In the Matter of an Arbitration Under
Labour Relations Act, 1995, S.O. 1995, C. 1

BETWEEN:

RYERSON FACULTY ASSOCIATION
(RFA)

(the “association" or “RFA”)

-and-

RYERSON UNIVERSITY

(the “employer")

-and-

INCUMBENT

(the “incumbent”
or “intervenor”)

Award on Merits

RE:	RFA Grievance #2020.01 Hire for Posting ID # 529527 – Department of Law and Business (Jan 20/20)
DATES AND LOCATION OF HEARING:	October 2/20, March 16/21 – June 10, 23, Sept. 23, 24, Dec. 13, 14, 2021.
SOLE ARBITRATOR:	Brian Etherington
APPEARANCES FOR THE UNION:	James McDonald, Chris Donovan, Mary-Elizabeth Dill, Counsel Andre Foucault, Exec. Dir. Lab. Rel.
APPEARANCES FOR THE EMPLOYER:	Simon Mortimer, Sean Reginio, Counsel Daphne Taras, Dean of Business Brad Walters, Dir. Faculty Affairs
APPEARANCES FOR INCUMBENT:	Michael Wright, Counsel Incumbent

AWARD

Introduction

This award deals with the merits of a grievance filed by the association on January 20/20 alleging that the hiring process for a tenure track position at Ryerson University (posted from November 18th to December 10th, 2019), which resulted in the hiring of the incumbent, violated the terms of Article 4 of the collective agreement (and any other contract clauses that may apply). The association sought full redress, including the cancellation of the incumbent's appointment as a tenured faculty member, and that the process be redone in conformity with the collective agreement. When the grievance was filed it urged the administration to immediately inform the incumbent that his appointment and the process by which it was made were being contested and that this could result in its nullification. Although not referenced in the initial grievance, it was clear from the opening statement of the association that the apparent motive for the alleged violations of the collective agreement procedures was the desire to provide a faculty position for the incumbent as part of a package to induce his spouse to accept a senior administrative position at the employer in another academic unit.

At the conclusion of opening statements, the incumbent made a preliminary motion asking for a ruling that if the association is successful in proving a breach of the collective agreement, that the remedy it is seeking in this arbitration, the cancellation of the incumbent's appointment and the rerunning of the hiring process in a manner that complies with the collective agreement, is not necessary or appropriate. In effect it was requesting a ruling that any remedy awarded for a violation of the collective agreement would not include the cancellation of the incumbent's appointment. Following some discussion on the motion, it was agreed that the parties would make written submissions on the motion so that it could be argued and decided prior to the scheduled commencement of the hearing on the merits and the introduction of evidence, so as not to cause any further delay to the resolution of the grievance. On June 1, 2021 I issued an interim award denying the incumbent's preliminary motion.

Background and Context

The union took the position this grievance was about the integrity of the hiring process for faculty at Ryerson University – whether the employer can manipulate the hiring process to pre-select a candidate and hire a candidate it had decided upon before any of the collective agreement hiring process was properly triggered. It submitted that the very reputation of the university turns on its ability to attract the best candidates using an open and competitive process. It noted that Professor X was the spouse of a person who the employer was attempting to hire as a senior administrator in the fall of 2019 (Professor Z) and thus the hiring of X was being used to negotiate with and attract X's spouse to accept the senior administrative position it was seeking to fill. As such the hiring of X was what has come to be known in the university world as a "spousal hire". The RFA alleges that in this case the spousal hiring of X to help persuade the spouse (Prof. Z) to accept the senior administrative position was done in clear violation of the provisions concerning the faculty hiring process found in Article 4 of the collective agreement (CA).

The association noted that Article 4 contained very detailed provisions concerning both the composition and training of the Departmental Hiring Committee (DHC) (4.1) and the recruitment and selection process (4.2). For example, art. 4.1 (J) requires the employer to arrange a training workshop each year to be conducted by it and the association to instruct DHC members on the DHC's legal obligations and duties under the CA and university policies, including consideration of the values of equity, diversity and inclusion (EDI). Such training is mandatory. The association asserts that the hiring process set out in Art. 4.2 is very detailed and provides for an open, competitive and collegial hiring process that requires the DHC to search actively for the strongest possible candidate pool (4.2(E)). At the end of the process the DHC is to make a recommendation to the Dean, who then fills the position. Art. 4.2(D) provides that the DHC will consult with members of the department about the needs of the department and the requirements of the position and then draft a profile for each position. The profile will be circulated to members of the department for comments and then submitted to the Dean for approval to be included in an advertisement for the position. The association notes these clauses refer to searching for the strongest possible pool of candidates not a single person from the outset. While a duration for the

posting is not indicated in the article the association notes that the administration recommends that posting remain open for at least one month. Once the applications are in, article 4.2(J) requires the DHC to make a decision as to which candidates are to be placed on the preferred candidates list. That list and the C.V.s of the people on the list are then made available to members of the department. Art. 4.2(L) requires those on the preferred candidates list to be invited for an interview and to make a presentation to members of the department and students. Art. 4.2(M) requires the DHC to solicit the input of members of Dept. before making a final recommendation. Under 4.2(P) the DHC is to give a written report to the Dean with an account of the process, how EDI obligations were addressed, and its recommendation concerning hiring. The Dean then has some discretion on whether to reject or accept the recommendation and, if accepted, forward it to the Vice-Provost to authorize the appointment.

The RFA contends that what happened in this case was as follows. In October of 2019 the Vice- Provost Academic was negotiating with Professor Z concerning Z's willingness to come to Ryerson from another country to fill a senior administrative position in another administrative unit when the issue arose as to whether there would a tenured position for her/his spouse, Professor X, in the Law and Business department in the business school. That spouse was a tenured professor with many years of experience as a university professor in the same institution that Professor Z was coming from. At that point the VP Academic contacted the Dean of Business to ask if Professor X might be an acceptable candidate in the law and business department. The Dean and VP discussed the option of appointing X through an alternate process for a term appointment as a Professor Distinction but decided that would not be acceptable. The Dean ultimately said yes provided that the VP could provide two new positions for the department involved if they agree to hire X (there was already a new position that had just recently been posted for the department). The Dean also made it clear the VP had to promise not to use the new third (or extra position) against a future allocation for that department. At that point, at the end of October of 2019, the Dean then sent the CV of Prof. X to Prof. Chris Macdonald, the chair of the department and the DHC, with an email saying here is the spousal person, before there had been any posting or even DHC consultation with a view to creating a profile for a posting. As the association puts it, the VP and Dean were identifying the person to be hired even before there was a profile or posting as

required by the CA. The association contends that at that early stage the appointment of the spouse of Prof Z was being viewed as a mere formality. On Nov. 11/19 the VP then asked the Dean how they should move forward with the appointment of Prof. X. The Dean forwarded that request to the Chair of the Department and he replied that they have an existing posting already out but that would not work because it was open until January 15/20, so he asked what next. The Dean suggested another ad for a new customized posting with a fast deadline and open rank.

That is what happened over the next two days with the assistance of Carrie Wiebe, an administrator working for the Dean of Business. The Dept chair said he could make it happen quickly as long as the extra position for Prof X would not affect the two other positions that he already had approved. He indicated that he thought he could get the consultation and vote process with members of the department done very quickly as long as the other positions were not affected. But he asked how a spousal hire differs from a regular hire and whether it still required a full search. Both the Dean and Ms Wiebe said they did not know. By the end of the day on Nov. 12/19 Wiebe told the Dept. Chair to proceed with the posting with a 2 week open period and she confirmed in writing that it would not affect the existing positions that had already been approved for that department. That evening Chair MacDonald sent an email to all members of the Department to tell them of the prospect of a spousal hire related to a senior administrative hire elsewhere in the university, and added that the spouse (Prof. X) was "highly qualified". He also told all members that the DHC would be developing 'quite quickly' a tenure track open-rank posting and would be forwarding a draft posting to them very soon. Further, he informed them he had been assured that this position is extra and will not interfere with the two other hires that had already been approved.

The very next day, Nov. 13th, the Chair forwarded the CV of Prof X and the profile for the new position to members of the department. He further assured them that this new position was 'effectively a freebie' with a written guarantee from the Provost that it would not affect the two positions approved for that year already, and the two replacement positions they were due to get the following year. While he told them he thought this was a very good thing for the department, he invited them to provide their thoughts or comments on this development. Although he received feedback from several colleagues, including some that talked of a need for some symbolic push

back, the overall response was that there was little reason to object to something that saw them gain an extra position for the department. That same day there was an exchange of emails between the Chair and the Dean about pushback and whether he could share more details with the members of the department on the nature of the spousal hire and the background of Prof. X. The Dean encouraged the disclosure of information to the department but advised caution on what went into such emails as there could be FOIP issues someday. The Dean also stated that it would be good for the profile to include anything to narrow the choices and indicated the VP wanted to get it done quickly as it could be a deal breaker for the senior administrative hiring.

After some additional emails about the profile and the posting the new position was posted on Nov. 18/19, and added to the CAUT posting website on Nov. 19/19. For qualifications it included several that appeared to be geared to fit the background of Prof. X, including a Master's degree in law and a specialization in international trade law. The posting indicated a deadline of Dec. 3/19 for submission of applications. The minutes of a departmental council meeting on Nov. 20/19 referred to a spousal hire and indicated that they still needed to post and go through the DHC process. There was a question asked about what they would do if someone better qualified should apply and the minutes record a response that they could just hire that other person as well now using a position that would have normally come to them in the following year. It was also noted in the discussion that as Prof. X was a white male there would be more pressure to make the other two upcoming hires meet the diversity goals of the university.

On Nov. 29/19 the Chair wrote to the Dean indicating the hiring process was going badly as there was strong opposition in the department but he also said he and the Provost had agreed to a modification that would let the process go forward. In emails between the Cbair and the Provost on Dec. 2/19 the Chair assured the Provost there was no personal animosity to Prof. X and almost everyone in the department wanted this hiring to happen but they had concerns about the process and a feeling of being rushed. The Chair, after discussions with the DHC and members of his department, told the Provost they could satisfy concerns if they extended the deadline for applications by one week and had the DHC meet to process the applications on the day of, or day after, the new deadline with a view to inviting Prof. X to do an interview by Skype on Dec. 12/19. The Provost indicated that should all work. On Dec. 6/19 the Chair reached out to Prof. X by

email and informally invited him to meet with the DHC for an interview and do an open presentation to the department on Dec. 12/19. The note indicated they had not done an official short list yet so this was not a formal invitation. On Dec. 11/19 the DHC circulated emails among its members including the CVs of six applicants, including Prof. X. The DHC members then weighed in on who they thought should be on the short list and agreed on a list of 4. They also agreed to circulate the CVs of all four to the department at that time and agreed to interview Prof. X immediately and interview the other 3 later. On Dec. 12/19 the Chair and Prof. X agree on Dec. 17 as the date for his interview and presentation.

On Dec. 12/19 the Chair emailed the Provost to inform him of the interview of Prof. X and the Provost asked him how long it would take the department to make a decision. The Chair replied he was not sure but noted the CA required the DHC to consult the department after the interview and he planned on giving the department 24 hours to provide comments. On Dec. 14/19 the Chair emailed the Dean and Provost to inform them that the search turned up 3 other highly qualified candidates – "real stars". He said the DHC was asking to take the opportunity to interview them in January of 2020 and, depending on the outcome, make an additional hire to replace a colleague who was leaving the department to join another faculty the following year. The Provost replied that the Chair should proceed – 'This is whatever agreed on conditional on the appointment of [Prof. X]'.

On Dec. 16/19 an invitation to Prof. X's presentation on Dec. 17/19 was sent to all members of the department. That same day there was a public announcement of the appointment of Prof. Z to a senior administrative position at the university. On Dec. 18/19 the DHC provided its letter to the Dean recommending the appointment of Prof. X. Under article 4 of the CA this recommendation must include a report on the posting and selection process that discloses the circumstances of the hiring. The report makes no mention of this being a spousal hire. On the same day the Dean recommended the hiring of Prof. X to the Vice Provost of Faculty Affairs. On the same day the offer of appointment to a tenured position as Professor in the department was sent by the Dean to Prof. X. On January 20/20 the policy grievance against the appointment was filed by the association.

The RFA contends the process used for this hiring undermines the entire purpose of the

process set out in the CA, that purpose being to ensure an open and competitive process to attract the most qualified candidates from diverse backgrounds. It noted that the provisions of Article 4.2 require the process to be based on the collegial needs of the department, be consistent with goals of diversity and inclusion, and ensure the strongest possible candidate pool with a view to hiring the most qualified applicant. It contended that what happened here was simply a number of performative steps to get to a person they knew in advance was to be hired as a condition of another hiring process. The association asserted this was a complete affront to the employer's collective agreement obligations. Further it noted that although the members of the DHC were members of the RFA, when carrying out the functions of collegial governance committees like the DHC, their actions are to be viewed as actions of the employer. As such when their actions breach the collective agreement the employer must be held accountable.

The employer stressed at the outset that the members of the academic administration of the university, the Dean and the VP Academic, are also faculty members and they have a dual role as administrators and members of faculty. As such they are attempting to make the best academic choices for the university as a whole. It noted as well that the Department of Law and Business that is the location of the appointment in question was in a state of flux at the time of the events in question as it was losing several members who were moving to appointment in other areas of the university and thus leaving the already small department of Law and Business. As such this department had a need for several new faculty to meet its needs for teaching and service at that time.

The employer's written response to the grievance following a meeting with the associaiont to discuss the grievance was sent to the RFA grievance committee on May 19/20 by the VP – Faculty Affairs (Tab 2, exh. 2). The employer listed the concerns with process articulated by the association at the grievance meeting and suggested they did not represent a violation of the CA. The first two concerns were based on the fact that the posting was not open for 30 days, but the employer noted there is no CA requirement for a 30-day period or any minimum duration for a posting. The third concern expressed by the association was that the recommendation of the DHC was rushed because four candidates were shortlisted but only one was interviewed prior to the hiring decision. The employer noted that all 4 candidates were interviewed because the other 3 on

the short list were interviewed in January for a second position. A fourth concern of the association was that the timing of the successful candidate's presentation prevented members of the department from attending the presentation, but the presentation was at 11.00 am and article 4.2 (M) simply requires that views will be solicited from department members who have seen the CV or attended the presentation of the candidate. There is no requirement for members of the department to attend the presentation. Thus, the employer contends it complied with the CA on these points.

Further, the employer noted there is nothing in the CA that prevents the administration from creating a position in conjunction with a department or a DHC, nor is there anything in the CA to prevent them from identifying prospective candidates who they think are excellent and contact them before a competition or posting to encourage them to apply. In short there is nothing to prevent faculty or administrators from identifying candidates who will meet the needs of a department or faculty or the university beforehand and bring them to the university's attention. It contends that what is found in the CA is a requirement that if a position is created that position and all candidates for the position will be identified by the DHC and no one can be recommended for that position without the DHC's recommendation following the creation of a profile, a posting, a selection of a shortlist, and the interview of the candidate.

The employer suggested we should look at the appointment through a lens in which members of a department can be consulted on whether they believe it is a good thing to have an additional posting beyond what they were expecting to maintain their existing complement. At no point was it a formality that Prof. X would be hired following approval by the department. He had to apply and the DHC and department had to make a determination that he was a worthy candidate for the position to be filled. It also contended that this was not simply a case of an extra hire as long as they hired Prof X. There was an extra hire here created by the employer in the hope that Prof. X would be the successful candidate but it was open to the department to decide not to hire Prof. X. Further it noted that this department was a group of well-educated and tenured faculty looking at the opportunity to hire an extra candidate and they considered it and decided it was worth it. There was nothing to prevent them from deciding that this candidate should be denied.

The employer also pointed to the DHC's letter of Dec. 18/19 to the Dean recommending

the hiring of Prof. X and noted how its contents reflected a process that in its view complied with Art. 4.2. It showed that Prof. X was appointed pursuant to a recommendation by the DHC following a posting and search that led to 11 applications and a list of 4 strong preferred candidates of which one was invited for an interview and the other 3 were being put on a short list for an upcoming hire. The letter also indicated that the DHC was mindful of the university's commitment to EDI and its responsibilities on that issue. The employer contended the DHC did a search in compliance with art. 4.2(C) and also complied with art. 4.2(D) with regard to consulting with members of the department on the requirements for the position. In that respect it noted there was nothing to prevent a DHC and department from considering the broader interests of the department such as the overall number of positions in the department when considering the requirements of the position. The DHC also complied with 4.2(F) in posting the position in the required locations for more than 2 weeks. It further claimed it complied with art. 4.2(E) in searching for the strongest possible candidate pool.

Further the employer contended that not all things are done in the same manner in every search in a department and there are often variations from one appointment to the next that do not violate the collective agreement or require the undoing of an appointment. It said the evidence would show that the DHC reviewed the applications and were comfortable after that review, the interview and job talk of Prof X, and the consultation with members of the department in recommending the appointment of Prof X to the Dean. It noted that while the association pointed to some of the feedback from members of the department as raising concerns, they were simply a part of the department as a whole determining what was best for its long-term interests and their determination is what is found in the letter of the DHC to the Dean on Dec. 18/19.

The employer also said it would show there was nothing in the CA to preclude the hiring of a spouse of another person being hired by the university or a candidate that was identified by the administration as a desirable candidate prior to the search process. A discussion of a targeted or good candidate often takes place before the hiring process starts. It asked me to focus on the essential facts: there was a job posted by the DHC; there were applications and CVs of several candidates submitted and considered; there was a short list created and an interview and job talk by Prof. X followed by consultation with faculty; others on the short list proceeded to a second

posting; this department is in a state of flux with several members of the small department leaving. The employer contended that this case has been vastly overstated by the association and based on a flawed theory. It also contended there was no reason for an administrator to not be included in identifying good candidates. Nor was there any reason for the Dept. Chair to not talk to the VP about a good candidate or possible candidates for positions. Further when there were concerns raised by department members about the posting process the VP and Chair agreed to extend the application deadline until Dec. 10 and further agreed that any application submitted up to Dec. 19 would be considered for the additional position to be decided in January of 2020.

In short, the employer took the position there was no violation of the collective agreement and to the extent there was any breach of the hiring process it was minor and technical and did not warrant interfering with the appointment of Prof. X.

The parties agreed on the intervention of Prof X in the arbitration proceeding on the basis that he could participate and intervene on issues that may affect his personal reputation or issues of appropriate remedy if there is a finding that the CA has been violated. On the issue of reputation, counsel for the incumbent noted that at the time of his application and appointment he was a tenured Distinguished Professor of International Commercial Law at a respected law school in the United States, where he had been a faculty member since the early 1990's and was awarded tenure in the early 2000's. He also held an LL.M. degree from a top tier US law school. The grievance filed by the RFA (of which he is also a member), has had a significant impact on his professional and personal life. He noted that due to the remedy of removal from his position sought by his association he was not able to set down deep roots in Toronto. Further it was noted that Prof. X was appointed Interim Chair of his department at Ryerson on January 1, 2020, an appointment that was unanimously supported by his colleagues. Counsel for the incumbent also suggested that the main reason this case was being pursued by the RFA was because it was a spousal hire case and contended if that were not a reason underlying the hiring the matter would not have been pursued this far. The incumbent further noted that on Dec. 1/20 all members of the department of Prof X wrote a letter to the RFA expressing their unanimous support for Prof. X. He was described as a person who was caught up in this matter through no fault of his own and the letter suggested the process was causing damage to Prof X and his department. The members of the department also

reject the view that there was anything improper in how the hiring of Prof X took place. Counsel for the incumbent also noted that the faculty of this small department is comprised of lawyers and ethicists who took great pains to ensure it was done ethically and was consistent with the requirements of the CA. The letter from the faculty in the department also stated that the extreme remedy sought by the RFA was not constructive.

The incumbent stated he did not dispute the role of the RFA to enforce the CA, but contended the association had rejected any concept of agency for its members and was denying any agency to the department members by pursuing the extreme remedy of removal of Prof X in this grievance. It contended that the disruptive effect on the department of the extreme remedy sought by the RFA must be recognized. It further suggested that it made no sense in this case, because the job into which Prof. X was hired would not have existed if there had been no spousal hire involved. The position was created as an extra to all positions due to his department solely to get the spouse of Prof X hired to a senior administrative position.

At the conclusion of its opening the incumbent made a request that I consider a preliminary motion for a preliminary ruling that the remedy of removal of Prof X from his/her appointment would not be appropriate in this case if a finding of violation of the CA was made after hearing evidence and argument on the merits. As noted above a process for consideration of that motion by written submissions prior to the first day of hearing scheduled for evidence was agreed to, submissions were made and an interim award denying the motion was issued on June 1/21. (Note that references to tab numbers in the award are references to tabs in exhibit 2, the Ryerson Faculty Association's book of documents, unless otherwise indicated.)

Evidence

The association called Prof Ian Sakinofsky as its only witness. He has been a member of faculty at the employer since 1991 and is a professor in the Dept. of HR Management and Organizational Behaviour in the Ted Rogers School of Management. He has been the President of the RFA since May of 2020. He has extensive experience as a member of the bargaining committee for the RFA from 2003 to 2009 and 2013 to 2019. He has also been a member of the executive of the RFA for most of the period from 2003 to 2019.

Prof Sakinofsky gave evidence on the process for setting up and operating DHC's set out in art. 4.1. DHC's are established in May of every year to take office and begin work in September of that year after a position is approved for their department. Upon approval of the job the DHC is convened to begin the hiring process. It has a discussion with members of the department to assess the hiring situation and set in motion a recruitment and selection process. That begins with a consultation with department members to establish a profile of the job to be filled. They look at gaps in the department that need filling, both research needs and teaching needs. They also look at the diversity (EDI) needs of the department. They eventually arrive at a profile based on those discussions. That profile is then circulated back to the members of the department for feedback and refinement. After the DHC has finished the profile it is forwarded to the Dean to develop the posting for the position.

The DHC selects its own chair but the Chair of the Dept is an ex officio member of the DHC. Art 4.1 includes a process for selecting the other members of the DHC and provides that it will normally have 5 members but that number can be reduced to 3 in a small department or increased to 7 in a larger department. The members of senior administration, such as the Dean and VP Faculty Affairs, are not members of the DHC.

Art. 4.1(J) sets out a process for the training of DHC members to be conducted annually in September or October to ensure every member is familiar with the legal obligations of the DHC, including the values of EDI. Sakinofsky said a member cannot sit on a DHC without having undergone the training required under 4.1(J). He testified that normally there are four or five training sessions held over a one-week period to enable them to catch all members of all DHCs for that year. Materials for the training workshops are prepared in advance by people from HR, the RFA and VP Faculty Affair's office. All DHC members are invited and asked to sign up for a particular session that fits their schedule. The HR dept., the RFA, the VP Faculty Affairs and the Office of Equity all have people from their offices present to assist with the training. The RFA typically has 3 or 4 people involved in the training, usually including the President of the RFA. Art 4.1(L) also provides for the assignment of one person from HR to each DHC to assist the DHC to comply with the terms of the CA for appointments. Sakinofsky said they usually get involved when the profile has been established and the DHC begins to look at where they will look to attract

candidates. At that point the DHC will contact the HR person and that person will decide where to place ads for the posting. They may also get involved in helping with scheduling and providing background for the DHC, but do not attend interviews or participate in decision making by the DHC. The HR person will encourage the DHC to focus on EDI issues and advice it on steps to follow on those issues. The Chair of the DHC has to include a report on compliance with EDI issues by the committee and the HR person will instruct and remind the DHC on this responsibility. For example, the HR person is relied on for how to tap into equity seeking communities. HR produces the training guide and presentation materials given to all DHCs and these provide a sequence that has to be followed by the DHC. Sakinofsky said that HR people are regarded as an authority to follow with regard to the administrative processes to be followed by the DHC.

Sakinofsky testified that the Dean of a faculty or school must approve an appointment before it can go the DHC and HR for the beginning of a hiring process. He noted that there may be much discussion and requests made for new hires and department but nothing happens unless the Dean approves the appointment. Once the approval for a hiring is given by the Dean the chair of the DHC convenes a meeting of the DHC and thereafter the DHC drives the appointment process. At that point it notifies the department that an appointment has been approved and they begin the process of developing a profile to be presented to the Dean after which an ad gets posted.

After the posting period is closed the DHC goes through the applicants and creates a preferred list. He said each DHC will develop its own process but often they start by creating a long list of acceptable candidates and then work on those to create a short list to be invited for an interview. At that point resumes for the short-listed candidates will be circulated to the department and campus visits and interviews are scheduled. Members of the department may then attend the presentations and interviews. The DHC then seeks feedback on the candidates and will eventually make a recommendation to the Dean on who should be appointed. Sakinofsky said that during all of that process the Dean typically has very little involvement apart from approving the appointment and meeting the candidate and approving the recommendation of the DHC.

Prof Sakinofsky was asked about the role of the DHC in fostering Ryerson's commitment to EDI goals and values (art. 4.2(B)). He said they are responsible for making recommendations of who to hire and ensuring there has been an open process that reaches all candidates and talking

to members of the department with respect to the needs of the department considering the profile of existing department members with respect to EDI values. The role of the DHC is to encourage the department in attracting and selecting candidates from as diverse a group as possible. Sakinofsky pointed out that art. 4.2 (E) requires the DHC to search actively for the strongest possible candidate pool where strength is measured in all possible dimensions relevant to an academic appointment, including EDI. Art 4.2(J) required the DHC to create a preferred list, also often referred to as a short list, and to interview the candidates on that list in some way (L). After completing interviews and getting feedback from department members it must make a recommendation to the Dean (4.2(P)), who has discretion to approve it, and if so recommends the appointment to the VP Faculty Affairs (VPFA). He stressed that the purpose of the DHC training was to inform the DHC members of the requirements of the CA and emphasize the need to focus on increasing diversity. He said the RFA views the DHC as an extension of our collegial existence, the fact that it is peers who do the selection of their colleagues.

Sakinofsky noted that the training for DHCs was strengthened in 2011 with new language in the collective agreement. The HR office and RFA and VPFA have an opportunity every to year to discuss and decide on the materials to be used in DHC training sessions. The sessions are usually hosted by a person from HR and the RFA is present at all sessions and given an opportunity to add comments during the session. He has attended most of the training sessions since 2013 (approximately 90%). The VPFA and RFA president normally welcome attendees and offer comments. He viewed it as a shared presentation. All participants are given a Guide for DHCs at the training session. Those materials contain much of the detail of the training session. We were provided with the Sept. 2019 edition of the guide. The stages of recruitment are set out at page 16 of the Guide (Exh. 2, tab 4). The first step emphasizes a focus on finding the best candidate who also meets diversity objectives. Sakinofsky said this was discussed at the training sessions and noted that in recent years recruitment has focussed more heavily on the need for diversity in hiring.

The Guide provides a template for a recommended search process, describing the steps in the process to do a search in a complete and fair manner. It describes how to objectively and responsibly put out a wide net and attract the best and most diverse candidates. The template also suggests months during which each phase of the process might take place. Sakinofsky suggested

months were indicated in the template because it can take months to get approval for a position and then have long discussions with the department and develop a profile and subsequently to attract more candidates for a big pool to ensure they find the best candidate. He suggested it could take 6 to 8 months to complete the recruitment process. He also referred to a 'hiring season', a time when most processes take place. Academic conferences normally take place in spring and early fall. Academic appointments usually commence on July 1, so the hiring must be completed a few months prior to that date. For that reason, the process is usually started in the fall of the prior year, often September.

Sakinofsky noted that the steps in the recruitment process set out at page 18 of the Guide for DHCs follow the same sequence as set out in art. 4.2 of the CA. He noted the posting has to be there for long enough time to locate and attract a strong pool of candidates and said that normally required 30 days at least for it to be seen by a wide enough group of people. The guide goes on to provide sample questions for consultations with department members. Sakinofsky said the RFA viewed this as a very important part of the training, noting that the DHC has to work with its department to make the appointment and the members of the department are key to the academic future and diversity of the department. They are key to identifying needs of the department and where they need to look to meet its academic and diversity needs. He contended that this was the most important part of the process. The Guide for DHC's also contained sample questions for the candidate interviews. Sakinofsky noted that the purpose was to have a structured interview and have the same questions asked of the different candidates to ensure fairness and objectivity in decision making.

The guide also provides a list of diverse sources for advertising of the posting with a view to reaching a wide pool of potential applicants. He noted that the goal of meeting diversity objectives in recruitment has made them conscious of the need to look more broadly in terms of advertising sources. Sakinofsky noted that Ryerson has a structure to enable access to better sources for EDI goals (at page 23 of the Guide). The guide notes that the DHC will have to provide a report on steps it has taken to diversity outreach. That refers to the need to include such report in the recommendation to the Dean as stated in 4.2(P). The Guide also contains a template for the letter from the DHC to the Dean to recommend a candidate for hiring (at p. 44). Prof Sakinofsky

said the report should include a description of the steps followed by the DHC and how it developed a long list and a short list and took diversity values into account, and a description of how they came to a decision. Sakinofsky said its structure is to show how the DHC touched all the bases and complied with the CA process. He said it is referred to in the training session but not in detail. The Guide also contains a section on Hiring Diverse Faculty (p. 67) to inform trainees that EDI is an institutional priority.

Sakinofsky also gave testimony on a slide presentation entitled "Collective Agreement Provisions and Leading Recruitment Practices for Department Hiring Committees" (Tab 3, Exh. 2). The copy provided was dated Sept. 2018. It is prepared by the HR Office and the VPFA. Every year they send it to the RFA in advance of the training sessions and the RFA can provide input and suggest changes to it. He said it each training session usually took 2 to 3 hours to complete. Following opening remarks by the RFA President and the VPFA the presenters for the bulk of the substantive training were all representatives of the administration. Participants are given a binder containing the slide presentation and the Guide (Tab 4) at the outset of the training session and they are then taken through the slides during the presentation.

Sakinofsky was asked about the Planning Considerations portion of the slide presentation with respect to how the Department members are consulted by the DHC to discuss its goals and the needs of the department to work toward a profile for the appointment. He said that after the Dean approves the position, members of the administration typically play no role in these planning considerations.

Sakinofsky noted that page 12 of the slide presentation contained a chart laying out the requirements of Article 4.1 and 4.2 with regard to composition of the DHC and its obligations once formed, in terms of involving the members of the department. At page 35 of the slide presentation there is a section titled Sourcing Talent that sets out three mandatory sources for advertising a posting and indicates a period of "Minimum 1 month" for those sources. That is followed by suggestions for additional outreach. This section is presented by a member of administration. Sakinofsky said the period of one month is to ensure people have enough time to see the posting and to increase diversity in outcomes. The slide presentation includes a section titled Assessment Principles and Methods. He said its purpose was to advise the DHC on how to screen and filter the

different applications and agree on practices and criteria so that they are all using the same criteria to assess the candidates. It is also to encourage the DHC to have a method of assessing candidates when their applications come in and to ensure the methods are equitable. They are encouraged to review applications with an EDI lens. At page 50 the slide presentation provides a list of Other Considerations, the first of which is "Hire only if it is the right candidate – position will not be lost." Sakinofsky referred to this as guarantee to the DHC that if they were not comfortable with a candidate, they did not have to hire that person out a fear they would lose the position.

In cross examination Sakinofsky confirmed that he was not on the RFA executive during the period of time between November and December of 2019. He agreed that the decision on whether or not a new faculty position would be created rested with the administration and that the approval of any posting for a department rested with the Dean. He agreed that the eventual decision to actually hire a person at the end of the recruitment process rested with the administration as well. He also agreed that an appointment by the administration follows on a recommendation by the DHC that the hiring meets its needs, and that the DHC decision making is a collegial process that is based on colleagues making recommendations based on the needs of the department. He also agreed that the Dean and Provost are also faculty members and members of the academic community. When it was suggested that as faculty members when there are collegial decisions being made, the Dean and Provost can partake in the discussion, he replied that they are not members of the bargaining unit. He also stated that they are not active members of the department, and only return to that status at the end of their term as an administrator. He further noted that there is a general understanding that as administrators they cannot participate in certain discussions in their department. He noted that the Dean and Assoc. Dean do not participate in faculty decisions in their department. Sakinofsky said there are certain defined things they cannot do or participate in, and they do not attend department council meetings unless they are invited.

Sakinofsky agreed that there was no time line for postings contained in the CA and there was no time line prescribed in the departments for consultations that take place in the appointment process. The CA says the DHC must consult with the department but does not set out time lines. He also agreed that the RFA does not have a role in consultations with the department for appointments. He also agreed that when a DHC makes a recommendation on an appointment it is

possible for it to reach a unanimous recommendation or in some cases make a recommendation with a dissent by members of the DHC. He agreed that members of the DHC can express their individual views for or against a recommendation. He also agreed that members of the DHC are also members of the RFA and they will determine what is important in terms of the needs of their department in appointment decisions. He also agreed that the Chair of the department has an obligation in his role to work in the best interests of his department and is supposed to represent the interests of the members of his department. He stated that the Chair of the DHC is supposed to reflect the wishes of his colleagues and to represent those wishes in dealing with the administration.

It was put to Sakinofsky that when members of the DHC engage in consultation around a posting and engage in discussions around the needs of the department it is the colleagues in their department and DHC who ultimately make the determination of what is in the best interests of the department and the needs of the department, and what should or should not go into the language for a posting. It was also put to him that it was the right of members of the department to decide when they want a position or a posting. He agreed that the members of the department have a right to be consulted and have input into the profile for a position. He agreed that determining department needs and the position description are department functions that are done through consultation on the profile and the chance to review it before it goes to the Dean for posting. He also agreed that there may be different processes for consultation and discussion and input in different departments and that some department processes may be shorter than others. He agreed that the size of the department may affect that. He further agreed that where a department had a recent prior posting they may already have knowledge of their needs and that could shorten any consultation needed to create a profile.

Sanikofsky confirmed that the RFA has access to all postings when they are put up on the employer's website. He was asked if he was aware of any members of the department of Law and Business who expressed concerns to the RFA about the posting process for the hiring of Prof. X in November or December of 2019. He said he was not on the executive at that time but thought there may have been some contact but did not have direct knowledge of any. He said that Ron Babin the president of the RFA raised concerns about the hiring process to the Provost, but he was

not sure when that occurred. He was asked if he was aware of any specific statements made to the administration that this hiring should not happen. He answered that he was aware there was an unfair labour practice filed by the RFA against the employer at the OLRB at some point. He thought there were some exchanges between the association and the administration but was not aware of the content. However, he said he was not aware of any member of the DHC or the department of Business and Law making a complaint against the actual posting or hiring process.

When it was suggested to him that the CA only required that a posting must be posted on the Ryerson website and no other sites are required (art. 4.2(F)), he responded that postings at Ryerson will normally be posted in at least three places. Sakinofsky agreed there was nothing in the CA dealing with informal faculty recruiting activities. He said he was unaware of the extent of informal discussion among academic colleagues with respect to recruiting academics from one university to another, but he agreed there was sometimes discussion among department colleagues with respect to the hiring of another faculty member from another institution. He agreed that during hiring discussions in a department it must happen that sometimes colleagues will have some post doc candidates in mind as good candidates. It was put to him that when department consultation takes place with respect to a profile for a posting, members of the DHC or department may have potential candidates in mind at the outset. He said he was not aware of that. He said he could not comment on the suggestion that faculty, when discussing position profiles, may have a desire to try to make the profile fit a particular candidate.

Sakinofsky was asked if he was aware that some postings are very broad but others are very narrow and specific. He said he had no knowledge of the tailoring of some position profiles. He was asked if he was shown evidence of some very narrowly tailored postings would he have any knowledge of why that was the case. He said he thought that was probably due to the needs of the department.

Sakinofsky thought there were 8 or 9 faculty members in the Business and Law department at the time of the hiring and 11 or 12 now. After looking at some documents in evidence he revised that to 10 members in November of 2019. He was aware that there was a prior posting that was still open when the Prof X posting was placed. He said neither he nor the RFA would have had any knowledge of the needs of the department of Business and Law in November of 2019. Nor

was he aware that the DHC had already recently had consultations with the Department members on the needs of the department due to the ongoing posting when the Prof X posting arose. He did not answer the question of whether he was aware the DHC already had a good idea of the candidate field for the department given the prior posting and their knowledge of the field. He was not aware of the consultation that had taken place between the DHC and the department due to the posting done prior to the Prof. X posting.

Sakinfosky said he was not aware that postings for less than 30 days duration were not uncommon at Ryerson. He admitted that there was no one from the RFA checking the duration of postings. He referred to the statement of 30 days as a minimum for postings in the Guide for DHCs. When asked for the source of that statement he said he thought it arose from an agreement between the parties. It was put to him that the 30-day minimum was primarily referenced with respect to international hires in the guide but he said it was also referenced for other hires. He said he believed the 30-day period for postings was a practice that had been followed and was what they trained people on the DHC to follow. He said he was not aware of other postings besides the one at issue being for less than 30 days.

Employer counsel then produced 4 postings for appointments at Ryerson that were posted for periods of less than 30 days (ranging from 15 to 20 days) on its Career Opportunities website. Two were for positions in its Faculty of Communication and Design, one for its School of Early Childhood Studies and one for its Dept of Chemistry and Biology (Exh 3). Sakinofsky agreed they were postings for a period of less than 30 days and no grievance was filed on those postings. The employer then produced 5 more postings for limited terms positions in the Ted Rogers School of Management from 2019 that were posted for only 15 days. It was put to the witness that departments can post for periods of less than 30 days as long as they are not required to meet the minimum of 30 days required by immigration regulations for international appointments. He said he was surprised by these postings because the training for DHCs referred to a 30-day minimum. He was asked if he based that on the single reference to a minimum of one month on one page of the manual, but said he based it on repeated direction to that effect in the training sessions over several years. However, he agreed there is no such requirement in the CA and agreed the CA governs over a training manual.

When asked if he was aware that in the development of some postings a department may have a candidate in mind for a targeted hire, Sakinofsky said that was not his experience. But he agreed that a posting can be crafted broadly or more specifically. However, he refused to agree with the suggestion that the more specific the qualifications were for a posting that would lessen the candidate pool. Employer counsel then put to the witness a 2019 posting for a tenure track position in Sociology that was very detailed and specific with respect to qualifications and area of specialty or interest (exh 3). It was put to him that the detailed qualifications required made the pool of candidates a lot smaller. He appeared to agree but said he did not know how many people might have the required narrow area of expertise. It was then put to him that a department having been told they have a position to fill can craft a position description as narrowly as want to to meet their needs. He replied that they are required to identify needs and skills for the position and then craft a description to search as broadly as they can to meet those needs. The employer then introduced a 2019 posting for a person specializing in 'green criminology' for the department of criminology. This posting also contained quite narrow and specific qualifications and Sakinofsky agreed with the suggestion that the DHC could narrow down the posting as narrowly as they see fit for the position in question.

It was then put to Sakinofsky that, despite the obligation of the DHC under art. 4.2(E) to search actively for the strongest possible candidate pool, the DHC can narrow the profile considerably to limit the potential size of the pool when looking for a person to meet its needs. He replied that they could limit the qualifications but they have to try to have as broad a candidate pool as possible given those limitations, to seek as big a selection ratio as possible.

Sakinofsky agreed that the deliberations of the DHC with respect to qualifications for the profile are not provided to the Dean or the administration. However, he said the short lists are sent to the Dean, and the final report to be given by the DHC to the Dean is required to justify the decision of the DHC. However, he agreed that the administration is only given the final report of the DHC and not any record of its deliberations. He admitted the report of the DHC recommending the hiring of Prof. X was signed by all 3 members of the DHC giving unanimous support for the hiring. He also agreed that the RFA did not dispute that the incumbent was academically qualified for the position and fully met the standards of the job posting. Nor did it dispute the DHC's

assessment that the incumbent's academic credentials warranted his appointment.

Sakinofsky was then asked if he disputed that the appointment of Prof. X fostered the university's commitment to EDI values. He replied that he could not comment on that but he could not see how. He said if the DHC believed that he could not comment on that, but he was not able to agree with that. He said one of the principles of EDI is to remove barriers and historic disadvantage and he could not see how the hiring of Prof. X could do that. He was then taken to the CV of the incumbent, where it was pointed out that the incumbent had published writings on race and gender issues (Tab 47). Included in his research interests were the intersection of international economic law and human rights, law and inequality and critical race theory. He eventually agreed that it was possible that having a scholar working in those areas would support the EDI goals of the employer. However, he also said he was not sure that this was the intent of art. 42(B) of the CA in terms of considering EDI values in the appointment process.

Sakinofsky said that the RFA's input into the materials provided for the training of DHC members was more than informal, but he agreed there was no RFA member vote or approval with respect to the training or the materials. He agreed that the CA does not set out any 'hiring season' or period for hiring, nor does it set out a period for job talks or when the hiring process should take place. He admitted that while there was an attempt to schedule job talks when members of the department can meet, it was not uncommon for members to not be able to attend job talks. It was put to him that the hiring process may be accelerated when a desired candidate says they have a job offer elsewhere. He did not agree. But he agreed there are cases where a DHC has two top candidates and can't choose between them and then seeks approval for a second job so they can hire both candidates. He also seemed to agree that when that happened they did not do a second posting for the new second position, so that they then in effect have posted one job but hire two people. He said he had heard of this happening but thought that the DHC would then go back to the department to make sure they were aware of what they were doing. It was then put to Sakinofsky that this was in effect what happened with the incumbent. Here there was one posting with 3 candidates short listed by the DHC with the incumbent, and all three of those added people were offered interviews for a second position prior to the acceptance of the job by the incumbent. It was suggested that this was simply a case of more than one position being created based on the

applications for one posting, similar to what the witness said had happened on occasion where there was more than one person the DHC wanted to hire. Here there was a posting and four preferred candidates and all four were interviewed and after the incumbent was hired a second job was ultimately filled later. Sakinofsky said he believed something different happened here, something more convoluted. However, Sakinofsky agreed that getting an extra second position was a good thing for the department, as he recognized that it had a bad student faculty ratio.

In cross examination the witness agreed that an important part of pursuing equity in hiring was hiring equity seeking groups into leadership or senior administrative positions, such as the Dean of a faculty. He also agreed that deans and senior administrators with academic appointments are also members of the Ryerson academic community and art. 4.2(B) requires the DHC to take into account Ryerson University's strong commitment to fostering equity. Sakinfosky said he was also aware at the time the RFA filed this grievance that the incumbent was the spouse of a person who was a member of an equity seeking group and was being pursued by Ryerson as a senior administrator. It was put to Sakinofsky that if the incumbent was hired that could mean his spouse would accept the offer to become a senior administrator at Ryerson and that would improve the goals of EDI at the university.

Sakinofsky agreed that he had briefly reviewed the resume of Prof. X he had not read any of his publications and was not familiar with them, or the content of his writing on critical race theory. He also agreed that Prof. X had been a dues-paying member of the RFA since January of 2020.

Sakinofsky agreed the RFA had failed to approve the incumbent's cross appointment to another academic unit, but said that its refusal in the first year was due to the absence of all documents required for such a cross appointment and then a second time a year later due to the absence of required documentation. He indicated it would be approved after the cross-appointment documents were properly completed. He also said the cross-appointment had to be approved by the DHC of the new department but he agreed that was not in the CA as the CA only required the agreement of the two department chairs to approve a cross-appointment. However, he said in his view the Chairs could not approve without consulting with the department and said he thought that had been the practice since 2016 when the parties agreed on a form for a memorandum of

understanding to be signed by the faculty member, the department chairs and dean when a cross-appointment was approved. However, he admitted there was no such requirement in the collective agreement in force when the grievance arose.

Sakinofsky agreed that he was not aware of any wrongdoing by the incumbent or his spouse during their respective hiring processes. He was also aware that the DHC recommendation to hire Prof. X was unanimous. He identified the purpose of tenure as giving persons academic freedom who can be trusted to exercise academic freedom. He said he was not aware of any other case in which the RFA has sought a remedy that would remove tenure from a faculty member who has not been guilty of any wrongdoing as a faculty member and was unanimously approved by his DHC. He also agreed that none of the prior postings in evidence that were for periods of less than 30 days had been grieved by the RFA.

In redirect Sakinofsky said that while he was not aware of the extent of informal recruiting for appointments at the university, when this does happen the candidate in question still must be approved and appointed in compliance with the CA process. He also confirmed that senior administrators who have academic appointments in a department are not allowed to participate in a normal fashion in departmental meetings. They are excluded from department council meetings unless they are requested or approved to attend. He said the rationale for that practice was that when members of the bargaining unit are making representations or recommendations to an administrator they want to be able to do so in the absence of academic administrators who are not part of the bargaining unit and not privy to discussions inside the bargaining unit.

Sakinofsky estimated that there were approximately 100 to 110 total limited term and tenure stream faculty postings per year over the last two years. He said that limited term positions are often more targeted to replace someone for a limited term and the posting may be shorter. Because the consequences of the appointment are not as permanent or significant there is not the same effort or time taken for those in many cases. He also suggested that limited term appointments do not have the same protections for academic freedom as a tenured position as they do not have the same employment security. He also was asked to distinguish the incumbent's hiring situation from what he was familiar with in terms of two positions arising from one job posting. He said the normal situation was where a DHC realized they had an exceptionally rich

pool of candidates with several desirable candidates from the single posting and then went to the Dean to ask for approval for a second position for a second candidate. He said the discussion with the Dean will take place when the DHC sees the second strong candidate in the pool and goes to the department at the same time to consult and seek support for the second appointment. He said this normally happens before any hiring is finalized but it can happen afterwards, and will normally come after the interviews. He said in such cases the candidates are measured against each other and the requirements of the position.

The employer called Professor Chris MacDonald as its only witness. He is an Associate Professor and was the Chair of the Department of Business and Law from the fall of 2017 until January 2021. He was the Chair of the DHC for his department during the period relevant to this grievance. He is a philosopher by training and had taught in a Philosophy department for 10 years before being recruited to join the business school at Ryerson in 2012. He described the Department of Business and Law in 2019 as being comprised of seven legal scholars and two philosophers in tenure stream positions and one or two limited term faculty. They also had some part time instructors. He described 2019 as a time of change and loss of faculty because the university had a new law school being established and some members of his department were interested in either moving to the law school or being cross appointed to the law school. They were in the process of losing two members and having two others be cross appointed. For his department it effectively meant the loss of the equivalent of three members in terms of teaching resources at that time.

As chair of the DHC MacDonald attended the DHC training sessions in the fall of 2019 and he said he had done it several times. He reviewed the training materials for the DHC in evidence (at tab 3, exh. 2) and said the objectives of the training at page 6 looked to be the same as what was typically covered in the training. He remembered reviewing the objectives of the DHC found at article 4.2 of the CA and said he had reviewed them several times during his time as Chair of the DHC. He estimated he had been involved in five or six searches to fill positions during his times serving as a member or the Chair of the DHC. He reviewed the DHC obligations at page 6 of the Guide for DHCs (Tab 4, exh 2) and said the DHC gets notification of these each year so they become automatic to them. He reviewed the steps in the Recruitment and Selection Process at the same page and said they were consistent with his understanding of the process and

he followed them.

MacDonald reviewed the grievance filed by the RFA in this case and said he had no role in its filing and was not consulted on the grievance despite the fact he is a member of the association. He said when he first read the grievance alleging that the hiring of Prof. X violated article 4 of the CA he was shocked because he knew the care and attention the members of the DHC and department took to ensure it was consistent with article 4 of the CA. He said he had significant experience with the DHC and job postings and was asked if he was aware of a minimum time requirement for postings. He said he was aware of a standard time but not a minimum time. He thought a few weeks was standard for postings but it was not found in the CA. He was shown a posting for limited term position in Business Law posted from April 26 to May 10, 2019, and another for a limited term position in Ethics and Critical Thinking for the same period. Both were two-week postings and both were covered by article 4 of the CA.

MacDonald was asked what he and other members of the department thought about when preparing a job posting. He said there were a couple of kinds of situations. In times of plenty with lots of new positions possible you ask what is the department short of and what do we need in the longer term. But there is a second type of situation where there is someone in or around the department who you think is good and you want to keep. Then you go to the Dean and persuade them to give you a tenure stream position and prepare a job description to fit that person. He also said that there are sometimes jobs are created with a specific person in mind. He recalled one case in which the department had a post doc person who was clearly a star. They could draft a profile broadly and get a thousand applications or draft the profile with that person in mind and maybe there are a few others who it fits and can apply, but this approach works more efficiently to hire the person you want. He was asked about Tips and Tools for Outreach and Candidate Engagement at page 25 of the Guide for DHCs which recommended that DHCs reach out to their own networks to ask directly about potential candidates and meet up and coming leaders in their area of research. He said all of his colleagues who go to conferences meet lots of people and mentor other people and try to keep in touch with bright young people wo they know who they are and know who to go after when they need someone. He said it was part of his job as Chair to keep up on that.

MacDonald was familiar with an email from the VPA to Dean Taras on Oct 19/19 that first

raised the prospect of whether Prof. X would be acceptable for a position in the Department of Business and Law as part of an arrangement that could result in Prof Z accepting a position as a senior administrator at the university (Tab 5, exh 2). He said it led to Dean Taras writing to him to say there was an opportunity that could lead to the department getting an additional position. On Oct. 30/19 Dean Taras sent an email to MacDonald and Prof. Alon-Shenker (a member of the DHC) forwarding the CV of Prof X as a potential candidate. It was then forwarded to all members of the DHC. On Nov. 11/19 the Provost wrote to Dean Taras asking how they should move forward on the application of Prof. X to the department of Law and Business. That email was forwarded to MacDonald and he replied right away that they had a posting out but the deadline was for January 15/20 so it could not be used. Taras then wrote immediately to MacDonald to suggest another ad with an open rank for business law and said to customize it and use a fast deadline. (Tab 13, exh 2). MacDonald said that at that time, Nov. 11/19, they knew the department was losing faculty they relied on for teaching courses to the new law school that was due to open the following year. As noted they already had one advertisement out to hire someone that had been posted on October 29/19. He also at that point wanted to make sure they were given an additional position and not have an existing position taken by Prof. X. He asked Dean Taras to get confirmation in writing that this would be a new and additional position over and above the department's current approved positions. He received that written confirmation in an email from Carrie Wiebe on Nov. 12/19 (Tab 14, exh. 2). That email also informed him that the posting should indicate it was only to be open for two weeks. On the day before he had several email exchanges with Carrie Wiebe and Dean Taras about how best to arrange for a fast posting for this new additional position and in that dialogue MacDoald indicated he could probably get the DHC to act quickly and consult with his department on this new posting but it would be better if he could get written assurance it would not interfere with existing postings. He made it clear it would be hard to get approval for this new posting if it interfered in any way with the two positions they already had approved for the department. On Nov. 11/19 he asked the Dean and Wiebe for something in writing to provide that guarantee, and also asked when he could involve all the other members of his department in the process so they were fully informed before any decisions were to be made.

On the same day he got the written guarantee that the posting for a position to fit Prof X

would be an extra position not affecting existing positions (Nov. 12/19), MacDonald wrote an email to all members of his department informing them of the possibility "of a spousal hire, related to a senior administrative hire that is happening, The spouse in question is *highly* qualified." He also told them the DHC would be rapidly developing a tenure track, open posting, that would be shown to them as soon as it was completed by the DHC, and assured them this was a "net new" position that would not affect existing postings. He did not recall getting any emails from department members in response to that email. That same evening, he had a draft posting before the DHC. So in effect, while the DHC was drafting and approving the profile, he was consulting all members of the department on the opportunity for them to gain a position through the spousal hire posting.

After that email the DHC decided to involve the department in a full discussion earlier than normal and in a more involved way because it was an unusual situation that they had not experienced previously. MacDonald said the department discussed the posting as a committee of the whole on a couple of occasions. Some members pointed out that this was very fast and they would have preferred to have more time and asked if they could do a longer process. MacDonald noted as well that, given the department was comprised of 7 lawyers and 2 philosophers, they went over the language of article 4.2 in a detailed way in some of those discussions to ensure that the DHC was doing its duty under the CA. He said that it became clear fairly quickly that they had something between consensus and unanimity that this process was consistent with the CA and should go ahead. MacDonald also noted that the other two members of the DHC besides himself were legal scholars and he relied on them to give him comfort with respect to the process. Despite the broad consultation with all members of his department, MacDonald said he was not aware of anyone in the department reaching out to the RFA to complain about the process.

On Nov. 13/19 MacDonald emailed all members of the department to provide an update on the spousal hire, including a link to Prof. X's faculty page and CV at his former academic institution. He also advised them of the senior administrative position that the spouse of Prof. X was being hired to fill and confirmed that this hiring was "effectively a freebie" that would not replace existing or future approved hires, and he had a written guarantee from the Provost on this. He then told them he believed it was a good thing but invited then to give feedback and tell him if

he was missing something. He also noted that some members of the department had served as senior administrators at the university. Professor Avner Levin is the founding chair of the department and served as the Interim VP Academic several years ago. Prof. Asher Alkoby has served as the Associate Dean of the Faculty. Two members of the department responded very quickly to say they agreed with the idea of making the spousal hire and one of those members said Prof X looked like a wonderful addition. The only significant comment came from Prof Levin who said he thought this was more about the spousal hiring process than about the candidate or his spouse and said if this was a real search for a full professor, with tenure, he would want the ad to set a higher bar, but he did not see the DHC as having any meaningful say, unless they wanted to stop the hiring of the senior administrator by way of rejecting their spouse. He thought that the DHC should push back against the university and the RFA so that it was not forced to go through some process they may not be comfortable with as they were being asked to be a rubber stamp.

MacDonald then emailed all members to report that he had discussed Levin's comments with him and concluded that a symbolic quantity of pushback was called for, rather than a derailing of the senior administrative search. He was happy to tell the Provost that the spousal hiring process was a bit silly but thought that declining a gift from the Provost in the form of the extra position was likely to do substantial damage to the department and antagonize the Dean. He also said that if the department wanted him to try to arrange a meeting about this he would do so. In reply to that request he got only one response from a member who said they should go ahead with the spousal hire. On November 15/19 he emailed to the Dean to ask whether if another star applies for the new position would they be allowed to use one of next year's positions (the law school backfills) for that person. Dean Taras then forwarded that request to the Provost with a note that the department was balking a bit and negotiating, using their bargaining power advantage. However, she described it as a reasonable request and suggested they do it. MacDonald testified that he was happy to take the department's concerns forward and ensure that they got as much as they could with respect to human resources for the department. On the same day he wrote to the DHC members to say he was waiting for the Dean's response to his request concerning whether there was another process available for the spousal hire and to give them a new draft position profile for their approval suggesting they try to get it approved as he thought they are more likely

to get concessions from the Provost if they moved quickly on the hiring. He noted that nothing could go ahead for the posting without the DHC's approval.

At that point Prof. Webb replied to say the posting looked fine but he knew of two other candidates who might apply who could exceed the qualifications (with a doctorate), and what if they had a diversity candidate apply with higher educational qualifications. He said he was thinking maybe they could say thank you for proposing this person who will be a very good addition for the department but could we hire him through a different process. The other member of the committee, Prof. Alon-Shenker then replied that she agreed with Webb but assuming that could not be done, at least they were now open to hiring an additional person from the other candidates who applied for the posting. For that reason she suggested they extend the deadline on the posting to allow a rolling consideration of candidates. That would allow them to interview and make a decision on Prof. X right away with department approval but ensure they got the best person for the second position by leaving the posting deadline open to attract more candidates. MacDonald said these emails showed that the DHC was trying to figure out how to move ahead but with integrity and ensuring they would not miss any good people.

On Nov. 20/19 there was a departmental council meeting at which there was a 10 minute discussion of upcoming appointments. Notes were taken of that discussion (tab 32, exh 2). It was pointed out that there was a spousal hire but they still needed to go through the posting and the proper DHC process. A question was asked about what would they do if they had a stronger candidate, would they still hire the spouse. In response MacDonald pointed out that, if that happened, he had approval to hire an additional person. They discussed that the posting had been narrowed to fit the spouse's specialty and to limit the number of other candidates. It was pointed out that there were two additional hires that were not affected by this spousal hire. It was pointed out that Prof. X was a white male so there would be more pressure for a diversity hire on the other two approved hires. The question was raised that a refusal to hire Prof X may have consequences for the department in the future as for example by denial of future positions. MacDonald said that question did not cause them to stop the process as they already had approval to hire a second person if the search turned up worthy candidates. It was pointed out that the ad for the job was already posted with a Dec. 3/19 deadline.

On Nov. 26/19 MacDonald wrote an email to the Dean asking for a phone call with her because his department was troubled. He said this was to raise the concern of members of the department that the process was too fast. He wrote to the Dean again on Nov. 29/19 to indicate the hiring process was going badly and that he had spoken to the Provost recently and they had agreed to a modification that would let the process go forward. He said the aggravation raised by members of his department was all procedural. He said members of the department liked the opportunity to gain an extra position and liked the candidate but were concerned about the process. He said he was simply engaging in shuttle diplomacy between his department and the senior administration.

Between Nov. 29/19 and Dec. 1/19 Prof Levin had spoken directly with the Provost. On Dec. 1/19 the Provost wrote to MacDonald to say that the Dean and Levin had told him there was considerable opposition to hiring Prof. X and he said he never meant to cause trouble for MacDonald but thought the hiring would be no brainer since it was a free position. He asked that he be informed ASAP if the department did not want Prof X because it would not be fair to have him hired into a hostile environment. MacDonald replied that he had put that question to his department by email. On Dec. 2/19 he reported that there was no animosity toward Prof. X in the department and they wanted to go ahead with the hire but with changes to the process. He also advised that the DHC refused to schedule an interview for Prof X before they had created a formal short list as that would be contrary to the CA, and they knew the RFA was watching. MacDonald said the department wanted to follow a process that: extended the posting deadline by one week until Dec. 10 (as agreed by the Provost); had the DHC meet as quickly as possible after the posting closed; and would invite Prof. X and any other desired candidates ASAP, possibly by SKYPE, and letting Prof X know in advance that he would be invited to interview, possibly on Dec. 12/19.

MacDonald was asked about the fact that the members of the DHC had received an email from the RFA President, Ron Babin, on Dec. 2/19, concerning the need to comply with article 4.2 of the collective agreement and not approve a spousal hire without such compliance. He said he could not recall the DHC having any discussion about the contents of this email because the DHC had already, by that point, had extensive discussions on compliance with the process described in article 4.2 and the need to maintain integrity on this. For that reason Babin's email did not really

change anything for the DHC.

On Dec. 6/19 the Provost wrote to MacDonald wondering how things were going and asking about the mood of the department. But he said he would leave next steps to MacDonald. MacDonald saidhe knew the Provost had a favoured candidate but the DHC had a process to follow under article 4.2, and they would review all the candidates who applied with an obligation to carry out the CA process in a way that was going to be good for the department. He said they were under no obligation to hire Prof X if that was the decision of the department.

On Dec. 6/19 MacDonald wrote to Prof. X to give him an update on the process to be followed after the posting closed with respect to the creation of a short list and the interview and job talk that would follow for short list candidates. He said because the short list had not been created he could not formally invite Prof X at that point, but wondered if he would be available for an interview on Dec. 12 if he were to be short listed. On Dec. 11/19 MacDonald forwarded the CVs of six applicants to the DHC members and asked them to let him know their views on who should be on a short list. The same day Prof Alon-Shenker proposed a short list of four names including Prof. X, and explained why the other two should not be included. She also said if the other members of the DHC agreed they should share these 4 names and CVs with the department ASAP. MacDonald replied with a request as to whether they could agree that Prof X was on the short list and interview him the next week and decide on interviews for others after that. The next day Prof Webb said he agreed with the proposed short list and with interviewing Prof X the next week. Prof Alon-Shenker then agreed with interviewing Prof X and asked if they could agree on and interview the other three candidates shortly thereafter. MacDonald replied that he needed more time to decide on the other three being on the short list but pointed out that they could proceed with Prof X quickly and pointed out that Art. 4.2 required them to solicit input from the other members of the department after the interview and job talk and before making a recommendation. He proposed they give the department 24 hours after his job talk to send input about Prof X before they made a decision on his application.

Later, on Dec. 12/19 MacDonald wrote that he agreed on the proposed short list and noted the DHC had two options: (1) to interview the other 3 candidates with an eye to using the additional senior posting the Provost has agreed to, right away, with interviews in January; or (2)

post a new ‘open rank’ position in January and advertise widely to get an even better pool of applicants. He then asked if they wanted him to circulate the 3 other CVs to the department and ask their input on how they should proceed. The members agreed and he did implement that suggestion. On the same day MacDonald issued the invitation to Prof X to come for an interview and job talk and they agreed on Dec. 17/19 as the date. Later that day MacDonald wrote to the Provost to inform him they were inviting Prof. X to an interview. The Provost asked him if he knew how long it would take the department to make a decision. MacDonald said he was not sure but pointed out that art. 4.2 required the DHC to consult members of the department before making a recommendation and said he intended to give the department 24 hours to provide input.

On Dec. 13/19 MacDonald sent the CVs of the other three short listed candidates to the department and asked for their views on the two options for dealing with them set out above. He also reminded them they would be interviewing and hearing the job talk of Prof X next week. He got feedback from many members immediately on how to deal with the 3 other candidates. He reported back that there appeared to be a consensus to follow option 1, interviewing the three remaining candidates with a view to using the additional position promised by the Provost if they agreed on an appropriate candidate. MacDonald also agreed with the suggestion of some members that if they did not agree on a candidate after the interviews they could repost the position to seek a wider applicant pool.

MacDonald said he was probably aware of the announcement of the hiring of Prof Z to a senior administration position shortly before the interview of Prof. X but said that did not change his thoughts on the application of Prof X in any way. The members of the department were invited on Dec. 16/19 to attend Prof X’s job talk on Dec. 17/19. On Dec. 18/19 MacDonald submitted the input he had received from the department to the other members of the DHC and also sent them a draft of a letter recommending the hiring of Prof. X to the Dean for their comments. Prof Alon-Shenker recommended changes to the Posting and Selection Process portion of the letter to indicate they had identified a short list of 4 strong applicants and subsequently invited one person for an interview and research talk, and the 3 other candidates would be invited for an interview and job talk in the new year. MacDonald made the revisions

and sent it back to the other DHC members for their signature (Tab 59, exh 2). The DHC letter recommending Prof X was sent to the Dean on Dec. 18/19 (Tab 60, exh 2). MacDonald confirmed that everything reported in the Selection Process and Onsite Interview portions of the letter actually happened and that the DHC was mindful of the university's commitments to equity, diversity and inclusion and its own responsibilities in that regard, beginning with the composition of the committee itself. He pointed out that this letter was derived from a template letter that was customized based on the circumstances of the search.

MacDonald said the Recommendation section explains the basis for the recommendation to hire Prof X and the DHC did discuss Prof. X's strong record of research and publication as well as his extensive experience teaching business law. They did believe he was a strong candidate who would do a lot to strengthen their teaching resources in the faculty in the areas of international trade law, property and intellectual property law. He said the outcome would have been very different if the person had been a weak candidate who did not offer the prospect of strengthening the department. He said the process to hire the spouse would have gone nowhere with a weak candidate.

MacDonald said that after he has sent the DHC recommendation the process of hiring is out of his hands and left to the Dean and her office until he is notified that the offer has been accepted and is advised as to when the appointment will commence. All of that took place with respect to Prof X at the end of December in 2019.

On January 8/20 MacDonald wrote to Carrie Wiebe to get the interview process for the other 3 candidates underway. Those interviews were carried out soon after that, following the usual process, but the department response to those interviews was not enthusiastic. As a result, the new position was reposted on April 1/20, to try to expand the pool. During that second process they interviewed several candidates, including one of the candidates from the short list that had been identified in the December 2019 short list and interviewed in January of 2020, and eventually hired that individual. Thus the extra position promised with respect to the hiring of Prof. X was eventually filled by that hiring of Prof. W, who had been part of that original short list created by the DHC in Dec. 2019.

MacDonald was then taken to a chart included in the Training Materials for DHCs (at

Tab 3. Exh 2) to set out the CA obligations of the DHC. He was asked if the DHC carried out those obligations with respect to the hiring of Prof. X. He said he was aware of these obligations and tried to comply with them. He said the DHC members were appointed in compliance with art. 4.1 (C). The DHC consulted with members of the department as required by art. 4.2(D), and the profile for the posting was drafted and circulated to the department and submitted to the department as required by art. 4.2(D). MacDonald said the DHC complied with the steps for formal consultation from art. 4.2 set out in the DHC training materials. He said after the approval was given for the position they consulted with department members for their input on the requirements for the position, such as education, equity and areas of specialization. They then prepared a draft profile and sent it to faculty members in the department for comment. The also complied with 4.2 (K) by providing a hard copy of the CVs of short listed candidates to the faculty members. They complied with 4.2(L) by having the candidate do a presentation to the department. And they complied with 4.2(M) by getting input from the department following the presentation and prior to making any recommendation. Finally, MacDonald also said the DHC complied with the list of requirements for the form of the recommendation letter set out at page 49 of Tab 3, exh. 2.

The incumbent asked MacDonald about the appointment of Prof X as the acting chair of the Department of Business and Law. He said the process of appointing an interim chair of a department is done by the Dean of the Faculty. He said this was done for his department on Dec. 31/20 when MacDonald went on sabbatical, with Prof X being appointed as Acting Chair effective Jan. 1/21. The Interim chair is responsible for student discipline, and representing the department at meetings for all chairs of departments in the faculty and all meetings with administrators in the university above the level of chair. The chair is also involved in the process of teaching assignments for members of the department and dealing with student transfers into the department. He also chairs department council meetings. Prof X was also on the DHC. MacDonald confirmed that the membership of the DHC is usually determined by collegial consensus among members of the department. He said it would be normal practice for Prof X to chair the DHC as acting chair of the department. He is also a member of the Faculty Tenure Committee for the Ted Rogers School of Management. MacDonald said that did not surprise

him because he was viewed by members of his department as a leader and a serious scholar and that is normally what it means to be on that committee.

MacDonald was asked if he drafted the letter of support for Prof X (exh 4) filed in evidence. He said he drafted parts of it but other members of the department wrote parts of it. He said one other member of the department said the grievance filed by the RFA was troublesome and that Prof X deserved to know that he was a valued member of the department, and all members agreed they should send a letter of support to communicate those views. He said that they were not asked by the employer to draft this letter, and this was simply an emotional and heartfelt response by the faculty. He said paragraph 4 of the letter, stating that they rejected the implication that there was anything improper about the process followed by the department, was included because they felt an implication of the grievance was that the members of the department had done something improper. MacDonald noted they rejected that implication and also stated that they had their own expertise on the DHC and in the department as legal scholars and ethicists.

MacDonald was asked about the letter's reference to the damage being done to the morale of the department. He said the members of his department believe strongly in collegial governance and strong support for collective bargaining and unions and they felt demoralized that they were having the rug pulled out from under them by their association. He noted that all those who signed the letter are members of the RFA. He also noted that five of the signers were on pre-tenure appointments without the protection of tenure so he warned them about potential risks to them of signing the letter, but they all insisted on signing the letter despite that warning.

In cross-examination MacDonald agreed that in the fall of 2019 the university was in the process of opening its new law school and his department was expected to have a close relationship with the new school. But he also saw this as causing the loss of some of his teaching staff so he was interested in gaining more appointments. He agreed the department chair normally sat on the DHC and was aware that article 4.1 of the CA provided that the chair is an ex officio member of the DHC. He thought it would be the same for an interim chair and he confirmed that the DHC in his department has always been comprised of three members of the department including the Chair and one elected and one appointed member. He said the elected

person in his department is normally chosen by consensus rather than election.

MacDonald said he was involved in the hiring of 5 faculty members as a member of the DHC prior to the hiring of Prof. X, two of which were tenure stream appointments. He was the chair for an earlier limited term hiring in 2019 but Prof X was the first hiring of a tenure stream person during his term as Chair. He agreed that the Provost (VPA) was the person who decided if there were resources to hire someone to a faculty position and if there would be money to expand the faculty. Deans can request the creation of positions and funds for the hiring of faculty and, when funding is agreed to by the Provost, it is the Dean who normally gets to decide what department will get the position. At that point the Dean notifies the department that they have a position to fill and the department then launches the DHC to carry out the appointment process.

MacDonald confirmed that the profile that is referenced in article 4 of the CA is part of the job ad or posting. They begin with a profile of what the department wants with respect to the type of faculty member they are looking for to meet the needs of the department. That profile is informed both by the needs of the department at that time and what department members might know about who is interested in applying at that time. He agreed that the CA referred to the hiring process being designed to attract the strongest possible candidate pool. He was asked if strength in that article referred to strength in all possible elements including EDI. He agreed but said there may be cases where they limit the candidate pool where they have some person in mind who may be working in the department in a limited term position or where members of the department know of other strong candidates working elsewhere through their research network. However, he did not know of Prof X before he was brought to his attention by the Provost and Dean. He agreed this was not a case of where someone in the department knew of some strong candidate beforehand and set up the posting to get that person. He also agreed that in his prior experience MacDonald had not narrowed a candidate pool on the basis solely of seeing his CV. He also agreed that in other cases the candidate being sought is personally known to members of the department and is attractive for that reason, but that was not the case for Prof. X.

MacDonald said he could not say whether thirty days was the typical duration for a posting but said that duration would be unremarkable. He agreed that normally you would want

the posting out there longer to attract the strongest pool of candidates. He agreed that two of the recent postings in his department that were for two weeks that he was asked about earlier were for limited term positions. However, he noted that his own hiring had been done following a posting of less than 30 days and he also referred to two other hires in his department that were done on shorter postings because both individuals were known to the department beforehand.

MacDonald agreed that the university is a different setting because other members of university get to decide, through collegial decision making, who will be allowed to join the collegium. He also agreed that limited term appointments (LTs) were different in that they were not being admitted to the collegium on a permanent basis. It was put to him this meant when hiring tenured faculty he wanted the candidate pool to be as broad as possible. He said that was not always the case and one did not always want thousands of candidates for every position. He was asked if it was fair to say there was much more care taken when hiring a person for a tenure stream position as compared to limited terms postings. He said he was not too sure about that because one had to put a lot of care into a LT posting because that can often be a stepping stone to a tenure stream position.

He was asked if the DHC normally creates a preferred candidate list or short list and then interviews the persons on that list. He agreed but said in some cases they first create a long list to be interviewed by video conference and then move from that to a short list. It was pointed out to MacDonald that art. 4.2 (L) states that those on the preferred candidates list shall be invited for an interview and give a job talk to the department. He said he knew that and he followed that provision. He agreed he was sent an email by the Dean on Oct 30/19 with the CV of Prof X attached and announcing to him this was the spouse person and asking him to keep this confidential. He said he was not sure if the Dean told him who the senior administrator hire who was the spouse of Prof X was at this point. He was not sure if he received this CV before the Provost had made a decision on the creation of a position, but he admitted he received this before the DHC had begun to create a profile for the position.

On Nov. 11/19, the Dean forwarded to MacDonald an email from the Provost to the Dean and the VP of Faculty Affairs asking how they should move forward with an application for Prof X to the department of Law and Business (Tab 13, exh 2). He admitted that this was not usual

and that he had never received emails from the Provost and VPFA about a candidate prior to a posting. He agreed that he understood from this email that the Provost had a preferred candidate. That email also informed MacDonald of the senior administrative position that was to be filled by the spouse of Prof. X. That email also informed him that the position for Prof X was the determining factor for that senior administrative appointment. In his response to the Dean, MacDonald told her they had an ad out for posting to fill the vacancy for one of the two people who were leaving the department to teach in the new law school but also told her that would not work because the ad did not close until January 15/20. MacDonald understood that the Provost was in negotiations with the spouse of Prof X at that time and thus there was urgency to deal with the hiring of Prof X as soon as possible.

MacDonald said he did not think Prof X taught classes in the Winter term of 2020 because teaching assignments had been done for the term prior to his hiring. He agreed that the urgency to deal with his hiring did not stem from the needs of the department. He also agreed that a second reason why the October posting for Law and Business (Tab 8, exh. 2) did not work for the situation of Prof. X was that it required a doctoral degree for educational qualifications. It also did not work because it was for a junior position with an IT specialty, neither of which fit Prof. X. He said when the Dean replied on Nov. 11/19 suggesting another ad with open rank, and to customize it with a fast deadline, he saw that as being an additional job for his department and in fact insisted on it being additional or extra to what he had as approved positions at that time. He understood the suggestion to customize to refer to making it meet Prof. X's areas of specialty. MacDonald also said they always customize the posting to either fit the department's needs or to meet the areas of a preferred candidate if one has been identified. It was put to MacDonald that art. 4.2(D) referred to the DHC consulting with the department when customizing a profile for each position, but at that point there had been no consultation. He agreed but said they had a need for an extra position for faculty in their department and if that was what it took to gain that position, to customize it to meet Prof.X's areas, then that was what it took.

On Nov. 11/19 MacDonald also had a number of email exchanges with the Dean and Carrie Wiebe (the administrative assistant to the Dean) concerning the development of a speedy

posting to deal with the hiring of Prof. X (Tab 15, exh 2). It began with Wiebe suggesting they may be able to duplicate the existing posting (Tab 8) with a two-week deadline and asking MacDonald if he could get it approved quickly. MacDonald replied that he might be able to get a posting and hiring done quickly but it had to be an extra or additional position and could not interfere with, or replace, any existing or current positions. He also asked if there was some different process for a spousal hire. The Dean and Wiebe told him they did not know the answer, but the Dean said they needed the department to vote yes. MacDonald also told them he needed guidance on the outlines of the position and if he should narrow the position to suit Prof. X.

MacDonald said he was aware of the need to attract the strongest candidate pool from his DHC training, but he was looking at that time for guidance from the administration as to whether there was some alternative means to attain the spousal hire. He said when he asked the Dean how to narrow the ad to suit Prof X no one said "wait a minute, we have to look for the strongest candidate pool" or reminded him of the need for the DHC to comply with the CA. However, MacDonald said they all did the DHC training session and said that was where the DHC obligations were laid out. He said it would have been very odd for the Dean's office to remind them to follow the CA.

MacDonald confirmed that on Nov. 11/19 he asked in the same email chain whether they would get anything in writing to confirm that this hiring would not be at the expense of the two ongoing hires and asked when he could involve the other members of his department in the process. He said he understood that if they decided not to hire Prof X they would not get the additional position and would only be able to hire the two positions they already had approved. However, he said no one in the administration every said if he did not hire Prof X they would only get the two positions they already had. He received the written confirmation he had requested from Carrie Wiebe in an email on Nov. 12/19 (Tab 14, exh 2). That email also told him to have the posting for Prof. X limited to two weeks and indicate a priority for Canadian citizens. On Nov. 13/19 he received an email from the Provost to Dean Taras and himself confirming that the spousal hire for Prof X would not in any way affect the existing positions for Law and Business that had already been approved (Tab 16, exh 2).

On Nov 12/19 MacDonald emailed all members of his department to inform them of the

imminent possibility of a spousal hire for which the spouse in question was highly qualified, to let them know the DHC would be developing quickly a tenure-track, open rank posting and be sharing that with them shortly, and inform them of his assurance this would be an extra position that would not interfere with the two existing hires that were pending. He wanted to put them on notice as soon as possible that they were getting an additional position related to a spousal hire (Tab 17, exh 2). On Nov. 13/19 he wrote to Dean Taras that he was getting some initial pushback from one person that Prof X did not have a doctorate and from one other person that he did not have enough publications for someone his age. MacDonald agreed that most new hires at Ryerson have a doctorate and said that in most fields it is important for new hires to have a doctorate as they do not have a record of publication at the outset of their academic career so the Ph.D. is used to show ability and potential. To deal with those concerns he asked the Dean if he could share Prof. X's profile with the department so they could see that he was an experienced teacher with publications and was from a law school where faculty are often hired without a doctorate. The Dean asked MacDonald to do so. She also told him to be careful with respect to what he put in emails as there could be FOIP issues someday. He took that to refer to possible freedom of information and privacy issues. He then asked the Dean if it would be useful for the department to arrive at a field of specialization to name in the call. The Dean replied, 'Anything that would narrow the choices.' He said he understood this to mean do it to favour Prof. X.

In this email exchange the Dean also told MacDonald that the Provost wanted this done quickly and said she thought this hiring might be a deal breaker for the hiring of the spouse to a senior administrative position. He was asked if he understood at this point that if he did not hire Prof X it could mean not hiring Prof. Z to the senior administrative position. MacDonald said they were never told that hiring Prof. X was the only way to get the hiring Prof Z accomplished. It was put to them that this was a way for the department to benefit itself and help the university to hire Prof Z as a very desirable candidate for a senior administrative position. He said the Provost had actually told him that if his department did not want to hire Prof X they did not have to do it and to let him know and they would find another way. He said he believed that occurred during a hallway conversation he had with the Provost after an administrative committee meeting. However, he understood that if the department did not hire Prof X they would not get

the additional position that came with his hiring. He said no one ever said to him that if you do not hire Prof X you will not get to hire someone else for that position. He was asked if he believed that if he hired someone other than Prof X for that posting they would still get to fill the other two postings that were in progress. He replied that he never really thought about that because by then he knew that that had a very qualified candidate in Prof. X. But he agreed that he knew the hiring of Prof. X could be a possible deal breaker for the hiring of his spouse, Prof. Z.

On the afternoon of Nov. 13/19 Prof. MacDonald emailed the whole department to provide Prof. X's CV and link to his online profile at his prior institution, to identify the position his spouse was being hired for, and clarify that this spousal hire was effectively a freebie for the department (Tab 22. Exh 2). On the latter point he emphasized that he had it in writing from the Provost that this spousal hire would not affect the two postings for the current year and two for the following year that had already been approved. He said he did this to satisfy the lawyers in his department. This is also when he invited feedback from the department and received several emails, for the most part showing a consensus that they should go ahead with the hire, but attracting the email referred to above from Prof. Levin about the fact he personally would have liked to see the ad set a higher bar, and the need for some push back. MacDonald was asked if he agreed with Levin's comment about not seeing the DHC as having a meaningful say unless it wanted to stop the hiring of Prof. Z, by rejecting Prof. X. He said he really did not think about that outcome resulting if they rejected Prof X, because the Provost had told him that he had other ways to get that done. However, he never asked the Provost about the other ways to meet Prof Z's demands because he wanted the hiring of Prof X to enable them to get a new position and gain a good person for the department. Nevertheless, he informed the department that he and Levin had discussed Levin's concerns and concluded that a symbolic amount of push back was called for. He also wrote that he thought the system for spousal hires was silly, and said he meant it was silly for them to have to go through the same process as a normal hire where you could have instead had some process of simply approving a qualified hire for spousal hire situation. He testified that he believed other universities have a separate process to deal with these types of situations.

MacDonald admitted that he wrote in his email to the department about symbolic push back that he thought declining the gift of an extra position from the Provost would do substantial damage to the department and antagonize the Dean no end. He agreed that the rejection of this position by the department would have "rocked the boat", and he had never really raised an alternative to proceeding with the spousal hire. He agreed that on Nov. 15/19 he had written to the Dean to report that he had been asked or implored to ask her if there was any other way to achieve the spousal hire without going through the DHC. He said he did not think at that time that there was any other way, and the Dean wrote back to confirm that was the case. She mentioned the CA had another provision for hiring a Distinguished Professor, but believed that could result in difficulties with the RFA. He said he learned the Provost was against that option as well and he did not pursue it.

MacDonald was referred to his Nov. 15/19 email to the Dean (Tab 24) where he asked, if there was another star candidate who applied for the Prof X posting would they be allowed to use one of the department's allotted replacement postings for the next year to hire the star as well as Prof X. He was ultimately told he could do that. In cross he was asked if they ended up with two candidates who were better than Prof. X was it the case that he could not use those two positions for the two candidates other than Prof X. He said no one told him that but he thought, given the high quality of Prof X, that was not likely to happen. The same day he sent an email to the other members of the DHC with a draft profile for the posting in which he explained he had narrowed it by saying they would especially like someone with an international trade specialty. He said he did that because it was Prof X's specialty. He also lowered the educational requirement to a Masters degree to fit Prof. X. This was when Prof Webb wrote back to say the ad looked fine but posed possible hypothetical problems re what might happen if other candidates with Ph.Ds applied and how could they justify hiring Prof X over them and also what if a diversity candidate applied with higher qualifications. MacDonald said this was just another example of hypothetical problems being raised but they would not be a problem, because they had similar situations arise in the past where they found more than one good candidate they wanted to hire, and they did actually get approval to hire another person under this posting later in January. The DHC ultimately interviewed the three people with doctorates from the short list created on the

Prof X posting after they hired Prof. X.

MacDonald agreed that they did not interview the other 3 short listed candidates for this posting prior to Prof X being hired. However, he pointed to the suggestion of Prof Alon-Shenker that they remove the deadline for the posting and interview candidates on a rolling basis, to allow them to hire Prof X quickly and then hire another candidate within a reasonable timeframe. He said they did not end up doing that but they did extend the posting deadline to Dec. 10/19. He said the purpose of a rolling deadline is to make it open ended so you don't have to declare the competition closed until you have enough good candidates. He said there was not a concern that another star candidate could create a barrier to hiring Prof X. He said they wanted to attract better candidates, but they believed they already had a good candidate who they wanted to have join the department, and they ultimately did end up with a second strong candidate arising out of the search who they hired eventually, albeit after a longer process (Prof Y).

On Nov. 18/19 he sent the ad for the posting to the Dean and Ms Wiebe for them to get posted (Tab 29). He also told them he was adding the spousal hire for Prof X to the agenda for the departmental council meeting to discuss the difficult position the DHC might end up in depending on the range of candidates who might apply. In cross he was asked if he referred to 'the difficult position' that could arise because a star candidate might apply and present a problem for the hiring of Prof X. He agreed but said he was preparing to push harder to advocate for the circumstance that, if better candidates applied, they would be able to hire them as well. MacDonald said he was a champion for the extra hire of a good person like Prof X as being very desirable for the department. He said the difficulty referred to was the need to hire Prof X as part of the recruitment and hiring of Prof Z as a senior administrator and the difficulty in maintaining and developing close ties with other parts of the university.

MacDonald was taken again to the minutes of the department council meeting of Nov. 20/19 and its notes concerning the discussion of the spousal hire (Tab 32). He agreed that the discussion identified Prof X as a candidate, as the spouse of Prof Z who was being recruited to a senior administrative position at the university, at a time when the ad had just been posted and before any applications had been submitted to the DHC. However, he said they also discussed the fact that, if they got other star candidates, they could hire another person now for a position

that would normally have been filled the following year. He was not sure if he had that confirmed in writing at that point but he recalled discussing it at that meeting. He said he could not recall the discussion about Prof X being a white male and that creating more pressure for diversity in other hires, but admitted that EDI goals were a frequent topic of discussion about hires. He said he was aware of the CA provisions concerning EDI values in hiring decisions, but said he was not aware of any attributes of Prof X that would reflect the need to increase diversity in the department.

MacDonald said he did not say at the department council meeting that failing to hire Prof X could lead to consequences for the department. He said he personally was happy about the appointment so would not have said anything about that but also said there was a concern that there was a very good person (Prof X) being presented to them and if they did not hire him they would have egg on their faces. However, he admitted that in an email to the department on Nov. 14/19 he did say that declining the gift of this appointment from the Provost would do substantial damage to the department and antagonize the Dean. He acknowledged those thoughts were expressed at the department meeting on Nov. 20/19.

MacDonald was asked what he was referring to in his email of Nov. 26/19 (Tab 35) to the Dean reporting that his department was troubled and asking for a meeting with the Dean. He said he was not sure of what he was referring to, but said most of the concerns in the department were about the process. He said other concerns were short lived, but concerns about process endured. He said he could not recall whether he raised the 'star' concern or the EDI concerns with the Dean, but thought he focussed on the process concerns of the time for the hiring and the mortgaging of future hires.

MacDonald wrote to the Provost on Nov. 28/19 asking for a 5-minute meeting. The Provost suggested they chat after an upcoming Board of Governors meeting. MacDonald thought this was when he raised with the Provost the need to slow down the process. He said he assured the Provost there was no problem with Prof X and there was no animosity toward him in the department. He said this is where the Provost told him that if the department did not want to do this (hire Prof X), the Provost could do it another way. That suggestion by the Provost is also reflected in an email from the Provost to MacDonald on Dec. 1/19, where he said if the

department does not want Prof X, he needs to know ASAP (Tab 38). In reply, MacDonald reassured him the department had no animosity aimed at Prof X and the main concern was that they were being rushed. He also told the Provost he tried to get them to agree to interview X before the short list was finalized but was told that would be contrary to the CA and the RFA was watching them. He admitted he was aware of an email from the RFA president at that time. He then set out a three-point plan to get through the hiring process: extend the deadline for the posting to Dec. 10; have the DHC meet as quickly as possible after the deadline; and invite Prof X and possibly others for an interview ASAP after the DHC meeting. He said he identified Prof X as an interviewee because they had already identified him as suitable candidate. He said he was simply providing an outline of the process planned for the hiring. He said he was planning to go through the steps of creating a short list in the DHC.

It was put to MacDonald that, before going through any of those steps in the DHC to review applications and decide on a shortlist, he had told the Provost of his decision to interview Prof X. He did not reply but agreed that the Provost had replied on Dec. 2/19 that this plan would definitely work and he raised no concerns. On Dec 6/19 the Provost wrote an email asking MacDonald how things were going what was the mood of the department (Tab 44). MacDonald agreed this was unusual but he did reply on the same day to report on the progress of the hiring process (Tab 44). On the same day he emailed Prof X an informal and unofficial note to describe the hiring process and propose possible dates for his interview (Tab 43). He agreed that he did not send out another email on the process to other applicants. He agreed that the urgency to provide Prof X with this heads-up on process and possible interview dates was due to the urgency created by the fact that the negotiations with Prof Z, his spouse, were dependent on the hiring of Prof X. He agreed that his follow up emails with Prof X on Dec 9/19 concerning the scheduling of an in-person interview were sent and received before the DHC had met to develop a short list (Tab 43).

MacDonald confirmed that his email of Dec 11/19 to circulate the CVs of six applicants to the members of the DHC was the first time he had circulated any CVs other than that of Prof X to the DHC (Tab 46). Prof Alon-Shenker replied with a proposed short list of 4, including Prof. X. On Dec. 12/19, MacDonald replied to ask the committee to agree that Prof X was on

the short list because interviewing him was urgent and proposed they discuss the other candidates later to see if they were worth interviewing. The two other members agreed to interview Prof X right away and MacDonald replied that he needed more time to review the other three candidates, but proposed a 24-hour deadline for members of the department to give input on Prof X following his interview and presentation. Later the same day MacDonald wrote the DHC members to say he agreed the other 3 candidates were good to be short listed but he was not agreeing they would go on the same short list as Prof X. Rather he was raising the question whether they should have a short list of one for this posting and have a second short list for the future hire, the extra one they were allowed to mortgage and hire now from a future position that had been approved for the following year.

It was put to MacDonald that they had people from the outside world who had applied to this posting and they had applied to be considered in relation to others on this posting. It was put to him that on Dec. 12/19 he was saying they were going to create a short list of one person for Prof X and another short list for the other three candidates. He replied that the other three candidates were ultimately short listed but not for this position. They were short listed for the second additional position that the Provost had approved hiring at that time, rather than waiting until the following year. He was asked where he had informed the other two members of the DHC that this was what was going to happen with respect to the short list for the immediate posting, did he in fact tell them that the other three were not going to be on the same short list as Prof X. MacDonald replied that this was collaborative decision making by all members of the DHC, it was not only him making this decision. He noted that at 7:24 pm on Dec 12/19 he wrote to Prof Webb and Prof Alon-Shenker to set out the two options: (1) interview the other 3 candidates with an eye to using the additional senior hire the Provost has promised, but interview them later since they were not competing with Prof X; or (2) post a new 'open rank' position in January and advertise widely to get an even better candidate pool (Tab 46). He was asked about his statement that there was no one competing with Prof X. He replied that roughly speaking that was correct, as they had two positions to fill and they were confident that Prof X was the right person to fill one of them. He agreed with the suggestion that they had effectively taken the other three 'star' candidates and removed them from this posting and had them compete for a

second posting.

On Dec. 12/19 MacDonald emailed Prof X to invite him for an interview and agreed to Dec. 17/19 for his visit, interview and presentation. The same day he informed the Provost of that development and was asked by the Provost how long it would take the department "to make a decision". He replied he was not sure, but pointed out the CA required the DHC to consult the department after the interview and he intended to give them 24 hours. MacDonald acknowledged that was a busy time of year for faculty at the end of term with exam marking. Given the communication methods in his small department and the amount of discussion they had already had on the issue of Prof X's appointment, he thought 24 hours was sufficient and no one objected to that time limit for comments. The Provost replied in an email that merely said "Perfect."

On Dec. 13/19 MacDonald emailed the two options discussed above for dealing with the other three candidates on the short list and got some questions on the two options but generally saw a consensus arise for the first option. He said he relied heavily on the other two members of the DHC to assess the options as they were both legal scholars. He admitted that the other three candidates all had doctorates. He was asked if he knew if any of the three came from equity seeking groups and said he thought two of them had names that suggested they might be. He said he could not recall if Prof Y was a person with disabilities. He said he did not really know the other candidates personally before that time. He said after the consensus arose to go with option one they decided to use the backfill appointment they had approved for Prof Levin's job in the following year to interview the three short listed candidates for that position. As a result, he wrote to the Provost and Dean on Dec. 14/19 (Tab 51) to announce that the posting for Prof X drew an additional three highly qualified candidates – 'real stars', and asked for approval to interview those three in January 2020 for the Levin replacement position. The Provost replied, "Please proceed. This is whatever agreed on conditional on the appointment of Prof. X."

MacDonald was asked if he understood this to mean he got the additional position to hire only if they hired Prof X. He said that seemed to be what it said, but he did not see it as conditional on hiring Prof X at that point as they anticipated that Prof X would be a good hire for the department unless his interview was a failure. He said he did not try to clarify what this

meant at that time because he had a written statement from the Provost in response to his earlier request for assurance that they would have an extra position if they hired Prof. X.

MacDonald then identified a letter of application he had received from one of the other short-listed candidates on Dec. 2/19, in which the candidate self-identified as a person with disabilities (exh. 5).

Prof. X did his interview and job presentation on Dec. 17/19. It was attended by the DHC and other members of the department. On Dec 16/19 an email was sent to, faculty, staff and students to invite them to the job talk. MacDonald solicited input from the members of the department and he did receive some comments. One member thought the presentation was not particularly strong as a research presentation, but MacDonald said there had been a misunderstanding with the candidate about what the job talk was supposed to be. By the morning of Dec. 18/19 MacDonald had drafted a letter to the Dean from the DHC recommending the hiring of Prof X (Tab 59) and circulated it to the DHC for their approval. Prof X was the only candidate from the short list that was interviewed prior to their recommendation. He agreed this meant there was no one else that Prof X was being measured against with respect to interviews for this posting.

MacDonald agreed that they had revised the recommendation letter with respect to the description of the posting and selection process after changes were suggested by Prof Alon-Shenker. The change was with respect to his reference to a short list of four strong candidates of which one was interviewed and hired and the other three were to be invited for an interview and job talk in the New Year. He agreed that, in the actual letter sent to the Dean later on Dec. 18/19, he described developing a "list of 4 very strong candidates and invited 1 applicant … for an interview and job talk". It went on to report that "The other 3 on our long list will form a short-list for an upcoming hire" (Tab 60). He said he could not recall the term 'long list' being used before, but said he chose that term because they did not offer an interview to the other three candidates. However, he said the other three were considered to be subject to interviews for a second hiring on the same posting because they were not required to reapply. MacDonald noted that this sometimes happens where they have too many strong candidates for a posting and decide they need to hire more than one.

It was put to MacDonald that the only reason Prof X met the requirements of the posting was because the Provost had given the department an extra position. He did not agree, and said that Prof X succeeded because he met the needs of the department, had a good CV with a strong record for teaching and research, and he would help them build links to the new law school, all of which made him a strong candidate. He said while X was not measured as an interviewee against other interviewees, he had some qualifications that no one else possessed and the department very much wanted him as a member. He said he thought Prof X was someone they would like to have for what he would bring to the department and they thought the CA was broad and permissive in allowing the department to decide for themselves who they would like to have join them.

It was put to MacDonald that the recommendation letter had a paragraph that said the DHC was mindful of the university's commitments to EDI and its own responsibilities in that regard, beginning with the composition of the DHC, which included the only woman in the department not currently on sabbatical. He agreed there was a need to have more women on full time faculty in the department at the time of the hiring. He agreed women were underrepresented in the department at the time. He thought there was a female candidate on the list of four candidates they agreed upon before hiring Prof X but did not recall if he had checked to determine if the person was a female at that time. He agreed one other candidate self-identified as disabled. He said he believed that the question of EDI concerns came up in the documents concerning DHC communications during the hiring process.

MacDonald said he was not aware of a plan to cross appoint Prof X to the law school after his appointment was approved and accepted, but when shown an email of Dec. 20/19 from the DHC to the Interim Dean of Law (tab 65) showing that was recommended, he said he was not surprised given that half of his department were cross appointed to the law school at that time.

On Jan 8/20 MacDonald received an email from Carry Wiebe confirming his department could go ahead with the process to hire a second person from the short list composed during the Prof X posting for three weeks in December of 2019, as long as the three candidates left from that short list were all Canadian. If any were not, then the position would have to be reposted for

4 weeks (Tab 66). He confirmed that eventually the three strong candidates left over from the Prof X posting did not interview very well so they decided to repost to fill that position (the replacement for Prof Levin). He said they slightly revised the ad and reposted it in March of 2020 but they again failed to find a candidate that impressed them, so they decided to reinterview a candidate from the list of 4 strong applicants they had agreed on for the Prof X posting, and ultimately hired that person (Prof. Y) in April of 2020.

MacDonald was asked about the memo that he and all members of his department wrote to the RFA Executive on Dec. 1/20 (exh 4). He said the members of the department by that time had come to know Prof X better and simply wanted to support him when they learned of the RFA grievance against his appointment. He said they were also upset and offended by the grievance, in that it suggested that the DHC had somehow acted improperly. He said this was part of his motivation for the memo to the RFA. He said he was not sure, when he wrote the memorandum of Dec. 1/20, if he knew that the arbitration had commenced on Oct. 2/20. He admitted that in the memorandum to the RFA he referred to the remedy sought by the RFA to terminate the appointment of Prof X. He said he was not sure how he became aware of that fact.

MacDonald agreed that when parties agree to a contract, they should comply with it. He was asked if he agreed that when one party fails to comply with the contract the other side can pursue legal remedies. He answered yes, sometimes, when they are appropriate, but some people try to avoid that if it would cause harm to others. MacDonald said the RFA grievance seemed to be an aggressive approach and sought a remedy that was extreme. He said members of his department were upset the RFA was taking this extreme approach to whatever problems they may have with the hiring process without consulting with him or members of the DHC so see what had happened. He said that he did not personally see any problem with the department deciding to get an additional position conditional on the hiring of Prof X. He did not see any problem with the overall process and thought that it was a good thing for his department.

It was put to MacDonald that he failed to see any problem with ignoring the terms of the CA, with respect to seeking the strongest possible candidate pool and other requirements, and did not see a problem with limiting the pool to one person who the Provost wanted to be hired. He said that was right, and he thought the CA was permissive to allow the department to do what it

felt was the best and hire the candidate who would be the best for the overall interests of the department.

In redirect, MacDonald agreed that the 2019 posting that was in place before the Prof X posting was created and filled indicated that it was looking for someone with IT and intellectual property among their interests. It identified intellectual property law as a need of the department (Tab 8). This was posted before anyone was aware of Prof X as a candidate. He noted that Prof Levin was scheduled to leave the department for the law school in the future and the department did not have anyone with those areas of interest. He agreed that the DHC's letter of recommendation for Prof X stated that his hiring would strengthen the department's ability to teach property and intellectual property law.

MacDonald noted that ultimately two positions were allowed to be hired under the posting that was created and posted on Nov 18/19 in response to the circumstances raised by the recruitment of Prof Z and Prof X. He agreed that on Dec. 13/19 he circulated the CVs of the three other candidates who were short listed, along with Prof X, when the Nov. 18/19 posting was closed. He noted they eventually interviewed all of the short-listed candidates. He was asked what other distinctions there were between Prof X and the other three candidates apart from the fact Prof X did not have a doctorate. He noted that as far as he was aware none of the others were a Distinguished Professor of Law. On that point he noted that he was unsure of the prior position of one other candidate but two of the others were quite junior candidates with nowhere near the experience of university teaching that Prof X possessed.

MacDonald said that he inferred there was some urgency with respect to the interviewing and hiring of Prof X because of the negotiations that he was aware were going on between the Provost and Prof Z. He said he was aware that the letter from the RFA President to him of Dec. 8/20 stated that they filed the grievance against the hiring of Prof X because it was their view the administration proceeded with the process in violation of the CA. However, he said no one told him during the process that he was in violation of the CA, and he had several legal scholars in his department telling him that they were taking steps to ensure compliance with the CA. He was also asked about the allegation in that RFA letter that the process had prejudiced other candidates in the competition. MacDonald said he did not accept that allegation because at the end of the

contested posting his committee had interviewed all 4 short listed candidates and initially decided to fill only the one position awarded to Prof X. They found the other three candidates not up to the requirements of the posting when they were initially interviewed in January of 2020. It was only two months later that they decided to reinterview one of the three other candidates and that person was ultimately offered a position in April of 2020.

Argument

Association

The Association described this as a particularly egregious case where the actions of the employer and the department have severely undermined the integrity of the CA. It argued the employer had deliberately manipulated the CA hiring process to engineer the hiring of a candidate whose identity had been predetermined, before any process under the CA was engaged. It submitted that these underlying facts made this case particularly important for the integrity of the CA and the collegium of the university, because so many decisions of the university are made with a process for collegial governance under the rules agreed to in the CA. It submitted those concerns are further emphasized when looking at the hiring of a tenure stream professor.

The union noted that the procedures negotiated in the CA are meant to attract the very best candidate through an open, transparent, collegial and competitive process. It submitted the evidence in this case demonstrated the process used to hire Prof. X lacked those characteristics. It began with a review of the evidence, followed by a review of general principles of law in the university setting, paying particular attention to the role of collegial committees within a collective agreement relationship for the governance of the university. It then moved on to a review of how the employer's actions violated the CA process, particularly article 4.2, and argued that the nature of the violation of the CA required remedies that would nullify the appointment of Prof X, require a rerunning of the appointment process with conditions to ensure a proper process is followed, and require significant damages to be paid to ensure future compliance with the CA process.

It relied on the evidence of Prof Sakinofsky as it pertained to the hiring process that is

used at Ryerson under the terms of the collective agreement. He was very aware of that process as an experienced negotiator of the CA and representative of the RFA in the joint training sessions conducted by the employer and association on the hiring process under the CA. It noted that training for DHC members is actually required by the CA (art. 4.1(J). The purpose of the training is to provide instruction by the employer on the values underlying the hiring process, including EDI, and ensure the DHCs actually follow those values. Sakinofsky testified that a central element of hiring at the university was that it is a collegial process with meaningful involvement of faculty members in the department. The focus of the hiring is to meet the needs of the particular department to fill shortages within the department with respect to teaching and research. He said for that reason the hiring process has to be run from the ground up, requiring consultation with the department concerning its needs. That is reflected in article 4.2(D) which requires the DHC to consult with its department to the extent possible about the requirements of each respective position, as part of the process of developing a position profile to form part of the ad for the job posting. That article shows an intent that the process is to be driven by the faculty of the department, not the administration of the employer.

Sakinofsky also said that typically the administration does not have any role in hiring after the position has been authorized for a department. The CA goes on to provide that the process will be open and competitive. Art. 4.2 (E) provides the DHC shall search actively for the strongest possible candidate pool, where strength is measured in all possible dimensions relevant to an academic appointment, including EDI.

Sakinofsky reviewed the materials in the training guide prepared by the employer for the mandatory training sessions for DHC members. He described it as 12 step process for hiring laid out in the guide and he said it typically could take 6 to 8 months to complete the hiring process. He also said that positions at the university were typically posted for 30 days at minimum before they were closed. He said he was surprised by the postings for less than 30 days that were introduced into evidence by the employer. Sakinofsky said the practice of posting for 30 days was what the administration typically described to DHC members during the training sessions. He said the purpose of holding a posting open for at least that long was to allow time so that the search can attract and select from the largest possible candidate pool, one of the stated goals of

the process in the CA. But there is no duration for postings set out in the CA.

The RFA noted that Prof MacDonald was relatively new to the positions of Chair of the department and Chair of the DHC. He had only been involved in 5 or 6 hires before the hiring of Prof X, and this was the first hiring for a tenure track position that he oversaw as the chair. It all started when the Provost emailed Dean Taras on Oct. 19/19, to tell her that they had an accomplished candidate for a senior administrative position at the university who had a spouse who was a professor at another university and he would accept a position in business and law, and asks her whether that would be acceptable. The Dean said yes but she needed to know more, and asked if she could sound out MacDonald, to which the Provost said yes. This all took place before any hint of a collegial process could begin. The Dean and Provost have identified a specific person to be hired into a faculty position before a position is even created. The association anticipated the employer would say that it is not unusual to identify a desirable candidate to recruit before a position is created. However, it noted that when MacDonald said that is sometime done for a specific recruit, the examples give were where members of the department are aware of a scholar or star post doctorate academic they are looking to attract. It noted these examples involved the department identifying a candidate, not the Provost or Dean. Thus, it was the community of scholars identifying who they wanted to recruit to join them in their work, not the administration.

MacDonald was clear that he had no knowledge of the incumbent or his work before he was presented with him by the Dean and Provost. Here the administration was identifying a particular candidate for its purposes before any of the collegial processes of the CA were applicable. That is followed by the administration manipulating the process to hire that candidate.

On Oct 23 and 24, 2019 the Provost and Dean exchanged emails referring to the possibility of using a Professor of Distinction process in the collective agreement to hire Prof X, but noted that was a limited term appointment. They went on to discuss that they had managed two other hires that had a spousal feature, but said they could not call them spousal hires. The Provost noted that if they could manage this hire they could approve three positions for the department (one extra position). At that time, they had already approved two positions for the

department to replace two faculty members who were moving to the new law school. The extra third position was the carrot or reward to be offered to the department if they could manage the hiring of Prof X (Tab 6). The Dean replied that the Provost would have to promise not to count the additional third position against any future allocation for the department.

In the following days the email exchanges continued and showed that the hiring of Prof X was becoming a significant part of the hiring of Prof Z to a senior administrative position. On Oct. 30/19 the Dean forwarded the CV of Prof X to members of the DHC and asked them to keep it confidential. Thus, they were given the resume for a specific candidate before any CA process for appointments, such as developing a job profile or having department consultation on such a profile and the needs of the department or any EDI concerns of the department are considered. The association asserted that the reason the administration wanted Prof X as the desired candidate had nothing to do with his credentials or what he offered to the department, but was only for the ulterior purpose of attracting Prof Z to accept an administrative position at the university. It contended this was clear in email exchanges between the Provost and Prof Z from Nov. 8 to Nov. 21, 2019, discussing the need for a position for Prof X in the Business and Law department (Tab 12). It points out that in those emails there is no suggestion that Prof X would not get that appointment and there is discussion of when the appointment would start and what his teaching requirements would be. However, it is stated in the earliest emails by the Provost that Prof X must apply and be interviewed for a position in the department. Prof Z made note in her reply that this sounded less certain and she was seeking assurance of that hiring. On Nov. 18/19 the Provost replies that Prof X will have to be interviewed and hopes it can be done within two weeks. But while he does not suggest any problems with the appointment, the Provost does not offer any assurance or guarantee. That resulted in Prof Z responding to try to get an early date for an interview and ask for specific information about the format and nature of the interview on Nov. 19/19. (Tab 12)

The RFA asserts these email exchanges made it clear that Prof X was not being recruited because the department had targeted him for his work or teaching, but rather it was only put forward due to his spousal relationship with Prof Z. It contends this was a completely improper purpose as there was no spousal hiring language in the collective agreement at the time, and

manipulating the hiring process for this purpose completely undermined the CA process and purposes. In its view, this is confirmed by the Provost's email to the Dean of Nov. 11/19 asking her for guidance on how they can move forward with the hiring process for Prof X and get a response from the department, and stating that this "is now the determining factor." It contended this referred to it being the determining factor for whether Prof Z would accept the senior administrative position. That email was then forwarded to Prof MacDonald on Nov. 11/19, so that he knew that was what the Provost and Dean wanted, and that the failure to hire Prof X could interfere with the employer's ability to hire Prof Z. He replied that they had a posting in place but that would not work for Prof X because it was for a junior position and was open until January 15/20. The Dean then told him they needed a new ad for an open rank that was customized with a fast deadline.

The RFA submits that seems contrary to the stated purpose in article 4.2, to create the strongest possible candidate pool. It argued that even though the employer raised some examples of postings that were narrower in terms of seeking very specific areas of expertise, those could be distinguished because they were the result of consultation on the needs of the department and that is not what happened here, where the Dean is telling the Chair to narrow the ad to fit Prof X before there was any consultation with the department on what they needed. It anticipated the employer and incumbent would argue that the members of the DHC were members of the faculty in the department, but it contended that we had an inexperienced DHC Chair who was losing faculty to the new law school and needed to have a good relationship with the Provost and the law school, and knew if he objected to hiring X he would be upsetting the Provost and would not be getting any extra position to hire. It submitted that this case was an instance of interference with the DHC by the administration, an interference that was ultimately implemented with success.

The association contends this was further demonstrated in a series of emails between the Dean, the Chair and Carrie Wiebe on Nov. 11 and 12, 2019 (Tab 15). In those emails Wiebe suggests that MacDonald pull together a quick posting for a two-week period, rather than 30 days (suggesting 30 days is the norm), and MacDonald replying he can probably do all that but wanted guidelines on whether he should narrow the description to suit Prof X, and asking for

something in writing that this would be an additional hire and would not affect any ongoing hiring that has been approved. Again, all of this is before any CA process has even commenced. MacDonald received the written assurance from Wiebe that hiring Prof X would be on top of any existing positions that had been approved for the department later the same day (Tab 14). At the same time, she provided him with a link to the profile of Prof X so he could use that when preparing the posting profile. Later, on the evening of the same day, MacDonald forwarded an email to all members of his department to give them their first notice of a potential spousal hire. The next day he provided all members of the department with the profile of Prof X and told them of his spousal relationship to Prof Z and the administrative position the university was seeking to recruit her for. That is also when he explained that Prof X did not have doctorate but that was common for university faculty in his field, and also assured them this hiring was a 'freebie' that would be in addition to all of their approved appointments. (Tab 22)

This was followed by feedback from members of the department, including the somewhat negative feedback from Prof Levin about the process that was being used and suggesting some pushback to avoid being used as a rubber stamp. The association contends that this feedback shows the real harm the employer's actions in this case have done, showing that the CA process did not mean anything, and could be undermined by the employer just hiring who it wanted and trampling over the CA process, without any consequences for those actions. It said that is confirmed by MacDonald's response on Nov. 14/19 that he and Levin had agreed to some symbolic pushback, but expressing a fear that declining the gift of the Provost could cause them substantial damage and antagonize the Dean. On the same day, MacDonald had email exchanges with the Dean about how to draft the posting to suit Prof X. The Dean recommended adding anything that would narrow the choices, and noted the need to get this done quickly as it may be a deal breaker for Prof Z. On Nov. 15/19 MacDonald emailed the Dean about questions from the department about what they could do if another star applied, could they hire that person as well as a replacement for one of the people who would be leaving the next year. The Dean then forwarded that request to the Provost and recommended it as a way to settle the department down and get the deal done (Tab 24). The RFA alleged this showed that they knew they were not trying to hire the best person by using the Prof X posting to make the spousal hire. It contended

that while the employer might try to use this to defend the process as making sure any worthy candidate would get a chance at the extra position, the CA process requires that all appointments have to filled using an open competitive process. It noted that these emails show there was one process for Prof X and another process for everyone else who cannot actually compete for the Prof X posting. And again, all of this happened before a job profile has been created.

On Nov. 15/19 MacDonald circulated a draft job ad for the posting to the DHC members, and had feedback from Prof Webb about problems they would face trying to justify hiring Prof X if other more qualified candidates with doctorates applied, and asking again if they can use some other process for this hire. The actual posting is eventually released on Nov 18/19 with a specialty in international trade and a Master's degree required to better fit Prof X. They held a departmental council meeting on Nov. 20/19 where the questions of what to do if other star candidates applied, and whether Prof X met EDI requirements, were raised and discussed. The association noted that MacDonald said he was not aware of Prof X meeting EDI values in any way. It argued that MacDonald said he was aware of CA requirements that the DHC was obligated to find the best candidate, and pay attention to EDI values, but indicated the real reason for hiring Prof X was that a refusal would upset the Dean and the Provost and would be seen as declining a gift. He also testified that after the release of the ad there continued to be some symbolic pushback from the department, and on Dec. 1st the Provost wrote him to say he had heard of considerable opposition to hiring Prof X and asked him to let him know ASAP if the department did not want to hire Prof X. MacDonald agreed it was unusual for him to hear from the Provost with respect to a hiring during the process, but he wrote back that the department wanted this appointment to happen and suggested that extending the posting deadline for a week would help quell department concerns about process. He tried to get the DHC to schedule an interview for Prof X prior to shortlisting candidates and that was rejected as not consistent with the CA. He noted that the RFA was watching the process. However, the email chain on Dec. 2/19 indicated that the DHC had informally planned to interview Prof X before there had been any meeting of the DHC to review applications. The association also argued that the wording of article 4.2 indicated that the decision on short lists and interviews is supposed to be a collegial decision and not involve the administration in that decision.

The RFA noted that the DHC received an email from the President of the RFA on Dec. 2/19 that emphasized the importance of complying with the CA, and using its open process for hiring to prevent nepotism and favouritism and ensure the hiring of the best qualified candidate for the job. Nevertheless, the DHC proceeded with the hiring of the incumbent and ignored the warning of the RFA. On that point it referred to email exchanges between MacDonald and the Provost on Dec. 6/19, before the job posting had closed, laying out a plan for the DHC to meet to review applications on Dec. 11 or 12 and to do the interview and job presentation with Prof X on Dec. 12 or the following week. He also suggested someone contact Prof X to give him a heads up with respect to the interview and job talk, again before any candidates have been short listed. On that same day, MacDonald emailed Prof X to informally and "hypothetically" schedule a date for an interview, noting that they did not have an 'official shortlist yet' so no formal invitations could be made at that point. The association contends that this series of emails demonstrates that the process used by the DHC here made a complete mockery of the CA process. It pointed to email exchanges between Prof Z and the Provost on Dec. 9 and 10, 2019 concerning scheduling a start date for Prof X's appointment as further evidence of this. (However, I note that the Provost on Dec10/19 wrote to Prof Z to indicate that he really could not confirm any start date for Prof X until the appointment process was completed by the Business and Law Department. He in fact said, "the matter is in the hands of the Business Law Department and we have to let the process play itself out.")

On Dec. 11, 12 and 13 the DHC exchanged numerous emails in which they agreed on a short list of four candidates including Prof. X. They also agreed that, because the interviewing of Prof X was urgent, they would agree he was shortlisted and could be scheduled for an interview ASAP before the short list was finalized. They also agreed to put two options to the department on how to deal with the other three candidates on the short list, to interview them for an additional hire on the current posting in January, or simply include them as applicants in a new open rank posting with a view to attracting an even bigger and better pool of talent. At that point they circulated the other 3 candidates CVs to the department and asked for their input on options 1 and 2. The department feedback supported the first option. The RFA contended that either option meant they were not competing with Prof X. MacDonald then emailed the formal

invitation for the interview on Dec. 17 to Prof X and updated the Provost on the interview and the plan to give members of the department 24 hours to provide input on Prof X. He also asked the Provost for permission to go ahead and interview the other three short listed candidates for the additional hire he had approved to replace Prof Levin. The Provost said yes, but it is "whatever agreed on conditional on the appointment of [Prof X]".

On Dec 17/19 the incumbent did his interview and job presentation, and after receiving feedback from the department MacDonald drafted a letter to the Dean recommending that he be hired. It was circulated to the DHC on Dec. 18/19. Pursuant to suggestions from one member of the DHC, the draft letter was revised to describe the other three candidates as being members of a long list who would form a short list for an upcoming hire. (Tab 59 and 60). The RFA described this as disingenuous because the DHC had clearly shortlisted the four candidates for the original posting that resulted in hiring Prof X. It suggested the DHC was trying to avoid an obvious breach of the CA requirement, that short listed candidates must be interviewed, by modification of the letter after the fact. It also pointed to the statement in the DHC letter to the Dean that it was mindful of the university's commitment to EDI and its own responsibilities in that regard as problematic given that it failed to mention that one of the candidates had identified as disabled, or that at least one of the candidates was a woman, when it pointed out there was a dearth of women to serve on the DHC. The incumbent was hired very soon after the recommendation was received by the Dean and the RFA filed this grievance in response to the hiring.

The DHC then interviewed the three other candidates from the short list in January, and that led to the position being reposted in March and one of the original three other candidates from the Prof X posting ultimately being hired for the second position. That led to the employer claiming there was no harm from any breach of the collective agreement because all short-listed candidates were interviewed and one of them ultimately was hired. But the association asserts they did not compete against each other for the two positions that were posted, and they never competed against Prof X. It claims that because they were never measured against Prof X we can never know if one them should have been hired instead of Prof X. It noted that the CA does not allow for carve outs from the principle that every appointment is to be done through a

completely open, transparent and competitive process. It claims the harm caused by the closed process used to hire Prof X cannot be undone by the fact the DHC later interviewed all of the candidates who were on the short list arising from the Prof X posting.

The RFA also asked that I draw an adverse inference from the employer's failure to call the Dean or the Provost, because they were heavily involved in the process used to hire Prof X, as evidenced by the numerous emails entered into evidence between them and Prof MacDonald. It noted that this adverse inference can be drawn even where the party who fails to call material witnesses does not bear the burden of proof. It relies on the arbitral awards in *Yellow Pages*, *infra*, and *Douglas Aircraft, infra,* for that principle. It submits that, in these circumstances, it is not so much asking me to draw an adverse inference as it is contending that the words used in their emails should be taken at their face value with respect to what Dean Taras, the Provost and Carrie Wiebe say they are doing or attempting to do in those emails.

In terms of authorities the RFA relied on the following: University of *Lethbridge Faculty Association and Board of Governors of the University of Lethbridge*, March 11, 1992 (Laux); *Algoma University Faculty Association and Algoma University Board of Governors*, 2015 CanLII 154116 (ON LA Etherington); *Mount Allison University Faculty Association and Mount Allison University*, 2012 CanLII 97782 (NB LA) (Stanley); *Douglas Aircraft Co. of Canada and U.A.W., Local 1967*, 1976 CarswellOnt *1505*, 13 LAC (2d) 410 (Gorsky); *Yellow Pages Group Co. and Unifor, Local 6006 (Debideen)*, 2017 CarswellOnt 12675, 285 LAC (4th) 138 (Luborsky*); Blouin Drywall Contractors Ltd. V. CJA, Local 2486,* 1975 CarswellOnt 827 (ONCA); *AMAPCEO and Ontario (Min. of Children & Youth Services),* 2008 CarswellOnt 7649 (Dissanayake); *Canadian Blood Services and OPSEU, Local 5101,* 2015 CanLII 79453 (ON LA) (Goodfellow); *Dalhousie University and Dalhousie University Faculty Association*, 1986 CanLII 6473 (ON LA) (Swan); *Acadian Platers Co and USWA, Local 8059*, 1997 CarswellOnt 5721 (Knopf*); Capilano College and Capilano College Faculty Association*, 1981 CanLII 4256 (BC LA) (Rilkoff); *University of Manitoba and University of Manitoba Faculty Association*, 1989 CanLII 8994 (MB LA) (Bowman); *York University and York University Faculty Association*, 1991 CarswellOnt 7147, 23 CLAS 180 (Marcotte); *West Park Healthcare Centre and S.E.I.U., Local 1*, (2005) 138 L.A.C. (4th) 213 (Charney); *Winnipeg (City) and Winnipeg Police*

Association, 2020 CarswellMan 204, 314 LAC (4th) 111 (Werier); and *Serco DES (Drivetest) and USW,* 2018 CanLII 64969 (ON LA) (Luborsky).

It relied on *Lethbridge University, supra*, for its recognition of the importance of collegial governance in making significant employment decisions like hiring, promotion and tenure in the university setting, where, unlike most workplaces, such decisions are made from the bottom up based on collegial decision making (pages 13 -14), largely without employer interference. That decision also explains why collegial governance and tenure are so important to the university's mission, because they ensure academic freedom. It noted that the incumbent was presenting the CAUT and American Association of University Professors' statements on the importance of tenure to argue it should only be taken away in very limited circumstances. But it argued this was not a case about taking tenure away from the incumbent for wrongdoing but rather a case where tenure should never have been given by such improper means to the incumbent. It contended that if one gets tenure through improper means it significantly diminishes its value and importance. It contended that the essence of a university faculty hiring process has been destroyed by the conduct of the employer here. It further relied on *Lethbridge University* for its finding that the VPA had properly rejected the recommendation by the hiring committee to hire a professor, because he found there had not been a real search as the process had been tailored to favour a particular candidate. The arbitrator found that several flaws in the search process raised "a real apprehension that the search process was not conducted in a "fair and equitable manner" as required by the Handbook. In short, the process appeared to be seriously flawed to the point where it could be said that collegial decision-making and peer evaluation had broken down." (p. 35). The RFA contended our case is worse because the administration actually encouraged and endorsed the flawed process.

The RFA relied on *Algoma University, supra*, for the principle that in a university collective agreement relationship the employer must be held accountable for the decisions of faculty members acting as members of committees of collegial governance when they act in contravention of the collective agreement. It submitted that this meant the employer in this case is accountable for decisions of the DHC that contravene the CA. On that point it also noted that the administration of the university in this case was well aware of, and involved in, what the

DHC was doing during the appointment process. The decision of Arbitrator Stanley in *Mount Allison University, supra,* is relied on for the same principle.

In terms of failure to follow the CA hiring process, the RFA pointed to the failure of the DHC to consider the EDI values by allowing the candidate who self-identified with a disability, and the candidates who were women on the short list, to compete with Prof X despite the fact Prof X did not further EDI goals. Rather, the hiring of Prof X because he was the spouse of an administrative recruit was a form of nepotism and favouritism that is contrary to the purposes of the appointment provisions in the CA (in particular art. 4.2(B)). It also asserted that art. 4.2(D), concerning the need for consultation with the department on the job profile, was contravened, based on evidence that the profile was specifically designed for the incumbent and in no way done to respond to the needs of the department concerning teaching and research. Instead, it was crafted to suit the needs of the administration with respect to the recruitment of a senior administrator.

The RFA also asserts a breach of art. 4.2(E), in that the DHC did not follow standard practice as outlined in the training materials for the DHC members with respect to a slower process that can take up to 6 to 8 months, with a job posting for 30 days to ensure they search actively for the strongest possible candidate pool. In addition, the DHC chair was counselled to narrow the profile, to narrow the scope of the posting, to fit the incumbent. And here the narrowing was not done to meet the needs of the department as was done in some of the postings included in exhibit 3. It alleged this was contrary to the directive in 4.2(E) to search actively for the strongest possible candidate pool.

The RFA also pointed to 4.2 (J) to (L) which deal with the creation of preferred candidates list. Both witnesses agreed this is a short list. Here they placed 4 candidates on the short list but only the incumbent was interviewed. The position was then awarded to Prof X despite the fact 4.2(L) requires that those "on the preferred candidates' list shall be invited for an interview with the DHC and they will also make a presentation …". It submits the fact that only Prof X was interviewed before he was hired into the position posted was a clear violation of art. 4.2(L). It submitted that 4.2(M) was also violated because it provides that "the DHC will solicit input from departmental faculty members who have seen the curricula vitae and/or from people

who attended the public presentations before making its final recommendations." It argued this simply could not be complied with because they did not interview or get presentations from all persons on the preferred candidates' list.

The RFA also alleged a violation of art 4.2(P) with respect to the required contents of the written report to the Dean, in that it failed to set out many of the events that took place in the recruitment process, and was not accurate with respect to some of the statements made. It omitted to report the steps taken to narrow the profile and the search or describe how the candidate was identified before the search began, or how the EDI factors were ignored. It submitted that here the 'cooked process' was worse than in *Lethbridge University, supra,* because the Dean was aware, and also involved in the breaches of the CA process.

With respect to the remedies requested, the RFA relied on its submissions on the preliminary motion concerning whether the remedy of nullifying the incumbent's appointment should be ruled inappropriate and unavailable at the outset of the hearing. It also relied on the Ontario CA decision in *Blouin Drywall, supra,* for the general principle that arbitrators have the jurisdiction to award such remedial measures as they find are necessary to give effect to the provisions of the agreement that have been breached. It submitted that, given the nature of the violations of the CA in this case, the only way to give effect to the violated provisions is to nullify the appointment of the incumbent and order the hiring process be rerun in a way that fully complies with CA provisions. On that point, it argued there is a distinction between taking away tenure for wrongdoing and nullifying an appointment with tenure where it has been given to someone it should have never been given to. It contended that the only reason tenure is so important is because it is only granted where proper processes are followed, and collegial decision making is done properly as to who is allowed to join the scholarly community of the university.

The RFA also argued that the nullification of the appointment is not a radical remedy as suggested by the letter from members of the department. It contended that it is in fact the presumptive remedy. It relied on the *AMAPCEO, supra,* award to support that position. In that case the arbitrator found the competition was not run properly and was asked by the employer to simply issue a declaration to that effect and was asked by the union to nullify the appointment of

the incumbent and award the job to the grievor. The arbitrator nullified the appointment of the incumbent and ordered the competition to be rerun properly with the condition that the selection panel could not take into account any experience gained by the incumbent or her performance in the position since the improper appointment. It argued this is how to effectively remedy a procedural violation of the CA. It submitted there was no reason to treat a tenured professor differently. The RFA also pointed to *Canadian Blood Services, supra,* for the principle that where a job posting grievance results in a finding of a flawed process the presumptive remedy is the rerunning of the competition (at p. 11). However, I note that in that case Arbitrator Goodfellow, after stating that principle, did not order that remedy but reserved jurisdiction to deal with remedy and left it to the parties to consider how they wanted to resolve remedial issues.

The RFA contended that this principle has also been applied in post-secondary faculty posting situations. It relied on *Capilano College, supra,* for that contention. In that case the arbitrator found the employer violated the CA as the chair of the selection committee was biased. The remedy ordered set aside the appointment of the incumbent and required that the process be rerun with a committee with a completely different membership and that the experience and performance of the incumbent not be considered. It also relied on *Dalhousie University, supra,* for the same principle. In that case Arbitrator Swan found that the process used to reappoint the chair of a department was contrary to the collective agreement. He stated that "the presumptive remedy for a procedural breach in labour arbitration is for the party in breach to be required to repeat the procedure." However, he also went on to state:

> In my view, absent an express statutory statement of effect, no defect should vitiate a proceeding unless, as a result of it, some real possibility of prejudice to the attacking party is shown, or unless the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.

The RFA contends that standard is met here, where the employer interfered so egregiously with the appointment process and ignored the explicit provisions of the CA in art. 4.2, such that it would bring the administration of justice into disrepute to allow the result to stand. It submitted that if the appointment is allowed to stand it will tell the administration they can pick a candidate and do an end run around the CA process by bribing a department with an extra position, and suffer no real consequences as a result. However, Arbitrator Swan ultimately

decided not to nullify the appointment and rerun the process because he found that there was no reasonably possible alternative outcome for the process even if it had been properly done, and he found that to grant that remedy would cause further chaos and disruption. The RFA contends that does not apply here because there were other short listed candidates who the department thought were very impressive, and there is no evidence of consequences of chaos if the appointment is undone at this point. It submitted there was no suggestion that the teaching obligations of Prof X could not be done by others if his appointment is nullified. It contended the reality was that his appointment did not follow the process the CA requires to be able join this university's community of scholars, and if he is to be appointed it should only be after the process is followed properly.

The RFA also seeks an award of damages for violation of the CA that is commensurate with the flagrant nature of the employer's violation. On this point it relies on *West Park Healthcare Centre, supra,* a case where the employer admitted it had deliberately violated the collective agreement concerning a restructuring of the workplace without consultation with the union, despite being warned by the union prior to the breach. In that case the board awarded $10,000 to the union and $1,000 to each employee affected by reassignment of duties under the restructuring. The board found that while punitive damages were not appropriate, compensation was appropriate for the violation of rights with intrinsic value and as a deterrent to the repetition of further such conduct (at para. 11).

Similarly in *City of Winnipeg, supra*, a declaration of violation of the CA was found to be insufficient where the employer had unilaterally made changes to the pension plan. Arbitrator Werier stated a number of principles concerning when damages are required for breach of the CA. He found that damages will be awarded when a declaration is considered insufficient and the purpose of the damages is to discourage such conduct in the future, and to indicate the rights which have been interfered with. He also stated it is not necessary for a union or its members to prove specific monetary loss where a declaration is not sufficient and harm has been caused. He also found that a finding of bad faith is not necessary for damages but can be a factor. On the issue of quantum, it will vary according to the facts of the case, considering factors such as the seriousness of the misconduct, the nature of the harm caused to the union, and the amount that is

necessary to give the employer a meaningful incentive to comply with the CA. In that case the amount awarded was $40,000. Here the union seeks a damages award of $100,000. It submits this is a very serious violation with misconduct that goes to the very essence of how a university is to be governed and interference with collegial processes. This has caused significant harm to the faith in, and integrity of, these processes. It notes this is a large employer and the amount needs to be enough to get their attention and get them to comply.

In summary, the RFA seeks a declaration of breach of the CA; an order nullifying the appointment of Prof X and requiring the hiring process for his position to be rerun in a manner consistent with the CA, with a DHC with a completely different membership and no consideration of the incumbent's performance or the experience gained since his appointment; and damages of $100,000.

Employer

The employer argued there was no breach of the CA either on its form, or on any interpretation of language based on past practice, with respect to accepted hiring practices. In the alternative it asserted if there was any breach it was not a material breach that warrants any remedy as it was a mere procedural breach not requiring any remedy other than a declaration. Further it contended there was nothing here that was manifestly unfair or unreasonable enough to warrant the overturning of collegial decision making by the department. It contends the reputation of the university depends on collegial decision making as a cornerstone of the university. However, it submitted that the reputation of the university based on collegial decision making depends not only on the ability of the department to make decisions free from interference by the administration, but also interference by the union. It submitted there is no basis to deny the academic assessment of the candidate by the DHC and department. It urged me to find that the DHC and department have not acted in bad faith or in an unfair manner, nor was their decision unreasonable based on all the evidence. Because the DHC did not act in bad faith or in an arbitrary or discriminatory manner, the employer acted reasonably in accepting the DHC recommendation. Further the DHC came to a unanimous decision acting in a collegial fashion.

The employer argues the RFA is wrong in alleging that this was an egregious case with a

process designed to fit a candidate the administration knew it wanted before the process started. The employer notes that the RFA alleged a breach of the CA provisions that call for an open, collegial and competitive process. However, the employer contends that when you look at all the evidence the hiring of Prof X was open and transparent and competitive. It described the RFA closing argument as a histrionic claim that the members of the department were unable to make their own decision, and made a mockery of the process. To the contrary the employer claimed, the evidence showed the department members felt quite able, and even a bit gleeful at times, to negotiate and achieve the gain of an extra position for their department. The evidence also showed the view of those same department members is that they gained a valued colleague, and do not wish their recruit to be lost in this arbitration process (exhibit 4).

The employer noted that the association called into question the decision of the department members and the truth of their recommendation letter. In its closing, the RFA referred to this as an attempt to paper over the process. Yet not a single member of the department has stated that that is the case, or taken any position similar to that assertion. And not a single member of the department has stated that the process was not transparent and open to all members.

The employer also noted that this is a policy grievance against the appointment of Professor X. There is no individual grievance just as there is no individual claiming that they were mistreated or were denied any right under the collective agreement. The employer also noted that the only faculty member who is represented by the association who is harmed by this grievance is the incumbent. In addition, the RFA admitted in its opening that the incumbent is an eminent academic whose qualifications are not in dispute. The fact that no individual was harmed is clear both because there is only a policy grievance, and there is no member of the department calling for the process to be redone, or asserting that they felt their rights with respect to recruitment and selection of the candidate were somehow impaired. In fact, the weight of the evidence supports the opposite conclusion. Both the evidence of Prof MacDonald and the views of all members of the department in exhibit 4 support that conclusion.

The employer also pointed to the direct evidence that several philosophers and lawyers who comprised the membership of the department read and reviewed the provisions of the

collective agreement to ensure compliance with its requirements in the process that was followed in the hiring of Professor X. That evidence suggested the members of the committee and the department were committed to compliance. Further, there was no evidence from any members of the department of a concern with the process, other than some expression of concern about the speed of the process partway through the posting, which led to an extension of the posting period. Further, there was also no evidence that any non-member of the RFA or external candidate was impacted negatively by the process. None of those candidates lost any rights either, given that all of the shortlist of candidates were eventually interviewed. The posting that led to the hiring of Professor X attracted a total of four candidates that the hiring committee saw as worthy of consideration, and the evidence showed they were four candidates from which two jobs could be filled. After the process was fully completed in January of 2020 all 4 were interviewed and only one offer was made, as the DHC only recommended one hiring despite the fact they had authorization to fill a second position. One of the three additional candidates was eventually hired a few months later pursuant to a subsequent posting, but there was no evidence that anyone lost any opportunity by the hiring of Prof. X, given what happened when then the other three were interviewed in January of 2020.

The employer also noted there was no dispute at the outset of this hearing that the incumbent was eminently qualified, as accepted by the RFA in its opening statement. It argued that assessment is fully supported when one views the 2019 CV of Prof X (Tab 47), that was placed before the entire department when they decided it would be worthwhile to have the posting and actively consider Prof X as a candidate. It expressed surprise then that the RFA in its closing appeared to suggest that the incumbent was somehow not appropriate because he did not have a PhD. At that time the incumbent held the title of Distinguished Professor of International Business Law at a respected American law school, where he had been a fully tenured professor for 17 years, and held a Masters from a top tier US university. He also had numerous publications and academic writings, including several on equality and race issues. Several of his publications were in top American law school journals.

The employer also asked, when considering the RFA's request for remedies, that I look at its own actions and inaction and whether in light of its conduct the remedies it seeks can stand.

It points out that the rights set out in article 4.2 are the rights of colleagues in the department who are alleged to have breached the CA, and the RFA cannot ignore their rights. It argues that if the RFA has a concern it must have some obligation to act in good faith to address that issue. It notes that, while the evidence showed the RFA president wrote to the DHC on Dec. 2/19 and notified them of its concerns about the hiring process, there was no evidence they wrote to the administration at that time to ask it to stop the process or hold a meeting with them. The RFA suggested the email to MacDonald on Dec. 2nd was putting the employer on notice, but it did not copy that email to the administration to put it on notice. The RFA reminded the DHC that the fundamental principle of the appointment process was to have a fair and ethical approach to hire the best candidate without prejudice or interference. The DHC decided they had to comply with the CA, and it carried on making a decision knowing the consequences of that decision would be with them for decades, and they appeared to be comfortable with that decision. The employer contended there was no evidence the DHC was not able to hire without prejudice or interference. They knew it was their right to consult among their colleagues and make a recommendation as a department.

The employer contended there was backdrop to the grievance, of the RFA laying in wait while they were aware the posting related to a spousal hire, and choosing to sit back and watch without telling the department or administration they must stop, because they could not possibly carry out an effective hire if they had a targeted candidate. The email from the RFA in fact stated you do not hire spouses unless the DHC has recommended that person following the process in art. 4.2, but it does not say you cannot hire spouses.

The employer also noted that the four points of concern raised by the RFA, as set out by the VP Faculty Affairs after his grievance meeting with the RFA, were not proven to be a violation of the CA (Tab 2). The fact the ad was posted for three weeks rather than 30 days was not a violation of the CA, as there was no minimum time for postings other than international searches, and there was evidence that postings of less than 30 days were not uncommon (Exh 3). The second concern was that this was a rushed process that resulted in the recruitment and search stage being prematurely foreclosed. The employer acknowledged it was a relatively fast process but noted others were short as well, and in this case the posting was extended for a week in

response to a request for more time. It also noted that there had been no complaints from faculty members about being rushed. The third concern of the RFA was that only one of the four candidates on the preferred candidates list was interviewed by the DHC, but the employer notes that all four were interviewed for the two positions that were available for that posting, but only one position was filled. It contended there were no adverse consequences from the fact Prof X was interviewed in December and the other three were interviewed in January. The fourth concern was that the timing of the incumbent's presentation prevented members of the department from attending. The employer argued that was pure conjecture as there was no evidence led to support that contention. The evidence of Prof MacDonald was that the turnout was normal. The employer thus submitted that, if the RFA was limited to its initial grounds for the grievance, there is nothing here to warrant interference with the collegial decision of the department.

However, it noted the RFA appeared to seek to go beyond the original claims in the hearing. It noted that under article 1.10 the definition of faculty member includes the Provost and Dean who are also part of the community of scholars. They often return to the position of a faculty member after serving in an administrative post, and are entitled to be involved in decisions and discussions about issues that matter to the academic community. They are entitled to have an interest and discuss potential recruits with colleagues. Dean Taras also has an appointment in the Department of Business and Law. It noted that the Chair of the department is also a member of the RFA, and under Art. 26 his role includes providing leadership in the development or the academic unit. Part of that role is to gain resources for the department in his dealings with the administration. It is also part of the Chair's role to represent the unit's interests in academic matters when speaking to the Dean and Provost, and seek to gain resources in those dealings, while working in consultation with his departmental peers.

The university has the right to decide whether it will or will not create a new position, and its administrative leadership can decide in which faculty or department a new position will be created. When they create a new position in a department that creates a posting. Article 4 does not cover the creation of a position or require it to be put in a particular department, but it does provide that no appointment will be made as a faculty member without the consent of the

department. The one exception is the ability of the administration to create a Professor of Distinction position under art. 13.4. There was some discussion of using that provision for Prof X, but it was decided not to use that route because they did not want problems with the RFA (tab 25). So they decided to seek a DHC recommendation under article 4.

The employer then went over the provisions of article 4 to show that they were complied with. There was no dispute that art. 4.1 was followed with respect to the formation of the DHC. The RFA alleged violations of art 4.2 (B), (D), (E), (K), (L), and (M). Yet Prof MacDonald testified that his department, with 7 lawyers in its faculty, discussed and took pains to comply with art. 4.2.

The employer began with the fact the appointment was recommended by the Dean, after being recommended to the Dean by the DHC, as required by Art. 4.2(A). It noted that the RFA contended that somehow the department could not make the decision because of the actions of the administration in identifying and proposing Prof X. It relied heavily on the one email from Prof. Levin during consultation with department members concerning the spousal hire, where he said he did not see the DHC having any meaningful say, which the RFA said meant they had no real choice. (Tab 22). But the employer contended there was no evidence of that, and it noted that neither Prof. Levin or any member of the department was called to support that claim. The evidence of Prof MacDonald did not support any claim that this was not a full and fair decision of the department after consultation. The Chair said it was a good opportunity for the department and a good hire, and testified that he spoke to Levin about his concerns and they moved past them, and with the support of the department members the DHC recommended the appointment. There was no evidence to support the claim that the DHC and department had no option. The administration did want to move quickly to get Prof Z to accept the administrative position, and did move to create a position to give Prof X an opportunity to apply. Given his academic standing and record of achievement he was very likely to be hired, but that is not a breach of the CA to create that opportunity.

In evidence was an email exchange between Levin and Dean Taras, where Levin raised the issue of the need for a balancing between the importance of hiring a good senior administrator like Prof Z, something that really mattered to the university, and the need for

collegial decision making in appointments. But the employer argues that balance was met here, because the decision that was made to hire Prof X was in fact a result of collegial decision making, of the DHC and all members of the department considering all the interests of the department in the circumstances and approving the hiring. On Nov. 13/19 the Provost emailed the Prof. Z to tell her there was no way around the process in the CA. Prof. Z replied that she understood that (Tab 19). In other email exchanges with Prof. Z in November of 2019 the Provost makes it clear that Prof X's appointment will have to go through the regular interview process and must be approved by the department after a job presentation (tab 12). He makes it clear that his appointment is not a done deal. It is clear in the exchanges between Prof Z and the Provost that this is an application process and the appointment is contingent on the approval of the department and the recommendation of the DHC, and there is no way around the CA (tab 12 & 34).

The employer contended that the email exchanges between the Provost and the Dean and the Chair and Prof Z do not reveal a cooked deal, with the Provost and Dean making the decision for the department, nor do they show the appointment of Prof X as a foregone conclusion before the department eventually decides to vote in favour of his appointment. Instead, you have the Provost telling the Chair to let him know if the department does not want this appointment because he can find another way to get it done, and you have the Provost telling Prof Z that the spouse can only be hired after approval by the DHC and the department under the CA process. It contended that, to the extent there was any discussion in emails that made it seem like a formality to get Prof X approved, that might be because it seemed obvious that someone like Prof X, with his record of achievement and a fully tenured position at an American law school seeking to move to a department of Business and Law at Ryerson, would be an attractive candidate for recruitment and likely to be successful in his application. In fact, one of the members of the department (Prof Grabin) observed in her email to the DHC that it would be rare for a full professor in a law school to leave a tenured job there to move to a business department. At no point was it a formality or somehow guaranteed that the DHC would make the recommendation unless the department found Prof X to be an attractive candidate. Prof MacDonald noted in his testimony that nobody in the administration expressed the proposal to

hire Prof X as “you must hire this person”. He also testified that the Provost at one point told him that if ‘they did not want this person we will find a way.’ Further MacDonald said he never saw the appointment as a barrier to hiring Prof Z if it did not go through, but rather viewed it as a way for the department to benefit themselves. He never viewed it as the only way to hire Prof Z.

The employer contends the appointment of Prof X can be viewed as a valid appointment under art. 4.2 because the candidate did apply, and he did compete, and his department and the DHC recommended his hiring after considering his application along with several others. It noted that the Chair first put the idea of Prof X being a candidate for appointment to his department on Nov. 13/19, to note the idea of the spousal hire as a way to get an additional position beyond those that had been approved, and asked if they wanted to do this (tab 22) . By Nov. 15/19 he has feedback and is doing a draft ad to show the DHC and noting that they may gain concessions from the Provost for considering this spousal hire, actively suggesting negotiating for what else they can get for the department (tab 26). On Dec. 1 & 2 the Chair and Provost are emailing back and forth about resistance in the department and whether the department does not want Prof X, and if so the Chair should tell the Provost. At that point the Chair assured the Provost there was no animosity toward Prof X, and that the concerns of the department were about process and the need to slow things down (Tab 38). The employer contends this is not evidence to support the view that Prof X had to be hired but rather it makes it clear that they knew Prof X would be an applicant, and that he was a spousal hire, and he would have to go through a process that complied with the CA. The employer also noted that most of the communication between the Provost, the Dean, and the Chair between Oct 30 and Nov 10, 2019, was to feel out the DHC to see if they were possibly interested in Prof X as a candidate for their department, as one option for an attempt to find a location for Prof X as part of the recruitment of Prof Z. It is not until Nov. 11/19 that they conclude that negotiations with Prof Z have reached a point where they ask if the Chair can get an ad out for a position in the department, and they begin to come to terms on the creation of a fully additional position for the department as part of the creation of an opportunity for Prof X to apply for a position at Ryerson. (tab 15).

The employer contends most emails between the administration and the Chair after that

date are about the timing of the process and getting updates on the progress of the appointment process. For example, on Dec. 12 the Provost asked for a sense of how long it may take for the department to make a decision, and MacDonald replies by pointing out the need to comply with the CA requirement for consultation with the department, and his plan to give members 24 hours to give feedback (tab 49). In defending the 24-hour period the employer noted there were only 9 members of the department at that time, and 3 were on the DHC so it only needed feedback from 6 members, and those people had been involved in consultation with the DHC throughout the process through emails asking their views on the possible appointment of Prof X.

On compliance with art 4.2(B), the employer notes that it requires the DHC to take into account Ryerson's strong commitment to EDI, but it is not a special program under the Ontario Human Rights Commission, so it does not create a preference for persons from identified groups. It only requires the DHC to take those values into account. The employer contends the evidence shows the department's decision supports the principles of EDI. It noted that Prof X's research deals with race and gender issues and thus fosters EDI values. Further the DHC knew that the hiring of Prof X was integral to the hiring of his spouse as a female black candidate for a senior administrative position at the university. The recommendation letter from the DHC simply says it took EDI objectives into account, and there was no evidence to the contrary. Further the employer noted that the other 3 candidates who were not hired in place of Prof X were also not hired for the other available position when they were interviewed in January of 2020. Thus, there is no evidence to question whether the DHC complied with 4.2(B). It also submitted there was no evidence to suggest 4.2(C) was not complied with.

With respect to 4.2(D), the employer contends the evidence showed the DHC did consult with members of the department to develop a job profile for the posting, and pointed to tabs 22, 26, 27, 29 and 32 of exhibit 2, to demonstrate the steps taken by the DHC in developing the profile and consultation with the department. It also noted that the department had already done a consultation on the teaching and research needs of the department for a prior posting (Oct 9/19) that was still ongoing (tab 9). That had identified technology and intellectual property as needs of the department. So they were not starting from scratch when they created the second posting for Prof X. The employer contends art 4.2(D) was complied with.

For art. 4.2(E), the RFA suggested that any tailoring of the qualifications for a position is contrary to this provision, that calls on the DHC to actively search for the strongest candidate pool. But the employer notes that the scope and shape of the pool is determined by the department when it does the profile for any position. The article does not refer to the broadest pool but the strongest pool of candidates for the position, as defined and tailored by the department and the DHC. The other postings provided by the employer in exhibit 3 made it clear that the postings are frequently designed to narrow the pool. The RFA has not grieved against the narrowing of the pool in these other postings. The art. 4.2 (E) obligation has to be read in light of the ability of the department to define the posting. The members of the DHC and the department are the experts on defining the posting and the scope and form of the pool.

The employer also noted that there was no dispute that there have been cases where a posting for a single position has gone up, and after reviewing the candidates they decide they need to hire two candidates because of the quality of applicants, and they go to the administration and ask them to approve a second hiring, in effect adding an additional position. In those cases, no one asks them to rerun the competition before they can hire the second person. Yet the association in closing contended that each hiring should stand alone and be viewed as a totally separate process, despite the fact that has not been the way it has been handled at Ryerson. The employer also notes that the posting was advertised in all locations required by art. 4.2(F). It further contended there appeared to be no issue raised with articles 4.2 ((G) to (K).

The employer argued that 4.2 (L), that required those on the preferred candidates' list to be interviewed, was complied with here because all four candidates identified on the initial posting were interviewed and gave job presentations in the department. It also contended that it is up to the DHC to decide whether a list of candidates is a long list or a preferred candidates' list or a short list. It submitted that the fact the DHC letter referred to a list of 4 very strong candidates, and then referred to the other 3 candidates as being on their long list, does not indicate a breach of art. 4.2(L), because even if the list of 4 that was originally created from the Prof X posting is known as a preferred candidates' list, all persons on it were interviewed and made presentations in compliance with art. 4.2(L). Further, the evidence shows that the DHC solicited input from the members of the department before making its recommendations as

required by 4.2(M). Art. 4.2 (O) and (P) are not relevant here.

The employer contends that the letter of recommendation provided the written report to the Dean with the elements required by art. 4.2(P). It noted that the DHC was composed of lawyers and philosophers who were striving to comply with the CA requirements in the process and in the report to the Dean, and the Dean accepted that recommendation.

The employer contended that, if the evidence of Prof Sakinofsky and Prof MacDonald is looked at closely, they agreed that not all postings are done in the same manner and there are variations that can arise in some circumstances. It asked me to note that Prof Sakinofsky used qualifiers like normally and usually in his testimony, and that showed there are acceptable normative variations in the process in some cases. It contended there are variations that arise to meet the needs of a department in some cases. It asked me to find that those are the facts that are of the most importance in reviewing this case.

The employer agreed with the arbitral authorities presented by the RFA for the principle that a failure to call a witness can lead to an adverse inference being drawn by the arbitrator. It pointed to a passage in *Yellow Pages, supra*, that held where a party could have brought a witness and did not, one can assume that witness would have been unfavourable, particularly where the witness was aligned in interest. In that respect it asked me to draw inferences from the failure of the RFA to call anyone from the department or the DHC as a witness. Further it contended I cannot find that Prof. Levin was unhappy with the process or the hiring based solely on an email when he was not called by his association. It also noted the RFA bears the burden of proof on this grievance, and that means there is an adverse interest to be drawn from its failure to call any members of the department. It asks me to consider the contents of exhibit 4 signed by all members of the department when considering the inference to be drawn.

The employer said that I could take the words in the emails by administrators at face value, but asked me to look at them through the lens of the employer having called Prof MacDonald to testify. It noted that I could not draw negative inferences from the emails of MacDonald unless those emails were put to him by the RFA when he was in the witness stand.

With respect to the caselaw, the employer referred to *Lethbridge University, supra*, and agreed with the RFA point that universities are a different or unique context for collective

bargaining because of the importance of collegial governance. However, it argued one had to look at it through the lens of a faculty association seeking to undermine and undo the collegial decision making to take away a tenured position from one of its members. It noted that, here we have collegial decision making by a DHC and an entire department on an appointment decision, and it is the RFA that is seeking to undo a collegial decision and the employer is seeking to rely on that collegial decision making. It submits it is the RFA that is attempting to undermine the expectation in the university setting, that decisions concerning appointments, tenure and promotion will be made collegially by academic peers. It noted that no member of the department affected by this decision has supported this grievance or been called to testify.

It also pointed to the *Lethbridge University* case for the principle that one should only reject the recommendations in a peer evaluation system where there has been a material breach or break down in the system of collegial governance (at page 18). It contended that this principle has been recognized in other cases in the university sector as a prerequisite before an arbitrator should interfere with collegial decision-making process. The employer also distinguishes the outcome of the award in *Lethbridge University, supra,* on the basis that there was a lot more in that case, in terms of misconduct and a flawed process. than anything that appears in this case.

The employer also contended that the DHC here did not really determine the incumbent's tenure, as he had been fully tenured many years prior at his previous institution and thus tenure was inevitably a feature of his appointment at Ryerson. However, the employer provided several tenure decisions it relied on for the approach that an arbitrator should take in reviewing collegial decision-making on tenure and appointment decisions. It relied on *Ryerson University and RFA (Garrity),* 2015 CarswellOnt 584 (Luborsky) for the principle that in university arbitrations a party has to show that a decision was manifestly unfair or objectively unreasonable to warrant interference by an arbitrator in a collective decision-making process (at para. 296). Further the arbitrator stated that, while there is no deference extended to the parties' decisions concerning the interpretation of the language of the CA, when it comes to making assessments or applying the standards indicated in the agreement for decision making, the arbitrator should show deference to the collegial decision-making process (para. 206). Further, even if you find that there has been a breach of process, one still must decide if the breach is significant enough to

warrant overturning that decision.

The employer also relied on *Ryerson University and RFA (Okouneva)*, 2016 CarswellOnt 2185 (Kaplan) for a similar finding, and its recognition that to the extent that mistakes were made or defects in process were made, one still must determine the extent they were sufficiently material to warrant arbitral interference. (para 108-109). It supports the view that there must be manifest unfairness or bad faith before the arbitrator undoes collegial decisions. The employer also noted that in that case the fact the committee recommendation was unanimous was a factor in deciding not to interfere with it.

Ryerson University and RFA (Law), (unreported reasons, July 1/15, Etherington), was also relied on by the employer for the principle that not every breach of a CA provision warrants interference with a collegial decision (page 114). A process error not having a consequential or prejudicial effect on anyone will generally not result in interference by an arbitrator. The employer contended that to the extent there was a procedural error here nobody's rights were denied and there was no consequential effect or prejudicial impact on other applicants. It argued that when one looks at the fact one candidate was interviewed in December and hired, and the other three were interviewed in January but none of them were hired as a result, that meant none of the other three candidates were prejudicially impacted by the decision to only interview one candidate in December.

The employer also relied on *Laurentian University v. L.U.F.A.*, 2011 CarswellOnt 7914 (Surdykowski), for the principle of arbitral deference towards collegial decision-making processes. The arbitrator found:

> That being the case, I am satisfied that it is not appropriate for an arbitrator to readily substitute his views for the views or decision of the collective agreement mandated expert assessors or decision-maker unless the assessment was made in a manner that was arbitrary, discriminatory or in bad faith, or which was unreasonable on the evidence. That is, the entities charged by the collective agreement with the responsibility for assessing and determining a tenure application are entitled to significant, but not complete deference.

Applying that principle to this case, the employer submits that I should not substitute my view by finding that the Dean could not rely on the DHC recommendation unless I can find that it was arbitrary or discriminatory, made in bad faith, or unreasonable. Looking at all of these

cases on standard of arbitral review in the university sector, the employer urges that I focus on the materiality of any errors made, the lack of prejudicial impact of any process error, and lack of any proof of arbitrariness, bad faith or discrimination. It submits that because the incumbent was hired for an additional position that was only created for the spousal hire and did not prejudice any other candidates, no one lost anything and there is no one in the department suggesting that there were any material errors that need to be addressed.

With respect to *Algoma University, supra,* the employer does not deny that it is accountable for DHC decisions. Rather it says the DHC and department made a decision and the employer relied on that, and I am being asked to review it and make a finding that the employer could not rely on that decision. It asks me to consider that decision in light of the evidentiary background presented herein that shows the department and DHC openly discussed the spousal hire opportunity and voted unanimously to hire Prof. X.

The employer also relied on *Greater Vancouver (Regional District) and Greater Vancouver...,* 1997 CarswellBC 3986 (Germaine) for its holding that, even if there is a finding of a flawed posting process, there may be no reason to interfere with the appointment if the evidence shows there was no miscarriage of justice in the end result (para 61). The employer contended that in our case we have evidence that the incumbent was an important and active member of the department and his record of achievement warranted his hiring.

In summary, the employer's primary position is there was no violation of the CA as the employer simply created a position and put it to the department, so that it could be posted and the incumbent could apply, and it accepted the recommendation of the DHC and department to hire Prof. X. In the alternative, if I find a breach, it urged me to refer to the submissions it made on the preliminary motion and find that any breaches in procedure warrant nothing more than a declaration. The employer noted that the association relied on *Canadian Blood Services, supra*, for the notion of a presumption in favour of rerunning the posting in such cases, but said it was a very different and distinguishable case. There it was found an internal unionized employee was treated as an external candidate for a posting and she was denied the job that she had the seniority and precedential standing for, and that warranted the process be rerun. There is nothing like that in the case herein, and the employer contends there is no basis for a rerunning of a

posting for an external hire with no internal candidate. Further the employer contends that the RFA request to order a rerunning of the appointment, after he has been so successful in his work in and for the department, would on this case cause chaos within this small department. That is worsened by the fact the department is already in the process of losing several members to the new law faculty and is trying to rebuild its resources. To cause it to lose Prof X, who has been the Interim Chair and a valued member, would cause chaos. Further the employer argues that to remove Prof X, as someone who left a fully tenured position he had held for over 20 years at a respected American law school to accept this job, to order the academic equivalent of capital punishment and leave him unemployed, is to cause chaos for him and his family, a situation akin to the result that arbitrator Swan held should not be awarded as part of an arbitral remedy in *Dalhousie University, supra*.

The employer noted that the basic principle for remedies is to try to put the party into the position it would have been without the violation. In this case, for the process error committed here, there is no need to do anything but issue a declaration. It contends that but for the breach Prof. X could have been interviewed in January with the other candidates and been given the job, based on the outcome of the interview process that ensued in January of 2020, where none of the other candidates were hired. On that basis there is no need to vacate his position for a new posting.

In further support of not removing the incumbent as part of any remedy, the employer relied on *Toronto (City) v. C.U.P.E., Local 79,* 1994 CarswellOnt 1297 (Abbott) and *Grande Yellowhead Regional Division No. 35 and CUPE, Local 1357*, 2009 CANLII 90161 (Tettensor). Those cases are examples of arbitrators finding that removal of an incumbent in a case of flawed posting process would be inequitable where there is no evidence of wrongdoing on the part of the incumbent. The employer argued the removal of the incumbent would not solve anything or undo any wrongdoing, but would only punish the incumbent.

The employer accepted that a finding of CA violation could result in a declaration and a compensatory order, but says any attempt to remove the incumbent would only be punitive in nature and completely inappropriate. It submitted that if the RFA seeks deterrence in a remedy there are other remedies that can serve that purpose. It also noted that the *West Park Healthcare,*

supra, decision relied on by the union was quite different, in that the employer intentionally and in bad faith left the union standing outside the tent while it made significant decisions negatively affecting many employees, in violation of its CA obligations. However, even in that case it did not require the employer to return circumstances to the status quo to put the parties where they were before the breach. In any event it submits this is not a case calling for significant damages as urged by the association.

The employer also noted that the remedy of removal and rerunning of the process is likely not practicable in this small department, as there are limited faculty available to ensure that no member of decision making was not a part of the process that is attacked in this case. It concluded by submitting that the employer was entitled to rely on the reasonable recommendation of the DHC, and it asked me to accept its reading and interpretation of emails and documents in evidence on the basis that the only witness of DHC actions called at the hearing was called by the employer.

Incumbent

The incumbent agreed with the parties at the outset that his participation would be restricted to submissions related to remedy and any evidence that could impact on the incumbent's reputation. The incumbent began with submissions concerning why he was requesting that not only the name of the Prof X and Prof Z should be anonymized to protect Prof X's reputation. He requested that other facts that could allow the identification of Prof X should also be anonymized. The RFA did not object to the anonymization of the names of Prof X and Prof Z, but did object to anonymizing his department, his former academic institution and the identity administrative position of his spouse.

The incumbent argued that without further steps to conceal the additional details of the identity of his spouse and the university departments involved, everyone at the university, and also many outside the university, who can use google could identify the incumbent. It contended that the RFA proposal for only anonymizing the incumbent's name would provide no real protection. It submitted it was asking for the anonymization of all of those details because the incumbent's professional standing should not be impugned in any way. It noted that this was not

a job competition case or a review of tenure case. It is simply a process case, in which none of the alleged violations of the process requirements were the incumbent's doing, or involved any wrongdoing on his part. Thus, he should not have his professional standing harmed in a dispute about whether article 4 of the CA was violated.

The incumbent argues this case is simply about an RFA allegation that the process used in the hiring of a faculty member was flawed, such that it violated the process prescribed by the CA, and did not involve any individual grievances, so there were no personal interests of any of its members being advanced by the RFA. It argued that the RFA's interest in alleging a breach of the CA in this case is to ensure that it can hold the employer to account for its breach of the appointment process. At the same time, this association grievance has already impacted the life and career of the incumbent as a dues-paying member of the RFA, and it has done so in a profound manner. That is the reason for granting intervenor status to incumbents in such cases. The RFA has chosen to pursue one set of interests over the interests of others within its membership. It submits this makes it very important to appreciate the significance of the removal remedy sought by the RFA in this case and its impact on the incumbent.

The incumbent submitted that, to even consider the removal remedy, an arbitrator would have to be satisfied the evidence demonstrated what the RFA had alleged would be the case at the outset, that the employer had undermined the CA process by improperly influencing the DHC and breaching the CA. It said it adopted and relied on the employer's submissions with respect to those issues.

The incumbent noted the RFA had requested the immediate removal of the incumbent and the rerunning of the competition, and was not proposing that the incumbent stay in his position as a faculty member pending the outcome of any new competition. Thus, the association was effectively asking for an order to put the incumbent on the street, without any appointment, after having held a tenured faculty appointment at two universities for over 20 years.

The incumbent asked me to consider why such a remedy would be sought, why the RFA was trying to go much further than simply proving a breach of the CA. It asked why the association felt it necessary to comment on what one faculty member thought about the

incumbent's job talk at a particular moment in time in a hiring process, and why it tried to attack the incumbent's qualifications in an unnecessary fashion, after stating in its opening that it did not challenge his qualifications for the position he held. It suggested this was the exact opposite of the collegiality that it attempted to suggest it was concerned the employer was undermining by interfering in the process. Further, the incumbent noted the RFA seemed at points to focus on the fact that the incumbent does not have a doctorate, when it is an accepted fact that many professors who teach law in North America do not have a doctorate. It noted the incumbent had been fully tenured at a respected American law school since 2001 and had an LLM from a top tier US university. He had also served a clerkship with the Ontario Court of Appeal and had a very impressive list of publications at the time of his hiring by Ryerson. In addition to going from teaching in a law school to teaching undergraduate students at Ryerson, he has had to live with the uncertainty raised by this grievance since January of 2020. Thus, he has vital interests in the outcome of this arbitration that justify his intervenor status.

The incumbent also points out the importance of considering the impact of any remedy on the members of the department. It referred me to exhibit 4, the memorandum from all members of the department to inform the RFA that its grievance was challenging a hiring process through which they had gained a valued and well-like colleague, and was doing significant damage to the incumbent and to the morale of the department as a whole. That memo also expressed the view that the remedy sought was extreme and not constructive. Further, since coming to the department the incumbent had become the interim chair of the department. Also, the RFA witness, Prof. Sakinofsky, was not aware that the incumbent's research interests included critical race theory. In addition, Sakinofsky was not aware of any wrongdoing or improper conduct on the part of the incumbent with respect to his hiring, and he could not identify any individuals who were disadvantaged by the hiring of the incumbent. As interim chair the incumbent had become a leader in the department, and was supported by his colleagues in the department in that role.

Thus, the incumbent argued that if any breach of the CA was found it should not result in an order to remove the incumbent or rerun the competition. It noted there are several alternatives available to remedy any wrong to the association. It submitted that, even if I were to find the

RFA was correct in calling a rerun of the posting a presumptive remedy for a breach of job posting procedures, it is not appropriate to order that remedy in this case. It contended that an alternative remedy available to the arbitrator was to order the employer to create another position to be filled without having the incumbent removed. It submitted that the ultimate question in remedies is what is most appropriate in all the circumstances. It pointed to the decision of Arbitrator Swan in *Dalhousie University, supra*, where he refused to order a rerunning of the competition because of the chaos that would likely result from such an order. The incumbent argues that chaos is not the threshold for a particular remedy, but rather the question is what is appropriate to remedy the violation. It cautioned that whatever is ordered as a remedy should not cause more harm than good. A removal of the incumbent, leaving him with no position after 20 years as a tenured professor would cause more harm than good. It would leave Prof Z with a spouse with no job after both left secure tenured positions to come to Ryerson, and would leave the department without its interim chair and the department without a valued colleague. It submitted the RFA was not able to identify any commensurate interests to be served by the order it requested, noting there was no association member who has an interest that can only be satisfied by the incumbent being removed.

The incumbent argued the RFA's interest is purely procedural and doctrinal, and completely impervious to the negativity it will cause to its own members. It noted that the RFA stated the only way to adequately remedy the breach is to cancel the appointment and rerun the posting, but it never explained why that was the case. Further, the incumbent noted that there was a significant difference between this case and the posting cases relied on by the RFA, the fact there is no individual grievor here. Where there is a grievor who has been disadvantaged by the improper posting, a simple declaration does nothing for that individual and thus is not sufficient. It pointed to the *Ministry of Children and Youth Services, supra,* as an example of that point. Arbitrator Dissanyake ordered a rerun of the competition between the incumbent and the grievor to fashion a remedy that specifically addressed the interests of the grievor as another member of the bargaining unit. Those competing interests of another faculty member are absent in this case.

The incumbent argued that the request for the extreme remedy by the RFA, and its

position on limited anonymization of the facts to protect the incumbent's reputation, demonstrates that the association is simply trying to leverage the situation to its advantage by seeking the most extreme remedy, despite the excessive damage that would cause to the incumbent and the department. It argues that it is ironic that the RFA claims this grievance is about issues that are crucial to the integrity of the hiring process, when it is the RFA that is questioning the unanimous decision of the DHC and the department, and acting against the interests of one of its members when all members of the department have signed a document declaring there was nothing improper about this hiring. It concedes the RFA has every right to grieve a breach of process, but asks why the RFA insists on pursuing a remedy so damaging to the interests of the incumbent and his entire department. It argues it is completely unjustifiable for the RFA to seek the dismissal of the incumbent when there is no individual grievor claiming they were denied a position by the process violation. It submitted that the affront to the RFA and the need to ensure the employer addresses the violation does not require the remedy sought. It stressed that remedies should be compensatory in nature, not punitive toward members who have not engaged in wrongdoing.

The incumbent pointed to several authorities it relied on in its preliminary submissions, including *Grande Yellowhead, supra,* and *Colonial Furniture, supra.* The incumbent also relied on two policy statements on the purpose and importance of tenure in the university sector. The first was a CAUT Policy Statement on Tenure (http://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-tenure). (exh 7) It describes tenure as something that ensures that academic staff can fully exercise their academic freedom without reprisal or retribution, and also states that tenure continues to protect and enable those who have achieved it, even when they move from one position to another within their institution or when they accept an appointment at another institution. The AAUP document (exhibit 8, American Association of University Professors) begins with the admonition that tenure is an indefinite appointment that can be terminated only for cause or under extraordinary circumstances such as financial exigency and program discontinuation (exh. 8 – http://www.aaup.org/issues/tenure) The incumbent also relied on a statement on tenure from *Lethbridge University, supra*, at page 14.

In closing, the incumbent asked me to refer back to the DHC letter recommending the appointment of Prof X to Dean Taras (Tab 60). It submitted I should focus on the fact that the DHC said it was mindful of EDI objectives in arriving at its recommendation ,and I should also look to the reasons for the recommendation, a part of the letter that was barely touched on when the Chair was cross-examined on the letter. It urged me to find there was no basis for interfering with the unanimous recommendation of the DHC when it stated it was pleased to strongly recommend the appointment of Prof. X.

Before the RFA made reply submissions it was clarified by the employer that it accepted that I had remedial authority to order the employer to create a new position and order that to be filled as a new posting, without interfering with the appointment of Prof X, if it was found that was necessary to put the parties in the position they would have been if there had been no breach of the CA.

The RFA began by disputing the incumbent's assertion that once a professor is given tenure at one institution it automatically moves with them if they accept a position at a new institution. It noted that under the applicable CA that is not how it works and it referred me to article 4.3 (C) which makes it clear that obtaining tenure when someone with an appointment elsewhere transfers to Ryerson is not automatic.

In response to the assertion that the RFA has not stated why the removal of the incumbent is necessary, the association says it is important to uphold the processes the parties have agreed to for tenure and appointment. It claimed the only way to correct the violation of those processes is to rerun the appointment procedure in compliance with the CA. It claimed this reason also addressed the fact there were no individual grievances. It asserted this was the only way to hold the employer to account.

The RFA denied its conduct should somehow disentitle them to any remedy they requested as if it was sitting on its hands during the process. It said this was not the case and pointed to the letter of the RFA president (Ron Babin) to the DHC (tab 69). It also noted that Prof Sakinofsky spoke of concerns being raised with the administration prior to the end of 2019, although he was not involved. That also led to an OLRB complaint (OLRB 2020 CanLII 53718).

With respect to employer contentions that the Dean and Provost are also faculty members, part of the community of scholars, and entitled to participate in recruitments and appointments, the RFA noted that Prof Sakinofsky said there was an understanding between the RFA and senior administration that the Dean and senior administrators cannot attend certain meetings in their department and cannot be involved in meetings of the DHC. The RFA also contended that the email comments of Prof Grabin about it being unusual for tenured law professors to apply to teach in a non-law school department were not directed at Prof X, but rather another candidate.

The RFA also claimed that Prof MacDonald's assertion that he was not forced to hire the incumbent, and the appointment was not conditional on anything else, was impeached in cross examination. It claimed that MacDonald admitted he had received the email at tab 51 from the Provost, where the Provost replied to his request to hire a second person from the short list, that he could proceed but it was whatever they agreed on conditional on hiring Prof. X.

With respect to the incumbent becoming the Interim Chair, the RFA noted that under article 26.2 (C) that appointment is done by the Dean after consultation with the department, and it is not the subject of an election.

With respect to the employer claim that the RFA was trying to undo a collegial decision-making process in this case, the RFA said that was a mischaracterization. It argued it was alleging that a collegial process was not allowed to occur in this case because of the improper interference of the administration. It rejected the employer claim that it merely did three things in the process at issue in this case: created a position; placed it in the Law and Business department; and accepted the recommendation of the DHC. It said the employer did a lot more to interfere, but the fourth thing it did was the Provost made the allocation of an appointment conditional on the appointment of a specific individual. It said that was confirmed in several places in evidence, and pointed to tab 51, where the Provost stated the extra position was conditional on the appointment of Prof X.

With respect to the employer contention that the DHC simply negotiated with the administration to get resources in the interest of the department, the RFA posited what would happen if a member was denied his tenure application and the employer came to the DAC and

said we need you to deny tenure to this person and if you do we will give you an extra appointment in the department. The RFA submitted that is akin to what happened here and that it was not a collegial process It argued that for that reason the tenure cases the employer put forward about deference to the collegial decision-making process should not apply here. The RFA claims this is a case of a material breach, in that this is a case of the administration preselecting a candidate and making an additional job conditional on appointing the preselected candidate, thereby potentially affecting the outcome.

The RFA also asked that I ignore the claims about the importance of the incumbent to the department. It submits that one cannot ignore the fact that there was a plan from the beginning to have the incumbent cross appointed to the law school (tab 64).

The RFA also asked that I reject employer arguments about the scope of the grievance based on the employer's response to the grievance early in the process, after a meeting where the RFA set out its concerns with the hiring process. It noted that following production requests the RFA learned a lot more about the employer's actions in violation of the agreement that it was not aware of at the time of its first meeting with the employer on this grievance. Thus, the failure of the employer to be forthcoming early in the grievance process led to the RFA discovering additional flaws in the process after production. The RFA also noted that the employer did not decline to pursue the Professor of Distinction as an option for Prof X's hiring to appease the RFA, but rather that route was not attractive to the incumbent because it only allowed for a limited term appointment.

The RFA noted that the 30-day norm for postings was found in the training materials prepared by the employer. It also noted that practice of tailoring a posting to fit the needs of a department was not what happened to the posting that was tailored for Prof X in this case. It said the problem here was that the tailoring to the posting was done to exclude candidates rather than to fit specific needs of the department.

The RFA also accepted it was not unusual to have one posting result in two hires because it resulted in two 'star' candidates, but it argued that only happens normally where the candidates have all gone through the same competitive process. That did not happen here because there was one appointment set aside for Prof X and one for all the other candidates. Thus, the incumbent

was not subjected to a competitive process. It asked me to reject the employer's claim that there was no unfairness or harm done here because all four strong candidates eventually were interviewed. It said the unfairness here arose from the fact the other three strong candidates were not allowed to compete with the incumbent. It argued the problems here arose long before the interviews, when the Provost originally proposed the incumbent as the candidate for a position. On the issue of whether the hiring of Prof X did anything to further EDI goals of the employer, the RFA asked me to refer to the cross examination of Prof MacDonald where he said he did not consider when hiring the incumbent whether the other candidates met the EDI objectives better than Prof X. Finally, the RFA said it was not seeking to have the appointment process rerun for punitive reasons, but rather for deterrence against future breaches and to meet the purpose of the CA provisions that appointments should only be made after the hiring process the parties have agreed to has been followed.

In response to the incumbent's request for anonymization, the RFA clarified that it did not object to the anonymization of the incumbent's name, the name of his spouse and the name of his former academic institution. However, it believed it was significant and important to identify in the award that it was a senior administrator who insisted that her spouse be hired as a condition of her appointment. It also objected to the anonymization of the department involved in the flawed process used to hire Prof X. It insisted there was not any significant reason to fail to name the department, and noted that the RFA grievance itself identified the department. It also noted that it was the department that conspired with the employer to violate the CA, and thus it too should be held to account.

The RFA argued that failing to name the department would be contrary to the principle of openness and public accountability that governs a labour arbitration proceeding. Further it argues the incumbent has not pointed to any countervailing reasons or evidence to explain why naming the Law and Business department would cause Prof. X any kind of personal or professional harm. The RFA noted that it was not aware of any case of a request to anonymize a university department. It referred me to *Serco des Cob (Drivetest) and United Steelworkers*, 2018 CanLII 64969 (Luborsky) as a recent authority on the law of anonymization in arbitration. Arbitrator Luborsky summarized the general principles as follows.

> Although transparency encompassed by the open court principle is perhaps more compelling for statutory employment tribunals, I conclude from the foregoing survey of the jurisprudence that in considering a request for anonymity in a published arbitration decision, the same balancing of individual privacy interests against the presumption of the publication of a grievor's name under the open court principle is the prevailing norm for private arbitrations in Ontario as well, and thus is the appropriate standard in the case before me. Approving anonymity for a grievor or witness involved in an arbitration is reserved to those "exceptional circumstances" where the reasons for the individual's request is sufficient to overcome the presumption of openness against the showing of a "significant risk of serious injury to other competing interests" or "some significant harm to be avoided", which the party seeking anonymity should raise at "the earliest possible time" and has the onus to prove on a balance of probabilities. What may justify a conclusion that an individual's name should be anonymized in an arbitration award is a fact specific inquiry having regard to all surrounding circumstances that even when satisfying the high threshold of the test in one case may not be enough to reach the same result in another context. (at para 75)

The RFA argued that the incumbent had simply failed to establish any basis on the evidence to find that the naming of the department would cause significant risk of serious injury to other competing interests of the department or the incumbent sufficient to warrant anonymization of the department's name. With respect to Prof Z it is content that she be referred to by her title without her name.

The RFA also clarified that it is asking for cancellation of the incumbent's appointment and a rerunning of the hiring process, and does not agree that a suitable remedy could include the ordering of an additional position to be filled without removing the incumbent, because that would not sufficiently discourage the employer breaching the agreement in the future.

In reply on the anonymization issue, the incumbent argued there was no reason to refer to Prof. Z's specific title and asked that she be referred to as a senior administrator. It argues that to name the department and the specific title of Prof Z will ensure that the identities of Prof X and Z are not protected. It submitted that this revealed that the RFA viewed this case as very personal in nature and not really about whether the CA was violated, as those issues could be fully addressed without identifying the name of the department or the specific title of Prof. Z.

Decision

After careful consideration of the evidence, relevant provisions of the collective agreement, submissions of the parties, and relevant authorities, I have decided that the association has proven that the process followed in the appointment of Prof. X was flawed in that it contravened the provisions of article 4.2 (L) and (M) of the CA. However, I have also found that the nature and circumstances of the breach of the CA do not require the undoing of the appointment of Prof X or the rerunning of the appointment process. Nor do they require the ordering of payment of damages to the association. The nature of the violations in this case are such that a declaration of violation should be a sufficient form of redress. My reasons are as follows.

First, I begin with a comment on the significance of the fact that there is a spousal appointment at the heart of this grievance. It became apparent during the hearing and introduction of evidence that the issue of spousal appointments, and the fact the parties had not agreed to a process or CA language to deal with spousal appointments, was a large factor in their inability to resolve this matter without an arbitration. Spousal appointments, the need to find a position for a spouse as a condition or component in the hiring of a desired administrator or 'star' faculty member from another institution, are not uncommon in the university workplace. As noted during the hearing, some parties in the university sector have agreed to a separate hiring process for such hires to recognize the need to deal with such situations in order to be able to compete when seeking to hire the best and the brightest. Unfortunately, these parties did not have such a separate process at the time of this grievance. I take arbitral and academic notice of the fact that in university workplaces subject to a collective agreement that do not have a special process for spousal hires, it is not uncommon for employers who are confronted with the need for a spousal hire to succeed in hiring a desired administrator, to approach the faculty association to ask for a waiver of the normal hiring provisions to enable the spousal hire. In such cases the association leadership will often then engage in high level discussions with senior administrators, and members in the departments involved, to decide on whether such a waiver is warranted. In doing so they attempt to identify the pluses and minuses of such an appointment for the objectives of the university, the union and the academic units involved (including EDI goals). In this case I was not provided with evidence of any such request for a waiver, or discussions of

pluses and minuses of the hiring between the parties prior to the hiring and the ensuing grievance. As such I have given no weight or consideration to any such discussions, or the absence of such discussions, in this award.

However, it appears that the absence of any form of special process or waiver for a spousal hire led the senior administration, with the cooperation of all members of the Department of Law and Business, to 'massage' or manipulate the process requirements set out in article 4.2 (Recruitment and Selection Process) to fit the significant time and circumstance constraints of the spousal hire for Prof. X, in a manner that would allow them to meet the time constraints for the hiring of Prof Z. To use a well-worn analogy, despite the obvious legal and philosophical talents of the members of the DHC and the department, trying to fit the appointment of Prof X as a spousal hire into a 4 or 5 week time frame, while trying to meet all of the process requirements set out in some detail in article 4.2, was a little like trying to fit a square peg into a round hole. Much or most of it fit, but one or two things did not. More on that later.

The main breach of the provisions of article 4.2 was the failure of the DHC to comply with article 4.2(L) and (M). Article 4.2(L) required that "those on the preferred candidates' list shall be invited for an interview with the DHC" and also make a presentation to individuals associated with the department. Article 4.2(M) required that "The DHC will solicit input from departmental faculty members who have seen the curricula vitae and/or from people who attended the public presentations before making its final recommendations." The plain meaning or intent of those provisions is that following review of all the applications on a posting the DHC will create a 'preferred candidates' list' or short list of the candidates that are strong enough to be considered for the position and invited to do interviews and presentations, followed by a solicitation of views of the members of the department on the preferred candidates' CVs and performance in their presentations. Clause (M) clearly contemplates the DHC will have the views of department members on the CVs and presentations of the candidates on the preferred candidates' list before it makes its final recommendations. In short, it contemplates a competitive process for a single posting in which the views of the department on all candidates on the preferred list or short list are considered by the DHC before it makes its final recommendation.

The competitive process intended by these provisions was not followed herein, because at the time of the solicitation of departmental views on Prof X he was the only candidate from the preferred or short list who had been interviewed or done a presentation. I note that the email exchanges between DHC members from Dec. 11 to Dec. 13, 2019 showed that the committee had agreed on a short list or preferred candidates' list of four candidates, but none of the other 3 short listed candidates were invited for an interview and presentation until January of 2020, long after the DHC had recommended the hiring of Prof X to the Dean. The fact that the recommendation to hire Prof X was made before any of the other candidates on the short list were invited to do interviews and presentations would appear to contravene the requirements of 4.2 (L) and (M), that those candidates on the preferred list be invited for an interview and presentation to the department, and the views of members of the department on the CVs and presentations of preferred candidates be solicited by the DHC "before making its final recommendation."

The employer attempted to argue there was no breach because there had been instances in the past where a DHC had gone to the administration for approval to make an additional appointment where a selection process for a single posting had turned up two 'star' candidates. However, there was no evidence to suggest that in those cases the DHC had not followed the normal process of creating a short list, interviewing all candidates on the short list and having them make presentations, before the DHC decided to seek approval for a second position so as not to miss out on an outstanding candidate. In short, there was no evidence to suggest that past practice had failed to comply with article 4.2 (L) and (M) before deciding to hire two candidates off of the short list, after interviewing all persons on the short list before making a recommendation to hire one from the list. The plain ordinary meaning of the language used in subparagraphs (L) and (M) contemplates all candidates on the preferred candidates list being interviewed and making presentations before a final recommendation is made.

The other allegations of violation of article 4.2 were not made out. I agree with the employer assertion that there are no time limits or statements of minimum duration for various steps in the process, from creation of the profile, duration of posting, or time for consultation with members of the department. While there may be norms that have developed in terms of the

amount of time for certain steps in the process, the only requirement of the language of the agreement is that various steps need to be completed prior to a recommendation by the DHC being finalized. However, the evidence led by the employer of other postings indicates that postings for less than 30 days are not uncommon. I have little doubt that the pace of steps like the scheduling of interviews and presentations, and consultation with faculty, may be sped up in particular cases where there is some urgency to get an offer out to a highly sought-after candidate who is likely to be getting offers from competing institutions. There is flexibility built into the process to allow the DHC to move through the process at the pace that it decides is required or appropriate to meet the needs of the department for action or contemplation.

Nor am I able to find any violation based on the RFA's allegation of article 4.2(B) with regard to a requirement that the DHC "take … into account Ryerson University's strong commitment to fostering equity, diversity and inclusion within its community, in all aspects of the recruitment efforts." First, the clause does not create an employment equity program with specific goals or objectives in terms of hiring ratios or other targets to be met with regard to recruitment from identified equity groups. Second, it only requires the DHC to "take into account" EDI objectives and also, in art. 4.2(P), report the way those objectives were taken into account in its recommendation letter to the Dean for the appointment. Third, it makes the DHC the decision maker in terms of how the EDI values are taken into account and the contents of the "brief statement" it provides to the Dean on how those concerns were addressed. Both the RFA and I may disagree on whether the appointment of Prof X gave sufficient account or weight to EDI values, but the CA makes the DHC the primary decision maker on that aspect of the process. In my view, in the absence of evidence of bad faith or arbitrariness on the part of the DHC in that function there is no basis for interfering with their recommendation on that basis.

I hasten to add that I agree with the employer's arguments that there were several ways in which the appointment of Prof X furthered Ryerson's "strong commitment to fostering" EDI within its community. Prof X was a well-established legal academic with published research on human rights and critical race theory. His hiring would also enable the successful recruitment of his spouse, as one of the first black female academics to be appointed to a senior academic administrative position in her field. In my view, those factors represented significant gains in the

pursuit of EDI objectives at Ryerson. While the RFA clearly does not agree with that assessment, and attempted to focus narrowly on the fact that Prof X was a white male, the CA provisions do not give the RFA, the employer, or the arbitrator the role of assessing the EDI implications of the appointment in the selection process. That function is left to the DHC at first instance, and it would appear from the fact there was not a single member of the department who objected to the appointment of Prof X on EDI grounds, that they did not take issue with that assessment. It may well be that they also recognized the value of the appointment of Prof Z as a senior administrator for the pursuit of EDI objectives at the university.

Nor can I find that the 'narrowing' of the profile for the job posting used for the hiring of Prof X was a violation of article 4.2 (D) or (E), requiring the DHC to create a profile for the posting in consultation with the department and to search actively for the strongest possible candidate pool. Once a position is granted by the administration to a department, these provisions give the DHC the role of creating a profile identifying the requirements of the position in consultation with the members of their department. There is nothing in the language of those provisions to limit or restrict the DHC and members of the department in identifying the requirements of the position. While the two witnesses said the profile is usually based on the identification of the needs or shortcomings of the department, those terms are not found in the provisions. Thus, it is left to the DHC, in consultation with the members of the department, to identify the requirements of the new position, in light of their views on what should be in the profile to best serve the interests of the department.

I agree with the employer that the requirement in 4.2 (E) to search for the strongest possible candidate pool does not in any way require the DHC to keep the profile as broad as possible to attract as many candidates as possible. It requires the DHC to search for the strongest possible candidate pool in light of the specific requirements of the position as narrowed by the profile. The evidence of prior postings in exhibit 3 made it clear that there is nothing unusual about the narrowing of a position profile to seek candidates who have very specific qualifications, experience and areas of research. Nor was there any significant dispute about the fact that a position profile for an appointment might be narrowed with a view to making it more suitable for the recruitment and selection of a 'star' candidate, either someone from another

institution who it was learned could be interested in moving to a new institution, or someone who was working at Ryerson in a post doc or limited term position. In any event, there is nothing in the language of article 4.2 to prevent the DHC, in consultation with its department members, from narrowing a position profile to suit what it identifies as being in the interests of the department for that position. I would add that, on the "strongest possible candidate pool" issue raised by the RFA, the evidence was that the posting did attract at least 4 very strong candidates for the posting.

The real controversy here was that the profile was narrowed for the purposes of facilitating a spousal hire, as opposed to suiting someone who had been identified by a faculty member at Ryerson as a 'star' candidate who needed to be pursued. The RFA argued that the entire process had to be viewed as invalid or contrary to the CA process because the administration had identified Prof X as a potential candidate before any part of the normal recruitment process had been triggered. It argued that this by itself made it a tainted or unfair and uncompetitive process. I am unable to agree with that argument for several reasons.

First and foremost, this process was carried out in an open and transparent manner from its commencement. From the very first communication from the Provost to the Dean and subsequently to the Chair, it was made clear the employer was looking for a place for Prof X as a spousal hire and they wanted to know if the department had any interest in Prof X as a potential candidate for its faculty. It was initially suggested, and later confirmed, that if they had an interest in his recruitment it would be as an extra or additional appointment to their already approved complement of positions. From that beginning, the Chair moved very quickly to consult with the members of the DHC as to the prospect of an extra position for the department for a spousal hire. As soon as it was possible thereafter, the Chair made known to all members of the department the reasons and terms for the spousal hire, including the administrative appointment that it was in aid of, the CV and web page of the candidate, and the fact that it was a 'freebie' that would not impact on the appointments already approved for that year and following years.

The RFA argued at the broader level that the purpose of article 4.2 is to ensure an appointment process that is collegial, open, transparent, and competitive. As I have already

pointed out above, the attempt to squeeze the spousal hire into the CA process failed to fully meet the competitive requirements of 4.2(L) and (M), due to time constraints for the hiring of Prof Z. But the process followed for the hiring of Prof X clearly met the requirements for an open and transparent process based on collegial decision making. The evidence showed an open and collegial discussion among members of the DHC and the department, both in emails and at a departmental council meeting, of exactly what this appointment process was about. That evidence revealed both an attempt by the DHC and other department members to comply with the CA process, and a full discussion of the advantages and disadvantages for the department and the university of appointing Prof X.

Perhaps more importantly, it was clear from the evidence that the main thrust of the collegial decision-making process for appointments in article 4.2, that colleagues in the department make the decisions about what is in the best interests of the department and who will be invited to join their department, was adhered to in the hiring of Prof X. From the first email of the Provost asking the Dean to check to see if Prof X was someone the department might be interested in appointing as a colleague, the decision on whether or not Prof X would be invited to join the department was left with the DHC and the members of that department. It was made clear to the Chair that if the department did not want the incumbent, they should let the Provost know, and he would find another way to proceed with the hiring of Prof Z. The email evidence demonstrated that it was made clear the extra appointment or "freebie" was conditional on the hiring of Prof X, but it was also clear from the same evidence, including the emails between the Provost and Prof Z, that the appointment had to be approved by the collegial decision-making process set out in the CA. It was made clear to Prof Z that if her spouse was not approved by the DHC and the department, the appointment would not be successful. There was no way to avoid that. I have no doubt, after reviewing all of the evidence, that if the members of the department and the DHC had found, at any stage of the process, that Prof X was not a desirable or suitable candidate for the position, it would not have voted to recommend his appointment. While that decision may have cost them an extra or bonus position in their department, if they had decided Prof X was not worthy of appointment and decided to hire one of the other strong applicants for

the posting, it would have simply meant giving up a position they never had to lose, in the absence of the offer of the spousal hire.

I hasten to add that the decision arrived at by the DHC and the department to hire Prof X was not surprising for a variety of reasons. First and foremost, he was a very accomplished academic with many years of experience as a tenured professor at a respected American law school. He in fact held a Distinguished Professorship at that school. As one of the members of the department observed, it was a bit unusual for someone with a fully tenured professorship in a Law Faculty to be interested in accepting a position in a department in a business school teaching undergraduate students. Absent the desire to support his spouse in her career, Prof. X was probably unlikely to have any interest in the position at issue. The RFA, not surprisingly in my view, conceded he was fully qualified for his position at Ryerson in its opening. For some unknown reason it seemed to recant from that slightly in its closing. I note in passing that for only one member of a department to comment negatively on a job talk would mean it was a standout performance in many, if not most, academic recruitment settings. The nature of the academic environment virtually guarantees serious and instant critiques for even the best presentation and performance. Second, as noted above, it was a win-win proposition, as it enabled them to strengthen the department's depth in a number of areas of teaching and research, as set out in the letter of recommendation from the DHC, by hiring a proven academic, but at the same time preserved all of their existing and planned appointment opportunities to search out other stars. Third, it enabled the department to assist the university in strengthening its commitment to EDI values. Fourth, it ensured future good relationships with the Dean and senior administration. The high quality of the appointment and the incumbent's value to the department is supported by the memorandum from all his colleagues submitted as exhibit 4.

The RFA contended that, because the administration had created an extra position for the purpose of facilitating a spousal hire and suggested Prof X as a possible candidate, and asked if the department was interested in such a candidate, that made the process contrary to the agreement from the outset. However, there is no language in the CA prohibiting the administration from creating a position to facilitate a spousal hire. The association also seemed to suggest that an administrator proposing an individual as a good candidate at the outset of an

appointment process, because they were a 'star' who it would be good to recruit for the benefit of the university or a department, was acceptable, but if the person was identified as a good candidate to support a spousal hire, that in itself made it unfair or invalid. However, there is nothing in the CA that makes such a distinction. Rather the CA appears to leave it open to the department or academic unit to make its own decisions about the motives and value of any appointment once a position is created and offered to an academic unit, as long as it adheres to the principles and requirements of collegial decision making set out in the CA. I should add that I find no merit in the RFA's contention that the letter containing the report and recommendation of the DHC was a breach of 4.2(P) because it was not detailed enough in its description of the recruitment process or the deliberation of EDI values. I note that the subparagraph calls for a "brief account" of the former and a "brief statement" of the latter.

However, as noted above, the time constraints imposed by the spousal hire context caused the DHC to violate the requirements of 4.2(L) and (M), in that they failed to have interviews and presentations from all candidates on the preferred list and consult with members of the department on the CVs and presentations for all preferred candidates before making their final recommendation. If they had done so, they could have weighed all of the factors relevant to the appointment, including: the relative strength of all four candidates in all areas, including teaching and research; the fact that hiring Prof X would mean they would have an extra faculty member while retaining all existing and planned appointments to use to hire others, including others on the preferred list; and the contribution to the department's and the university's commitment to EDI values presented by the appointment of each of the preferred candidates. It is undoubtedly true that members of the DHC, and to a lesser extent members of the department, did in fact attempt such an analysis using the CVs of the other preferred candidates that had been made available to all members of the department on Dec. 13/19 (tab 50, exh 2), several days before Prof. X's presentation. However, because of the violation of subparagraphs (L) and (M), they did not have the interview, presentations and consultation input for all preferred candidates as intended by the language of the provisions, when the DHC made its final recommendation on Prof. X.

In terms of remedy a declaration of the violation of article 4.2(L) and (M) will be issued. However, there will be no order requiring the undoing of the appointment of the incumbent or the rerunning of the appointment process for the position held by Prof. X in a manner that complies with article 4.2. Nor will there be any order for the creation of an additional position to be filled in compliance with article 4. On the latter type of order requiring the creation of a new position, it was suggested by the incumbent as an option for a compensatory remedy that would deter the employer from future breaches of article 4 but not disturb the appointment of Prof. X. However, the RFA indicated in its reply submissions that it was not interested in a remedy of that nature, and for that reason it was not considered.

In terms of the remedy requested by the association for the immediate removal of the incumbent from his position and the rerunning of the appointment process for his position, there is simply no basis for such an order in this case. While the RFA suggested this was the presumptive remedy for the violation of a job posting provision, I note that in two of the cases it cited as authority for that proposition the arbitrator declined to make that order despite a request for that remedy (*Dalhousie University, supra,* and *Canadian Blood Services, supra*). Further, as noted by both the employer and the incumbent, the cases where that remedy was ordered generally involved an individual grievor who could demonstrate prejudice to their rights under the CA as a consequence of the employer's breach of the hiring provisions. That of course is a significant, if not the primary reason, for such a remedy being found appropriate in job posting cases despite the negative impact of the remedy on the incumbent. The absence of any demonstrated prejudice to any other individual caused by the violation in this case is a significant factor in finding it to be inappropriate where it would have a devastating impact on the incumbent, someone who also has rights under the collective agreement.

Nor do I find a persuasive case for a removal and rerun remedy if I go back to first principles for remedies from seminal cases like *Polymer Corp. Ltd. and Oil, Chemical, & Atomic Workers* (1959), 10 LAC 51 (Laskin). Under those cases, arbitrators can look at the make-whole principle or the remedial objective of placing the aggrieved party as near as possible to the position it would have been in had the CA not been breached. The evidence in this case concerning what happened when the other three candidates on the preferred list were eventually

interviewed and did job talks, in January of 2020, supports the employer's contention that it is more likely than not, if the provisions in art. 4.2 (L) and (M) had been complied with, Prof. X would have been hired. The failure of the other 3 candidates to be found worthy of hiring for the additional appointment approved by the Provost for January 2020, supports the employer's contention that none of them suffered any prejudice as a consequence of the employer's breach of the CA. Thus, putting the parties in the position they would have been in had the CA been complied with would mean preserving the status quo with respect to the appointment of Prof X.

I also find that the removal and rerun remedy requested by the RFA is inappropriate on the facts of this case in that it would cause more harm than good, and would cause significant disruption and relative 'chaos' for both the incumbent and the small department of Law and Business. The devastating impact of such a remedy on the incumbent was well put by his counsel, and can be regarded as punitive in the circumstances, given the absence of any fault or wrongdoing on his part. In these circumstances, I find that the conclusion of Arbitrator Swan in *Dalhousie University, supra*, concerning the disruptive effects of a remedy involving the displacement of the incumbent as an important factor against its use, are apposite to this case.

The RFA also requested an award for damages for a substantial amount, suggesting the amount of $100,000, as necessary to compensate the RFA for the violation and deter the employer from engaging in a similar violation in the future. The RFA contended the large amount was justified by what it described as the egregious nature of the violation in this case. It argued that the amount of damages should be determined by factors such as the seriousness of the misconduct, the nature of the harm caused to the union, and the amount that is necessary to give the employer a meaningful incentive to comply with the CA. It pointed to *City of Winnipeg, supra*, where the amount awarded was $40,000 for the employer's unilateral alteration of the pension plan in violation of the collective agreement. Here the union seeks a damages award of $100,000. It submits this is a very serious violation with misconduct that goes to the very essence of how a university is to be governed and interference with collegial processes. It contends the employer's violations have caused significant harm to the faith in, and integrity of, these processes.

Despite the assertions of the RFA, I am unable to find any conduct on the evidence before me that can be described as egregious or serious misconduct. There is no conduct herein that is similar to an employer unilaterally altering a pension plan in violation of the collective agreement (*City of Winnipeg*, *supra*) or engaging in a major restructuring of the workplace while keeping the union in the dark (*West Park Healthcare Centre*, *supra)*. As noted above, the spousal nature of the appointment and what was going on here was done in a very open and transparent manner, with the involvement of several members of the RFA. The evidence is clear that the RFA was aware of what was going on by no later than Dec. 2/19, when its president wrote a letter to members of the DHC about his concerns that they ensure compliance with article 4. The evidence is also clear that members of the DHC and the department were attempting, in apparent good faith, to work through the hiring process in a manner that complied with the CA. They ultimately failed to meet the process requirements for two subparagraphs, due to the need to meet the short time demands for the hiring of Prof. Z. Further, there was no evidence that there has been a pattern of this employer flouting the CA requirements with respect to appointments that requires a significant award of damages to ensure it complies with the relevant provisions in the future. Of course, a future violation that demonstrated a 'flouting' of these requirements of article 4 might well warrant significant damages.

Finally, unlike the two cases cited above by the RFA as precedents for a significant damages award to remedy a CA violation, in this case there was no evidence the employer's breach caused significant harm to employees in the bargaining unit. Here there was no evidence of harm or prejudice to individual employees as a consequence of the employer's actions. To the contrary, it is arguable that the members of the department of Law and Business were able to take advantage of the employer's desire for a spousal hire to gain two valuable additions to its faculty instead of one, while at the same time improving the university's commitment to EDI values in the process.

In the final analysis I have decided that the employer's violation of article 4.2 (L) and (M) do not require any order for damages for the following reasons. First, I was not presented with evidence of this case being part of a pattern or repetition of employer misconduct in terms of circumvention of the CA provisions concerning appointments. The RFA did make reference to

Ryerson Faculty Association v Ryerson University, 2020 CanLII 53178 (ON LRB), where the RFA stated, as part of its unsuccessful argument that the employer had committed unfair labour practices, that it had previously filed grievances against spousal hires. However, I was not presented with any evidence on past practices in violation of article 4 with regard to spousal hires or otherwise. As noted above, evidence of repeated violation suggesting a flouting of the CA could well result in an order for significant damages. Second, this was not a case of the employer acting in a furtive or surreptitious matter actively concealing the true nature of what was going on from the union and members of the bargaining unit. Within the first week or two of the events that transpired, Prof MacDonald asked if he could share the details of the spousal candidate who was being proposed, and the administrative hire that was at issue, with all members of his department, and he was told to do so within a day or two of his request.

Finally, I need to address a couple of points on the anonymization of the individuals most directly involved in the spousal hire at issue herein, Prof X and Prof Z. I have anonymized the names of Prof X and Z, as agreed to by the parties. The RFA disagreed with the request of the incumbent to anonymize the name of his academic unit, the Department of Law and Business. The incumbent said it was necessary to protect the reputation of Prof X because it would make it too easy for people to identify Prof X. I sided with the RFA on this issue for two reasons. In my view the request for anonymization of the department did not meet the test set out in *Serco des Cob (Drivetest) and United Steelworkers, supra,* of being necessary to prevent "the significant risk of serious injury to other competing interests" or "some significant harm to be avoided". Further, in my view the evidence did not impugn the conduct of the members of the DHC or the department as acting with a lack of integrity or in bad faith. Nor did it cast aspersions on the character or reputations of Prof X or Prof Z. There was no alleged wrongdoing on the part of Prof X or Prof Z. They were never depicted as the villains of the piece. Perhaps more to the point, after all the evidence and arguments were completed, Prof X can only be characterized as a legal scholar of significant repute and experience, whose value to the department was quickly recognized by all of his colleagues, and resulted in him being quickly appointed to a leadership position with the unanimous acceptance and support of his colleagues. As for Prof Z, I have identified her as someone who was successfully recruited by the employer for a senior

administrative position (which for clarity I define as a position at the level of Dean or higher in the administrative hierarchy at the university). The RFA clarified at the very end of argument that, while it consented to anonymizing her name, it wanted her to be identified by her specific administrative title. I have decided to side with the incumbent's position on this point, that she only be referred to as holding a senior administrative position, as identifying her specific title would not be consistent with agreeing that her name not be identified in the award. In short, to name her specific title would be tantamount to using her name in the award.

In summary, for all the foregoing reasons I have found, and do hereby declare, that the employer violated the requirements of article 4.2(L) and (M) of the collective agreement in the hiring of Prof. X, in that the DHC failed to have interviews and presentations from all candidates on the preferred list and consult with members of the department on the CVs and presentations for all preferred candidates, before making their final recommendation to the Dean with respect to the hiring of Prof X. However, for the reasons given above, I have found that the RFA's allegations of other violations of article 4.2 have not been proven. I have also found that the circumstances of the employer's violations of article 4.2(L) and (M) do not warrant the additional remedies of the annulment or undoing of the appointment of Prof X and the rerunning of the appointment process as requested by the RFA. I have also found that the circumstances of the employer's violation of article 4.2(L) and (M) do not warrant an award of damages to be paid by the employer to the RFA. I thank counsel for their cooperation and efficiency in the presentation of the evidence and submissions in this case. I remain seized to deal with any issues arising from the implementation of my award.

Signed in Guelph, this 28th day of February, 2022.

Brian Etherington
Arbitrator