

SUBJECT	<i>Faculty Association of the University of British Columbia v. University of British Columbia</i> Case Note
DATE	June 20, 2024
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BACKGROUND

At the June 10, 2024, SFU Senate meeting, Senators engaged in a discussion about the intersection of collective agreements and policy obligations. President Johnson asked the Office of the General Counsel to review applicable case law and provide Senate with an update and guidance in this area.

This case note summarizes *Faculty Association of the University of British Columbia v. University of British Columbia*, 2010 BCCA 189, which provides insights into this matter, and provides some takeaways for Senate's consideration. Thank you to Senator Percival for sharing this case citation with us.

SUMMARY AND TAKEAWAYS

In *Faculty Association of the University of British Columbia v. University of British Columbia*, the British Columbia Court of Appeal held that, under the *University Act*, RSBC 1996 c. 468, a university's senate has power over academic governance and a university's board of governors is not entitled to interfere with that power by the terms of a collective agreement or otherwise. Thus, when making academic policies, the senate is not constrained by the terms of the university's collective agreements.

This decision makes a distinction between the obligations of a university's board and a university's senate, vis-à-vis the university's collective agreements:

1. **Senate Policies:** This case confirms that a university's board cannot through a collective agreement limit the statutory powers of its senate over academic governance. Thus, the senate's ability to pass academic policies is not limited by the terms of collective agreements approved by the board.
2. **Board Policies:** While the board cannot limit the statutory powers of the senate, the board may enter into collective agreements that restrict its own statutory powers. Thus, board policies must be consistent with the collective agreements that the board has approved on behalf of the university.
3. **Policies Subject to Shared Jurisdiction:** The *University Act* includes a number of areas where the board and senate share jurisdiction including, for example, the establishment of faculties and the terms of affiliation with other institutions of learning. The statutory provisions dealing with these areas generally empower the senate to make recommendations or pass resolutions, which are then subject to the approval of the board before becoming effective. This decision indicates that the senate is not limited by the terms of collective agreements in making such recommendations or resolutions. However, as the board *is* required to abide by the terms of collective agreements that it has approved, the board's ability to approve such recommendations or resolutions may be constrained if it determines that the recommendations or resolutions are inconsistent with those collective agreements.

CASE BACKGROUND

The board of governors of the University of British Columbia (UBC) approved a collective agreement (Collective Agreement) between UBC and the university's faculty association (UBCFA) effective July 2006. The Collective Agreement included terms relating to student evaluations of faculty.

In May 2007, UBC's senate passed a policy regarding student evaluations of teachers, which included provisions regarding the use of such evaluations in employment decisions about faculty. UBCFA filed a grievance claiming that aspects of the policy violated the Collective Agreement. The grievance was referred to an arbitrator.

ARBITRAL DECISION

In arbitration, UBC objected that the senate policy could not be the subject of a grievance under the Collective Agreement. It argued that, under the bi-cameral governance model of the *University Act*, the board could not restrict the statutory powers of the senate through a collective agreement. Thus, the senate was free to pass an academic policy even if it were not consistent with an existing collective agreement.

In contrast, UBCFA argued that UBC as an employer was a single entity, and thus, all of UBC's constituent parts, including its senate, were bound by the terms of the Collective Agreement (the Single Entity Employer Argument).

The arbitrator rejected the Single Entity Employer Argument reasoning that, under the *University Act*, the university was composed of separate parts, including the board and senate, each of which had defined powers. He thus accepted UBC's position that UBC's board could not bind the senate to a collective agreement that conflicted with the terms of a senate policy. UBCFA sought review of the arbitrator's decision in the Court of Appeal.

APPEAL DECISION

The Court of Appeal upheld the arbitrator's decision. In the appeal, UBCFA advanced two primary arguments:

- First, it maintained the Single Entity Employer Argument.
- Second, it argued that when the senate exercises a permissive power granted to it under the *University Act*, as it was when it passed the student evaluation policy, the senate must do so in harmony with UBC's obligations under the Collective Agreement, and, in the case of an irreconcilable conflict between the agreement on the policy, the Collective Agreement must prevail (the Harmonization Argument).

First, the court rejected the Single Entity Argument and agreed with the arbitrator's conclusion that UBC was composed of separate parts with defined powers. The court noted that the *University Act* expressly sets out areas where the board and senate have separate powers as well as areas where their powers intersect or overlap. The court stated that while "one would expect the Board and Senate to cooperate in all areas of mutual interest [], ultimately, the power over academic governance is in the Senate and the Board is not entitled to interfere with its policy-making role in that regard by the terms of a collective agreement, or otherwise."

Similarly, the court also rejected the Harmonization Argument. The court found that the crux of this argument was that the Collective Agreement should prevail over the senate policy in the event of conflict. The court noted that there is no provision in the *University Act* that permits the board, under its power to enter into collective agreements, to trump the senate in matters of academic governance. The court also reasoned that the Harmonization Argument had to fail because reaching any other conclusion would mean that the board would effectively have power to dictate aspects of academic policy through its power to enter into collective agreements and no such role for the board is contemplated by the *University Act*.

In coming to its conclusion, the court distinguished the board's ability to limit the senate's statutory powers with the board's ability to constrain its own powers.