ARBITRATION ACT, SBC 2020, c. 2 and
LABOUR RELATIONS CODE, RSBC 1996, c. 244
ARBITRATION DECISION

TEACHING SUPPORT STAFF UNION

UNION

SIMON FRASER UNIVERSITY

EMPLOYER

(Re: Voluntary Recognition Agreement – Research Assistants and Grant Employees)

Arbitrator:	James E. Dorsey, K.C.
Representing the Union:	William B.C. Clements, Maria P. Koroneos
Representing the Employer:	Patrick-Gilligan Hackett
Case Management Conferences:	January 18; February 25; and May 11, 2022
Online Hearing:	July 11 to 14; August 15 to 17 and 19, 2022
Decision:	September 13, 2022

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1. Voluntary Recognition Agreement Dispute Referred to Arbitration

[1] This dispute is over SFU's implementation of a November 15, 2019 Voluntary Recognition Agreement in which SFU agrees to recognize TSSU as the bargaining agent for "those persons who hold positions as research assistants or grant employees at SFU who are or who will become employees of SFU and who are not otherwise

properly included in the bargaining unit of another union which is certified as a bargaining agent for employees of SFU ('Included Persons')."

[2] When TSSU and SFU signed this appended agreement, TSSU was preparing to apply to the Labour Relations Board on November 21, 2019 to vary its certificate to include research assistants and grant employees.

[3] SFU and TSSU agreed collective bargaining was to begin May 1 or earlier. Because TSSU anticipated bargaining could be concluded within a year, it agreed to defer applying to the Board until November 14, 2020 or another date mutually agreed. In anticipation of collective bargaining, SFU undertook:

> … to determine in a timely way those positions which should reasonably be characterized as positions held by Included Persons and those positions which are properly included in the bargaining unit of another union which is certified as a bargaining agent for employees of SFU ("Excluded Persons"). (¶ 2)

[4] They agreed to a process to identify Included and Excluded Persons.

> TSSU and SFU shall meet at least once every 30 days from the signing of this document until the completion of the process. At least 3 days in advance of each meeting, SFU shall provide TSSU with the latest preliminary list of Included Persons, Excluded Persons, and the persons whose classification is yet to be determined. (¶ 2)

SFU did not provide any preliminary lists before May 1, 2020. Almost three full years later, this process has not been completed.

[5] On May 19, 2020, TSSU referred implementation of the Voluntary Recognition Agreement to me for mediation and arbitration. The appended order for SFU to provide preliminary lists was issued June 16, 2020 under the *Labour Relations Code*. Collective bargaining began March 23, 2021.

[6] On January 6, 2022, TSSU referred to mediation/arbitration a difference over the inclusion of "those individuals who receive compensation as scholarship and/or stipend" listed in the implementation details appendix to the Voluntary Recognition Agreement. This difference was not resolved in March mediation and was scheduled for arbitration.

[7] By agreement between counsel, the June order was reissued under the *Arbitration Act*. This was not an agreement the *Arbitration Act* is a source of any or all of my jurisdiction. A ruling on the timing of submissions on this jurisdictional issue is appended.

[8] Determining the nature and extent of my jurisdiction under either or both the *Labour Relations Code* and *Arbitration Act* was deferred until the hearing. This determination has significance for the source, nature and scope of my arbitral authority, perhaps the interpretive approach and use of extrinsic evidence in interpreting the agreement and whether review of my decisions is the jurisdiction of the Labour Relations Board or Supreme Court of British Columbia. There are also process matters, such as award confidentiality and privacy (s. 63(2) of the *Arbitration Act*). There is no claim for costs.

[9] To resolve a difference over the scope of issues to be addressed on the scheduled arbitration dates, I directed, as SFU proposed, that the hearing would address all TSSU's claims that SFU failed to implement the Voluntary Recognition Agreement in addition to the difference over "those individuals who receive compensation as scholarship and/or stipend."

[10] TSSU and SFU agree I am properly appointed as arbitrator under the Voluntary Recognition Agreement, which includes:

> SFU and TSSU agree to appoint Jim Dorsey, to mediate and/or arbitrate under Part 8 of the Labour Code any difference which may arise between them regarding the implementation of this Agreement. For certainty, the implementation of this Agreement does not include any matters connected with or arising from the collective bargaining required under clause 4. (¶ 9)

[11] On TSSU's application at the beginning of the hearing, there was an order to exclude witnesses until they testified.

[12] On the fourth day of hearing, July 14, 2022, it was agreed I would review redactions in 90 documents disclosed by SFU to TSSU, of which 68 were included in books of documents entered as exhibits. Before my review, SFU reduced the extent of redaction in 15 of the 90 documents. SFU gave me unredacted copies of the 90 documents. The reasons for the content redactions were because an attachment was disclosed separately or the content was a live link, irrelevant or covered by labour relations or solicitor-client privilege. My determinations and decisions are appended.

[13] The evidence includes hundreds of pages of a comprehensive and reliable documented record of events and testimony from Katie Gravestock, TSSU Chief Steward 1; Dr. Derek Sahota, TSSU Member Advocate; Elsa Plican, Director, HR Research & HRIS; Dr. Jon Driver, Professor Archeology; Dr. Eugene Fiume, Professor

of Computing Sciences and Dean of Applied Sciences; Dr. Dugan O'Neil, Vice-President Research and International; Mary Aylesworth, Director, Financial Operations; and Chris Hatty, Executive Director, Human Resources and Labour Relations.

[14] Two persons intimately involved in the negotiation and implementation of the Voluntary Recognition Agreement were not available to testify. Sandi de Domenico, Associate VP Human Resources, left SFU in April 2021. Julia Trasler, Labour Relations Advisor, has been on extended medical leave since May 2021.

2. Graduate Students Paid Research Assistantship From Grant Funds

[15] SFU is a research university with R50 policies specific to its research personnel – University Research Associates (R50.01); Postdoctoral Fellows (R50.03); University Research Assistants (R50.04); and Employment of Personnel Funded from Research (R50.02). Research personnel are paid out of various funds by Payroll Services in the Department of Finance.

[16] Some research personnel are paid employment income as SFU employees or as employees of other employers for whom SFU provides a payroll service. Some graduate students are paid scholarship income from research grants awarded to faculty members.

[17] Central to this dispute is whether and when payments to graduate students are properly employment or scholarship income. Are the payments properly employment income for performing research related tasks for a supervising faculty member? Are the payments financial support to help students pursue their academic program?

[18] Students enroll, pay tuition and attend SFU to learn, to earn educational credentials and to choose and pursue a career path. Some pursue post-graduate studies for master's and doctorate degrees to further their learning, credentials and career pursuits. Most graduate students need financial support from employment, scholarships, loans or other sources.

[19] Students might obtain awards and scholarships from donors outside SFU or from SFU, which offers merit-based awards and scholarships paid through the Office of Graduate & Postdoctoral Studies. Payments are applied first to any outstanding tuition. SFU has merit-based donor funded awards and need-based bursaries administered by

Student Services (Financial Aid & Awards Office), which also administers a need-based Work Study Program.

[20] To attract and retain promising graduate students, SFU offers funding to study in the high-cost Metro Vancouver area where SFU has three campuses. SFU's fourth location is the Bamfield Marine Sciences Centre on Vancouver Island. The funding offered for one or more terms can take many forms and have many components.

[21] Registered graduate students can apply for a teaching assistantship as an employed Teaching Assistant or Tutor Marker.

> Teaching Assistantships
>
> Registered graduate students are eligible to apply for Teaching Assistant (TA) and Tutor Marker (TM) positions across the university. If your offer of funding consisted of TA/TM positions, you are required to apply for these positions. Generally:
>
> - Available positions are posted 8 weeks prior to the start of the term, for a period of 2 weeks, and can be found at www.sfu.ca/grad/job-postings.html.
> - TAs, TMs, and sessional instructors at Simon Fraser University are covered by the terms and conditions of a Collective Agreement between Simon Fraser University and the Teaching Support Staff Union (TSSU), found here, www.tssu.ca/collective-agreement/.[1]

[22] Under the TSSU-SFU collective agreement, graduate students without a merit-based scholarship receive TA and TM appointment priority in some circumstances (Articles 13.F.3.2 and 15.F). The compensation for employment for all TAs and TMs is a combination of salary and scholarship (Article 29).

[23] A funding offer to a graduate student might include a research assistantship.

> Research Assistantships
>
> A component of your offer of funding may be in the form of a Research Assistantship (RA) funded by contract research, or other grant funds, which may require some work related to your research:
>
> - The value of the RA may not be the same in each academic term.
> - Continuation of this component of your offer of funding may depend upon satisfactory performance of the duties assigned by your research supervisor and on the availability of funds.
> - If you have received an external award/scholarship, the value of your award may impact the value of your RA.
> - Students are required to maintain full-time status in the term in which the RA is paid.
> - If you change your degree program, you may lose your RA position unless your new supervisor can provide funding for an RA position for you. For

[1] *Simon Fraser University Graduate Student Admission Handbook* (September 2019 – August 2020), p. 11

example, if you change from an MASc program in engineering to an MEng program, you will lose your RA unless your new supervisor can provide RA funding for you.

- In addition, if you change supervisors while in your graduate program, you may also lose your RA position unless your new supervisor can provide funding for a RA position for you.
- Please contact your program to verify how your RA is paid.[2]

[24] The research assistantship for an academic term is paid through the payroll system biweekly or as a lump sum. These payments are referred to as "scholarships" in the payroll system. In the science faculties, they are also referred to as "stipends."

[25] The "research supervisor" is a faculty member who is the Principal Investigator (PI) for a research contract or grant which the faculty member has been awarded. The main Canadian sources of research grants are the National Science and Engineering Research Council (NSERC), the Canadian Institute of Health Research (CIHR) and the Social Scientist and Humanities Research Council (SSHRC).

[26] For decades before 2019, PIs used research grant funds to employ individuals paid employment income through the SFU payroll system with statutory and other deductions and remittances as employees of the PIs, not as employees of SFU. In 1976, the Labour Relations Board decided these "grant personnel" are not SFU employees and not included in the TSSU bargaining unit.[3] The individuals might or might not be SFU graduate students. In the payroll system, most of these positions were classified as "Research Assistant."

[27] Graduate students given a research assistantship and paid scholarship income are also classified as Research Assistants. They could be working on the same research project receiving a scholarship paid from the same contract or research grant funds as fellow Research Assistants employed by the PI and paid employment income.

[28] On occasion, a graduate student or PI might want to change the categorization of a student's income from scholarship to employment for all or part of a term. An

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[2] *Simon Fraser University Graduate Student Admission Handbook* (September 2019 – August 2020), p. 11
[3] *Simon Fraser University and AUCE, Local 2*, Labour Relations Board unpublished Letter Decision in Appeal #98/76, December 31, 1976. The grant personnel were 268 persons in "Scientists, Associates, Postdoctoral Fellows, Technicians, Assistants and related Secretarial and Clerical roles." (see *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 3)

example arose in August 2013 when Associate Physics Professor Dr. J. Steven Dodge sought guidance on a situation.

> I have an unusual situation with a student that I hope you can help me resolve, regarding the classification of a Graduate Student Research Assistantship as "Scholarship income" or "Employment income."
>
> Here are the basic facts:
>
> - The student is pregnant, due in early December, and she would like to earn employment income to be eligible for EI.
> - She expects to complete her PhD degree around the middle of October.
> - The typical practice in Physics is to assign Graduate Student Research Assistantships as scholarship income, so the only employment income that she has accrued is through teaching assistantships. To earn the extra hours through teaching, she would need to take on 8.5 base units of teaching, defend her thesis, and give birth, all in the Fall term. She's nearly done with her thesis, so I don't think this is impossible, but I also don't think it's a good idea.
>
> I suggested that her supervisor could offer her a research assistantship as employment income, to allow her to complete the hours necessary for her to be eligible for EI. As I understand the rules, RAs may be considered employment income if the work is not counted toward the degree, but I am uncertain about the rules for how to decide that, and no one else in the department seems to know, either. Is it correct, for example, that once she submits her thesis, any additional work could be eligible for employment income? What about before she submits?
>
> The supervisor is sympathetic to his student, but is understandably concerned about running afoul of NSERC and/or EI rules. Since our normal practice is to offer RAs as scholarship income, it is important that we avoid the appearance of offering an RA as employment income inappropriately, simply so that the student can be eligible for EI. Can you offer any advice for how to navigate this?

[29] The Manager, Payroll advised no change could be made. There was to be a review of the criteria for designating scholarship and employment income.

> When defining type of income we must refer to guidelines set by CRA, and not the effect of what that decision will have on someone's personal circumstances.
>
> Steven, as you stated below the current process for Physics is to assign Graduate Student Research Assistantships as scholarship income, so the only employment income that is accrued is through teaching assistantships.
>
> In order to deviate from that, there must be a change in either the working relationship, type of award/funding received or her student status that would trigger the change from Scholarship to Employment income.
>
> We must demonstrate consistency in our process, therefore, if none of the above has changed then we must continue to classify this income as Scholarship.
>
> Finance will be conducting a larger review on Scholarship awards in the near future to ensure the correct criteria is being met when using this income classification.

[30] In December 2013, the Office of Graduate and Postdoctoral Studies posted a chart of frequently asked questions adopted from guidelines at the Universities of

Waterloo and Windsor and Queen's University: "To assist grantees in deciding whether to pay a graduate student research assistant scholarship or employment income."[4]

[31] The first question was: "What is the primary motivation of the professor in appointing the research assistant?" The student was to be paid scholarship income if the primary motivation was: "To assist his/her student financially and/or bring the student up to the guaranteed level of funding; to facilitate the student's research related to his/her thesis." Bringing payments to the guaranteed level of funding was a form of topping up. The student was to be paid employment income if the primary motivation was: "To hire a student to assist in completing the tasks necessary for the professor's own research and for the professor's own academic and professional goals."

[32] What was the student's primary motivation? To secure employment income or scholarship income "To assist in his/her training to become an independent researcher; to assist in qualifying for his/her degree; financial assistance that will enable the student to focus on his/her graduate studies."

[33] What will be the nature of the student's activities? It is employment income if "Tasks will be unrelated to the student's own thesis' tasks. Tasks may be more basic in nature and not necessarily develop the student's research capacity (e.g. reference checking, data entry, photocopying papers, etc. for professor's research)." It is scholarship income if "Research will relate to student's own academic pursuits, but complementary to the professor's overall research program; tasks will help the student become an independent researcher." Research work complementary to the PI's research program did not create employment.

[34] If the interactions were collaborative between mentor and mentee, then it is scholarship income. It is employment income if the student was to take direction and instructions and had low independence. It is scholarship income if the student's independence is variable. "Depends on current level of training of the student and mentorship style of professor. Preparing a student to be an independent research[er] is a goal of a graduate scholarship."

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[4] *Graduate Research Assistants: Scholarship vs. Employment Income*, December 2013

[35] These 2013 guidelines reproduced a traditional academic mindset. There was no FAQ on the indicia of an employment relationship at common law or what employment tribunals, like the Employment Standards Tribunal, would consider to determine whether a specific student/supervisor relationship was an employment relationship or an academic mentor/mentee relationship.

[36] There were no payroll-related deductions or employer contributions on scholarship income paid to graduate student research assistants. There was no workers' compensation coverage. The scholarship income was not insurable earnings for Employment Insurance benefits, such as parental leave benefits or, in 2020, the pandemic Canada Emergency Response Benefit. No Canada Pension Plan credit or RRSP contribution entitlement was earned. A tuition tax credit was not deductible against scholarship income.

[37] Each term, departmental administrators and PIs made a decision about the nature of each relationship between a graduate student and PI when they completed a Payroll Admission Form to enroll non-continuing or fixed term research personnel for employment or scholarship income. The 2018 guide for completing this form included:

> **GUIDE FOR THE COMPLETION OF PAYROLL APPOINTMENT FORM**
>
> The Payroll Appointment Form (PAF) is used to initiate payments to individuals who are not affiliated with a Union/Membership group and who will be non-continuing persons working at the University. Therefore, there must always [be] an end date to their appointment. Note that there may be more than one non-continuing appointment for the same person.
>
> **********
>
> Employment and Payment Options
>
> **Research Assistant (Employment income)**
>
> Check this box if the work is undertaken primarily for economic gain and there is an employee/employer relationship. Payroll source deductions will be taken, and income will be recorded as employment income on a T4 slip. WCB coverage is provided. Caution: Payroll cannot make retroactive corrections from employment income to scholarship income, so please ensure correct box is checked.
>
> **Recreation and Athletics (Employment Income)**
>
> Check this box if the hiring department is Recreation and Athletics.
>
> **Post Doctoral Fellows (Employment Income)**
>
> Check this box if this is a Post Doctoral Fellowship (PDF) you may refer to Policy R50.03 to determine if it meets the criteria of a PDF. Earnings will be treated as Employment Income and will appear on T4 slip as taxable income.
>
> If the Post Doctoral Fellowship is an Award and does not have an employee/employer relationship with the sponsoring Faculty member, please

indicate this on in the comments section of the form. You must also attach the contract which outlines that the employee/employer relationship does not exist.

University Research Assistant (Employment Income)

Check this box if the appointment qualifies as a long term University Research Assistant under policy R50.04. Appointment must be for a minimum of 2 years and includes an option for benefits.

Other

Check this box if none of the above categories for employment income suit the type of work being performed.

Graduate Student Research Assistant Scholarship

Check this box if the graduate student is working as a research assistant that is very closely related to his/her thesis research and is required for completion of the Master's or Doctoral degree for which he/she is enrolled. No payroll source deductions will be taken, and the income will [be] recorded as scholarship income on a T4A slip. WorkSafeBC coverage is not provided. If the research being performed is unrelated to person's graduate program and the primary beneficiary of the work is the University, the work is considered to be employment income and should be coded as Research Assistant (employment income).

National Scholarship

Check this box if the scholarship received meets the criteria for National Scholarship. Please refer to the following for additional information on eligibility for scholarships and awards. http://www.sfu.ca/dean-gradstudies/awards.html

Payroll source deductions will not be taken, and the income will recorded as scholarship income on a T4A slip.

[38] The number of graduate student research assistants paid scholarship income fluctuates through the Fall, Spring and Summer terms. Each term some of them also have employment income from TA or other positions covered by the TSSU-SFU collective agreement. They are TSSU members and pay union dues.

[39] Part of Dr. Sahota's journey from a first-year SFU student in 2001 to earning his physics PhD in 2019 included employment as a TA at SFU; earning employment income as a research assistant covered by a collective agreement at McMasters University when doing research for his master's degree in his supervisor's lab, which also related to his supervisor's research; receiving a $105,000 NSERC Alexander Graham Bell scholarship in 2011 paid over three years to pursue his PhD research which he did at SFU with Dr. Dodge; and receiving scholarship income from a research assistantship working in Dr. Dodge's lab where there were structured schedules, deadlines and expectations. The data from his research work remains in a data repository in Dr. Dodge's research program. As is almost always the situation, his research had an alignment with Dr. Dodge's funded research and became a chapter in his thesis.

[40] Dr. Sahota's personal experience and knowledge about graduate students is that, unlike a merit-based scholarship, such as the NSERC scholarship he was awarded, research assistantships come with expectations set by PIs. The student's research work directly benefits PIs in their current programs and future applications for grants. A research assistantship can be ended by PI direction to Payroll Services. A "true scholarship" is not intended to directly benefit anyone other than the student recipient.

3. PDF and University Relationship: Employment or Educational

[41] Views about the nature and purpose of research are central to characterising or choosing to treat the relationship between research personnel and Canadian universities as an employment or an educational, academic or training relationship. There is little or no legislative recognition of the status of university research personnel beyond federal income tax treatment of scholarship, fellowship and bursary income.

[42] A useful illustration of an evolution in thinking about relationships in academic communities is Postdoctoral Fellows (PDFs), the highest level of term or non-continuing research personnel. In October 2000, SFU adopted a Postdoctoral Fellows Policy (R50.03).

> This 2000 policy differentiates between 'External PDFs' and 'Grant PDFs'. External PDFs receive stipends either directly from an external agency, or through SFU from funds that are provided to SFU for administration on behalf of that agency. The policy is silent on employment relationship, but Section 3.3 does state that "External PDFs are not eligible to receive employment benefits from SFU." It is interpreted that there is no employment relationship for External PDFs.
>
> 'Grant PDFs' receive compensation from research grants or contracts, and who are considered to be employees of the grant holder rather than of SFU.[5]

[43] In 2012, contrary to the submissions of the University of Toronto, the Ontario Labour Relations Board decided approximately 870 PDFs, of whom approximately 90% were in the sciences, were employees eligible to be represented by a trade union.

[44] The PDFs were paid a stipend not reported by the university as employment income. There was no dispute "Revenue Canada considers the PDFs stipends to be taxable income" although many PDFs report it as a "scholarship, fellowship or bursary."[6]

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[5] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 10

[6] *University of Toronto (Governing Council)*, [2012] O.L.R.D. No. 179, ¶ 36. On the tax consequences of income being a scholarship, fellowship or bursary see *Canada v. Amyot*, [1977] 1 F.C. 43.

[45] U of T said the relationship between a PDF and PI was predominantly educational. The union said that collaboration, enhancing a curriculum vitae and development of academic skills is a feature of all academic employment in a community of scholars exploring ideas. The Board decided the educational value of the work performed by PDFs was irrelevant to determining whether there was an employment relationship.[7]

[46] The Board concluded prior decisions that PDFs were not engaged in insurable employment under the *Employment Insurance Act* or pensionable employment under the *Canada Pension Plan* were not binding and unhelpful in determining employee status under the *Labour Relations Act, 1995*.[8] "The fact is that the PDFs perform work in the University of Toronto's labs, using the University's equipment and materials, produce something of value, i.e. research, and receive compensation from the University for the performance of that work. These are all hallmarks of an employment relationship."[9]

[47] Finally, the Board found there was no mutual intention that the relationship was academic or educational and not employment expressed in the policies and letters of engagement from the more powerful university party.[10]

[48] For reasons recounted below, SFU updated its 2000 Postdoctoral Fellows Policy in June 2019 to recognize some PDFs as SFU employees and some as independent.

> 4.1 "Postdoctoral Fellow" or "PDF" means a person who has completed a doctoral degree and who has been appointed by the University for a limited period of time to undertake advanced research and further professional development in association with one or more of the University's faculty members.
>
> 4.1.1 There are two appointment categories for PDFs
>
> a) a PDF whose salary is paid in whole or in part either from funds held by a University faculty member or from the University's financial resources or a combination of the two will be appointed as an Internal PDF. An Internal PDF is an employee of the University;
>
> b) a PDF who has secured funding from an external funding organization or a fellowship program which is external to the University and whose salary is paid wholly from such funding will be appointed as an External PDF. An External PDF is not an employee of the University. Use of the University's facilities to manage and account for an External PDF's funding, including processing of

[7] *University of Toronto (Governing Council)*, [2012] O.L.R.D. No. 179, ¶ 89
[8] *University of Toronto (Governing Council)*, [2012] O.L.R.D. No. 179, ¶ 90-101
[9] *University of Toronto (Governing Council)*, [2012] O.L.R.D. No. 179, ¶ 102
[10] *University of Toronto (Governing Council)*, [2012] O.L.R.D. No. 179, ¶ 106

> payroll and administration benefits, does not alter the status of an appointment as an External PDF.

[49] A faculty member oversees each PDF, whether an SFU employee or independent.

> "Faculty Member" means a University grant eligible faculty member who has been designated to oversee the activities associated with a PDF's advanced research and further professional development. For purposes of this definition, a "Faculty Member" includes a person holding an appointment at the University in one of the following ranks: Adjunct, Professor, and Professor Emeritus. (s. 4.3)

[50] In this updated policy, "research" means an "undertaking intended to extend knowledge through a disciplined inquiry or systematic investigation or both." (s. 4.2)

[51] At the time of the 2019 policy update, 95 to 100 PDFs were brought onboard as SFU employees.

[52] The initiative leading to this change in policy and employment status for PDFs and other research personnel was prominent in the events preceding the Voluntary Recognition Agreement and this dispute over whether the relationship with a graduate student paid a research assistantship is, or is to be, an employment relationship.

4. Research Personnel Employment Practices Review (2018)

[53] When Dr. O'Neil became Associate Vice-President, Research in 2017, the Vice-President asked him to look into ways SFU could recruit more PDFs. He knew one of the recruitment barriers was that PDFs did not have access to all SFU services and benefits of SFU employees. He spoke to Ms de Domenico and they decided to co-sponsor a project to explore the question for PDFs and other research personnel. They were the liaison with the executive to ensure high level research goals were met.

> The project to review employment practices related to personnel funded from research income began in 2017 as an internal initiative to research legislation and examine data produced from the payroll system, the Student Information Management System (SIMS) and the Human Capital Management system (HAP).
>
> In January 2018, SFU engaged Sierra Systems to facilitate a more comprehensive review at the request of Associate VP of Human Resources, Sandi de Domenico and Associate VP of Research, Dugan O'Neil. The purpose of this review was to identify common practices across SFU (and issues raised therefrom), to compare these with practices at peer institutions, and to identify considerations for improving SFU's practices for the benefit of research personnel, principal investigators and the institution.[11]

[11] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 7

[54] Dr. O'Neil testified all the labour relations pieces of the initial review and subsequent project were within Ms de Domenico's expertise and oversight. He was not consulted or involved in the November 2019 discussions with TSSU about voluntary recognition. Ms de Domenico brought Dr. Driver into those discussions and there were "the usual labour relations mysterious happenings with trade-offs behind closed doors."

[55] Sierra Systems Group undertook a review from February to May 2018.[12] The following is its final draft overview of SFU's research enterprise.

> **Issue**: The issue of rights and obligations of research personnel, principal investigators and SFU the institution goes back many decades. Peer research and internal interviews show that internal policies and accepted practice no longer reflect the needs of stakeholders within SFU, the institution's strategic priorities, nor the wider research landscape at peer institutions. Specifically, SFU's research enterprise has grown and its output relies on a healthy supply of research personnel as key members of the university community. At the same time, an increasing focus on equity and social sustainability is a strategic priority that underpins many of SFU's initiatives.
>
> Upwards of 25% of the university's professional community are not considered employees of the institution (1,673 grant-funded research personnel). They are considered employees of principal investigators or as trainees. Though many are fully-trained and essential contributors, the grant-funded term employment situation means that such personnel are not guaranteed a long-term role and often are not eligible for employer-provided benefits - including health and dental, leaves and access to many SFU services. Research personnel feel undervalued and unrecognized. On the other end, principal investigators may lack the administrative capacity and HR knowledge required to meet the obligations of employer, especially as SFU's focus on research grows. Principal investigators feel that they are taking on risks and responsibilities better suited to SFU (which currently only performs payroll administration for research personnel) and that they are not supported to do their best research.
>
> **Impact of Current State**: The current state raises uncertainty and inequity among research personnel and principal investigators. This uncertainty leads to risks: risks that employer obligations are not met, risk that employee rights are not upheld and risk that administrative tasks are taking away from a focus on research. The inequity raises risk to SFU's ability to attract research personnel and strong research faculty and ultimately to its ability to conduct research, its research funding trajectory and its reputation. This is therefore an institutional issue that demands an institutional response.[13]

[56] Sierra Systems Group identified ~1,673 grant funded research personnel through analysis of a data extract by SFU IT Services from the October 28, 2017 payroll run.[14] There had been 3,245 payments to 2,260 personnel with unique identification

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[12] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 1
[13] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 3
[14] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 7

numbers.[15] With a caution there might be a <2% duplication and that the point in time data extract was not validated for consistency with additional extracts, the distribution of the research personnel was:

Research Personnel	Count	Non-research Personnel	Count
Grad Student Scholarship	617	Enhanced Pension	19
National Scholarship	3	Other, non-continuing staff	407
Postdoctoral Fellow	110	Program-Coordinator/Fac Ass.	12
Research Assistant	824	Recreation Services Staff	114
Other non-continuing (Fund N, R, X)	78	Sessional Lecturer 1	3
Other, non-continuing (Description RA)	7	Sessional Lecturer 2	27
University Research Associate (not on extract – figure from Faculty Relations)	26		
Totals	~1,673		~582
Total Unknown*	~30		
*Unknown = "Other non-continuing" positions also described as "Other, non-continuing" and not paid through research funds (N, R, X)			

The Recreation Services Staff work at camps. The total of the Grad Students (617), National Scholarship (3), Research Assistants (824) and non-continuing (85) is 1,529.

[57] There was no identification of the distribution between part and full-time; short or long term; or which "student scholarship recipients may be performing employment-related tasks rather than trainee-related tasks."[16] Further analysis and/or system updates were required to address the fact that:

> Research Assistant secondary descriptions appear to include non-research roles (for example, Writing Facilitator, APSA Association Director, Education Consultant, Tutor) and roles that are [or] may not be research-oriented (for example, Admin Assistant, Events Coordinator, CUPE's office employee). This may inflate the number of research personnel.[17]

[58] The change in SFU's research enterprise since the 1970's was summarized as follows:

> Cutting-edge research is core to SFU's strategic vision. For decades, research personnel have been instrumental in realizing this vision. References to Research Assistants date to at least 1973, and by 1975 SFU had 286 research personnel - Scientists, Associates, Postdoctoral Fellows, Technicians, Assistants and related Secretarial and Clerical roles. The employment relationship between such grant-funded research personnel and SFU was raised as an issue even in those days. A 1976 Labour Relations Board of BC ruling held that grant employees were not to be considered employees of SFU for the purposes of collective bargaining. This

[15] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 23
[16] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 24
[17] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 24

> direction has been enshrined in SFU's Policy R 50.02, the main policy governing employment of research personnel, effective 1992. This policy serves as guidance to principal investigators and states that "personnel whose income is derived from grant funds remain employees of the grant holder and not the University". This distinction is an important one: the employee-employer relationship is a legal relationship that grants certain rights and imposes certain obligations. At SFU, principal investigators hold the statutory obligations of employer for the majority of research personnel, and are currently responsible for the recruitment, offer negotiation, onboarding, administration, termination and ongoing management of their research personnel.[18]

[59] The number of research personnel had grown six-fold; SFU had become a leading Canadian research university; and peer institutions were directly employing research personnel to extend them employment benefits. Despite payroll and administrative support, the responsibilities on PIs were onerous and there was risk exposure for both PIs and SFU.

> In the years since, the research enterprise at SFU has continued to mature:
>
> - Increase in number and reach of initiatives
> - Increase in complexity: additional cross-disciplinary research; partnerships with institutions, agencies and industry
> - Six-fold increase in research support personnel from 286 (1976) to ~1,673 (2017)
> - Almost three-fold increase in research funding to $139 million between 2004-2017 (internal figure)
> - Policies governing Postdoctoral Fellows (2000) and long-term Research Assistants (2013) were established to further recognize specific classes of research personnel
>
> In parallel, the peer landscape has also shifted: an online scan of various classes of research personnel across 13 peer institutions identified that 71% of classes are entitled to benefits and that 71% of classes are considered employees of the institution. Of the employees, at least 28% of classes are affiliated with a union or association. Some institutions provide formal HR support, reference materials and mandated practices governing salaries and benefit minimums.
>
> In 2018, the existing employment practices and policies pertaining to SFU's research personnel appear suited to an earlier time in SFU's research history. Though SFU offers support through letter templates, department administrative support (depending on the department), benefits enrolment (where eligible and offered), payroll processing as well as an Office of Graduate and Postdoctoral Studies, the remaining responsibilities on principal investigators can be onerous. Moreover, such practices may expose both principal investigators and the institution to unnecessary risk.
>
> The institution is thus undertaking a review on the topic of policies and practices related to employment of research personnel. This report provides details on the

[18] Research Personnel Employment Practices Review – Confidential Draft, May 31, 2018, p. 5

> approach, the research, and the findings. It also proposes considerations for a future direction that SFU might take.[19]

[60] One initial assessment was: "it is probable that SFU would be considered the employer of grant-funded research personnel, and should there be an investigation or ruling, that outcome would supersede SFU policy."[20] This had implications for federal income tax, Canada Pension Plan, Employment Insurance and immigration legislation and provincial employment standards, income tax, workers' compensation and human rights legislation. Tri-council funding from NSERC, CIHR and SSHRC did not mandate or exclude "any forms of employment relationship."[21]

[61] The matters for future consideration include: completely rewriting R50 policies from the ground up; updating the PAF; and having a phased transition plan.

> Interview participants agreed on high level outcomes with respect to employment relationships and benefits, and generally agreed on degree and direction. When asked about critical success factors for such a transformation, many participants raised concerns about implementation.
>
> Specifically, many questioned SFU's ability to achieve outcomes in line with the guiding principles across thousands of stakeholders and with limited funds. There are many levers that SFU can use to ease into the future state. Suggestions to navigate towards the desired outcome often include some combination [of] the following incremental transition paths:
>
> a. Some classes included → all classes (begin with PDFs and long-term RAs)
> b. Centrally-funded → grant funded (consider requiring 2020 grant budget proposals to meet new policies but grandfathering current)
> c. Limited benefits → increase in benefits over time (begin with most valued benefits as determined by HR Benefits team)
> d. Explore contributions to an "extraordinary expense fund" to be used for ineligible expenses and large expenses that may significantly affect a project (UBC contribution rate is 0.5% of research funding)[22]

[62] The first in the list of future considerations was designating SFU as employer for some or most of the 1,673 research personnel because SFU was, in substance, their employer.

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[19] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, pp. 5-6
[20] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 8. This conclusion relied, in part, on an Interpretation, Policy and Guideline published by the Labour Program of Employment and Social Development Canada (IPG – 069, "Determining the Employer/Employee Relationship" (https://www.canada.ca/en/employment-social-development/programs/laws-regulations/labour/interpretations-policies/employer-employee.html) and Canada Revenue Agency publication (RC4110(e), Rev. 17, "Employee or Self-Employed").
[21] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 9
[22] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 22

> Discussion: Currently, the majority of the 1,673 research personnel identified are not considered employees of the institution. This represents ~25% of SFU's faculty and staff community. This treatment is out of line with many peer institutions and has been raised as a common issue in all internal participant interviews. In fact, external agencies such as WorkSafe BC and the Canada Revenue Agency look to the substance of the work rather than contracts and policies. Interviewees raised the fact that in substance, SFU is the employer.
>
> The additional classes should include all those currently classified as employees of a PI. This includes "research assistants" (909 individuals) and "postdoctoral fellows" (110 Grant PDFs). Where a PDF receives external funding and an employment relationship may not be practical, equivalent treatment should be provided. The University may consider treatment of current "Trainees" (620 scholarship recipients) and other non-affiliated term workers (600 "other") that may be involved in research.
>
> Designating the University, rather than PI, as employer will serve to provide institutional recognition for services (eligibility for service awards) and to align risk exposure inherent in an employment relationship. It will also provide access to certain services available to employees of SFU.
>
> The concerns raised include (1) increased administrative burden where the university is involved in defining jobs and performing hiring, (2) loss of PI control, (3) increase in costs where the employer designation provides for additional services and benefits.[23]

[63] The Sierra Systems Group report was accepted by the co-sponsors and received Executive endorsements by the President, Vice-President Academic, Vice-President Research and Vice-President Finance and Administration in April and May 2018.

5. Research Personnel Initiative (RPI) (2018 - 2022)

[64] SFU decided in the summer of 2018 to recognize some classes of research personnel as SFU employees and to complete their transition to employment by the 2019 Fall term.

[65] SFU committed to a Research Personnel Initiative (RPI) for which it used research personnel numbers from the October 2017 data in the review report.

- 26 University Research Associates
- 909 research personnel funded from research grants and contracts (824 Research Assistants plus 85 other non-continuing = 909)
- 110 Postdoctoral Fellows
- 8 University Research Assistants.

SFU identified the 909 research personnel included some unknown positions paid through research funds.

[23] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 19

[66] At town hall faculty consultations attended by the RPI sponsors on November 27 and December 5, 2018, there were concerns about the categorization of research personnel:

> 1. The RA category is extremely blurry when students are involved (scholarship-based vs. employment based) - how will this be taken into account? Currently, many PIs choose scholarship (even when it is an employment relationship) solely to make income non-taxable for students.
> 2. Will there be guidelines/job descriptions for Research Personnel categorization? There is currently wide overuse of the RA category (students hired as administrative support, etc.) - new Policy should discourage this in some way.
> 3. Unfairness of external PDFs (and scholarship-based RAs) not receiving benefits, while PDF employees (and employment-based RAs) do.[24]

[67] The RPI expressly did not include within its scope for transition to SFU employment 620 research personnel (3 national scholarship positions plus 617 graduate student scholarship or trainee positions). This decision was not revisited after the sponsors heard from faculty at these town hall meetings.

[68] In late 2018, Ms de Domenico asked Ms Plican to be the Human Resources Lead on the RPI project team. Her time commitment to the project increased in February 2019 with examining the situation of PDFs and preparing the revised R50.03 policy in June 2019. The transition of PDFs to SFU employment began in September 2019. By November 2019, planning was starting for the next phase – Research Assistants.

[69] In May 2020, Ms Plican became the RPI Project Manager, with oversight by Michael Strang, Senior Director, University Project Delivery. The original team chair or project manager NTT Data Consultant Barbara Thirlwell went on leave in January 2020. Jim Tucker was engaged as RPI Project Manager in March 2020.

[70] Ms Plican testified she was not involved in a March 2, 2020 revising of the project scope statement which identifies deliverables, risks and out of scope tasks.

> 2. Out of scope for RPI Project Team
> - Changes to how SFU handles scholarship income
> - Operationalizing those changes is out of project team's scope, as well
> - Defining guideline for differentiating scholarship income from employment
> - Mary in Payroll provides this
> - Tracking & enforcing adherence to BC employment standards (???)

[24] *Research Personnel at SFU: Faculty Consultation Feedback – 11/27/2018 & 12/5/2018*

- Recommendations to address non-employment matters between supervisors and grad students
- Changes, if any, resulting from RES implementation
  - for example, processes for tracking salary encumbrances[25]

[71] Ms Plican testified the thorny issue of differentiating employment and scholarship income was deliberately out of the project's scope. There was limited time and resources. The mandate was to transition the identified employees to SFU employment.

[72] The transition of research personnel to employment by SFU was accomplished in three streams completed in the 2021 Fall term. For each person, there was a review of the terms of appointment, a written offer and acceptance of employment and entries in the payroll system.

[73] The project team's closeout report in March 2022 states:

> The Research Personnel Initiative was successful in transitioning research personnel from the employ of individual Principal Investigators to employees of the University. This involved consulting with stakeholders, holding over 240 workshops, information sessions and working group meetings to create more than 39 new artifacts (processes, guidelines and tools) to support the research enterprise. To date, the project team has sent out over 2,700 offers of employment and responded to over 7,200 requests for information. In addition, many issues were uncovered that the project addressed and resolved.[26]

[74] This report identified two of the challenges as "significant change resistance" and that the "Initiative was started without a fulsome understanding of the current state, the work that would be required, and potential impacts and lacked the resources to undertake the initiative."

> This was a project that had many outside factors that required the project to be fluid and the team to pivot and adjust to meet its goals. Some of those factors included the voluntary recognition of TSSU as the bargaining agent for the research assistants, four different project managers, significant change resistance, and the global pandemic. The project team worked and built strong relationships with all the stakeholders and have provided a high level of customer service. The effort required to successfully implement these changes was enormous. There were limited data available, disparate practices, lack of compliance, and significant change resistance.[27]

[75] From inception until its final report, asking whether any graduate students receiving a research assistantship scholarship were employees of a PI and whether any

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[25] *RPI Draft Project Scope Statement*, March 2, 2020, p. 2
[26] *RPI Project Closeout Report*, March 7, 2022, p. 1
[27] *RPI Project Closeout Report*, March 7, 2022, p. 2

who were should be transitioned to employment by SFU was explicitly outside the scope of the RPI.

6. Science Researchers' View of SFU Research Assistantships

[76] Regarding graduate students with research assistantship scholarships as trainees, not employees, is embedded in the view of research in the Faculties of Science and Applied Sciences which have 80% of SFU's research assistantships. The principal source of research funding is NSERC. Broadly, faculty undertake research to expand human knowledge and advance scientific progress. Some programs might seek targeted outcomes. Faculty funded by grants from CIHR or SSHRC might have other research objectives.

[77] Dr. O'Neil, Vice-President Research and International and a particle physicist, recognizes the way research grant funds are spent varies greatly across and within SFU's eight academic faculties. The faculties have different traditions, cultures and approaches to classifying payments from research grant funds to graduate students as scholarship or employment income. His research experience and current participation in the team-based Atlas Experiment using the $10b CERN laboratory in Geneva informs his view of the nature of scientific research and its funding.

[78] On the research grants he supervises with other SFU PIs, they hire many PDFs and few Research Assistants. Graduate students with a research assistantship scholarship work within the Atlas Experiment group of researchers and might have to go to Geneva to work shifts to learn about CERN and record data.

[79] Scientific research is questioning, challenging and adding knowledge to society. Research funding is for this pursuit which Dr. O'Neil testified can be mentored, but not directed. Research outcomes cannot be pre-ordained. Intellectual challenging, inquiry and creative meandering often ends up in a place never preconceived. Scientific research is distinct from any product of the research, which might be a master's or doctoral thesis, single or co-authored publication, patent or commercial endeavour.

[80] As a PI, Dr. O'Neil gives students scholarship funds to meander and collaborate with others while he provides mentoring oversight, including theoretical, practical and sometimes organization, publication or career political help. Often he learns the

unexpected from his student's research. The process frequently involves more interaction and mentoring at the beginning of the professor-student relationship, but matures as the student selects and follows a path of inquiry. In some research programs, the mentoring and supervisory process is collaborative among PIs. PDFs and other researchers, including fellow students, at SFU and elsewhere contribute to a student's mentoring and learning.

[81] Students learn methodology and instrumentation, data analysis and documentation and reporting. They contribute and give benefit to research programs and use what they do, learn and discover to meet their academic goals – select a thesis topic, write and defend their thesis.

[82] This nurturing/training role is an essential component of the terms of NSERC grants which want a hopeful legacy of some expansion of knowledge result and an actual legacy of a future generation of researchers being trained. PIs must be mindful to make efficient and effective expenditures of research grant funds.

[83] The ultimate goal of the professor and principal-student relationship is teaching that helps students complete their academic program and find their future career. They leave an archived thesis openly available. There might be a co-publication involving the PI and, in the case of the Atlas Experiment, 3,000 others in 40 countries and 100 institutions.

[84] Dr. O'Neil's experience is an intense relationship with no more than 5 graduate students, who have applied to be involved in the Atlas Experiment. Faculty members recruit or select students who have an interest in their research. Students seek our faculty members with whom they want to work. Dr. Fiume testified students can be very resourceful in recruiting PIs or professors. There will, and should be, a significant overlap of the PI's research and the student's research for a master's or doctorate degree and thesis.

[85] Dr. O'Neil knows that in some disciplines a PI can have as many as 30 graduate students with a research assistantship. The relationship between PI and student is a "light touch" with no in-depth collaboration.

[86] Dr. O'Neil has employed research assistants to perform one or a set of specific tasks and to provide deliverables by a specific date. Unlike scientific research, the outcome is intended and directed. This is an employment, not a mentor-mentee, professor-student, principal-student or educational relationship.

[87] For undergraduate students, NSERC has Undergraduate Student Research Awards (USRA) valued at $6,000 plus a contribution by the university for 14 to 16 weeks. A student may have one award per fiscal year and no more than a total of three. NSERC frames the relationship as employment.

> - Institutions are required to supplement the award and should comply with their provincial and/or federal employment standards. The institution will be responsible for supplements to the weekly value and fringe benefits (if applicable).
>   - In addition to the terms and conditions of your award, the activities are governed by the agreements, including employment agreements (if applicable), you have with the host institution.
> - NSERC's contribution is paid directly to the host institution and is included in the salary that you receive.
>
> *********
>
> The institution will issue payments to you for the total value of the award in accordance with its pay procedures. It will also issue a T4 or T4A slip (statement of income) to you at the end of the calendar year.[28]

[88] Dr. Fiume, formerly Professor of Computing Sciences at U of T, joined SFU in January 2017 as Professor of Computing Science and Dean of Applied Sciences. Graduate students he supervises and the lead scientist on a funded research project do some of the heavy lifting working in a broad array of ways. The scope of the research space for graduate students is open discovery to find a path through academic progress toward a thesis and, perhaps, publication. Often students work together in collaborative research.

[89] Dr. Fiume testified that while some graduate students are employed as Research Assistants to work on a defined project, such as developing specific software, Applied Sciences faculty generally fund and not hire students. Naturally, their research has some congruence and alignment with the faculty member's research agenda and program, but is distinguishable as a training and academic undertaking in the records the student keeps. Research assistantship funding is for the research endeavour not

[28] https://www.nserc-crsng.gc.ca/students-etudiants/ug-pc/usra-brpc_eng.asp (September 1, 2022)

for any outcome like a publication and is not tied to the extent of a student's intellectual contribution.

[90] Dr. Fiume testified SFU's creator ownership Intellectual Property Policy (R30.03) protects student creators while giving SFU access to what was created while using its resources. The greater latitude students have in funded research, the more ownership they can have. Stronger students are more curious and creative and have a greater latitude to choose their research path and select a thesis topic. The grant funding is agnostic to ownership of the intellectual property, which one or more students, Research Assistants, PDFs or PIs might claim.

[91] Dr. Fiume testified the research assistantship funding is "simply for students to think." His style is to be collaborative not directive with graduate students and to provide mentoring and training in research methods. He obtains the research grant funding and provides a general scope with suggestions where to look. While the most common research structure is unfettered, some might be more focused. There will be times, in this creative environment, when he and a student will spend hours with a whiteboard.

[92] Students report what has been done, which might not be progress, and prepare summaries in retrospect. Their academic progress is measured through course work and stages of their thesis not their work on funded research. Most research programs have multiple funding grants and research missions. The flexibility of funding allows students with research assistantships to follow a passion and to drift in a new direction that might result in a change in PI and funding for the student.

[93] Having an emphasis on students being in an open research environment develops sound scholars and scientists. Student graduation is an indicator of success. Publication enhances the reputation of a lab and SFU. Good research creates a halo effect for everyone.

7. TSSU Campaigns to Represent Research Assistants (2018 & 2019)

[94] When Dr. Sahota became TSSU Member Advocate in 2018, after being Chief Steward in 2016 and 2017, he had longstanding concerns about the working conditions of research assistants, including graduate students paid a scholarship or stipend. He

proposed and the TSSU Executive approved a campaign to organize and add research assistants to the certified bargaining unit.

[95] A campaign was begun in the 2018 Fall term with the slogan “Researchers Work” because their work contributed value and benefits to the supervising PIs and SFU. By mid-October, the TSSU concluded it would not obtain a sufficient number of signed membership cards to make a successful application to the Labour Relations Board to vary its certificate. It paused the campaign to regroup.

[96] About the same time in October 2018, TSSU saw a copy of a *Revisions to Research Personnel Employment Practices* presentation co-sponsored by Dr. O’Neil and Ms de Domenico, which excluded 620 scholarship research personnel. Dr. Sahota testified TSSU knew the work many did, the hours they worked and the payments they received. TSSU considered them to be in employment relationships and needing representation. Excluding them from the RPI was both a concern and a motivation to put more resources into an organizing campaign.

[97] Ms Gravestock was elected Chief Steward in the 2017 Fall term. She was a PhD student, TA and research assistant in Labour Studies. Her research assistant work on a supervisor’s project was interviewing policy makers on elder care and aging issues. She was involved in the 2018 campaign, which was restarted in the summer of 2019. She testified she learned that, unlike the research assistant group with which she worked, other research assistants were unhappy and wanted rights and protections equivalent to TAs.

[98] TSSU hired an organizer in April 2019; researched public websites and made private inquiries to build a data base of research assistants across departments; set up and trained a network of ~100 campaigners; launched a “Research is Work” campaign at a BBQ gathering in late August; and had a total of 180 people involved in the campaign. The goal was to sign sufficient members within 90 days and apply and have the Board hold a representation vote before the final intense examination period of the Fall term. The campaign would not go public until a substantial number of research assistants were signed up.

[99] In the 2019 summer there was discussion about the employment status of a student with a research assistantship paid a scholarship who had suffered a brain injury

during her work. Dr. Sahota became aware of the discussion because she was to work as a TA in the Fall term. He understands WorkSafe BC provided her workers' compensation coverage as an employee of SFU.

[100] In 2019, the Faculty of Applied Sciences used the following template letter for Research Trainees, with which Dr. Sahota took exception as creating a relationship other than employment.

> Dear Appointee:
>
> This is to confirm your funding as a Research Trainee from XXX to XXX. The funding will be provided to you in biweekly payments of $XXX for a total amount of $XXX.
>
> This agreement exists solely between you as a student and me as your research supervisor. This does not constitute as an offer of employment from Simon Fraser University.
>
> The primary purpose of this appointment is to assist you in furthering your education and the pursuit of your degree through the performance of research activities in your field of study. As such, payment for these activities will be classified as scholarship income for taxation purposes. Accordingly, there will be no income tax, CPP or EI deductions from this income. You should set aside funds to cover your eventual income tax obligation.
>
> Mandatory SFU Safety Orientation Training: WorkSafe BC requires all new employees to take complete safety orientation training. SFU has a short online module you can take here: https://canvas.sfu.ca/enroll/RR8WDW, and periodically offers classroom sessions of the same material. You shall be informed if any additional training is required.
>
> Termination of this appointment may be initiated by either party giving two (2) weeks' notice, except in the case of termination for cause.
>
> If you accept the terms of this letter, please sign and return the enclosed copy of this letter, retaining the original for your records.

[101] Dr. Sahota disagreed with SFU's 2013 published guidelines on when to pay scholarship instead of employment income. His opinion is that graduate student research assistants paid scholarship income through SFU Payroll Services are employees of SFU not the PIs because they receive offers on SFU letterhead; are given SFU safety training; sometimes supervise SFU employees; use SFU equipment; follow SFU policies; produce a work product that benefits SFU; and SFU has liability responsibilities.

[102] TSSU conducted its organizing campaign on the belief that, like PDFs at the U of T, the Labour Relations Board would decide graduate student research assistants have an employment relationship with SFU.

[103] Dr. Sahota believes that in some circumstances, it is not a binary choice between an employment and educational relationship. There could be an intermix of relationships. A functional recognition of a mix of employment and educational relationships is that some employees are paid both salary and scholarship income under the TSSU collective agreement.

[104] TSSU did not sign into membership graduate students with merit-based awards and scholarships and no employment relationship.

[105] Many of the graduate student research assistants paid scholarships were TSSU members as TAs or other classifications and volunteered to work on the 2019 "Research is Work" organizing campaign. Dr. Sahota testified they were the strongest campaign supporters with almost unanimous support in the Physics Department.

[106] TSSU tracked the membership drive with daily reports and graphs of targeted and other departments. The momentum waned in early October. TSSU went public about the campaign on October 22, 2019. Within two days, Dr. Sahota knew the campaign would exceed its target and the required membership threshold. The plan was to submit the certificate variance application on November 21. Under the Board's process at the time, there would be a representation vote on November 28, before the term examination period.

[107] Dr. Sahota testified that on October 22, Ms de Domenico emailed each trade union and employee organization in the SFU community stating her opinion that research personnel paid a scholarship/stipend were not SFU employees. They might become employees under a future project. Dr. Sahota testified that within 30 minutes he replied disputing this opinion. Ms de Domenico did not respond.

[108] The organizing campaign continued into November when the plan to apply to the Board for a certificate variance was deferred because the November 15 Voluntary Recognition Agreement was negotiated and signed.

8. Employer Voluntary Recognition Under *Labour Relations Code*

[109] The general law on voluntary employer recognition of a trade union as the exclusive bargaining agent for a group of its employees is relevant background to this Voluntary Recognition Agreement and dispute.

[110] Granting voluntary recognition to a trade union as the bargaining agent for a group of employees is an employer prerogative that predates legislated mechanisms to certify a trade union as the exclusive bargaining agent for a group of employees and to compel their employer to recognize and bargain collectively with the trade union. Legislation compelling collective bargaining was a response to intense industrial conflict and the accompanying economic disruption when groups of employees went on strike to force employers to recognize trade unions as their collective bargaining agents.

[111] In 1974, in dissent on the issue under appeal, Chief Justice Laskin affirmed the continuation of voluntary recognition after enactment of compulsory collective bargaining legislation:

> What is in issue in this appeal is something fundamental in labour-management relations, namely, the integrity of voluntary collective bargaining. It is notorious that long before labour relations legislation was enacted in British Columbia, compelling employers to bargain collectively with trade unions which obtained certification thereunder as bargaining agents for employees of those employers, there were collective bargaining relations between employers and trade unions which were the product of voluntary recognition of such trade unions by employers. The introduction of compulsory collective bargaining legislation did not exclude voluntary recognition, and consequent voluntary bargaining, other than to require proof, if an issue arose thereon, that a collective agreement which resulted from voluntary negotiation was supported by a majority of the employees covered thereby.[29]

[112] Some employers prefer voluntary recognition over Labour Relations Board certification proceedings because it begins a relationship agreeably rather than adversarially; the employer and union, not the Board, determine the scope of the bargaining unit represented by the union within the employer's business organization; and it avoids the expense and delay of Board proceedings. Voluntary recognition is common in some industries with transitory work sites and work forces, like construction. For trade unions, under some collective bargaining legislation, voluntary recognition might not have the same security of tenure that comes with Board certification.[30]

[113] Some compulsory collective bargaining legislation specifically distinguishes between a voluntary recognition agreement and a collective agreement which grants voluntary recognition and provides for employee challenge to either.[31] Such

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[29] *Terra Nova Motor Inn Ltd. v. Beverage Dispensers & Culinary Workers Union, Local 835*, [1974] S.C.J. No. 124

[30] E.g., *Manitoba Pool Elevators*, [1978] 1 Can. LRBR 161 (CLRB) (Dorsey), p. 165; 25 di 345

[31] E.g. Ontario *Labour Relations Act*, 1995, S.O. 1995, c. 1, s. 66(1):

mechanisms are necessary to ensure the voluntarily recognized trade union has the majority employee support mentioned by Chief Justice Laskin and to safeguard against an employer voluntarily bargaining with one trade union to defeat employee selection of another trade union[32] or to gain a sweetheart agreement favourable to the employer.

[114] In British Columbia, the *Labour Relations Code* recognizes a voluntary collective bargaining relationship in section 18(4)(a), which provides "a trade union that is a party to a collective agreement, but is not certified for the employees covered by it, may apply to be certified at any time." Section 34 provides for the revocation of the voluntarily recognized bargaining rights "of a trade union party to a collective agreement but is not certified for the employees covered by the collective agreement" on the same basis as revocation of certified bargaining rights.

[115] In 1977, the Board observed that these and other provisions "clearly imply that an employer and a trade-union may elect to skip the certification step and to move voluntarily into the collective bargaining regime."[33] The essential condition for trade union bargaining agent status is the existence of a collective agreement between a trade union and an employer.

> Certainly an agreement to recognize an uncertified trade-union cannot be equated with a certificate of bargaining authority. Unless a first collective agreement is negotiated, the parties are not yet fully brought into the Code's scheme and are not subject to statutory obligations respecting collective bargaining.[34]

[116] In 1999, the Board affirmed that for a trade union to be voluntarily recognized with the status of an exclusive bargaining agent under the *Labour Relations Code*, the trade union must be party to a collective agreement, not just a voluntary recognition

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> Termination of bargaining rights after voluntary recognition
> 66(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 18 (3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

See another approach in the Nova Scotia *Trade Union Act*, NSRS 1989, c. 475, s. 30

[32] For a discussion of the importance of majority employee support for certification (and recognition) of the bargaining agent see *Canadian Union of Public Employees, Local Union 8920 v. South Shore District Health Authority (Bargaining Units Grievance)*, [2015] N.S.L.A.A. No. 1 and No. 14 (Dorsey)

[33] *Delta Hospital*, [1977] B.C.L.R.B.D. No. 74; [1978] 1 Can. LRBR 356 (BC), p. 8

[34] *Delta Hospital*, [1977] B.C.L.R.B.D. No. 74; [1978] 1 Can. LRBR 356 (BC), p. 11

agreement. "Unless a collective agreement is negotiated, parties have not brought a voluntary recognition relationship under the Code."[35]

> In *Delta Hospital*[36] the Board stated that unless a first collective agreement has been negotiated, parties are not brought fully into the Code's scheme and are not subject to statutory obligations respecting collective bargaining (p. 370). In order to establish that a disputed agreement is really a "collective agreement", a trade union should be prepared to offer evidence that it is representative of a majority of the employees affected. There is no set way for this to be done; for example, the union may show that a majority of employees affected are members or that a reasonable ratification procedure was followed. However, the Board added this caution:
>
> > ...the Code contemplates that an agreement between an employer and an uncertified trade-union will enjoy the legal status of a "collective agreement", and will thus be binding on the employees, only if one may reasonably judge that the trade-union is in some way actually representative of the group of employees affected.[37]

[117] There is no evidence that before SFU entered into the Voluntary Recognition Agreement, it knew the percentage of research assistants, the percentage of grant employees or the percentage of the combined groups who were TSSU members. Perhaps, SFU decided it did not need to know because the Board requires a concluded collective agreement covering the employees and evidence that a majority of the employees chose to be represented by TSSU by ratifying the collective agreement binding on them. SFU and TSU incorporated this in their Voluntary Recognition Agreement.

> SFU and TSSU understand and accept that a voluntary recognition agreement requires the employees who will be represented by the voluntarily recognized bargaining agent to ratify such representation in a manner which would, if challenged, be satisfactory to the Labour Relations Board. Should the Included Persons either fail or refuse to ratify this representation in such a manner, it will become void and its content and any measures taken by either SFU or the TSSU to implement its content will be *without prejudice* to such steps or positions as may be taken by either SFU or the TSSU in connection with any proceedings which may then arise from or relate to the TSSU's efforts to organize the Included Persons. (¶ 7)

[118] There was one significant difference over representation in TSSU and SFU's relationship after signing the Voluntary Recognition Agreement. TSSU acted on the belief the agreement gave it representation rights as the bargaining agent for Research

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[35] *University of Victoria*, [1999] B.C.L.R.B.D. No. 190, ¶ 94
[36] *Delta Hospital*, [1977] B.C.L.R.B.D. No. 74; 1978] 1 Can. LRBR 356 (BC)
[37] *University of Victoria*, [1999] B.C.L.R.B.D. No. 190, ¶ 66; See also *SSP America Inc.*, [2018] B.C.L.R.B.D. No. 99

Assistants and Grant Employees who were and would become SFU employees. Consequently, it sought and expected to be given information about these persons to the same extent as it is entitled to information about TAs and other employees in the bargaining unit. SFU maintained representation rights did not arise for its employees until a collective agreement was concluded.

[119] TSSU is an independent, non-hierarchical and directly democratic trade union. As collective bargaining was delayed and the highly transient community of Research Assistants and Grant Employees turned over each academic term, TSSU wanted to consult, engage with and report to those it believed it currently represents.

[120] SFU was not completely obstinate in maintaining TSSU's legal representation of Research Assistants and Grant Employees as their exclusive bargaining agent did not crystalize until collective bargaining was concluded and a collective agreement was ratified. However, it was unwilling for various reasons to give TSSU access to personal information of current employees or those it intended to transition to its employment. To help foster a collaborative, cooperative and harmonious relationship, Mr. Hatty sought to be responsive to TSSU representations about the situations of individuals and to extend some benefits before a collective agreement was concluded. In doing this, he was not acknowledging TSSU exclusive bargaining agent rights had been achieved before there is a ratified collective agreement.

9. SFU and TSSU Voluntary Recognition Agreement (November 15, 2019)

[121] TSSU did not have the option of bargaining for Research Assistants and Grant Employees under Articles 2.B of the collective agreement because they are not an employment category of "non-faculty teaching support staff."

> A. In accordance with the certificate issued by the B.C. Labour Relations Board December 13, 1978 and the variance of that certificate issued by the Industrial Relations Council May 20, 1992, the University recognizes the Union as the exclusive bargaining agent for all non-faculty teaching support staff excluding Laboratory Instructors I and II, Sessional Lecturers, and Associates in the Faculty of Education.
>
> B. If an employment category other than those in existence on the initial date of this Agreement is added to the bargaining unit during the life of this Agreement, the parties will negotiate the terms of the Agreement which shall apply to the new category.

[122] Before November 2019, the most recent employment category added to the bargaining unit was Graduate Facilitator. TSSU and SFU had achieved amendments to the collective agreement to include this category of employees. That experience was a factor in the choice made about voluntary recognition of Research Assistants and Grant Employees.

[123] Despite the RPI initial target dates, in November 2019 none of the ~1,000 research personnel within its scope had become SFU employees. The onboarding or transition of PDFs to SFU employees was underway, but not completed. TSSU was not seeking to represent PDFs, who are agreed Excluded Persons in the Voluntary Recognition Agreement.

[124] The initial discussions about voluntary recognition also reflect the reasons employers sometimes prefer voluntary recognition over Board proceedings and some of the risks a certified trade union must assess when considering to accept voluntary recognition instead of applying to the Board.

[125] If TSSU made a certificate variance application, there were foreseeable issues to be determined by the Board: identifying all research personnel recognized by SFU as its employees; whether there was an employment relationship between SFU and other research personnel, including those on a research assistantships paid a scholarship about which Ms de Domenico and Dr. Sahota had disagreed in their October 22 email exchange; and the appropriateness of adding “holders of NSERC USRA and equivalent funded by SFU,” work-study student employees and perhaps others to the TSSU certified bargaining unit.

[126] Under the Board’s process, SFU would have to file payroll lists against which the signed membership cards would be compared and post voting notices in laboratories and other workplaces. Ballots of disputed individuals would be segregated and sealed until their right to vote as employees included in the expanded bargaining unit was determined by the Board. Most likely, there would be a prolonged hearing to determine the employment status of disputed persons and the Board would be asked to revisit its 1976 decision that “grant personnel” were not SFU employees.

[127] In November 2019, TSSU and SFU were engaged in collective bargaining for renewal of their collective agreement. Dr. Sahota and Mr. Hatty were engaged in the

negotiations. Mr. Hatty, who had no involvement in or responsibility for the RPI, learned TSSU intended to apply for a certificate variance. He reported this to Ms de Domenico who discussed the implications with others.

[128] Ms de Domenico and Mr. Hatty met with Dr. Driver, who recalls they wanted the benefit of his academic experience. He had been Provost and Vice-President Academic for eight years from September 2008 to August 2016. In September 2019, he was appointed again to replace his successor as Provost and Vice-President Academic until a new appointment was made, which happened in November 2020.

[129] As the senior academic officer for eight years, Dean of Graduate Studies from 2000 to 2008 and supervisor of graduate students, Dr. Driver was very familiar with SFU's research personnel.

[130] During his career at SFU since 1981, he had been President of the SFU Faculty Association and during his first two terms as Provost and VPA, he met each term with all the trade unions. He had been involved in two rounds of collective bargaining with TSSU, more intensely in 2012 when there was mediation and arbitration to achieve a collective agreement. After his second term, he worked with a group, including a TSSU representative, to prepare a sexual violence policy in January 2017.

[131] Dr. Driver testified SFU learned out of the blue that TSSU was intending to apply to the Labour Relations Board to represent research assistants. He was aware of, but had minimal engagement with, the RPI. While it was not high on his priorities list, there was frustration with the pace at which the RPI was proceeding. SFU could oppose the TSSU because there were few research personnel who were SFU employees. However, that did not seem consistent with the RPI and it would not enhance the student experience to fight them. Working with TSSU in the same direction as the RPI was an opportunity to move it along a little faster. It seemed more sensible to offer voluntary recognition.

[132] Dr. Driver knew there was a lack of clarity about scholarship and hourly wages in complicated, simultaneous relationships between graduate students and academic supervisors. Some were clearly hired as employees and paid regularly with tri-council grant funds. Others were given a lump sum to pay tuition, rental damage deposits or

other costs to assist a graduate student to get on with the academic program. He agreed to attend a meeting with the TSSU with Ms de Domenico and Mr. Hatty.

[133] Mr. Hatty testified the interest was to have voluntary recognition in place of a Board proceeding: the collective bargaining for Graduate Facilitators had proceeded quickly and smoothly; a lengthy Board proceeding could be avoided and the relationship with TSSU could be enhanced; research assistants were to become SFU employees as soon as the transition of PDFs was completed; and producing employee lists for the Board proceedings within the Board's timelines would be very problematic.

[134] Monday, November 11 was a holiday. Mr. Hatty was scheduled on leave for two weeks beginning Friday, November 15. He had many things to attend to before he began his leave. On Tuesday, November 12, 2019, Mr. Hatty asked Dr. Sahota and Chief Steward Scott Yano to meet with him and Ms de Domenico to discuss voluntary recognition in Ms de Domenico's office.

[135] Dr. Sahota recalls his response to the suggestion of voluntary recognition was that TSSU would likely want to complete its campaign and give everyone the benefit of the democratic process of a Board conducted vote. In any event, voluntary recognition would not be possible unless it included research assistants paid a scholarship or stipend to whom the TSSU organizing team was committed. Mr. Hatty does not recall him saying voluntary recognition had to include these graduate students.

[136] That evening, the TSSU organizing team held an emergency, three-hour, consensus-building meeting to consider whether voluntary recognition was an acceptable alternative to the planned Board application. Before midnight, Dr. Sahota emailed Ms de Domenico and Mr. Hatty that they could meet the next afternoon after collective bargaining on a without prejudice basis to discuss the possibility of voluntary recognition. The email includes: "TSSU will be setting up a subcommittee comprised of RAs and our current members to attend the meeting, in keeping with our directly democratic roots."

[137] At midnight, Dr. Sahota emailed himself a summary of the organizing team's whiteboard conditions on which TSSU would further consider voluntary recognition.

> Must haves:
> 1) All RAs and grant employees included -- this includes the stipend RAs

2) A list ASAP ... as in by Friday.
3) no backslide of working conditions
4) a deal by Nov 15 (and no agreeing on the 13th)
5) expeditious start to bargaining in Spring 2020.
Extra point after
6) ratification
7) any benefits we can get out of them

[138] Because of Dr. Sahota's science faculty experiences, he referred to "stipend" research assistants, rather than "scholarship" research assistants.

[139] Receiving a list of all affected research personnel by Friday, November 15 was important because some of the organizing team wanted to conduct a vote among them. Having an agreement by November 15 was important because the plan was to have four TSSU members spend Saturday, November 16 photocopying membership cards to file with the Board application on November 21.

[140] Acquiring existing collective agreement benefits after voluntary recognition was patterned on the prior agreement including Graduate Facilitators under the collective agreement.

[141] Not all of the members of the organizing team were able to attend the emergency evening meeting. At midnight, Dr. Sahota emailed all organizing team members.

> We already shared this exciting news with those available to make the emergency meeting, but now we want to share it with all of you as well. Please consider this email as confidential and do not share it outside of the organizing team. Regardless of this new development, we absolutely need all of you to continue your on the ground organizing work, this is the final push.
>
> Late this afternoon, the two highest people in Human Resources at SFU, Sandi de Domenico (AVP HR) and Chris Hatty (Director of Labour Relations), asked for us to meet with them. At that meeting they offered to negotiate a path for SFU to voluntarily recognize TSSU as the Union for RAs at SFU. This is happening because of your amazing work to sign over 880 members to join the union.
>
> We told them we'd have to talk to you folks, and there's no way we'd ever agree to such a thing if it didn't include those stipend based RA positions in the sciences (which we know is a sticking point for them which they plan to fight us on at the Labour Board). This evening we held an emergency meeting and over 40 folks attended in person or via video conference. Together we talked through the pros and cons and decided it was worth meeting with SFU and setting out a pretty firm lines regarding what voluntary recognition we would accept. Should those not be met, we're prepared to walk away and continue with the regular process of having the Labour Board hold a vote.
>
> We have now informed SFU that we are willing to meet with them on a without prejudice basis tomorrow afternoon to have these discussions. A without prejudice

> basis means, should a deal not be reached, neither side can use what was said against the other side in the future.
>
> Because we need to submit the cards by Nov 21, this will be an extremely urgent process. If we're not able to get a deal by this weekend, we'll be headed down the path of having the labour board vote.
>
> As organizers this means two things off the bat:
>
> 1. **We absolutely need you to continue getting cards and preparing people for a November 28 vote; our power comes from our ability to act collectively, now is the time we need to give every last ounce of energy to get to the finish line.**
> 2. If you are interested in being part of our "subcommittee" for the negotiation process regarding the voluntary recognition and are available tomorrow afternoon, **please come by MBC 1304 at noon on Wednesday Nov 13**. We will further refine strategy then, and plan to meet at SFU at 1pm.
>
> Again please keep this information as confidential, and expect another possible emergency meetings in the coming days. Please stay tuned to your email.
>
> In solidarity,

[142] Mr. Hatty, Ms de Domenico and Dr. Driver met to strategize. Mr. Hatty testified Ms de Domenico wanted a collaborative process with TSSU. They were relying on Dr. Driver's expertise and detailed knowledge of research assistants. He had no specific or granular knowledge about the group they were proposing they voluntarily recognize, but the fit was with the TSSU bargaining unit not another group represented by another union. He knew there were some data issues and some persons like union officers who were classified in the payroll system as research assistant as a placeholder.

[143] SFU's planning notes for the meeting with TSSU were consistent with Ms de Domenico's knowledge as a RPI sponsor and her prior communication with Dr. Sahota.

> Planning Lines:
>
> - We are not opposed to employing RAs or certifying appropriately.
> - However, there are many unknowns - number of current RAs, terms of employment, time to get them on as employee.
> - Students on scholarship are not included.
> - Want this to be a collaborative process: withdraw LRB application, work with us to identify groups and individuals, then run the drive while we get them on board;
>   - Disputes can be mediated.
> - If not, we will state at LRB that they are not employees.

[144] At 1:30 pm, Dr. Driver, Ms de Domenico, Mr. Hatty and Ms Trasler, the Labour Relations Advisor dealing with most matters with TSSU, met with Dr. Sahota, Mr. Yano, Ms Gravestock and four other TSSU representatives. The TSSU organizing team was

gathered waiting to hear the meeting outcome, which could not include any final agreement by the TSSU delegation.

[145] One clear difference that had to be overcome in this exploratory meeting. The first condition of TSSU's mandate for agreeing to voluntary recognition was: "All RAs and grant employees included -- this includes the stipend RAs." For SFU, "Students on scholarship are not included."

[146] Ms de Domenico and Mr. Hatty took the lead at the meeting. She spoke about SFU's research goals, data coding issues, that 80 to 100 PDFs were now employees and the next phase was "pure RAs." Mr. Hatty spoke about the Board process on a certificate variance application.

[147] SFU's meeting notes of what Dr. Sahota said are consistent with the direction the TSSU organizing team had instructed.

> DS [Dr. Sahota]: The focus is can we get to a deal? Get to a voluntary recognition. We have managed to find near 1000 RAs and we have found a number who are definitely CUPE.
>
> - Folks in sciences who are paid stipends – they are most deeply affected by conditions, and need to be priority. Some are paid a scholarship, others a stipend (taxable), some as wages.
> - Change management – we want no backsliding in working conditions while we sort out a deal. IE, maintenance of compensation. Status quo.
> - May be lengthy process but we want to get started soon.
>
> CH [Mr. Hatty]: That aligns with our plan. We want to consult with TSSU to determine the groups, then priorities, rather than waiting for everyone.
>
> DS: We are resistant to queuing because of our history with long drawn out bargaining. We want to be moving forward by Spring 2020.
>
> CH: What about certification vote? Can you put it on hold while we work on identifying the groups?
>
> DS: Hardcoded timelines. If we are going to do something we have to do it by the end of the week. But we can agree on an orderly process. Board is likely to say no to abeyance.

[148] Mr. Yano and Ms Gravestock's more abbreviated notes of key points taken for their personal use are consistent with SFU's meeting notes. Dr. Sahota was clear an agreement had to include research personnel paid scholarships/stipends.

[149] At this point in the meeting, Dr. Driver took the lead for SFU looking for a way to resolve who was to be included. He testified that he believed some persons paid scholarships were clearly hired, which is consistent with what the RPI had heard from

faculty in November and December 2018. The problem was to identify the scholarship recipients who are employees. SFU's meeting notes continue.

> JD [Dr. Driver]: Is there a quick win on a group?
>
> SDD [Ms de Domenico]: Like PDFs?
>
> JD: We could identify those who are clearly doing research work, and employ a quick confirmation process with supervising faculty. Scholarship group is a different issue, but we might be able to move forward.
>
> DS: The majority are those plus scholarship. Not really a chance of leaving scholarship group behind, but we could reach an agreement that they are voluntarily recognized and look at them later. Whenever we start dividing up groups, we have problems.
>
> What is the possibility of getting a list of those who are RA from payroll by end of the week?
>
> SDD: No. The data is inaccurate, and we don't want to include those who are not legitimately RAs. PDFs are our focus.
>
> JD: I would like to brainstorm – we don't know how many on scholarship want to stay untaxed, and how many want benefits etc. Some request scholarship.
>
> DS: No backsliding = we negotiate. TAs have wage plus scholarship so there is a way of addressing that in bargaining conversation.
>
> JD: To clarify you are talking about those paid scholarship from grant, not University grant?
>
> DS: We have specified on our website the difference – University grants not through payroll.
>
> JD: We seem close, but it seems the scholarship may be a sticking point. I agree that there are those earning scholarships who are RAs and others who are independent. Disentangling those will be tricky. Is there are way to talk about bringing them into the bargaining unit if we have a clearer definition of what constitutes scholarship vs income. As a graduate supervisor, I give my student a scholarship for thesis writing and there is no work associated apart from producing a thesis.
>
> DS: The more common is when the student is given scholarship in exchange for work. There is an implied obligation. Is there a downside to those having a route to advocacy?
>
> JD: Is there a way to say there are 1000 people and we plan to bring them in once we have negotiated a set of terms?
>
> CH: That's not how it works.
>
> DS: Lets capture everything, we will bargain towards something functional. You have to recognise they will be employees and you will bargain with us.
>
> JD: You are also intending to include UGs as RAs, and people who are not students?
>
> DS: That is less rare than we thought, some working for 2 or 3 PIs. We will figure out terms and conditions given the spectrum.
>
> CH: What about PDFs?
>
> DS: Some may have signed cards, but this is not about PDFs. They are not students, post doctoral, so we are including anyone not identified as PDF.

> SDD: We are aiming to identify those who are attempting to circumvent CRA rules, but protect those who are genuinely purely on scholarship.
>
> JD: What if I hire a student for a week to clean a lab – would you be looking at a time limit?
>
> DS: We want to find ways to avoid workarounds through bargaining.
>
> SDD: We will not get buy in from faculty if we make it complicated.
>
> DS: We have heard from faculty that the current system is a paperwork burden, so we are looking for simplification.
>
> CH: Certification?
>
> DS: Research Assistant and Grant Funded Employees excluding Post Doctoral Fellows.

[150] Dr. Sahota testified that when he advocated an approach of including everyone and bargaining about the circumstances of distinct groups, Dr. Driver said he was convinced and looked to Ms de Domenico who nodded agreement.

[151] Mr. Hatty testified he was more cautious than Dr. Driver and Ms de Domenico who both wanted an agreement and a collaborative process with TSSU. He wanted time to assemble a collective bargaining team, learn about the nuances of the work circumstances of the included employees and prepare for negotiations.

[152] While Dr. Driver suggested only a few recipients of scholarships from research grant funding are receiving academic scholarships and the others were performing work for SFU, Mr. Hatty wanted to do his homework and evaluate all the circumstances to determine whether the scholarship payment was for an academic pursuit or other work. He opposed a TSSU proposal to begin collective bargaining in February.

[153] Dr. Sahota, who sometimes speaks quickly, testified the SFU notes of the meeting are not a complete record of all he said and all of the discussion between him and Dr. Driver on key subjects. He recalls they talked about including undergraduate students and work-study employees in addition to students paid scholarships from grants. This exchange is not in SFU's meeting notes . Both Ms Gravestock and Dr. Driver recall he raised the work-study employees when exploring with Dr. Sahota who the TSSU would represent.

[154] There was no agreement at this meeting. The TSSU delegates could not conclude an agreement. The conclusion of SFU's notes record:

> **Next Steps:**
>
> DS: We have to start processing for LRB on Saturday, so we need to reconvene tomorrow to work on an agreement.

JD: We need to come back to this conversation asap.

[155] Ms Gravestock testified she and her group left the meeting with a clear understanding graduate students with research assistantships paid scholarships and stipends were to be included. Dr. Driver had insight into the situation of this group which the TSSU organizing team considered the "most exploited" group of research assistants. Dr. Sahota was clear that if they were not included, there would be no agreement. Her note is: "sciences – stipends/scholarship RAs must be inc."

[156] Dr. Sahota testified the TSSU representatives met with the organizing team after the meeting. He announced to the team: "They surrendered. We dictated terms. They gave everything."

[157] The next morning, Dr. Sahota, Messrs. Yano and Hatty and Ms de Domenico met in her office. It was agreed there would be a joint communication when a final agreement was reached. Throughout the day, there were exchanges of draft agreements. By the end of the day, TSSU and SFU lawyers were reviewing a draft.

[158] Dr. Driver had no involvement in negotiating the terms of the agreement. Ms de Domenico was principal SFU negotiator. Mr. Hatty received drafts by email. His concern was to have enough time to prepare for collective bargaining for a group he did not know. TSSU was proposing collective bargaining begin March 15. He proposed May. The final agreement is May 1 with a possibility of beginning earlier. Clause 4 states:

> On the earlier of the completion of the process described in clause 2 above or May 1, 2020, SFU and TSSU will begin collective bargaining to establish the terms and conditions of employment that will be added to the existing collective agreement between SFU and the TSSU to govern the employment of Included Persons. Subsequent to the completion of the process described in clause 2, a list of Included Persons, their departments and email addresses shall be provided to TSSU.

[159] Clause 5 states: "To the extent the current terms and conditions of employment of an Included Person are within SFU's control, the parties agree the terms and conditions of employment and related matters shall remain as status quo for Included Persons." This was TSSU's "no backslide of working conditions," which generated competing, detailed proposals because SFU was not yet the employer of all Included Persons. Dr. Sahota and Ms Trasler resolved the difference by including the following in the implementation appendix.

> With regard to clause 5 of the Memorandum of Agreement of Voluntary Recognition, signed November 15th, 2019, the parties agree and acknowledge that SFU may have limitations of control over changes to the terms of conditions of Included Persons whilst they are in the employment of grant holders. However, SFU commits to exercising all reasonable measures as are available to maintain current conditions for Included Persons during the implementation of this Agreement.

[160] This approach was consistent with the good faith basis for the entire agreement in Clause 8: "At all times during the currency of this Agreement, SFU and TSSU must act in good faith, and will take such further steps as may be reasonable or necessary to give effect to this Agreement."

[161] On November 15, Dr. Sahota and Ms de Domenico met and signed the agreement.

[162] Three matters in the agreement warrant specific attention. The first is the timeline to produce data in the form of preliminary lists of "Included Persons, Excluded Persons, and the persons whose classification is yet to be determined" by 27 days (30 minus 3) after November 15, which is December 12, a date later than the timeline to produce lists for the Labour Relations Board if TSSU had applied as planned.

[163] SFU knew the data issues. It had the report from Sierra Systems Group and knew the steps Sierra had taken to generate the October 2017 classifications counts the RPI had been using. The RPI sponsors and project team had used some of the payroll system data to transition PDFs throughout 2019. Mr. Hatty knew anecdotally that there were anomalies. Sierra had identified over 500 non-research personnel, including Recreation Services Staff, who were miscoded. How did SFU intend to overcome the data issues and deliver lists on December 12?

[164] The second is the agreement that Research Assistants and Grant Employees include "individuals who receive compensation from grants as scholarship and/or stipend." This is the group which was specifically excluded from the scope of the RPI. Ms de Domenico knew this. Unlike the work-study student employees, this group required identification and classification of each as employee of a PI or SFU or genuine recipient of a pure scholarship like the merit-based award and scholarship recipients. This would be a significant task separate from or as an expansion of the RPI.

[165] The third is the acceleration of the RPI timeline for research personnel within its scope to May 1, 2020, which was 6.5 months after November 15. Dr. Driver might have wanted to incentivize the RPI to move faster. How did Ms de Domenico, a RPI sponsor from the inception, intend to both expand and fast-track the RPI process?

[166] On November 15, Dr. Sahota and Ms de Domenico discussed the agreed joint communication, which was issued November 19. This was an expression of the collaboration Ms de Domenico wanted to achieve with TSSU. At Dr. Sahota's suggestion, the communication included reference to ~1,500 not ~1,000 research assistants. The ~1,500 was the RPI count of ~1,000 plus ~500 of the out-of-scope scholarship group of ~620 less an estimate of the persons who would be "properly included in the bargaining unit of another union which is certified as a bargaining agent for employees of SFU."

[167] The communication, signed by Dr. O'Neil, Ms de Domenico, Ms Gravestock, Mr. Yano and Dr. Sahota, informed the SFU community about the existence of a voluntary recognition agreement endorsed by key senior leaders in SFU's research enterprise, including Dr. Jeff Derksen, Dean and Associate Provost, Graduate and Postdoctoral Studies, a co-sponsor of the RPI with Dr. O'Neil and Ms de Domenico. All three were members of the RPI Steering Committee, which included Alison Blair, Associate Vice-President, Finance, and Dr. Wade Parkhouse, Vice-Provost and Associate Vice-President, Academic. In addition, the joint communication was endorsed by Dr. Driver and Joy Johnson, Vice-President, Research and International.

[168] It states unequivocally "SFU and TSSU have mutually agreed to make all eligible research assistants employees of the University by May 2020." Dr. O'Neil and Ms de Domenico signed the communication for SFU.

[169] A message is that an additional group not included in the RPI would become SFU employees and "faculty principal investigators will have support to administer the employment of research assistants."

> Subject: Simon Fraser University and TSSU collaborate to recognize the important contributions of research assistants at SFU
>
> On November 15, 2019, Simon Fraser University and the Teaching Support Staff Union (TSSU) agreed to make research assistants employees of the University and voluntarily recognize them as members of TSSU. This agreement was made

> to recognize the valuable contributions and important role research assistants play in advancing SFU's research mission.
>
> It was signed by Sandi de Domenico, associate vice-president, human resources and Derek Sahota, TSSU's member advocate on behalf of the Research is Work organizing team, and was endorsed by Dugan O'Neil, associate vice-president, research; Jeff Derksen, dean and associate provost, graduate and postdoctoral studies; Joy Johnson, vice-president, research and international; and Jon Driver, vice-president academic and provost *pro tem*.
>
> SFU and TSSU have mutually agreed to make all eligible research assistants employees of the University by May 2020.
>
> This agreement means that the University and TSSU will work together on a timeline and a solution that considers the needs of research assistants and faculties, recognizing research assistants' right to unionize. Once research assistants become employees, SFU and TSSU will begin negotiating the terms and conditions of employment. As employees of the University, research assistants will be formally recognized as members of the SFU Community and faculty principal investigators will have support to administer the employment of research assistants.
>
> This collaboration between SFU and TSSU is a significant step forward in supporting the University's ability to continue to be competitive and expand innovative research and in recognizing the significant contributions research assistants make to the University. In 2018, SFU launched the Research Personnel Initiative to update the R50 Policies governing research assistants, research associates and postdoctoral fellows to make them employees. Over recent months, research assistants have been organizing to join TSSU to gain better representation for their work. The first phase of the Research Personnel Initiative to onboard eligible postdoctoral fellows (PDFs) as employees has allowed the University to pilot processes and learn more about what will be needed to support the transition [of] the research assistants.
>
> Faculties and their administration will be supported throughout this transition, as there is a high level of diversity and complexity in the different roles of research assistants. The first step for the project leaders will be to work with faculties to understand and define the work performed by approximately 1500 research assistants across SFU.
>
> At this time, detailed information will be limited until the first phase of identifying research assistants and their current terms and conditions is completed. TSSU will meet with the project leaders every 30 days during the transition and updates will be posted to the HR website in the coming weeks.
>
> Sincerely,

[170] Dr. O'Neil testified he probably saw a draft of this communication, but does not recall any discussion about: "The first step for the project leaders will be to work with faculties to understand and define the work performed by approximately 1500 research assistants across SFU."

[171] Ms de Domenico was the common SFU leader in the RPI and Voluntary Recognition Agreement. Ms Plican testified that in November 2019, she was aware voluntary recognition negotiations were happening and she offered Ms de Domenico

her knowledge from the RPI project because she foresaw the negotiations might impact the RPI. Ms de Domenico declined saying she had it covered. Ms Plican was not consulted during or immediately after the negotiations.

[172] Ms Plican testified she was not tasked to implement the agreement. That was assigned to Ms Trasler, who Mr. Hatty testified was the natural lead because of her role in dealing with TSSU.

[173] Ms Plican testified she expressed concerns about the May 1 timeline to Ms de Domenico and was directed to do the best she could. Providing information to support collective bargaining became part of the scope of the RPI. Meeting the Voluntary Recognition Agreement timelines and providing lists to TSSU did not.

[174] No steps were taken to accelerate the RPI. TSSU was not included as a RPI stakeholder. No steps were taken to expand its scope to ~1,500 research assistants from the original ~1,000.

[175] Ms Plican testified she discussed the inclusion of "individuals who receive compensation from grants as scholarship and/or stipend" with Ms de Domenico who was clear this was included to capture individuals who were not receiving a true scholarship and would be classified as employees. The RPI did not make inquiries or undertake a process to determine who was misclassified. It hoped someone in Payroll Services would.

[176] Ms Plican testified the RPI recognized there would be "a lot of resistance" from faculty already generally resistant to the RPI if there was a change to scholarship payments from research grants. It was not within the RPI mandate to make any change in the scholarship group.

[177] Apparently, the RPI did not share Dr. Driver and Dr. Sahota's view that some or most of these individuals are or could be in an employment relationship. Dr. O'Neil testified research assistantship scholarship payments for research partially related to the student's degree and partially related to the PI's grant funded research project is fundamental to the way in which future researchers are trained. Supporting educational goals through SFU scholarships, tri-council scholarships and research assistantships

paid from grant funding have been treated in the same manner. The RPI was not going to change this.

[178] Dr. Driver testified he thought that if SFU took an inclusive approach, the scholarship "stickling point" could be resolved through meetings with TSSU and collective bargaining. Some, but very few, graduate students are given a scholarship paid from grant funds for independent research or personal academic work. Some are employees and should not be given a scholarship to skirt CRA rules because the student wants to. The work each does has to be examined. He agreed with Dr. Sahota that if there were any classification loopholes faculty members would exploit them.

[179] Dr. Driver testified things progressed much more slowly than he thought they would have. He expected collective bargaining could be concluded within a year. His time during the next year was taken with budgets, Covid and collective bargaining with the Faculty Association over a difficult pension issue.

10. SFU Did Not Perform Commitments (December 2019 - April 2020)

[180] From November 15, 2019 to May 1, 2020, there were four Voluntary Recognition Agreement meetings. SFU did not prepare for itself any lists of positions reasonably characterized as positions held by Included Persons and those properly included in another union's bargaining unit. It did not provide TSSU any preliminary list of Included Persons, Excluded Persons and those whose classification is to be determined.

[181] At the four meetings, SFU raised concerns about including certain groups. TSSU could not, or would not, help SFU resolve its concerns because it meant excluding some Research Assistants and Grant Employees it believed had been agreed to be included. TSSU was willing to explore the appropriateness of including some persons coded in the payroll system as Research Assistant, about which it was unaware and had not expressly sought to include in either the "Research is Work" campaign or the Voluntary Recognition Agreement.

[182] Why were individuals coded in the payroll system as Research Assistants when they were not? The September 13, 2021 Steering Committee meeting minutes report:

> The team has been working to identify all RAs in all funds and then determine if they are correctly classified as RAs. The TSSU suggested that RAs are in all funds, so the project team wanted to be comprehensive in its analysis.

> The analysis identified individuals who are not covered under policy and do not fit into an existing employee group. They were hired using the PAF because departments may have done so historically, in order to bypass certain processes and/or to give people access to SFU email, financial systems, etc.

[183] No research assistant employed by a PI was transitioned to SFU employment by May 1, 2020. Collective bargaining did not begin on or before May 1, 2020.

A. SFU Treats First Process Meeting as Meet and Greet (December 13, 2019)

[184] By agreement, the first process meeting was scheduled for Friday, December 13. SFU was to provide a preliminary list to TSSU no later than December 10. It did not.

[185] Instead, someone realised that, when it made list disclosure commitments in the Voluntary Recognition Agreement, SFU had not considered its obligations under the *Freedom of Information and Personal Privacy Act* (FIPPA) and any limitations on disclosure to TSSU of personal information about persons not employed by SFU or not covered by a collective agreement with TSSU.

[186] On December 10, Ms Trasler emailed the SFU Information and Privacy Archivist, with copies to Mr. Hatty, Ms Plican and Ms Thirlwell, asking about disclosing the agreed lists.

> We have recently signed an agreement with TSSU to voluntarily recognize research assistants as employees of the University and bargain them into TSSU. The agreement is attached. The process of identifying the individuals, who are currently employed by their Principal Investigators (grant holders), will be undertaken with TSSU. We would like some guidance on the limitations on sharing information with TSSU, bearing in mind that these individuals are currently not our employees.
>
> The main issue here is that our payroll system has many individuals coded as RAs as a convenience, but many of them will not be eligible to be included in this transition. We may need to discuss with TSSU if these individuals fit into the scope.

[187] After a conference call with the email recipients, SFU's Information and Privacy Archivist sent them a followed-up email on the evening of December 12. It includes:

> The sections of FIPPA that we discussed are:
>
> s. 33.1(l)(d), which permits the disclosure of personal information if the disclosure is in accordance with a treaty, arrangement, or written agreement that authorizes or requires the disclosure and is made under an enactment of BC or Canada. However, we determined that the Memorandum of Agreement with TSSU isn't made under the Labour Relations Code.
>
> s. 22(4)(e), which states that it is not an unreasonable invasion of a third-party's privacy to disclose their position, functions or remuneration as an employee of a public body, in conjunction with s. 33.1(l)(a.l), permit the University to disclose

> information about an individual's position, functions or remuneration. I couldn't find the OIPC Order I mentioned, so this section of FIPPA applies only to the RAs once they have become employees of the University in 2020.
>
> s. 22(4)(j), also in conjunction with s. 33.1(l)(a. 1), permits the disclosure, in respect of a discretionary benefit of a financial nature granted to an individual by a public body, of the name of the third party to whom the benefit applies, what the benefit grants to the third party, and the date on which the benefit was granted. This is the section the University could rely on for the disclosure [of] scholarship information.

[188] There is no evidence SFU's conclusion that the Voluntary Recognition Agreement was not made under the *Labour Relations Code* was communicated to TSSU. SFU did not rely on the FIPPA sections identified to disclose any scholarship information to TSSU.

[189] The next day, Ms Thirlwell, Ms Plican and Ms Trasler met with five TSSU representatives: Dr. Sahota, Ms Gravestock, Chief Steward Lilian Deeb and members Brad Kleinstuber and Steven Brownlee. TSSU expected it would be given a preliminary list at the meeting. SFU had no list. It would be some time before it could produce a partial list.

[190] Ms Gravestock testified this was the first mention of FIPPA and there was shock that no list was provided.

[191] SFU told TSSU that information about non-employees paid through Payroll Services could not be shared. Dr. Sahota asked about SFU work-study student employees. Ms Plican asked who they are. Dr. Sahota explained and suggested there were other research assistants who were SFU employees, such as those in The Institute for the Study of Teaching and Learning in the Disciplines and Student Services. There should be no FIPPA barrier to sharing personal information about SFU employees now represented by TSSU.

[192] Dr. Sahota suggested a list of existing SFU employees could be produced by the following Wednesday. The conclusion of Ms Gravestock's notes state:

> Derek [Dr. Sahota]: We want to reiterate, the Memorandum is clear that data has to be brought to the meeting. We absolutely need to get this process going by next week. You can let us know next week on Monday what you can provide us but you need to provide us data by next week, on Wednesday, otherwise we're not going to get to bargaining on May 1st.
>
> Jools [Ms Trasler]: There is a slightly different understanding of what this data is coming out of this meeting. We need to clarify what we will be providing. We have duties of protection. We will be in touch on Monday and what we can achieve.

> What we are certain, we weren't expecting that this meeting would be to provide the data. We thought it was a meet and greet.

B. No Preliminary List and Meeting the Following Week (December 17-19, 2019)

[193] On Tuesday, December 17, Ms Trasler emailed Dr. Sahota and Ms Gravestock with copies to Ms de Domenico, Mr. Hatty, Ms Plican and Ms Thirlwell.

> Hi Derek
>
> Thank you to you and your team for meeting with us on Friday. We understand your disappointment that we were not able to provide data for this first meeting, but as we explained, the Research Personnel Initiative is a major project for our team. We would be remiss if we did not spend some time identifying the best way to provide TSSU with appropriate, relevant data within the limitations placed on us by legislation that protects the personal information we hold.
>
> You have suggested Work Study and University Research Assistants as suitable groups to start our process of identifying and categorizing Included Persons as per the definition in the Memorandum signed on November 15th 2019. In addition you have offered to send us a list of other work areas where we might start to identify Included Persons, which is very helpful in the development of our process.
>
> The next phase of our project is to identify research personnel who are more appropriately included as employees of SFU, and we intend to identify Research Assistants by the following indicators: the nature of their work is research directly related to the grant they are employed under; and the grant they are employed under is held by a principal investigator who is employed by SFU.
>
> According to the terms of the Memorandum, 3 days in advance of the 30-day meeting we will provide the Union with "the latest preliminary list of Included Persons, Excluded Persons and the persons whose classification is yet to be determined." At this early stage, we are considering those whom we identify as Research Assistants per the indicators above, as the potential list of Included Persons. At our meeting we heard that you feel there is urgency to identify and contact those whom we both agree are "Included Persons" as per the definition in the Memorandum signed on November 15th 2019, in order to canvas individuals for proposals in preparation for bargaining in May 2020. After seeking advice from the Information and Privacy Office, we have concerns about releasing contact information for individuals who are not, at this time, employees of the University, and we will need to seek further advice to ensure that our disclosure will not breach our duty of protection of personal information. While we are unable to share contact information, we suggest that, to inform the discussion about appropriate categorization of the individuals, we share: the number of employees in the identified group; details of the type of work being performed; and terms of compensation including length of contract.
>
> Over the coming weeks we will be bringing more resources into our team and going out into various work areas to speak with PIs and identify our first group of potential "Included Persons". Where the employment criteria match our indicators, we may be able to gain the individuals' permission to share contact information with TSSU and deliver this information in advance of our next meeting.
>
> Kind regards

[194] Chief Stewards Ms Gravestock and Ms Deeb replied within hours with the first TSSU allegation of SFU bad faith. They copied Ms de Domenico, Mr. Hatty, Ms Thirlwell and Ms Plican.

> It is completely unacceptable that SFU has already failed to live up to our Memorandum of Agreement of Voluntary Recognition within a month of it being signed. The Agreement states "At all times during the currency of this Agreement, SFU and TSSU must act in good faith, and will take such further steps as may be reasonable or necessary to give effect to this Agreement" (MOU of Voluntary Recognition, Point 8).
>
> It is worth noting that, had TSSU filed for certification at the Labour Board, the Employer would have been obligated to provide us a list of individuals, regardless of whether or not the Employer considers them employees, within days. The Employer has had nearly two months since we went public with our organizing drive and a month since we signed the MOU and still does not even have a preliminary list to provide TSSU.
>
> This signals to us that those who have been tasked with implementing this Agreement are not yet acting in good faith. Adding insult to injury, we have just been invited to a meeting that takes place more than 30 days after our last meeting; this is another instance of the Employer not meeting the terms of the Agreement that was signed. Particularly in light of current events, we need to meet much earlier in January.
>
> The Employer's most egregious violation so far has been to come to the first meeting (on Friday, Dec. 13) stipulated in Point 2 of the Agreement completely unprepared, with not even a single person to include in the preliminary list of Included, Excluded Persons or to be classified persons, and indicating that the Employer never had the intention of providing a list for said meeting. At the meeting, we were extremely concerned that the employer was proceeding in bad faith. For example, Elsa laughed out loud when we told the Employer that at least a preliminary list of names needed to be provided to us by Wednesday, given the fact that a violation of the Agreement had already taken place.
>
> To remedy the situation, we suggested that the Employer provide a preliminary list of names and contact information that would be easily discernible and were not subject to any concerns, valid or not, regarding FIPPA by Wednesday, Dec. 18th. This would be a way to demonstrate the Employer's return to acting in good faith regarding the implementation of the Agreement.
>
> Immediately after the meeting, we sent the Employer a list of suggested starting points below, which left sufficient time to make a preliminary list by Wednesday. Those starting points are:
>
> **1) Work-study positions**
>
> **2) University Research Assistants**
>
> **3) Likely excluded folks in Student Services**
>
> **4) SFU Funded RA positions. From recent public postings we are aware of positions which exist** in: http://www.sfu.ca/vpresearch/centres.html
>
> VP Academic
>
> Big Data Initiative
>
> Institute for the Study of Teaching and Learning in the Disciplines (ISTLD)
>
> Graduate & Postdoctoral Studies Office

Carnegie Community Engagement Classification Office

5) SFU Centres that directly report to VPR office under Policy R40.01:

From the above, what will you be able to provide by Wednesday (tomorrow)? Individuals in the first three categories above should be readily available to the employer, given the clear processes and university hierarchies that govern their employment.

We do not agree to your suggestion of sharing: the number of employees in the identified group, details of the type of work being performed, and terms of compensation including length of contract. The Agreement specifically states that the Employer will provide us with a "preliminary list of [...] persons" (Point 2). We view your suggestion as attempting to re-write the terms of the Agreement.

We do not agree with your assessment of the privacy concerns, and it is necessary to point out that we are also bound by privacy considerations under PIPA. In order to proceed in good faith as agreed in Point 8 of the MOU, the Employer must make all reasonable efforts to fulfill the Agreement we signed. In order to meet this requirement, the Employer could readily use SFU's web survey tool to ask individuals from the payroll data, all of whom should have SFU IDs, if they consent to the Employer disclosing their contact information to TSSU for the purposes of implementing the Agreement. This could yield results within 24 hours.

Please advise.

Katie and Lillian

[195] At Mr. Hatty's suggestion the next day, Dr. Sahota and Ms Gravestock met with him and Ms Trasler on Thursday, December 19.

[196] This was the beginning of a pattern. The RPI stuck to its course with no implementation of the Voluntary Recognition Agreement. TSSU made suggestions that were not embraced by SFU and in frustration made accusations of bad faith and sought assistance from persons outside the RPI project team. Mr. Hatty intervenes to try to ease TSSU's frustration, to broker some solution and to maintain cordial and collaborative relations with TSSU.

[197] At the Thursday meeting, Ms Trasler explained she had challenges working with the separate RPI project. She had her laptop in the meeting with access to payroll data. She said had been examining the payroll data and had identified approximately 1,600 persons after duplicate appointments were removed. Dr. Sahota was willing to exclude the recreation staff.

[198] It was suggested SFU would seek a release from each of its employees before giving personal information to TSSU. Until releases were obtained, SFU would seek to prepare a list of "positions" not "persons." First there were people to speak to about a

request for releases. TSSU was focused on conducting an outreach to prepare for collective bargaining in May. SFU did not seek releases until March 11.

[199] At the same time, TSSU was not willing to provide SFU with a partial list of Research Assistants and Grant Employees based on its membership cards.

[200] It was anticipated SFU would provide some form of list in January. None was.

C. Risk: Scholarships Paid as Non-Taxable Income (December 2019)

[201] The Voluntary Recognition Agreement put a spotlight on payments to "individuals who receive compensation from grants as scholarship and/or stipend."

[202] The RPI was not addressing the circumstances of graduate students paid a scholarship or whether they were included in the 2018 review conclusion that "it is probable that SFU would be considered the employer of grant-funded research personnel, and should there be an investigation or ruling, that outcome would supersede SFU policy."[38]

[203] Payroll Services provides biweekly pay for approximately 7,000 using a legacy payroll system and software not designed for payment of scholarships. Its role is processing, not policy making. Over the years, it paid scholarships based on information from departments about who is to be paid, the amount to be paid and the attributed hours from which the system derives an hourly rate. Payroll Services does not know the purpose of the scholarship, whether it is top-up or other payment or the faculty protocols for making guaranteed payments to graduate students.

[204] As the 2018 guideline for completing the PAF stated, Payroll Services did not change individual employment income payments to scholarship payments. "Caution: Payroll cannot make retroactive corrections from employment income to scholarship income, so please ensure correct box is checked."

[205] There had been an increasing number of requests for Payroll Services to retroactively change scholarship income to employment income so students could qualify for Employment Insurance benefits. The requests were disruptive for payroll

[38] Research Personnel Employment Practices Review – Confidential Draft, May 31, 2018, p. 8

staff and orderly workflow processes. No change was made without agreement of the hiring authority. In a few instances, the requested change was made.

[206] There was a sufficient number of these requests to raise concerns about whether SFU was being fully compliant with the *Income Tax Act* and *Employment Insurance Act*. There had not been a Canada Revenue Agency payroll audit for some time. Perhaps there would be one in the near future.

[207] Other SFU units pay scholarships from other funds outside payroll. Perhaps they should also pay scholarships from research grants. If they did, then employment payments would remain with Payroll Services. Was SFU at risk for not making any deductions and remittances for scholarship payments processed by Payroll Services? What is the test to distinguish employment and scholarship payments?

[208] These questions and risks were on the mind of Mary Aylesworth, Director, Financial Operations, responsible for Payroll Services who also wanted to automate more workflow. With the RPI and Voluntary Recognition Agreement there were to be some significant changes impacting Payroll Services.

[209] On December 13, 2019, Ms Aylesworth requested an opinion from SFU's tax advisor on its practice of not withholding income tax from scholarship payments to students from research grant funds. She sent him the 2013 FAQ document on scholarship and employment income.

> I'm seeking your advice with our rather complex payroll processing of graduate students who are hired by researchers and treated as non-employees by SFU. We have approximately 4500 individuals in 4-5 categories who are given employment contracts on an academic term basis and brought onto the payroll using the attached appointment form. Some individuals may have up to three different appointments in a single term. This means we are adding and terminating thousands of students each term throughout the year. The majority of these individuals will be transitioned to become SFU employees in May 2020, but the details are still in development although we know they will be employees under a collective agreement.
>
> Currently:
>
> These appointments are generally handled by the faculty or department administrators on behalf of the researcher. You will note the form allows the hiring department to indicate one of the employment categories, or to select scholarship. They cannot chose both for the same appointment, but a student may have one appointment that is employment and another appointment that is considered scholarship. For these groups, their employment income and scholarship funds are both processed and paid by Payroll. Income tax is withheld from the employment income, and scholarship funds are treated as non-taxable.

> I am concerned about the scholarship funds paid to these students by the department or by the researcher's grant. Within the department, these are described as *stipends*, or a *top-up* of their salary for the term. I am concerned by the mixed terminology and practices that may put us at risk by treating these payments as non-taxable. I've also attached a document the departments use to determine scholarship vs employment. And, this is a link to the policy departments reference: [link to] SFU Policy 50.02 Employment of Personnel Funded from Research.
>
> I've noted the following from CRA:
>
> > 3.8 Scholarships and bursaries usually apply to education at a post-secondary level or beyond, such as at a university, college, technical institute or other educational institution. However, there are circumstances where scholarships or bursaries are awarded for education below the post-secondary school level. Scholarships and bursaries normally assist the student in proceeding towards a degree, diploma, or other certificate of graduation. Scholarships and bursaries may apply to any field of study, including an academic discipline (such as the arts or sciences), a professional program (such as law or medicine), a trade (such as plumbing or carpentry) or skill (such as certified first aid and truck driver training courses). Normally, a student is not expected to do specific work for the payer in exchange for a scholarship or bursary.
>
> My questions:
>
> - Can an individual be both a student receiving a scholarship from the university and an employee of the university?
> - How does CRA differentiate between scholarship income vs employment income when the scholarship is paid by the employer?
> - Do you see a problem?

[210] The December 15 reply from Barry F. Travers, FCPA, FCA, Partner, National Tax KPMG Global and Canadian Leader – Infrastructure, Government and Healthcare Tax (IGH Tax) begins with critical comment on the 2013 document.

> First of all I would suggest that the commentary contained In the Grad Studies Scholarship v Employment Income reference material dated December 2013 is seriously out of date and quite frankly incorrect. If this is posted on a university website that is available to departments I would take this off the site immediately since if the CRA conducted a payroll audit and saw this as reference material it would lead them down a path to an assessment.

[211] Under the *Income Tax Act*, many sources of income are included as income for a taxpayer. Under section 56(1)(n), some scholarship, fellowship and bursary amounts are to be included.

> Scholarships, bursaries, etc.
>
> (n) the amount, if any, by which
>
> (i) the total of all amounts (other than amounts described in paragraph 56(1)(q), amounts received in the course of business, and amounts received in respect of, in the course of or by virtue of an office or employment) received by the

> taxpayer in the year, each of which is an amount received by the taxpayer as or on account of a scholarship, fellowship or bursary, or a prize for achievement in a field of endeavour ordinarily carried on by the taxpayer, other than a prescribed prize,
>
> exceeds
>
> (ii) the taxpayer's scholarship exemption for the year computed under subsection (3);

[212] The subsection 56(3) exemption has its complexities. For example, in 1972 in *Canada v. Amyot*, a judgment which appears later in the discourse at SFU about scholarship and employment income, a PhD student received money from the Canada Council. Was it a "scholarship, fellowship or bursary" for which the amount above $500 was taxable or a "research grant" from which expenses could be deducted to reduce the taxable amount? The student claimed it was a research grant.

[213] The Court agreed with the Government of Canada that the money was a "scholarship, fellowship or bursary."

> In order to bring the receipts within paragraph 56(1)(o), the purpose of the grant must have been to enable the defendant to carry on that research. The key question is the purpose of the payments he received from the Canada Council and not the means adopted, by necessity or choice, to achieve that purpose. If the purpose was the research itself, which is to say, in most cases, not research as an activity for its own sake but for the sake of the novel proposition, anticipated or otherwise, that might ensue upon it, then the grant was made for that purpose and fell within paragraph 56(1)(o). That would be so even if the defendant's advancement in the academic world was an active, but secondary, objective or an inevitable, but incidental, benefit. On the other hand, if the purpose of the grant was to assist the defendant to advance his academic career and the research undertaken was but a means, however essential, to carry out that purpose then the grant was a bursary, scholarship or fellowship and fell within paragraph 56(1)(n).
>
> Notwithstanding the undisputed quality of the research in this case and the time devoted to it in 1972 to the exclusion of other activities, the object of the grant was not the defendant's contribution to the general body of knowledge on the Italian Communist Party; it was to assist the defendant toward his doctorate. Having regard to the defendant's level of academic attainment in 1972, the grant was a fellowship and the amounts received by him on its account fell within paragraph 56(1)(n) of the Act.[39]

[214] On the question of what constitutes research, in 2004, the Federal Court of Appeal agreed with a taxpayer covered by a collective agreement that certain sums received from his employer, Université Laval, while on sabbatical were research grants under the *Income Tax Act* and entitled to more favourable treatment for the taxpayer

[39] *Canada v. Amyot*, [1977] 1 F.C. 43

than a taxable employment benefit. The Court determined research and similar work for the *Income Tax Act* is "a set of scientific, literary and artistic works and activities having as its purpose the discovery and development of knowledge."[40]

[215] Before considering whether income is a "scholarship, fellowship or bursary" or a "research grant" with their differing tax treatment, the payment must not be employment income, which is treated differently than either.

[216] Mr. Travers' advice to Ms Aylesworth was specific. The vast majority of the scholarship/stipend payments are payments in an employment arrangement which require income tax source deductions. They are not a gift "for achievement that requires no performance of duties."

> I would also suggest that if ANY duties or responsibilities are required to be performed by the recipient then the payment cannot be viewed as a scholarship or bursary. As you have pointed out in your message a scholarship by definition is an award for achievement that requires no performance of duties. If someone is performing any duty then the payment cannot be a scholarship.
>
> There may be situations where the payment may be in respect of a research grant or to a research assistant that could qualify as such if the person is in fact the primary researcher. However, in the vast majority of the cases where a researcher (professor) hires a research assistant this would be viewed as an employment arrangement that requires a T4 to be issued with source withholdings.
>
> I share your concern on all fronts!!

[217] There was a risk in not separating payment processes for scholarships from the employment payroll process. Ms Aylesworth shared this opinion with Ms Blair to whom she reports and who was a member of the RPI Steering Committee.

[218] On December 16, Ms Blair forwarded the opinion to Ms de Domenico, Drs. Driver, O'Neill and Parkhouse and Martin Pochurko, Vice-President, Finance and Administration. Dr. Parkhouse replied promptly:

> Hi Alison,
>
> I agree that we should clean up our processes but please note that many faculty provide funding to their students from research grants with no expectation of duties to be performed. It is merely financial support for them to pursue their degree and in general requires that the student be eligible for receiving an award equivalent to a scholarship (academic merit). They are funded exactly the same as a graduate fellowship. We must ensure that we adapt procedures that would allow for this to be allocated and treated as a scholarship.
>
> There are ways that this can be run through Graduate and Postdoctoral Studies and meet the guidelines as outlined.

---

[40] *Ghail v. Canada*, [2004] F.C.J. No. 265, ¶ 44

> PS - Barry kept mentioning PDFs and the question Mary posed is directly related to graduate students. It is actually quite common for students to receive employment income and scholarship income in the same semester contrary to what he says as an individual may be TAing but also receiving a graduate fellowship in the same semester.

[219] In January 2020, Ms Aylesworth began discussions about how to revise the PAF.

D. No Preliminary List (January 14, 2020)

[220] Dr. Sahota and Ms Gravestock met with Ms Trasler and Ms Thirlwell on January 14, 2020.

[221] No list was provided before or at the meeting. Ms Thirlwell talked about getting a project team in place and problems the RPI was encountering. Ms Trasler spoke about FIPPA and that the Voluntary Recognition Agreement was signed without knowledge of all the dirty data problems. Nothing was going to happen quickly. What would happen if SFU could not meet the May 1 date?

[222] Dr. Sahota suggested possible work arounds and how to make some progress. The expectation was that someone would contact TSSU the next day. No one did.

E. SFU Defines Scholarship vs. Employment Income (February 2020)

[223] On January 27, Ms Aylesworth emailed Deena Corburn, Director, Graduate and Postdoctoral Studies, with a copy to Ms Plican and others about the tax opinion she had received. She wrote, in part:

> I was forwarded a copy of the attached Grad Studies Scholarship v Employment document that has been used in conjunction with the PAF. Unfortunately, this document is seriously out of date. I have not been able to find this on the SFU website, so I hope this indicates that it has already been withdrawn. Can you confirm this?
>
> I understand that PIs have occasionally issued a PAF to provide a "top-up" or "stipend" to RAs and PDFs, and that they do this by checking the Scholarship Box on the PAF. This is not permitted under CRA rules and would have to be treated as income with the standard withholdings and tax filing obligations. If there are any duties or responsibilities to be performed by the recipient, then the payment cannot be a scholarship. It would be very rare for an individual to receive both employment and scholarship income from the same employer.

[224] On the same day, Ms Plican asked Ms Aylesworth for a definition of scholarship the RPI project team could use in discussions with PIs because "TSSU has suggested that some of the 'scholarships' are actually employment income and believe these roles should be part of TSSU …." Ms Aylesworth replied February 11, in part:

> A scholarship or bursary is essentially a "gift" for achievement that requires no performance of duties. Therefore, the practice of adding a "top-up" or "stipend" to an individual's pay, and calling it a non-taxable scholarship, is wrong. This is additional income and must be reported as taxable income.
>
> If the RA is conducting their own research as a subset of the PI's research grant, this is another matter entirely, but it does not automatically qualify as a scholarship. "There may be situations where the payment may be in respect of a research grant, or to a research assistant that could qualify as such if the person is in fact the primary researcher. However, in the vast majority of the cases where a researcher hires a research assistant, this would be viewed as an employment arrangement that requires a T4 to be issued with source withholdings." (KPMG)
>
> If a Researcher wishes to award a scholarship, this must be uncoupled from the employment relationship and should not be processed as part of the individual's payroll. Also, bear in mind that scholarships are not necessarily 100% non-taxable. If it is truly a scholarship, I believe this should be managed and awarded via Student Services.

[225] Ms Plican emailed Ms Aylesworth February 19 that until something more comprehensive was available, perhaps with a checklist to distinguish between scholarship and employment income, the RPI project team would use a definition from *Canada v. Amyot* and ask departments if the scholarship and stipend payments being made to research assistants were "a sum of money or its equivalent offered (as by an educational institution, a public agency, or a private organization or foundation) to enable a student to pursue his studies at a school, college or university."[41]

[226] There was no consultation with TSSU about the choice of this 1960's definition focused, as the outdated 2013 FAQs were, on the purpose or motivations for the research assistantship not whether the payment is an "award for achievement that requires no performance of duties." It does not recognize the tax opinion "If someone is performing any duty then the payment cannot be a scholarship."

[227] The use of this definition ignores that employment, like a teaching assistantship, might be offered to enable a student to pursue studies at SFU. It gives no guidance to faculty to make an informed judgment about whether a payment is for employment or a scholarship. It gives no guidance or reason to make any change from traditional practice.

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[41] This definition of scholarship quoted in *Canada v. Amyot*, [1977] 1 F.C. 43, ¶ 11 was from Webster's Third New International Dictionary published in 1961 (see footnote 3 and ¶ 10 in the judgment).

[228] This definition did not address that the voluntary recognition is for those persons who hold positions as research assistants or "grant employees" defined in the Employment of Personnel Funded from Research Policy (R50.02): "A 'grant employee' shall refer to any person who is employed by a grant holder to provide research services, and who is paid either wholly or in part from grant funds."

[229] There is no evidence the use of this definition brought any originally excluded research personnel paid scholarship income within the scope of the RPI for transition to employment by SFU.

F. RPI Project Team Defines Research Assistant (February 2020)

[230] After Ms Thirlwell took leave of absence in January, Ms Plican kept the project work going until Mr. Tucker was engaged as RPI Project Manager. At the time, the RPI did not have a detailed or comprehensive project plan, only high-level objectives. A statement of project scope was drafted in March 2020 after the PDFs had been transitioned to SFU employment.

[231] In February, Ms Plican was working on a definition of research assistant for the purposes of the Voluntary Recognition Agreement to be used by the RPI project team when it validated data and gathered information from departments. After she consulted Ms de Domenico, who consulted Dr. O'Neil, the proposed working definition was:

- An individual performing research related work (lab and/or investigative work) on a grant or contract held by a grant holder (University employee) where those grant funds are administered through SFU.
- Income and benefits paid to the individual are derived from grants or contracts held by a University employee (typically a SFU faculty member).
- For greater clarity, the salary and benefits are paid out of a fund 13, 31, 32, 35, 36, 37 or 38 account.
- The work will not be primarily administrative in nature (including but not limited to managing the research funds, facilities or personnel).
- Excludes employees of separate legal entities hosted by SFU for which SFU only provides payroll services, e.g., the Kids Brain Health Network
- Excludes postdoctoral fellows and other senior (post-PhD) research scientists (e.g., University Research Associates).

[232] On February 13, Mr. Tucker decided this definition did not require formal approval by the RPI project sponsors. It could be filed under Decisions in the project RAID (Risks, Actions, Issues, Decisions) log.

[233] TSSU was not included in the consultation on this definition of research assistant, which did not consider all the terms of the Voluntary Recognition Agreement. It does not include work-study employees or "holders of NSERC USRA and equivalent funded by SFU." It excludes persons whose work is primarily administrative in nature, which TSSU might or might not agree are Excluded Persons "properly included in the bargaining unit of another union which is certified as a bargaining agent for employees of SFU."

[234] Ms Plican testified a copy of this starting point for a definition was given to Ms Trasler. She understood Ms Trasler had asked the TSSU for a definition on December 19 and none had been received.

G. Third Process Meeting Cancelled (February 2020)

[235] While the RPI was adopting definitions for scholarship and research assistant to be used for both the RPI and Voluntary Recognition Agreement without consulting TSSU, no one was preparing a preliminary list for the February meeting to be held 30 days after the January 14 meeting. No list was provided to the TSSU. The meeting was cancelled. Dr. Sahota recalls the cancellation was because someone on the RPI project team was ill.

H. SFU Wants to Exclude Work-Study Employees (March 3, 2020)

[236] Dr. Sahota and TSSU member Alicia Massie met with Ms Trasler on March 4. SFU did not provide a preliminary list before or at the meeting. No one from the RPI project team attended.

[237] SFU was questioning whether work-study employees are Included Persons. Dr. Sahota was clear there was no ambiguity about either their research work, which was 60% research and a mix of other duties, their employment status or their inclusion. He had discussed their inclusion with Dr. Driver and Ms de Domenico before the Voluntary Recognition Agreement was signed.

[238] SFU would not provide TSSU with personal information of this group of SFU employees and had no other information to share with TSSU.

[239] While it was not discussed, there was no issue work-study employees would have voted had TSSU proceeded with its application to the Labour Relations Board.

SFU might have argued some or all of them were not research assistants or grant employees, but could not argue they were not SFU employees.

[240] Perhaps SFU would have argued at the Labour Relations Board that these employees should not be included in the TSSU bargaining unit for some other reason, such as the financial need criteria on which they were selected or the source of the funds used to pay them. For TSSU financial need was a reason for inclusion with access to collective agreement and union benefits like assistance for childcare costs.

[241] SFU was concerned about a TSSU email communication to research assistants in the Department of Molecular Biology and Biochemistry (MBB). Dr. Sahota said they were union members with access to union benefits.

I. TSSU Meets with Dr. Driver and Ms de Domenico (March 10, 2020)

[242] Ms Gravestock testified the March 4 meeting was a red flag – no one from the RPI attended and the agreed inclusion of work study employees was being questioned. On March 6, she and Dr. Sahota emailed Dr. Driver and Ms de Domenico with a copy to Mr. Hatty about their perception of what was not happening and seeking urgent assistance in implementing the Voluntary Recognition Agreement.

> Dear Sandi and Jon,
>
> Nearly four months ago we sat down to discuss quite a monumental change in the treatment of Research Employees at SFU and signed an agreement to make it happen. Since then, progress has not proceeded as per the terms of the agreement. Within a month of the agreement being signed, SFU had already failed to live up to the agreement, and SFU continues to violate the agreement. And while we have been assured that the project team continues work on producing a list of preliminary RAs, it is now March and we still have not received even a single person to include in the preliminary list of Included, Excluded Persons or to be classified persons. Further, simple acts of good faith, such as agreeing to send an email to all PIs back in December, still have not been followed through on by the project team.
>
> While there are some folks who seem to be committed to implementing the agreement and reaching the agreed May 1, 2020 start date for bargaining, our view is that others at SFU are actively trying to obstruct the process and prevent us from getting to the bargaining table. Our ongoing conversations, including one this week where we were informed that the University's position is that Work-Study RAs should not be included in the voluntary recognition agreement – when the agreement specifically names them as included – are not indicative of the project team acting in good faith.
>
> We need an urgent appointment with the two of you to discuss remedying this situation; we can rearrange our schedules to meet next Wednesday March 11th

> between 9:00am-5:00pm or Thursday March 12th, 9:00am-1:00pm. If you cannot make those times, please suggest others and we will make arrangements.

[243] On March 9, Ms de Domenico, Ms Plican and Ms Trasler met. To date, the RPI project team had identified only 27 MBB research assistants. A draft email to go to these persons had been prepared.

[244] The meeting notes report Ms Trasler's view that:

> TSSU needs to speak with potential RAs to prepare for bargaining. We need terms and conditions in order to prepare for bargaining. If we have to tell them the May 1st date has changed, we have failed on all counts with the MOU. We need to go out to a larger group with potentially unclean data with disclaimers.

[245] Ms de Domenico wanted to move more quickly than the RPI project team was planning. Ms Plican was committed to having the PIs included in the process and not deviating from the RPI project team's methodical approach. The minutes conclude:

> EP [Ms Plican]: Need to send out VPA email first, but the 27 are in MBB, so EP will contact Christine B and let her see the email before we send it out. She should warn PIs they are getting the email.
>
> JT [Ms Trasler]: Clean up email and share with EP, ED [Erin Driscoll, Change Management and Communications Lead], SDD [Ms de Domenico]. Send out email to 27 tomorrow. Update TSSU re 27. Call Manoj [Director, Financial Aid and Awards] re Work Study Fund.

[246] On March 9, an email on behalf of Doctors Johnson, Driver, O'Neil and Derksen and Ms de Domenico was sent to all Vice-Presidents, deans and associate deans of research for further distribution to the SFU community. The message was that transition of PDFs to SFU employees was nearing completion. To do the same for research assistants, the project team was going to be:

- Gathering data: reviewing current RA roles to gain an understanding of the work they're doing
- Building role profiles: creating profiles (categories) for the types of work RAs do
- Creating an onboarding plan: defining a process for the intake of RAs as employees
- Onboarding: transitioning those categorized as RAs to employee status
- Developing HR practices: updating policies and creating processes that align to SFU values and legislated requirements
- Working with TSSU: providing employee names once they're onboarded, to respect the RAs' right to unionize

[247] There was no mention of graduate students with research assistantships paid a scholarship or stipend.

[248] On the morning of March 10, Ms Corburn emailed Ms Plican a message she sent to Dr. Derksen on February 24 about scholarship and employment income. In that email she wrote:

> Here are some links that have led to our current understanding of scholarship/employment income at SFU (along with conversations with Finance). If our current understanding is incorrect (based on current state not future state) it should be communicated to the departments as soon as possible to ensure compliance with CRA Regulations.

[249] One CRA source states:

> 3.28 An amount paid or benefit given to a person to facilitate the advancement of the recipient's education may be considered employment income pursuant to subsection 5(1) where the particular facts and circumstances indicate that an employment relationship exists between the recipient and the grantor. In such cases, the recipient may undertake training, studies and research of a type that is ordinarily expected of them under the terms of their employment. A common but not isolated example of such an arrangement is a medical post-doctoral fellowship, which is discussed further at 113.36.
>
> 3.29 Normally, when an employer-employee relationship exists, the employer expects work to be done, dictates how and when it should be done and remuneration is provided for such services. While not an exhaustive list, some of the factors that might indicate the existence of an employment relationship would be:
>
> - intention of the worker and the payer when they entered into the arrangement, such as in a written agreement that indicates that the worker is an employee or an offer of employment;
> - the payer has the right to exercise control over the worker, such as what research or clinical activities will be done and how and when they will be conducted. The determination of the degree of control can be difficult when examining the employment of professionals. For example, due to their expertise and specialized training, doctors may require little or no specific direction in their daily activities. When examining the factor of control, it is necessary to focus on both the payer's control over the worker's daily activities, and the payer's influence over the worker. It is the control of a payer over a worker that is relevant, and not the control of a payer over the end result of a product or service purchased;
> - the payer assigns tasks to be done, such as rotations, on-call duties, teaching, resident coaching, etc.;
> - the payer determines and controls the method and amount of pay to the worker;
> - the payer provides benefit plans which are normally provided to employees, such as registered pension plans or group accident, health and dental insurance plans;
> - the payer provides paid vacation leave and other work-related paid leave; and
> - the worker must perform the work, not subcontract the work or hire assistants.
>
> 3.30 Amounts that are considered to be received in respect of, in the course of, or by virtue of an office or employment, are specifically carved out of the application of paragraph 56(1)(n) (see 113,3). Instead, such amounts are included in

> employment income under either subsection 5(1) or paragraph 6(1)(a). Where the particular facts and circumstances indicate that an employment relationship does not exist between the recipient and the payer, the amount may be considered fellowship income under subparagraph 56(1)(n)(i) or a research grant under paragraph 56(1)(o).[42]

[250] Dr. Driver, Ms de Domenico, Dr. Sahota and Ms Gravestock met on March 10. Dr. Sahota testified he was hopeful because he regarded Dr. Driver as a fair person committed to what he said. Dr. Sahota recalls he explained what had not happened and Dr. Driver told Ms de Domenico she could have gotten him involved earlier. Ms Gravestock recalls Dr. Driver was upset that he had not been in the loop and nothing had been provided when, if TSSU had applied to the Board, a list would have to be produced within days.

[251] The next day, March 11, Dr. Sahota followed-up by email, in part, as follows:

> Thank you and Jon for the meeting yesterday.
>
> We've taken some time to think about how we might work together to start bargaining on May 1, 2020. We remain frustrated by the delays and doubtful that there is any way to truly mitigate the failure to live up to the terms of the agreement; however, we have outlined what we see as a reasonable pathway below. Should another meeting be required, we are available to do so.
>
> The agreement is clear that eligible RAs must be considered as SFU employees as of May 1, 2020 at the latest. We don't believe considering folks as employees requires making employment letters for each individual, which will certainly take quite a long time. Instead we think employment status can be implemented such that folks who are eligible employees:
>
> 1. will be able to approach SFU or TSSU and get assistance on employment concerns;
> 2. will be covered under Worksafe BC, Employment Standards Act, and any other applicable legislation, while their conditions may initially fall below these thresholds, they can be remedied as issues are brought forward;
> 3. will have access to opt-in to the current extended health-care package for RAs to be paid out of the bridge funding;
>
> This will ensure the agreement terms are met and also ensure that RAs and Grant Employees are protected as they go about their duties.
>
> The other key matter is the issue of data and the list, first regarding a signup process to partially mitigate the current failure to provide a list, including:
>
> 1. An email out to grad students to sign-up to the TSSU list (we understand this is already in progress);
> 2. An email to department / centre decision makers so they can provide the signup to their RAs;

---

[42] *Income Tax Folio S1-F2-C3, Scholarships, Research Grants and Other Education Assistance* (https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-1-individuals/folio-2-students/income-tax-folio-s1-f2-c3-scholarships-research-grants-other-education-assistance.html)

3. An email to PIs updating them on the process, clearly reiterating the May 1, 2020 employment status, even if the paperwork isn't done.

Finally there is the matter of the concrete data which can be provided immediately. While there is a dispute between the parties regarding FIPPA issues, our understanding is that dispute only arises in the case of the "grey zone" that exists only until April 30, 2020 where the parties differ about whether folks are SFU employees. On May 1, 2020 folks are employees and thus data related to their employment can be provided to their recognized bargaining agent, TSSU. TSSU has an obligation under PIPA to protect that data and only use it for valid purposes. Therefore:

1. Contracts or appointment forms and summaries therefrom that commence after May 1, 2020 shall be immediately released in batches to TSSU. If SFU so desires, adding a checkbox or notification of release of information on the forms would doubly protect against FIPPA concerns;
2. Data should be immediately provided for the "included persons" in groups in TSSU's December 17, 2019 email which included: work-study positions, SFU funded RA positions (e.g. in the VP Academic Office, Big Data Initiative, ISTLD, Grad & Postdoc studies, Carnegie Community Engagement office, etc) that are paid from SFU funds and thus are already SFU employees;
3. The data on remainder of included persons who continue to receive compensation after April 30, 2020 shall be provided no later than May 1, 2020;
4. Where "excluded persons" who are/will be SFU employees are identified, e.g. those whose community of interest lies with APSA, CUPE, or SFUFA, the data should immediately be provided to the proper organization and TSSU shall be provided the data regarding the position (department, rate of pay, etc.) but not be provided the personal information such as name and contact information.
5. Where there are situations where individuals are on the list and [clearly not] employees (the staff of SFUFA or APSA for example), TSSU shall be provided a description of situations and number of affected individuals, but not be provided the personal information such as name and contact information.

****

We want to find a negotiated pathway towards resolving our need to communicate with the employees who we represent, but with May 1, 2020 bargaining commencement rapidly approaching there is quite some urgency to reach an agreement immediately.

Please advise,

[252] Acknowledging employment status without concurrent written contracts and other processes was not an acceptable approach to the RPI team. It wanted to have the documentation in place to mitigate risks and to manage the transition in an orderly manner. Ms Plican testified this was the decided approach supported by the RPI sponsors, Dr. O'Neil and Ms de Domenico.

[253] On March 11, an email from Ms Trasler on behalf of Dr. Driver under the subject "Research Assistant - TSSU Certification" was distributed to current and some former research assistants.

> Simon Fraser University (SFU) has agreed to voluntarily recognize the Teaching Support Staff Union (TSSU) as the Union for eligible RAs and, on November 15, 2019, Simon Fraser University entered into an agreement with the TSSU to support their preparation to bargain the first collective agreement on behalf of RAs. We have identified that you may currently be an RA or may have held such a position previously.
>
> As part of the Research Personnel Initiative (RPI) eligible RAs are being transitioned from an employee of a grant holder to an SFU employee.
>
> The TSSU needs your input and participation to prepare for bargaining, and would like to hear from you as soon as possible. You may sign-up to the TSSU's RA mailing list to take part in this process: https://www.researchiswork.com/signup/
>
> You can also email the TSSU if you have questions about RA unionization: tssu@tssu.ca.
>
> **No final decisions have been made and there is no guarantee at this time that you will be transitioned from an employee of your grant holder to an SFU employee or that, as an SFU employee, you will be a TSSU member. Further information on the Research Personnel Initiative can be found on the project webpage:…**

[254] The tactic was to work around FIPPA's constraints on SFU by having research assistants identify themselves and consent to SFU giving their personal information to TSSU.

[255] This communication and TSSU's suggestions went by the wayside in mid-March when SFU moved to remote instruction after the March 11 pandemic declaration. The RPI project team had to allow time for the SFU community to make all the required changes and adaptations before competing for faculty and administrators' attention.

[256] Although it was unlikely collective bargaining would begin May 1, TSSU wanted to know the names of the persons for whom it would negotiate and to have them participate in preparing bargaining proposals. It had to resort to self-help. The organizing team was brought together to start signing as members the current group of research assistants and grant employees.

J. RPI and Voluntary Recognition on Separate Trajectories (April 2020)

[257] In April, the RPI project and implementation of the Voluntary Recognition Agreement were operating on separate trajectories which would not converge by May 1.

[258] SFU did not provide a preliminary list before or at the fifth process meeting on April 8 when Dr. Sahota and Ms Gravestock met with Ms Trasler. The RPI was in charge and no one from the RPI had attended a meeting since Ms Thirlwell on January

14 before she went on leave and was replaced by Mr. Tucker, who Ms Plican replaced in May. Ms Plican had not attended a meeting since December.

[259] Dr. Sahota testified that before the meeting he was hearing concerns from research assistants and faculty members about what the RPI project team was communicating and from TSSU members about not achieving their representation goals and the absence of access to benefits.

[260] TSSU wanted research assistants on payroll and covered by the *Employment Standards Act* and workers' compensation. It believed SFU could simply recognize research assistants as employees and complete any administrative work later. The work study program had been cancelled for the Summer term. The individuals were to be placed in the bursary program.

[261] Ms Gravestock's notes include:

> JT: I have that meeting with Elsa on the 21st to go through some of that data. I'm going to get a meeting with Chris and the [Tucker?] and we're going to talk more about the work-study students. What I would like to do is put together a new MOU.
>
> DS: I just want to put out there that we are very upset with the way things have gone. We really need to get as much of this sorted out as soon as possible and if this isn't possible then we are still exploring the LB route. One of the things I wanted to flag with us is with the project team. We want to hear more about how they are g … we have also heard back from faculty members that what they are defining RAs is doesn't fit into social sciences and humanities. Those faculty members were very upset and provided that feedback to us. I have a lot of concerns about what is happening there. If names still can't be disclosed by then that's fine but as of May 1st that purported issue doesn't exist anymore.

[262] On April 20, the RPI project team gave the RPI Steering Committee an update. The project team was "Working with Labour Relations to understand TSSU requirements" and there was no planning yet for RPI support for collective bargaining.

[263] Ms Trasler met online with Dr. Sahota, Ms Gravestock and the new Chief Steward Seamus Grayer on April 22. She reported research assistants employed by PIs were covered for workers' compensation. The RPI project team had criteria for transitioning individuals to the status of SFU employee. Many who TSSU said were employees were not included.

[264] TSSU meeting notes typed during the online meeting in a document shared by Ms Gravestock and Mr. Grayer capture some of both TSSU and Ms Trasler's frustration.

DS: Huge problem. Initiative has defined RA to exclude 100s of people defined within the cert. Jon talked to us about his RAs who are internally funded, always intended to be part of this. He told us himself. He's already told his people that they are SFU employees. Why are we hearing now that the criteria are in no way representative of a good faith effort. We can't be clear enough about how upset we are about this.

<Derek hangs up at 2:14pm>

<Return 2:35 pm>

DS: Before we left, we are upset about this and we'll let you finish from where you were if that's ok.

JT: Yeah. I do understand your frustration, absolutely. With the current COVID. There's no chance of meeting the 1st of May to have them on board as employees. From your reaction there, my feeling is that we […] at that point little understanding of what the project involved.

My difficulty with our conversations is that I am responsible for negotiating with a project team who is still finding their way through what they are going to be doing. At this point we have no chance for 1st of May.

Our definition of what a ra is and what criteria will need to bring them on board is developing and my personal feeling is that there is a lot of work to be done on that. I can give you the update that Elsa gave me, and then see what you want to do next out of that.

One of the first things we've been looking into, and in order for us to prepare any kind of bargaining, you need to know the current terms of employment for RAs are. That's our start point. I have provided to the project team the areas that we will need to know about to start looking at terms and conditions of employment for bargaining. Deliver that by July this year as they work through groups of various variations of an RA.

We are looking at delivery of that July 2020. The other piece that we wanted to give to you at this time is, I know last time you wanted a list of individuals or numbers of who will be transitioned.

The project team is looking at transition any RAs that meet the criteria and that have contracts running past the start of fall 2020, as well as those who start after fall 2020 and who meet criteria. We are not expecting any RAs to be employees probably before sept. there may be some. If there are some we may be able to get those july/aug. When I talk about them meeting the criteria, those criteria are subject to change – that's something we're still looking at.

Every time I talk to the team they're doing something different, lots of complexities in that definition.

My main concern with what you just said around jon driver's expectations is that he is including univ funded RAs and I see that could fit the criteria if they are employed to work not on their research but primarily for a PI's research so that is kinda where we are right now.

What I need to know at this point is can we continue to work on this or are we so far away from the MOU that we signed that we have no baseline. I don't like being in a position of not having a goal to work towards which I feel we are at now. The research team has put those goals to one side.

DS: I would def agree that we're far away from the MOU. I appreciate the frankness. It's upsetting but I appreciate it, better for us to know bad news than not know at all.

[265] TSSU wanted to get on with what Dr. Sahota stated was the shared intention – avoid the Labour Relations Board and get to collective bargaining quicker than proceeding with a Board application. Ms Trasler hoped collective bargaining could begin in September. TSSU wanted a complete list of research assistants to consult with the persons on whose behalf it would be bargaining.

[266] Ms Trasler reported the criteria the RPI project team were using to identify those research assistants eligible for transition to SFU employment: employed by a PI who is an SFU employee; paid from external grant funds; and employed primarily on the PI's research project, not administration or management of the project and not teaching.

[267] Hearing these criteria for the first time, the TSSU committee believed it was necessary to explore the many nuanced situations among research assistants. This meant identifying all research assistants paid through payroll, regardless of their payroll fund code, because all of them were presumptively employees under the Voluntary Recognition Agreement.

[268] In a later letter on September 1 to Dr. Driver, Dr. Sahota speaks to limitations TSSU saw in the research assistant definition being used by the RPI project team.

> On April 22, 2020, the University presented TSSU with their working definition of an RA that explicitly contravened the voluntary recognition agreement. SFU stated that RAs are workers that must meet all of the following criteria:
>
> - be engaged primarily in laboratory or "investigative" work;
> - be working primarily on the PI's projects, not "their own research"; and
> - be paid through an external grant held by an SFU employee
>
> This definition excludes all 'non-laboratory' research workers, RAs paid via scholarship/stipend, doing work that may be intertwined with their academic requirements, workers paid through an internal SFU grant, and work-study employees.

[269] By April 22, TSSU had not received any list of any Included or Excluded Persons who were current or future SFU employees. As Ms Trasler had foreseen with Ms de Domenico and Ms Plican on March 9, despite her best efforts, SFU had "failed on all counts" in implementing the Voluntary Recognition Agreement. No one could overcome resistance to expanding or accelerating the RPI or to changing faculty approaches and practices in making scholarship payments.

[270] A Voluntary Recognition Agreement process meeting was scheduled for May 5. In the meantime, TSSU was to discuss and decide what it was going to do next.

[271] In November, TSSU would have given the Board copies of the over 880 membership cards, which the Board would have checked against SFU payroll records required to be delivered to the Board within days of the TSSU application. SFU had not given names and positions to TSSU in 6.5 months.

[272] Despite its various activities, from November 15 to May 1, SFU had done nothing of substance to implement the Voluntary Recognition Agreement.

[273] TSSU had no preliminary list; no commitment to commence collective bargaining; no substantial information about any SFU position included, excluded or represented by another trade union; and no insight on what SFU considered appropriate proposals for collective agreement. The Spring term had ended and the Summer term was beginning. Many of the 880 organizing campaign membership cards were stale dated. There was a pandemic and everyone was working remotely.

[274] SFU had not acted on TSSU suggestions to make incremental progress on identifying Included, Excluded and other persons. TSSU had agreed to defer any application to the Board until November 2020. What would be the gain if TSSU could or did walk away from the Voluntary Recognition Agreement?

[275] The RPI had not determined which persons with the title "Research Assistant" would be eligible for transition to employment by SFU. The plan at April 27 was:

> - Those research personnel who are identified as eligible to become employees will be invited to sign an Offer of Employment formalizing their employment status with SFU. Terms and conditions of employment will be captured as they exist in their current appointments.
> - This process will begin in June 2020. If you are not contacted with an Offer of Employment, continue to follow your contracted terms and work duties as usual.
> - Terms of employment may be revised when a Collective Agreement has been ratified; upon ratification, they may be eligible for benefits, as negotiated within the collective bargaining process.[43]

[276] The RPI was telling research assistants about TSSU membership.

> Unionization
>
> - SFU has agreed to voluntarily recognize the Teaching Support Staff Union (TSSU) as the Union for eligible RAs.

[43] *FACT SHEET: Research Personnel as SFU Employees*, April 27, 2020

- Only SFU employees are eligible for union membership. Currently, grant-funded RAs are not employees of the university, and therefore RAs are not yet recognized members of the TSSU.
- Some employees currently in our systems as RAs may not meet the criteria to be recognized as RAs for the purposes of this project and, as such, may not be eligible for TSSU membership.
- Future employment terms and conditions for employees will be negotiated as part of the bargaining process; in the meantime, current employment terms and conditions will continue to apply.
- Research personnel are invited to contact TSSU to assist the Union in preparing for collective bargaining on behalf of those who do become employees. Research personnel may work with TSSU in advance of being confirmed as eligible and/or signing Offers of Employment.
- All inquiries related to eligibility for membership of TSSU, CUPE or APSA, should be referred to Labour Relations.[44]

11. Mediation and Preliminary Lists Production Order (May and June 2020)

[277] At the sixth process meeting on May 5, there was no preliminary list and no concrete progress. Ms Trasler reported there was likely to be a six-month delay while the RPI project team consulted with departments and gathered information.

[278] The RPI project team updated the RPI Steering Committee on May 19. The team had defined a process for gathering, storing and inputting employment data. It had concluded there was a lack of ready data to identify research assistants and determine TSSU eligibility. SFU had underestimated the scope of variation in research assistant duties and roles and the terms of their employment. No research assistant employed by a PI and paid from grant funds would be transitioned to SFU employment until the Fall.

[279] Coincidentally, on May 19, TSSU referred implementation of the Voluntary Recognition Agreement to arbitration. TSSU and SFU agreed to proceed to mediation on June 11 and 15 without lawyers attending. In a shared document, SFU explained its efforts to comply with the Voluntary Recognition Agreement.

> **Efforts to Comply**
>
> TSSU's decision to certify RAs happened prior to the transition and during the planning phase of the RPI, in the midst of regular collective bargaining with TSSU and shortly after TSSU's certification of another employment group. The University has made every effort to support TSSU's claim to RAs, by negotiating and signing the MOA. When the impacts to the negotiated timeline were identified, the University proposed creative solutions. For example, while personal data cannot be provided to TSSU to allow them to contact RAs, communication has been sent from the HR office to all potentially eligible RAs, encouraging them to contact

[44] *FACT SHEET: Research Personnel as SFU Employees*, April 27, 2020

> TSSU to assist in preparation for bargaining. As well, the University was willing to start the negotiating process in May 2020, suggesting that TSSU already had the prerequisite knowledge within the current TSSU membership to identify areas of interests to include in their bargaining proposal (a large majority of Teaching Assistants have also held research assistant positions as well as Teaching Assistant positions). This would have allowed negotiations to start and continue while names were identified and provided to the TSSU prior to the ratification process in November.
>
> The complexity of the transition lies in a number of areas:
>
> - Each grant awarded to a PI has associated terms and conditions for the use of the grant funds, which includes salaried employees;
> - The nature of the work performed by RAs in every area of the University is as diverse as the individual research projects;
> - Some RAs are employed by multiple grant holders on a variety of research projects, while some are employed by a single grant holder but paid from multiple grants;
> - Turnover is continuous due to contract and project duration, and contracts are varied;
> - In order to collect necessary data and identify eligible individuals, it is necessary to meet with each PI regarding each RA;
> - The numbers of RAs (currently approximately 600 individuals) is significantly higher than the number of PDFs included in Phase 1. Each must be individually assessed for eligibility to be, first, transitioned as employees and, second, meeting the criteria for TSSU membership.

[280] On June 10, an email message on behalf of Drs. Driver, O'Neil and Derksen and Ms de Domenico was circulated to faculty and others under the subject "Update on RPI (unionization of research assistants)." It includes:

> In 2018, SFU undertook the development, research and implementation of the Research Personnel Initiative (RPI) to make the graduate and undergraduate students, as well as the range of other people who presently work as research personnel, employees of the university. The goals were to better support these people in the research and tasks they do for SFU, to recognize them as employees and to improve support for the people who are their supervisors.
>
> **********
>
> We have heard that there has been concern that SFU is now attempting to narrow the scope of personnel who will become employees, with a focus on research assistants in laboratory settings. This perception is incorrect - nothing has changed in the scope and aims of the RPI project. We appreciate the concerns of faculty members and also share the view that students doing archival manuscript research for a professor may be research assistants in the same way as students working in laboratories.

This was the first reference to any graduate students becoming SFU employees. It is unclear if was intended to exclude or include graduate students paid a scholarship from research grant funds.

[281] On June 16, I issued the appended order containing mediated terms.

12. SFU Defines and Classifies Without TSSU (July 2020 - March 2021)

[282] SFU finance personnel continued to explore the risks associated with making scholarship payments through payroll with no income tax withholding and reporting on a T4A Statement of Pension, Retirement, Annuity and Other Income (instead of a T4 Statement of Remuneration Paid), which the recipient might treat as exempt from income tax pursuant to subsection 56(3) of the *Income Tax Act*.

[283] On June 25, 2020, Ms Aylesworth received an opinion from Mr. Travers on the:

> … payment of amounts in the documented form of a "scholarship" to teaching assistants, tutor/markers, sessional instructors, research assistants ("RA's") (collectively referred to herein as "TA's") who are also in receipt of income from employment for their services they provide to faculty members at Simon Fraser University ("SFU").
>
> The purpose of our comments is to outline the income tax reporting requirements and policy which SFU as an employer must follow on the payment of amounts to recipients under the legislative requirements of the Income Tax Act (Canada) (the "ITA") as administered by the Canada Revenue Agency ("CRA").

[284] His opinion includes the following:

> It is a question of fact as to whether the payment made as a "scholarship" by SFU to the TA's pursuant to the Collective Agreement would be considered to retain its attributes as scholarship income for income tax purposes under the ITA as opposed to salary income subject to income tax withholdings with alternate reporting for tax purposes.
>
> The purpose of any collective bargaining agreement between an employer and its employees is, amongst other things, to outline the types of work to be performed by the employees, the work conditions and the compensation and benefits to be provided for services rendered.
>
> *********
>
> There is no wording or suggestion in the Collective Agreement to allow a reasonable determination that the payment of the scholarship income component is somehow in connection to any other activity of award or merit as a student. Thus it would be difficult to develop a position that the payment of scholarship income under the Collective Agreement is for any other activity than the performance of employment duties to SFU as outlined in the Collective Agreement.
>
> *********
>
> Therefore, to the extent that a payment is characterized as a 'scholarship' by a payor and the payment is made by an employer by virtue of an office of employment then it would be inappropriate for an employer to report the payment as scholarship income on form T4A in Box 105, as the conditions for inclusion under p 56(1)(n) of the ITA have not been met due to the employment activity carve out in sp 56(1)(n)(i).
>
> Further, in such cases it would now be appropriate for an employer to instead treat the payment of the 'scholarship' component of pay that has been issued by virtue

> of an office of employment, as salary and wages, which would be subject to income tax source withholdings and reported to the recipient on form T4 as opposed to form T4A.
>
> *********
>
> While employment income payments to RA's are not currently governed by a collective agreement, the same issues apply to RA employment income and scholarships.
>
> **Summary**
>
> It appears to be an interpretive question of fact as to whether an appropriate position could be developed to support whether the scholarship income paid to the TA's pursuant to the Collective Agreement can actually be reported as scholarship income without income tax withholdings as contemplated under paragraph 56(1)(n) of the ITA.
>
> Significant evidence exists that no conditions or criteria need to be maintained by a student in receipt of the scholarship income beyond the performance of their employment duties as a TA pursuant to the Collective Agreement.
>
> On this basis there is significant evidence to suggest that the scholarship income is earned as a result of the office of employment and employment duties performed by the TA and thus is excluded from the treatment of scholarship income as outlined in subparagraph 56(1)(n)(i) of the ITA. If this is the case the scholarship income would instead be required to be reported as salary and wages pursuant to paragraph 6(1)(a) of the ITA.

[285] While Ms Aylesworth's focused concern was the risks associated with the manner in which Payroll Services was processing and reporting scholarship payments, the RPI project team was treating all matters related to scholarship as beyond its scope. The July 2, 2020 PRI project statement lists the following as beyond its scope:

1. Changes to how SFU handles scholarship income
    - Operationalizing those changes is out of project team's scope, as well
2. Defining guideline for differentiating scholarship income from employment
    - Mary in Payroll provides this

[286] While developing guidelines to differentiate scholarship and employment income was not within the purview of Payroll Services, the RPI would adopt what Payroll Services produced, which it expected to receive in time for the Spring term. Dr. O'Neil testified nothing useful was provided for the RPI and he was disappointed the RPI did not get the clarity it anticipated. It was not the "silver bullet we hoped it to be."

[287] Dr. Sahota, Ms Gravestock, Messrs. Grayer and Hatty, Ms Plican and Ms Trasler met on July 7. Before this meeting, TSSU had received a list and surveyed research assistants. TSSU and SFU began identifying some of the anomalies in the payroll data and some obviously Excluded Persons. They were discussing when collective bargaining could begin.

[288] In mid-July, when Ms Plican was working on the transition of grant funded PI employees, she discovered many inconsistencies and issues across SFU. In an email to Barbara Sherman, Research Project Manager, Ms Plican observed the following about the treatment of NSERC USRA payments.

> Not sure how you can pay min wage with a scholarship…..they are actually being employed (as per NSERC website) so not sure how SFU made the determination that it was scholarship. I think it's the term "award" that people may interpret as equal to "scholarship" when all of the grants that the Tri-Agencies do are called "awards" and they are used to pay salary!! Wow! This will definitely be challenging change that will need to happen…..but first, we'll work with the appropriate people and the sponsors to get them to make the decision and then do whatever comms/changes that will need to happen. It will most likely not be ready for Fall 2020!

[289] Within the Office of Graduate and Postdoctoral Studies there was discussion about categories of research funding for the Fall term. On July 14, Dr. Derksen distinguished employment and scholarship as follows:

> **Employment:** To hire a student to assist in completing the tasks necessary for the professor's own research and for the professor's own academic and professional goals: tasks will be directed and defined by the professor. Tasks may be broad in range and in degree of expertise or complexity. Student takes direction and instructions from the professor; employer/employee relationship and expectations.
>
> **Scholarship:** To assist the student's research related to their academic project and to support the student financially and/or bring the student up to the guaranteed level of funding. While the research may be related to the professor's overall research program, it is defined by the academic pursuits and outcomes reflected in the student's thesis or final project. The relationship is supervisor/student and academic mentor/mentee.

[290] In the RPI project plan of July 24 prepared by Mr. Strang, the timeline for RPI's support for collective bargaining with the TSSU was February to August 2021.

[291] At an August 6 Voluntary Recognition Agreement process meeting, TSSU said it would be ready to begin collective bargaining in October. SFU said it likely would not be ready by then.

[292] During the summer of 2020, TSSU learned that, in anticipation of the RPI transition of research assistants to SFU employees, some departments were adopting new approaches to classifying research assistants for the Fall term.

[293] The Faculty of Applied Sciences, created three classes of research assistants.

> Research Assistants who will be transitioned to University employees as of September 1, 2020:

- **"True RAs" (Grant Employment Research Assistant) being paid out of Fund 13 or 31** - Research Assistants who assist in completing the tasks necessary for the professor/supervisor's research program and/or towards the research group's general academic deliverables. There is an employer /employee relationship and expectations.

Research Assistants who will not be transitioned:

- **RAs being paid out of Funds other than 13 or 31 (for now)**
- **Research Trainee/Student (Grant Stipend Funding) paid out of any funding source** - Students of the PI who perform work and research towards the student's own academic program. The purpose of this appointment is to support the student financially and/or to bring the student up to the guaranteed level of funding. The relationship is supervisor /student and academic mentor/mentee.

RAs on existing contracts (i.e. started before September 2020) will not be transitioned at this point.

[294] Dr. Fiume testified he likely saw, but does not recall this classification of research assistants prepared by the Faculty of Applied Sciences academic and research affairs personnel. "Research Trainee/Student" is NSERC terminology. He does not use the term "True RA."

[295] The approach in the School of Computing Science was to categorize student research assistants as "Trainee" or "True RA" to distinguish those who were eligible to be represented by a trade union and those who were not with a preference for "Trainee" classification.

> The Research Trainee/Student category is the same as what we have been doing for years; nothing new. We were just calling them RAs. Now we need to call them Research Trainees/Students.
>
> True RAs will become employees of the University and potentially join a union in the future, with all the restrictions and benefits that come with unionization. This is the main reason why the University is asking us to do this categorization now.
>
> To be categorized as True RA, the student's work must be 100% for the PI, not for their thesis. Examples of such work include hiring a student to collect datasets, annotate data, conduct surveys, implement software, etc., which is NOT related to the student's research/degree. If the work is partially related to the student's research or degree, the student should be hired as a Research Trainee/Student, not as True RA.
>
> If a PI categorizes a person/student as True RA, they have to be prepared to demonstrate that the student is only doing PI work.
>
> Appointing a student as both True RA and Research Trainee/Student is possible ONLY IF the student's tasks for their own research/degree and the tasks for the PI are completely different.

[296] Dr. Fiume did not recall seeing or discussing this communication, which he testified reflected best practice in the School of Computing Sciences. The same

approach was taken in the four schools in the Faculty of Applied Sciences and continues today.

[297] On August 18, Dr. Jennifer Scott, Member Services Officer, SFU Faculty Association (SFUFA) and Visiting Research Fellow, SFU Department of English wrote Dr. O'Neil about these classification approaches. She wrote, in part:

> Over the past number of months, we've received a lot of conflicting info from the University regarding RAs, and as you can imagine, our members have many questions and concerns.
>
> This week we received some documentation from the Faculty of Applied Science and the Faculty of Science regarding RA appointments. In this documentation, it describes two types of RAs: "true RAs" and "Research Trainees/Student (Grant Stipend)."
>
> We have a couple of concerns with what is being done with these positions. In most cases, it is nearly impossible to meaningfully distinguish between what is research for a faculty member and what research contributes to student training and education. As you know, typically there is significant overlap between the faculty research being conducted and the student's own research. Faculty members hire students who are interested in pursuing research questions congruent with their own research program; students want to work with specific faculty members for the same reasons.
>
> In the documentation we received, there is one section that is of serious concern. The guidelines state *"If the work is partially related to the student's research or degree, the student should be hired as a Research Trainee/Student, not as True RA."*
>
> In the documentation, it suggests that the PI determines which type of RA they are hiring. However, what happens if there is a disagreement between the PI and the Department or Faculty regarding the categorization? Who has the ultimate decision-making power in this situation? Furthermore, whether intentional or not, this directive suggests that overlapping work between the student and the faculty member is *de facto* the Intellectual Property of the student, which raises major concerns for us.
>
> The other concern we have raised with the University before is liability for faculty regarding WorkSafe coverage.
>
> Earlier this Spring, we had a case where a graduate student was injured doing field work related to her thesis, and was told by her Department that she would not be covered under WorkSafe as she was not injured while undertaking duties as a University employee.
>
> We brought this to Li-Jeen Broshko, who assured us and the faculty member that in fact, the student would be covered by WorkSafe. Now it seems that there is some grey area as to when students are covered by WorkSafe and when they aren't. We need a clear directive from SFU to Departments and Faculties explaining exactly where the liability lies if a student were to be injured either in their capacity as a 'true RA' or in their capacity as a 'Research Trainee/Student.'
>
> I hope you can help clear up some of these concerns we have, and Brian and I would be very happy to meet to discuss these issues further.

[298] This communication and the issues it raised were discussed at an August 24 meeting of the RPI Steering Committee attended by Dr. O'Neill, Ms de Domenico, Dr. Derksen, Mr. Strang and Ms Plican. The meeting minutes include:

> Definition of RA
>
> A communication was received from the Faculty of Applied Science and the Faculty of Science which expressed confusion around the definition of an RA and the distinctions between employment income and scholarship income.
>
> The team is supporting work being undertaken outside the project to delineate employment and scholarship income, led by Mary Aylesworth, but further work is required in this regard. As this work stream will not be complete until Jan 2021, an interim communication is required to clarify the process for the fall 2020 term.
>
> The group discussed the related compliance issues and eligibility for WSB coverage, as well as intellectual Property (IP) issues. It was suggested that the IP issues could be addressed through separate IP agreements, but referenced in employment contracts. The IP policy is also due for a renewal / full rewrite.
>
> The Sponsors will reply to the communication, offering to work with the faculties to address their concerns on a case-by-case basis, as more fulsome guidance will not be available until the spring term.

[299] The action was to "Prepare communication to clarify definitions of employment income and scholarship income," which was beyond the project's scope and would be undertaken by SFU Procurement.

[300] While SFUFA was hearing faculty member concerns about potential classification differences, intellectual property and liability for workplace illness and injury, Dr. Sahota received communications from faculty members who did not agree with the approaches in the Faculties of Science and Applied Sciences. He forwarded these approaches to Ms Trasler with a suggested alternate approach acceptable to him and expressed concerns about workers' compensation coverage. He testified he did not receive a reply.

[301] On September 1, Dr. Sahota wrote a lengthy letter to Dr. Driver and Ms de Domenico about these communications. He wrote, in part:

> The documents and communications we received are consistent with the University not acting in good faith. These actions lead towards the exclusion of Research Assistants and Grant Employees who are explicitly included under the November 15, 2019 Voluntary Recognition Agreement. Further, it has restricted the ability of these workers to access rights under pertinent legislation, putting their Health and Safety at risk.
>
> The TSSU demands the University cease and desist from renaming those individuals who receive compensation from grants as scholarship and/or stipend as "Research Trainee/Student (Grant Stipend Funding)" or equivalent. The TSSU

> also demands that the University cease and desist from stating that RAs and Grant Employees are not TSSU members and/or not represented by TSSU.
>
> Ceasing this behaviour and working with the Union to retract this misinformation would partially mitigate the harm caused, and demonstrate the University's intent to meet its obligation to act in good faith under the November 15, 2019 Agreement.
>
> We request a response by Wednesday September 10th at 3pm.

[302] TSSU's view rooted in the Voluntary Recognition Agreement was not congruent with the perspective of SFUFA's members, the RPI project team looking for definitions or Payroll Services' objective of minimizing risk through compliance with income tax requirements.

[303] Dr. Sahota emailed Dr. Driver and Ms de Domenico again on September 3 under the subject heading "Research Assistants and Grant Employees and 'research trainee/students'."

> Dear Sandi and Jon,
>
> Over the past months we've had many troubling messages through various SFU angles regarding Research Assistants and Grant Employees who are paid as scholarship / stipend being reclassified as "research trainee / student" or various other names that appear to be an effort to avoid the voluntary recognition agreement for a large portion of the Sciences and Applied Sciences.
>
> This matter intersects with Health and Safety, but we do already have a meeting scheduled on that aspect with Chris and Melinda on September 9th. However, we also need to ensure that we are absolutely clear with the University that the continuation of efforts to recategorize Research Assistants in attempts to avoid the voluntary recognition are unacceptable and must stop.

[304] Ms de Domenico replied she had asked Ms Plican to look into this and copied Dr. Driver, Mr. Hatty and Ms Plican.

[305] Dr. Driver testified these classifications reflect an organizational dynamic that occurs when a faculty seeks to do an end run around what SFU as an institution is trying to do. His recollection is that he thought the use of these classifications was inconsistent with the Voluntary Recognition Agreement and subverting the process.

[306] Dr. Fiume's perspective is that it was simply academic leaders in faculties trying to interpret and apply broad principles without specific direction. These classifications reflect a traditional view of research assistants and funded students and seek to provide clarity and crispness.

[307] On September 3, Dr. Driver emailed Ms de Domenico with a suggested definition of research assistant that respected the Voluntary Recognition Agreement and an offer to speak to Dr. Fiume.

> Hi Sandi,
>
> It is nice to see TSSU providing us with solid documentation about their concerns - it makes this much easier to deal with.
>
> I would like to know where Computing Science is taking their direction from. I am concerned that this is not in the spirit of the agreement that we reached with them. Would you like me to follow up with Eugene?
>
> I think for the purposes of the collective agreement we will need to find a way to define RAs very clearly. Graduate students do receive scholarship support (for example, from internal scholarships such as a Graduate Fellowship or from external scholarships such as NSERC or SSHRC awards). These clearly are intended to support a student's general progress through an academic program.
>
> However, there is an option to pay students through research grants in the form of a stipend or scholarship. There needs to be clarity as to whether the student receiving that funding is employed or if they are being funded to support their academic program. The test here might be whether a faculty member directs the work of the student, but the problem is that the faculty member is also the academic supervisor of the student. We will therefore need a clearer test to distinguish between a faculty member who supports a student, versus a faculty member who employs a student. I think in an academic setting we might consider the following tests:
>
> a) does the faculty member benefit from the work of the student, beyond being credited for successfully supervising their academic work? For example, will the work of the student result in a co-publication with a faculty member? If so, the student can be considered an RA.
> (b) does the faculty member retain intellectual property rights in the work of the student? If so, this looks like an employment relationship.

[308] Ms de Domenico replied:

> Yes, Derek's been good recently about providing examples.
>
> I have no idea where or who Computing Science is taking their direction from (Elsa may be able to shed some light on it). And yes, it would be helpful if you could follow up with Eugene.
>
> The issue of a clearer definition does keep coming up with TSSU but as well with the PIs and the faculties. Using your suggested 'tests', I will ask the project team to run through various scenarios and then prepare a short position memo for review and approval by yourself, Wade, Dugan and Jeff before broader communication to Deans and faculties.
>
> Once the University is firmly on the same page, we can then share with TSSU.

[309] Dr. Driver responded:

> Thanks, Sandi. This sounds like a good plan. One of the good things that will come out of unionization of RAs is that faculty members are going to have to be explicit about what students are expected to do, and who has ownership of the intellectual work that they produce. Some faculty members in FAS [Faculty of

> Applied Sciences] have not been clear with students on these issues. (Of course, there are many others who do a great job, but we tend to hear about the problems).

Dr. Driver did not speak to Dr. Fiume.

[310] On September 4, Ms de Domenico emailed Ms Plican.

> Would you please prepare a one-page document based on Jon's 'test' that we can use to more clearly define what is a true RA. I suggest using several different types of situations as examples. Please loop Jools [Ms Trasler] in as well and anyone else (Mary A. for scholarships???) you need in order to get more perspectives. I recommend that this be a priority given it will have a somewhat long approval and communication timeline including a final discussion with Derek. Let's bring it forward to the next Sponsor group meeting once you have a draft ready.

[311] At a September 8 meeting, the RPI Steering Committee specifically assigned Ms Plican the task of preparing by October 31 a guidance document on the definition of a research assistant. There is no evidence there was any "final discussion" with Dr. Sahota.

[312] As mentioned in Dr. Sahota's September 3 letter, on September 9, he, Ms Gravestock and TSSU Occupational Health & Safety Commissioner Natalia Perez met with Mr. Hatty and Melinda Skura, Senior Director, Environmental Health & Safety. SFU's message was that all persons paid to do work were covered by the *Workers Compensation Act* regardless who their employer is, but there could be uncertainty when individuals receive payment as a grant, scholarship or stipend. TSSU's view was that scholastic research assistants were a very, very small percentage of all research assistants who were overwhelmingly workers, employees, prospective TSSU members and represented by TSSU, their voluntarily recognized bargaining agent.

[313] At the Voluntary Recognition Agreement process meeting on September 10, attended by Dr. Sahota, Ms Gravestock, Mr. Grayer, Ms Trasler, Ms Plican and Labour Relations Advisor Lea Tsang, SFU reported it did not have definitions of research assistant or scholarship that the RPI project team was using to identify research assistants. The project team was relying on position titles assigned by faculties and was focusing on those in financial funding codes 13 (Internal Research) and 31 (Sponsored Research). The immediate goal had been to have individuals entered in the system so they would be paid in the September 11 payroll. There was discussion

about inconsistencies, position titles and other matters in the payroll lists. The preliminary lists production order filters were not limited to these two codes.

[314] In anticipation of collective bargaining, there was discussion within Human Resources and Labour Relations about who was to be covered by the collective agreement. There were broader ongoing discussions about when employment and scholarship income should be paid. Mr. Hatty wanted guidance for collective bargaining. He arranged a discussion with Dr. Driver and Ms de Domenico to have the benefit of Dr. Driver's subject matter expertise.

[315] During the discussion, Dr. Driver provided three scenarios, which Mr. Hatty wrote for Ms de Domenico, who passed them on to Ms Plican.

> **Scenario 1** – PI hires an RA to assist by conducting research that is assigned / supervised by a PI. Pretty straight forward, clearly an employment relationship. This is work. The research conducted by the RA may be used in whole or in part, to contribute to the PI's paper or publication. We discussed how the work (research), may be the IP, (intellectual property), of the PI and or the RA. We may not get too deep into the IP issues, but I raise it as it was discussed and it may help us with the employment test.
>
> **Scenario 2** – A Grad student doing independent research, pursuant to their studies, exclusively to contribute to their studies/thesis. This research is not work. It is not requested by the PI in whole or in part and is not being assigned and/or used as part of a paper or publication owned by the PI. It is exclusively an academic exercise.
>
> **Scenario 3** – A Grad Student may conduct independent research to be used in whole or in part for their thesis, at the same time, this same research may be assigned / supervised by the PI to be use in whole or as a sub set of their research project; it may become part of a paper or publication owned or co owned by the PI and RA. This is considered RA work.
>
> **Note:** We know that in some instances when work is being performed, the RA is paid by scholarship and not wages. While this will have to be sorted out moving forward, and may have CRA implications, this has turned out to be a bit of a red herring. The type of remuneration is not determinant in defining work or if someone is an RA or not. The test: is work being assigned/performing by a PI that is then used by the PI to advance their research, pursuant to their grant.

[316] Dr. Driver testified these scenarios capture his view of the distinction between employment and academic pursuits. He expects the work of any trainee will contribute to the PI's overall work. He gives the benefit of any doubt of classification to employment as in Scenario 3.

[317] Mr. Hatty had no role in the RPI and its decision making. His focus was on labour relations issues. He relied on Dr. Driver's scenarios. Dr. Sahota took hope from a

September 22 email from Mr. Hatty that TSSU and SFU were aligned in their approach to Included Persons.

> Good Morning Derek,
>
> At her earliest opportunity, Melinda will clarify to the safety committee that RA's are considered employees and are therefore covered by Worksafe. As we discussed, there may be a caveat in instances where students doing research, purely for their own individual academic pursuits, are not performing work for the university and are therefore not considered employees, (it is our understanding that there are likely few students that fall within that group).
>
> I understand that the project team is working on a definition for RA's; we will share that with you when it's finalized. That may help to reduce any further ambiguity/ concern regarding coverage.
>
> Thanks

[318] The view that it is likely few graduate students paid research assistantship scholarships were not performing work for SFU and therefore not employees was not shared in the Faculties of Science and Applied Science or the RPI.

[319] No one discussed Dr. Driver's three scenarios with Dr. Fiume or Dr. O'Neil. Dr. Fiume testified he considers these scenarios problematic. Scenario 1 is not nearly as clear as it appears. It presumes a hiring and employment relationship, not open-ended research and ignores the overlap of student and PI research programs. Scenario 2 is clear and correct. Scenario 3 is very confusing and warrants great caution separating research from the product of research.

[320] Dr. O'Neil testified Scenario 1 is similar to the last research assistant he hired, but the third sentence is problematic. Scenario 2 is clear and correct. Scenario 3 is problematic with a strange view of research ignoring team-based research. It begins with a Grad Student and ends with a PI and RA. It does not effectively tease out the grey zone.

[321] These scenarios were given to Ms Plican, but did not prevail in her preparation of Ms de Domenico's requested one-page document based on Dr. Driver's test. Ms Plican's analysis was that these scenarios constituted too drastic a change that would adversely affect grant funding and graduate student recruitment. She wrote:

> Scenario 3 above is the one that may be problematic. In order for a grad student to be paid "scholarship" from a grant there has to be benefit to the grant, therefore, the information they are gathering, etc. will need to be used by the grant holder. Therefore, I'm not sure that any grad student, based on the above definition in scenario 3 would ever be considered scholarship. So the dollars that are being paid from grants will always be employment, therefore, this is a fundamental

change for the faculties. They have relied on this source of funding for grad student support and attracting the grad students.

[322] Ms Plican testified the test in Scenario 3 based on any benefit to SFU was "too loose." All research grants require some benefit for any approved expense. Employment should not be created where none exists.

[323] By September 20, Ms Plican had prepared a draft discussion document "Defining Research Assistant Employment and Scholarship" for the September 23 sponsors meeting. The purposes were:

- Provide guidelines for faculty members and departmental administrators to determine if the financial support they are providing to a graduate student will be an appointment which is considered employment or support in the form of scholarship, and
- To define 'scholarship' as identified in the Memorandum of Agreement (MOA) between TSSU and SFU for voluntary recognition.

[324] The discussion document contains legislation and compliance considerations, CRA and SFU definitions, payroll guidelines and other considerations.

- Clear definitions and consistent terminology are required across the university. This is not currently the case and the situation causes great confusion. The following terms are used interchangeably:
  - Stipend
  - Research Trainee/Student
  - Graduate Research Assistant
  - Scholarship
  - Graduate Student Research Assistant Scholarship.
- In order for a faculty member to provide scholarship payments to graduate students through their grants, there needs to be a benefit to the grants.
- TSSU's position is that if there is any benefit to the faculty member or the university, then it should be considered employment. This is not in line with legislation (ITA) and is not for the financial benefit of graduate students, but rather is intended to increase TSSU membership at the expense of the graduate student.
- Not all RAs are graduate students.

[325] Ms Plican settled on definitions similar to Dr. Derksen's July draft.

> **Grant Employment Research Assistant**: To hire a student to assist in completing the tasks necessary for the professor's own research and for the professor's own academic and professional goals. Tasks will be directed and defined by the professor. Tasks may be broad in range and in degree of expertise or complexity. Student takes direction and instructions from the professor; employer/employee relationship and expectations. Considered employment income and students will receive a T4 tax form.

Grant Stipend Funding: To assist the student's research based on their academic project and to support the student financially and/or bring the student up to the guaranteed level of funding. While the research may be related to the professor's overall research program, it is defined by the academic pursuits and outcomes reflected in the student's thesis or final project. The relationship is supervisor /student and academic mentor/mentee. Considered scholarship funding and students will receive a T4A tax form.

[326] A revised one-page draft includes questions or tests to determine whether a payment from a research grant is employment or scholarship income and five potential scenarios of which two are employment.

Questions / Tests to determine classification (employment income vs. scholarship income)

Question	Test	Classification	
		Yes	No
Is the relationship between the faculty member and student an employment relationship?	Is the payment of funds tied to amount of work performed?	Employment	Scholarship
	Does the faculty member dictate how and when the work should be done and what remuneration is provided for such services?	Employment	Scholarship
Is the relationship between the faculty member and student an academic relationship?	Do the activities performed by the student support their thesis and/or academic pursuits?	Scholarship	Employment
	Is the research performed for a faculty member related to the student's own research?	Scholarship	Employment
	Is payment of funds subject to satisfactory academic progress and to demonstrated competence in laboratory duties and/or other procedures relevant to the student's area of study?	Scholarship	Employment

Potential Scenarios

Scenario 1 – Graduate student is engaged in activities in the pursuit of their thesis and the grant holder is also their academic supervisor. The grant holder provides the student with scholarship support through their grant. The student's activities are self-directed and the results are beneficial to both the faculty member and the student. The student owns the outcomes produced.

Scenario 2 – Graduate student doing independent research, pursuant to their studies, exclusively to contribute to their studies/thesis.

> **Scenario 3** – Graduate student is employed by the grant holder who is not their academic supervisor. The grant holder directs their work and there is an employer/employee relationship.
>
> **Scenario 4** – Graduate student is employed by the grant holder who is also their academic supervisor. The grant holder directs their work and there is an employer/employee relationship.
>
> **Scenario 5** – Graduate student may conduct independent research to be used in whole or in part for their thesis; at the same time, this same research may be assigned / supervised by the PI to be used in whole or as a subset of their research project. It may become part of a paper or publication owned or co-owned by the PI and RA.

[327] One of the RPI project next steps was to "Separate out the methods of payment (i.e. employment through Payroll Services, scholarship through Grad Studies/Student Services straight into the student's account)." Ms Aylesworth was to organize a working group to lead the transfer of scholarship payments from Payroll to Grad Studies/Student Services.

[328] The outcomes the RPI project team was seeking were:

- Satisfy compliance requirements under ITA, reducing risk to SFU in a CRA audit.
- Provide students with the appropriate form of compensation and maximize the financial support provided to them. This also reduces the risk to students if audited by CRA.
- Compliance with the Labour Code. Only employees can be represented by a trade union, including TSSU. They do not represent graduate students, but may represent graduate students who are employees of SFU.
- Clarify the meaning of scholarship in the MOA to address TSSU's claim that individuals receiving scholarship should be included in the voluntary certification.

[329] A September 22 updated RPI Project Charter has a goal to have all research assistants and other research personnel transitioned to SFU employment by January 2022 and the project completed in February. Among the identified risk were three high risks: push-back from departments against converting scholarship recipients to employees; current scholarships being deemed employment income; and TSSU promoting unrealistic expectations/timelines for the project.

[330] By October, negotiations for inclusion of the Graduate Facilitators under the collective agreement were nearing completion. SFU was not committing to a date to begin collective bargaining for Research Assistants and Grant Employees.

[331] TSSU was unaware of much of the discussion within the RPI and elsewhere in SFU about defining employment and scholarship income and other matters. Dr. Sahota testified the initial February definition of research assistant, which was placed in the RAID log, although missing fund 11, would have been a start to discussion if TSSU had known about it.

[332] TSSU gave notice October 7 to commence collective bargaining for Research Assistants and Grant Employees. It proposed beginning November 6.

[333] A preliminary list sent to TSSU before the October 8 process meeting included 252 Research Assistants employed by SFU and 62 work study employees. At the meeting, there was discussion about several continuing issues about Included and Excluded Persons.

[334] Mr. Hatty attended the first meeting of Ms Aylesworth's scholarship and employment income working group on October 19. Ms Trasler attended the second on November 16. Moving payment of non-employment income out of Payroll Services required clearer definitions and guidelines for faculty and department administrators, especially in science faculties where a high percentage of persons were receiving both employment and scholarship income. The discussion continued at a December 7 meeting.

[335] At the same time, the RPI project team was attempting to define "non-affiliated work" performed by research personnel supporting, but not doing, research. A draft November 4 document includes:

> *Definition:* Work required to support the research objectives, but which does not require conducting research*. When personnel devote the majority of their time to research support duties they are not considered Research Assistants. Some examples of when research support may be required:
>
> - the size and complexity of the project requires support above and beyond normal levels of support provided by Departments/Faculties;
> - the size and complexity of the research project requires a level of support that negatively impacts a PI's capacity to provide leadership and contribute to research activities;
> - expertise outside the research area is necessary to meet the project objectives /deliverables.
>
> *CRA definition: research involves a critical or scientific inquiry aimed at the discovery of new facts, or the development of new interpretations or applications.

[336] The RPI project team identified the categories of non-affiliated research support as administrative/financial; laboratory management; communications/technical writing; and IT/knowledge translation (e.g. developer, programmer, coder). TSSU saw blurred lines. For example, when does technical writing end and become research writing?

[337] TSSU and SFU representatives discussed the issue of defining who is and who is not a research assistant at the process meeting on November 5. They were learning about small groups of individuals engaged in programs or work unknown to them. TSSU was interested to know who will represent those who are not research assistants it represents. How would research support be distinguished from research assistant work?

[338] The RPI project team wanted clarity and had a narrower focus for its processes and communications. Human Resources wanted to identify the group for whom there would be collective bargaining. TSSU wanted to get to the collective bargaining table to negotiate about differences.

[339] The RPI project team was processing Fall term appointments. By November 13, 518 payroll appointment forms had been entered and 558 employment contracts had been sent to research personnel. 120 longer-term research assistants were being transitioned to SFU employment. New issues were arising. One was whether SFU employed research assistants were eligible for the holiday closure and, if so, who pays?

[340] By mid-November, the product of Ms Plican's work to distinguish employment and educational relationships providing employment or scholarship income had not received RPI approval. The minutes of a sponsors' meeting on November 19 include: "There is a separate committee (Mary Aylesworth is heading it up) that will define scholarship and review the process. Addressing this issue will also provide greater clarity for grad students and the TSSU, as well as clarifying IP rights. The goal is to finalize the definitions by summer 2021."

[341] At a December 10 process meeting under the Voluntary Recognition Agreement, a review of some details of the lists identified that some research assistants were coded in the payroll system as research associates. Perhaps, they preferred the more prestigious title or there were administrative errors. Some previously agreed mis-categorizations had not been changed.

[342] TSSU wanted to get to collective bargaining. There were ongoing differences whether formal and recognized employee status was the basis of who TSSU was to represent and whether TSSU represented all recipients paid scholarship income through payroll.

[343] Although there was an impasse on who would be included under the collective agreement, the plan was to begin formal collective bargaining in January.

[344] By December 11, 871 research assistants had been entered in the payroll system and 691 research personnel had been sent employment contracts.

[345] On December 22, 2020 TSSU applied for an order to mitigate ongoing harm from SFU's failure to commence collective bargaining and to act in a timely manner since the June 16 order. It wrote, in part:

> **Failure by SFU to Commence Bargaining**
>
> With the lists of data in hand, TSSU has expeditiously pursued the commencement of bargaining in an effort to conclude bargaining [within] the November 14, 2020 timeline outlined in the agreement. TSSU has been preparing for bargaining since February 1, 2020. Through outreach efforts, including two large-scale surveys, 1721 responses were received for RAs. The needs identified from these survey responses and other outreach have been used to draft bargaining priorities. An opening proposal package was ratified by the TSSU membership at a Special General Meeting on October 1, 2020.
>
> TSSU gave written notice to SFU on October 7, 2020 to commence bargaining. TSSU has yet to receive a formal reply. As part of that written notice, TSSU identified the following current sections in the Collective Agreement which should apply to RAs Articles: 1-12, 19-24, 26, 28, 29, 30 and Appendices A, I, and O. Remedying the harm caused by the delays in commencing bargaining requires both a remedy for the individuals who have been delayed in their ability to access rights, such as benefits, and a remedy for TSSU.
>
> **Failure by SFU to act in a timely manner and in good faith while classifying individuals**
>
> The agreement (para 2) outlines that "*SFU will undertake in a timely way those positions which should reasonably be characterized by positions [included with the TSSU bargaining unit …] and those positions which are properly included in the bargaining unit of another union [...]*." The agreement outlines this process should complete on an approximately 5.5 month timeframe no later than May 1, 2020 (para 4); however, now 13 months after signing and over 6 months since the order to produce data, TSSU estimates the process is less than 30% complete and now stalled, with the inflow of new positions being comparable to the classification rate, as demonstrated in the data of Table 1.
>
> Table 1: Progress of completion of classification of the total RA list data into SFU employees and excluded positions that fit in other bargaining units. Data in the table does not include 1030 positions from the November 3, 2020 list and 999 positions from the December 3, 2020 list which were part of the Pivot project, which the parties do not agree on the status of, but which TSSU understands do not continue into 2021.

RA List Data Date	Total Number of Positions	Positions classified by SFU as employees	Positions classified by SFU as "Excluded"	Completion Percentage
June 23, 2020	2118	0		0%
July 27, 2020	2323	0 (424 potential)		0%
Sept 3, 2020	2082	80	216	14%
Oct 1, 2020	2209	226	312	26%
Nov 3, 2020	2371*	392*	241*	27%
Dec 3, 2020	2410*	440*	TBD	TBD

> During discussions with SFU, several key facts have become clear. SFU has arbitrarily decided to only examine positions which are paid from two of its funds (#13 and #31), and has excluded those paid from other funds, including but not limited to: #11, 21, 23, 25, 35, 36, 40, and 62. Individuals in work-study positions and those paid as a scholarship/stipend have been excluded from the examination process despite being specifically named in the agreement.
>
> These arbitrary decisions which have no basis in the wording of the agreement nor in good faith efforts to pursue the process in a timely manner have left many hundreds of individuals without any clarity as to their status, representation rights, and access to legislative minimums such as those outlined in the Worker's Compensation Act and the Employment Standards Act. Remedying this harm requires a method to immediately implement rights.

One of the remedies sought was to have collective bargaining begin February 1 and end October 6, 2021 with any impasse resolved by arbitration in a manner similar to the first collective agreement provision in s. 55 of the *Labour Relations Code*.

[346] Sometime in early 2021, Ms de Domenico left SFU and was no longer a RPI co-sponsor or steering committee member.

[347] In January 2021, similar to the approach at the University of Waterloo, the employment and scholarship income working group was drafting and consulting on a set of frequently asked questions to distinguish Graduate Research Studentship from a Graduate Research Assistantship using SFU common terminology. The draft list of examples of duties and responsibilities of an employed research assistant, still based on the CRA definition of research, was:

> Under the supervision of the Primary Principal Investigator or designated supervisor, the Research Assistant may undertake some or all of the following examples of duties and responsibilities. This list is for example only and does not define the limit of duties and responsibilities.
>
> - Assist in the development of models used for research, with the design of research projects and in defining the overall direction and priorities of research.
> - Research to determine the applicability of new technology and systems related to research* project work.
> - Design, modify and perform activities within research projects.
> - Perform data collection, sampling, identification and/or preparation.
> - Administer forms or questionnaires to gather data; record and/or code data or observations.

- Maintain research-related records and databases, enter data according to established protocols.
- Analyze, structure and interpret research data.
- Perform system design, prototyping and development as a research* activity
- Set up, maintain and test experiments.
- Observe and report the behaviour of specimens or research participants.
- Perform journal reviewer selection, prepare manuscripts for production and communicate with journal authors, reviewers, etc.
- Perform literature or archival research.
- Perform surveys and/or conduct interviews as a research*activity
- Assist with feed preparation and the daily maintenance and care of study organisms.
- Edit and translate as a research* activity.
- Develop processes, protocols and procedures for research* activities
- Assist in the reporting of findings (e.g. presentations, manuscript writing, final report development).
- Assist PI with project compliance, ethics and grant applications.
- Write reports as a research* project activity.
- Contribute to and/or lead development of policy report, academic publications and presentations.

*CRA definition: research involves a critical or scientific inquiry aimed at the discovery of new facts, or the development of new interpretations or applications.

[348] TSSU might have a broader range and list of examples.

[349] In March, SFU produced a document on determining the nature of employment for research personnel as a Research Assistant or Research Support relying on the CRA definition of research. TSSU considers the definition too narrow excluding research outside a laboratory, such as community research and working with partners and existing knowledge.

[350] TSSU and SFU began collective bargaining March 23, 2021. Mr. Hatty replaced Ms Trasler after the fifth session on May 13 when she took extended leave. Since the sixth session on August 12, he has been the lead SFU negotiator.

13. From Collective Bargaining Beginning to Hearing (March 2021 - July 2022)

[351] On March 29, 2021, a document from the RPI on *Voluntary Recognition and Becoming a Union Member* with reference to the CRA definition of research was circulated within the SFU community. It states who is not included in the voluntary recognition.

Who is not included in the November 2019 Voluntary Recognition MOA?

- Persons who primarily support research activities but do not participate in the research themselves, such as Administrative/Financial support. Lab Management, Communications/Technical writing, or IT/Knowledge Translation (Developer, Programmer, and Coder);
- persons who hold an appointment as a Postdoctoral Fellow OR University Research Associate; and
- persons who receive scholarship income to support their research activities.

[352] TSSU stated its opinion on the document contents in a lengthy letter to SFU dated April 4, 2021, which states, in part:

> The March 29 memo *"Who is included in the November 2019 Voluntary Recognition MOA?"* states only those who "*are primarily involved in research as defined by the Canada Revenue Agency: Research involves a critical or scientific inquiry aimed at the discovery of new facts, or the development of new interpretations or applications.*" This particular CRA definition comes from Income Tax Folio S1-F2-C3 and is not a universal definition. It only pertains to the Income Tax Act paragraph 56(1)(o) when defining the portion of research grants paid directly to a taxpayer which do not count as taxable income because it is offset by direct expenses. With regards to paragraph 56(1)(o), CRA also references Ghali v The Queen, 2004 FCA 60, 2005 DTC 5472, which states *"research or any similar work"* in paragraph 56(1)(o) may be defined as: *"a set of scientific, literary and artistic works and activities having as its purpose the discovery and development of knowledge."* The use of *"may be"* indicates the Court did not see that definition as exhaustive. Even this expanded definition does not cover all types of research conducted at SFU. For example, some research aims not to discover and develop knowledge, but to characterize, translate, confirm, and/or understand already existing knowledge, and research that takes a decolonial approach in which the consideration of "discovery" of knowledge is deeply problematic.
>
> The Agreement already contains an implicit definition of who is a research assistant and grant employee by indicating it is all those holding such positions except those otherwise properly included in another bargaining unit. Further, in a method analogous to the Labour Board certification process, the Agreement outlines a community of interest approach as the guiding factor. Three categories of explicitly included workers are outlined in the Appendix: *"those individuals who receive compensation from grants as scholarship and/or stipend; holders of NSERC USRA and equivalent funded by SFU; work-study student employees."* The Appendix indicates that this list of included employees may be expanded, but the list of explicitly included employees has no such allowance.
>
> The persistent effort to narrow the definition of who is included in the TSSU bargaining unit through the process of the Research Personnel Initiative is another indication that the University is acting in bad faith with regards to the implementation of the agreement. TSSU reserves the right to take any and all action it deems necessary to ensure the University meets its duty of good faith in contractual performance pursuant to Bhasin v. Hrynew, 2014 SCC 71 and any other requirements under the BC Labour Relations Code.
>
> ********
>
> The mischaracterization of the Agreement in the March 29 memo must be corrected and the University must begin acting in good faith with regards to the

inclusion of individuals into the TSSU bargaining unit. Further the TSSU demands the University cease and desist from any and all communications that contradict the Agreement and acknowledge in subsequent communication, such as those from the Research Personnel Initiative, that any definitions are not finalized, that the Agreement is binding, and that TSSU represents RAs.

Ceasing this behaviour and working with the Union to retract this misinformation would partially mitigate the harm caused, and demonstrate the University's intent to meet its obligation to act in good faith under the Agreement.

[353] Mr. Hatty's reply of May 4, 2021 states, in part:

In your letter you state that, during discussions to reach the Agreement in November 2019, Dr Jon Driver asked whether students in receipt of scholarship or stipend to support them in the completion of their thesis should be included and TSSU replied in the affirmative. Despite the opinion expressed in your letter that a student who receives a scholarship from their academic supervisor is therefore in a "relationship" which has "potential for exploitation and thus the need for protection via a union", I would remind you that, in accordance with the BC Labour Relations Code, a Union can only represent employees.

You also state that the parties agreed that included individuals would be transitioned to SFU employee status, and that the Agreement included *"those individuals who receive compensation from grants as scholarship and/or stipend."* During the discussions and subsequent meetings with Mediator Jim Dorsey, we feel that we have been very clear with TSSU – we acknowledge that individuals at SFU may have been paid scholarship in exchange for work in order to put more money into the hands of the student, contrary to legislation, and this was the reason that the language *"those individuals who receive compensation from grants as scholarship and/or stipend"* was included in the Agreement. However, individuals who are compensated by scholarship or stipend for employment, and are eligible to be transitioned to SFU employees, will become employees compensated through salary or hourly wage. Therefore, no individuals in receipt of scholarship or stipend for research will be affiliated with TSSU. We want to be very clear that it was never the intention of SFU to agree that students in receipt of scholarship and stipend, with no employment relationship with SFU, would be included in the RA (TSSU) employee group.

It is understood that TSSU has concerns that students in receipt of scholarship or stipend may be subject to pressure from faculty to perform work outside their own research. All Principal Investigators (PIs) will be instructed in the appropriate methods of compensation and employment conditions and provided with tools to ensure that our employees are compensated and supported appropriately. The Graduate Student Society (GSS) is one of the appropriate bodies to support students who feel they are being treated inappropriately by their academic supervisor, and we will work with GSS to provide advice and support if there are identified issues with work being compensated through scholarship.

With regard to communications with the SFU community, the Research Personnel Initiative (RPI) provides update communications about their progress. The communication of March 29, 2021 addressed concerns and questions from the community such as the process of transition to SFU employee and whether, when transitioned, an employee is required to join a Union. The description used in the communication was created in consultation with the SFU research community. TSSU were involved in that consultation during meetings with Mediator Jim Dorsey, and agreed that the definition would be used by the RPI to assist PIs in

> identifying the appropriate payroll coding for their employees. In our meeting with Jim Dorsey on March 18th 2021, TSSU stated that there was a general understanding of the definition of "research" and we could move on from exploring the various legal definitions. TSSU also agreed that the RPI team should proceed with that definition in order to identify those individuals who will be eligible to vote on the collective agreement. I am therefore confused and extremely disappointed by your insistence at paragraph 9 of your letter on finding suitable wording to define research.
>
> *********
>
> The RPI definition of an RA makes the differentiation between a Research Assistant affiliated to TSSU (an employee who is primarily conducting research) and employees who are more suitably affiliated to a different employee group ("persons who primarily support research activities but do not participate in the research themselves.") I am curious to know why, at paragraph 8, you now state that the examples given in the RPI update ("Administrative/financial support, Lab Management, Communications/Technical writing etc") are in dispute as they are clearly not research activities and are roles represented by other employee groups such as CUPE Local 3338 and APSA.

[354] On May 25, 2021, Ms Aylesworth wrote a final discussion paper with recommendations to the scholarship and employment income working group. She found practices varied at other universities. For example at the University of Waterloo:

> Graduate Teaching Assistantships (TA) and Graduate Research Assistantships (RA) and sessional teaching appointments at the University of Waterloo are considered employment income and are subject to statutory deductions for income tax, Canada Pension Plan (CPP) contributions and Employment Insurance (EI) premiums.
>
> Payments are processed by Payroll department, are made by direct deposit to the student's bank account, and are paid in monthly instalments on the last Friday of each month. Annual earnings are reported on a T4 slip. RA, TA and sessional income can be automatically redirected to the student's account to pay student fees. In some cases, a student award may be provided concurrent with the TA appointment.
>
> If a student receives a student award, the payment is processed through Quest, the student account system, and are made by direct deposit to the student's bank account or by cheque. Annual awards are reported on a T4A slip.
>
> TA and RA earnings (employment income) are paid on a monthly basis; awards are paid once per term.

[355] Ms Aylesworth wanted to return to the basis for her initial request for tax advice.

> **Narrowing the Scope of this Working Group**
>
> Recent discussions have taken us beyond the original concerns raised by KPMG after reviewing SFU's payment practices for RAs and TAs. I would like to return to those concerns by focusing on changes to the PAF and related process instructions to ensure that employment income and academic support (scholarships) … .

[356] Her recommendations were consistent with a narrower scope of work:

1. Revise the PAF form to separate more clearly the taxable payment details from the non-taxable payment details. Alternatively, create a separate form for scholarship and fellowship award payments.
2. Create an advisory memorandum similar to the University of Toronto's T4 T4A memorandum.
3. Create a glossary of defined terms and post on the Payroll webpage.
4. Standardize the Offer Letter template for use across the academic units.
5. Develop a communication plan to inform faculty and academic staff.
6. Convene a working group of stakeholders in advance of the PAF automation project. Map the current processes, standardize terminology, and eliminate the non-value added steps.

[357] With this outcome, the working group was disbanded. Distinguishing between employment and scholarship income was not pursued any further within or outside the RPI. A new guide for completion of the PAF includes the following employment and payment options.

> **Research Assistant (Employment income)**
> Check this box if the work is undertaken primarily for economic gain and there is an employee/employer relationship. Payroll source deductions will be taken, and income will be recorded as employment income on a T4 slip. WCB coverage is provided. Caution: Payroll cannot make retroactive corrections from employment income to scholarship income, so please ensure correct box is checked.
>
> *********
>
> **University Research Assistant (Employment Income)**
> Check this box if the appointment qualifies as a long term University Research Assistant under policy R50.04. Appointment must be for a minimum of 2 years and includes an option for benefits.
>
> **Other**
> Check this box if none of the above categories for employment income suit the type of work being performed.
>
> **Graduate Student Research Assistant Scholarship**
> Check this box if the graduate student is working as a research assistant that is very closely related to his/her thesis research and is required for completion of the Master's or Doctoral degree for which he/she is enrolled. No payroll source deductions will be taken, and the income will recorded as scholarship income on a T4A slip. WorkSafeBC coverage is not provided. If the research being performed is unrelated to person's graduate program and the primary beneficiary of the work is the University, the work is considered to be employment income and should be coded as Research Assistant (employment income).

[358] The Research Assistant (Employment income) selection includes Research Assistant and Research Support. TSSU particularizes that the May 31, 2022 payroll data in the Spring term provided by SFU includes 671 Included Persons and 1,357 Excluded Persons:

- up to 664 research assistants and grant employees who have been classified under the R04000 and R05000 job codes who receive compensation from grants as scholarship and/or stipend;
- up to 131 research assistants and grant employees who have been classified SFU employees under the R01610 job code but who classified as "research support" via their payroll appointment form (PAF) on the narrow basis that they are not "primarily performing work that involves conducting research as defined by the Canada Revenue Agency as involving “a critical or scientific inquiry aimed at the discovery of new facts, or the development of new interpretations or applications." (the CRA definition)
- up to 562 research assistants and grant employees, including all work-study student employees, who have been classified as "other non-continuing staff" under the R08000 job code.

[359] There is no dispute in this arbitration about work study student employees or students receiving a NSERC UGRA scholarship.

[360] In the 2021 Fall term, the RPI was approaching completion of its scope of work. The minutes of a Steering Committee meeting on September 13, 2021 record:

> Bargaining Update
>
> SFU and TSSU are still at the bargaining table. TSSU intends to stage a rally on Sep 23. They still want those receiving scholarship income to be made employees. If people are paid scholarship when they are actually employees, then SFU will do proper employment contracts and ensure it is done correctly. If the scholarship supports their own scholarly work, then they will not be made employees.
>
> *********
>
> Once the TSSU agreement is ratified, Labour Relations will hold conversations with APSA/CUPE to determine the appropriate approach to RAs that are not part of TSSU.
>
> Transition Update
>
> All eligible Research Personnel have now been transitioned to SFU employees, so SFU is able to produce a voting list for TSSU (post-bargaining). EFAP benefits for all non-student research employees is being provided effective Sep 1, on an interim basis, until bargaining is complete. The VPFA agreed to pay for EFAP in the interim, until the collective agreement is in place. The total cost is less than $10K.
>
> The feeling is that work to date is starting to change the mindset, with RAs feeling more included (e.g. orientation process).

[361] By October 25, all research personnel the RPI considered eligible had been transitioned to SFU employment. The minutes of the sponsors meeting record some competing views on the benefits of being an employee or a student scholarship recipient.

> Meeting with Graduate Student Society (GSS)
>
> The GSS reached out to the project team to discuss the project. In summary, the GSS wants all graduate students paid through a research grant to be employees

(i.e. do not pay scholarship any more). The committee noted that the GSS cannot take a position that is seen to undercut TSSU, so the GSS is supporting TSSU's position that all RAs should be employees. The GSS wants to be involved in creating the definitions, but this is not appropriate as the GSS is not involved in negotiations.

The GSS position is partly based on a perception that employees have greater protections than students do, but the reality is that employees are not more protected than students. The GSS raised the example of a student who brought forward an issue but did not get resolution, but this could also happen as an employee. If there are problems with a supervisor, employee rights would not apply. These issues should be dealt with as student issues and ensuring the appropriate support and protections are in place for scholarship students, which is not done by making them employees. The types of protections that GSS wants students to have would not be covered by employee rights, which are limited. If graduate students have issues, the issues should be brought to Grad Studies.

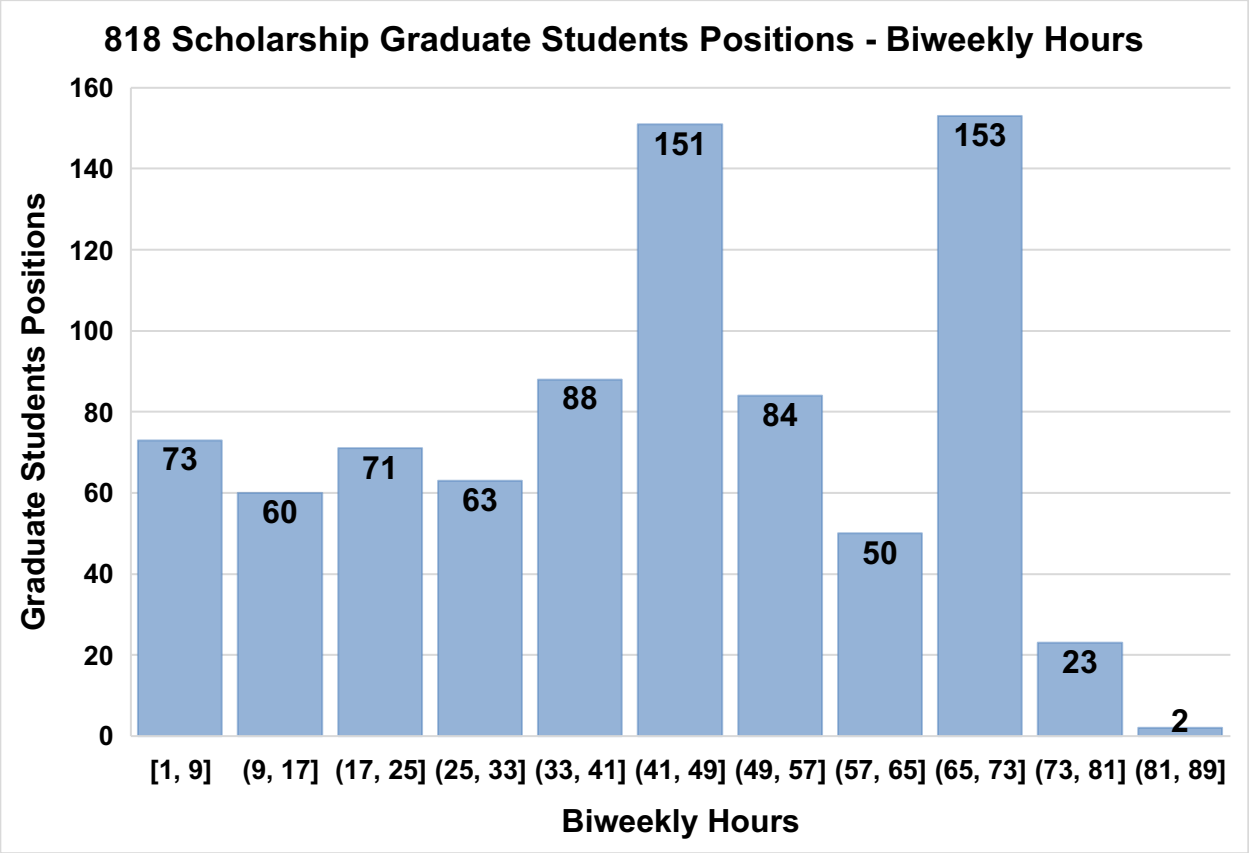
There are also benefits to students from scholarships, including better tax treatment and greater flexibility in the length of time taken to complete their degree.

Further, if the process is made too complicated, then faculty may stop bringing on graduate students as RAs. Many faculty want an academic relationship and would prefer to avoid the hassle of being an employer.

[362] On July 14, 2022 in the Summer term, there were 2,537 names, including some duplicates, in various job codes: 819 Research Assistants, 180 Research Support, 715 Other Non-Continuing Staff, 5 National Scholarship and 818 Graduate Student Scholarship. The distribution within SFU of graduate students paid scholarship was:

Department	No.	%
Beedie School of Business	1	0%
Communication Arts Technology	43	5%
Faculty of Arts and Social Sciences	31	4%
Faculty of Applied Sciences	258	32%
Faculty of Education	1	0%
Faculty of Environment	44	5%
Faculty of Health Sciences	49	6%
Faculty of Science	389	48%
Vice Pres Academic Office	1	0%
VPR VP Research Summary	1	0%
Total	**818**	

[363] The current PAF includes a place for the PI or departmental administrator to insert the biweekly hours and minutes to be paid at an hourly rate entered in another place or the biweekly hours and minutes for which a scholarship amount is to be paid. The distribution of the biweekly hours for the 818 graduate student positions paid scholarship income is depicted in the following graph.



[364] The removal of 22 duplicate names reduces the total number and moves the distribution upscale. The total hours for all was 34,910.68. The total compensation paid was $518,182.04. The average derived hourly rate is $14.84. Without duplicates, the average biweekly hours for 796 graduate students is 43.86 biweekly hours or 21.93 hours per week.

[365] At June 1, 2022, the minimum hourly wage rate was increased from $15.20 to $15.65 plus 4% vacation pay for a minimum of $16.28.

[366] The graduate student with the most biweekly hours (84) in one position was paid $1,066.67, which produces a derived hourly rate of $12.70. Among the students with 2 positions, one was paid total compensation of $1,767.36 for a total of 123 biweekly hours, a derived hourly rate of $14.37. Another with a total of 117.32 biweekly hours was paid total compensation of $1,742.42, a derived hourly rate of $14.85. A third with a total of 113.56 biweekly hours was paid total compensation of $2,000.19, a derived hourly rate of $17.05.

[367] This payroll data in an Excel workbook entered as Exhibit 14 was available in December 2019, but not disclosed to TSSU until Ms Plican testified.

14. Jurisdiction - *Labour Relations Code* and/or *Arbitration Act*?

[368] What is the statutory jurisdiction for arbitration of this dispute? Are there agreed or other arbitration rules which must be applied?

A. SFU and TSSU Submissions

[369] SFU submits the Voluntary Recognition Agreement is not a collective agreement. Under the Board's decisions, TSSU is not a bargaining agent and there cannot be an arbitration under the *Labour Relations Code*.

[370] To give some validity and meaning "to mediate and/or arbitrate under Part 8 of the Labour Code any difference which may arise between them regarding the implementation of this Agreement," clause 9 can be read as an agreement under sections 2 and 5 of the *Arbitration Act* to arbitrate in British Columbia and an agreement on the applicable law under section 25.

[371] TSSU submits, considering all the context, this is an arbitration under the *Labour Relations Code* because the Voluntary Recognition Agreement meets all the principles and policies on which the Board relied in its decisions. TSSU is a certified bargaining agent for a unit of SFU employees. There was an agreement to include additional classifications in the bargaining unit. This is not a sweetheart agreement; does not prevent the employees from selecting representation by another trade union; and ensures affected employee confirmation of TSSU representation. Substantively, the agreement preserves existing terms and conditions of employment for the employees and transitioned employees have been extended some collective agreement benefits and representation.

[372] In effect, the Voluntary Recognition Agreement is an agreement about an identified group of employees within the scope of Article 2.B of the collective agreement. It is an accretion to the bargaining unit with provision for employee ratification. It is an agreement entirely within the framework of the existing collective agreement.

[373] Alternatively, under the *Arbitration Act* there is an agreement to arbitrate (s. 5) under rules recognized under Part 8 of the *Labour Relations Code* (s. 5(3)) with labour

relations law, including the more liberal admission of extrinsic evidence and open court principles, as the law applicable to the substance of the dispute (s. 25).

B. Discussion, Analysis and Decision

[374] The purpose of Part 8 of the *Labour Relations Code* is "to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work" (s. 82(1)).

[375] The Voluntary Recognition Agreement is not a part of the TSSU and SFU collective agreement. It is not implementation of an agreement under Article 2.B of the collective agreement. It is not a separate collective agreement.

[376] The Voluntary Recognition Agreement is a prelude to collective bargaining to extend provisions of the collective agreement or include terms and conditions of employment for newly Included Persons not covered by the Board's 1978 certificate varied in 1992.

[377] TSSU is not the exclusive bargaining agent for this group of newly Included Persons who are not yet covered by and have not ratified a collective agreement. TSSU and SFU are not party to a collective agreement covering this group of employees.

[378] There is no collective agreement and no grievance or other dispute under the provisions of a collective agreement. This is not an arbitration under the *Labour Relations Code*.

[379] The statutory jurisdiction to arbitrate this dispute over the interpretation and implementation of the Voluntary Recognition Agreement is the *Arbitration Act*. The Voluntary Recognition Agreement is a written agreement to arbitrate under s. 5 of the *Arbitration Act*.

[380] The agreement in clause 9 to mediate/arbitrate under Part 8 of the *Labour Relations Code* is an agreement on the law applicable to the substance of the dispute under section 25 of the *Arbitration Act*.

> Law applicable to substance of dispute
> (1) The law applicable to the substance of a dispute is the law designated by the parties to the arbitration agreement.

(2) If the parties to the arbitration agreement have not designated the law applicable to the substance of a dispute, the arbitral tribunal may choose the applicable law.

(3) An arbitral tribunal must decide the substance of a dispute in accordance with the applicable law, including any equitable rights or defences available under that law.

(4) An arbitral tribunal may grant relief or remedies under the applicable law, including orders of specific performance, injunctions, declarations or other equitable remedies available under that law.

[381] This applicable law includes section 96 of the *Labour Relations Code*: "An arbitration board must, within 10 days of issuing an award, file a copy of it with the director who must make the award available for public inspection." Agreement to this law is an agreement under section 63 of the *Arbitration Act* not to be bound by its privacy and confidentiality requirements.

15. Summary of Submissions

A. TSSU Submissions

[382] TSSU submits the express inclusion of "those individuals who receive compensation from grants as scholarship and/or stipend" was an intended and agreed change in SFU's relationship with graduate students with research assistantships. Graduate students not previously treated as employees would become SFU employees. It was mutually understood there would be a few student recipients of payments from research grant funds who were not and would not be employees. This mutual intention of SFU and TSSU is confirmed in statements during negotiations and after November 15 in various contexts and in the testimony of Dr. Driver and Mr. Hatty.

[383] TSSU's declared intention was to negotiate something workable and functional that recognized any duality of relationships for this group for whom it wanted to commence collective bargaining prior to May 1, 2020.

[384] This group was specifical excluded from the RPI and specifically included in the "Research is Work" campaign. Dr. Sahota told SFU both before and at the November 13 meeting that including this group was the first condition for TSSU agreeing to voluntary recognition proposed by SFU to avoid Labour Relations Board proceedings.

[385] After the November 15 agreement was signed, the intention and agreement to include this group was affirmed in the November 19 joint communication expressly

stating the transition to SFU employment would happen by May 1 for ~1,500 research personnel, not the ~1,000 in all prior RPI communications.

[386] Among the ~1,500 who were or "who will become employees of SFU" are three enumerated groups. One is "those individuals who receive compensation from grants as scholarship and/or stipend."

[387] TSSU submits that, despite the express written agreement and clear mutual intention, SFU allowed the RPI and others who did not participate in the negotiations and, perhaps, did not agree with what SFU had committed, to continue as if no change had been agreed.

> The University decided it would not change the legal form of the relationship it had with the individuals in this identified group, notwithstanding what it had agreed with the TSSU. It made no sincere effort to do so. It now declares that it was not legally possible to make this change because they are not "employees," which ironically is the very position they had started with when they met with the TSSU in November of 2019 and bargained a change to the status quo for the group.
>
> The reality the University ignores is that the legal issue is not whether the pay these individuals receive is capable of being treated as a "scholarship" for tax purposes, nor even whether the relationship is capable of being lawfully formed and regulated as a "student" relationship. Rather, the issue is whether the legal form of the relationship might also, equally lawfully, be constituted so as to treat them as "employees" for the purposes of collective bargaining. The University refused or failed to consider that.[45]

[388] The individuals in the group are capable of being treated as employees as Dr. Sahota was when he was a research assistant covered by a collective agreement while doing his master's degree at McMasters University. It is relevant to consider that an employment and student relationship can overlap and co-exist; that work has a training or educational value in any situation and particularly an academic environment which does not detract from employment;[46] collective bargaining and the right to join a trade union are *Charter*-protected rights;[47] the remedial *Labour Relations Code* protecting the freedom to be a trade union member requires a large and liberal interpretation with exclusions narrowly construed;[48] "Limited direct control over hours of work, or a situation where a researcher is given broad latitude in the conduct of the research and

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[45] Union's Outline of Argument, p. 5
[46] *University of Toronto (Governing Council)*, [2012] O.L.R.D. No. 179
[47] *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3
[48] *Gateway Casinos & Entertainment Inc. (c.o.b. Lake City Casinos)*, [2009] B.C.L.R.B.D. No. 210, ¶ 54

what questions to explore, is not determinative, nor even a useful guide in the context of academic research;"[49] and

> The pay that researchers receive is associated with the performance of research duties that benefit the PI, the University, and the grant research program. While there may be varying degrees of autonomy in the research work of any particular research assistant, a consistent and unavoidable feature is that during the period of any paid "scholarship," the individual must be performing research duties within the scope of the research program that is recorded and reportable as work benefitting the grant research and objectives.[50]

[389] TSSU submits the legal test for the existence of an employment relationship is not always the common law test. The test can be a purposive approach in a statutory context,[51] which might be different than another statutory context.[52] Students can be employees for labour relations purposes.[53] They are not excluded from the *Labour Relations Code* and the status of student and employee are not mutually exclusive. As the Ontario Labour Relations Board decided:

> While the intention of the parties is a significant factor, nothing in *Ottawa-Carleton District School Board* suggests that it can transform what is not otherwise an employment relationship into an employment relationship. Put another way, the parties cannot by their "agreement" render the relationship of an employee an independent contractor or vice versa: see for example *Greypoint Properties Inc.*, [2000] OLRB Rep. May/June 479 at paragraph 15. I also note in this respect the primary evidence of the intention of the parties in this case are the letters of engagement and policies drafted by the University of Toronto. PDFs have no control over the drafting of either of these documents. In such circumstances the Board must be particularly careful to give effect to the substance rather than the form of the relationship.[54]

[390] In statutory contexts involving taxation, pensionable earnings and employment insurance benefits, the intention of the parties can be a determinative factor when a relationship can be seen as one of employment or education. Payments can be both student assistance to further education and compensation for work performed. Is it a contract of employment or one for financial assistance?[55] If the dominant payment of a

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[49] Union's Outline of Argument, p. 6
[50] Union's Outline of Argument, p. 6
[51] E.g., *B.A.T. Construction Ltd.*, [1994] B.C.L.R.B.D. No. 450 reconsidering [1993] B.C.L.R.B.D. No. 124 and B178/93
[52] *McCormick v. Fasken Martineau DuMoulin LLP*, [2014] 2 S.C.R. 108
[53] *St. Paul's Hospital*, [1976] B.C.L.R.B.D. No. 43
[54] *University of Toronto (Governing Council)*, [2012] O.L.R.D. No. 179, ¶ 106
[55] *Rizak v. Minister of National Revenue*, [2013] T.C.J. No. 241, ¶ 33

stipend to a graduate student is compensation, then it is employment and the payments are insurable earnings.[56]

[391] TSSU submits there can be a choice in the form of the relationship when there can be different manners of forming the relationship.[57] In the Voluntary Recognition Agreement, SFU chose and agreed to form an employment relationship with those "individuals who receive compensation from grants as scholarship and/or stipend" just as it chose to change the form of relationship it had with PDFs. Instead of doing as agreed, SFU's intention and agreement was corrupted by resistance from faculty and others. It acceded to maintaining the *status quo* in contravention of the Voluntary Recognition Agreement.

[392] TSSU submits that, while SFU acknowledges it failed to provide preliminary lists, it understates the seriousness of this failure. By accepting SFU's offer of voluntary recognition, TSSU gave up its application to the Labour Relations Board with everyone knowing its memberships cards for a transitory group would become stale dated and the results of its campaign and the work of many volunteers would be lost.

[393] The spirit of the Voluntary Recognition Agreement was to share information, meet and act expeditiously. To these ends, specific timelines, good faith dealings and a commitment to make reasonable efforts were negotiated. Instead of SFU following through with performance, TSSU was given excuses and entreaties to be patient although SFU knew at the time of making commitments that there were dirty data issues. SFU abandoned the issue of data production to the RPI, which was not given a mandate to comply with the process or the May 1 date in the Voluntary Recognition Agreement. No one took leadership to meet the committed process or timelines.

[394] TSSU submits SFU failed, contrary to clause 8, to "take such further steps as may be reasonable or necessary to give effect to this Agreement" by applying a process, definitions and classifications to capture the agreed Included Persons.

> Ultimately, the process was left to the RPI group to simply complete its project. The RPI did not see its role as complying with the VRA. It left the issue of making any changes to the scholarship group outside its scope. Further, it proceeded to implement process changes using a narrow definition of "research" and a catch-all category of "other non-continuing" with no attempt by the University to reconcile

[56] *Rizak v. Minister of National Revenue*, [2013] T.C.J. No. 241
[57] See *Russell v. Minister of National Revenue*, [2016] T.C.J. No. 109, ¶ 19

> this with the defined scope of "Included Persons" in the VRA or to engage with the TSSU to settle who was left out as a result of the RPI process. Instead the RPI proceeded to completely remove the "other non-continuing" employees from the regular lists SFU was required to provide to TSSU.[58]

[395] TSSU was left to deal with an intermediary, Ms Trasler, to learn what the RPI project team was and was not doing. What the RPI was doing was entrenching the status quo; using a narrow definition of research, which TSSU, Dr. Driver and some faculty did not find appropriate; creating a new classification of "Research Support" without any discussion with TSSU; and moving individuals to a classification called "Other Non-continuing." Dr. Driver, Ms de Domenico and Mr. Hatty knew there was to be change, but no one made it happen.

[396] There was no credible effort to determine all the Included Persons or transition Research Assistants and Grant Employees to employment with SFU by May 1, 2020. "The University failed completely to meet the deadline and the RPI planning, resource allocation, and project timelines proceeded without regard for any timelines agreed to by the University with the TSSU in the VRA."[59]

[397] Additionally, before May 2020 and for many months afterwards there was no SFU planning for collective bargaining. The Covid pandemic was a legitimate reason to redirect attention and resources, but by mid-March before the pandemic four months had passed without any tangible steps taken by SFU. The pandemic does not excuse the complete failure to commence collective bargaining by May 1, 2020 or to act expeditiously on the TSSU October 7, 2020 notice to commence collective bargaining.

[398] TSSU submits SFU's conduct, exemplified by these many breaches of clauses 2 and 4 of the Voluntary Recognition Agreement, constitute a failure to act in good faith contrary to clause 8 and the general law. There was a profound capricious and arbitrary failure by SFU to meet its commitments which undermined the Voluntary Recognition Agreement on which TSSU and Included Persons relied in good faith. SFU's conduct defeated the very object of the agreement – timely transition of Included Persons to SFU employment and expeditious commencement of collective bargaining.

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[58] Union's Outline of Argument, p. 10
[59] Union's Outline of Argument, p. 10

[399] What was to have happened in 6.5 months for all Research Assistants and Grant Employees lingers on with no examination or change of the employment status of "those individuals who receive compensation from grants as scholarship and/or stipend." SFU followed a strategy in conflict with its good faith and reasonable further steps obligations to give effect to the Voluntary Recognition Agreement under clause 8 - "At all times during the currency of this Agreement, SFU and TSSU must act in good faith ….to give effect to this Agreement."

> Where there is a good faith obligation, the party under that obligation must perform its contractual duties honestly and reasonably and not capriciously or arbitrarily. It is not a fiduciary obligation but the party must have appropriate regard for the legitimate contractual interests of the other contracting party. One aspect of that obligation of good faith is that the party must not act in a way that would eviscerate the very purpose of the agreement.[60]

SFU had little or no regard for the legitimate contractual interest of TSSU.

[400] TSSU seeks:

1. a declaration that the VRA has been breached by SFU, including but not limited to, clauses 2, 4, and 8 of the agreement;
2. a declaration that "those individuals who receive compensation from grants as scholarship and/or stipend" are included in the TSSU bargaining unit as "Included Persons";
3. an order that the parties are to commence bargaining for all "Included Persons" on a mutually agreed date as soon as possible;
4. an order that the parties negotiate a mutually agreed upon process by November 14, 2022 for assessing exceptions to inclusion, if any, based on the Summer 2020 scenarios developed by Chris Hatty, Jon Driver and Sandi de Domenico with scenarios 1 and 3 being "Included Persons" and scenario 2 being "Excluded Persons";
5. a direction that the parties attempt to negotiate and resolve, by November 14, 2022, damages claimed by the TSSU, including any compensatory, aggravated, and/or punitive damages to either the TSSU, affected individuals, i.e. who are or who would have been Included Persons during the period of agreement, or both, for each the following breaches of the VRA:
    a. of clause 2 by failing to provide full preliminary lists every 30 days of "Included Persons, Excluded Persons, and persons whose classification was yet to be determined", between November 15, 2019 and June 16, 2020, and between May 10, 2021 and May 13, 2022;
    b. of clause 2 by implementing processes, definitions, and categories that did not reasonably capture all of those who should be "Included Persons" under the VRA, while failing to make reasonable or adequate efforts to identify the list of Included Persons with the TSSU;
    c. of clause 4 by failing to meet the agreed May 1, 2020 commencement to collective bargaining;

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[60] *0856464 B.C. Ltd. v. TimberWest Forest Corp.*, [2014] B.C.J. No. 3170, ¶ 183

d. further of clause 4 by failing to commence bargaining in a timely way subsequent [to] TSSU's October 7, 2020 notice to commence bargaining;
e. of clause 2 and 4 by failing to transition all "Included Persons" to employee status by May 1, 2020;
f. of clause 8 by failing to act in good faith under the VRA and/or the general law;
g. of clause 8 by failing to take such further steps as may be reasonable or necessary to give effect to the VRA; and

6. a declaration that Arbitrator Dorsey remains seized to resolve any and all issues concerning damages claimed by the TSSU, including the quantum of any damages, if the parties are unable to resolve those claims.[61]

B. SFU Submissions

[401] SFU submits it and TSSU's mutual contractual intention is clearly discernable from the words used to express their intention in the Voluntary Recognition Agreement.

[402] Clause 1 states Included Persons are research assistants and grant employees at SFU who are or will become SFU employees unless they are included in another bargaining agent of a certified trade union.

[403] Employee status is inherent in the distinction between the narrow and specific lists of positions "which should reasonably be characterized as positions held by Included Persons" and positions "which are properly included in the bargaining unit of another union which is certified as a bargaining agent for employees of SFU ('Excluded Persons')." They do not include those expressly excluded in clause 3.

[404] The lists and meeting process in clause 2 might or might not be completed by May 1, 2020. Under clause 4, the process continues "until the completion of the process," which will be the delivery of the final list "of Included Persons, their departments and email addresses." Clause 6 allows a year to give SFU "sufficient time to undertake the process required by clause 2."

[405] The obligation to begin collective bargaining with or without completion of the process is mutual. Neither the process nor beginning collective bargaining is subject to the TSSU's internal democratic processes. The process was more complicated than anticipated and neither was ready to begin collective bargaining by May 1.

[61] Union's Outline of Argument, pp. 11-12

[406] TSSU and SFU knew the Voluntary Recognition Agreement was not covered by the *Labour Relations Code*. If they had thought it was, then in clause 5 there would have been reference to section 32 of the *Code*, which includes "an employer must not increase or decrease rates of pay or alter a term or condition of employment of the employees affected by the application, without the board's written permission."

[407] The clause 6 deferral of application to the Labour Relations Board for no more than one year was TSSU's get out clause. There was no guarantee there would be a final list by November 14, 2020 or any specific date. TSSU did not opt out on November 15, 2020. It chose to continue and to begin collective bargaining with its October 7 notice.

[408] The consequence of TSSU's choice is that, unless there is a mutual agreement, TSSU and SFU are bound by the Voluntary Recognition Agreement and the Labour Relations Board's policy driven interpretation of voluntary recognition requiring employee ratification in accordance with clause 7.

[409] The clause 8 contractual obligation to act in good faith and take further steps as "may be reasonable or necessary to give effect to this Agreement" is a bilateral, mutual agreement. It is also a savings clause if things do not unfold as planned or anticipated.

[410] SFU submits it was forthright in disclosing the problems it encountered with data and other matters, like the limited control it had over those engaged by grant holders. It did not try to hide anything. TSSU simply blamed, became intransigent and did not fully engage to find solutions. For example, the mediated consent preliminary lists disclosure order could have been proposed as early as January 2020. TSSU would not provide membership information to SFU to assist. It did not provide definitions. It shouldered no shared responsibility, but put everything on SFU. This was not taking reasonable or necessary further steps.

[411] Clauses 9 and 10, a bare bones arbitration agreement under section 5 of the *Arbitration Act*, are explicit and clear that matters for collective bargaining are not the subject of this arbitration, which is not to be an interest arbitration. This is consistent with the hands-off approach of the Labour Relations Board to voluntary recognition agreements when there is no collective agreement.

[412] The scholarship issue was foreseen to be and became a "sticking point." SFU has sought to respect and not allow circumvention of *Income Tax Act* provisions, while protecting true scholarships. This is an ongoing process.

[413] SFU submits final determination of the employment or educational relationship between PIs and graduate students paid scholarship income is not a matter of implementation to be arbitrated under the *Arbitration Act*. The evidence reveals the complexity of this issue, which should be addressed in collective bargaining.

[414] The entire Voluntary Recognition Agreement is driven by and based on employment and bargaining unit appropriateness.[62] These are in the words of the agreement, which is to be read and interpreted in accordance with the common law of contract.

[415] The interpretive goal is to ascertain the objective intention of the parties[63] using a "practical, common-sense approach not dominated by technical rules of construction"[64] when reading the words of the contract[65] as a whole[66] consistent with their ordinary meaning and surrounding circumstances known to the parties at the time.[67]

> Contracts must be interpreted as a whole rather than the interpretation of individual parts: *Sattva* at para. 63. The factual matrix extant at the time of making a contract can be considered without any precondition that the terms of the agreement are ambiguous. Rather, considering the factual matrix surrounding the making of a contract is one part of the interpretive exercise: *Sattva* at paras. 46-50.
>
> When interpreting a contract and examining the factual matrix around which the contract was made, the court must decide if there is any ambiguity in the document. It is not appropriate to consider the parties' subjective intentions, nor events occurring after the contract was formed: *Sattva* at paras. 58-60. Rather, contractual interpretation relies on an objective assessment of the facts known (or that reasonably ought to have been known) to the parties: *Sattva* at para. 58.[68]

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[62] See *Island Medical Laboratories*, [1993] B.C.L.R.B.D. No. 329
[63] See *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 55; *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, ¶ 74; *Low v. Straiton Development Corporation*, 2022 BCSC 302, ¶ 56a
[64] See *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 47; *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, ¶ 74; *Low v. Straiton Development Corporation*, 2022 BCSC 302, ¶ 47
[65] See *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 76
[66] See *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, ¶ 64; *Low v. Straiton Development Corporation*, 2022 BCSC 302, ¶ 48
[67] *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, ¶ 74
[68] *Low v. Straiton Development Corporation*, 2022 BCSC 302, ¶ 48-49.

[416] The factual matrix extant in November 2019 is that a large number of research personnel were employed by PIs since the Labour Relations Board's 1976 decision that they were not SFU employees. In 2018, SFU undertook a profound transformation in a major undertaking which was in progress when TSSU publicized its organizing campaign. While TSSU claimed it had the membership support to make a successful application to vary its bargaining unit certificate, the situation was more ambiguous than TSSU acknowledges.

[417] Both TSSU and SFU made gains and avoided risks by entering into a voluntary recognition agreement. Both knew the scholarship issue was a sticking point. The final skeletal agreement does not express a clear mutual intention that SFU would make an additional sea change by transitioning to employment the 620 scholarship trainee positions expressly excluded from the RPI.

[418] SFU submits it knew some of the scholarship relationships should be characterized as employment. These are the ones it agreed to be Included Persons, not all graduate students receiving scholarship payments from research grants. SFU did not agree to change the way it conducts its academic affairs. This is consistent with the language and surrounding circumstances known to SFU and TSSU.

[419] Over 80% of the graduate students receiving scholarship payments from grant funds are in the Faculties of Science and Applied Science. Drs. Fiume and O'Neil testified about the complexity of relationships that exist when training the next generations of researchers through scholarship support as a public good. Professors and students recruit one another. They do not go through a hiring process to make an employment relationship. They have both an educational and economic relationship whose core purpose is not economic or employment. The educational purpose is the determinative wallpaper of the relationship. TSSU did not achieve a sea change in these relationships in SFU's academic research world with a few words in the Voluntary Recognition Agreement.

[420] During the pandemic Research Assistants were transitioned to employment with SFU. They will be represented by TSSU when a collective agreement is ratified.

[421] SFU and TSSU met frequently and moved on to collective bargaining without finding common ground on the inclusion of graduate students "who receive compensation from grants as scholarship and/or stipend."

[422] SFU submits, in the most minor way, it breached the Voluntary Recognition Agreement by failing to provide preliminary lists until the order in June 2020. Neither TSSU nor SFU tried to start collective bargaining in May. Neither was prepared to be at the collective bargaining table with substantive proposals. Both were frustrated, but neither walked away. The circumstances were more complex than either anticipated.

[423] SFU submits the factual matrix does not even approach bad faith dealings. A disagreement over what was intended is not bad faith. There was delay, but significant progress and delay in achieving what was agreed. This is not bad faith. SFU performed its contractual duties "honestly and reasonably and not capriciously or arbitrarily."[69] It continuously informed TSSU what was happening. There was no dishonest dealing.[70] There is no basis for punitive damages when SFU has not breached its duty of good faith.[71] SFU tried to honour and implement the Voluntary Recognition Agreement, including by participating in this arbitration. If SFU is incorrect in its interpretation, it acted honestly and did not breach its duty of good faith.

[424] TSSU took an incorrect and intransigent interpretation to achieve a gain not in the Voluntary Recognition Agreement. There was never any agreement to make an employment relationship with scholarship recipients who are not employees of any employer. It was never contemplated that a refusal to do so would attract damages.[72]

[425] SFU submits there is no basis for the declarations TSSU seeks. While there were implementation performance "bumps in the road," there is no basis for anything more than nominal general damages for not providing lists. This must be offset by TSSU's failure to take reasonable or necessary steps and the mitigating factors of the scale of the project and the pandemic. While it could have done better, SFU persevered with gains for TSSU through challenges presented with Ms de Domenico's resignation and Ms Trasler's illness.

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[69] *Bhasin v. Hrynew*, [2014] 3 S.C.R. 494, ¶ 63
[70] For the importance of dishonesty in finding bad faith see *C.M. Callow Inc. v. Zollinger*, [2020] S.C.J. No. 45
[71] *Atlantic Lottery Corp. Inc. v. Babstock*, [2020] S.C.J. No. 19, ¶ 63
[72] See *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, [2008] 3 S.C.R. 79, ¶ 12

[426] SFU submits the goal must be to finish the deal. It could be helpful to have clear direction on how to address the ongoing dispute over scholarship payments under the Voluntary Recognition Agreement without straying into interest arbitration or setting negotiating boundaries.

16. Discussion, Analysis and Decision

A. Voluntary Recognition Agreement Clauses 2, 4 and 8

[427] In 2019, SFU and TSSU's separate major undertakings intersected with the negotiation of the Voluntary Recognition Agreement with benefits and risks for each. During the brief period of exploration and negotiation from November 12 to 15, TSSU was in a position to obtain objectives if SFU wanted to avoid the immediacy of an application to the Labour Relations Board, which would require SFU to post notices, produce lists and prepare positions to advocate before the Board. SFU avoided this by obtaining a process extending for months over which it had control.

[428] It is not known how long the entire Board investigation, voting and hearing process would have taken, but the investigation and voting process would have concluded in days, not months. It is not known when the hearing process would conclude and notice to commence collective bargaining could be given. It could have been before or after May 1, 2020.

[429] SFU gained time under the clause 2 process. While TSSU avoided risk, it lost the urgency that accompanied an application to the Board. Then SFU assigned the substance of the process as an appendage to the RPI which remained steadfast to its process and project plan and essentially ignored the timeline to which SFU committed. Despite its protestations, demonstrations and referrals for mediation and arbitration, TSSU was not able to recapture any of the urgency it relinquished.

[430] SFU did not determine in a timely way "those positions which should reasonably be characterized as positions held by Included Persons and those positions which are properly included in the bargaining unit of another union which is certified as a bargaining agent for employees of SFU ('Excluded Persons')."

[431] SFU attended monthly meetings as agreed but did not "provide TSSU with the latest preliminary list of Included Persons, Excluded Persons, and the persons whose classification is yet to be determined."

[432] SFU did not take any further substantive steps "as may be reasonable or necessary to give effect" to the Voluntary Recognition Agreement.

[433] Implicit in the agreement and explicit in the contemporaneous joint communication was a commitment "to make all eligible research assistants employees of the University by May 2020." Only SFU could do this. It did not. No grant funded employee who was an Included Person was transitioned to SFU employment by May 1, 2020. SFU did not begin collective bargaining by May 1, 2020.

[434] At least until mid-March pandemic declaration and the June 2020 mediated preliminary lists order, SFU was in breach of the contractual process and substantive obligations in clauses 2, 4 and 8.

[435] SFU's breaches of clauses 2 and 8 caused the failure to begin collective bargaining on May 1. Its breaches seriously impeded TSSU's ability to prepare for good faith collective bargaining. The provision of lists would have enabled TSSU to prepare as it did when lists were provided from June to September and it gave notice to bargain in October.

[436] SFU's breaches of clauses 2 and 8 resulted in a breach of clause 4, which was contingent on SFU providing lists and making determinations in a timely manner under clause 2 and transitioning Research Assistants and Grant Employees to SFU employment by May 1.

[437] There were months after Ms Trasler took leave in May 2021 in which SFU did not provide any or complete preliminary lists and did not meet with TSSU although the clause 2 process was not completed. Each of these was a breach of clause 2.

[438] Throughout the period from December 2019 to at least the commencement of collective bargaining in March 2021, there was organizational dissonance within SFU manifested in a degree of indifference toward SFU's contractual obligations under the Voluntary Recognition Agreement. Some of it was disagreement with what SFU had agreed with TSSU and a belief graduate student research personnel would not benefit

from union representation and coverage by a collective agreement. Definitional and other choices were made without consulting TSSU as a fully participating party to the agreement. The result was to limit the scope and diminish the number of persons considered by SFU to be Included Persons and a failure to fully perform its contractual obligations.

[439] This approach was not in the spirit, intention or words of the agreement. The clause 2 process and early collective bargaining were to be the forums in which a collaborative relationship with TSSU was to explore, discuss and negotiate the boundaries of Persons Included in the TSSU bargaining unit and Excluded Persons "properly included in the bargaining unit of another union certified as a bargaining agent for employees of SFU." Parenthetically, the Association of Administrative and Professional Staff Association (APSA) is not a union certified bargaining agent.

[440] Despite Ms Trasler and Mr. Hatty's efforts, until at least the beginning of collective bargaining in March 2021, TSSU was denied and excluded from much of the participatory, collaborative benefit of the Voluntary Recognition Agreement designed to replace adversarial proceedings before the Labour Relations Board. TSSU was often left to learn what SFU was doing to determine the Included Persons in its bargaining unit from sources other than the clause 2 process. Often it was treated as an interloper rather than a collaborator.

[441] The behaviour is not a credit to SFU as an institution or its organizational capability to act in a manner on which contracting parties can rely with confidence. Perhaps, the approach and behaviour would have been different if the other contracting party was someone outside the SFU community. Or if a full representation of faculty decision makers had more participation in SFU's approval of the terms of the Voluntary Recognition Agreement. The response to sea changes out of the air can be tempests and resistance.

[442] None of SFU's behaviour was dishonest, capricious or arbitrary. SFU did not act in bad faith or breach of its good faith obligation in clause 8.

[443] The implementation appendix to the Voluntary Recognition Agreement provides that during implementation the list of included employees "may be expanded as new information is obtained." It is implicit this newly obtained information will be shared with

TSSU in the clause 2 process. Not consulting or including TSSU in critical definitional and other decision making was a breach of clause 2.

B. Individuals Receiving Compensation from Grants as Scholarship

[444] In 2017, SFU's research enterprise had a $139m market share from which ~1,673 research personnel were being paid employment or scholarship income in the Fall term. The number varies from term to term and is different today.

[445] The total number of research personnel includes graduate students contributing to the research enterprise who are paid scholarship income for a more tangible contribution than simply thinking or engaging in intellectual or experimental meandering. Apart from the evidence of the research assistant work performed, like the January 2021 examples of duties and responsibilities of research assistants, it is common sense that in July 2022 the SFU research enterprise did not pay almost 800 graduate students over $250,000 a week for over 17,000 hours commitment with no responsibilities and no performance of assigned duties.

[446] Continuation of research assistantship payments can depend "upon satisfactory performance of the duties assigned by your research supervisor and on the availability of funds."[73] The assigned duties encompass a broad range of tasks, including what the RPI has identified as research support duties, with requirements and expectations they be performed within the allocated hours.

[447] The ideal, conception model of academic research rooted in making empirical observations to challenge or expand the knowledge of previous generations and to create comprehensive theories using mathematics, as Isaac Newton did in 1687 in *The Mathematical Principles of Natural Philosophy*, is seductively appealing.

[448] However, this conception of academic research does not capture the full range of research undertaken at SFU. Some disciplines use field work, statistics, probability calculations and other tools and techniques to expand knowledge and understanding. Some research is not funded to go where no one has gone before, but to confirm, not challenge, the existing order in the pursuit of mundane political (including military), economic or other goals.

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[73] *Simon Fraser University Graduate Student Admission Handbook* (September 2019 – August 2020), p. 11

[449] The 2018 Sierra Systems Group review highlighted that SFU's research enterprise had matured with increased complexity involving "additional cross-disciplinary research; partnerships with institutions, agencies and industry."[74]

[450] In this context, limiting the definition of research to the one used by the Canada Revenue Agency for the *Income Tax Act* ("research involves a critical or scientific inquiry aimed at the discovery of new facts, or the development of new interpretations or applications"), as the RPI did, does not include the range of research in all disciplines. It is arguably not as inclusive as SFU's policy definition in June 2019 – "an undertaking intended to extend knowledge through a disciplined inquiry or systematic investigation or both."

[451] The limited purpose and scope of the Canada Revenue Agency definition was identified by some faculty and in the June 10, 2020 email to faculty from Drs. Driver, O'Neil and Derksen and Ms de Domenico who: "share the view that students doing archival manuscript research for a professor may be research assistants in the same way as students working in laboratories." This view was shared by Dr. Driver and Dr. Sahota on November 13, 2019.

[452] The definition of research adopted by the RPI is not as broad as other possible definitions, including the definition in the Université Laval collective agreement quoted in a 2004 Federal court judgment.

> 2.1.04 Research includes activities leading to the expansion and deepening of knowledge and its dissemination and novel use.
>
> The following in particular are recognized as research:
>
> (a) the development of knowledge, that is, the design, establishment and development of scientific undertakings devoted to the systematic pursuit of new knowledge and the steps pertaining to this;
> (b) literary or artistic creation, that is, the production of original works or forms of expression;
> (c) scientific, literary or artistic criticism, that is, the requisite activities for synthesizing or critiquing skills acquired in a particular area of knowledge;
> (d) the presentation of communications and participation in seminars, conventions or other scientific, artistic, literary or professional events;
> (e) the publication of articles, manuals or works peculiar to the discipline;
> (f) participation in research programs of other universities.[75]

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[74] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 5
[75] *Ghail v. Canada*, [2004] F.C.J. No. 265, ¶ 42

[453] Graduate students engaged in research programs must work within a program structure for which they will have assigned duties directed by a PI faculty member who might be supervising fewer than 5 or up to 30 graduate students.

[454] If there is an employment relationship between a PI and a graduate student then, as emerged from the discussion among Dr. Driver, Ms de Domenico and Mr. Hatty, the method of payment is irrelevant, a red herring. The form or categorization of the payment is not determinative of the substance and nature of the relationship.

[455] Similarly, as a Canada Revenue Agency source identifies, training, studying and researching can be a facet of an employment relationship

> 3.28 An amount paid or benefit given to a person to facilitate the advancement of the recipient's education may be considered employment income pursuant to subsection 5(1) where the particular facts and circumstances indicate that an employment relationship exists between the recipient and the grantor. In such cases, the recipient may undertake training, studies and research of a type that is ordinarily expected of them under the terms of their employment. A common but not isolated example of such an arrangement is a medical post-doctoral fellowship, which is discussed further at 113.36.[76]

[456] Payment by scholarship might be requested by a student or selected by a department administrator or PI in a belief it will benefit a student or to skirt requirements of the *Income Tax Act*, *Employment Insurance Act*, *Canada Pension Plan*, *Immigration Act* and *Employment Standards Act*, all of which were identified by the Sierra Systems Group in 2018. As Ms Aylesworth testified, students with increased frequency have wanted payments retroactively recategorized to have access to a benefit they or someone else believed they did not need, should not obtain or like the Canada Emergency Response Benefit was unanticipated.

[457] The RPI sponsors were told in 2018 town hall meetings that many, not a few, PIs "choose scholarship (even when it is an employment relationship) solely to make income non-taxable for students." The Sierra Systems Group's opinion was that by looking at the substance instead of form "it is probable that SFU would be considered the employer of grant-funded research personnel, and should there be an investigation

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[76] *Income Tax Folio S1-F2-C3, Scholarships, Research Grants and Other Education Assistance* (https://www.canada.ca/en/revenue-agency/services/tax/technical-information/income-tax/income-tax-folios-index/series-1-individuals/folio-2-students/income-tax-folio-s1-f2-c3-scholarships-research-grants-other-education-assistance.html)

or ruling, that outcome would supersede SFU policy."[77] Graduate students paid by scholarship are among the grant-funded research personnel.

[458] Mr. Travers' opinion, approaching the issue from the perspective of the meaning of scholarship as an exemption from income for the *Income Tax Act*, was that the vast majority of scholarship payments through Payroll Services were made in an employment arrangement which require income tax source deductions. They were not a gift "for achievement that requires no performance of duties." They were not payments to simply think or meander.

[459] Dr. Driver recognized this reality and believed that the benefit of any doubt should be given in favour of employment status while excluding true academic scholarship recipients. Like the TSSU, he saw departmental initiatives nine months after the signing of the Voluntary Recognition Agreement doing the opposite by changing the question from what is a true scholarship to who is a trainee with a narrow "true research assistant" exception.

[460] Mr. Hatty communicated to Dr. Sahota in the context of workers' compensation and occupational health and safety coverage that graduate students paid "purely for their own individual academic pursuits," who Ms de Domenico referred to as "genuinely purely on scholarship", are the exception.

> At her earliest opportunity, Melinda will clarify to the safety committee that RA's are considered employees and are therefore covered by Worksafe. As we discussed, there may be a caveat in instances where students doing research, purely for their own individual academic pursuits, are not performing work for the university and are therefore not considered employees, (it is our understanding that there are likely few students that fall within that group).

[461] This correctly captures Mr. Travers' opinion. True scholarship payments to graduate students are "purely for their own individual academic pursuits." It is not payment for performing duties assigned by a faculty supervisor on the PI's research program and subject to termination of payment if those duties are not performed. This was the opinion of Dr. Parkhouse in December 2019 when he wrote:

> I agree that we should clean up our processes but please note that many faculty provide funding to their students from research grants with no expectation of duties to be performed. It is merely financial support for them to pursue their degree and in general requires that the student be eligible for receiving an award equivalent to

[77] *Research Personnel Employment Practices Review – Confidential Draft*, May 31, 2018, p. 8

> a scholarship (academic merit). They are funded exactly the same as a graduate fellowship. We must ensure that we adapt procedures that would allow for this to be allocated and treated as a scholarship.

[462] The approach of Dr. Driver, Mr. Hatty and others that most graduate student and PI relationships are employment not true scholarships accords the current understanding of an employment relationship and the evolution of the legal test for employment from the common law fourfold test[78] based in contract, which is often referred to in court decisions, to a purposive work regulation interpretation apportioning obligations, risks and rewards in context under different statutes. This shift is because employee status is the gateway to both the benefits and burdens of the legislative schemes. This is reflected in the Labour Program guidelines cited by the Sierra Systems Group, the Ontario Labour Relations Board decision on PDFs, the expansive definition of worker under workers' compensation legislation and Mr. Travers' opinion.

[463] It is well recognized that in a working-learning environment there is a spectrum of relationships with indicia of both employment and education.[79] The Ontario Labour Relations Board agreed that an educational component to the relationship does not negate the relationship from being employment.[80]

[464] When there are characteristics of both an employment and educational relationship in a research university, the dependency and protective need of the weaker student party favours a determination that the relationship is employment even though the dominant and controlling party says it is an educational relationship and wants to maintain the *status quo* because of a belief it is in the student's best interest, with which students might not agree, or for other financial, administrative, control or other reasons.

[465] The facts and circumstances of a relationship have always been examined closely to determine if the legal character of the relationship is an employment relationship. What has changed over time is the perspective and context in which the facts and circumstances are viewed.

[466] In the today's society and economy, the current stage of the evolution is to focus on unequal bargaining relationships involving control by one party and subordination by

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[78] *Montreal (City) v. Montreal Locomotive Works Ltd.*, [1946] J.C.J. No. 10, ¶ 17 – control; ownership of tools; chance of profit; and risk of loss.
[79] E.g., *St. Paul's Hospital*, [1976] B.C.L.R.B.D. No. 43, ¶ 32
[80] *University of Toronto (Governing Council)*, [2012] O.L.R.D. No. 179

the other in which those performing work are in need of protection and the benefit of a legal duty of good faith and fair dealings. In the courts, this is accompanied by a recognition of independence and deference to administrative tribunals acting in distinct regulatory regimes. More recently, in some circumstances there is the added element of *Charter* protected freedom of association rights.

[467] This evolution and the current approach to determining the existence of an employment relationship are critical components of the context in which the language of the Voluntary Recognition Agreement was negotiated and must be interpreted.

[468] SFU and TSSU agreed TSSU would be the voluntarily recognized bargaining agent for certain person holding research assistant and grant employee position at SFU who were SFU employees and who would become employees of SFU. It was not left to SFU's discretion to decide who would and who would not become SFU employees. Instead, TSSU and SFU "discussed various specific cases around Included Persons" and agreed on specific exclusions and specific inclusions in the bargaining unit.

[469] It was agreed one specific inclusion is "those individuals who receive compensation from grants as scholarship and/or stipend." It was agreed the "list of included employees is not exhaustive." And that SFU had limited control over the terms and conditions of employment while these individuals "are in the employ of grant holders."

[470] This is not an agreement all scholarship students will be included in the bargaining unit. It would not be collective bargaining in good faith to seek coverage of a collective agreement over persons who are not employees. Such a demand or proposal could be negotiated to an impasse.

[471] It is an agreement to include "individuals who receive compensation from grants as scholarship and/or stipend" who are in an employment relationship with PIs who, like other research personnel, will be transitioned to employment by SFU and become employees of SFU. This is clear from a reading of the works of the Voluntary Recognition Agreement in the factual matrix context at the time it was agreed.

[472] It is an agreement to look at all individuals who receive compensation from grants as scholarship to determine which ones are employees and to transition them to SFU employees. Mr. Hatty confirmed this as recently as his May 4, 2021 letter.

> … we acknowledge that individuals at SFU may have been paid scholarship in exchange for work in order to put more money into the hands of the student, contrary to legislation, and this was the reason that the language *"those individuals who receive compensation from grants as scholarship and/or stipend"* was included in the Agreement. However, individuals who are compensated by scholarship or stipend for employment, and are eligible to be transitioned to SFU employees, will become employees compensated through salary or hourly wage. Therefore, no individuals in receipt of scholarship or stipend for research will be affiliated with TSSU. We want to be very clear that it was never the intention of SFU to agree that students in receipt of scholarship and stipend, with no employment relationship with SFU, would be included in the RA (TSSU) employee group. (emphasis added)

[473] There is no evidence of any effort by SFU to examine the specific facts and circumstances of "individuals who receive compensation from grants as scholarship and/or stipend" to identify those who were being paid scholarship or stipend for employment. Instead, SFU through the RPI gave unreviewable designation to departmental administrators and PIs.

[474] SFU's failure to undertake this review without collaboration with TSSU was a breach of clause 1 and the Appendix of the Voluntary Recognition Agreement.

C. Remedies

[475] The remedies awarded for contractual breaches in the implementation of the Voluntary Recognition Agreement must respect the agreement in clause 9 that "the implementation of this Agreement does not include any matters connected with or arising from the collective bargaining required under clause 4." This includes a final decision on which individuals "who receive compensation from grants as scholarship and/or stipend" are employees and are to become employees of SFU.

Declaration

[476] I declare SFU breached clauses 1, 2, 4 and 8 and the Appendix of the Voluntary Recognition Agreement as found and described above.

[477] I declare individuals receiving compensation from grants as scholarship and/or stipend who are employees of a PI are to become employees of SFU and included in

the bargaining unit as Included Persons unless they are properly included in the bargaining unit of another certified trade union.

Damages

[478] This is an appropriate circumstance to award TSSU damages for the multiple contractual breaches by SFU. TSSU seeks compensatory, aggravated and punitive damages payable to TSSU and affected individuals denied inclusion among Included Persons.

[479] TSSU requests that no amount be determined until TSSU and SFU have an opportunity to address and, presumably, negotiate a specific amount or no amount. Until that happens TSSU requests I retain jurisdiction to decide the matter under section 49 of the *Arbitration Act*. This request is consistent with TSSU and SFU's labour relations and current collective bargaining relationship.

[480] I retain jurisdiction to decide all aspects of this matter, including the amount of any damages, if TSSU and SFU are unable to achieve an agreement by November 14, 2022.

[481] If there is no application to exercise this retained jurisdiction within 30 days after the conclusion of a renewed collective agreement, then the retained jurisdiction will have lapsed and cannot be exercised.

Individuals Receiving Compensation from Grants as Scholarship and/or Stipend

[482] The clause 2 process of the Voluntary Recognition Agreement must be used to have an informed discussion about inclusion of "those individuals who receive compensation from grants as scholarship and/or stipend." This has not happened. In part, this was because the TSSU and SFU's mutual intentions and agreement overreached SFU's organizational capacity diminished for a time by the pandemic and, in part, because institutional, department and faculty change resistance could not be overcome.

[483] To remedy this and fulfill the mutual intention of the Voluntary Recognition Agreement, I order as follows:

1. In addition to the mediated preliminary lists order, within seven days of the date of this decision, SFU shall provide TSSU a copy of an Excel workbook

containing the two worksheets in Exhibit 14 with updated data for the first pay period in the 2022 Fall term. The data does not include individual email addresses provided for in clause 4 of the Voluntary Recognition Agreement but does include the department column data.

2. In addition to the mediated preliminary lists order, beginning with the second payroll period in the 2022 Fall term and ending when a renewed collective agreement has been concluded, SFU shall provide TSSU a copy of an Excel workbook containing the same data as in Exhibit 14 with updated data for the pay period within one working day after each of the first three pay periods of each term and each intersession. This will be the second and third pay periods in 2022 Fall term. The data does not include individual email addresses provided for in clause 4 of the Voluntary Recognition Agreement but does include the department column data.
3. For each individual who receives compensation from grants as scholarship and/or stipend for which TSSU requests information about their research assistantship or other basis for the scholarship, SFU shall, within ten calendar days of the request, provide TSSU with electronic copies of all paper and electronic documents related to the payment of scholarship income to that individual for the academic term or intersession. This includes all emails and any other communications between the individual and any SFU faculty and administrative employee.
4. SFU and TSSU shall resume the meeting process in clause 2 of the Voluntary Recognition Agreement no later than October 3 or another mutually agreed date to determine the individuals who receive compensation from grants as scholarship and/or stipend purely for their own individual academic pursuits with not expectation of duties to be performed and the individuals who are employed and are to become employees of SFU.
5. No later than the first day of the 2023 Spring term, SFU shall transition all employed individuals who receive compensation from grants as scholarship and/or stipend who are Included Persons to employment with SFU.

6. Unless agreed otherwise by TSSU and SFU, when there is an agreement that an individual who receives compensation from grants as scholarship and/or stipend is an employee and Included Person, SFU will retroactively change the payments for the academic term from scholarship to wages.
7. Any difference whether an individual who receives compensation from grants as scholarship and/or stipend, who is agreed to be an employee is either an Included or Excluded Person will be referred to me for a final decision in accordance with the Voluntary Recognition Agreement in an expedited manner.
8. Any difference over the employment status of an individual will be submitted by application to the Labour Relations Board under section 139(a) of the *Labour Relations Code* or to any other mutually agreed person for final decision in accordance with the application of the *Labour Relations Code* to the intended bargaining unit and collective agreement under the Voluntary Recognition Agreement.

[484] The Board may treat any application pursuant to this order as a referral by me under section 98 of the *Code*.

[485] The Board might on its own motion under section 139 of the *Labour Relations Code* regard a decision on any difference over employee status as an orderly, constructive and expeditious method of settling a dispute before it arises in the context of whether there is a voluntarily recognized collective agreement ratified by those intended to be covered.

[486] I retain jurisdiction to decide any matter related to the interpretation, application and implementation of this award and remedies.

SEPTEMBER 13, 2022, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey

Appendix 1: Memorandum of Agreement of Voluntary Recognition (Nov. 15, 2019)

Between

Simon Fraser University (SFU)

And

Teaching Support Staff Union (TSSU)

1. Simon Fraser University ("SFU") agrees to recognize the Teaching Support Staff Union ("TSSU") voluntarily as the bargaining agent for those persons who hold positions as research assistants or grant employees at SFU who are or who will become employees of SFU and who are not otherwise properly included in the bargaining unit of another union which is certified as a bargaining agent for employees of SFU ("Included Persons").

2. Further to this voluntary recognition agreement ("Agreement"), SFU will undertake to determine in a timely way those positions which should reasonably be characterized as positions held by Included Persons and those positions which are properly included in the bargaining unit of another union which is certified as a bargaining agent for employees of SFU ("Excluded Persons"). TSSU and SFU shall meet at least once every 30 days from the signing of this document until the completion of the process. At least 3 days in advance of each meeting, SFU shall provide TSSU with the latest preliminary list of Included Persons, Excluded Persons, and the persons whose classification is yet to be determined.

3. SFU and TSSU agree that persons who hold an appointment as a post-doctoral fellow or as a University Research Associate are not Included Persons. Such persons are, therefore, expressly excluded from the scope of this Agreement.

4. On the earlier of the completion of the process described in clause 2 above or May 1, 2020, SFU and TSSU will begin collective bargaining to establish the terms and conditions of employment that will be added to the existing collective agreement between SFU and the TSSU to govern the employment of Included Persons. Subsequent to the completion of the process described in clause 2, a list of Included Persons, their departments and email addresses shall be provided to TSSU.

5. To the extent the current terms and conditions of employment of an Included Person are within SFU's control, the parties agree the terms and conditions of employment and related matters shall remain as status quo for Included Persons.

6. TSSU will defer any application to the Labour Relations Board for a variance of its bargaining unit to include Included Persons until at least November 14, 2020. The purpose of this deferral is to provide SFU with sufficient time to undertake the process required by clause 2 above and SFU and TSSU with sufficient time to undertake the collective bargaining required by clause 4 above. This date may be amended by mutual agreement.

7. SFU and TSSU understand and accept that a voluntary recognition agreement requires the employees who will be represented by the voluntarily recognized bargaining agent to ratify such representation in a manner which would, if challenged, be satisfactory to the Labour Relations Board. Should the Included Persons either fail or refuse to ratify this

representation in such a manner, it will become void and its content and any measures taken by either SFU or the TSSU to implement its content will be *without prejudice* to such steps or positions as may be taken by either SFU or the TSSU in connection with any proceedings which may then arise from or relate to the TSSU's efforts to organize the Included Persons.

8. At all times during the currency of this Agreement, SFU and TSSU must act in good faith, and will take such further steps as may be reasonable or necessary to give effect to this Agreement.

9. SFU and TSSU agree to appoint Jim Dorsey, to mediate and/or arbitrate under Part 8 of the Labour Code any difference which may arise between them regarding the implementation of this Agreement. For certainty, the implementation of this Agreement does not include any matters connected with or arising from the collective bargaining required under clause 4.

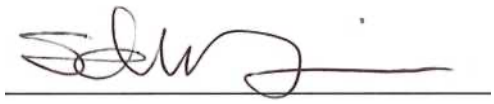
10. The Labour Code and the decisions of the Labour Board dealing with voluntary recognition agreements must be applied in all respects to this agreement by both parties.

11. This Agreement is dated November 15, 2019.

An attached appendix provides implementation details.

On behalf of:

Simon Fraser University



[Sandi de Domenico, Associate VP Human Resources]

Teaching Support Staff Union

[Derek Sahota. TSSU Advocate]

Appendix: Implementation Details

The parties have discussed various specific cases around included persons and have agreed to the following:

Explicitly excluded:

- post-doctoral fellows
- University Research Associates

Included within the TSSU bargaining unit are research assistants and grant employees, including but not limited to:

- those individuals who receive compensation from grants as scholarship and/or stipend
- holders of NSERC USRA and equivalent funded by SFU
- work-study student employees

The above list of included employees is not exhaustive and the parties discussed that during implementation it may be expanded as new information is obtained. A community of interest approach would be the guiding factor in determining the appropriate bargaining unit.

With regard to clause 5 of the Memorandum of Agreement of Voluntary Recognition, signed November 15th, 2019, the parties agree and acknowledge that SFU may have limitations of control over changes to the terms of conditions of Included Persons whilst they are in the employment of grant holders. However, SFU commits to exercising all reasonable measures as are available to maintain current conditions for Included Persons during the implementation of this Agreement.

November 15, 2019
Appendix to Memorandum of Agreement of Voluntary Recognition

Appendix 2: Preliminary Lists Production Order (June 16, 2020)

Labour Relations Code of British Columbia
Mediation / Arbitration

The Teaching Support Staff Union

(Union)

Simon Fraser University

(Employer)

ORDER TO PROVIDE PRELIMINARY LIST AND UPDATED PRELIMINARY LISTS (VOLUNTARY RECOGNITION AGREEMENT)

Background:

A. The Employer and Union entered into a Voluntary Recognition Agreement dated November 15, 2019.

B. The Agreement provides for recognition of the Union as the bargaining agent for unidentified "persons who hold positions as research assistants or grant employees at SFU who will become employees" subject to implementation of the agreement and application of the Labour Relations Board's decisions on voluntary recognition in its interpretation and application of the *Labour Relations Code*.

C. The Agreement provides for the Employer to provide the Union preliminary lists of "Included Persons, Excluded Persons and the persons whose classification is yet to be determined."

D. An Appendix to the Agreement includes implementation details, including exclusions from and inclusions in the bargaining unit.

E. The Agreement provides for my appointment under Part 8 of the *Labour Relations Code* to resolve, by mediation, arbitration or both, any differences that might arise between the Employer and the Union regarding the implementation of the agreement.

F. On May 1, 2020 the Union advised a difference has arisen in the implementation of the Agreement "including but not limited to the failure of SFU to provide any of the lists or data outlined in the agreement by May 1, 2020."

G. Through Mediation discussions with the Union and Employer between June 9 and 16, 2020 it was established that:

   a) The Employer is in possession and control of a subset of payroll records from which a preliminary list can be extracted;

   b) The subset of payroll records includes groups of persons whose personal information is not relevant or potentially relevant, including employees of organizations other than the employer and persons explicitly agreed to be excluded under the Appendix to the Agreement;

c) The Employer is not opposed to providing a preliminary list of potentially excluded and included persons and makes no objection based on legal privilege;

d) The Employer has been advised that it would not be in compliance with its obligations under the *Freedom of Information and Protection of Privacy Act* if it were to provide personal information (name, email address) without an order;

e) I have authority under the Agreement and Part 8 of the *Labour Relations Code* to make an order that the Employer provide preliminary lists;

f) Making an order that the Employer provide preliminary lists is necessary and consistent with the Agreement and the purposes and objectives of the *Labour Relations Code*.

THEREFORE, I ORDER THAT:

1. On or before June 23, 2020, the Employer provide an initial electronic preliminary list of names, department, faculty, job code description, fund code, job title and email addresses extracted from the payroll records created by applying description and title filters discussed in mediation on June 15, 2020.
2. On or before June 23, 2020, the Employer provide the Union a complete list of filters used to sort the payroll records.
3. The three-day time limit to meet in paragraph 2 of the Agreement is relieved against to allow the Union and Employer to meet not later than July 7, 2020.
4. The Employer provide updated preliminary lists on or before three days in advance of each meeting agreed in Paragraph 2 of the Agreement. Where filters have been updated, a list of all filters will be provided to TSSU with the updated preliminary lists.
5. At all times, the preliminary list and updated preliminary lists shall remain in the custody of Union Advocate Derek Sahota, Chief Steward Katie Gravestock and Chief Steward Seamus Bright Grayer and no additional complete copies shall be made.
6. For purposes of investigation and verification of the information in the initial and updated preliminary lists, these lists may be viewed by members of the Union Executive, TSSU staff and Departmental Stewards.
7. The initial and updated preliminary lists may not be used for any purpose other than the Agreement, its implementation and this mediation/arbitration proceeding.
8. On the conclusion of the currency of the Agreement, the Union must destroy the initial and all updated preliminary lists.
9. This order may be varied on application of either the Union or Employer or on joint application.

This Order is made and dated at North Vancouver, BC on June 16, 2020.

James E. Dorsey

Appendix 3: Decisions on SFU's Redaction of Documents (August 2, 2022)

I have completed my review of the 90 redacted, re-redacted and unredacted documents provided by SFU. I did not review redactions within a document which do not exist in the same document introduced as an exhibit. Attached is a summary of my review of these documents. These findings and decisions, without the attachment, will be appended to the final arbitration decision.

Independent of discovery in litigation under procedural rules of court or an administrative tribunal and pre-hearing production and disclosure of documents in arbitration under the *Arbitration Act* and in grievance-arbitration under the *Labour Relations Code*, persons have a right of access to included public body records under the *Freedom of Information and Protection of Privacy Act*. There is no submission that a right of access under *FIPPA* preclude any of the redactions in these documents or that a disclosure exception under *FIPPA* is the reason for any redaction. Consequently, I have not considered the provisions of *FIPPA* in this review of redacted documents.

SFU identified five categories of redactions. The following are descriptions of what I found and determined in each category.

1. **Attachment Disclosed Separately**
   There are 29 documents with redactions in this category. It is unclear why the name of an attached document was redacted when the attached document has been disclosed with or without redaction. There appears to be extensive duplication in the attachments. Some are, and others might be, different iterations of the same document.
   I was able to confirm some of the attachments were disclosed separately because I had access to the attachment in the unredacted document and recognized it as a document among the exhibits.
   I am uncertain whether others were disclosed separately because I did not find them among the exhibits. This does not mean definitively that they are not among the exhibits with a different file name. Or they may have been disclosed but not included among the exhibits.
   The result is that I am unable to determine each of this category of redactions encompasses an attachment that has been disclosed separately.
   Decision
   Therefore, SFU is to review the documents with Attachment Disclosed Separately redactions and identify the attachment(s) which are among the exhibits and the attachments which are not among the exhibits and when the latter were disclosed to the TSSU.
2. **Live Link**
   There are 3 redactions in this category. None of the links in the unredacted documents were accessible to me.
   Decision
   While each of them appears to be to a document otherwise disclosed, SFU is to review the 3 documents with Live Link redactions and identify whether the materials at the link are among the exhibits or were disclosed to the TSSU.
3. **Labour Relations Privilege**
   This privilege is claimed for 24 redactions in 15 documents.
   Decision

Some of the content is not potentially relevant to the issues in dispute, but all of the content in each document redacted for labour relations privilege is content clearly confidential for labour relations considerations. These are appropriate redactions.

4. Solicitor Client Privilege

This privilege is claimed for 4 redactions in 3 documents.

Decision

Each of the redactions relate to seeking advice from a lawyer or advice received. These are appropriate redactions.

5. Irrelevant

Only three documents have no redaction for irrelevancy. Many of the documents have multiple redactions for irrelevancy. Broadly, the categories of content redactions are as follows:

A. Document Collection Content

The name of a person who sent a document or email thread to a person in Human Resources compiling documents for disclosure with the date and time it was sent.

B. Financial Content

Actual, budgeted or projected costs relating to the RPI project or matters within its scope.

C. Administration

Content about administrative matters being undertaken or planned. Most relate to the RPI project or Payroll. None relate to the Voluntary Recognition Agreement.

D. RPI Matters Unrelated to Research Assistants and Grant Employees

Content about RPI project plans and accomplishments with respect to post-doctoral fellows and research associates; project outreach and consultation; and project resource requirements or requests.

Submissions of TSSU and SFU

SFU's submission is that the irrelevancy of each redaction in the documents it disclosed as potentially relevant documents is evident in reading the unredacted content.

TSSU submits documents disclosed as potentially relevant to the issued in dispute and the claims made by TSSU should be disclosed without any or fewer redactions.

> Applying the ***UBC*** [*University of British Columbia (Re)*, [2010] B.C.L.R.B.D. No. 138] test, TSSU says that the documents in question (as requested of and provided by SFU), are clearly relevant. SFU has not satisfied the onus upon it to justify the redactions, as described in ***Minchin v. Movsessian*** [*Minchin v. Movsessian*, [2021] B.C.J. No. 1471] and ***North American Trust Co*** [*North American Trust Co. v. Mercer International Inc.* (1999), 71 B.C.L.R. (3d) 72]. We are dealing with the redaction of <u>relevant</u> documents and SFU has provided no good reason for withholding the information. In addition to the issue of identifying included persons, the Grievance/Arbitration concerns SFU's breach of the VRA, and SFU's motivations for that breach. Those issues are before the Arbitrator and it is entirely relevant for the Union to question the basis for SFU's conclusions regarding the project and the "transition" of RAs. The documents in question relate directly to these issues. To whatever extent the redacted portions of the documents speak to SFU's motivations and reasons for action/inaction, as well as the determination of goals in relation to the "project" (e.g. costs of the project, assessment of resources spent, additional resources needed), it is TSSU's position that they should be disclosed.

SFU submits the redaction of irrelevant content is permissible and appropriate.

> This is particularly the case where, as here, the relationship between the parties is ongoing rather than transactional. If litigation between these parties, which is inevitable, becomes a mechanism by which wide-ranging disclosure of irrelevant or privileged information may be sought and possibly, based on the parties' prior experience, obtained, damage to the parties' relationship, including damage to a climate of trust between the parties, is a predictable consequence. The document production process occasioned by litigation would be increasingly weaponized with both parties seeking and both parties being required to produce irrelevant information simply because it appears in a document – such as a report or minutes – which also contains relevant information. The paramount concern is not, therefore, with the degree of sensitivity attached to a given piece of irrelevant information. In the context of an ongoing relationship like that which exists here, the paramount concern arises from the bare fact that the information being sought is irrelevant.
>
> The relationship between an employer and a union is fraught with centrifugal forces. The duties established by the *Code* and the discretion afforded to an arbitrator are, in part, correctives to this fact. The same general considerations apply even if, in the particular circumstances of this case, the *Act* applies. These considerations explain why decisions of the BC Supreme Court, which typically hears cases arising from transactional relationships or from formerly ongoing relationships, and which are heard under the Rules established by and which bind the Court but which do not bind an arbitrator, have no meaningful application in the present case.
>
> Here, the majority of redactions made in the disclosed records were made on the basis of irrelevance. A small number of redactions were made on the basis of labour relations privilege. Provided the assertion of labour relations (or any other) privilege is sustained, an arbitrator, whether acting under the *Act.* or the *Code*, simply has no authority to set it aside.
>
> The TSSU's claims are notably weak in connection with the redaction of documents generated during course of the RPI. As you have heard, the RPI pre-dated and was independent of the Voluntary Recognition Agreement. Obviously, there was a link between the RPI and the Voluntary Recognition Agreement (vis-à-vis the University, the TSSU couldn't organize people who were not University employees) and the chronological overlap of the RPI and VRA processes supplies some of the context for understanding the implementation of the Voluntary Recognition Agreement. However, the redacted information in the RPI related documents is, to accept, for purposes of the argument, the TSSU's preferred test, without materiality. The redacted information is simply not necessary to prove or disprove any material fact in the dispute before you.

Discussion, Analysis and Decision of Redactions for Irrelevance

Under both the *Arbitration Act* and *Labour Relations Code*, within limitations and subject to the provisions of a collective agreement or arbitration agreement, an arbitrator may establish arbitration procedures and order the production of documents. (*Arbitration Act*, ss. 32 and 21; *Labour Relations Code*, s. 89)

This is not arbitration of a grievance under the collective agreement and there is no collective agreement provision providing guidance on this issue. Grievance-arbitrators may and have ordered disclosure of documents without redactions. (E.g., *Kamloops/Thompson School District No. 73 (Ault Grievance)*, [2006] B.C.C.A.A.A. No. 183 (Dorsey); *Coast Mountain Bus Co. (Disclosure of Personal Information Grievance)*, [2007] B.C.C.A.A.A. No. 172 (Dorsey))

Under section 63 of the *Arbitration Act.* proceedings are private and confidential. Consequently, decisions of arbitrators are not publicly available and it cannot be researched whether the arbitral consensus is that arbitration practice follows the principles of the BC Supreme Court Rules when not otherwise agreed in the arbitration agreement.

It is notable the Vancouver International Arbitration Centre Domestic Arbitration Rules (effective September 1, 2020) expressly provide: “Oral and documentary discovery procedures developed for and used in court procedures are generally not appropriate procedures for obtaining documents and information in an arbitration under these Rules.” (Rule 19(a)). These Rules give an arbitrator discretion to determine whether documents are relevant to an issue and material to an outcome of the arbitration and to balance interests in ordering production.

Neither these Rules nor any other arbitration rules are incorporated in the November 15, 2019 Memorandum of Agreement of Voluntary Recognition or agreed to be applicable in the referral to arbitration. The Memorandum does include a specific agreement that: “The Labour Code and the decisions of the Labour Board dealing with voluntary recognition agreements must be applied in all respects to this agreement by both parties.” (¶ 10). The extent, if any, of redaction of potentially relevant documents is a procedural matter not encompassed by this specific agreement.

In 2010, the Labour Relations Board for its practices and procedures adopted the principle in the Rule 7-1(1)(a)(i) of the July 1, 2010 BC Supreme Court Rules of Court on discover of documents in *University of British Columbia (Re)*, [2010] B.C.L.R.B.D. No. 138. That Rule limits discovery to “all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact.”

Not all grievance-arbitrators have found the Board’s approach and limitation of the Board’s prior approach to be appropriate under a collective agreement which contains no agreement on rules, practices and case management strategies similar to those of the Board or BC Supreme Court. (E.g., *Hospitality Industrial Relations (Documents Disclosure Grievance)*, [2015] B.C.C.A.A.A. No. 132 (Dorsey); For a similar approach to another BC Supreme Court rule see *Simon Fraser University (Adverse Party as Witness Grievance)*, [2017] B.C.C.A.A.A. No. 52 (Dorsey))

Rule 7-1(1)(a)(i) if applied in this arbitration as an arbitration under the *Arbitration Act* not the *Labour Relations Code* (which has not yet been addressed and determined) presumes full disclosure, but allows some for irrelevancy.

In an action for damages arising from a police shooting in *Minchin v. Movsessian*, [2021] B.C.J. No. 1471, the plaintiff produced redacted medical records. Master Elwood determined “… there is no authority for the proposition that a listing party may redact medical records by treating every medical condition, test result or topic of conversation within a single interaction as a separate document allowing for a separate analysis of relevance.” (¶ 24) And the Rule does “not authorize litigants to edit documents on the basis of relevance alone. Generally speaking, the whole of a document must still be produced if a part of it may be used to prove or disprove a material fact: *Este v. Blackburn*, 2016 BCCA 496 at para 19.” (¶ 26). While redactions could not be made as of right under the Rule, the Court had guidelines which permit redactions for irrelevance and for other good reason. After review, Master Elwood disallowed most of the

redaction in this litigation between strangers, but maintained some of the redactions as irrelevant.

In a domestic violence and trespass claim, Master Bilawich wrote that the balance to be struck was between "the need to protect privacy interests in irrelevant material against the need to ensure adequate discovery for the proper administration of justice." (*Chow v. Wichacz*, [2022] B.C.J. No. 11, ¶ 39). Many of the redactions the defendant sought were maintained based solely on the pleadings, not on the Master's review of unredacted documents because the defendant did not agree Master Bilawich could review unredacted documents.

This is not a dispute between strangers who had a transactional relationship or parties whose relationship is ended. This is a dispute between a trade union and employer with a long standing and ongoing relationship, currently engaged in collective bargaining and several ongoing grievance disputes in an institutional community with many diverse interests in the RPI and Voluntary Recognition Agreement.

In this context I find it is appropriate to limit the content of potentially relevant document disclosure to exclude through redaction content that is not relevant to the dispute being arbitrated.

It is evident from my review that different redactors applied a different standard at different times to determine the degree of irrelevancy that warranted redaction because some of the content redacted as irrelevant is included in exhibits in either the TSSU or SFU books of documents. There appears to have been a relatively consistent approach to groups A, B and C, but some difference in D.

I have determined that no redaction for irrelevancy reviewed in the documents either overreached or withheld content that is potentially relevant to the issues in dispute. These are appropriate redactions.

Appendix 4: Ruling on Jurisdictional Submissions (August 12, 2022)

These are my decisions on the two issues addressed in our case management conference call today.

Admissibility of Data Inadvertently Disclosed July 14

In direct examination of Ms Plican during the online hearing on July 14, 2022, SFU distributed and tendered an electronic Excel workbook as an exhibit The intended exhibit was only one of two sheets in the workbook summarizing some of the data for 2,537 persons in the second sheet, including 818 graduate students receiving scholarship payments.

The data included personal and other information not intended to be disclosed. When this disclosure slip was quickly identified, a PDF copy of the first sheet was substituted and entered as Exhibit 12 (% of Scholarships 2202-07-14).

Ms Plican reported the personal information data breach to the SFU Privacy Office. I deleted the Excel workbook.

After review of the workbook, TSSU deleted some, but not all columns of data on the second sheet. TSSU identified columns of data it had not previously seen. Today, it informed SFU counsel that It anticipates it will introduce into evidence its retained columns of data in the second sheet, some of which were not previously disclosed to TSSU. SFU objects.

The disputed columns of data are not covered by the June 16, 2020 Preliminary List Production Order.

In early preparation for this arbitration, there was an understanding SFU would disclose all potentially relevant documents, which was a massive undertaking. On May 31, 2022, I issued a consent order that SFU disclose “relevant and potentially relevant records and documents.” TSSU assisted in SFU’s management of disclosure by narrowing the scope of its request without excluding anything it did not know about.

Decision

The distribution and percentage of graduate students paid a scholarship in Exhibit 12 is relevant. The data in the second TSSU redacted workbook sheet, which was provided to me, on the distribution and percentage of research assistants, research support and other non-continuing personnel is also relevant. The distribution of hours paid, hourly rates and other data columns is also potentially relevant. While a report on this data from the payroll system is encompassed by the May 31, 2022 order, it is understandable it was overlooked in the compilation of extensive materials for disclosure.

SFU’s objection to the admissibility of this document is overruled.

Submissions on the Statutory Basis of the Jurisdiction for this Arbitration

On February 17, 2022, SFU counsel wrote the following to me and TSSU.

> I say what follows not to debate the issue but to let Will, Maria, and Derek know the question I am asking myself so they can, in turn, think about the question. The parties share a common interest in arriving at the correct answer to the question.
>
> I also stress that the University does not have a preferred answer to the question. The University is simply concerned that the jurisdictional question be addressed correctly. The question and the correct answer underlie both your authority to

> produce a decision which is valid in law and fundamental aspects of the pre-hearing, intra-hearing, and post-hearing process that is available to the parties.
>
> From my perspective, the choice of the statutory basis for your jurisdiction lies between the *Arbitration Act* and the *Labour Relations Code*.
>
> More particularly, while I recognize there is a "choice of law" provision in the voluntary recognition agreement, it is relatively specific and addresses the substantive law that you will apply in the event of a dispute. In any event, I don't see how the parties could confer jurisdiction under the *Labour Relations Code* ("Code") by agreement. A jurisdiction derived from a statute exists or not and if it exists it does so by virtue of the statute. The Labour Relations Board has issued decisions addressing what is required for a voluntary recognition to exist and to be effective for purposes of the Code but until a voluntary recognition is effective, it appears to lie outside the Code. And even when a voluntary recognition has taken effect (i.e., post-ratification or its equivalent by the proposed bargaining unit) the only provision of the Code which speaks explicitly to a voluntary recognition is section 34.
>
> So I lean towards seeing the dispute resolution provision in the voluntary recognition agreement as an arbitration agreement within the meaning of section 5 of the 2020 *Arbitration Act* with, as I indicated above, a choice of law provision. It is worth noting there is no counter-part to section 5 in the Code.

This issue was discussed at a case management conference on February 25, 2022. TSSU counsel was willing to operate on an assumption the *Arbitration Act a*pplied and by agreement each party would bear its own costs. There was no need for an immediate decision under which statute the arbitration was proceeding. SFU counsel spoke about a 1999 Labour Relations Board decision and followed with an email that day.

> What follows is not to resile from the consensus this morning that the jurisdictional question could wait but I came across something that I wanted to bring to your and the TSSU's attention.
>
> I mentioned the UVic voluntary recognition case in which I was counsel (BCLRB No. B190/99). I was reading it for other reasons when the following came to my attention.
>
> The panel, chaired by John Hall, discusses what is required to establish a voluntary recognition but also comments expressly about what brings a voluntary recognition under the Code at para. 94: *Unless a collective agreement is negotiated, parties have not brought a voluntary recognition relationship under the Code: Delta Hospital, at p. 370*. And to similar effect at para. 66.
>
> I was looking at the document disclosure order you made during the mediation and noted it referred to the Code in the style of cause and in the order. I want to ensure you and the TSSU have a chance to consider whether the order needs to be reissued. I will ask the University the same question. This matters because, among other things, the order provides the basis for lawfully disclosing certain personal information.

The preliminary list order was reissued with agreed changes under the *Arbitration Act*.

Answering the statutory jurisdiction question was deferred to the hearing. At the beginning of the hearing, it was again deferred when the TSSU offered a way to avoid addressing the application of s. 63 (Privacy and Confidentiality) of the *Arbitration Act* to reporting proceedings to its membership.

In an email exchange today between counsel, TSSU counsel wrote:

> Finally, I would also like to raise a procedural matter and propose how it may be handled. The question raised by you on behalf of the University concerning whether this proceeding falls under the Arbitration Act or the Labour Relations Code, and relatedly whether, and if so how, the provisions in the Arbitration Act requiring a confidential proceeding apply, remain unresolved. That is a matter concerning which you would proceed first in argument, followed by reply on behalf of the TSSU. It also raises a distinct issue that stands apart from the substantive issues in dispute.
>
> In the circumstances, I propose that final argument next week address the substantive arguments and that the question of statutory jurisdiction and related issues be addressed separately through a brief exchange of written submissions following the hearing. The University would provide its submission first, followed by a TSSU submission, and finally a reply from the University. That will hopefully be orderly and efficient ….

SFU counsel did not agree because the jurisdictional question "is inextricably linked to the substantive issues in the case and I am prepared and fully expect to argue it next week." TSSU counsel replied:

> It would assist me if you would explain your position and outline how the issues are linked. I will need this statement of position as a matter of fairness to be prepared to address your position and respond, and it may also allow us to resolve this procedural issue.
>
> Further, I should ask in any event, whether you agree that the University should proceed first in argument concerning the jurisdictional issues, irrespective of whether those issues are argued next week or at another time. Assuming that is not disputed, can you let me know how you would see the order of argument if the issues are all heard together next week? I assume in that case that the TSSU might proceed first on substantive issues, then hear your position first on the jurisdiction after that, but let me know if you have a different view.

SFU counsel replied, in part: "The jurisdictional question goes to the heart of Jim's decision making parameters, the applicable law, and his remedial authority. There is not the slightest reason to deal with the issue separately from the main argument. Indeed, doing so would be counter-productive since it would lead to inefficiency and confusion."

TSSU counsel focuses on "parameters" and "As a matter of fairness, I ask that you identify how and in what way you say the jurisdictional question affects Jim's decision making parameters, the applicable law, and his remedial authority."

TSSU seeks an order for particulars about SFU's legal position and direction that the final summations proceed as it proposed.

Decision

TSSU's applications are denied. It is not unfair to proceed as SFU proposes. It is not more efficient or helpful to proceed as TSSU proposes.

TSSU has the carriage of its case and adequate notice of the jurisdictional issue, which is not an adversarial trap. This is a substantive- issue to be decided to determine what flows from the choice between the *Arbitration Act* and the *Labour Relations Code*.

It is expected TSSU will specify in its final submissions the jurisdictional authority on which it relies for each decision and remedy it seeks in this arbitration. SFU might agree or disagree with the jurisdictional authority on any or all. TSSU will have an opportunity to reply.