In the Matter of an Arbitration

BETWEEN:

YORK UNIVERSITY

(The "University)

AND

YORK UNIVERSITY FACULTY ASSOCIATION

(The "Association")

(Association Policy Grievance re: Termination of Life Insurance)

Before: Eli A. Gedalof, Sole Arbitrator

Hearing Held: July 21 and 22, 2020.

Appearances:

For the University

John Brooks, Counsel, Hicks Morley Hamilton Stewart Storie LLP
Amanda Lawrence-Patel, Counsel, Hicks Morley Hamilton Stewart Storie LLP
Leanne De Filippis, Counsel, Office of the Counsel, York University

For the Association

Emma Phillips, Counsel, Goldblatt Partners LLP
Mary-Elizabeth Dill, Counsel, Goldblatt Partners LLP
Ramneek Pooni, Executive Associate, YUFA
Professor Sheila Embleton, Chief Steward, YUFA
Dr. Erin Black, Witness, Executive Associate, YUFA

AWARD

INTRODUCTION

1. This matter is a policy grievance filed by the Association and dated July 30, 2018, alleging that the University breached the collective agreement between the parties and the *Human Rights Code* by reducing at age 65 the life insurance benefit provided for under the collective agreement, and by

terminating that life insurance benefit at age 71. Although filed as a policy grievance, the grievance arose out of the personal circumstances of Professor James Laxer. To the parties' knowledge his is the only case in which the issue that is the subject of this award has crystalized. In particular, Professor Laxer turned 65 in 2006, the same year that the province eliminated mandatory retirement. Upon turning 65, his life insurance coverage under the University's Sun Life Policy was reduced from three times his annual salary to one time his annual salary. Professor Laxer continued to work as a full time professor, past the normal retirement date, until his passing on February 23, 2018, at the age of 76. After his passing, his surviving spouse made inquiries of the University regarding the life insurance benefit available to her. She was advised that Professor Laxer's coverage had ceased when he commenced mandatory receipt of pension benefits at age 71. It was this denial of coverage that sparked the instant grievance.

2. Prior to commencing the hearing on the merits in this matter, the parties engaged in case management and reached a number of procedural agreements in support of the efficient and orderly resolution of this case. First, the parties agreed to bifurcate the collective agreement interpretation and *Human Rights Code* issues, and in light of that agreement this decision addresses only the collective agreement interpretation issue related to the termination of life insurance benefits at age 71. Second, the parties also agreed that while the ultimate onus in this case rests with the Association, the University would proceed first putting forward its preliminary arguments and its evidence in support of both those arguments and its interpretation of the collective agreement. Finally, the parties agreed to file written briefs in support of their respective positions and agreed that the bulk of the evidence in this case would take the form of uncontested documents and the will say statements of Dr. Barry Miller on behalf of the University, and Dr. Erin Black and Professor Ruthanna Dyer on behalf of the Association. The sole exception to the documentary nature of the record in this case is that the University elected to cross-examine Dr. Black, who was therefore called to provide *viva voce* evidence.

3. The issues to be addressed in this award are:

(i) Under the terms of the Collective Agreement, do life insurance benefits cease at age 71 and mandatory receipt of pension?

(ii) Have the parties reached a binding interpretive agreement with respect to the termination of life insurance benefits at age 71 and mandatory receipt of pension?

(iii) Should the grievance be dismissed as untimely?

(iv) Should the grievance be dismissed in accordance with the doctrine of laches?

(v) Should the Association be estopped from pursuing a remedy in this grievance?

I note that all of these issues are interrelated to varying degrees, and that issues (i) and (ii) are particularly so, as are issues (iii) to (v).

4. The University's primary position is that when mandatory retirement was eliminated and the issue of the availability of life insurance benefits past the normal retirement date first arose, the parties mutually agreed in 2009 to an interpretation of the life insurance benefit. This interpretation was based on Sun Life's position that benefits terminated at age 71 upon the mandatory receipt of pension benefits (the "Sun Life interpretation"). The University argues that that interpretation is also supported by a holistic reading of the collective agreement, but its primary position is that the parties themselves are entitled to reach their own agreement on how the collective agreement ought to be interpreted and having done so their interpretation must be given effect. The University argues that the Association cannot now, after years of silence and multiple renewals of the collective agreement language in issue, resile from that interpretive agreement.

5. In the alternative, the University argues that the grievance should be dismissed as grossly untimely under the terms of the collective agreement or in accordance with the principle of laches. In this context it argues that this is not a continuing grievance, but rather relates to a discrete event in 2009, albeit one with continuing consequences. In the final alternative, the University argues that the Association should be estopped from obtaining a remedy in this grievance.

6. The Association argues that the language of the collective agreement is clear, and plainly provides for the provision of life insurance benefits to members such as Professor Laxer, who choose to continue working full time past the age of 71. There can be, it argues, no real "interpretive" dispute between the parties. Instead, it argues that the University would have to show that YUFA agreed to amend the collective agreement to match the University's position. Yet it argues that at no time did the University even seek to engage the process required to amend the collective agreement, and there is nothing on the record, particularly in writing as required, to support the conclusion that the parties reached such an agreement. Instead, argues the Association, the University seeks to rely on a series of collateral, ambiguous and inadmissible communications through unauthorized bodies and

representatives to limit on the basis of age, rights established for all members under the collective agreement.

7. In response to the University's preliminary motions, the Association maintains that its grievance is both continuing and timely, and that in any event this would be an appropriate case in which to exercise my discretion under s.48(16) of the *Labour Relations Act, 1995* to relieve against any timeliness objections. The Association also maintains that the University has failed to establish a basis for applying the equitable doctrines of laches or estoppel.

THE COLLECTIVE AGREEMENT

8. Employees' benefits are set out at Article 26 of the Collective Agreement, the relevant portions of which read:

> ARTICLE 26
>
> Employees' Benefits
>
> 26.01 The terms and levels of benefits in effect as of the signing of this Agreement are defined by OHIP legislation and relevant benefit plans. The Employer agrees to maintain those terms and levels except as they are modified by this Agreement. A statement of the terms and levels of the various benefits shall be provided by the Employer to the Association and shall be considered to be a part of this Agreement. The Employer agrees that participation in Extended Health Benefits is not contingent upon participation in OHIP.
> [emphasis added]
>
> **Pensions**
>
> 26.02 The parties agree to continue the York Pension Plan in effect as of 30 April 2012 and as may be amended in agreement with the Association following the outcome of the multi-lateral negotiations regarding the Pension Plan and Solvency Relief.…
>
> Group Life Insurance
>
> 26.07 The Employer shall continue to pay 100% of the premiums of the University's Group Life Insurance, as currently in force.

9. In light of these provisions, there is no dispute that the terms of the Policy form part of the Collective Agreement. The terms of the Policy in issue read:

DEFINITIONS

Employee—full-time faculty members, research associates and assistants and other full-time employees who are scheduled to work at least 24 hours a week at the employer's business establishment or at some other location where the employer's business requires them to be.

Termination of Employment—occurs on the day a person ceases to qualify under the definition of employee, or the date he cease to be active at work, whichever is earlier.

…

EMPLOYEE LIFE INSURANCE BENEFIT

Classification	Amount of insurance
…	…
All other employees under 65 years of age and employees who attained 65 years of age on or after July 1st of the year immediately preceding the date of employment and before July 1st of the year of employment.	3 times the employee's annual basic earnings, the result adjusted to the next higher $1,000 (if not already a multiple of $1,000) subject to a maximum benefit of $600,000.

Reduction of Amount of Insurance

On July 1st coincident with or next following the date the employee attains age 65, the amount of insurance shown above is reduced to 1 times the employee's annual basic earnings, the result adjusted to the next higher $1,000 (if not already a multiple of $1,000) subject to a maximum benefit of $600,000.

TERMINATION OF INSURANCE

The Employee Life Insurance benefit will cease immediately on the date of the employee's retirement. [emphasis added]

10. In addressing the meaning of the term "retirement", which is not defined within the Policy itself, the parties also referred to Article 14 of the Collective Agreement, the relevant portions of which read:

ARTICLE 14

Retirement

…

General Conditions and Definitions

14.01 (a) "Retirement" means the voluntary termination of an individual's full-time status at York University at any time after that individual would, if a member of the York Pension Plan, be eligible to receive a pension from the York Pension Plan (i.e., anytime after attainment of age 55). Continuation in a part-time capacity, or as "professor emeritus" or "librarian emeritus" or "senior scholar" is not inconsistent with the use of the term "retirement".

(b) Normal retirement date shall be defined as 1 July coincident with or next following an employee's 65th birthday.

(c) Employees shall be eligible to retire from the University and (assuming that they have been members of the York Pension Plan) shall be eligible to receive a York Pension, at any time following attainment of age 55.

(d) The parties agree to establish a joint committee to study pension plan and retirement provisions to look at all aspects, including possible pension improvements, improving the minimum guarantee, full benefits for same-sex spouses, credit for years of service, and portability.

…

11. The University also relied upon Section 6 of the Pension Plan, which reads:

Section 6 – Retirement Dates

6.01 <u>Normal Retirement Date</u>

The normal retirement date for a Member of the Plan will be the first day of July coincident with or next following attainment of age 65. However, a Member who retires on or after attainment of age 65, but before attainment of the normal retirement date, will receive benefits described under Section 7.03(2), as if he or she had attained the normal retirement date under the Plan.

Notwithstanding the foregoing, for the purposes of Section 16.07(2) of the Plan, normal retirement date for a Member or former Member shall mean the first day of the month coincident with or next following the date on which the Member or former Member attains age 65.

6.02 Early Retirement Date

A Member may elect to retire and may receive his or her pension on the first day of any month coincident with or following the attainment of age 55.

6.03 Postponed Retirement Date

A Member whose retirement under the Plan is postponed may elect to continue making required contributions to the Plan during such period, but not beyond the commencement of benefit payments, or to cease making required contributions to the Plan at or following his or her normal retirement date. The election of a Member to cease making required contributions to the Plan at or following normal retirement date is irrevocable and shall take effect on the first day of the month selected by the Member to cease contributions. The election of the Member to cease contributions must be made at least 2 months in advance of the first date of the month on which contributions are to cease.

Notwithstanding the foregoing, contributions must cease and benefits under this Plan must commence no later than the end of the calendar year in which the Member attains age 71 or such other time as is acceptable under the Income Tax Act.

12. The parties also referred to several additional provisions which they argued were relevant to interpreting the Policy and Collective Agreement provisions in issue. A number of the communications relied upon by the University in support of its interpretation involved members of the Joint Committee on the Administration of the Agreement (the "JCOAA") and the Joint Subcommittee on Benefits (the "Benefits Subcommittee"), and provisions of the collective agreement regulating the operation of those committees include the following:

Article 7
Joint Committee on the
Administration of the Agreement

…

7.02 The Joint Committee shall not have the power to add to or modify in any way the terms of this Agreement but shall function in an advisory capacity to the Association and/or the Employer with the general aim of ensuring that this Agreement is administered in a spirit of co-operation and mutual respect…. [emphasis added]

…

7.06 The parties agree to establish a Joint Subcommittee (of JCOAA) on Benefits. The Subcommittee will address itself to establishing and maintaining communication between the parties regarding benefits and will discuss, among other matters, the form, frequency, modes of distribution and content of regular updates on claiming trends, plan details, benefits statements, a benefits magazine and ongoing issues regarding individual benefits claims. The Subcommittee will also, when necessary, discuss revising the Supplemental Benefits Program and benefits of members of the bargaining unit who have retired from the University. The Subcommittee shall meet at least once every three (3) months and shall submit a summary report of its activities to the JCOAA once annually, between 1 February and 31 March.

13. Finally, the parties also referred to the following provisions in addressing the timeliness issue:

ARTICLE 9
Grievance and Arbitration

…

Complaint Stage

COMPLAINTS FILED AGAINST THE EMPLOYER

9.10 Any complaint may be presented and discussed informally between an employee and his/her Dean/Principal/University Librarian or designate or the Vice-President Academic.

A representative of the Association may represent the employee if the employee so wishes. If the complaint is resolved at this stage, the agreed resolution of the matter shall be reduced to writing by the Dean/Principal/University Librarian or designate within fourteen (14) days of the meeting at which the complaint is presented, and the complainant shall confirm in writing within seven (7) days his/her acceptance of the resolution. A copy of the agreed resolution shall be mailed to the Association.

…

Stage One

GRIEVANCES FILED AGAINST THE EMPLOYER

9.12 Subject to Article 9.08, the complainant may, within twenty-one (21) days of the date of the act or omission giving rise thereto, or of the date on which the complainant first knew or ought reasonably to have known of such act or omission, present the Dean/Principal/University Librarian or designate with a written grievance under the carriage of the Association containing a clear and concise statement of the facts surrounding the grievance, the specific Article(s) of the Agreement involved (although an incorrect or incomplete reference will not invalidate the grievance), the relief requested, and the results of the Complaint Stage or the reasons for bypassing the Complaint Stage. The Dean/Principal/University Librarian or designate shall reply in writing within fourteen (14) days of his/her receipt of the written grievance and shall send a copy of the reply to the Association.

(a) Where, pursuant to Article 9.08, the Association has elected to proceed directly to Stage One, it shall present the Dean/Principal/University Librarian or designate with a written grievance, containing a clear and concise statement of the facts surrounding the grievance, the specific Article(s) of this Agreement involved (although an incorrect or incomplete reference will not invalidate the grievance), or the reasons for bypassing the previous stage(s), and the relief requested.

(b) If a 9.07(c) dispute has not been resolved at Stage One, the Association may proceed directly to arbitration.

…

Time-Limits

9.23 The parties agree that the grievor shall be expected to act in accordance with the time-limits set out in this Article, and that failure by the grievor so to act shall result in a requirement for the grievor to explain at the subsequent stage of the procedure the reasons for failure to abide by the agreed time-limits.

Failure by the non-grieving party to respond in accordance with the time-limits set out for each of the stages of the grievance procedures shall entitle the grievor to carry the grievance to the next stage. The parties shall, however, have the right by mutual agreement in writing to extend the time-limits fixed in both the grievance and arbitration procedures.

EVIDENCE

14. In addition to relying on the terms of the Collective Agreement and the Policy, the Employer relies on a series of communications that took place between representatives of the parties, for the most part, in 2009. These communications are described in the will say statement of Dr. Barry Miller, the University's Senior Policy Advisor on Labour Relations. Dr. Miller was not cross-examined and the Association does not dispute the veracity of his

evidence, although it does dispute its significance to the matters in issue in this grievance. At the material time, Dr. Miller was the Director and then Executive Director of Faculty Relations and was the principal University contact for the Association for grievances and collective bargaining. In that capacity, Dr. Miller was the University co-chair of the JCOAA and also represented the University on the Benefits Subcommittee.

15. According to Dr. Miller, the issue of life insurance terminating at age 71 arose first from the November 2005 amendments to the *Ontario Human Rights* Code, eliminating mandatory retirement at age 65. Subsequently, in 2007, the Federal Budget increased the age at which a person must commence receipt of pension benefits under the *Income Tax Act* from 69 to 71. As a result of these changes, the University anticipated that some faculty members would choose to work past their normal retirement age of 65, and past their mandatory receipt of pension benefits at age 71. In anticipation of these events, the University's Associate Director, Pension & Benefits, Teresa Ducharme, contacted Sun Life to inquire into the status of life insurance coverage in these circumstances. Sun Life responded that as it interpreted the Policy, life insurance coverage terminated upon "an employee's mandatory receipt of pension".

16. The University determined, in 2009, that it was necessary to communicate this information to the bargaining agents representing employees covered by the Policy, with a view to then advising the employees themselves. According to Dr. Miller, there is a long standing process of ongoing communication between the JCOAA Co-Chairs that takes place in between meetings, to help manage the agenda, review action items arising from or relating to the work of the JCOAA and to discuss newly arising issues. Dr. Miller also regularly corresponded with the Association's Executive Associate, who he described as the principal Association staff representative for the JCOAA. Dr. Miller understood that the staff representative would then convey the information to the Association representatives, who could then together decide how to proceed, and whether the issue should be addressed internally, through some other dispute resolution process or in collective bargaining, as they saw fit. In 2009, the Association Co-Chair on the JCOAA was Mary Kandiuk, who also sat together with Professor Dyer on the Joint Subcommittee on Benefits. The University's representatives on the Joint Subcommittee on Benefits were Dr. Miller and Teresa Ducharme. The Association's Executive Associate at the time was Heidi Bishop.

17. On November 17, 2009, Dr. Miller sent an email to Heidi Bishop, attaching a Memo from Terisa Ducharme which in turn addressed Sun Life's interpretation of the "meaning of retirement" under the Policy. Dr. Miller highlighted that according to the "clarification", coverage will "end upon their

'mandatory receipt of pension' at age 71". The attached Memo references the terms of the Policy and in particular that it terminates "immediately on the date of the employee's retirement". The Memo then advises as follows:

> The Life Insurance Policy does not specifically define retirement. We have inquired and Sun Life indicates that it interprets our policy such that being in mandatory receipt of pension constitutes retirement and as such coverage for life insurance terminates upon an employee's mandatory receipt of pension.
>
> The Federal Budget 2007 amended the Income Tax Act to delay mandatory receipt of pension until the end of the calendar year that a member of the pension plan turns 71. Under York's pension plan payment commences December 1 of the year that an employee turns 71.
>
> **Moving forward**
>
> Based on the interpretation we have received from Sun Life that being in mandatory receipt of pension constitutes retirement, coverage for life insurance will therefore terminate upon employee's mandatory receipt of pension. The communication to employees will be amended to indicate the following:
>
> **Group life insurance continues according to the terms of the existing plan. Commencing July 1 coincident with or following age 65 the benefit provided is equal to one times your annual salary. In the event you elect to continue working beyond December 1 in the year you reach age 71 the life insurance coverage will cease upon mandatory receipt of pension.**
>
> For any employee attaining age 71 in 2009 or 2010 that continues to work beyond their normal retirement date their group life insurance will cease no later than January 1, 2011. Notification will be provided to these employees prior to December 31, 2009.
>
> If there are any questions please contact me.
>
> [bold in original]

18. Dr. Miller described this communication with Ms. Bishop as entirely normative, and it was his expectation that as Executive Associate she would follow up with him if the Association had any questions or concerns regarding this interpretive issue. On the morning of November 18, 2009, Ms. Bishop responded to the email indicating that she had forwarded the email to the members of the benefits subcommittee and would get back to him with any comments. Later that same morning, Ms. Bishop sent a second email which read as follows:

> Has it ever been the case that senior scholars have had life insurance past their 71st birthday? Will an announcement be going out to members, members of the benefits subcommittee would appreciate input on the announcement…

19. In response, on the morning of November 19, 2009, Dr. Miller sent an email to Heidi Bishop advising that a communication would be going to affected employees, and that he would send her a draft "for review/input by the [benefits] subcommittee" but would in the meantime invite any comments/feedback "for Terisa's consideration as she drafts the communication". In response, later that afternoon, Ms. Bishop wrote that "YUFA members of the [benefits] subcommittee would suggest the memo be distributed to members aged 65/over in the event they need it for financial purposes."

20. Following this exchange, Dr. Miller believes that he had a conversation about the limitations on life insurance with the Association's Co-Chair on the JCOAA, Ms. Kandiuk. Dr. Miller does not remember the details of this conversation but did report that he had had this discussion in an email to senior University administrators at the time. Dr. Miller believes that had Ms. Kandiuk raised any concerns or objections regarding the interpretation of the Sun Life policy, he would have reported those concerns at the same time. He also notes the "Moving Forward" section of the memo was amended following this discussion, including by providing contact information if employees had questions about the issue. This final version of the memo, dated November 27, 2009, was then circulated to "all employees of the University who participated in group life insurance under the Sun Life Policy, including all faculty members and librarians represented by the Association and including Professor Laxer who was over age 65 at that time, working beyond their normal retirement date." The final version contained the same statements concerning Sun Life's interpretation of the policy and the statement under the heading "moving forward" indicating that "life insurance will therefore terminate upon the employee's mandatory receipt of pension".

21. Dr. Miller believes that when Ms. Bishop wrote to him on November 11, 2019 and stated that "YUFA members of the [benefits] subcommittee would suggest the memo be distributed to members age 65/over in the event they need it for financial purposes", she understood that the University's interpretation would be communicated to represented faculty and that this plainly meant that the University would cease paying life insurance premiums for faculty members in mandatory receipt of pensions. The Association did not grieve the October 26, 2009 memo or the November 27, 2009 memo. The University ceased paying life insurance premiums for employees in mandatory

receipt of pension at age 71 in January 2011. The fact that these premiums were paid prior to mandatory receipt of pension and ceased to be paid after is reflected on the pay advice that faculty members receive.

22. Following these communications, the University also reiterated its interpretation of the policy in several issues of the *P & B Times,* a newsletter produced by the Pension & Benefits Office. In particular, the September 2010 issue, under a "Questions & Answers" heading, included the following statement:

> …
> Your coverage will end when you retire. Coverage may also end on the earlier of the following dates:
> …
> Age 71 regardless if you continue to be employed.
> …

Similarly, the December 2014 issue of the *P & B Times* indicated that "Your coverage will end when you terminate, retire, or age 71, whichever is earliest." Finally, the October 2017 issue included the statement "It is important to remember this coverage ends immediately upon termination or retirement (or age 71)".

23. The Faculty Association, in addition to the terms of the Collective Agreement and the policy, relies on the will say statements of Professor Dyer and Dr. Erin Black. Professor Dyer was a faculty member at York for 13 years and was in 2009/10 a YUFA-side member of the Benefits Subcommittee. She was not at that time a member of YUFA's executive. According to Professor Dyer, the main function of the benefits committee at that time was to address issues related to individual benefits claims and to review financial reports from the insurer. According to Professor Dyer, the Subcommittee met infrequently, and its function was advisory only; it did not make decisions. Professor Dyer did not recall seeing the email correspondence between Dr. Miller and Ms. Bishop. She did recall Dr. Miller raising the issue of termination of life insurance, but that there was very little discussion of the issue. Her understanding, "based on the way the matter was presented", was that termination of the life insurance coverage was a statutory requirement under the *Income Tax Act* or the *Pension Benefits Act*. She understood the issue was a *"fait accompli"* and did not understand that it could be challenged by YUFA.

24. It was in this context that Professor Dyer wanted to ensure that YUFA members over age 65 were notified of the issue. However, as Professor Dyer also understood that the University could not amend the collective agreement through the Benefits Subcommittee, she did not advise the YUFA members of

the JCOAA or the YUFA executive of the issue. Professor Dyer further notes that the JCOAA minutes from November and December 2009 do not reflect any discussion of the issue at that time, and in her experience had the matter been discussed they would have done so. Rather, according to Professor Dyer the parties were at that time pre-occupied with a restructuring taking place that affected half of YUFA's membership, such that the life insurance issue got less attention than it would have in normal circumstances.

25. Dr. Black is a YUFA Executive Associate and Staff Representative whose duties include supporting YUFA members with various issues, and providing support for various YUFA committees and initiatives, including collective bargaining. According to Dr. Black, after Professor Laxer's spouse, Sandy Price, brought the life insurance issue to YUFA's attention, the parties discussed YUFA's concerns about the age-based distinctions at their regularly scheduled Accommodations and Complaints and Grievances meetings on April 25, May 9 and 18 and June 13, 2018. By this time, the parties were in the midst of collective bargaining and on July 30, 2018 YUFA filed the instant grievance. The parties reached a final settlement on the renewal of the Collective Agreement on October 15, 2018, for a collective agreement with a term of May 1, 2018 to April 20, 2021. At no point in bargaining, says Dr. Black, did the University raise the issue of or tender a proposal with respect to life insurance.

26. Dr. Black also made inquiries with respect to whether the life insurance issue had ever been brought forward to YUFA by an affected member. To her knowledge, Professor Laxer's case is the first and only case to be brought to YUFA's attention. Further, to her knowledge, the issue of life insurance for active members over the age of 71 had never been discussed by YUFA's executive prior to Ms. Price approaching YUFA in March of 2018.

27. Finally, in addressing the *P & B Times* communications relied upon by the University, Dr. Black notes that as a newsletter distributed to a variety of groups and bargaining units with different pension and benefit entitlements, it is not an official means of communication. It is not, she says, regularly monitored by YUFA. In reply she cited a specific example in 2017 where YUFA, in the context of discussing a grievance, had reiterated its position that the *P & B Times* is not an official means of communicating changes to the pension and benefits plans. The *P & B Times* is not distributed to YUFA staff, and Dr. Black maintained that to the extent that it may be reviewed by members of the YUFA executive, they do so in their individual capacity and not in their capacity as YUFA officers. She further noted that the newsletter specifically contains statements emphasising its unofficial status. In particular, the front cover includes the following caution:

> [p]lease keep in mind that since this newsletter is distributed to different groups with different entitlements, for example former employees no longer have benefits, that all articles may not pertain to you and your situation.

28. Similarly, she notes that the back cover of the *P & B Times* reiterates that:

> information provided in this newsletter is of a general nature, should you require further information that specifically pertains to you please contact your Pension & Benefits Counsellor…**In the event the information contained herein conflicts with the applicable contract, policy or guideline, the terms of the contract, policy or guideline will prevail.**
>
> **[emphasis in will say statement]**

I note that the electronic versions of the *P & B Times* put to Dr. Black in cross-examination and discussed further below appear to be in a different format than those described in Dr. Black's will say Statement. However, they also include at the end the following statement, which is to the same effect:

> This newsletter is designed to present York employees, former employees and retirees with useful general information pertaining to their pension & benefits. Please keep in mind as this newsletter is distributed to different groups with different entitlements, all articles may not pertain to you and your situation. In the event the information contained herein conflicts with the applicable contract, collective agreement, policy or guideline, the terms of the contract, collective agreement, policy or guideline will prevail.

29. In cross-examination, Dr. Black acknowledged that the *P & B Times* is distributed broadly to faculty members (although in reply she also confirmed that it might be diverted to a junk mail folder), and that she would assume that this included YUFA's president. She also acknowledged that YUFA's member on the JCOAA and the Benefits Subcommittee, as well as YUFA chief steward are also normally faculty members, and that the members of YUFA's executive are generally faculty members. Dr. Black was also directed to a June 2019 issue of the *P & B Times*, and subsequent email communication from Professor Miriam Smith, identified as JCOAA Co-Chair, to Leanne De Filippis on behalf of the administration. Dr. Black agreed that Professor Smith raised issues about the content of the June 2019 *P & B Times* in that correspondence, and that the issue was subsequently placed on the agenda for the July 16, 2019 JCOAA meeting. She was also directed to a January 2019 issue of the *P & B Times* and subsequent JCOAA minutes reflecting that YUFA was concerned about the tone of the communication but indicated that she was not at that meeting. And, she was directed to an August 2018 issue of the *P & B Times*,

an email exchange between Professor Smith and Leanne De Filippis forwarding an email from Terisa Ducharme referencing that issue, and minutes of a subsequent JCOAA meeting on September 25, 2018, reflecting that the Association raised the following issue:

> The Association expressed concern about the tone of a communication issued by Pension and Benefits memo. The Association further indicated that Pension and Benefits must be clear in its communications that the Collective Agreement and plan documents govern interpretation of benefit entitlements, not other parties.

ARGUMENT AND ANALYSIS

The University's Argument

Introduction

30. The University's primary position is that in 2009 the parties agreed to the Sun Life interpretation of the life insurance policy, and that the Association cannot now resile from that agreement. In the alternative, the University argues that even if there was not an interpretive agreement between the parties, the grievance should nonetheless be dismissed as untimely, on the basis of the doctrine of laches or, very much in the alternative, on the basis of the doctrine of estoppel.

The parties agreed to the Sun Life interpretation

31. The University summarizes its primary position as simple and straightforward: a deal is a deal. It argues that when sophisticated labour relations parties clearly and plainly agree to an issue of interpretation of their own collective agreement, that agreement is binding until such time as they agree to a different interpretation, or the provision in issue is amended. In the University's submission, the parties' agreed interpretation was "clear, unequivocal, documented in writing and communicated to all affected employees, including faculty and librarians and Professor Laxer."

32. In the University's submission, when the provincial government eliminated mandatory retirement and the federal government increased the age for mandatory receipt of pension, it was clear to all that some professors, such as Professor Laxer, would choose to work past both age 65 and age 71. This was a major issue in the university sector, with wide ranging implications. In this context, the University sought clarification from Sun Life about the

application of its life insurance policy. When it received Sun Life's interpretation that coverage ceased upon mandatory receipt of pension, it notified its various bargaining agents, including the Association. The communications between Dr. Miller and Heidi Bishop (the Association's executive assistant and staff representative responsible for the JCOAA) that followed, argues the University, constitute a clear and plain agreement between the parties to interpret the policy, which forms part of the collective agreement, in accordance with Sun Life's advice. This agreement is reflected in the fact that the parties expressly agreed to distribute the University's proposed memorandum setting out that interpretation. It is also reflected, argues the University, in the involvement of the benefits subcommittee, which included Ruthanna Dyer and Mary Kandiuk.

33. The University argues, based on the contemporaneous email communications, that the evidence is clear that Ms. Bishop did provide the Benefits Subcommittee with Ms. Ducharme's memo containing the Sun Life interpretation. Notwithstanding Professor Dyer's vague recollection that she believed that the termination of the life insurance at age 71 was mandated by law and could not be challenged, the University argues that YUFA, including Heidi Bishop, would clearly have known that they had the ability to challenge the interpretation. The issue was consistently framed as one of interpreting the Policy, and never as a statutory requirement. Instead, with full knowledge of the issue, YUFA raised no objections either at the benefits subcommittee or by grievance and requested that the University distribute the memo to its members age 65 and over. Further, although Dr. Miller could not remember the details due to the passage of time, it is uncontested that he did speak with Mary Kandiuk about the issue and in light of the report that he did make to senior administration, it is clear that had she raised any concerns he would have communicated those concerns. The University argues that on the balance of probabilities, the only reasonable conclusion is that she did not raise any objections.

34. Following these exchanges, the University also communicated the interpretation to all faculty through the distribution of the *P & B Times,* including the members of YUFA's executive and the Benefits Subcommittee. And while Dr. Black's evidence was that YUFA did not monitor the *P & B Times,* the University notes that Professor Smith clearly did, and that YUFA had demonstrated that it was not reticent to raise concerns about the content of the *P & B Times* when it did have concerns. All of this conduct, argues the University, reflects an agreement between the parties on the interpretation of the life insurance policy.

The Agreed-To Interpretation is Correct

35. Notwithstanding its steadfast position that an arbitrator ought not to look behind the parties' agreed-to interpretation, the University also maintains that its interpretation is in any event correct.

36. In support of its interpretation the University relies primarily on the terms of the York Pension Plan. This plan is incorporated into the Collective Agreement by virtue of Article 26.02, which over successive collective agreements has provided that "[t]he parties agree to continue the York Pension Plan in effect as of [the date of the expiration of the prior collective agreement]". The University argues that section 6 of the York Pension Plan in turn provides for several different "Retirement Dates", emphasising that this heading is plural. These dates include a "Normal Retirement Date" (6.01), an "Early Retirement Date" (6.02) and a "Postponed Retirement Date" (6.03). In the "Unofficial Consolidation to December 31, 2013" version of the plan, under the heading "Postponed Retirement Date", the document shows the amended language following the elimination of mandatory retirement which reads as follows:

> A Member whose retirement under the Plan is postponed may elect to continue making required contributions to the Plan during such period, but not beyond the commencement of benefit payments, or to cease making required contributions to the Plan at normal retirement date.
>
> Notwithstanding the foregoing, benefits under this Plan must commence no later than the end of the calendar year in which the Member attains age 71 or such other time as is acceptable under the *Income Tax Act.*

A subsequent January 1, 2017 restatement of the Plan reflects additional amendments with respect to the timing of a member's election but is otherwise substantially the same.

37. The University also relies on the January 2002 York University Pension Plan Booklet which, under the heading "Frequently Asked Questions About Contributions", addresses circumstances in which a member can stop contributing to the Plan and advises that "[i]f you take a postponed retirement, you may elect not to contribute past your normal retirement date." The January 2014 Plan Booklet, under the heading "Retirement Dates" and subheading "Mandatory Receipt of Pension" reads as follows, consistent with the definition of "Postponed Retirement Date":

> Under the terms of the Income Tax Act, you must commence receiving your York University pension no later than the end of the year in which

> you reach age 71. Under the terms of the York University Pension Plan, this is the December 1st in the calendar year in which you reach age 71.

The University argues that as the terms of the Pension Plan are also incorporated into the Collective Agreement, the concepts of "postponed retirement" and "postponed retirement date" inform and should be included within the meaning of "the date of the employee's retirement" in the termination clause under the Life Insurance Policy. Further, argues the University, this interpretation is not inconsistent with the definition of "retirement" under Article 14.01(a) of the Collective Agreement, which simply does not speak to the circumstances of members such as Professor Laxer who continue to work full-time following mandatory receipt of pension.

The Grievance is Untimely

38. With respect to its timelines argument, the University argues that the 9 year delay from the time of the 2009 communication around the interpretation of the life insurance policy to the filing of the grievance in 2018 is fatal. While it acknowledges that the time limits under the collective agreement are not mandatory, Article 9.12 contemplates that a complaint will be filed within 21 days of the act or omission giving rise to the complaint, "or of the date on which the complainant first knew or ought reasonably to have known of such act or omission". Article 9.23 provides that if the grievor does not act in accordance with the time limits, the grievor is required to explain the reasons for failing to do so. According to the University, the Association has completely failed to provide any explanation for why it did not challenge the University's interpretation of the life insurance provision until July of 2018. With the passage of multiple renewal collective agreements, the University argues that the grievance is plainly out of time.

39. In support of its argument, the University relies on *Trent University and O.P.S.E.U. (Re)* (1994), 37 C.L.A.S. 227 (Burkett)("*Trent University*") for the proposition that the University's decision to implement its interpretation of the policy and to cease paying premiums for employees in mandatory receipt of pension was a singular act that does not give rise to a continuing grievance. This act may have had ongoing consequences for professors working past age 71, but those consequences, argues the University, flow from the decision made in 2009, which was not grieved.

The grievance should be dismissed in accordance with the doctrine of laches

40. The University argues there are two requisite elements to the doctrine of laches, both of which are met in this case: i) a finding of delay as a result of acquiescence, and; ii) detriment or prejudice to the other party such that

the delay is unreasonable and it would be unfair to proceed with a hearing on the merits of the complaint. It argues that over a period of 9 years and multiple renewals of the collective agreement, the uncontested interpretation of the life insurance policy became entrenched. The University has long-since ceased paying insurance premiums for employees in mandatory receipt of a pension, such that it now finds itself facing a claim for potentially hundreds of thousands of dollars for which it is uninsured. It has also lost multiple opportunities to address the issue in collective bargaining, or to make out its case at an earlier date when the issue was fresh and memories had not yet faded. This circumstance, it argues, is highly detrimental and results from the Association's undue delay, for which it has offered no reasonable explanation. It would, argues the University, be unfair to allow the grievance to proceed in these circumstances.

41. In support of its arguments, the University relies upon *Wabi Iron & Steel Corp.,* 184 L.A.C. (4th) 144 (Marcotte) ("*Wabi Iron & Steel*"), *University of British Columbia v Faculty Association of the University of British Columbia,* 2013 CanLII 82543 (BC LA) (Gordon)("*University of British Columbia*") and *Re Extendicare (Canada) Inc. and Ontario Nurses' Association,* (2004), 135 L.A.C. (4th) 359 (Harris)("*Extendicare*").

The Association should be Estopped

42. In the final alternative, the University relies upon the equitable doctrine of estoppel. Citing *Maracle v. Travellers Indemnity Co of Canada,* 1991 CanLII 58 (SCC) ("*Maracle*") and *Toronto Police Services Board v. Toronto Police Association,* [2007] O.L.A.A. No. 420 (Tacon) ("*Toronto Police Services Board, 2007*"), it identifies the four elements of the doctrine as: i) a representation by words or conduct; ii) an intention that the representation be relied upon; iii) reliance in the form of some action or inaction; and iv) detriment resulting therefrom.

43. With respect to the first element of estoppel, the University emphasises, citing *Owen Sound (City) Commissioners of Police v. Police Assn.,* 1984 CarswellOnt 2395 (Picher)("*Owen Sound (City)*") and *Re Child and Family Services of Timmins and District and C.U.P.E., Local 2196*, (2009) 97 CLAS 256 (Knopf)("*Child and Family Services of Timmins*"), that it is reasonable for an employer to expect that if the union disagrees with its interpretation of the collective agreement, it will be met with a grievance. Where the Union does not object to a clear pattern of conduct over an extended period of time, its silence constitutes a representation that it does not object to the employer's action.

44. In addressing the second element of the test, the University cites *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals,* 2011 SCC 59 (CanLII) ("*Nor-Man*") for proposition that the only reasonable inference the University can draw from the Association's conduct was that it accepted its interpretation of the Sun Life Policy. Citing *Revel v. Litwin Construction (1973) Ltd.,* 1991 CanLII 826 (BCCA)("*Litwin Construction*"), the University argues that "intention" can be inferred from such conduct, and the test does not require an express intention to induce reliance. It would be, argues the University, manifestly unfair if it was not entitled to rely upon the Association's representation by conduct in these circumstances.

45. With respect to the third and fourth elements, the University cites *Ryan v. Moore,* 2005 SCC 38 and *Centre Manufacturing, Inc. and C.A.W. Canada, Local 222* (2009) 81 L.A.C. (4th) 281 (Knopf)("*Centre Manufacturing*") and argues that by entrenching and sustaining its interpretation of the life insurance benefit over at least two rounds of collective bargaining, it has relied upon the Association's representation. It has neither paid life insurance premiums for employees in receipt of their pension, nor has it had the opportunity to address the issue in bargaining, both of which are to its detriment. Citing *Toronto (City) and Toronto Professional Firefighters' Assn., Local 3888* (2012), 111 C.L.A.C. 103 (Goodfellow), it argues that just the lost opportunity to bargain language to "enshrine" its established practice constitutes detrimental reliance. Further, the University argues that it is also prejudiced by the fact it is now faced with a grievance in which communications from more than a decade ago are key to the interpretive dispute. The loss of clear memories, documentation and key witnesses also constitute detrimental reliance on the Association's representations commencing in 2009.

The Association's Argument

Introduction

46. The Association argues that fundamentally this case is about whether the plain language of the Collective Agreement, which clearly and expressly entitles all full time professors to life insurance, should prevail, or whether the administration should be allowed a collateral attack on this plain language to disentitle a group of older employees from a benefit they have earned. From the Association's perspective, what the University is attempting to characterize as an "interpretive" issue is no such thing. Rather, what the University would need to demonstrate is that the parties agreed to "amend" the collective agreement, and that this agreement to amend was so clear and

unequivocal that it would warrant stripping employees of an established benefit on the basis of age. In light of the nature of the benefit and the nature of the communications relied upon by the University, in the context of a collective agreement that explicitly stipulates a process for amending the collective agreement, the Association argues that the University's evidence falls far short of the requisite standard.

Interpretation of the Collective Agreement

47. The Association's primary argument is that the entitlement to life insurance coverage for full-time professors is clear and express. Article 26.01 of the Collective Agreement provides that the University is required to maintain existing benefits "except as modified by this Agreement", and that the various benefits "shall be considered to be part of this Agreement." An amendment to those benefits would therefore require the agreement of the parties and an amendment to the Collective Agreement, which as addressed below the Association argues cannot have taken place. Under Article 26.07, the University is required to pay 100% of the premiums of the University's Group Life Insurance, "as currently in force", again enshrining the terms of the plan as it existed. Those terms, in turn, define "employee" for the purpose of the plan as including "full-time faculty members". "Termination of Employment" is defined as "the day a person ceases to qualify under the definition of employee, or the date he ceases to be active at work, whichever is earlier". There can be no dispute that individuals such as Professor Laxer fall squarely within the definition of employee, and there can be no dispute that Professor Laxer's employment did not terminate prior to his death. As an "employee" within the meaning of the plan, who had attained the age of 65, Professor Laxer's life insurance entitlement is defined in the Plan Details as "1 time the employee's annual basic earnings, the result adjusted to the next higher $1,000", subject to the stipulated maximum. Thus, argues the Association, there can be no doubt that Professor Laxer has met all of the eligibility criteria for the benefit, and nowhere in either the Collective Agreement or the Plan text does it anywhere say that an employee loses this eligibility by virtue of turning 71 years of age or by virtue of collecting a pension.

48. The Plan does stipulate, under the heading "Termination of Insurance", that "[t]he Employee Life Insurance benefit will cease immediately on the date of the employee's retirement". The Plan does not define "retirement", but the Association argues that a plain language reading of the term cannot possibly include an employee who continues to work full-time, in a manner that is materially indistinguishable from any other full-time employee. Further, while the Plan does not define "retirement", the Collective Agreement does. As a right that is incorporated into the Collective Agreement, the Association

argues that the Collective Agreement definition of "retirement" ought to resolve any question as the meaning of the term in the plan, rather than the definition unilaterally adopted by Sun Life, a third party to the agreement.

49. In this regard, the Association notes that under the preamble to Article 14 of the Collective Agreement, headed "Retirement", the timing of an individual's retirement "shall in the normal case be influenced by the wishes of the individual". The term "retirement" is then defined as "the voluntary termination of an individual's full-time status at York University at any time after that individual would, if a member of the York Pension Plan, be eligible to receive a pension from the York Pension Plan". Article 14.02(c) specifies that "Retirement shall normally be followed by the assumption of any of the following options", none of which include continuing full-time employment. Professors who chose to continue working full-time simply do not and cannot meet this definition, irrespective of whether they are eligible for or are in fact collecting a pension. Neither is there any other language in the Collective Agreement or the Policy that even purports to terminate the benefit at age 71 or upon mandatory receipt of pension.

50. To impose Sun Life's definition in this context would be, argues the Association, absurd. Citing *C.E.P., Local 777 v Imperial Oil Strathcona Refiner,* 2004 CarswellAlta 1855 (Elliott)("*Imperial Oil*") and *Air Canada v Canadian Union of Public Employees, Air Canada Component,* 2013 CanLII 48962 (CA LA) (Davie) the Association emphasises that the Collective Agreement must be read together as a coherent whole, giving meaning to each word and preferring an interpretation that is "most consistent with the collective agreement as a whole". Citing *London Civic Employees, Local 107 v. London (City)* 2010 CarswellOnt 6719 (Etherington) ("*London Civic Employees Union, Local 107*"), *London (City) v C.U.PE., Local 101*, CarswellOnt 10136 (Brant) ("*London (City)*", *Re Strathroy-Cardoc Police Association v the Municipality of Strathroy-Cardoc Police Services Board,* 2012 CanLII 51946 (Cummings) ("*Strathroy-Cardoc Police Services Board"*), *Brockville Mental Health Centre v Ontario Public Service Employees Union,* 2016 CarswellOnt 2751 (Knopf), *Markham Stouffville Hospital v CUPE, Local 1999*, 2018 CanLII 111617 I(ON LA) (Trachuck) (Jud. Rev. Dsmsd. 2019 ONSC 5373 (CanLII) ("*Markham Stouffville Hospital"*) and *Scarborough Hospital v. CUPE 1487,* 2014 CanLII 66059 (ON LA) (Goodfellow) ("*Scarborough Hospital*"), the Association argues that had the parties intended to differentiate amongst employees on the basis of age, they would have required clear and unambiguous language to indicate such an intention. In the absence of such clear language, the University's unilateral imposition of such a distinction violates the Collective Agreement.

The Association did not "Acquiesce" or Agree to the University's Interpretation

51. In response to the University's argument that the parties have already agreed on the correct interpretation of the life insurance benefit and that the issue in this grievance is already determined, the Association raises three key points. First, it disputes that the parties have ever agreed on the University's interpretation. Second, it argues that the emails relied upon by the University to support its arguments are parol evidence and inadmissible. And third, it argues that even if the evidence is admissible, it cannot have the effect of creating an age-based limitation on employee benefits absent an explicit Collective Agreement amendment to that effect.

52. On the first point, the Association argues that at most the email exchanges reveal that the administration "advised" the Association of its position. As far as Professor Dyer understood, the age 71 limitation was simply presented to the Benefits Subcommittee as a "*fait accompli*", which she understood to be mandated by statute. She did not understand that the University was proposing to amend the Collective Agreement, an action that the Benefits Subcommittee was not empowered to take, either actively or through acquiescence. Neither, argues the Association, could the contents of a vaguely remembered "hallway discussion" constitute acquiescence of or give rise to an agreement to amend the Collective Agreement or create an age-based limitation on benefits. The issue, argues the Association, was never directly addressed by the JCOAA or even placed on the agenda of the JCOAA. Nor can a general and conditionally-worded communication in the *P&B Times*, a publication that the Association has maintained is unofficial and which on its face does not purport to alter collective agreement rights, give rise to finding that the parties agreed to alter those rights. This conclusion, argues the Association, is particularly clear where the parties have agreed to a specific process for amending the Agreement under Article 32. In light of that process, the Association argues that it was incumbent on the University to engage that process, and not merely raise the issue with an unauthorized staff member or to a body that is merely advisory to the JCOAA which in turn is not itself authorized to alter the Collective Agreement.

53. Citing *BCW, Local 322 v Canada Bread Co.,* 1970 CarswellOnt 980 (Christie)("*Canada Bread*"), *Ottawa Civic Hospital Nurses' Assn. v. Ottawa Civic Hospital*, 1971 CarswellOnt 881 (Weatherill)("*Ottawa Civic Hospital*") and *Keeprite Workers' Independent Union v National Refrigeration & Air Conditional Corporation,* 2008 CarswellOnt 9026 (Jesin), the Association argues that had the parties intended to amend their collective agreement, they would have to have done so through a body that was authorized to make such a change (as distinguished from a body that is responsible for day to day issues of administration), and done so in a written and signed document.

54. On the second point, the Association notes that the University's argument depends on the admissibility of extrinsic evidence to vary the plain terms of the Collective Agreement. Where a provision is neither latently nor patently ambiguous, the Association argues that such evidence ought not to be admissible. In this case, the term "retirement" is defined by the parties in the Collective Agreement in a manner that could not more clearly contradict the University's interpretation. In the usual course, parties should be understood to "say what they mean and mean what they say". In support of this argument, the Association cites *Cmmr. Of N.W.T. v. N.W.T. Public Service Assn.,* 1986 CarswellNat 874 (Hope), *Sattva Capital v. Creston* Moly, [2014] 2 S.C.R. 633 ("*Sattva Capital*"), *Leitch Gold Mines Ltd. et al. v. Texas Gulf Sulphur Co. (Incorporated) et a.,* [1968] O.J. No. 1336 (HCJ), *Dominion Colour Corp. and Teamsters Chemical, Energy and Allied Workers, Local* 1880, 2003 CarswellOnt 10054 (Surdykowski), *LIUNA, Local 183 and Ontario Excavac Inc.,* 2019 CarswellOnt 3042 (Rogers), *Park Lane Chevrolet Cadillac Ltd. and UFCW, Local 175,* 2017 CarswellOnt 12676 (Stout), *Ryerson University v. Ryerson Faculty Association*, April 15, 2020 (unreported) (Sheehan) and *CJA, Local 579 v. Bradco Construction Ltd.,* [1993] 2 S.C.R. 316. In assessing the admissibility of the University's evidence, the Association emphasises that none of the communications relied upon by the University relate to the time or circumstances under which the parties created the life insurance entitlement. Rather, this evidence, arising well after the parties reached their bargain, is introduced to "subtract from, vary or contradict" the terms of the parties' written agreement. This use of extrinsic evidence, the Association argues, is precisely what the rule against parol evidence is designed to prevent.

55. Finally, the Association argues that even if the University's evidence was admissible and even if the Association did acquiesce, both points the Association disputes, the parties would still have to have agreed to clear and express language in order to disentitle employees from a benefit on the basis of age. The Association argues that in similar circumstances the University's argument was rejected for this reason in *Scarborough Hospital,* a case in which the employer also relied on communications between the parties and the absence of any objection from the Union.

The Grievance is Timely

56. The Association argues that the University's timeliness objection is without merit for two reasons. First, it argues that the grievance raises a continuing violation of the Collective Agreement. Second, it argues that the Collective Agreement does not in any event contain any mandatory time limits.

57. On the first point, the Association relies on *Toronto Parking Authority v. C.U.P.E., Local* 43 1974 CarswellOnt 1372 (Adell) and *Port Colborne General Hospital v. O.N.A.,* 1986 CarswellOnt 3676 (Burkett)("*Port Colborne General Hospital*") and argues that any ongoing failure to provide wages or benefits constitutes a continuing breach of the Collective Agreement. Citing *Religious Hospitallers of St. Joseph of Hotel Dieu of Kingston v. O.P.S.E.U., Local 452,* 1992 CarswellOnt 1251 (Stewart), the Association argues that while the decision to exclude YUFA members over age 71 may have taken place at a discrete point in time, this does not change the continuing nature of the University's failure to provide the benefit on an ongoing basis. Citing *O.P.S.E.U. v. Ontario (Ministry of the Attorney General)*, 2003 CarswellOnt 5707 (Abramsky), the Association argues that neither does the fact that the breach has been ongoing for an extended period of time alter its character as a continuing breach. In this regard, the Association distinguishes the circumstances in *Trent University,* which was more analogous to a demotion or failure to promote case and did not involve an ongoing benefit to the employer. In the instant case, the University continued to enjoy all the benefits provided by a full time employee such as Professor Laxer but failed to provide him with a benefit to which he was entitled under the Collective Agreement in exchange for that work.

58. On the second point, the Association relies upon Articles 9.12 and 9.23 of the Collective Agreement to establish that there are no mandatory timelines under the Collective Agreement. In particular, the use of the term "may" in Article 9.12 makes clear that the 21-day time frame is "directory" and not "mandatory". Further, Article 9.23 stipulates that the grievor shall be expected to act in accordance with the time limits, but that the failure to act results only in "a requirement for the grievor to explain at the subsequent state of the procedure the reasons for failure to abide by the agreed time-limits". In this regard, YUFA relies on its arguments in opposition to laches and estoppel and maintains that it has provided such a compelling explanation. In the final alternative, the Association maintains that this is in any event an appropriate case for the arbitrator to exercise his discretion under s.48(16) of the *Labour Relations Act*. Citing *Port Colborne General Hospital*, the Association argues that it has provided reasonable grounds for the extension and that the University would not be substantially prejudiced by the extension.

The Grievance is not Barred by Laches

59. In responding to the University's reliance on the doctrine of laches, the Association emphasises that it is an extraordinary remedy, available only where the defending party has suffered such significant prejudice that it is "no longer possible to have a fair hearing" (see *Schlegel Villages and SEIU, Local 1*, 2015 CarswellOnt 15934 (Ont. Arb.) (Luborsky)("*Schlegel Villages*") and

Canadian National/Canadian Pacific Telecommunications v. C.A.C.W., 1981 CarswellOnt 1961 (Beaulieu). Citing *SEIU, Local 1 v. St. Michael's Hospita*l, 2012 CarswellOnt 2085 (Ont. Arb.) (Schmidt), the Association argues that the nature of the grievance, both ongoing and raising issues under the Human Rights Code, militates against the application of the doctrine, particularly to bar a grievance concerning a fresh violation and seeking to resolve the issue prospectively. Instead, citing *Blouin Drywall Contractors v. C.J.A., Local 2486*, 1975 CarswellOnt 827 (OCA), the Association argues that the grievance ought to be decided on its merits.

60. In any event, the Association maintains that the University has failed to establish either "acquiescence" on the part of the Association or that the University has suffered "serious prejudice", both requirements of the doctrine.

61. Citing *Parking Authority of Toronto,* the Association argues that to establish acquiescence the University would need to show that the Association not only had "knowledge of the state of facts", but also "the realization by the union that those facts constitute a violation of a legal right". To the extent that the evidence establishes that the Association turned its mind to the issue, it is more consistent with a misapprehension of the legal status of the issue than any form of acquiescence to the violation of its rights. Citing *Schlegel Villages,* the Association argues that the failure on the part of the University to confirm the Association's acquiescence in clear words and unambiguous actions is fatal to its laches claim. In this context, the Association also emphasises that unlike the circumstances in *Wabi Iron & Steel* or *Extendicare,* Professor Laxer's case was the first and only time that the issue had ever crystalized.

62. The Association also maintains that the University has failed to meet its onus to establish "serious prejudice". Citing *CN/CP Telecommunications*, *supra,* the Association argues that even gross delay does not, in and of itself, outweigh the competing interest in seeing that justice is done and that the matter be decided on its merits in a fair hearing. In particular, the Association disputes that the University has established that it has become entrenched in its practice, lost the opportunity to bargain, or lost the ability to make its case. Unlike the facts in *Extendicare* or *University of British Columbia*, the Association maintains that complying with its obligations under the life insurance plan will not require major restructuring or substantial administrative changes by the University; it simply involves a cost. Citing *Toronto Parking Authority,* the Association argues that the mere cost of ending an illegal arrangement does not constitute prejudice and has more than outweighed by the interest in adhering to the Collective Agreement. With respect to the alleged lost opportunity to bargain, the Association argues that the University has in fact come out ahead in that it has not been paying

premiums for the past 10 years, but that in any event it did not seek to bargain the life insurance provision in the last round of bargaining, which post-dated the filing of the grievance (see *Schlegel Villages*). Neither, argues the Association, has the University demonstrated any difficulty in presenting its case due to the passage of time, as was found in *Wabi Iron & Steel, University of British Columbia* or *Extendicare*.

63. In sum, the Association argues that the overall equities in this case favour allowing the grievance to proceed and should not give rise to the discretionary remedy of laches.

The Association is Not Estopped

64. In responding to the estoppel argument, the Association disputes that the doctrine can apply to the enforcement of its statutory rights under the *Ontario Human Rights Code.* As noted above, the parties have bifurcated these proceedings and set aside the *Code*-based aspects of this grievance. I will not therefore comment further on this aspect of the Association's argument, except to note that the University is not here purporting to preclude the Association from pursuing that aspect of the grievance.

65. In response to the merits of the University's claim for estoppel, the Association argues that it has failed to make out the essential elements of the doctrine. In particular, citing *Toronto Police Services Board v. Toronto Police Assn.,* 2002 CarswellOnt 907 (Ont. Arb.)(Knopf), *York University v. Y.U.F.A.*, 1997 CarswellOnt 6478 (Ont. Arb.) (Mitchell), and *Georgian College of Applied Arts & Technology v. O.P.S.E.U.*, 1997 CarswellOnt 67301 (Ont. Arb.)(Schiff), the Association argues that its silence in 2009 is not the kind of clear, unequivocal and informed representation required to support an inference that it understood the effect of that silence and intended that the University act upon it.

66. Neither, argues the Association, has the University established detrimental reliance. Citing *Bay Mills Ltd. v. U.S.W.A.*, 2000 CarswellOnt 6147 (Ont. Arb.) (Knopf), the Association notes that detrimental reliance cannot be inferred and must be proven in evidence. Citing *Bruce Power LP and Society of Energy Professionals,* 2017 CarswellOnt 20291 (Ont. Arb.)(Surdykowski), the Association argues that a lost opportunity to bargain does not automatically establish prejudice, and the quality of that lost opportunity must still be assessed (see also *Ontario Power Generation Inc. and Society of Energy Professionals*, 2017 CarswellOnt 17689 (Ont. Arb.)(Stout)). In this case, the Association argues that the best indication of the limited value of that opportunity is the fact that the issue was not even raised in the most recent round of bargaining (see *Saskatchewan (Ministry of Justice) and SGEU*,

2014 CarswellSask 645 (Sask. Arb.)(Ponak), *St. Michael's Hospital, supra,* and *Canadian Pacific Railway and Teamsters Canada Rail Conference,* 2017 CarswellNat 6009 (Flynn)). Further, given that the University has in fact benefited from an extended period without paying premiums, the Association argues that the University has in fact enjoyed a "windfall" (See *Loomis Express and CAW, Local 775,* 2013 CarswellNat 3539 (Can. Arb.)(Pelz)).

Remedy

67. The Association seeks a declaration that the University violated the Collective Agreement, that it cease and desist from violating the collective agreement by terminating employee life insurance at age 71 and that its affected member, i.e., Professor Laxer's estate, be made whole.

Analysis

Issue 1: Under the terms of the Collective Agreement, do life insurance benefits cease at age 71?

68. While both parties maintain that the language of the collective agreement supports their respective position, they approach this grievance from opposite directions. The Association argues that the language of the parties' written collective agreement should be given primacy, and that the parties should be taken to "say what they mean and mean what they say". The University argues that the parties have themselves already agreed on how to interpret the words of the collective agreement, and that it is that interpretive agreement that should be given primacy, and not the arbitrator's own interpretation of the language in the collective agreement. Resolving this grievance requires that I consider both perspectives. But in my view, the correct starting place is to consider the meaning of the written collective agreement between the parties. The question of whether there is in fact an interpretive agreement between the parties—a proposition that is very much contested by the Association—should at the very least be considered in the context of the actual words adopted by the parties to express their bargain in the collective agreement.

69. As summarized in *Imperial Oil,* the usual approach to interpreting collective agreements is to read the words of the parties "in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object, and the intention of the parties" (at para. 40). In applying this interpretive method, it is necessary to consider the meaning of individual words and phrases, but always within the context of the broader provision within which those words and phrases are employed, other

related provisions, the collective agreement as a whole, and the manner in which all of these elements have been woven together. If possible, the goal is to ascertain the parties' intention from the terms of their agreement. Applying this method, and for the reasons that follow, I find that the language of the collective agreement clearly and unequivocally supports the Association's interpretation and cannot reasonably support the interpretation proffered by the University.

70. The Life Insurance Policy, incorporated into the collective agreement by virtue of Article 26, sits at the centre of this grievance, and I therefore begin with the terms of that policy. The Policy extends life insurance benefits to "employees", a term that is explicitly defined to include "full-time faculty members", among others. This aspect of the definition is based entirely on the quantity and nature of the work performed, without any reference to age or pension status. On a plain and ordinary reading of this definition, there can be no doubt that it captures full-time professors such as Professor Laxer who work beyond the age of 71 and who are in receipt of a pension. The policy also defines the meaning of "Termination of Employment" as occurring on "the day a person ceases to qualify under the definition of employee, or the date he ceases to be active at work, whichever is earlier." Again, it is clear that the employment of a professor who continues to work full time past the age of 71 and while in receipt of a pension has not terminated.

71. In accordance with the terms of the Policy, employees under the age of 65 receive an insurance benefit of up to 3 times their annual basic earnings. This amount is reduced to one times their annual basic earnings "[on] July 1st coincident with or next following the date the employee attains age 65". This is one of several examples in the collective agreement where the parties have expressed an explicit intention to restrict the availability of a benefit on the basis of age. And it is highly significant that they did not explicitly express such an intention to terminate the Life Insurance Policy entirely on the basis of any age limit, or on the basis of receiving a pension. Read together with the definition of employee, and absent some other basis for exclusion, a professor who continues to work full time beyond the age of 71 and mandatory receipt of pension meets all of the stipulated criteria to receive a life insurance benefit, subject to a cap, of one times their annual basic earnings. Having satisfied the stipulated requirements for eligibility, the question is whether the life insurance benefit nonetheless ceases to apply after age 71 and mandatory receipt of pension by virtue of the termination provision.

72. The triggering event for terminating coverage of an employee is "the date of the employee's retirement." The term "retirement" is not defined in the Policy. The Association argues that its interpretation is consistent with the plain and ordinary meaning of this term, while the University's is not, and in

this I agree. One generally thinks of retirement as leaving the workforce in at least some respect. The term allows for some nuance and I do not suggest that it need be "all or nothing". As discussed below, the collective agreement specifically contemplates that faculty may continue to work in some limited capacity during their "retirement". But one would not generally use the term "retirement" to refer to the circumstances of a person who continues to carry out all the functions of their job on a full time basis in a manner that is indistinguishable from their unretired colleagues, as the University's interpretation would require. Further, I find that this conclusion is strongly reinforced when one considers the use of the term "retirement" in the broader context of the collective agreement.

73. Retirement is addressed in Article 14 of the Collective Agreement. According to the preamble to the article, its clauses "govern the retirement of full-time faculty and professional librarian employees" and are premised on the principle that "the timing of an individual's retirement from the University, and the assumption of any part-time responsibilities following retirement shall in the normal case be influenced primarily by the wishes of the individual." It is noteworthy that the parties have not agreed that the timing of retirement is premised on attaining a particular age or commencing mandatory receipt of pension, neither of which conditions are subject to being influenced by the "wishes of the individual".

74. Article 14.01 (a), under the heading "General Conditions and Definitions", provides a comprehensive definition of the term "Retirement" which reads:

> "Retirement" means the voluntary termination of an individual's full-time status at York University at any time after that individual would, if a member of the York Pension Plan, be eligible to receive a pension from the York Pension Plan (i.e., anytime after attainment of age 55). Continuation in a part-time capacity, or as "professor emeritus" or "librarian emeritus" or "senior scholar" is not inconsistent with the use of the term "retirement". [emphasis added]

On a plain reading of this definition, it is simply not possible to reconcile its application to a full-time professor, irrespective of that person's age or pension status. Simply put, there is no sense in which such an individual can be said to have voluntarily terminated their "full-time status at York University", simply because they have turned 71 years of age or commenced mandatory receipt of pension. Such an employee is clearly "eligible to retire" in accordance with the terms of the Collective Agreement, but they have equally clearly not actually retired.

75. The University argues that its interpretation of the term "retirement" in the Life Insurance Policy does not conflict with the definition in Article 14.01(a), because that definition does not specifically address the circumstances at issue in this grievance. I do not agree with this proposition. The definition specifically contemplates that once an individual attains age 55 and is eligible to receive a pension, they will only fall within the definition of "retirement" if they voluntarily terminate their full time status at the University. The fact that the definition identifies certain classes of individual, such as "professor emeritus" or "senior scholar" who might also meet the definition of "retirement" does not alter the fact that the definition clearly intends to exclude from retirement individuals who continue to work as full-time faculty members and who have not voluntarily terminated that status.

76. The University also relies on the reference to "Retirement Dates" in the Pension Plan, which includes a reference to a "Postponed Retirement Date", to argue that the reference to "retirement" in the Life Insurance Policy should be read more broadly than the definition in the Collective Agreement. There are several problems with this argument.

77. First, the Pension Plan does not define "retirement" to includes a "Postponed Retirement". Rather, Section 6 of the Pension Plan speaks to the timing of one's retirement and the consequences of choosing different retirement "dates", from "early" to "normal" to "postponed". Section 6.03 speaks to the "retirement" being "postponed" (i.e., not yet happening), it does not create a form of retirement called "postponed retirement", in the sense that an individual who has elected to postpone their retirement can be said to be nonetheless "retired".

78. Second, even if the terms of the Pension Plan could be found to support the conclusion that under the Pension Plan full-time professors who work past the age of 71 and are in mandatory receipt of pension are in some sense "retired", there is nothing in the parties' agreement as a whole to suggest an intention to incorporate this meaning into the Life Insurance Policy. The Life Insurance Policy stipulates eligibility requirements that clearly entitle full time professors who have postponed their retirement date to receive coverage, and the termination clause refers to "retirement" only.

79. To the extent that the parties have agreed to a definition of the term "retirement" outside of the Life Insurance Policy, it is found in Article 14.01(a) of the Collective Agreement, not in the Pension Plan. As discussed above, that definition is comprehensive and can be read harmoniously together with the Life Insurance Policy. To read the Pension Plan and the Life Insurance Policy together in the manner suggested by the University would result in applying conflicting definitions to the same term. In the absence of any express

intention to adopt a different meaning for the term "retirement" in the Life Insurance Policy as the parties have agreed to in the Collective Agreement, an interpretation that avoids such a conflict is clearly preferred.

80. A plain language and harmonious reading of the Collective Agreement, the Life Insurance Policy and the Pension Plan together overwhelmingly supports the conclusion that full-time professors are entitled to life insurance coverage, irrespective of whether or not they are over the age of 71 and in mandatory receipt of pension.

Issue 2: Have the Parties Reached an Interpretive Agreement?

81. The University's primary position is that in 2009 the parties agreed in writing to interpret their collective agreement as terminating life insurance benefits upon mandatory receipt of pension at age 71. As addressed above, this agreement is not reflected in the terms of the actual collective agreement between the parties, or in the terms of the life insurance policy that is incorporated therein. Indeed, as I have found, the terms of the collective agreement clearly and unequivocally support the opposite conclusion. Nonetheless, the University argues that the parties bound themselves to the Sun Life interpretation of the life insurance policy through a series of exchanges between the parties' representatives.

82. The Association objects to the admission of this extrinsic evidence as barred by the parol evidence rule. As noted above, it cites several authorities for the proposition that in the absence of any ambiguity in the language of the collective agreement, arbitrators ought simply to give effect to the parties' agreement on its terms. In the instant case, however, the University has argued that the parties themselves reached a binding agreement in writing to interpret the collective agreement in a particular way. In this context, I find it is appropriate to consider the University's evidence in order to assess whether it has in fact established that such an agreement exists. And for the reasons that follow, I find that it has not.

83. In support of its position the University relies primarily on email communication between Dr. Miller and Heidi Bishop, the Association's Executive Associate in November of 2009. There are, in my view, two fundamental problems with the University's reliance on these communications.

84. First, nowhere in these communications does Ms. Bishop actually say that the Association agrees with the Sun Life interpretation put forward by the University. It is clear that Ms. Bishop did not raise any objections when the

University advised her of Sun Life's interpretation of the Policy and that based on that interpretation coverage would terminate upon mandatory receipt of pension. These exchanges also establish that Ms. Bishop forwarded the University's proposed interpretation to the YUFA members of the Benefits Subcommittee, and that the Subcommittee members suggested that the University circulate a memo advising its members over age 65 "in the event they need it for financial purposes". I also find that to whatever extent the Association members of the Benefits Subcommittee, including Ms. Dyer and Ms. Kandiuk, may have believed that the University's interpretation was a *fait accompli,* this was not the result of anything misleading on the part of Dr. Miller. It is clear on the record as a whole, including Dr. Miller's will say, the email exchanges, the memoranda and the *P & B Times* communications, that the University's position was founded on Sun Life's interpretation of the policy and it was communicated as such. Certainly, the statutory amendments related to the elimination of mandatory retirement and the age for mandatory receipt of pension were a part of the conversation, and it may be that these references resulted in some confusion amongst the Association committee members, but that confusion was not the result of any misleading communication on the part of Dr. Miller. But nonetheless, nowhere in this exchange, or in any of the exchanges relied upon by the University, does the University propose that the parties enter into any kind of binding interpretive agreement, and nowhere does any Association representative even purport to accept such a proposal.

85. Second, having regard to the terms of the Collective Agreement, it is clear that these parties have agreed that in any event, within the context of the JCOAA and the Benefits Subcommittee, neither Ms. Bishop nor the Associations members of the JCOAA and the Benefits Subcommittee had the authority to enter into the kind of agreement that the University purports was created by the email exchange and communications with Dr. Miller. Ms. Bishop was the Association's principal staff representative for the JCOAA and it was in this capacity that Dr. Miller communicated with her concerning the life insurance policy. His understanding, which I accept on the basis of his uncontested will say statement, was that Ms. Bishop would then transmit her communications with him to the Association who could then deliberate internally to decide if the matter should be addressed in other forums or other processes. However, in accordance with Article 7.02 of the Collective Agreement, the parties specifically agreed that "the Committee shall not have the power to add to or modify in any way the terms of this Agreement, but shall function in an advisory capacity to the Association and/or the Employer with the general aim of ensuring that this Agreement is administered in a spirit of co-operation and mutual respect". In the instant case, the purported interpretive agreement the University seeks to enforce would both add to and modify the plain meaning of the collective agreement. It is, quite simply,

precisely the kind of agreement that the parties have agreed the JCOAA is not empowered to make. It follows that an unelected staff-representative acting in her capacity as a member of that Committee or its Subcommittee must also lack this power. Neither could such an agreement arise from a cursory discussion of the issue in the Benefits Subcommittee or a passing conversation with Ms. Kandiuk.

86. Even absent Article 7.02, and taking the University's evidence at its highest, I would still not find that the communications relied upon by the University are sufficient to create a binding agreement between the parties that life insurance terminates upon mandatory receipt of pension. I have found that the relevant provisions of the Collective Agreement in this case are clear and unambiguous and cannot reasonably support the University's interpretation. There is no signed agreement between the parties to modify or alter these terms, as would be required had the parties wished to change the terms of their agreement (see *Canada Bread Co.* at para 14). I accept, as the Association argues, that in the usual course this should be the beginning and the end of the analysis. As the Supreme Court of Canada held in *Bradco Construction Ltd.*, discussing the general rule prohibiting the use of extrinsic evidence to interpret Collective Agreements, at para 43:

> The rule developed from the desire to have finality and certainty in contractual obligations. It is generally presumed that when parties reduce an agreement to writing they will have included all the necessary terms and circumstances and that the intention of the parties is that the written contract is the embodiment of all the terms. Furthermore, the rule is designed to prevent the use of fabricated or unreliable extrinsic negotiations to attack formal written contracts.

87. The question of whether to admit extrinsic evidence in interpreting a collective agreement can be slightly more nuanced than simply determining whether or not the language in issue is ambiguous. As discussed in *Sattva Capital Corp,* extrinsic evidence may in some circumstances be relied upon to provide context, or as an interpretive aid to understanding what the parties meant when they agreed to particular language. But the presumption stands that the parties should generally be taken to "mean what they say and say what they mean" (see, e.g., Ryerson University at p.10 and *Park Lane Chevrolet Cadillac Ltd.* at para. 84, citing *Ontario Power Generation v. Society of Energy Professionals* (December 13, 2012)(Surdykowski)). And here, the University is not seeking to rely upon extrinsic evidence to clarify what the parties meant by the word "retirement" in the life insurance policy. The evidence it seeks to rely upon post-dates the parties' agreement to that language and is in no way related to the collective bargaining process. Instead, it is relying on such evidence to establish the existence of a side-agreement to change the meaning of the collective agreement. To achieve this end, I find

that it would have been necessary for the parties to enter into written and signed agreement to modify the Collective Agreement, in accordance with the principles set out in *Canada Bread Co. supra*, and *Ottawa Civic Hospital*.

88. I therefore find that the parties have not entered into a binding interpretive agreement and that on the clear and unambiguous terms of the collective agreement, life insurance benefits do not terminate at age 71 or upon mandatory receipt of pension.

Issue 3: Should the grievance be dismissed as untimely?

89. The answer to the question whether the grievance is timely turns in part on whether this is a "continuing grievance" or whether it relates to events that were fixed in 2009. I will therefore start by examining this issue before turning to the timeliness provisions of the Collective Agreement.

90. In support of its position that the instant grievance is not a continuing grievance, the University argues that it relates to a "discrete event and interpretation in 2009". Relying primarily on the decision of Arbitrator Burkett in *Trent University,* the University argues that where a breach arises from a single decision, this decision may have ongoing consequences but does not constitute a "continuing grievance". The Association cites Arbitrator Burkett's decision in *Port Colborne General Hospital,* among several others, for the proposition that an ongoing failure to pay a benefit under a collective agreement results in a series of separately identifiable breaches and therefore gives rise to a continuing grievance. A careful review of these authorities is instructive.

91. In *Trent University* the grievance arose from a decision by the University to restructure its custodial operations. Prior to the restructuring, certain custodians on the night shift were assigned lead hand duties and paid a lead hand premium. Following the restructuring, all custodians were assigned to the day shift under the supervision of the custodial coordinator, and the former lead hands were advised that they would therefore no longer be paid a supervisory bonus. Arbitrator Burkett summarized the jurisprudence and reasoned as follows (at paras 12-15):

> [12] Finally, the union characterizes these as "continuing grievances" such that any time limit for filing runs from the most recent breach. The jurisprudence in respect of the distinction between a continuing and a non-continuing grievance has been aptly described by one arbitrator as "a fruitless search through a thicket of precedents". While general guidelines emerge the difficulty remains in applying them to any given case. Counsel, in their written submissions, made reference to a number

of these general guidelines. Reference is made to Brown & Beatty, "Canadian Labour Arbitration" (3d), page 2063, as follows:

> Where the violation of the agreement is of a continuing nature, compliance with the time limits for initiating a grievance is not as significant unless the collective agreement specifically provides that the grievance must be launched within a fixed period of time. Continuing violations consist of repetitive breaches of the collective agreement rather than simply a single or isolated breach. They usually involve the non-payment of money, an illegal strike, or benefit premiums, or the assignment of work; but have been said not to include a refusal to deduct union dues nor a failure to communicate a change in a wage increase. It has been suggested that the correct test is the one developed in contract law, namely, that there must a recurring breach of the duty, not merely recurring damages. Where it is established that the breach is a continuing one, it has been held that the failure to initiate it within the stipulated time from the date of its first occurrence will not render it inarbitrable.

and to Palmer "Collective Agreement Arbitration in Canada" (3d) page 188 as follows:

> 5.41]be [sic] essence of a continuing grievance is that the act complained of must be one that recurs ...
>
> ... Although there is some suggestion in the foregoing quote [from Dominion Glass] that the continuity of damage is a criteria in this matter this is clearly not the case; it is the recurrence of the act by the alleged violator of the collective agreement that is the basis for a finding in these cases. It is irrelevant that the consequences of the initial act are ongoing. This point was made when continuing grievances were defined as: "Grievances which do not relate to a single act possessing substantial finality, such as a discharge or a promotion, but relate instead to a continuing course of conduct - conduct which is renewed at regular intervals and is capable of being considered as a series of separate actions rather than as one action which may just happen to have continuing consequences".

and to *Re: Port Colborne General Hospital (1986) 23 LAC (3d) 323 (Burkett)* as follows:

> It is clear from a reading of the cases that the question that must be asked is whether or not the conduct that is complained of gives rise to a series of separately identifiable breaches, each one capable of supporting its own cause of action. Allegations concerning the unjust imposition of discipline, the improper awarding of a promotion or the failure to provide any premium or payment required under the collective agreement on a single occasion, while they may have ongoing consequences, constitute allegations of discrete non-continuing violations of the collective agreement. In contrast, an allegation of an ongoing failure to pay the wage rate or any benefit under the collective agreement or an ongoing concerted work

> stoppage constitute allegations of continuing breaches of the collective agreement.

[13] In applying these general guidelines to the grievance at hand we are pulled in both directions. While a single discrete event gave rise to the grievance, the employer continues to refuse to pay the lead hand premium that is sought, which on its face constitutes an ongoing failure to pay the wage rate. A series of recent awards deal with whether or not placement on the salary grid constitutes a continuing or non-continuing grievance. The issue is similar to that before us and, therefore, the analysis is instructive. In Re: *Province of British Columbia and B.C.N.U.* (1982) 5 LAC (3d) 404 (Getz), the arbitrator concluded that the employer's duty to assess past experience constituted a single duty and not a recurring one as would give rise to a continuing breach. In the subsequent award in *Re: Altamount Nursing Home and O.N.F.* (October 3, 1985) unreported (Swinton) the arbitrator rejected the conclusion of arbitrator Getz, on the basis that "the employer benefits from that experience and the collective agreement contemplates that compensation will be paid for that benefit". Focusing on the ongoing benefit enjoyed by the hospital and the ongoing requirement to compensate accordingly it was found that the failure to compensate constituted a continuing breach. This reasoning was adopted by arbitrator Rose in *Re: Regional Municipality of Haldimand-Norfolk and Office and Professional Employees* (1991) 23 LAC (4th) 282. Finally, arbitrator Stewart adopted the same approach in *Re: Religious Hospitallers of St. Joseph and O.P.S.E.U.* (1992) 29 LAC (4th) 326 in a case where it was also alleged that the grievor had not been placed at the proper level on the salary grid. She concluded,

> ... the violation claimed occurs at each pay period when the employer has the benefit of Ms. Spence's services but does not compensate her for them in accordance with the collective agreement.

[14] In the matter at hand, it cannot be said that the employer is enjoying an ongoing benefit by reason of its failure to pay the grievers in the amount dictated for services performed and/or by reason of qualifications which are available to it on a continuous basis. In this case, the grievors were relieved of their lead hand responsibilities and, because they no longer act in that capacity, are no longer paid a premium. In these circumstances, the claim is more analogous to one of improper denial of promotion or improper downgrading, both of which would, on the basis of the guidelines cited, be treated as non-continuing violations. Although there is a continuing effect (i.e. the Griever is not working at the level that he/she claims and, therefore, is not being paid at that level) the alleged breach is properly characterized as non-continuing in nature. Similarly, in this case the grievors are not being paid what they claim they are entitled to but it cannot be said that the employer is somehow benefiting by virtue of not paying for services performed or for qualifications possessed, as in the

> salary grid cases. The breach here, if there is one, is in respect of an action taken on a specific day that contravenes the terms of the collective agreement. Consequently, we have been persuaded that, as with alleged cases of improper denial of promotion and/or improper downgrading, this is an alleged non-continuing violation that occurred on May 4, 1993 so that the time limits run from that date. If *U.S.W. and S. Schoniger* (1966) 18 LAC 30 (Londe) stands for a different proposition we decline to follow it.
>
> [15] Having regard to all of the foregoing, we hereby uphold the employer's preliminary objection and find that this grievance is inarbitrable by reason of not having been filed in a timely fashion.

92. I agree with Arbitrator Burkett's summary of the state of the law and with his application of the law to the facts before him. However, in my view, this decision does not support the University's position in the instant case. In *Trent University*, the distinct act that gave rise to the grievance was the decision to remove the lead hand duties from the grievors. It is true that this act had the consequence of depriving the grievors of lead hand pay on an ongoing basis, but the continuing effect of that decision was attributable to the fact that they were no longer actually carrying out the functions of a lead hand. In other words, to the extent that there was an ongoing failure to pay the lead hand premium, it was attributable to the fact that the grievors were not earning it by performing lead hand duties. And that state of affairs was attributable to a single decision made by the employer at a specific point in time, i.e., to restructure its operations and remove those duties. These facts are analogous to the promotion/demotion cases where arbitrators have found that there is no continuing grievance.

93. In the instant case, the collective agreement requires the employer to "maintain" the requisite employee benefits and to "continue to pay 100% of the premiums of the University's Group Life Insurance, as currently in force". That Policy, in turn, read together with Article 26, requires the University to provide life insurance on an ongoing basis to full time professors, irrespective of their age or pension status. Unlike the circumstances of the former lead hands in *Trent University,* the University's decision to stop paying life insurance premiums and cease providing coverage for full time professors in mandatory receipt of pension did not in any way alter the fact that those professors continued to meet all of the eligibility requirements to qualify for that benefit. Instead, by ceasing to provide benefit converge, the University continued on an ongoing basis to receive all of the benefits of the work performed by professors over age 71—work for which the Collective Agreement requires that they be compensated with, along with wages and other benefits*,* a life insurance benefit—without having to pay the cost of that benefit. This circumstance is analogous to the wages and benefits cases referenced by arbitrator Burkett and the Association in its submissions. The

failure to maintain life insurance benefits for full time professors in receipt of a pension is an ongoing failure to pay a benefit earned under the terms of the collective agreement, as addressed in *Port Colbourn General Hospital, Religious Hospitallers,* and *O.P.S.E.U. v. Ontario (Hunt).*

94. For all of these reasons, I find that the instant matter is a continuing grievance, and therefore timely.

95. In the alternative, even if I found that this was not a continuing grievance, I would in any event decline to dismiss this grievance on the basis of timeliness. The timeliness provisions in the collective agreement are not mandatory. Article 9.23 requires that the grieving party explain its failure to abide by the agreed-to time-limits, but there can be no doubt that an arbitrator retains the discretion to relieve against the time limits where such an explanation is provided. I address below the Association's explanation for the timing of the filing of the grievance in the context of determining the University's motion to dismiss the grievance on the basis of laches. And on the basis of those same considerations, had I concluded that this was not a continuing grievance, I would nonetheless have exercised my discretion to relieve against the time limits under the grievance procedure.

Issue 4: Should the Grievance be Dismissed in Accordance with the Doctrine of Laches

96. In most general terms, the equitable doctrine of laches may operate to bar the hearing of a grievance where there has been delay in filing the grievance as a result of acquiescence, and where there has been detriment or prejudice to the other party such that the delay is unreasonable and it would be unfair to proceed with a hearing on the merits (see, e.g., *Wabi Iron & Steel Corp*, at para. 24). The University argues that it has established the conditions for applying the doctrine in this case for the following reasons: i) the Association's delay in bringing the grievance has been extreme and unreasonable, running from 2009 to 2018, and ii) this delay has prejudiced the University which became entrenched in its practice as a result of the Association's acquiescence, lost the opportunity to bargain in respect of the issue on multiple occasions and has been prejudiced in its ability to make its case. It further argues that a delay of over 8 years creates a presumption of prejudice. The Association argues that the doctrine should not be applied to bar a timely grievance or a grievance of this nature, that it has not in any event acquiesced to the University's interpretation, and that the University has not suffered any prejudice.

97. As is apparent from the authorities cited by the parties, the application of the doctrine in any given case is highly fact specific. In assessing the issue in the instant case, it is helpful therefore to consider both the principles articulated in those authorities and the manner in which they were applied to the facts.

98. In *Toronto Parking Authority,* the union grieved that the employer was requiring certain employees to work less than 8 hours a day and more than 5 days a week without payment of overtime. The collective agreement contained an hours of work provision that set a normal work week of five 8-hour days, and that provided for overtime pay for hours worked outside the normal working week. The employer's practice of scheduling "part-time" employees six days a week predated the union's certification in 1957 or 1958, and the grievance was not filed until July of 1973. The arbitrator concluded that it was a timely continuing grievance and that the collective agreement required that overtime be paid for those employees working a sixth day. The arbitrator then considered the employer's reliance on the doctrine of laches. After identifying the two prerequisites summarized above and emphasising the equitable nature of the doctrine as, in essence, "the prevention of unfairness", the arbitrator held that it was necessary to first determine whether the requirements of the doctrine were met, and only then to determine whether the application of the doctrine was required to prevent unfairness (paras. 25-26).

99. On the issue of acquiescence, the arbitrator found that with approximately one quarter of the bargaining unit affected and in light of the systemization of the hours of work for these employees, it was difficult to believe that the union was not aware of their presence "for many years" (para 28). However, he also found, with some hesitation, that this knowledge alone was not sufficient to establish "acquiescence" because the normal work week provision was "not so obviously breached in this case as to justify the conclusion that at some point in the relatively distant past they must have sprung from the pages of the collective agreement and forced themselves upon the attention of a responsible official of the union in relation to part-timers" (at para. 29).

100. On the issue of detriment, the arbitrator recognized that prejudice could result from the "entrenchment" of a practice, or the "passive continuance of a practice now held to be illegal" (at paras. 30-31). He further accepted that the administrative difficulties involved in changing the scheduling now were disproportionately, albeit modestly so, greater than they would have been had the union raised the issue earlier. Yet when weighed against the advantage the employer had enjoyed for an extended period as a result of its practice, which he describes as an "extra-contractual bonus", he found that in the final

reckoning the employer had failed to establish any loss in being required to comply with the collective agreement (at para. 31). Further, in weighing the "unfairness" and "injustice" the employer might feel in being required to change a longstanding and convenient practice, he was also swayed by the impact the employer's unlawful practice had on the employees, who found themselves with inferior terms and conditions of employment as a result of the employer's practice (at para. 32). On balance, he dismissed the employer's plea for laches.

101. The grievance at issue in *Extendicare (Canada) Inc., supra,* arose from bargaining unit exclusions that were alleged to violate the scope clause of the collective agreement. The grievance had been filed some 15 years after the position was first excluded. After reviewing the authorities, with particular emphasis on *Toronto Parking Authority,* the arbitrator concluded that ONA had acquiesced through its delay in bringing the grievance, and that the employer had suffered substantial prejudice as a result. In particular, on the first prerequisite, the arbitrator found that the exclusion of the Assistant Directors of Care was a clear *prima facie* breach of the Collective Agreement, and that ONA must have known this. On the second prerequisite, the arbitrator reasoned and concluded as follows (at paras. 25-26):

> 25 I turn now to the second chief point to be considered, has there been any change of position on the Employer's part? I agree with Arbitrator Adell at page 159 that it is not a change of position that is required so much as suffering a detriment:
>
> > "change of position" terminology is perhaps unfortunate all around. It is easy to imagine a party suffering detriment through not changing anything but simply through carrying on with and entrenching a previous practice that now must be discontinued.
> >
> > Indeed, it is precisely that sort of detriment — suffered through the passive continuance of a practice now held to be illegal— that the employer alleges in this case. ...
>
> 26 Unlike the situation in *Parking Authority of Toronto*, this Employer will not simply have expenses as a result of the administrative change-over and ongoing inefficiencies. Rather, it will require a complete reorganization of the management structure if it is required to divest itself of two managers. ONA suggested that it will be possible for the incumbents to simply implement whatever policies the Employer desires. That submission is not in accordance with the evidence. It is uncontradicted that the ADOC position exercises all of the authority of a front-line manager, and has done so since 1984, now twenty years on. This situation is more akin to *Cybermedix*, supra.

> 27 I find that there is clear detriment on the facts before me. ONA's failure to pursue its rights over such a lengthy period of time has deprived the Employer of the evidence of prior negotiations as to how, if at all, these matters were dealt with, why the ADOC position was initially excluded, or what, if any, rationale existed for the different recognition clauses at the two Sudbury sites; that evidence is lost. Further, these positions have been dealt with as management positions. To transfer them now to the bargaining unit would leave the Employer without the supervisory structure necessary to maintain its operation. It would be required to re-order a managerial structure that has been in place for many years. As was the case in *Cybermedix*, supra, the prejudice here is real and not notional, should the Association's claim be upheld. Also, on the evidence, there is no explanation for ONA's delay.

102. In *Wabi Iron & Steel Corp.* the arbitrator similarly found that the doctrine of laches could apply to a continuing grievance. In that case, the employer had returned an employee to work following a medical leave at a lower pay band, for reasons of "Accommodate in the workplace". The union did not grieve until six years later. After reviewing the authority cited above, the arbitrator concluded that the delay was unreasonable and could not be explained. The Union would have seen the rating on the seniority list, and the grievor would have seen his lower wage rate "every time he was paid". Further, given that the decision to place the grievor at level 10 was made six years prior, and given that the company had no opportunity to preserve its evidence concerning the basis for its decision to do so at the time, the arbitrator concluded that the company's ability to defend itself had been prejudiced and it would not be fair to proceed with the grievance (at paras. 28-29).

103. The grievance at issue in *University of British Columbia* concerned the manner in which the employer had been applying the pension contribution formula under the collective agreement. The grievance was filed after 20 years of practice without objection. The arbitrator found that it was a continuing grievance and therefore timely under the collective agreement but dismissed it on the basis of laches.[1]

104. First, she found that the University's practice was clearly reflected in readily available sources of information, including following the 1989 round of bargaining when the new pension contribution formula was negotiated and parties could be expected to pay attention to its implementation, and in a variety of ways subsequent to that. Further, the arbitrator found that the

[1] I note that in conjunction with her analysis of the doctrine of laches, the arbitrator also applied section 89(f) of the British Columbia *Labour Relations Code*, which empowers arbitrators to reject a grievance for "unreasonable delay" if the delay has "operated to the prejudice or detriment of the other party to the difference".

Association had been put on notice of the change, which would also have been apparent given that it was a jointly sponsored pension plan (at p. 38). In all the circumstances, she found that a 20 year delay in bringing the grievance was unreasonable.

105. On the detriment branch of the test, the arbitrator found that the delay did operate to the University's prejudice and detriment on several grounds. First, the 20 year delay (24 years had passed by the time of the hearing) undermined the quality of the available extrinsic evidence concerning the 1989 negotiations where the parties incorporated the contribution language into the collective agreement. Second, she found that University had entrenched its administrative practices around contributions, and that "regulatory complications" would arise due to the delay in grieving. Further, altering these administrative practices now would result in significant costs to the plan members as a whole, 17% of whom were not Association members. Third, absent notice from the Association that it intended to revert to what it claimed were its strict rights, the arbitrator found that the University had lost a number of opportunities to address the issue at the bargaining table. Fourth, the arbitrator found that the University had agreed to provide a significant supplemental benefit to the Association's high earners in reliance on the premise that the contribution language had been settled in 1989 and that the Association had accepted the implementation of that language (at pp. 41-42). In all these circumstances, the arbitrator found that the University had satisfied the requirements for the doctrine of *laches* and that the grievance should be barred on that basis (at p. 43).

106. In *Schlegel Villages*, the grievance in issue concerned the breadth of an automatic recognition provision in the union's scope clause, and whether it applied only to new facilities at certain enumerated locations, or whether it extended to the entire province. The union had filed an initial grievance some five months after a new location had opened but did not proceed with that grievance. Three years later, the union grieved the failure to apply the recognition clause at a subsequent new location. The employer sought to have the grievance dismissed on the basis of laches, arguing that the union had agreed with the employer's interpretation of the recognition clause, and that that was why it had abandoned its initial grievance. The employer argued that it had relied on the union's unreasonable delay in pursuing the issue to its detriment by not pursuing an amendment to "tighten up" the relevant language in collective bargaining, and because the turnover in management staff over the three years compromised the employer's ability to defend itself. The union argued that the doctrine should not apply because the matter was a continuing dispute, the sudden departure of its representative provided a reasonable excuse for the fact that the grievance fell through the cracks, the total delay was not so inordinate, the employer had not been prejudiced

because it had passed up two opportunities to bargain around the language even after it knew the union was pursuing the grievance and the union was only seeking prospective remedies.

107. In considering the application of the doctrine of laches in the context of labour arbitration, the arbitrator made the following observations, with which I agree (at para. 39):

> [39] The Supreme Court of Canada has recognized an "organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance", which simply stated is the principle long accepted in labour law that: "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (per Cromwell J. in *Bhasin v. Hrynew*, *supra*, at para. 63). Within that organizing principle, the equitable doctrine of laches as developed by the civil courts has for many years been applied in the reasonable discretion of labour arbitrators to ensure the proper administration of the dispute resolution system under a collective agreement which seeks to balance "expedition and finality on the one hand and the fair resolution of the merits of disputes on the other": see the discussion in *Brown & Beatty's Canadian Labour Arbitration*, supra, at para. 2:3210. [emphasis added].

108. After reviewing the arbitral jurisprudence, the arbitrator distilled the following non-exhaustive list of considerations in determining whether or not to exercise his discretion to dismiss the grievance "in the interest of ensuring fairness of the dispute resolution procedures under a collective agreement" (at para. 46) [2]:

> (i) The delay must be objectively "undue" or inordinate having regard to all of the surrounding circumstances;
>
> (ii) A factor in determining whether the delay is inordinate is the excuse or excuses for the delay, which must be reasonable and incurred in good faith with no improper motives and/or abusive intent;
>
> (iii) Another factor in determining whether the delay is inordinate is the timing of the delay in the context of the grievance procedure; which presumes a greater detrimental impact at the initial stages than the later steps in the procedure;

[2] See also *Canadian National/Canadian Pacific Telecommunications v. C.A.C.A.W.*, 1981 CarswellOnt 1961 (Beaulieu), which also discusses the balancing of interest between providing finality in the grievance process, on the one hand, and ensuring that justice is seen to be done on the other, in the context of placing an onus on the party seeking dismissal for delay to show real and serious prejudice (at paras. 16-18).

> (iv) The fact and extent of the delay in all of the surrounding circumstances must support a conclusion that there was a form of acquiescence by the grieving party in the position taken by the opposite party on the merits of the dispute, which the party seeking application of the equitable doctrine of laches has the burden of establishing;
>
> (v) The party requesting application of the doctrine must also demonstrate that it has suffered real as opposed to notional prejudice as a result of the undue or inordinate delay, which is found to reasonably compromise its ability to defend itself and/or would have such a detrimental impact in the event of the grieving party's success on the merits of the grievance to make it manifestly unfair to hear the dispute at that stage in the parties' ongoing relationship; and
>
> (vi) While a continuing grievance may be timely (in the sense of being capable of filing under the time limits of the collective agreement notwithstanding the long period of time that the alleged breach has been ongoing), the considerations enumerated above may override or act as a shield to an otherwise timely grievance in the interest of preserving the presumed base level of fairness and good faith dealing in the contractual relationship between the parties.

109. Applying these considerations to the facts before him, the arbitrator emphasised that the onus of establishing acquiescence rests with the party relying on the doctrine (at para. 49). And on this element, he found that while the employer's witness honestly testified that he believed that the union's former representative had agreed with his position, in the absence of any specifics or any confirmatory evidence of the union's express agreement or any effort at the time to memorialize that agreement, he was not prepared to find acquiescence (at paras 50):

> [51] Given that the doctrine of laches is an equitable device used to shield the Employer from strict compliance with a collective agreement provision should the Union be correct in its interpretation of the disputed language, the conduct of the Employer in failing to confirm the Union's acquiescence, in clear words or unambiguous actions so that the Union might be placed on notice of the Employer's perception in the matter, is also a consideration in arriving at an equitable result. Without such clarity in Mr. Putt's evidence on this point, I cannot conclude the failure by the Union to pursue its August 26, 2010 grievance past the initial filing and response stage of the grievance procedure constituted the kind of unequivocal acceptance or acquiescence (as opposed to mere inadvertence) which the Employer must establish to support application of the equitable doctrine of laches in the circumstances of the present case.

110. The arbitrator also found that the employer had failed to establish the requisite prejudice or detriment, reasoning as follows (at para. 53):

> [53] The evidence of "real" as opposed to "notional" prejudice to the Employer is also tenuous or speculative, at best. Notwithstanding the Employer's assertions that it would have proposed amendments to "tighten up" the relevant language had it recognized the matter as a live issue during contract negotiations leading to the 2011 – 2013 collective agreement, the Employer's conduct after receiving the second grievance dated February 4, 2013 is telling as to the weight that can be accorded to that notion of prejudice. On the evidence I find the Employer met with the Union in contract negotiations scheduled for early March of 2013 without making any proposals on the relevant language because the issue had already been submitted to binding arbitration, even though the Employer clearly knew the Union's position in the matter. If that was the case, why doesn't the same thinking apply if the Union had processed the first August 26, 2010 grievance to arbitration? The inconsistency in the Employer saying that it would have pursued an amendment if it had been aware the Union was pursuing its first grievance to arbitration but not when it was aware that the Union was pursuing the second grievance to arbitration, must undermine the credibility and thus any weight that I can give to the Employer's claim of prejudice. Rather, consistent with Mr. Putt's testimony, any prejudice suffered by the Employer by not recognizing the need to propose amendments during bargaining after the first grievance, was mitigated by its ability during the two subsequent negotiating rounds to propose the same amendment(s) after the second grievance was filed. The Union's unequivocal disclaimer of any remedy that might impact the properties organized by a different union further undermines any claim of real prejudice to the Employer as a result of the delay.

111. On balance, therefore, the arbitrator concluded that while there was actual delay between the filing of the first and second grievances, there was no "undue" delay or real prejudice to the employer in proceeding with the grievance, and the plea in laches was denied (at para. 56).

112. As noted and as is apparent from a review of all of the authorities cited by the parties, the application of the doctrine of laches is discretionary and highly fact specific. Ultimately, it is necessary to balance the interests of both parties, and to determine whether it would be unfair to permit the grievance to proceed. In assessing the evidence, the onus to establish the grounds for applying the doctrine rests on the party seeking to rely upon it. However, in assessing whether that party has met this onus it is also important to consider that some evidence may be unavailable precisely because of delay, acquiescence or detrimental reliance on that delay.

113. Turning to question of delay and acquiescence in this case, it bears emphasising at the outset that the University was from the very beginning forthcoming about how it intended to apply the life insurance policy to faculty

members who continued to work full time beyond mandatory receipt of pension. Between Dr. Miller's communications with the members of the JCOAA and the Benefits Subcommittee, the memorandum prepared by Ms. Ducharme and the *P & B Times* articles, it is clear that the University's representatives acted in good faith in raising the issue upon learning of Sun Life's interpretation in 2009. I note, however, that the University did not in fact cease paying premiums for such employees until January 2011. Based on my interpretation of the collective agreement, the University therefore began breaching the collective agreement in January 2011. The issue in the instant grievance was first raised with the University by Ms. Price on March 28, 2018, after which it was discussed by the parties and ultimately grieved on July 30, 2018. There was, therefore, a delay of some nine years from when the University first identified the issue or some seven and a half years from the time the University ceased to make the required premium payments, to the time the Union filed a grievance. While this delay is nowhere near the extreme delay at issue in some of the authorities cited, it is also of a sufficiently substantial nature that in the appropriate circumstances it could support a finding of acquiescence. Nonetheless, for the reasons that follow, I find that on the facts of this case, I cannot conclude that the Association did in fact acquiesce to the Sun Life interpretation.

114. The Association's explanation for why it did not challenge the Sun Life interpretation until 2018 was multi-faceted. First, according to Professor Dyer, it was only briefly raised in 2019 at the Benefits Subcommittee, and she was under the misapprehension that it was statutorily required. It was, she believed, a *fait accompli* and it was for that reason that she believed the membership should be apprised. Second, at the time the issue was raised, the Association was preoccupied with an ongoing restructuring at the University, that impacted a large portion of YUFA's bargaining unit. The life insurance issue, which might have at some other time garnered more attention, simply fell through the cracks. In the case of a benefit that is accessed by members on a regular basis this might not be a compelling explanation. But in this case, as the Association emphasises, the actual impact of the University's interpretation did not manifest even once until Professor Laxer's passing, after which the grievance was promptly filed. According to Dr. Black, to the best of her knowledge and based on her discussions with other YUFA staff representatives, the issue of life insurance coverage for active members over age 71 was never discussed by the YUFA executive. Finally, while the University did raise the issue in several intervening issues of the *P & B Times*, the Association emphasises that this is not an official means of communication and in any event even on its face it does not purport to define rights under the Association's collective agreement.

115. Given the very specific nature of the benefit in issue, I find the Association's explanation plausible. I accept, as the University argues, that there is nothing in the record of communications around the issue to support the belief that the termination of life insurance coverage was statutorily mandated. I specifically find that that is not the way the University presented the issue. But the record does support the conclusion that the issue was presented to the Association's representatives as a *fait accompli,* based on changes to the *Income Tax Act* and Sun Life's interpretation of the Policy. There is no sense in which the University was seeking the Association's agreement on the substantive issue; there was only consultation on how the decision would be communicated to the Association's membership. Further, unlike the circumstances in *Extendicare* or *University of British Columbia*, where the longstanding impugned practice would have been obvious to the bargaining unit as a whole on an ongoing basis, the termination of life insurance benefits at age 71 would not. The vast majority of the bargaining unit and YUFA's executive, having not reached that age, would simply see that they are continuing to receive coverage as provided for in the Collective Agreement. At most, a small number of individuals might notice that the premium contributions no longer appear on their pay stubs. But such limited information is not in my view sufficient to establish acquiescence on the part of the Association. The circumstances in this case are more analogous to those at issue in *Schlegel Villages* than in the authorities relied upon by the University.

116. Neither do I find that the University has established real detriment or prejudice. The University argues that it has been prejudiced in presenting its case because memories of specific discussions between Professor Miller and the Association's representatives on the JCOAA and the Benefits Subcommittee have faded. Undoubtedly memories would have been sharper had this grievance been litigated closer to 2009. But a lack of precision in recollecting the conversations between the parties' representatives is not the reason the University has not been able to establish the existence of an interpretive agreement between the parties. Rather, it is because the University did not seek or obtain an actual agreement to alter the parties' rights under the Collective Agreement. The kind of agreement the University seeks to establish was created is simply not the kind of agreement that it could obtain through a "hallway discussion", engaging with an association staff person on the JCOAA or with the members of the Benefits Subcommittee, or through a notice in an unofficial university-wide publication that is explicitly inapplicable where it conflicts with a right under a collective agreement.

117. Further, unlike the circumstances in *University of British Columbia*, there is no evidence before me of any *quid pro quo* between the parties in exchange for an agreement to deny life insurance coverage to members of the

bargaining unit over age 71 and in mandatory receipt of pension. In other words, to relieve the University of its obligation to provide life insurance under the terms of the collective agreement would not maintain a balance that formed part of the bargain between the parties as it did in *University of British Columbia*.

118. Unlike the circumstances in *Toronto Parking Authority*, the evidence before me does not establish that the University has enjoyed an actual windfall or "extra-contractual bonus" as a result of having ceased to pay benefit premiums for certain individuals from 2011 onward, as compared to the cost of paying out the claim in this grievance. But neither does the evidence establish that the University has suffered any net detriment by virtue of finding itself self-insured for the claim on behalf of Professor Laxer. I simply do not know whether the cost of paying out this claim is greater or less than would have been the cost of paying premiums on behalf of all of the employees eligible for the benefit under the collective agreement. Consequently, I cannot find that the University has established that it suffered a detriment on this basis.

119. Neither is there any evidence before me to establish that the University would suffer any detriment in having to alter its practice of not providing the requisite coverage going forward, beyond having to absorb the cost of a benefit to which employees are entitled under the terms of the collective agreement. In this regard, the facts before me *are* more analogous to the circumstances in *Toronto Parking Authority* and are unlike those in *Extendicare (Canada) Inc.*.

120. Finally, I also cannot find that the University has suffered substantial prejudice in having lost the opportunity to bargain changes to the life insurance benefit under the collective agreement. Similar to the circumstances in *Schlegel Villages*, the University had an opportunity to "tighten up the language" in the collective agreement following the filing of the grievance and elected not to pursue the issue in bargaining. In my view, this failure undermines the claim that the University has shifted its position to its detriment as a result of the Association's delay in filing a grievance. As alluded to above, the doctrine of laches is intended to operate to prevent unfairness. It is not, in the context of collective bargaining, intended to provide a party with the *quid* when there is no *pro quo*.

121. For all of these reasons, I decline to dismiss the grievance on the basis of the doctrine of laches.

Issue 5: Should the Association be Estopped from Pursuing the Grievance

122. The requisite elements for establishing the doctrine of estoppel are not in dispute. They are summarized by the Supreme Court of Canada in *Maracle, supra,* as follows (at para. 13):

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

123. In the labour relations context, Arbitrator Tacon spelled out the test in *Toronto Police Services Board* as follows (at para 80):

> Estoppel is a legal principle that prevents a party from asserting its strict legal rights where it has led the other party, by its words or conduct, to believe that it will not do so, and the other party has relied on that belief to its prejudice or detriment. The essential elements of estoppel are the following:
>
> (1) a finding that there was a representation by words or conduct;
>
> (2) an intention that the representation be relied upon by the party to which it was directed;
>
> (3) reliance in the form of some action or inaction: and
>
> (4) detriment resulting therefrom.

124. After setting out these elements, Arbitrator Tacon provides a helpful review of how the doctrine has been applied in the labour relations context in particular, at paragraphs 81-93. I will not duplicate the entirety of that review here, but it reveals several important principles that are central to the parties' arguments in the instant case. Principal among them is the notion that silence or acquiescence can trigger the doctrine where silence "amounts to a representation", or where it leads to the reasonable conclusion that the party opposite has accepted one's position. Further, while the onus to establish the elements of the doctrine rests with the party asserting it, arbitrators have been willing to infer an intention that a representation be relied upon on the basis of objective evidence, as opposed to requiring the party asserting an estoppel to prove a subjective intention or "inducement" on the part of the party opposite. And in assessing whether such an intention can be inferred, arbitrators have also relied upon the reasonable expectation that a union will, if properly informed, grieve when an employer implements an interpretation

of a provision with which it does not agree. However, arbitrators have also been careful to emphasise that actual "clear and cogent" evidence is required with respect to each of the elements. Reasonable inferences may be drawn from the evidence, but the doctrine should not be founded on findings that are speculative.

125. With respect to the first element of the test and its position that the Association's failure to grieve the implementation of the Sun Life interpretation from 2009 until 2018 constitutes a representation by conduct, the University relies on the decisions in *Owen Sound* and *Child and Family Services of Timmins.* The University also relies upon the decisions in *Nor-Man* and *Litwin Construction* in support of its position that the failure to grieve in this case constitutes "silent condonation" and acquiescence from which the requite intention to rely should be inferred. These awards warrant careful consideration.

126. In *Owen Sound*, the association sought to challenge the board's interpretation of a sick leave credit provision, which interpretation had been implemented for at least 25 years and as long as 32 years without objection. In considering whether such lengthy period of inaction satisfied the first part of the test for estoppel, Arbitrator Picher noted that collective agreements generally differ from other forms of private contract, in that they are constantly renegotiated and renewed. Throughout this ongoing process, the parties' responses to practices or changes in practices inform their expectations (at para. 24). On the evidence before him, arbitrator Picher found that all of the information required for the association or any member of the bargaining unit to review the manner in which the board applied the sick credit was always readily available, and the board's approach was never challenged in any way for as long as 32 years. Further, he found that to change the manner in which sick leave credits were calculated to accord with the association's interpretation would require the board to retroactively credit all members of the service, at a substantial cost. It was in this context that Arbitrator Picher held that "it is reasonable for any employer in a collective bargaining relationship to expect that the application of any part of the collective agreement which does not meet with the approval of the opposite party will either give rise to a grievance or become a point of contention in the periodic renegotiation of the collective agreement" (at para. 26). He further concluded that while there was no evidence either way as to whether the association was actually aware of the manner in which the board had been calculating credits, it had at least constructive notice and took no action (at para. 30). Further, because the board had relied upon the association's long-standing acquiescence and "accordingly geared its financial planning and expectations for the life of the current collective agreement", he concluded

that it would be inequitable to permit the association to rely on that interpretation for the life of that collective agreement (at para. 30).

127. In *Child and Family Services of Timmins*, the employer had a long-standing and consistent practice of applying the term "doctor's certificate" under the collective agreement to exclude certain statutorily recognized "doctors", such as chiropractors. While Arbitrator Knopf accepted the union's broader interpretation of the term, she found that the union was estopped from asserting that interpretation for the life of the current collective agreement. In reaching this conclusion, she found that the Union was fully aware of the employer's practice, with its former Chair having been impacted by it and having specifically acknowledged the application of the policy in writing. In this light, arbitrator Knopf found that the failure to raise an objection to the employer's interpretation over several rounds of bargaining and "other similar situations in the past", supported the conclusion that knowledge had vested with the union and the employer had relied upon the undisputed practice. This, she concluded, gave rise to a "classic case of estoppel" (at para. 13).

128. In *Nor-Man*, the primary issue before the Supreme Court of Canada was whether a labour arbitrator's decision to apply the equitable doctrine of estoppel should be reviewed on the "correctness" or "reasonableness" standard. The Court found the latter, concluding that labour arbitrators have the requisite expertise to adapt and apply equitable doctrines within the sphere of "arbitral creativity…drawing inspiration from general legal principles, the objects and purposes of the statutory scheme, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of the grievances of which they are seized" (para. 45).

129. The arbitrator in *Nor-Man* had applied the doctrine of estoppel to preclude the union from asserting its interpretation of a seniority/vacation entitlement calculation provision for the life of the collective agreement, contrary to some 20 years of practice over the life of at least 5 collective agreements. The Court of Appeal found that the arbitrator erred in applying the doctrine without a specific finding that the promisor intended to affect its legal relations with the promisee. Instead, the arbitrator found only that the union ought to have known how the employer was calculating vacation and did not object (para. 25). The Supreme Court overturned this finding and restored the arbitral award, emphasising that the arbitrator was applying the doctrine of estoppel in the context of an ongoing collective bargaining relationship. In particular, the Court cited with approval Professor Weiler's explanation of the different considerations that arise in applying estoppel in the labour relations context: (at para. 50)

> . . . a collective bargaining relationship is quite a different animal. The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day-to-day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational decisions within the framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is that if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in [*Corporation of the District of Burnaby and Canadian Union of Public Employees, Local 23*, [1978] 2 C.L.R.B.R. 99, at p. 103], "It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship — all contrary to the objectives of the Labour Code" . . . .
>
> (*Re Corporation of the City of Penticton and Canadian Union of Public Employees, Local 608* (1978), 18 L.A.C. (2d) 307 (B.C.L.R.B.), at p. 320)

130. In the result, the Court found that the question was not whether the arbitrator had applied the court's test for "promissory estoppel", as distinct from "estoppel", to the letter, but rather whether he had adapted and applied it in a manner "reasonably consistent with the objectives and purposes of the *LRA*, the principles of labour relations, the nature of the collective bargaining process, and the factual matrix of [the grievance]" (at para 60). The Court concluded that he had (para. 61).

131. The decision of the British Columbia Court of Appeal in *Litwin Construction* arose outside of the labour relations context, but similarly found that it is not necessary to find an express intention where reliance is founded upon a failure to act (at p.16):

> there is no requirement that the conduct, which was relied upon by the person who seeks to raise an estoppel, have been intentionally designed to induce that reliance. Nor is it essential that there be any positive acts upon which the reliance may reasonably be said to have arisen. The

> conduct relied upon may, in fact, be a failure to act in circumstances which gave rise to an inference upon which the reliance is founded.

132. I accept the principles articulated in these cases relied upon by the University. But as in most cases, the specific facts and the specific labour relations context of the instant dispute are crucial to the application of those principles. And for the reasons that follow, I find that the facts in the instant case should be distinguished from those in the "representation by inaction" cases relied upon by the University.

133. In *Owen Sound*, the impugned practice was easily ascertainable and had affected every member of the bargaining unit on an ongoing basis for a period of between 25 and 30 years. *Nor-Man* arose from similar circumstances, where the practice had been in place for over 20 years and 5 collective agreements. In *Child and Family Services of Timmins*, the impugned practice had not only been applied to an unspecified number of members of the bargaining unit; it had been specifically applied to the union's chair in circumstances where she was directly impacted by it and acknowledged its application.

134. In the instant case, the impugned practice affected a relatively small proportion of the bargaining unit and the impact of that practice did not affect a single member of the bargaining unit, let alone its leadership, until the circumstances giving rise to the instant grievance. On a day to day and ongoing basis, the fact that the University was not providing life insurance coverage to employees in mandatory receipt of pension would not have been obvious to the Association or its membership at large.

135. Neither do I find that the Association's silence in the face of the P&B Times publications constitutes the kind of representation required to found an estoppel. The P&B Times is an unofficial general information document that is careful, and appropriately so, to warn that it may not apply to all employees and that its advice is subject to the terms of the various collective agreements. It is not reasonable in this context to conclude that an individual familiar with the Association's collective agreement would necessarily raise an objection where the information in the P&B Times conflicts with that agreement.

136. It also bears emphasising, as discussed above, that the Association representatives with whom the University engaged over the issue were clearly not authorized by the Association to represent to the University that the Association would forgo its right to life insurance coverage under the Collective Agreement. In other circumstances, this fact alone might not necessarily preclude a finding that the Association intended, whether subjectively or objectively, that the University rely upon their representations. But in this case, the parties have explicitly bargained limits to what their JCOAA

representatives can do. The JCOAA provisions reflect a balance between the parties' interest in being able to engage over the administration of the collective agreement on a day to day basis, while protecting themselves by limiting the risk that in so engaging their representatives might unwittingly prejudice the rights that they have collectively bargained. In other words, when it comes to establishing rights under the collective agreement, the JCOAA provisions create a kind of safety net or "safe space", that allows the parties to work together to implement the collective agreement but precludes them from altering their rights under that collective agreement. To alter the collective agreement required a more formal process than the University engaged here.

137. Further, as is also discussed above, the actual statements attributed to the Association's representatives do not amount to statements that the Association agreed with the Sun Life interpretation. At its highest, the University's evidence establishes that the Association's representatives were told that Sun Life interpreted its policy a particular way, and that the University would act upon that interpretation. On the evidence before me there was no substantive discussion of the actual basis for the Sun Life interpretation, or what precisely Sun Life relied upon in the terms of the Policy in reaching its conclusion. The issue was, as the Association argues, presented as a *fait accompli*. In response, the Association requested that the University advise its members over 65 of this conclusion so that they could plan around it financially. Nothing actually expressed by the Association indicated that they agreed with the interpretation, or even that they understood the basis for the decision or its relationship to their rights under the Collective Agreement.

138. In any event, even were I to find that the Association, whether by words or conduct, represented that it would not object to the termination of life insurance benefits for members in mandatory receipt of pension, I would not find that the University has established that any reliance on those representations was detrimental. The University has identified three bases upon which it claims to have detrimentally relied upon the Association's acquiescence: i) it ceased to pay premiums for employees over 71, and therefore finds itself facing claims for which it has no coverage and is effectively "self-insured"; ii) it has lost the opportunity to bargain its position into the collective agreement, and iii) it has lost the ability to litigate this issue when the evidence was fresh. I have largely addressed and dismissed these grounds in assessing the application of the doctrine of laches, and those findings are equally applicable here.

139. I would add here, however, that the only consequence of applying the doctrine of estoppel would be to bar the single claim on behalf of Professor

Laxer. Otherwise, in the absence of any evidence of any other outstanding claim, the Association's claim for relief is prospective. And once the University received the instant grievance, it had the opportunity to both address the absence of ongoing coverage for its employees over age 71 **and** to address the issue in the last round of collective bargaining. It chose to do neither. To the extent that the University finds itself self-insured following the filing of the grievance, that is not the result of any detrimental reliance on any representation made by the Association.

140. With respect to the claim arising from Professor Laxer's passing, there is no dispute that the University ceased to make premium payments on his behalf and that the claim for benefits on his behalf crystalized prior to the filing of the grievance. I agree with the University that the circumstance of finding itself self-insured for potentially hundreds of thousands of dollars could give rise to significant prejudice. But as noted above, on the specific evidence before me, a finding of prejudice would be entirely speculative. The evidence establishes that since January 2011, the University ceased to make premium payments on behalf of any professor who continued to work past age 71 and mandatory receipt of pension, and that as a result it finds itself liable for one relevant insurance claim. There is nothing in the evidence before me to establish whether, on balance, the cost of the claim is greater or less than savings from ceasing premium payments. In the absence of such evidence, I cannot find that any reliance by the University on the Association's failure to object sooner was to its detriment. Any such conclusion would be entirely speculative. The onus is on the University to establish detrimental reliance and I find that it has not met this onus on this ground.

CONCLUSION

141. For all of these reasons, I find that the collective agreement provides a life insurance benefit to full-time professors who continue to work past age 71 and mandatory receipt of pension, equal to "1 times the employee's annual basic earnings, the result adjusted to the next higher $1,000 (if not already a multiple of $1,000) subject to a maximum benefit of $600,000". I also find that the parties have not agreed to a contrary interpretation of this benefit entitlement, that the grievance is continuing and timely and that it is not barred by the doctrine of laches. Neither do I find that the doctrine of *estoppel* ought to be applied on the facts of this case. The University has therefore breached the collective agreement by failing to provide a life insurance benefit to Professor Laxer. I further declare that the University is required under the terms of the collective agreement to provide the life insurance benefit to full time professors who work past the age of 71 and mandatory receipt of pension.

142. Nothing in this award should be read as in any way determinative of the Association's outstanding claims under the *Human Rights Code,* related to the reduction of the life insurance benefit at age 65. Consequently, I am not yet able to determine the extent of the benefit to be paid to Professor Laxer's estate. I refer these issues to the parties to canvass whether they can be resolved and remain seized in the event that they cannot.

Dated at Toronto, Ontario, this 20th day of April 2021.

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Eli A. Gedalof
Arbitrator