Negotiating Collective Agreements, Arbitration and the Right To Strike

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In January of this year, 63% of Association members voted in favour of establishing the University of Victoria Faculty Association as a certified union, with a turnout of 83%. As a result, the Faculty Association now has, under the B.C. Labour Code, negotiating options that it previously did not have, most notably the right to strike. This, however, does not compel the Association to ever use this right.

During the lead up to certification, some concerns were raised regarding the implications of this new right. One concern, which some members have expressed, is that it might be too easy for the Association to go on strike, given that a legal strike vote only requires a 50%+1 majority of those voting. A related concern is that a strike might occur almost by accident, as a result of miscommunication (whether the fault of the administration team or the Association team or both) during the negotiating process. Many of these concerns were raised in the context of a discussion on the merits of having the right to strike versus the right to take issues to binding arbitration.

The purpose of this discussion paper is to examine how certification has changed what negotiating options are now available to Association members and to the Association’s negotiating team going forward, and to provide an assessment of the strengths and limitations of these options. In addition, we speak to how the Association could address the “it is too easy to go on strike” concern, noted above, through the placement of structural limitations on the ability to strike. As we discuss below, however, such structural limitations are not without cost. Our intent here is not to argue for the view that the right to strike should be left “as is” with only the limitations of the Labour Code – a view which we believe has merit – but rather to explore as fully as possible the options for, and the costs and benefits associated with, various options to limit the Association’s ability to strike.

We begin with a brief discussion on the place of binding arbitration and strikes in collective agreements for unionized and non-unionized faculty associations. We then discuss binding arbitration in more detail, including its legal and juridical bases, its historical role in the University of Victoria Framework Agreement, and some possible permutations of a binding arbitration clause in our new collective agreement. We follow this with a discussion of what is entailed in the right to strike as a faculty association. We then present a brief discussion of the comparative cost of arbitration versus the right to hold a strike vote as a means of resolving impasses during negotiations. We conclude by providing a brief list of some possible configurations of strike and arbitration rights in collective agreements and in other arrangements.

Unionization, binding arbitration and the right to strike at Canadian Universities:

Across Canada, most faculty associations are unionized. Institutions in Alberta constitute an exception: there, law prohibits unionization, and unresolved matters are referred to binding arbitration. At those institutions that are not unionized, it is usually the case that there is no dispute resolution mechanism
for non-salary matters, but binding salary arbitration for salary (and, usually, benefits) matters. This was
the case at UVic prior to certification, and remains the case at Waterloo, Toronto and McMaster (McGill,
which is non-unionized, does not have salary arbitration). Among unionized faculty associations, only
two institutions in Canada have binding arbitration as a more or less permanent feature of their
collective agreements. In both cases – UBC and Ryerson – faculty did not unionize as a result of a
certification drive and vote, but rather unionized as a result of “voluntary recognition” on the part of the
employer. In the case of UBC, under B.C. Labour Law, this does mean that faculty there could still,
should they choose to, run a certification campaign and, as a consequence, walk away from the
permanent “no strike” restriction built into the collective agreement there (though only after the expiry
date of any currently “in force” agreement) should they wish to do so. Faculty and librarians at UVic
would not have this option if they successfully negotiated a similar provision in the agreement here: if
the UBC wording were built “as is” into any agreement at UVic (that is, agreed to by the employer),
current members would permanently bind the hands of future generations of faculty and librarians. As
will be discussed later, though, there are other options involving arbitration that could be possible.

**Arbitration: What it Is and What it Isn’t**

The form of arbitration used to construct a settlement when the parties cannot come to an agreement
at the negotiating table (other than an agreement to refer unresolved matters to arbitration) is called
interest arbitration. (The other type of arbitration – involving the adjudication of disputes and
grievances within the framework of an existing collective agreement is not germane to this discussion).

The two main types of interest arbitration are replicative (which is far more common) and adjudicative,
which is the type of arbitration which existed for salary and benefit matters (only) in the Framework
Agreement at UVic. Across British Columbia, replicative arbitration was in place in the last round of
salary negotiations at SFU and UNBC, while adjudicative arbitration was in place at UBC and UVic. Simon
Fraser has a particular type of replicative arbitration called “final offer selection” (technically, final offer
selection can occur under either the replicative or the adjudicative model).

It is important to note here that arbitration is not primarily or even secondarily about social justice or
fairness. Nor is it about a neutral third party’s view of what constitutes a “fair” settlement. Rather,
under the principle of replication, an arbitrator tries to construct a fictional universe in which the parties
come to an agreement and uses this universe as the referent to answer the question, “what would the
parties have agreed to had they come to an agreement themselves?” In replicative arbitrations,
arbitrators have tended not to pay much credence to “ability to pay” arguments, emphasizing
comparisons with other (usually geographically proximate) bargaining units or comparable occupations.

In addition, arbitration is not a process likely to result in radically or even substantively different
outcomes than what would have likely been achieved at the table. Arbitration is by its nature a
“conservative” process: if an arbitrator is persuaded that a bargaining unit is well behind comparable
units and (most importantly) that the parties “could have” come to an agreement to deal with it, he or
she will not award a settlement which makes up the difference but will, typically, close the gap in “small
increments.” For non-salary matters, unless there has been some evidence of prior agreement on the
part of the parties, the process is even more conservative: arbitrators rarely insert new language into an agreement at the request of a union or take out existing language (unless it is prohibited by law) favoured by employers. UBC’s most recent settlement illustrates this: Arbitrator Colin Taylor dismissed all of the Association’s position with respect to non-monetary agreement language in little more than a single sentence, arguing that this is something for the parties to work out among themselves. This may seem odd, as these matters went to arbitration precisely because they could not come to an agreement, but Arbitrator Taylor’s language was consistent with the practice of most arbitrators on matters of this sort. Faculty Associations therefore cannot look with any degree of reliability on arbitration to deal with non-monetary differences. This limitation even extends to some monetary matters, as can be witnessed by the UVic settlement, in which the arbitrator did not speak to any of the outstanding issues concerning benefits. In sum, arbitrators will almost never provide a new benefit not previously agreed to by the parties, and are extremely reluctant in general to award new language or alter existing language in a collective agreement.

Adjudicative arbitration and adjudicative criteria in the University of Victoria Framework Agreement

Both UVic and UBC went into arbitration in 2012 with adjudicative criteria for the arbitrator. As mentioned above, this form of arbitration is not nearly so common as the replicative form. Adjudicative arbitration compels an arbitrator to make adjudications according to criteria established by the parties in advance. In itself, this does not necessarily lead to poor outcomes for a Faculty Association. For instance, one could imagine that had the sole criterion in 2012 had been “the desirability of providing salaries and benefit comparable to those provided at [insert list of 20 agreed-upon universities],” the outcome would have been significantly different. In this instance, the Faculty Association would have had less trouble arguing its case, since the salary offer from the university clearly put UVic further behind those other institutions. However, even with this emphasis on comparative salaries and benefit, it is unlikely an arbitrator would have brought UVic up to the average salary of the other named institutions, and unlikely that there would have been much, if anything, in the way of benefits improvements.

In actuality, the adjudicative criteria that the arbitrator must consider under the past Framework Agreement made arbitration an extremely difficult process. The arbitration criteria were as follows:

1. The university’s ability to pay;
2. Faculty and librarian salary levels at other universities;
3. The level of settlement for other employee groups within the university;
4. Inflation levels;
5. The University’s need to attract and retain qualified faculty members and librarians.

It is useful to compare these Framework Agreement criteria with the criteria in the UBC collective agreement. The arbitration criteria at UBC are:

1. Changes in the Vancouver and Canadian consumer price indices
2. The need for the University to maintain its academic quality by retaining and attracting Faculty Members, Librarians, and Program Directors of the highest calibre;
3. Changes in British Columbian and Canadian average wages

4. Salaries and benefits at other Canadian universities of comparable academic quality and size

The first criterion is almost identical to the one which was in play with the Framework Agreement at UVic (UVic criterion 1), but all other criteria -- not to mention the exclusion of “ability to pay” at this point -- were more favourable in the case of UBC than they were in UVic’s case. In criterion 2 (UVic criterion 3), the UBC language calls for an arbitrator to determine what is required to bring members of “the highest calibre” to the institution, while at UVic the bar is lower: all the administration has to do is demonstrate that it can bring in and retain people who are qualified, not people who are the best in their fields. Clearly, the salary bar for the former is going to be lower than the salary bar for the latter. UBC criterion 3 usually works to the benefit of the Association’s position, because (except in times of high inflation), increases in wages and salaries across all sectors (and not just a restrained public sector) tend to exceed inflation. The UVic Framework Agreement has no such provision, replacing it with one listing compensation levels given to other employee groups. Among other things, this gives the employer a lot of power (restrain staff salaries and you can hold back faculty and librarian salaries too); it may even at times serve to suppress salaries of other employee groups. Finally, UBC criterion (4) is different in two ways from the UVic Framework Agreement (UVic criterion 2): it specifies other Canadian universities as opposed to “other universities” and it includes benefits (whereas the UVic language, whether by intent or otherwise, excludes benefits). Given the emphasis on arbitrator Colin Taylor’s UVic award on SFU salaries, the omission of the word “Canadian” was critical: by default, an arbitrator will tend to give much more emphasis to provincial rather than Canada-wide comparisons. Finally, the absence of the word “benefits” in the UVic criterion made it virtually impossible for there to be any expectation that benefits would be improved as a result of arbitration (though, to be sure, this is already a difficult matter given the “conservative” nature of the arbitration process, as noted above). This criterion is also more difficult and expensive to argue than it was a decade ago, since Statistics Canada no longer maintains a comparative faculty salary database.

There are also crucial differences in how the concept of “ability to pay” is considered. In the UBC collective agreement, the Association must first demonstrate that the university has the ability to pay but if it can do so, then ability to pay itself no longer gets weighed against other criteria in the agreement. Moreover, ability to pay is much easier to establish in the UBC collective agreement than it was in the UVic Framework Agreement. At UBC, the faculty association needs merely to demonstrate that, in recent years, faculty salaries have not been taking up an increasing share of the University’s budget (across Canada, generally the opposite has been true, especially if senior administrators are not included in the category of “faculty”). Then, unless the University can itself demonstrate that a state of financial distress exists (something which is very difficult to demonstrate), “ability to pay” is established and the arbitration moves on to adjudicative criteria. Nonetheless, whenever the words “ability to pay” appear in an arbitration process, the process itself becomes quite expensive for any faculty association (even though it has a much larger membership base to support the high costs of outside consultants and experts, establishing ability to pay was far from a trivial financial matter for the faculty association at UBC). With the adjudicative criteria around ability to pay contained within the University of Victoria Framework Agreement language, even a demonstration that the University has consistently racked up
surpluses over the past decade is not necessarily sufficient, as the university can counter-argue, “yes, but this doesn’t prove that we will have a surplus next year or the year after that.” The UBC Association did not face this barrier.

**The Right to Strike**

One of the arguments against arbitration is that it results in “settlements” which are not agreed to by the parties. Agreed-to, as opposed to imposed, settlements carry with them “joint ownership” of the end product. They involve compromises that both parties feel they can live with, even though usually considered less than optimal by each side. In particular, on non-monetary matters, the right to strike gives a faculty association some leverage in an environment where the status quo (which an arbitration will tend to favour) is considered unacceptable for some reason or reasons and where, for most matters, arbitration would end up being a costly and unproductive exercise from the Association’s perspective.

The argument against arbitration with respect to salary matters is less clear. It is possible, for instance, that given the presence of the Public Sector Employers’ Council (PSEC), the only way in which a faculty association could exceed the so-called “PSEC mandate” is to do so through arbitration. In the current negotiating environment, this limitation probably applies most critically to “base” salary increases, as opposed to other mechanisms (special adjustments, special merit increments, changes in career progress mechanisms, etc. Certainly, “breaking” a PSEC mandate with respect to base salary increases (e.g., the UBC settlement of 2.5% versus the “mandate” of 2%) is more difficult outside of arbitration. But, technically, the “mandate” is not a legislated outcome (if it were, it would be susceptible to a legal challenge); rather, it constitutes a form of “hard bargaining” through which, not just the UVic administration, but also government in the form of PSEC is “at the table.” Finally, while leverage over PSEC at single bargaining tables might be limited, co-ordinated efforts by more than one faculty association in the province might – if we follow past cases in other sectors – lead to changes in the “mandate” (i.e., the “mandate” itself can and has been a rather fluid thing; for instance, the percentage increases being discussed by PSEC early in 2012 were quite different from the final 2+2 formula announced later in the year).

Whatever the merits of the argument for having some form of arbitration on salary matters, it must be understood that there are major limits within arbitration processes, to any gains which might be achieved in terms of benefits, even under replicative arbitration (the specific problem under UVic’s old Framework Agreement’s adjudicative arbitration form of achieving benefits improvements was discussed above). More importantly, though, the argument in favour of pushing for arbitration only applies to a political regime in which a particular political party dominates the BC political structure and in which PSEC continues to exist. It may be wise to find a negotiating structure which works best within this context (the next 3-4 years at least), but it would be patently unwise to devise a negotiating process which itself cannot be changed in the event that PSEC is dissolved or changed substantially by a different government in the future.

**Strike Mandates**
Conventional wisdom among chief negotiators at unionized faculty associations is that an Association
would never call a strike with a strike vote mandate of less than about 2/3 of those voting. Most recent
strike mandates – among the handful of institutions that have gone on strike and among the many
institutions that have not – have been substantially higher than this. At the University of New
Brunswick, 97% of faculty voted, with 90% of these voting in favour of a strike. At the University of
Prince Edward Island in 2006, 75% of faculty turned out to vote and 82% of these voted to strike. At
Western, where faculty did not actually go on strike, 70% voted in favour of a strike in 2003, 88% in 2006
and 87% in 2010, with slightly over 70% turnout in 2003 and slightly over 50% turnout in the other 2
years. Turnout at Western is attenuated given the fact that a large plurality of the membership consists
of part-time faculty. At Manitoba, 66% of members voted in 2013 with a yes percentage of 68%; in 2007
these percentages were 76% (yes vote) and 55% (percentage voting). Previous strike votes ranged from
63% to 70% yes. The lowest strike vote “yes” percentage we can find for an institution which actually
went on strike was 61% – at Memorial.

We do not have complete information on the strike votes at other institutions (apparently, CAUT does
not currently collect these data, though we will urge them to do so in the future).

Restrictions in the Labour Code

The B.C. Labour Code itself provides some restrictions on the right to strike. First, a strike cannot occur
without a vote from the bargaining unit. If a strike vote is positive (authorizing a strike), it is good for
only three months; if the union has not initiated “job action” within this period, another vote must be
called. There is then a minimum 72 hour waiting period after a strike vote has been called. Next, the
employer has the right to put its final offer directly to the membership for a vote, going “over the
heads” of the negotiating team and the Executive. If this vote is positive, then a new Collective
Agreement consisting of the employer’s last offer is put in place. Although this is rarely invoked, the
Minister of Labour can force a vote on an employer’s last offer during a strike. Finally, the Labour Board
can appoint a mediator in a dispute.

Other Forms of Job Action

As explained to the Association’s membership by the Association’s lawyer (Allan Black), at a recent
information meeting, a “strike” can involve any of a number of forms of job action organized by the
union (conversely, a ban on strikes would ban these job actions as well). These include but are not
limited to: a) establishing pickets throughout the campus even if classes continue a) a refusal to submit
grades at the end of the term b) a boycott on university committee meetings c) starting classes 10
minutes late for a defined number of days d) rotating cancellation of classes so that no more than one
class per course is cancelled e) a single “day of protest” during which no classes are held f) a single “day
of protest” during which classes are held but faculty members discuss “issues in higher education"
instead of mandated curriculum materials g) cancellation of all office hours.

Cost Comparisons: Impasse Resolution based on the Strike Threat versus Impasse Resolution based
on Arbitration
Both arbitration and the use of a “threat to strike” involve major cost considerations. To begin with, the cost of joining the Canadian Association of University Teachers defence fund (basically, a collective strike fund run by and for most unionized faculty associations in Canada) is $20/member to start and then $5.25/member per month. This would add roughly $51,000 per year to the Association’s expenditures, and probably require a dues increase (mil rate increase of 0.6, against a current mil rate of 5.0, excluding CAUT and CUFA-BC dues). Some, but not all, unionized faculty associations also run their own local “strike fund” or create substantial reserve funds which could be used in the case of a strike but could also be used for other purposes (e.g., a major legal action defending a member or members). Of course, the point of a strike fund is not to facilitate going on strike, but to make a strike threat at least somewhat credible so that leverage at the negotiating table is increased and the likelihood of success in achieving an agreement is increased. Joining a strike fund also provides a mechanism by which support is given to other faculty associations that might be on the “cutting edge” of negative change processes, such as impending program closures as an outcome of program prioritization exercises. The argument here is that university faculty associations have a collective interest in resisting some forms of negative change (and encouraging other forms of positive change) which might be playing out, in the first instance, at other institutions but which could eventually affect all institutions.

A negotiating regime based on arbitration is not without cost either. In the lead up to the most recent arbitration, the following costs were incurred: a) invoices from third-party accountants (Price, Waterhouse, Cooper), b) fees from the arbitrator/mediator, c) invoices from the Association’s lawyer, d) additional costs from the consultant the Association used (and has used in negotiations since 2004), e) additional course releases for negotiating team members as the process drags on and very large amounts of time are spent on preparation for arbitration. Each of these was substantial (in 2012-13, the negotiating team essentially donated its time without any course release beyond June 2012 but it would be unfair to expect future negotiating team members to be prepared to do this). The cost of a negotiating consultant could be reduced in future as an Executive Director takes on the task of “negotiating support” as planned, but it is likely that a mediation/arbitration process would then leave the Association’s office short-handed when it comes to staff support for members on non-negotiating matters in this configuration and possible indeed likely that temporary additional staff assistance would be required.

The exact cost of an arbitration will depend on its scope (monetary matters only? monetary and non-monetary?), the type of arbitration (adjudicative vs. replicative), the adjudication criteria if the arbitration is adjudicative (viz., whether “ability to pay” is a criterion), whether the process remains elongated as was the case in the Framework Agreement (or is more streamlined, as it is at other universities), and how transparent the university’s financial reporting and budget process is. Minimally, even an “inexpensive” arbitration can be expected to cost in the order of $200,000-250,000. Part of this cost is likely to be incurred even if there is a settlement after a mediation process, given that the Association will need to prepare itself for the possibility that the mediation might fail. If there is one arbitration across three salary negotiations, then the cost of arbitration will already be roughly the same as the cost of the CAUT strike fund, not counting the huge additional time commitment required of faculty association members on the negotiating team (course releases hardly make up for time spent by
volunteers and are not intended to fully “reimburse” them for time spent). If there is more than one arbitration or if there is arbitration and a mediation process during a 5-6 year period, then the cost of arbitration will exceed the cost of contributing to the CAUT strike fund.

Costs will be higher if a combination of the right to strike and an arbitration option are employed, although this very combination might be the best avenue to employ to obtain a good agreement while minimizing the odds that member will actually find themselves on strike. Under this approach, the negotiating team, the Executive and ultimately the membership would decide, once an impasse has been reached, whether it makes more sense to offer arbitration to the administration given the mix of outstanding, unresolved issues (for example, the answer might more likely be “yes” if the differences boil down to salary matters only).

Moving Forward: Possible configurations of rights around binding arbitration and strikes

If arbitration, then what form?

If arbitration is envisaged as an alternative to negotiations where the parties have the right to strike (Association) or lock out (University), the further question of, “what form of arbitration?” needs to be asked.

For salary and benefits arbitration, the adjudicative criteria in the old Framework Agreement made arbitration both an expensive proposition for the Faculty Association (especially with the “ability to pay” criterion, which is unusual) and an exercise with a substantially reduced probability of success in relation to either replicative arbitration or arbitration with criteria which were more “balanced” between employer and association positions.

For arbitration dealing with non-monetary matters, if a decision is made to attempt arbitration on unresolved non-monetary issues, aside from the fact that anything new (for example, an association proposal designed to mitigate negative consequences of some new draconian administrative policy) is not likely to be included in an arbitrator’s award, the strong likelihood that an arbitrator will simply ignore Association proposals unless already agreed to in substance by the administration or previously agreed to in some documentable form needs to be addressed. The arbitration language could include a requirement that the arbitrator “must address each proposal,” but this alone merely prevents an arbitrator from totally ignoring proposals and does not do much to change the overall likelihood that non-monetary proposals will go nowhere if not fully agreed to by the administration – precisely the situation the Association found itself in with the old Framework Agreement.

What Triggers Arbitration?

Arbitration can be embedded in a collective agreement, or it can be agreed to by the parties at the negotiating table as a strike-avoidance (or strike ending) mechanism. Arbitration was used to put an early end to the recent strike at the University of New Brunswick: rather than allowing the strike to continue, the parties agreed to send some salary matters to an arbitrator, after the administration
agreed to some basic principles important to the Association on the construction of a salary settlement but continued to disagree on the important “how much?” details.

While arbitration can be embedded in a Collective Agreement itself, this is fairly rare and, in the Canadian context, limited to institutions with the “voluntary recognition” form of union. There are different mechanisms by which this might happen. For instance:

1. In the course of a longer collective agreement, there could be a mid-agreement salary settlement involving negotiations on salary matters only with arbitration in the event that these negotiations fail. Thus, in a four-year overall Collective Agreement, salaries and benefits for years 1 and 2 might have already been set, but a special salary negotiating process calling for arbitration might apply to years 3 and 4. This is similar to the old Framework Agreement, except that, with the latter, the salary settlements often extended beyond the terms of the master agreement itself (in some cases with considerably awkwardness).

2. A Collective Agreement may set the terms for the negotiating process and “automatic renewal” for the next Collective Agreement only. An arbitrator is given power to renew the agreement for a specified period of time, to insert or take away language and to construct a salary and benefits settlement, but is specifically prevented from including a replication of the arbitration language in any imposed settlement. Thus, if the parties go to arbitration in 2018 and the arbitrator awards a 2-year settlement, the strike option becomes available in 2020 – though nothing prevents the parties from agreeing to arbitration again in that year in advance of negotiations or during negotiations.

3. A Collective Agreement may permanently specify renewal provisions such that negotiating impasses always lead to arbitration. If included in the collective agreement at UVic, this would permanently erase the right to strike, making UVic the only institution in Canada to have done so. While it would appear that UBC has done the same thing, as a voluntary recognition union, UBC’s faculty association retains the option of mounting a certification drive to recover the right to strike – something that UVicFA would not have inasmuch as it is currently unionized by virtue of a certification vote. Under this option, present members effectively preclude future generations from making democratic decisions on the question of whether to employ the strike threat or not.

Membership instructions to the Negotiating Team

There is also an arbitration option outside of a Collective Agreement (i.e., no language mentioning arbitration in the Collective Agreement itself). The membership and/or the Association’s Executive could simply instruct the Negotiating Team to try to get the administration to agree to arbitration on either a) all unresolved matters or b) all unresolved salary and benefits matters in the event that there is an impasse in negotiations. This membership motion could be passed:

a) At the onset of negotiations if the membership feels that issues at stake are not important enough to warrant the threat of a strike
b) At any point in negotiations where, upon hearing what the remaining differences in position are, the membership feels that some or all remaining issues should be referred to arbitration.

c) As a standard motion which is put to the membership prior to any strike vote (if this vote fails, the union then proceeds to take a strike vote)

The disadvantage of (a) is that it takes negotiating leverage away from the negotiating team and is likely to yield poorer settlements. Option (b) assumes a regular reporting structure where the Negotiating Team frequently lets the membership know where negotiations stand on outstanding issues. Sometimes, negotiating protocols (usually demanded by administrations) keep positions “confidential” until an agreement has been reached, making regular reporting more difficult. Faculty Associations tend to resist these protocols, though, because of a desire to keep members informed (this is also good democratic practice), so usually “bans on publication” at least allow for “communication with the principals” (translation: it’s OK to let members know what is happening as long as this doesn’t take the form of press releases to the wider public).

The discussion here assumes that striking is an “all or nothing” matter, but, as noted above, a strike vote is required to authorize something as small as a boycott on committee meetings. A complex matrix of possible options exists. For example, the membership could even simultaneously pass a strike vote (to enable forms of job action other than a strike since otherwise these would not be allowed under the Labour Code) and a motion restricting the types of job actions authorized at the present time and compelling another vote (on whether to strike and/or on whether to refer some or all outstanding matters to arbitration) before anything close to what we usually think of as a “strike” (cancellation of classes) can occur.

**Constitutional Provisions**

It is also possible for a Faculty Association to adopt constitutional provisions which would place limitations on the Association’s ability to call a strike vote or which would require a “super majority” for a strike vote to have effect. A “2/3 vote” requirement, for example, would imply that at least a few of those individuals who were opposed to unionization at UVic altogether would have to agree on going on strike before a strike could occur. A 2/3 vote requirement for an actual strike vote might be challenged under the Labour Code, though the challenger would probably only be able to remove the (“you may not strike with less than 2/3 support”) provision without actually being able to compel an Executive to go on strike in the event of, say, a 52% vote. A constitutional requirement that a strike vote cannot be held at all without an enabling motion to hold a strike vote (with this motion requiring 2/3 support) might not face this difficulty. A constitutional requirement restricting the forms of job action (a) in all cases in the absence of a second confirming membership vote or (b) if the strike vote was less than a given percentage, would also be possible. Here, a 52% strike vote would authorize the Executive to engage in things such as meeting boycotts, but would not authorize it to call a full blown strike. A quick list of possible constitutional provisions is as follows (this list is not exhaustive and not all items are mutually exclusive):
1) A requirement that the administration’s final offer be placed before the membership and rejected prior to any strike vote (this assumes that there is a fully formed administration final offer, which might not be the case)

2) A supermajority vote requirement for strike votes

3) A requirement that a motion referring all outstanding matters to arbitration be placed in front of the membership prior to any strike vote and, optionally, a supermajority vote requirement rejecting this motion before a strike vote can be taken

4) A requirement that, subsequent to a strike vote, the membership be given regular opportunities to rescind this vote if any form of job action is taken up (e.g., weekly or bi-weekly).

5) A requirement limiting the forms of job action the Executive can take (e.g., ban on a full strike though not on other forms) if there is anything less than a supermajority outcome with the strike vote

6) A total ban on a) all forms of job action or b) “full strikes,” which could be rescinded only by a constitutional change requiring a supermajority.

What an appropriate “supermajority” would consist of is, of course, a matter that would need to be discussed. It is conceivable that different thresholds might be considered appropriate for different requirements.

At most Canadian unionized institutions, the “supermajority” requirement is implicit: Executives are simply not inclined to call a strike with weak support. Constitutional provisions are not required. However, in instances where portions of the membership do not trust their own elected representatives, constitutional provisions are possible. To our knowledge, such provisions have only been put into place at Concordia University, and were later removed because members felt they added too much complication to the negotiating process and hurt the ability of negotiation teams to obtain good settlements.

Summary:

It is neither fair nor reasonable to ask the question, “Do you think arbitration is a good idea?” without placing this question in context. This context includes the following:

a) What triggers arbitration?

b) What does arbitration apply to? (Monetary matters? all matters?)

c) What type of arbitration is involved (adjudicative vs. replicative)?

d) (If adjudicative) what are the arbitration criteria?

e) Does the arbitration constrain the negotiating process in future negotiations?

f) (In the context of a particular negotiation): what are the outstanding issues?

Nor is it reasonable to ask the question, “should members give up the right to strike in advance of negotiations?” without placing this question in context. This context includes:
a) Are members being asked to give up the ability of future generations to make this decision for themselves, or is this a matter that the membership can review and reconsider at any time?

b) Are there any particular benefits that are obtained in exchange for giving up the right to strike beyond any single round of negotiations?

c) Are members being asked to give up all forms of “job action” or just the full withdrawal of services?

In both questions, an important further issue is “what is at stake?” It is difficult, if not impossible, to predict in advance what sort of issues might arise at future negotiating tables. It may simply be the case that negotiating impasses, if they occur at all in the near future, occur over matters related to salary. But it may, alternatively, be the case that other issues, totally unrelated to money, come to the forefront. If these issues were to touch on questions of academic freedom, institutional democracy, academic job loss, unfair procedures or excessive and unreasonable work requirements, then the stakes will have changed.

We have not attempted to articulate the view that the right to strike is fundamental to the achievement of “buy in” to collective bargaining. There is, we feel, merit to this view, though we understand that not all members will agree with us on this question. What we have attempted to do is to outline the various options which would be available to the Association in the event that the membership decided that it did not trust its elected Executive and its Negotiating Team to approach even the contemplation of a possible strike with extreme caution and wanted, instead, to impose some sort of a restriction on these bodies. The major mechanisms for placing restrictions are: a) restrictions in the collective agreement itself b) restrictions in the Association’s constitution and c) membership motions giving instructions to the Executive and/or the negotiating team. Restrictions in the constitution or in the form of a membership motion could restrict all forms of job action or just some (e.g., “full strikes” while allowing other forms of protest and job action); this distinction is not, however, possible if the restriction takes the form of a collective agreement provision. Restrictions can apply a) to the “next” round of negotiations, b) until rescinded by the membership or c) permanently. Restrictions other than restrictions in the collective agreement could take the form of a ban or they could take the form of a higher threshold vote requirement (“supermajority”).

All forms of restriction come with a price: they will reduce the leverage the negotiating team has at the negotiating table and thereby reduce the likelihood of achieving a good agreement unless there are no major issues under dispute. Over the next 4 years (with a BC Liberal government, a province-wide employers’ council), it could be argued that this price worth it in the case of monetary negotiations. And it is also the case that for some types of restrictions, the price may be small in any event; for instance, a 60% “supermajority” requirement does little to alter the negotiating dynamic while at the same time may help to assure those who are concerned that a strike might occur with a slim majority which “could have gone otherwise” with different people choosing to vote, that there will be solid support before any job action is conducted.
We think that members themselves must decide how the Association should approach the arbitration vs. strike question, though we are concerned that this question can easily be painted as a dichotomy when in fact it is not. Among other things, we feel that both the ultimate right to strike and the ability of the parties to jointly agree to arbitration at any point in negotiation can be seen as tools which can use to produce good collective agreements. As important, arbitration is not a single, unitary process but can take on many different forms; the same applies to the right to engage in job action. The one option that we are adamantly opposed to, though, is one that would permanently impose an unspecified form of arbitration – or arbitration of the sort seen in our past Framework Agreement – on not just the present generation of members but on future generations of members. We would urge colleagues to not support this inherently undemocratic option.