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April 28, 2017

Mr. Jordan Kirkness
Baker & McKenzie LLP
Brookfield Place
Bay/Wellington Tower
181 Bay Street, Suite 2100
Toronto, ON M5J 2T3

Mr. John Goldthorp
Staff Representative
Greenridge Plaza
Unit #7, 105 Sutherland Drive
Kingston, ON K7K 5V6

Dear Mr. Kirkness and Mr. Goldthorp,

Re: Arbitration Award between Queen's University and United Steelworkers (On Behalf of USW, Local 2010) and (On Behalf of USW, Local 2010, Unit 1) Academic Assistants dated April 25, 2017

Please attach this letter to the front of the award.

ERRATA

1. Page 14, second paragraph, fifth line to read as follows:

   "Formula to bargaining unit members did not unduly interfere with the Charter of"

2. At the request of the University and only for purposes of alignment with its submissions:

   a) Page 13, last paragraph, first sentence to read as follows:

   "In regard to the Union's grievances, the University submitted that two key issues must be determined."

   b) Page 13, last paragraph, third sentence to read as follows:

   "Secondly, whether or not the collective agreement requires the University to deduct the initiation fee."

Yours truly,

William A. Marcotte

William. A. Marcotte

cc: Ministry of Labour

IN THE MATTER OF AN ARBITRATION

BETWEEN:

QUEEN'S UNIVERSITY
(The "University" or "Employer")

- and -

UNITED STEELWORKERS
(ON BEHALF OF USW, Local 2010)
and
(ON BEHALF OF USW, LOCAL 2010, UNIT 1)
ACADEMIC ASSISTANTS
(The "Union")

AND in the matter of Union policy grievances

ARBITRATOR: William A. Marcotte

APPEARANCES:

FOR THE UNIVERSITY:
J. Kirkness, counsel
H. Shields, dir. and counsel
L. Newton, counsel
L. Colby, sr. l.r. advisor

FOR THE UNION:
J. Goldthrop, USW staff rep.
K. Orser, pres. Loc. 2010
B. Broderick, v-p. & gr. off., Loc. 2010

File ID: 873431
Folder ID: 10039-RR-17
Ref ID: 39319

Hearings held in Kingston on March 29 and 30, 2017

AWARD

There are two July 27, 2016 Union policy grievances before me, one filed by Local 2010 and one filed by Local 2010-01. The Local 2010 grievance states:

> The Employer has violated the Collective Bargaining Agreement under Articles 4.01 and 4.02. The complaint is in regard to the refusal of the Employer, despite multiple notice letters by the Union, to deduct the $10 initiation fee from each new bargaining unit member hired after the initial formation of the bargaining unit.

The wording of the grievance filed by Local 2010-01 is identical save that it references Articles 7.01 and 7.02. Articles 4.01, 4.02, 7.01 and 7.02 are otherwise identically worded. Reference will be made throughout this award only to Articles 4.01 and 4.02.

<u>ARTICLE 4 – UNION DUES</u>

4.01 The University agrees to deduct from each pay of each employee in the bargaining unit, on a per pay basis, such Union dues, fees and assessments, as instructed by the Union in accordance with the Union's Constitution, that are applicable to each bargaining unit member, regardless of whether she/he is also a Union member. For clarity, the dues, fees and assessments prescribed by the Union shall not include fines, penalties, levies or the like that the Union may, pursuant to its Constitution, impose against Union members.

4.02 [in part] All such dues, fees and assessments shall be remitted to the Union forthwith and in any event no later than 15 days following the last day of the month in which the remittance was deducted....

The parties also referred to the following provisions of the collective agreement under which the Local 2010 grievance arises:

4.07 On the date of hire, the University shall advise each new employee of the name of her/his Union Steward and the Local Union President.... Within 60 calendar days from the start of employment, new employees shall be allowed 1.5 hours including travel time to attend a Union orientation session, which will be attended by no more than 2 Union Executive members. Neither the employees nor the members of the Union Executive will suffer a loss in wages for attending the orientation session.

ARTICLE 26 – HUMANITY FUND

26.02 (a) The University agrees to deduct on a monthly basis ... the amount of $0.02 per hour from the wages of employees in the bargaining unit for all compensated hours, to pay the amount so deducted to the Humanity Fund ... and to advise in writing both the Humanity Fund ... and the Local Union that such payment and the names of all employees in the bargaining unit on whose behalf such payment has been made.

26.03 It is understood and agreed that participation by any employee in the program of deductions for the Humanity fund may be discontinued by an employee or may be added at any time following the receipt... of that employee's written statement of her/his desire to discontinue or begin such deductions from her/his pay.

Reference was made to the following sections of the Constitution of the International United Steelworkers:

ARTICLE XI
Membership

Section 1. No applicant for membership shall be regarded as being a member in good standing until the full amount of the initiation fee has been paid.

Section 5. Any member who retains employee status in a bargaining unit represented by the International Union but who because of a layoff has not, for twenty-four (24) continuous months, performed at least five (5) days' work in any month in such bargaining unit shall be deemed not in good standing (but not expelled) and devoid of all membership rights until such time as the member ... resumes payment of current dues, at which time the member will be automatically be restored to good standing.

Section 6. A member not in good standing shall not be permitted to vote, nominate for office, hold office, or be a candidate for office.

ARTICLE XII

Section 1. Any member may be penalized for committing any one or more of the following offenses: .... (d) advocating or attempting to bring about the withdrawal from the International Union or of any local Union or any member or group of members.

ARTICLE XIII
Trials of Members and Local Union Officers

Section 1. Any charges against a member or a Local Union Officer must first be submitted in writing to the Local Union of which the individual charged is a member or an officer ....

Section 5. In the event that the accused fails to appear...the hearing shall proceed with the same force and effect as if the accused were present.

Reference was also made to the *Labour Relations Act*:

47. (1) **Deduction and remittance of union dues.** – Except in the construction industry, and subject to section 52, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith.

(2) **Definition.** – In subsection (1),

"regular union dues" means,

(a) in the case of an employee who is a member of the trade union, the dues uniformly and regularly paid by a member of the trade union in accordance with the constitution and by-laws of the trade union, and

> (b) in the case of an employee who is not a member of the trade union, the dues referred to in clause (a), excluding any amount in respect of pension, superannuation, sickness insurance or any other benefit available only to members of the trade union.

Ms. Kelly Orser has been the Local president since the Union was certified in 2011. Negotiations over the first collective agreement began near the end of that year and were completed in mid-July, 2012. The language of art. 4.01 was an on-going topic of negotiations. The Union's initial proposal was as follows:

> 4.01 The University agrees to deduct from the pay of each employee in the bargaining unit, on a per pay basis, such Union dues, fees and assessment as prescribed by the Constitution of the Union.

On request from the University, the Union provided it with a copy of its Constitution. In the following negotiations, Ms. Orser said, "I recollect the University was more concerned with fines and penalties within the Union [i.e., under its Constitution]. If an employee loses good standing up to the national level, [he or she] can be fined. That's an in-house process and the University didn't want to be involved in that process, nothing to do with initiation fees or joining fees. There were no discussions I can recall of the concept of a closed shop or open shop at all, even under discussions of Union orientation sessions was anything said that we'd have to collect initiation fees." She did not recall seeing Union Form R-115, entitled, "SUMMARY OF UNION DUES", but was aware of a "form" about those matters and that the Union would be providing one to the University. Relevant to our purposes, that form is to be completed by the University on a monthly basis and contains as follows: "1. Number of Members in a Bargaining Unit; 2. Number of Members Paying Dues; 3. Number of Hours Included in Earnings; 4. Total Earnings (excluding lump sum earnings); 5. Percentage Dues; 6. Per Hour Dues; 7. Initiation Fees; Number of New Members _ at $_; 8. Lump Sum Dues (bonus, profit sharing, etc.); 9. Miscellaneous (please specify)." She does receive these monthly reports.

In regard to the ratified language of art. 4.01 in the collective agreement, Ms. Orser said she understands the University's responsibility to be: "initiation fees, dues, assessments, the University is required to deduct those for us. The chief negotiators had discussions about it, we achieved satisfaction. The University would not have to deduct fines and penalties but normal fees and assessments were agreed to." In regard to initiation fees, "the parties agreed that for the first month initiation fees would be waived [i.e., for September 2012], but other dues and assessments would be collected and from October first, any new employees hired into the bargaining unit would pay dues and assessments and it would include the ten-dollar initiation fee".

Ms. Orser said that from October, 2012 to June, 2014, the University's Monthly Summary of Union Dues reports do not indicate initiation fees were being deducted. "In July [2014] it came to our attention. Our Local went under administration and that triggered an audit by the International Union. They identified that the initiation fee was not being collected. They instructed me and Ms. McComb [i.e., the USW staff representative who negotiated the initial collective agreements] to bring it forward to the University and meet with them to start that process." At a meeting with the University shortly thereafter, Ms. McComb suggested getting the initiation fee collection process started but, "the University [representatives] said they did not have to deduct the initiation fee."

Bargaining over the renewal of the first collective agreement that expired on December 31, 2014 began in late February, 2015. In an email dated March 23, 2015 from Ms. McComb to Ms. Heather Shields, who deals with employee and labour relation matters for the University, Ms. McComb states:

> Please be advised that in future the Union will insist that Article 4 – Union Dues (4.01) be applied according to the strict literal meaning of that language, (including "in accordance with the Union's Constitution" and the Labour Relations Act Section 47. Sub (1) and (2) or any other section that may apply), notwithstanding its misapplication in the past, or any past practices.

> In the event the University does not adhere to the strict meaning of this clause, the Union reserves the right to process a grievance, up to and including arbitration.

During the second round of negotiations, art. 4.01 was discussed. Ms. Orser said that "a proposal was made to the University in attempting to clarify or strengthen the language because it was becoming clear the University had a different view of it. Our proposed language was never agreed to by it." The Union, however, did not change its understanding of art. 4.01. The University continued not to deduct initiation fees and Ms. McComb continued to insist it do so in correspondence to it. This refusal caused the Union to file the grievances at hand. Ms. Orser attended the negotiations over the renewal of the Local 2010-01 collective agreement. The Union was again unsuccessful in getting the University to accept its "clarifying" language for, in that case, art. 7.01.

In cross-examination, Ms. Orser agreed that a bargaining unit member and a union member are different; a bargaining unit member becomes a union member in good standing upon payment of the initiation fee under Article XI, section 1 of the Union's Constitution. She agreed that under section 6 of that Article, a bargaining unit member who has not paid the initiation fee cannot vote for, run for, or, hold executive office. To her knowledge, the payment of the initiation fee serves no other purpose. She agreed that under Article XII, section 1(d), a member can be penalized for advocating withdrawal from the Union, but believed it was if advocating "publicly." She agreed that under Article XIII there is a trial process for penalizing members who contradict the Constitution or rules. She agreed Article XI, section 5 speaks to the distinction between membership rights versus retaining status as a member. She said there are no rules in the Constitution that apply to bargaining unit members as opposed to union members.

Ms. Orser agreed that in filling out the Union's monthly dues forms, the University clearly indicates it omitted reference to No. 7 of R-115, i.e., "Initiation Fees …". She has no direct knowledge of the University's decision to omit that reference from the form. "My understanding was that new employees into the bargaining unit would start paying dues and the ten-dollar initiation fee", but not bargaining unit members employed prior to October 1, 2011. Ms. Orser did not recall discussing bargaining unit members versus Union members in the first round of negotiations, "or that the Union has to collect the initiation fee. I understood all members pay the initiation fee and the University collects it. For the second round of negotiations for the 2010-01 collective agreement that was for me, the first use of closed/open shop, union member/bargaining unit member. But for the first round [for the Local 2010 collective agreement], the University was concerned with internal fines for members." She agreed the Union has never attempted to collect initiation fees at the orientation sessions for new bargaining unit members. Ms. Orser said, "Our understanding is that when you begin a bargaining unit job, you are a member in good standing. We don't see the distinction between bargaining unit member and union member."

In re-examination, Ms. Orser said, "The initiation fee was never on my radar. I really thought it was taken care of before I became president."

Mrs. Briana Broderick filed the grievances at hand. She participated in the second round of negotiations over both collective agreements. She said the matter of initiation fees "was an issue for us right off the bat.... Basically, it came down to a lot of questions about the Constitution. The University was asserting that not all bargaining unit members are union members", which she found surprising. "We ended up not agreeing. We sought clarification. When we discovered it wasn't collecting the initiation fee, we were advised to clarify [art. 4.01] by Ms. McComb." She is only "casually" familiar with the monthly summary of dues report. The Union position on art. 4.01, she said, has never waivered.

In cross-examination, Mrs. Broderick's evidence is that she understands there to be no difference between a bargaining unit member and a union member. She understands that to be a member of the Union in good standing, the initiation fee has to have been paid. She was not sure if a bargaining unit member who had not paid the initiation fee was not in good standing. "You're a member of the Union, you have a Union card, you can participate in all parts of union life." She said she is, "not a constitutional expert .... If you have a card, it makes sense to pay the initiation fee whether or not you participate in the bargaining unit". She disagreed that in the second rounds of negotiations bargaining unit member and union member were thoroughly discussed. To her knowledge, every new member gets a union card.

Ms. Heather Shields is the director and counsel for employee and labour relations and has been involved in the negotiations of the collective agreements, but was not involved with the Local 2010-01 one for the second round. Her evidence is that the University has never collected initiation fees for any of the bargaining units at the University. The language of art. 4.01 has remained unchanged since initially forming part of the collective agreement.

Ms. Shields received an email from Ms. McComb in July, 2014, advising that initiation fees, or "joining fees" as expressed by Ms. McComb, were to be deducted for bargaining unit members. She contacted Ms. Newton and was informed of the University position, i.e., it did not collect that fee. That matter was discussed by the parties at that time. Ms. McComb's March 23, 2015 letter advising it is to be collected was the next time it was mentioned to Ms. Shield's following commencement of the second round of negotiations in February, 2015 with Local 2010.

Ms. Shield's was referred to the University's Step 2 response to the grievance filed by Local 2010. As concerns its reference to s. 47 (1) and (2) of the *Labour Relations Act*, "the Act requires us to deduct Union dues for all bargaining unit members. Our position on art. 4.01 is consistent with that requirement. We agreed to deduct only what the Act requires of us." Ms. Shields' attention was drawn to reference by the University of a distinction "between all employees who form the bargaining unit (by default of their position at the University), and particular employees within the bargaining unit who make a personal decision to become a Union member [and] only those employees ...become a union member ... required to pay ... an initiation fee." Ms. Shields said, "The University, in art. 4.01, has agreed to deduct dues that are applicable to everyone in the bargaining unit, every pay period. "It does not matter [to us] if an employee has made a choice to join the Union .... An initiation fee only applies to someone who has chosen to be a union member and it is a one-time payment."

The University made its decision not to collect initiation fees on review of the Union's Constitution in reference to art. 4.01. Ms. Shields so informed Ms. McComb of its position at the bargaining table; "the initiation fee reflects a personal choice, that's an internal Union matter. The initiation fee is something different from Union dues." Ms. Shields said, "It's a personal decision and is not the type of information we should know about." Her evidence, also, is that collecting the initiation fee would require a manual process not covered by the University's computerized systems used to deduct union dues. Ms. Shields understands there are members of the bargaining unit who have not signed union cards, and, thus, are not Union members.

In cross-examination, when asked how she would know that some members had not signed union cards, Ms. Shields said, "What I would have been saying is my assumption was not everyone would choose to become a Union member, a possibility only."

Ms. Lisa Newton started as the director and counsel for employee and labour relations in March, 2011, responsible for negotiating and administering the collective agreements, including for Locals 20101 and 2010-1 beginning with the first rounds. She acted as chief spokesperson for the second round with Local 2010-01. Ms. Newton said it was her and another employer representative, a Mr. Orth, who negotiated the art. 4.01 language and that the parties had worked from the Union's initial proposals.

Ms. Newton's evidence is that from the very first, the University position on art. 4.01 is that, "We'd only deduct and remit [to the Union] what was applicable to all bargaining unit employees, but not Union members." The discussions at the bargaining table "many times [was that] bargaining unit members are covered by [OLRB] certification, and a subset is those who chose to become Union members.... We were working from [the Union's] original document and dues are as prescribed by their Constitution." It was the University that proposed the language in art. 4.01 beginning after the phrase. "in accordance with the Union's Constitution." The last sentence, beginning with "For clarity", was included, Ms. Newton said because "All discussions were in respect to what dues and fees mean. We were told that was standard language, [i.e., up to "Union's Constitution"] concerning dues and fees. So, we wanted clarity. Either Ms. McComb or Mr. Landi [a Union representative] had said dues, fees and assessments would not include fees and penalties."

The University did not want to make those deductions because, "those were [monetary matters] including impose-able on Union Members versus bargaining unit members." Ms. Newton also indicated that from the University's perspective, 'We have no right to know and don't want to know who is a Union member...the Labour Relations Act says no one is compelled to identify themselves as a Union member.... We don't know who is or is not a Union member for all kinds of good labour relations." In discussing this issue in negotiations on December 7, 2011, Ms. Newton's notes indicate that Mr. Landi had said, "fee is collected from every new hire, not intended to cover i.e., Fines against." Further, her notes indicate Ms. McComb had said, "...Our dues structure includes the $10 assessment fee."

In cross-examination, Ms. Newton's evidence is that she is aware of the Union's Humanity Fund under Article 26 of the collective agreement and which provision allows bargaining unit members to opt out or opt in for payment purposes. In re-examination, Ms. Newton said Article 26 was negotiated separately from Article 4 and at a "much later" date.

The Union submitted that the language of art. 4.01 is clear, unambiguous and requires the University to deduct the initiation fee for all bargaining unit members. There is no need to give weight to the evidence of negotiating history since it only demonstrates that the parties were polarized in their views of the language in art. 4.01. However, if weight is placed on that evidence, Ms. Orser's testimony is that the Union only agreed to waive that fee for the members who participated in the ratification of the first collective agreement, but that the University was expected to collect the initiation fee after September, 2012. Further, it was submitted that the Union considers there to be no distinction between bargaining unit members versus Union members as purported by the University.

The Union submitted that the clear language of art. 4.01 speaks for itself and notes that under art. 13.08, an arbitrator has no jurisdiction to "add to, subtract from, change alter, modify or amend any of the provision(s) of this Agreement." Article 4.01 clearly identifies what is excluded from deductions to be made by the University and nowhere speaks to the initiation fee. There is no ambiguity in the language, and evidence of negotiation history does nothing to dispel this clarity.

By way of remedy, the Union seeks a declaration that the University breached the collective agreement and a direction to it, on a "going forward basis", to deduct and remit for every new hire the ten-dollar initiation fee along with dues and assessments.

The Union did not submit any arbitration awards but simply noted that "the authorities are many" in regard to an arbitrator's jurisdiction under a collective agreement, and, in regard to the matter of ambiguity.

The University submitted section 47 (1) and (2) of the LRA, relevant to our purposes, makes a distinction between a bargaining unit member and a union member. Moreover, the definition of "regular union dues" in ss. (2) (a) does not include a one-time fee. For an employee who is not a member of the trade union, under ss. 2 (b) the "regular union dues" exclude "any other benefit available only to members of the trade union." The University submitted that since the initiation fee under the Union's Constitution is a prerequisite for union governance matters, it is a benefit only for Union members. These provisions of the Act provide the context for the interpretation of the language of art. 4.01, which language is contended to be clear and unambiguous, as is the Union's claim; rather, the University has a different meaning than held by the Union.

The University submitted that section 13 of *Employment Standards Act,* (the "ESA") specifically requires that deductions from an employee's wages can only be made if he is she so authorizes in writing. The University, therefore, cannot interpret the language of art. 4.01 in any way it wants to, in that it must not breach section 13 of the ESA. The University submitted that section 13 of the ESA also contributes to the context for interpreting the language of art. 4.01.

In regard to the Union's Constitution, the University submitted that two key issues must be determined. Firstly, whether or not the Constitution requires an initiation fee from non-union members. Secondly, whether or not the Constitution requires the University to deduct the initiation fee. As concerns the first issue, the Union's witnesses confirmed that under the Constitution, the initial fee plays no other role than governance matters. Moreover, there is no Constitutional requirement for a non-union member to pay an initiation fee. While Ms. Orser and Mrs. Broderick made no distinction between bargaining unit members and union members in administering the collective agreement, this Union is not a closed shop and the University needs specific authorization from a bargaining unit member in order to deduct the initiation fee. However, having knowledge of an employee's bargaining unit status raises a *Charter of Rights and Freedoms* issue and the University's interpretation of the collective agreement language must be in accord with the provisions of the *Charter*.

The University submitted that the Rand Formula applies in the instant case and in that regard, in *Re Lavigne and Ontario Public Service Employees Union et al.*;, 67 O.R. (2d) 536, [1989] O.J. No. 95, Action No. 560/87, 3 O.R. (3d) 511 (S.C.C. Note), the Court of Appeal determined that application of the Rand Formula to bargaining unit members did not unduly interfere with the Chart of Rights where it provides for freedom of association and an employee is not bound to associate only with the union or to become a member of the union. Thus, the Union witnesses' view of membership goes beyond the requirements of the Rand Formula, and ought not be adopted. Further, under the Union's Constitution, a member's freedom of speech is restricted under Article XII and which restriction ought not be imposed on someone who does not want to become a union member.

As to the second issue, the University submitted that the language of art. 4.01 is to be interpreted on the basis of its express language and not on the basis of the parties' intentions. In so interpreting collective agreement language, different words are to be given different meanings. In art. 4.01 there is reference to "bargaining unit member" and to "Union member". Thus, those different words have different meanings. Therefore, one must ask if art. 4.01 does or does not require the University to deduct the initiation fee from an employee "regardless of whether she/he is also a Union member".

The University submitted that reading art. 4.01 as a whole requires an interpretation that is consistent with two notions therein; that it is applicable to all bargaining unit members, and, regardless of being a Union member. The

University submitted that consistent with those two notions, the initiation fee does not apply to all bargaining unit members, but only to Union members. The evidence of negotiating history is clear in that the University did not want to bear the administrative burden of making a one-off deduction and it did not want to know who is or is not a Union member, bearing in mind the Union's Constitution prohibits disclosure to an employer that an employee is a Union member. Further, the distinction between a bargaining unit member and a Union member was thoroughly discussed at the bargaining table. At the table it was put to the Union that the University position is that the initiation fee only applies to a Union member and, as was Ms. Newton's evidence, the Union did not respond to the University. The University has openly disclosed its interpretation of art. 4.01 to the Union, given the monthly summary of dues reports omit initiation fee information. Ms. Orser confirmed that the Union would not collect the initiation fee in the first round of negotiations, thus, this matter of not doing so was acceptable to the Union. On this matter, the Union did not call either of its spokespersons, Ms. McComb or Mr. Landi, therefore, there is no clear evidence to contradict that of Ms. Newton. The University submitted that its behaviour of omitting initiation fee information is consistent with its interpretation of art. 4.01.

In regard to the Union's interpretation of art. 4.01 language, the University submitted it does not result from a reading of the whole of art. 4.01. The phrase, "regardless of whether she/he is also a Union member", must be read in accordance with the Union's Constitution, noting the use of the term "also" in that phase. The clauses of that article are connected and interrelated such that both conditions need to be met in order for the University to deduct the initiation fee. Moreover, the failure on the part of the Union to recognize the distinction between "bargaining unit member" and "Union member" makes its position on the interpretation of art. 4.01 untenable. The University also submitted that its interpretation is consistent with the phase "on a per pay basis", which requirement is not met for the initiation fee which is a one-off deduction. In any event, the Union has the opportunity to collect the initiation fee at the orientation session under art. 4.07.

In support of its position on the merits of the grievance, the University also submitted *Re Overwaite Food Group Limited Partnership and United Food and Commercial Workers, Local 1518* (April 4, 2006) unreported version (Larson); *Re Armtec and United Steelworkers, Local 4054*, 2012 CarswellOnt 14718, 113 C.L.A.S. 62, 226 L.A.C. (4th) 396 (Marcotte); *Re Carillion Services v. C.U.P.E., Local 942*, 2011 CarswellOnt 7115, 105 C.L.A.S. 149, 205 L.A.C. (4th) 400 (Goodfellow), and, *Re Hamilton Health Sciences Corp. and OPSEU, Local 273*, 2014 CarswellOnt 11950, 120 C.L.A.S. 25, 246 L.A.C. (4th) 211 (Knopf).

The issue to be determined in this award is whether or not the University breached art. 4.01 of the collective agreement in failing to deduct the initiation fee from new members of the bargaining unit. I find the merits of the grievance, on the evidence and submissions before me, require determination of the correct or proper interpretation of the language of art. 4.01. Both the Union and the University contend the relevant language in art. 4.01 is not ambiguous. However, they put forth different interpretations of that language and it is within this framework the parties are joined in their dispute. If the language is found to be ambiguous, extrinsic evidence in the form of negotiating history may be used in aid of its interpretation.

Prior to dealing with the language of art. 4.01, as concerns s. 13 of the ESA, there is no issue that as the exclusive bargaining agent for bargaining unit members, the Union has the authority to require the University to make deductions from their wages under section 47 of the Labour Relations Act.

Under s. 47(1) of the LRA, the University is required to deduct from the wages "of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues..." Under p. 47 (2), the Act defines "regular union dues" for (a) a member of the union, and (b) an employee who is not a member of the union. In each case, the dues are to be remitted to the union. Different from the University's obligation under s. 47 of the Act however, art. 4.01 of the collective agreement states the parties' agreement that the University is to deduct "such Union dues, fees and assessments as instructed by the Union ...", i.e., not just union dues.

In regard to the University's reference to the *Canadian Charter of Rights and Freedoms,* in *Re Overwaitea, supra,* employees were asked by supervisors to remove a button distributed by the union as part of a campaign against the employer's conversion of some of its stores to another store "banner". Relevant for our purposes, Arbitrator Larson commented on the impact of the *Charter* in the context of labour relations, at p. 7:

> ... it is well-established that while [the Charter] does not regulate private party disputes, arbitrators must consider fundamental Charter values .... Collective agreements should be interpreted in the context of the value system prescribed by the Charter.

A fairly comprehensive examination of the *Charter,* relevant for our purposes, is provided for in *Lavigne.*

In *Re Lavigne, supra,* an Ontario college faculty member objected to paying dues to his union that were used for non-collective bargaining purposes. The Divisional Court found that the faculty member's freedom of association under s. 2(d) of the Canadian Charter of Rights and Freedoms had been violated "to the extent that such [collective] agreement permitted union dues payable under the agreement to be used for purposes not related to collective bargaining" (p.6). Relevant for our purposes, the Court of Appeal found that, "The use of the dues by [the union] was a private activity by a private organization and hence beyond the reach of the Charter" (p.22). Also relevant to our purposes, the Court found that the mandatory requirement to pay dues pursuant to the Rand Formula did not infringe on the faculty member's freedom of association, at p. 27:

> The positive freedom of association [in the Charter] safeguards the right of individuals to associate with each other for the purpose of protecting common interests and pursuing common goals. The agency shop or **Rand Formula** [Emphasis in original] provision does not limit or interfere with that right. It imposes no restriction on an employee's ability in voluntary association with others to achieve a common purpose or advance a common cause; the employee remains patently free to oppose the union and the causes it may support, to seek to have the union's bargaining rights terminated, and to join with others for such purposes.

Further, in regard to how a union uses the payments made by its members, the Court states, at p. 31: "Whether any restriction ought to be placed on the union's use of payments compelled by an agency shop provision ... is, in our opinion, not a constitutional matter for the courts."

The above decision indicates, relevant to purposes at hand, that where dues are collected by way of the Rand formula from bargaining unit members, there is no infringement on freedom of association rights under the *Charter*. Further, what the union does with those funds is a private matter beyond the reach of the *Charter*. In that regard, the way in which the Union here uses the money it collects from bargaining unit members is a private matter and the University has no role to play in that regard, save for deducting and forwarding those monies to the Union.

In regard to the interpretation of the language of art. 4.01, the arbitral task is set out in *Re Armtec, supra*, at paras. 8 and 9:

> 8. Where an arbitrator is required to interpret the words of a collective agreement, the basic task to be performed is aptly addressed in Brown and Beatty, *Canadian Labour Arbitration*, 4th ed. (Aurora, Ont.: Canada Law Book, Inc.) at para. 4:2100:
>
>> It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it. As one arbitrator, quoting from *Halsbury's Laws of England*, stated in an early award:

> "The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit."
>
> .....
>
> "But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for purposes of interpretation, equivalent to the intention." (Footnotes omitted.)
>
> Accordingly, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions.

9. In aid of interpreting the stated or express language in a collective agreement certain assumptions guide that determination, *supra,* at para. 4:2110:

> In searching for the parties' intention with respect to a particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense ... It has been stated, however, that where there is no ambiguity or lack of clarity in meaning, effect must be given to the words of the agreement, notwithstanding that the result may be unfair or oppressive ...

(See also *Re Hamilton Health services, supra,* wherein the arbitrator notes, at p. 19: "the basic principles of contract interpretations are that the contract must be read as a whole and that its terms are presumed to be consistent".)

In applying the above arbitral approach to the language of art. 4.01, the University agrees to deduct from the pay "of each employee in the bargaining unit ..." That is, the deduction is to be made whether or not that employee is a bargaining unit member or a Union member. Further, the parties agree that what is to be deducted are, "... such Union dues, fees, assessments ... in accordance with the Union's Constitution." Under the Union's Constitution, Article XI, section 1 indicates that there is an "initiation fee" to be paid to become a Union member. That fee, therefore, is applicable to "each employee in the bargaining unit." In that regard, in terms of the distinction between a bargaining unit member and a Union member, the initiation fee is be deducted, "regardless of whether he/she is also a Union member." That is, whether or not an employee is a member of the bargaining unit or a Union member, there is no distinction as from whom the deduction is to be made. And whatever may be the University's view of the requirements or operation of the Union's Constitution, those are private matters and the University has no role to play in them.

I find the second sentence, which begins with the phrase, "For clarity", makes clear the University, in mandatory fashion by use of the word, "shall", is not to deduct "fines, penalties, levies or the like ... imposed against Union members" under the provisions of the Union Constitution. "The like" takes its meaning from "fines, penalties and levies", such that these sorts of deductions are in the nature of fines and penalties. An initiation fee, while it may constitute a levy, is not of the same nature as a penalty "imposed against Union members." In that respect, until a bargaining unit members pays the initiation fee she or he is simply not a Union member.

On the above examination of the language of art. 4.01, I find that the initiation fee is a fee in accordance with the Union's Constitution. I find, therefore, it is a fee that is to be deducted by the University. I find the deduction of the initiation fee is to be made regardless of whether the employee in the bargaining unit is a Union member or not a Union member. I find the initiation fee is not a payment that is excluded from deduction for reason that it is a fine or penalty. I find, therefore, that the language of art. 4.01 clearly and unambiguously requires the University to deduct the initiation fee from every member of the bargaining unit regardless if she or he is a Union member. In so deducting from every new employee in the bargaining unit, there is no issue as to whether or not the University has knowledge of who is or who is not a Union member. And while the University argued that the effect of the phrase, "on a per pay basis", excludes the deduction of the one-off initiation fee, that phrase cannot have the effect of preventing its deduction. Having so found, I find the extrinsic evidence in the form of negotiating history is inadmissible for purposes of interpreting the language of art. 4.01.

The grievance, therefore, is upheld. By way of remedy, the Union requests that I declare the University is in breach of art. 4.01 and 7.01 of the collective agreements. I so declare. Also as is its request, I direct the University to deduct and remit to the Union the ten dollar initiation fee for every new bargaining unit employee hired subsequent to the date of issuance of this award.

Dated at Toronto, this 25th day of April, 2017.

William A. Marcotte

William A. Marcotte
Arbitrator