BRITISH COLUMBIA LABOUR RELATIONS BOARD

SIMON FRASER UNIVERSITY

(the "Employer")

-and-

TEACHING SUPPORT STAFF UNION

(the "Union")

PANEL:	Jitesh Mistry, Vice-Chair
APPEARANCES:	Patrick Gilligan-Hackett, for the Employer Leo McGrady, Q.C., for the Union
CASE NO.:	68669
DATE OF DECISION:	August 21, 2015

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 This decision concerns an unfair labour practice complaint brought by the Employer alleging that the Union has failed to bargain in good faith and engaged in conduct amounting to coercion and intimidation, contrary to Sections 9, 11 and 47 of the *Labour Relations Code* (the "*Code*").

2 On August 20, 2015, the Board received the Union's application for leave to sur-reply. Later the same day, the Board received a letter from the Employer in reply to the Union's sur-reply application. I find it unnecessary to consider the Union's unsolicited application (and, by extension, the Employer's reply) and decline to do so.

II. BACKGROUND

3 The Employer is a university pursuant to the *University Act*, R.S.B.C. 1996, c. 468. It was established in 1965.

4 The Union represents teaching assistants, tutor markers, and sessional instructors employed by the Employer, as well as instructors in the English Language and Culture and Interpretation and Translation Programs ("ELC/ITP").

5 The parties have a longstanding bargaining relationship.

6 On April 30, 2014, the parties' 2010-2014 collective agreement expired.

7 On May 22, 2014, the parties signed a bargaining protocol agreement, that includes the following provisions:

> [...] The Negotiating Teams for the University and the Union shall meet jointly at mutually agreed times and locations [...] The University and the Union shall advise each other of the names of members o[f] their respective committees, and any changes in the number and/or composition of the committee which may occur from time to time [...]
>
> Every effort will be made to conduct Joint Bargaining sessions at least twice per month (excluding summer break) [...] Every effort will be made to accommodate meeting dates and times, to ensure the orderly progress of negotiations. In the event that it becomes necessary to cancel scheduled meetings, every effort will be made to reschedule the days in order to meet the minimum number of meetings required.

8 On June 4, 2014, the parties first met in collective bargaining to exchange and discuss issues and proposals.

9 The parties subsequently attended mutually agreed upon bargaining sessions on: June 18, 2014; August 26, 2014; September 16, 2014; September 30, 2014; October 7, 2014; October 21, 2014; November 13, 2014; November 25, 2014; December 9, 2014; January 22, 2015; February 12, 2015; and February 19, 2015.

10 On March 27, 2015, the Union undertook a strike vote. Approximately, 92% of voters were in favour of strike action.

11 Both of the parties' submissions included repeated and lengthy references to the other side's alleged cancellation of collective bargaining dates and/or practice of taking extended caucuses during bargaining and/or insistence on short bargaining days.

12 On April 16, 2015, the parties attended a scheduled bargaining session. Late in the morning, the Union asked for a break to caucus. Before bargaining resumed, at approximately 2:26 p.m., the Union served strike notice on the Employer.

13 When the Union served strike notice, essential services had not yet been designated by the Board.

14 On April 18, 2015, the Board designated essential services.

15 On May 13-15 and June 3, 2015, the parties engaged in further collective bargaining.

16 At its core, this complaint concerns a subsequent June 10, 2015 letter (the "June 10th Letter") from the Union to the Employer's President, Dr. Andrew Petter. The June 10th Letter includes the following passages:

> [...] We have reviewed bargaining to day, and have identified changes necessary to renew the possibility of agreement without serious disruption. In the absence of the following commitments to support those changes, we have been instructed to escalate our current limited job action, to more serious actions, with unfortunate[ly] more serious impacts on the student population. In the event that you, too, wish to see a resolution without further disruption, we will suspend plans for escalation and bargain, as long as measurable progress is registered. **The following are the specific conditions which we need to be in place to engage in productive bargaining**:
>
> A) **remove all of the Employer demands on the table with regard to the ELC/ITP Instructors.** Your committee has stated that there are no problems with these programs to be addressed at the table, yet they have made proposals

> that are all concessionary, attempting to remove the few rights that currently exist for these Instructors in particular;
>
> B) **add a member of the Senior Administration to your committee with the authority to conclude an agreement at the table.** The current committee has advised TSSU on several issues that it must confer with various departments to attain directions as to its stance at the bargaining table, causing disruptive delay to the process. This has become a serious impediment to progress.
>
> C) **add another employer representative to your committee who has taught in the last three years.** Although we appreciate that your committee does have one academic participant, it does not appear that he can easily make himself available, and we feel an involved academic presence would facilitate discussion of our five key issues.
>
> D) **commit to more time at the bargaining table, with concurrent sessions, and no pre-set adjournment times, in order to take advantage of any momentum that may be generated at the table.** This request has been formally communicated to your committee in the past, but beyond one three day session has been answered negatively. (emphasis added)

17 The parties engaged in further correspondence regarding the June 10th Letter and what the Employer refers to as the "preconditions" contained within it.

18 On June 22, 2015, the Union advised the Employer that it would not be attending the collective bargaining session scheduled for June 24, 2015.

19 On July 8, 2015, the parties attended a previously scheduled collective bargaining session. The Union states that at that bargaining session, the Employer advised it had exhausted its agenda of issues to discuss and was, consequently, cancelling the upcoming July 9, 2015 bargaining session on the basis that there was no interest in discussing the Union's agenda items and issues.

20 On July 9, 2015, the Employer posted a "SFU-TSSU Labour Update" (the "Labour Update") on its website. In the Labour Update, the Employer alleged that following the filing of this unfair labour practice complaint, the Union "removed their preconditions and agreed to return to the bargaining table". The entirety of the Employer's Labour Update is set out below:

> Late yesterday, SFU filed a request for mediation with the Labour Relations Board, consistent with our ongoing goal of developing a

> new Collective Agreement with TSSU while minimizing disruption and hardship to students and our campus community.
>
> The University's negotiation team attended a bargaining session with TSSU yesterday with the intent of presenting and discussing constructive proposals, and responding to TSSU's proposals, in an effort to work toward a new Collective Agreement. **(Following the University's unfair labour practice complaint to the Labour Relations Board, the TSSU removed their preconditions and agreed to return to the bargaining table.) While the parties were able to reach agreements on two minor changes, there was no agreement on any of the remaining substantive bargaining issues.** At the conclusion of yesterday's bargaining session, the parties mutually agreed to cancel the July 9 bargaining session.
>
> As a result of the lack of advancement, **the University believes that the assistance of a mediator may help both parties achieve some progress.** SFU and the Union have used mediation in the past and in many instances, with the assistance of this third party, significant progress has been achieved. With that aim in mind, **the University made an application for mediation to the Labour Relations Board last evening.**
>
> We hope the Union will respond favourably to the Board's appointment of a mediator to assist the University and TSSU in the interest of achieving a new Collective Agreement.
>
> We hope that this approach will lead to more productive and fruitful negotiations and will help to minimize disruption and hardship to SFU students and our campus community from any potential future labour action. (emphasis added)

21 (The Union disputes that its suggested commitments were "preconditions" to "return to the bargaining table".)

22 On July 15 and 16, 2015, the Union held a second strike vote.

23 On July 17, 2015, the Union served 72 hours strike notice on the Employer.

24 On July 21, 2015, the Union's members began to withhold students' grades as part of its strike action.

25 On July 22, 2015 the parties attended a scheduled bargaining session. The Employer states that a number of unidentified individuals, who are not members of the Union's bargaining committee, attended the bargaining session with the Union's bargaining committee. The Employer further states that it did not know the identity of

these approximately nine individuals, but that throughout the day they would come and go. The Employer says the Union refused to identify these individuals.

26 Over the course of July 22 and 23, 2015, the parties engaged in further communications (as well as making public statements regarding these unidentified individuals).

27 On July 23, 2015, the parties met for another collective bargaining session. The Employer says it again agreed on a without-prejudice or precedent basis to allow the Union to have the unidentified individuals attend the bargaining session. The Employer further states that it "continues to have serious concerns about unidentified individuals attending the parties' bargaining sessions".

28 At the July 23, 2015 bargaining session, the parties signed off on a proposal regarding seniority for ELC/ITP Instructors.

29 The Employer states that it offered the Union collective bargaining dates on August 17, 18 and 31, 2015.

30 The parties have agreed to attend mediation at the Board from September 1-4, 2015. The Employer states that, as a result, the August 2015 collective bargaining dates have been cancelled.

III. THE PARTIES' POSITIONS

The Employer's Position

31 The Employer submits the Union has committed an unfair labour practice by refusing to continue collective bargaining unless the Employer agreed to the Union's preconditions set out in its June 10th Letter. The Employer says the Union has imposed impermissible preconditions that have inhibited collective bargaining.

32 The Employer further submits that even if the alleged preconditions were not contrary to Section 11 of the *Code* in and of themselves, the Union's refusal to continue collective bargaining unless the Employer agreed to these demands is a violation of the duty to bargain in good faith.

33 The Employer submits the expression of the Union's views regarding the progress of collective bargaining, the Union's proposed solutions, and the threat of escalating strike action if the Employer did not accede to its views, constitute coercion and/or intimidation prohibited by Section 9 of the *Code*.

The Union's Position

34 The Union's position is well-summarized in the following passage from its initial written submission to the Board:

> The Employer's complaint (the "Complaint') is significantly premised on a misconception that the Union imposed "preconditions" on the Employer in order to have continued participation in collective bargaining, that the Union underwent strike action over matters of format and process, and that the Union would not continue bargaining unless its "preconditions" are met. With respect, the Employer is mistaken, as the facts below establish.
>
> In the alternative, the Union submits that the matter is now moot given that the parties have continued bargaining and that the Employer's stated position in a press release from July 9, 2015 refers to the Union's alleged removal of the preconditions and "return to the bargaining table." [...]

The Employer's Position in Final Reply

35 The Employer submits it is not appropriate to make a finding of mootness where an allegation of an unfair labour practice is made during an ongoing labour dispute. In this respect, the Employer notes that the underlying collective bargaining dispute has not been concluded.

36 The Employer further submits there continues to be issues between the parties related to the preconditions set out in the June 10th Letter. The Employer notes that the Union has never withdrawn the preconditions or stated that it would not again attempt to make its participation in collective bargaining conditional on these preconditions.

37 The Employer further says that the conflict between the parties regarding the unidentified individuals demonstrates that the dynamics of collective bargaining continue to be adversely affected by the issues raised in its complaint. In this regard, the Employer notes that, when it raised the issue of the unidentified individuals, the Union levied allegations that the Employer was now issuing coercive and intimidating preconditions to returning to collective bargaining.

38 The Employer says that without a decision of the Board, it is left not knowing whether the Union is entitled to make demands relating to the matters outlined in the June 10th Letter. The Employer says that if the Board finds the complaint has merit and grants the remedies sought by the Employer—in particular an order that the Union cease and desist from making the demands in the June 10th Letter—it will have an obvious practical effect on the relations between the parties.

39 With respect to the merits of the complaint, the Employer submits the Union is seeking to avoid the content and effect of the written correspondence between the parties.

IV. ANALYSIS AND DECISION

40 In *Health Employers' Association of British Columbia (Fraser Health Authority and Burnaby Hospital)*, BCLRB No. B334/2002 (Leave for Reconsideration of BCLRB No. B228/2002), 87 C.L.R.B.R. (2d) 70 ("*HEABC*") at paragraphs 29-31, boldface and underlining added, a reconsideration panel of the Board addressed the concept of mootness in the context of Board proceedings:

> The Board's general approach is to decline to adjudicate academic issues. In *Borowski,* the Court explained that the general practice or policy of the Court is to decline to decide a case which is moot, but that the Court retains a discretion to adjudicate a moot dispute as a matter of policy or the practice of the Court.
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> Accordingly, *Borowski* established a two-stage analysis for dealing with the issue of mootness. **At the first stage, it is necessary to determine whether the dispute has become moot. A case is moot if "...there is no longer a live controversy or concrete dispute" (p. 242). At the second stage, if the dispute is found to be moot, it is necessary to decide if the Court should exercise its discretion to hear the case.** The Court described this as "...a discretion to be judicially exercised with due regard for established principles" (p. 243). It went on to describe **the three principles which form the rationale for the mootness doctrine and which must be considered when exercising the discretion to hear a moot case**:
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> 1. **The first principle is a recognition of the importance of an adversarial context to the competent resolution of legal disputes.**
>
> 2. **The second principle is a concern for conserving scare judicial resources.** The Court expanded on this second principle in two regards:
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> (a) first, the Court stated:
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> > ...**an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration.** In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly... . The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the

> point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved. (p. 245); and
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> (b) secondly:
>
> There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. **The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law**.... (p. 245)
>
> 3. The third principle recognizes a concern that the Court not be seen to be intruding into the role of the legislative branch of government by pronouncing judgments in the absence of a dispute affecting the rights of the parties.
>
> (pp. 243-247)

The Court went on to explain that considering the extent to which the three principles are present is not "...a mechanical process. The principles identified...may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and *vice versa*" (p. 247).

41 In the case at hand, the Employer itself has publicly stated in its Labour Update that the Union has removed its "preconditions" and "return to the bargaining table". While the larger collective bargaining dispute continues, it is apparent from the Employer's own public statement there is no longer a "live controversy or concrete dispute" with respect to the alleged preconditions set out in the June 10th Letter: *HEABC*, para. 30.

42 I am not persuaded that the Union's allegations against the Employer with respect to the unidentified individuals at the July 22, 2015 bargaining session "show that the dynamics of bargaining continue to be affected by the issues raised in the Complaint", as the Employer asserts. There is presently no unfair labour practice complaint before the Board regarding the unidentified individuals. To the extent that collective bargaining has been affected by the unidentified individuals issue, it appears to be a minor distraction that has not impeded the parties from resolving at least one bargaining item and scheduling further bargaining dates.

43 Indeed, the fact that the parties have actually returned to collective bargaining and scheduled mediation at the Board on September 1-4, 2015, is the most compelling

evidence that recent events have overtaken the June 10th Letter and the alleged preconditions within it.

44 I note the Employer itself says that if the Board concludes it must make determinations about the larger collective bargaining context, an oral hearing is required. While I have not made any determination regarding the relevance and necessity of such contextual background evidence, this assertion by the Employer at least establishes the very real possibility that scarce public resources will be consumed by adjudication of the merits of the complaint in an oral evidentiary hearing. I find that the delay and expense inherent in such a potential oral hearing greatly outweighs any uncertainty with respect to the substance of the complaint, particularly in light of the subsequent bargaining events.

45 The Employer relies upon two cases where the Board declined to find a dispute moot on the grounds that the underlying labour dispute is ongoing: *Sears Canada Inc.*, BCLRB No. B243/2007 at paragraph 30; and *Sun-Rype Products Ltd.*, BCLRB No. B266/2007, 151 C.L.R.B.R. (2d) 91 ("*Sun-Rype*"). I find these cases are distinguishable as they do not involve a discrete and limited allegation of a failure to bargain in good faith that has largely been overtaken by subsequent events. Both *Sears* and *Sun-Rype* involved Section 68 complaints alleging unlawful use of replacement workers. In *Sun-Rype*, the Board's decision to not find the matter moot largely rested upon the potential for the Union to obtain monetary damages from the Employer's use of impermissible replacement workers: paras. 28-30. No such considerations apply here.

46 The sole case relied upon by the Employer specifically concerning an allegation of a failure to bargain in good faith is *Board of School Trustees of School District No. 36 (Surrey)*, BCLRB No. B389/98, wherein the Board found the matter to be moot partially on the grounds that a collective agreement had been reached: para. 16. However, the decision does not suggest that a matter may *not* be found to be moot in other circumstances. Equally as important, the decision largely rests upon the principle that "any ruling on this application may not necessarily have a practical effect on the rights of the parties [...]": para. 16. For the reasons set out in this decision, I similarly find that any ruling on this complaint will not have a practical effect on the rights of the parties.

47 I find the issues raised in the complaint are moot and decline to exercise discretion to hear this matter further. The parties have moved well beyond the June 10th Letter. To proceed further with this complaint would serve as an unnecessary and distraction from bargaining, contrary to the Board's duties to "[encourage] the practice and procedures of collective bargaining between employers and trade unions" and "[promote] conditions favourable to the orderly, constructive and expeditious settlement of disputes": Section 2(c) and (e) of the *Code*.

V. CONCLUSION

48 For the reasons set out above, the complaint is dismissed.

LABOUR RELATIONS BOARD

JITESH MISTRY
VICE-CHAIR