. The Board also challenged the notion that the proportion of workload relative to research or scholarly activity is a general working condition that is "reasonable", "certain" or "known". It was submitted that while Article 20.04 provides that a Member's workload includes research in "varying proportions", the Board has not approved a specific workload distribution or established a minimum in relation to overall workload. It was said that the proportion of research time that is "reasonable" within the meaning of Article 17.18 will depend on all of the circumstances. The Board also submitted that it has retained the management right to assign workloads in varying proportions under Article 17.18, as long as Members remain free "to devote a reasonable proportion of their time to research, scholarly, artistic and/or professional activities". It was acknowledged that while the transition to on-line teaching may have required some Faculty Members to devote less of their time to research than before, it was said that this workload distribution was temporary, reasonable, and consistent with Articles 17.18 and 20.04. This was said to be supported by the decisions in the two cases involving *York University v. YUSA*, *supra.*

64. The Board responded to the Association's contention that COVID-19 measures interfered with the Association's exclusive right to represent its Members by asserting that the Association has not adduced any evidence to establish that the Board contracted directly with individual Members in relation to their terms and conditions of

employment. The Board distinguished the cases cited by the Association on the basis of them being very different factually than the case at hand.

65. The Board also responded to the Association's assertion that the Parties have "occupied the field" in the area of working conditions or workload by pointing out that the Collective Agreement does not specify a mode of teaching delivery. Further, the Board relied on the Management Rights clause and Article 21.01 providing that the "University may schedule instruction in locations other than regular Campus" and Article 19.02 providing that "[t]he Board may determine the manner in which, and the level at which, facilities and services are provided to Members ...". It was further stressed that the Board's right to manage the location of employees' work is particularly important where restrictions on access to University property are necessary to allow the Board to discharge its legal obligations in relation to health and safety.

66. The Board stressed that Article 19.03 should be interpreted in a manner consistent with the Board's obligations under Article 33, its own Environmental Health and Safety Policy and the *Occupational Health and Safety Act* to provide a safe environment for all University employees. It was submitted that the DFA's interpretation of Article 19.03 would give it an effective "veto" over any significant change in working conditions – including changes that impact other bargaining units – and inhibit the Board's ability to maintain a safe working and learning environment during the pandemic. It was suggested that if the Association withheld its agreement, the Board's hands would be tied, and it could be unable to respond effectively to any significant risks to health and safety. The Board argued that such a result cannot be what the Parties intended, given their mutual recognition of the importance of health and safety in Article 33.

67. Alternatively, the Board also submitted that changes it implemented in response to COVID-19 were authorized and approved by the Senate, consistent with the University's bicameral system of governance and in accordance with the University's existing practices and processes for decision-making in departments. Therefore, it was argued that the decision to move instruction to an on-line mode of delivery was not a

matter for collective bargaining and does not breach the Collective Agreement. Therefore, it was suggested that the grievance should be considered inarbitrable. [Because of the analysis that follows, the details supporting these submissions have been omitted].

68. Finally, the Board submitted that its decisions concerning remote work and remote teaching for the Fall and Winter terms of 2020/21 were fair, reasonable and "absolutely necessary" to protect the health and safety of DFA Members. It was submitted that the Board formulated a fair and reasonable response to the pandemic, and that it was the "*only* response it could offer" to appropriately balance its obligations to the staff, students and University community. The Board challenged the accuracy and relevancy of the Association's claims about other Nova Scotia universities' responses to COVID-19 by pointing out the differences in the size and nature of the other institutions and pointing out that the others are also offering on-line instruction to their students. This Arbitrator was asked to follow the line of authorities that apply a deferential standard of review to the exercise of management rights and to only interfere if managerial decisions are found to be discriminatory, arbitrary, or made in bad faith. Reliance was placed on *Labour Law in Canada*, *supra,* 4:2326; *Memorial University of Newfoundland and MUNFA* (Knopf), *supra*.

69. In closing, the Board asked that the grievance should be dismissed. In the alternative, it was suggested that if there has been a breach of the Collective Agreement, only a declaratory remedy would be appropriate in accordance with the decision in *Dalhousie University Faculty Association and Dalhousie University, In the Matter of a Grievance Re Department of Education Appointment of Chairman*, 1986 (Swan), *supra*.

V. THE FACULTY ASSOCIATION'S REPLY[2]

70. It was submitted that the Board's arguments fail to account for the different words used in the two first sentences of Article 19.03. Further, it was said that the words in Article 8.06 support the DFA's position. It was also said that the Board mischaracterized Arbitrator Thistle's Award between the Parties regarding Article 19.

71. The DFA also submitted that the Board's argument that the DFA has failed to establish general working conditions that were reasonable, certain and known should be rejected because the Association's witness statements established that the vast majority of DFA Members taught students in person on Campus before the pandemic, performed the majority of their work on Campus, and this was the norm or a general working condition of DFA Members. It was said that the fact that Members enjoyed some freedom to work off-Campus does not change the fact that working on Campus was a general working condition that was reasonable, certain and known. To define "general", the Association relied on https://www.lexico.com/en/definition/general: "affecting or concerning all or most people, places, or things; widespread," or "Considering or including the main features or elements of something, and disregarding exceptions".

72. Further, it was said that Members' full access to Campus should be accepted as a "general working condition that was reasonable, certain and known" because the Crisis Management Plan and Policy on University Closure or Class/Examination Cancellation make it implicit that "normal" working conditions are when Members can freely access Campus and that only "adverse" conditions are the ones that necessitate restricting access to Campus.

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[2] The Association's response to the Board's submissions regarding the "bi-cameral" system of governance are omitted because this issue is one that does not need to be decided.

73. The DFA also argued that the exceptions to in-person teaching in the past do not change the fact that in-person teaching on Campus is a general working condition that was reasonable, certain and known.

74. The Association clarified that it is relying on the Members' right to dedicate a *reasonable* proportion of their time to research and scholarly activities. It was that working condition that was said to have been violated by the measures put in place by the Board.

75. The Association responded to the Board's submissions regarding arbitrability by arguing that the issue of whether the Board has breached Article 5 raises a "difference" between the Parties concerning the interpretation and application of the Collective Agreement that needs to be resolved by arbitration, pursuant to Section 42 of the *Trade Union Act* and *I.F.F., Local 268 v. Halifax (City),* 1982 CarswellNS 337, (NSCA); *Seaview Manor Corp. v. CUPE, Local 2094,* 2013 CarswellNS 181 (Richardson), paras. 25, 55 and 46.

76. In response to the Board's submissions with respect to whether the Collective Agreement has "occupied the field", the DFA argued that even if the contract has not explicitly addressed the general working conditions of Members in relation to their location of work, the in-person nature of teaching or their access to Campus, those are general working conditions are at the core of the employment relationship, so there is no room for the Board to act unilaterally in those matters. Reliance was placed on *University of British Columbia Faculty Association v. University of British Columbia*, 2003 CanLII 89028 (Dorsey), pp. 72-76.

77. Further, the DFA submitted that the Board's arguments about the merits or the advisability of its unilateral decisions should be disregarded, because they are not at issue in this grievance. This was said to be consistent with the rulings in *Dalhousie University v. Dalhousie Faculty Association*, unreported, August 6, 1986 (Swan). p. 22; *York University v. Y.U.S.A.* (1996), 45 C.L.A.S. 170 (Knopf); *Nova Scotia Teachers*

Union v. Minister of Education and Early Childhood Development of the Province of Nova Scotia (Special Certificates), *supra*. It was stressed that the fundamental issue is whether the Board violated the Collective Agreement by making these decisions unilaterally and without the consent of the DFA.

78. The DFA objected to the Board's suggestion that requiring DFA's agreement for change could risk the health and safety of DFA Members and other University staff. It was stressed that the DFA has never asserted that there should have been a full return to Campus and in-person teaching. The DFA acknowledged that some restrictions are necessary for health and safety reasons, and that any modifications to the Campus re-opening plan would require review and approval by the Chief Medical Officer of Health. To clarify, the DFA stressed that the point of this grievance was to assert that it has the right to be an equal partner in those decisions when they concern significant changes to the general working conditions of its Members.

79. Responding to the Board's argument on mootness, the DFA insisted that there is a live dispute requiring adjudication concerning whether the Collective Agreement prohibits the Board from requiring the majority of DFA Members to work from home, deliver classes on-line from home, and significantly restricting access to the Campus, absent the consent of the DFA.

80. Addressing the issue of remedy, the DFA stressed that the COVID-19 LOU does not include many remedies that are being sought in this case. The DFA stressed that it is seeking an order requiring the Board to meet with the DFA "forthwith" to negotiate in good faith and reach agreement with the DFA on these outstanding requests.

VI. THE DECISION

81. Before embarking on the analysis of the evidence and submissions, it is important to clarify what this Award does not attempt to resolve. As the Faculty Association properly acknowledged, this is not a case about whether there should have been a full

return to in-person teaching or an unrestricted access to Campus. The DFA has accepted that some measures were necessary to respond to COVID-19. Nor will this Award delve into the question of whether Dalhousie University has a bicameral system of governance. While that is an interesting question, it does not need to be resolved in this case because all the submissions make it clear that the decisions that the grievance addressed were made by the Board and affect the application and administration of the Collective Agreement. That makes all the issues that need to be resolved arbitrable.

82. Further, it must be kept in mind that this Award deals with the Board's decisions that affected Faculty Members in the Fall/Winter of 2020/2021. The grievance does not challenge the Board's decisions to suspend in-person classes or curtail access to Campus in March 2020 when COVID-19's impact was first recognized across the country.

83. Accordingly, this Award focuses on the following essential issues raised by the grievance and the submissions of the Parties:

i. Should this Arbitrator decline jurisdiction to decide this matter because it has been rendered moot by the Parties' new Collective Agreement that includes a COVID-19 Letter of Understanding?
ii. Has the Board violated Article 19 (Existing Practices) of the Collective Agreement?
iii. Has the Board violated the DFA's exclusive bargaining agency under Article 5, Article 8.01(a), and the whole of the Collective Agreement?
iv. Has the Board violated Article 36.01 of the Collective Agreement by exercising its rights in an unfair or unreasonable manner?
v. Has the Board violated any other Articles of the Collective Agreement?
vi. If there has been a breach of the Collective Agreement, what is the appropriate remedy?

i) Should this grievance be considered moot?

84. Arbitration is designed to resolve actual disputes between the parties to a collective agreement. Under Article 29.15, only a "difference ... relating to the interpretation, application, alleged violation or administration of the Collective Agreement, including whether a matter is arbitrable, may be submitted to arbitration". Arbitration is a not a forum for theoretical debate, nor was it created to allow for the resolution of hypothetical issues. It is supposed to be a practical forum to bring efficient and effective resolution to existing problems in the workplace. Therefore, a live or actual difference must exist for an arbitration hearing to proceed.

85. The court system is much more cumbersome and expensive than arbitration. Courts can be called upon to give rulings on abstract issues of significance in limited circumstances in a process called a 'Reference'. However, the courts can refuse to hear issues that are no longer in dispute between the parties. The doctrine of mootness was explained by the Supreme Court in the case of *Borowski v. Canada (Attorney-General)*, [1989] 1 S.C.R. 342, cited by Arbitrator Veniot in *Cape Breton University and CUPE Local 3131, supra:*

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. . . .
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot"

> applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

The Supreme Court's approach is one that arbitrators follow; see also *ATU and Halifax*, *supra*. If there is no longer any "tangible and concrete" dispute, the parties should not be put to the time and expense of an arbitration hearing.

86. In the case at hand, the Board has argued that the Parties' COVID-19 Letter of Understanding in their recently achieved Collective Agreement has rendered the issues raised by this grievance to be moot. It is tempting to agree with that proposition because the Letter of Understanding does address many of the critical concerns that arose when the Board restricted Faculty's access to Campus and insisted on on-line teaching. The Letter of Understanding contains many benefits and protections for Faculty Members that respond directly to the DFA's complaints about the impact of the changes that the Board implemented in the Fall of 2020.

87. If the Letter of Understanding had resolved all the issues raised by the grievance, it would not be in the Parties' interests to receive a decision on issues that have already been put to rest. Arbitrators should not encourage expensive hearings to air disputes that have already been properly addressed and resolved by the parties. However, whether or not a grievance is moot depends on the essential nature of the claim and whether the issues have actually been resolved by the passage of time. In this regard, the grievance raises substantive and practical questions regarding the application and interpretation of Article 19 and many other provisions, including the DFA's exclusive bargaining rights. The submissions of the Parties reveal that there is a "live" and significant difference concerning whether the Board can require most DFA Members to teach and work remotely and restrict their access to Campus. These are more than theoretical issues. The extent of COVID-19's impact on this Campus and this community is unknown. As this Award is being written, COVID-19 and its variants continue to create uncertainty across the country. The Board's restrictions on the mode

of teaching and access to Campus are still in place. They may even have to continue. Further, the DFA's representation rights and its right to participate in decisions with so much impact have far-reaching implications. Therefore, it cannot be concluded that this is an appropriate case to decline jurisdiction on the basis that the grievance is moot. It is the responsibility of an arbitrator to hear and resolve the live issues raised in a grievance.

88. Having accepted jurisdiction over this case, it must also be said that the achievement of the COVID-19 Letter of Understanding is very significant to the issue of remedy. That is dealt with in more detail in paragraphs 118-121 below.

ii) Has the Board violated Article 19 (Existing Practices) of the Collective Agreement?

89. This question involves the interpretation and application of the language in the Parties' Collective Agreement. I have considered the many arbitral cases cited by the Parties that dealt with other universities' collective agreements. However, they are of little assistance due to the differences in the language and factual situations giving rise to their conclusions. Fortunately, the Parties agree upon the principles of interpretation that should be applied to their contract and that were set out by Arbitrator Surdykowski and cited by Arbitrator Stout in *Ontario Power Generation and Society of Energy Professionals, supra:*

> The fundamental rule of collective agreement interpretation is that the words used must be given their plain and ordinary meaning unless it is clear from the structure of the provision read in context that a different or special meaning is intended, or the plain and ordinary meaning result would be illegal or absurd, Words or phrases cannot be ignored. All words must be given meaning, different words are presumed to have different meanings, and specific provisions prevail over general provisions. As a matter of general principle collective agreements must be interpreted in a manner which preserves the spirit and intent of the collective agreement. However, it is the words that the parties have agreed to use which are of primary importance. The parties to a collective agreement are deemed to say what they mean and mean what they say. Allegedly missing words or terms cannot be implied under the guise of interpretation unless it is absolutely essential to the clear mutually intended operation of the collective

agreement, or to make the collective agreement consistent with legislation which the parties cannot contract out of.

... The task of a rights arbitrator is to determine what the collective agreement provides or requires, not what he or one of the parties thinks it should say, regardless of the apparent fairness of the effect on either party or on bargaining unit employees. The parties are entitled to no more or less than what the collective agreement stipulates, and clear wording trumps all considerations other than legislation.

These principles must be applied to Article 19 and the Collective Agreement as a whole.

90. Article 19 creates significant rights and obligations for both Parties. Each aspect of the Article warrants repeating for ease of analysis and understanding:

> 19.01 The Board or its agents shall not unilaterally alter existing practices and processes for decision-making, consultation and recommendation in Departments and similar units, or alter Departmental, Faculty or similar structures which support teaching and research. Changes may be made in accordance with existing processes that are reasonable, certain and known or in accordance with processes for change approved or authorized by the Senate within its statutory jurisdiction.

This provision deals with the alteration of the practices and processes that are not directly relevant to the issues at hand. The importance of this clause is its relation to the rest of the Article.

91. Article 19.02 deals with the manner and level of facilities, services and the general working conditions that support the Members' responsibilities under Article 17, those being teaching, research, administration and engagement in professional or artistic endeavors:

> 19.02 The Board acknowledges its responsibility to maintain facilities, services and general working conditions which support the effective discharge by Members of their responsibilities as specified in Article 17. The Board may determine the manner in which, and the level at which, facilities and services are provided to Members, on the understanding that the Board will endeavour to maintain reasonable levels of working space, secretarial and other support services, including telephones, computing, printing, duplicating and library

> services, technical services and teaching and research assistance. The reasonableness of levels of services may be measured by consideration of financial resources of the Board and past practice in the provision of such services.

92. In a previous case between these Parties in 1990, *supra,* Arbitrator Thistle dealt with the Board's responsibility to maintain levels of facilities, services and general working conditions in the context of the Board's decision to withdraw secretarial support from Faculty Members. That case dealt directly with Articles 19.02 and 19.03 and concluded that those provisions retain a broad discretion for the Board in relation to its responsibility to provide a reasonable level of services for the Association Members:

> In analyzing the effect of this Article, I have to pay careful attention to the language the parties have chosen to express the Board's obligations. The Board has retained the authority to determine the level of services provided to members. It did not assume a strict liability to provide a reasonable level but agreed to "endeavour" to provide a reasonable level. Thus, even if the Association had demonstrated an unreasonable level of services resulted from a reduction in secretarial support, a violation of Article 19.03 would not necessarily have been demonstrated. A violation would occur only if it could be shown against the referenced criteria that the Board had not endeavoured to maintain reasonable levels of secretarial services.

It should also be noted that this Award took into consideration the fact that there was no evidence that the Board's decision had been made without it "endeavouring to find ways to maintain a reasonable level of secretarial support services", and that it had given consideration to financial resources and past practice. Nor had there been any change in the process for decision making. The factual context is somewhat different from the case at hand because it dealt with the impact on non-bargaining unit staff. However, Arbitrator Thistle's recognition of the Board's retention of discretion over the level of services is significant. More importantly, that decision concluded:

> ... even if discussion were required, the change would not have required the agreement of the parties through the Association-Board Committee as is suggested in the grievance form. The Board can still make the change unilaterally after the opportunity has been provided for the Association's comments.

I agree with and adopt Arbitrator Thistle's interpretation and application of the language. It provides a consistent reading of Articles 19.02 and 19.03 that recognizes the Board's responsibility to maintain a reasonable level of facilities, services and general working conditions which support the effective discharge by Members of their responsibilities as specified in Article 17, while at the same time reminding the Parties that their contract only obligates the Board to "endeavour to provide" the services and supports. That decision makes it clear that the responsibility to maintain these facilities and services is not absolute. The Board has the authority, consistent with its Management Rights clause, to determine the manner in which, and the level at which, facilities and services will be provided as long as it "endeavors" to maintain reasonable levels of working space … support services … technical services and teaching and research assistance". The reasonableness of the manner and levels of services is a question of fact. The importance of this language is that the Collective Agreement recognizes that "facilities and services" are not set in stone and their conditions remain a matter of Board discretion.

93. Article 19.03 goes to the heart of this grievance. It addresses processes for change and the Parties' role in two types of changes:

> Any significant change in general working conditions which are reasonable, certain and known may be made by agreement of the Parties through the Association-Board Committee.
> [emphasis added]
>
> Any significant change in the levels of facilities and services provided, which levels are reasonable, certain and known, shall be discussed by the Parties through the Association-Board Committee and an opportunity shall be provided for the Association's comments and suggestions about a proposed change to be considered before the change is introduced.
> [add emphasis added]

Formatting the words of the Article in this way highlights that the Parties have created a difference between the processes for significant changes in "general working conditions that are reasonable, certain and known" and significant changes in "the levels of facilities and services provided, which levels are reasonable, certain and known". It

should also be noted that "general working conditions which are reasonable, certain and known" (Article 19.03) are different again from "general working conditions which support the effective discharge by Members of their responsibilities as specified in Article 17" (Article 19.02).

94. This formatting also illustrates that the Parties have adopted different processes for change and conferred different rights to the Board. Changes to existing processes, consultations and recommendations are to be changed in accordance with existing processes (19.01). The Board has to maintain facilities and services, but has the discretion to determine the manner and level in which those services are provided (19.02). Any significant change to those levels and manner of services must be discussed by the Parties at the ABC (19.03). In contrast, the same discretion is not acknowledged with respect to "general working conditions". Significant changes in "general working conditions" that are reasonable, certain and known are to be made "by mutual agreement" (19.03). The inclusion of the words, "by mutual agreement of the Parties" means that the changes cannot be made without that agreement. To read the Article any other way would effectively read out that words "mutual agreement".

95. I am mindful of the Parties' advocates' skillful submissions on the meaning of the words "may" and "shall" and when or if they can be considered synonymous in the context of this Collective Agreement as a whole. These are sophisticated and scholarly Parties. They must be deemed to have chosen their words carefully. The principles of contract interpretation demand that all the words be given meaning. The word "may" in the first sentence empowers or enables the Parties to make changes. The words "by agreement of the Parties" mean that those changes can only be made by agreement. The principles of contract interpretation demand that all the words be given meaning. Therefore, the Article must be read as a whole. The difference in the words "may" and "shall" is important; but the Parties' responsibilities and rights do not rest on those two words alone.

96. Therefore, it must be concluded that the different wording of the two sentences in Article 19.03 creates two different situations and gives rise to two distinct rights. Article 19.03 mandates that significant changes to "the manner and levels of facilities and services" that the University provides must be discussed with the Association at ABC meetings before changes are made. This provision imposes a positive obligation on the Board to bring significant changes to manners and levels of facilities and services to the Association's attention for consideration before the changes are made. This gives the Association an important and meaningful consultative role. This interpretation is the only one that is consistent with Article 19.02 wherein the discretion over the levels of facilities and services is accorded to the Board. That is also exactly what Arbitrator Thistle has already concluded.

97. In contrast, any "significant change" to "general working conditions that are reasonable, certain and known" may be made by the Parties' agreement at ABC meetings. That means that they can only be made at ABC meetings. This interpretation does not amend or change the Collective Agreement. Indeed, any reading of this provision that would result in allowing unilateral change would effectively read out the words "by agreement of the Parties through the Association-Board Committee". Those words must be given effect and meaning.

98. By adopting the words that provide that general working conditions that are reasonable, certain and known cannot be significantly changed without mutual consent, the Parties have mirrored language in Article 8.06 that allows for amendments to the Collective Agreement to be made by the Association-Board Committee. The word "may' does not mandate change; it simply empowers the Parties to make changes. The fact that these changes can be made by mutual consent must mean that they cannot be made without such consent. It leaves no room for unilateral change.

99. This conclusion is the only one that is consistent with a reading of Article 19 and the Collective Agreement as a whole. While the word "may" opens the door for change, the requirement that the change be made "by agreement of the Parties" means that

significant changes to working conditions that are reasonable, certain and known can only be made by way of mutual consent.

100. Therefore, the critical question in this case becomes whether the Board's COVID-19 directions created significant changes to the "general working conditions that are reasonable, certain and known". The term "general working conditions" is not defined in this Collective Agreement. "General working conditions" would certainly include the specific terms and conditions that are set out in this Collective Agreement. This provision, in concert with Article 8.06, empowers the Parties to agree to amend the contractual terms at the ABC if they choose to do so. It goes without saying that the terms of the Collective Agreement cannot be altered without mutual consent. Further, Article 8.06 prescribes that the ABC is the forum for making such changes or amendments during the life of a Collective Agreement.

101. The Parties' submissions and the wording in Article 19.03 also suggest that the phrase "general working conditions" encompasses something broader than the terms of the contract because of the accompanying phrase "which are reasonable, certain and known". If the Parties had intended to limit the opportunity for mutual changes to those set out in Article 8.06, there would be no need for the first sentence in Article 19.03. Article 8.06 would have sufficed. This Award does not attempt to offer a definitive answer to what might be considered to be a "general working condition" for purposes of Article 19.03. All this Award endeavors to resolve is the question of whether the changes implemented for Fall/Winter 2020/2021 altered the Faculty Members' "general working conditions which are reasonable, certain and known".

102. The Board's COVID-19 directions certainly imposed significant changes on many Faculty Members' working lives. The evidence provided by the Faculty witnesses was clear. The impact of the changes was substantial. Their teaching methods changed from in-class to on-line course delivery. This meant that they had to quickly acquire new pedagogical and technological skills to adapt to the on-line and sometimes a-synchronous methods of course delivery. They had to spend more time than before to

respond to the academic challenges that their students encountered. They no longer had the same access to Campus internet, tech support and research tools. Many Faculty Members' were concerned that their research, promotional, leave and sabbatical plans would be negatively impacted by the changes.

103. These changes must be viewed in two categories. The Board's direction to Faculty Members to work from home and their restricted access to offices and some on-Campus resources amount to significant changes in the manner and level of facilities and services that had been in place prior to March 2020. However, those changes are precisely the kinds of changes that are within the Board's discretion and that can be made without the agreement of the DFA, by virtue of the wording of Articles 19.02 and 19.03. They were made after there had been extensive consultation with the DFA about those changes at the ABC-COVID-19 meetings in the months between March and June 2020 and in discussions that continued informally during the Summer. Further, the Board's witness statements demonstrated that considerable efforts were made to maintain the manner and levels of services and facilities for DFA Members, including providing access to equipment, technical support and Campus resources during this period. Those efforts did not replace the manner and levels of services and facilities that existed before March 2020. However, given that there was great uncertainty about the threats to health and safety posed by COVID-19, it cannot be concluded that the Board "failed to endeavour to maintain reasonable levels of working space … and other support services, including … computing, printing, duplicating and library services, technical services and teaching and research assistance". Under these unique circumstances, it must be concluded that the Board met the requirements for the process of making changes to the manner and levels of services and facilities under Articles 19.02 and 19.03. This conclusion also applies to the changes affecting the services available to Retirees and Members who have been laid off (Articles 24, 27).

104. The other category of change was the Board's direction to most Faculty Members to teach on-line. This was a significant change in a general working condition because most, but not all, courses had been taught in-person before March 2020. Indeed, it is

safe to take arbitral notice that the in-class experience and rapport that educators have with their students is an integral aspect of the university experience, both for students and for faculty. Therefore, the key question becomes whether the in-person method of course delivery amounts to a general working condition which is "reasonable, certain and known".

105. Article 19.04 imposes an onus on the Association to establish when general working conditions are "reasonable, certain and known".

> 19.04 The onus of establishing a practice or process within the terms of Clause 19.01 or general working conditions or level of facilities and services within the terms of Clauses 19.02 and 19.03 shall rest upon the person or persons alleging its existence and it must be shown that the alleged condition, level, practice or process is reasonable, certain and known by the Board or its agents (including Department Chairpersons or Departments and similar units) and therefore is deemed to have been authorized by the Board.

Therefore, the evidentiary onus is on the DFA to establish that in-person teaching is a "reasonable, certain and known" working condition.

106. Prior to March 2020, academic life was predictable. For the most part, Faculty Members taught their students "face to face". However, nothing in the Collective Agreement speaks to how courses are to be delivered. Instead, Article 17.12 requires Faculty to teach the courses assigned to them "in accordance with the schedules and curricula as approved from time to time by the Department, College, Faculty or Senate." In a different case between these parties in 2008, *supra,* Arbitrator Ashley wrote: "It is not reasonable to suggest that a Faculty Member ... should alone determine how her (sic) teaching responsibilities will be met. ..." Even prior to March 2020, on-line course delivery was taking place. The Senate's Syllabus Policy defines a course as:

> [A] structured series of classes or a sustained period of instruction [traditional (face-to-face), online or blended] that is offered for credit in a particular term, as part of an undergraduate or graduate program at the University.

While in-person or "face-to-face" course delivery was, and hopefully will remain a preferred or default pedagogic method, it cannot be said to be a "certain" or protected working condition under this Collective Agreement. For example, Article 21.01 deals with "Off-Campus Teaching" and recognizes that "the majority of the work of Dalhousie University will take place within the campus". The rest of Article 21 deals with the expenses and workload implications that may arise from "off-Campus" teaching. The wording of those provisions address "travel and incidental" costs that might arise from the requirement to teach "in a location other than the regular campus and requiring transportation". Therefore, it is clear that Article 21 addresses situations where a Faculty Member is not working from their home base. The direction to work from home and deliver course content "on-line" seems far different from the situations addressed in Article 21. However, it is important to note that Article 21.01 also provides that "the University may schedule instruction in locations other than the regular Campus." Ironically, that phrase might actually be a complete answer to this aspect of the grievance because it allows the Board to mandate instruction outside of the Campus location. Therefore, if Article 21 does pertain to off-Campus teaching in any circumstances, it can only mean that requiring classes to be taught on-line for the 2020/2021 academic year was consistent with the Collective Agreement. Therefore, there has been no violation of this provision. More importantly, it confirms that face-to-face teaching cannot be said to be a "certain" condition.

107. The Association has also argued that Members' ability to reasonably conduct their research is another condition that was also protected by Article 19.03. This must be answered in three ways. First, the support for research and other professional activities properly falls within the ambit of the Board's responsibility to provide the levels of services and facilities that support such endeavors. The analysis above concluded that the Board has complied with Article 19.02 in this regard. Secondly, even though it is accepted that the evidence established that many Faculty Members' research has been interrupted by the Board's COVID-19 measures, the Association cannot successfully assert that there is certainty with respect to the amount of time that is available for research, scholarly or other professional activities. Article 20.04 enshrines these

activities as important aspects of an academic appointment, but states that these duties are included in the workload "in varying proportions". There is no "certain" amount of time that a Faculty Member can expect to devote to research. In particular, Article 17.18 prescribes that "Members have the right and the responsibility to devote a *reasonable* amount of their time to research, scholarly, artistic and professional activities." The University is only required to "endeavor to facilitate these activities". Nothing in this Award should be interpreted to diminish the University's responsibly to support Members' careers with respect to research, scholarly, artistic and professional activities. However, what is important to this case is the fact that the Collective Agreement recognizes that there is no certainty with regard to the amount or proportion of time a Member may have for these duties, nor is there certainty in the level of supports they may require. The Board must endeavor to facilitate the Faculty's reasonable devotion to these activities. However, what is reasonable will depend on the circumstances of each case. The circumstances could include other workload demands, teaching commitments, departmental needs, personal situations, special opportunities and the exigent circumstances that arose due to COVID-19. The implication of this clause for this case is that the amount of time that Faculty Members may have had for these duties in the past cannot be said to establish a "certain" or "known" working condition. Further, while many Faculty Members may have experienced delays in their research agendas, the evidence also revealed that the Board endeavored to support research by making library services available on-line and by providing document delivery, curbside pickup and arranging for some in-person Campus access. Further, time sensitive research that had to continue on Campus was allowed to continue. Two hundred and fifty principal investigators were able to return to their lab facilities. Therefore, it cannot be concluded that the limitations placed on Faculty Members' research were unreasonable or amount to violations of Articles 19 or 20.

108. There is a third aspect to this issue. The DFA raised valid concerns about how the challenges to research may have negatively affected Members' careers, in terms of tenure and promotional opportunities. It is true that scholarly success has a huge impact on academic careers. Tenure and promotion are dealt with in the Collective

Agreement in the complex provisions of Article 14. The details of these terms need not be reproduced. What is important about Article 14 is that Members' rights with respect to tenure, appointments, reappointments and promotional opportunities are often tied to timelines. Had there been no changes to the application of Article 14 after March 2020, there could have been a finding that the Board violated Article 19.03 by making unilateral changes to this aspect of Members' contractual rights. However, in June 2020, the Parties reached mutual agreement to allow Faculty experiencing COVID-19 disruptions to request two-year deferrals on the consideration of their reappointments, tenure applications, continuing appointments, or 'appointments without term'. This agreement focused on the impact of the Board's COVID-19 measures on the tenure and promotion provisions of the Collective Agreement. It was made before the Board's announcement in the Summer of 2020 concerning the 2020-2021 academic year. This agreement is a textbook example of the Parties implementing the wording of the first sentence in Article 19.03. They reached mutual agreement on a significant aspect of the "certain" working conditions related to Article 14.

109. Further, no doubt due to the effective advocacy of the DFA in the ABC-COVID-19 meetings, the Board allocated additional resources to Human Resources, teaching assistants, tech supports for course design, designating study and workspace on Campus, and it modified the metrics it would have applied to tenure and promotion considerations. As the DFA's witness statements revealed, these efforts still left the Faculty Members with many challenges and frustrations. However, it cannot be concluded that the changes, no matter how impactful, were made in contravention of the Collective Agreement and Article 19.03 in particular. Articles 19.02 and 19.03 read together give the Board discretion over the level of services and facilities that will be provided to Members of the Faculty bargaining unit. Given the circumstances of COVID-19, the efforts the Board made to meet the Faculty Members' needs and the meaningful consultation that did take place, there can be no finding of a breach of Articles 19.02 and 19.03. With respect to the on-line teaching and research, it has not been established that they are "certain" or protected by Article 19.03. On the other hand, where the ability to conduct research was affected by the Board's decisions, the

June 2020 agreement of the Parties to relax the Collective Agreement's timelines for consideration of tenure and promotion also met requirement for the mutual agreement for such change that is the precondition in Article 19.03.

110. These conclusions do not ignore the fact that there may well be an overlap between "general working conditions" and "facilities and services". One may well affect the other. However, this decision serves to make a distinction between the contractual and "certain" working conditions than cannot be altered without the consent of the Association as opposed to the manner and levels of facilities and services that can only be altered after discussions with the Association about such changes at the ABC.

111. Further, the Collective Agreement must be read in a way that is consistent with the Parties' respective rights and obligations. It must be noted that the DFA has acknowledged that some restrictions were and may remain necessary for health and safety reasons due to COVID-19. Further, the DFA has properly recognized that modifications are needed for the Campus re-opening plan and that they would require review and approval by the Chief Medical Officer of Health. All that the DFA is seeking is an "equal partnership" in those decisions, insofar as they concern significant changes to the general working conditions of DFA Members. However, if that "equal partnership" has the potential to delay, impede or prevent health and safety measures that are necessary for other members of community, there would have to be explicit wording in the Collective Agreement to recognize such power. That wording cannot be found in Article 19 or elsewhere in this Collective Agreement. The Management Rights provision empowers the Board to manage in accordance with the Collective Agreement and its obligations under the law. These rights must be exercised consistently with the Collective Agreement and the law. Article 33 and the *Occupational Health and Safety Act* require the Board to maintain a safe environment for all the University's employees. Pursuant to that, COVID-19 triggered the Board's Crisis Management Master Plan wherein a pandemic is considered to be a "disaster", i.e., the highest level of danger to the University. This is the Plan that triggered the formation of the Return to Campus Committee that was authorized to manage the safe return of the academic and research

communities to Campus. That Committee followed the recommendations of the existing Occupational Health and Safety "hierarchy of controls" that were aimed at substantially reducing the risks of COVID-19 to the University community. To have ignored these recommendations would have been unreasonable. The Board must be able to implement emergency plans to protect the health and safety of students, employees and the community without waiting for the Association's consent. Emergency measures impact many interests beyond the DFA's Members. While it is presumed that the DFA would always act in the community's best interests and would never impede any critical measures to protect health and safety, it cannot be concluded that this Collective Agreement intended to preclude the Board from enacting emergency measures affecting individuals and a community beyond this bargaining unit without the DFA's consent. Of course the exercise of management prerogative to implement emergency measures to maintain a safe University environment must not override the Collective Agreement. However, the responsibility to take such action must mean that the management rights under this Collective Agreement include the corresponding right to take the actions that are necessary to protect the University and local community.

112. As a result, it must be concluded that the evidence does not support a finding that there has been a breach of Article 19. The evidence does reveal that there were significant changes to Faculty Members' working lives when they were precluded from accessing the levels of facilities and services that they enjoyed prior to March 2020. However, the Board acted within its discretionary authority to make those changes and engaged in meaningful consultation with the Association with respect to those changes. There were also changes to the Faculty Members' working conditions with respect to the methods of course delivery and with respect to research. However, those conditions cannot be said to have been "certain" or protected by the terms of the Collective Agreement. Finally, the changes that may have affected tenure and promotion were addressed by the Parties when they reached agreement on the application of the contractual timelines governing those career opportunities in June 2020. Therefore, those changes were made by agreement of the Parties and in

accordance with Article 19.03. Accordingly, the changes that took place cannot be said to have violated Article 19.03.

iii) Has the Board violated the DFA's exclusive bargaining agency under Article 5, Article 8.01(a), and the whole of the Collective Agreement?

113. The exclusive rights of the Association to represent its Members are fundamental to the application of this Collective Agreement. The DFA's representation rights are also enshrined in statute under s. 27(a) of the *Trade Union Act.* As the certified bargaining agent, the DFA has the exclusive authority to bargain collectively on behalf of its Members in relation to their work, their teaching duties and their ability to devote a reasonable amount of time to research, scholarly activity and any aspect of their terms and conditions of employment. The DFA effectively fulfills this role, as evidenced by the quality and depth of rights and benefits it has achieved for its Membership in this Collective Agreement and through its effective partnership on the Association-Board Committee.

114. However, the specific right that the Association is asserting in this aspect of the grievance is the right to prohibit the Board from negotiating or imposing new or different terms of employment on any member or group of members. There is simply no evidence of any individual negotiations or agreements with Faculty Members. Nor does the evidence supported a conclusion that the changes mandated by the Board have violated or "occupied" any of the existing Collective Agreement provisions with respect to teaching assignments, research, scholarly activities or access to Campus or services. Further, the evidence does not establish that the Board's directions with regard to COVID-19 amount to a circumvention of the DFA's bargaining authority. To the contrary, the evidence indicates the Board's endeavors to respond to the DFA's expressed interests and suggestions. The fact that agreement was not reached on all aspects of the DFA's concerns does not establish that the DFA's representation rights have been ignored or slighted. The DFA is correct when it says that arbitrators must be "vigilant" in respecting and protecting the exclusive bargaining rights of a trade union or

an employee association. However, this is not a case where those rights have been violated.

115. It is unfortunate that the Board's decisions and processes left the DFA with the impression that the Board does not respect the role of the Association or its Members. There is no evidence to support a conclusion that the Board intended to disrespect the Association or its Members. While "intention" is not relevant, it must be noted that the Board was trying to protect people's health and to engage with the Association under very challenging circumstances for all. It is too easy to suggest ways that the engagement could have been more inclusive and/or effective. However, that does not lead to a conclusion that the Board undermined or impeded the Association's important right to represent its Members.

iv) Has the Board violated Article 36.01 of the Collective Agreement by exercising its rights in an unfair or unreasonable manner?

116. While the Association properly recognized that the Board had to respond to the COVID-19 pandemic to protect the health and safety of the staff, students and the community at large, the DFA also pointed out that other local educational institutions adopted more limited measures. The DFA also cited COVID-19 statistics suggesting that the health and safety risks were, and are, not as dire as the Board may have feared, particularly for the Winter 2021 term. The DFA may be correct on all those counts. Hindsight is always very revealing. Perhaps the Board could have imposed less drastic measures. Perhaps the Return to Campus Plan could have been, or may still be, safely modified. It certainly would have been respectful to have given the Association a place or a voice on the Return to Campus Committee. However, an arbitrator's authority is very limited. We do not sit in judgment over the wisdom of management decisions. We are restricted to considerations of whether management has acted in accordance with the Collective Agreement. Because of this, arbitrators must give deference to management's decisions unless they are unreasonable, made discriminatorily or in bath faith, see *Brookfield Management*, *supra.* Under this contract and in these circumstances, the scope of arbitral review is to determine whether the

exercise of the management functions has been made in good faith, without discrimination and in a "fair and reasonable" manner. This is enshrined in the Collective Agreement:

> 36.01 The Parties agree they shall exercise their respective rights under this Collective Agreement *fairly and reasonably*, in good faith and without discrimination, and in a manner consistent with the provisions of this Collective Agreement. (emphasis added)

There are no allegations of bad faith or discrimination. The evidence discloses that all the Board's decisions were made to reduce the risks of harm to students and staff. The circumstances facing this Board and, indeed, all of Canada were uncertain and generated a great deal of fear. Despite the challenges facing the Parties, there were extensive Committee and informal efforts made by the Board to discuss the impact of the changes with the DFA and to alleviate the hardships caused by the COVID-19 measures. Further, the Health and Safety Committee was advised that these measures should be put in place. The legitimacy of the health and safety concerns cannot be doubted. The Board's decisions may not have been the "only" fair and reasonable response to the pandemic that was possible. Less restrictive measures might have worked. However, the evidence satisfies the standard of achieving a reasonable balance of the University's obligations under the unusual circumstances created by the COVID-19 pandemic. In this regard, it may warrant noting that governmental, public and private institutions that have adopted the most cautious responses to COVID-19 have encountered the least negative effects of the virus. Further, the impact of the virus continues to plague our nation. Therefore, even if hindsight suggests that the Board's COVID-19 measures could have been or could become more moderate, that does not mean that they were "unreasonable" or that there was any unfairness in the way they were implemented. Accordingly, it cannot be concluded that there has been a breach of Article 36.01.

v) Has the Board breached any remaining provisions of the Collective Agreement?

117. The last specific Article that the DFA alleges to have been violated is Article 30.13. This provisions deals with Off-Campus Activities and is aimed at ensuring that Faculty Members who pursue research or other professional activities off-Campus will still fulfill their teaching and other responsibilities to the students and the University. Therefore, this provision has little application to the facts of this case. However, it is interesting to note that it demands that Members must be "on Campus at times appropriate to meet their responsibilities in teaching". Any failure to meet those responsibilities would be problematic. However, under the COVID-19 directives, those teaching responsibilities are met without the Members having to be "on-Campus" physically. The evidence simply does not support a finding that there has been a breach of this Article.

vi) If there had been a breach of the Collective Agreement, what would be the appropriate remedy?

118. Having failed to establish any violations of the Collective Agreement, the policy grievance must be dismissed. Therefore, the issue of remedy could be ignored. However, it is important to advise that even if the contract had been violated, only declaratory relief would have been granted. Given the exigent situation created by COVID-19, the uncertainty that everyone faced in 2020 and the Board's legitimate concerns about the health and safety of students, staff and the community at large, it would be inappropriate to do anything other than to declare that a technical violation had occurred.

119. If it had been found that the Board violated Article 19 by unilaterally making significant changes to general working conditions that were "certain", there would have been a finding of a violation of the Collective Agreement. Such a finding could have triggered the principles of contract law that dictate that the party whose rights have been violated is entitled to be placed in the position that it would have been in if the contract had been properly respected. The fundamental right that the Association claimed under Article 19 was the right to an "equal partnership" in the decisions that the Board

implemented in the Summer of 2020. As the evidence revealed, the Association was accorded meaningful consultative rights at the ABC with respect to the changes affecting the manner and levels of facilities, services and general working conditions that support Members' duties under Article 17. If it had been concluded that the Association was denied the right to agree to any changes with respect to the Board's decision to change general working conditions that were "certain", the remedy for that could potentially have resulted in an order requiring such consultation to take place.

120. However, this is where the concept of mootness comes back into play. The Association asked for an order requiring the Board to meet, discuss and agree upon its outstanding requests relating to access to Campus, on-line teaching and working from home. The Association indicated that there are still outstanding issues and that it intends to advocate for more protections for its Members concerning class size, workload adjustments, additional staff, more Teaching Assistant supports and a delay in the commencement of the Winter 2021 semester. I make no comment on the legitimacy or appropriateness of these demands. However, it cannot be ignored that the DFA engaged in negotiations and discussions about the impact of COVID-19 at the collective bargaining table in the Fall and early Winter of 2020. Those discussions resulted in the COVID-19 Letter of Understanding in the new Collective Agreement that achieved many positive measures for DFA Members. The LOU is a comprehensive document, dealing with items ranging from the provision of home-office equipment, to PPEs, academic freedom, workload adjustments and the waiver or deferral of time-sensitive provisions in the Collective Agreement relating to career advancement. The LOU must be recognized as being the Parties' resolution of COVID-19 issues that fall within the ambit of their Collective Agreement. If this Award were to have ordered the Parties back to the bargaining table to re-open those discussions, it would amount to an inappropriate and unwarranted intrusion into the collective bargaining process. The LOU is the best evidence of what the Parties could achieve through such discussions. By definition, its terms represent the "give and take" that are necessary to meet the respective interests of the Parties. If the Parties were ordered back to the ABC to discuss these issues further, it would upset the delicate balance that was achieved, not

only in the LOU, but in their new Collective Agreement as a whole. As the Supreme Court of Canada advised in *Borowski and Canada, supra,* when events occur that affect the relationship of the parties and result in a situation where no live controversy continues to exist affecting their rights after a grievance is filed, the case must be said to be moot. The achievement of the COVID-19 LOU in early January 2021 must be accepted as the resolution to the Board and the DFA's controversy about the effects of the Board's COVID-19 measures on the rights of DFA Members. The fact that the DFA wishes to achieve more for its Membership does not mean that the COVID-19 LOU should be re-opened. It would be contrary to the principles of collective bargaining, collective agreement administration and the doctrine of "mootness" to provide a remedy that would allow the reopening of those discussions.

121. Accordingly, even if I am wrong about all the conclusions reached above, I would not have ordered the Parties to meet further to negotiate the issues that they have already resolved. The most I would have done would have been to issue a declaration that there had been a violation of the Collective Agreement.

VII. CONCLUSION

122. In conclusion, the grievance must be dismissed. However, I wish to provide a cautionary note. Like all arbitral decisions, this one must be read and applied only to the fact situation it addresses. The analyses above apply to the specific facts facing the Parties when COVID-19 struck Halifax. Further, the conclusions that have been reached are on the basis of the specific evidence presented and the language of this Collective Agreement. Other universities and organizations across the country faced and are still facing the challenges of COVID-19. One can only hope that the circumstances giving rise to this grievance will not continue and will not be repeated.

123. Finally, I cannot conclude without commending and thanking the Parties' advocates for the quality and intellectual integrity of their submissions.

Dated at Toronto this 26th day of February, 2021

Paula Knopf - Arbitrator