

IN THE MATTER OF AN ARBITRATION

BETWEEN:

DOUGLAS COLLEGE

(the "College")

AND:

DOUGLAS COLLEGE FACULTY ASSOCIATION

(the "Association")

(Associate Dean Grievance)

AWARD

Arbitration Board:

Joan M. Gordon

For the College:

Colin G.M. Gibson

For the Association:

G. James Baugh

Dates and Place of Hearing:

**September 13 & 15 and October 2 & 27, 2006
New Westminster, British Columbia
November 9 & 10, 2006
Vancouver, British Columbia**

Introduction

In the mid-1990s, the College undertook a significant re-organization of its management structure. The second level of the new management structure involved individuals holding Dean positions.

On April 7, 1998, the parties signed a Memorandum of Agreement establishing terms of reference for individuals holding term Dean positions who are moving into faculty positions in the Association's bargaining unit. In May 2005, the parties agreed to include the Memorandum of Agreement in their collective agreement as Letter of Understanding #15 (hereinafter referred to as the "Agreement"). Paragraph D of the Agreement, and in particular the meaning of the following italicized sentence (the "Sentence"), is central to the issues in dispute between the parties:

D. Affected Positions

This Memorandum of Agreement applies to the following positions:

Dean, Language, Literature and Performing Arts
 Dean, Child, Family and Community Studies
 Dean, Commerce and Business Administration
 Dean, Humanities and Social Sciences
 Dean, Sciences and Technology
 *Dean, Health Sciences

These positions (title/responsibility) may vary in accordance with College growth and organizational change.

* This position will convert to a renewable term position when vacated by the current incumbent.

When the Agreement was initially negotiated, the Faculty of Health Sciences was one of the Faculties in the College's Instructional Division. In or about March 2005, the Dean of Health Sciences, Joy Holmwood, sought approval from senior management for an excluded ongoing (i.e., permanent) Associate Dean position in the Faculty of Health Sciences. In late April 2005, Ms. Holmwood prepared a job description for that position and the College subsequently approved it as an ongoing position.

The Association objects to the College's decision to approve the Associate Dean as an ongoing position. The Association contends the College "hived off" part of the

Dean's duties and responsibilities and assigned them to a position called Associate Dean in order to avoid the application of the Agreement. The Association maintains the Agreement was intended to prevent the College from acting in this manner and required the College to establish the Associate Dean position as a once-renewable, five-year term position. The Association says the Associate Dean position is captured by the Sentence because the parties mutually intended the language to apply to the establishment of another layer of management between the Deans and faculty to whom faculty report. The Association further says the Sentence captures the Associate Dean position because it is in reality a Dean with a different title. From the Association's perspective, the College simply split the Dean of Health Sciences position into two academic Deans, one responsible for internal faculty matters and one responsible for external matters.

The Association also contends that the College's approval of the Associate Dean as a permanent position with no right to return to faculty at the end of a term constitutes a fundamental change in direction and philosophy from that in existence when the Association and the College negotiated the Agreement. The Association maintains the Agreement was intended to preserve the "University Model" whereby faculty move into Dean positions for a limited term and then return to teaching at the end of the term. The Association says the College's decision undermines the University Model and discourages faculty movement up the academic ladder such that the College should be prevented from acting as it has until the Association has had the opportunity to negotiate this fundamental change with the College at the bargaining table.

By way of remedy, the Association seeks a declaration that Associate Deans in all Faculties listed in paragraph D are covered by the Agreement, a cease and desist order, and a prospective order that Associate Deans in all Faculties listed in paragraph D be appointed to once-renewable, five-year term positions pursuant to the Agreement.

The College contends that the Agreement applies narrowly to the term Dean positions listed in paragraph D. The College emphasizes that the Sentence was included in the Agreement by the College's negotiator who explained at the time that the purpose of the Sentence was to ensure that, if the names of the Faculties listed in paragraph D changed over time, or programs moved from one area to another or to a new area, the Agreement would apply. The College asserts that the Associate Dean of Health Sciences position is a new, operations-manager type position which is qualitatively different from the Dean's position. Consequently, says the College, the Agreement has no application to it.

The College characterizes the grievance and remedy sought as “extraordinary” because, from the College’s perspective, the dispute represents the Association’s attempt to restrict management’s right to create new, excluded management positions on the terms it sees fit. The College says the Agreement does not clearly and unequivocally give the Association that extraordinary right or the remedy it seeks. The College maintains it possesses the management right to unilaterally create new, ongoing excluded positions. It says that, while management will consult with the Association on issues affecting faculty, management has not “bargained away” its right to establish new, excluded administrative positions on the terms it sees fit.

Collective Agreement Provisions

Reference was made to these provisions during the parties’ presentations:

2.4 Union Representation (general)

This Agreement applies to those persons in the bargaining unit specified by the Certificate of the Association.

3.1 Management Rights

While the College customarily delegates to appropriate faculty groups responsibility for determining which courses and sections shall be timetabled in any semester; for assigning instructional duties to instructors; for determining instructor’s home campus; for requiring instructors to develop new courses or to revise existing ones; for ongoing program development and revisions; this delegation shall not be construed to abrogate the College’s rights with respect to these functions but neither shall it be unreasonably withheld. Generally, and without being limited by the foregoing, the College has the right to manage, operate and direct the working force of the College.

The College agrees that these rights will be exercised in a manner consistent with the provisions of other articles in this Agreement.

7.6 Administrators Moving into Faculty Positions [formerly Article 14.23]

Administrators may, at their or the College’s request, transfer to a teaching position in their field of expertise at any time if a vacancy exists, and after consultation with the appropriate Selection Committee. This transfer shall

take priority over the applications of persons other than full-time instructors. Administrators assuming instructional responsibilities will be governed by Article 5.8.1 for all instructional activities.

7.7 Selection of Administrators [formerly Article 6.4.14]

Whenever a vacancy arises for the following positions: President, Vice-Presidents, Deans, Directors, or other similar excluded administrative positions that may be created, the Association shall have the right to appoint to any committee established to fill the position, members equal to the number of members appointed by the College which will appoint at least one member. This clause does not apply to those administrative positions that do not have faculty reporting to them.

7.7.1 Selection Process for Administrator Selections

- (a) Purposes
 - (i) to define when Selection Advisory Committees, that include faculty, must be established for the purpose of filling vacant administrative positions; and
 - (ii) to establish guidelines for such selections.
- (b) Scope and Authority
 - (i) This article applies to selections for Vice Presidents, Deans and Directors or other similar excluded administrators, with the exception of the President, who have faculty reporting to them as provided in Article 7.7 above.
 - (ii) The Association has the right to appoint to any committee established to fill a vacancy for such a position, members equal to the number of members appointed by the College, which must appoint at least one member.
 - (iii) *Deans Positions (Term) will also be done in accordance with Letter of Understanding #15.*
 - (iv) In all cases the Selection Committee's authority, in accordance with this article is one of recommendation.

(emphasis added)

Background

The College is a post-secondary educational institution with campuses in New Westminster and Coquitlam, British Columbia. Approximately 13,000 students are enrolled in the various programs offered by the College. The College employs approximately 50 excluded administrators.

The Association is the certified bargaining agent for instructors, counsellors, librarians and community programmers (i.e., the "faculty") employed by the College. There are currently about 930 faculty at the College. The Instructors who teach the College's program offerings in the Continuing Education Unit are non-union. Support staff at the College, currently numbering 780, are represented by the British Columbia Government & Service Employees' Union.

Bill Day was the President of the College until the fall of 1995. In the early 1990's, he established a Task Force to examine a potential re-organization of the College's structure. The Task Force submitted its report on May 6, 1994. Three months later, President Day circulated his report to the College community proposing a complete re-organization of the College and its management structure.

Very briefly, the management structure prior to the re-organization was comprised of a governing Board with the President reporting to the Board. Immediately under the President was a Bursar reporting directly to the Board, and a Dean in charge of each of the College's five Divisions. The Deans held ongoing appointments. Three Divisions had teaching faculty: Academic Studies, Education Services and Applied Programs. Departments within the Divisions were overseen by Chairs in the academic areas, and Directors in the applied programs and services areas.

Chairs were elected by and from the faculty in the academic departments and were responsible for the overall administration of the departments. Chairs served three-year terms and were excluded from the Association's bargaining unit during their terms. At the end of their terms, they were guaranteed the right to return to teaching. Each Department had a number of disciplines, and each discipline had a Convenor which was a bargaining unit position. Convenors were elected by faculty in the discipline, and they served one-year terms. Most Convenors taught and received time release from teaching to perform functions such as curriculum development, assigning courses to faculty and timetabling.

Directors were selected from internal and external candidates and held permanent appointments. They were in charge of their Departments including programs and the employees working in the department. They did not teach. Certain Departments had selected Co-ordinators while other Departments had elected Convenors.

The new organizational structure contemplated a President supported by two levels of management plus a third level of faculty and instructional support. The former Bursar and Dean positions were eliminated and replaced by four Vice-Presidents in charge of Instruction, Educational Services, Finance and Administration, and College Development. Reporting to the Vice-Presidents are excluded Deans in charge of the instructional areas, and excluded Directors in charge of the service areas. The former Chairs and Directors became the new Deans pursuant to either a selection or confirmation process. The parties' collective agreement at that time contained a provision entitling the Association to appoint an equal number of members to a Selection Committee if the excluded administrator position had faculty reporting to it: See Article 6.4.14, now Article 7.7, above.

Following searches for the four new Vice-President positions, these individuals were appointed: John McKendry, Vice-President of the Instructional Division; Al Atkinson, Vice-President of the Educational Services Division; Peter Greenwood, Vice-President of the Finance and Administration Division; and, Mia Gordon, Vice-President of the College Development Division. Vice-Presidents McKendry and Atkinson had faculty members reporting to them. Two former Deans, Ms. Gilgan and Mr. Doerr, left the College.

President Day left the College in the fall of 1995 after having appointed the four Vice-Presidents to their positions. The responsibility therefore fell to the new President, Susan Hunter-Harvey, to implement the second level of management -- i.e., the excluded Dean and Director positions.

The College operates on a collegial model whereby management and faculty discuss issues of importance to the College and the Association's members. Consistent with this model, the College kept the Association abreast of its restructuring decisions. The primary forum for such consultation is the parties' Labour Management Relations Committee ("LMRC") meetings.

I will review the evidence presented at the hearing in some detail because the outcome of the dispute turns on the facts as I find them.

The Dean Positions

Administrators at the College are excluded from the Association's bargaining unit, but for many years the parties have included provisions in their collective agreements addressing issues such as administrators' right to teach, administrators moving into faculty positions, the Association's right to appoint members to selection committees when vacancies arise for excluded administrator positions that have faculty reporting to them, and so forth. In 1991, an issue arose between the parties regarding the application of the selection committee provision to temporary administrator vacancies. The issue was discussed at LMRC meetings and the parties reached an agreement which was recorded in a protocol document for Administrative Staff Appointments (the "1991 Protocol").

When the College began to implement the second level of management -- the new Deans -- the Chairs in the Academic Division became concerned about the implications of the new Dean positions for their positions as Chairs. The Chairs were required to apply for the new Dean positions and proceed through a selection process. Their concerns in turn led to discussions at LMRC meetings about the selection procedures for the new Deans. The Chairs' goal at that time was to ensure that the new Dean positions retained the characteristics of the former Chair positions: election by and from departmental faculty; three-year terms in excluded positions; and, the guaranteed right to return to faculty at the end of the terms.

On the evidence before me, the College and the Association began discussing the second stage of the re-organization during LMRC meetings in 1995. Prominent issues for discussion included the selection of academic administrators, the characterization of positions as new jobs or substantially similar jobs to their prior jobs, and the terms and conditions associated with academic administrator positions. The Association proposed term appointments for academic administrators, but expressed a willingness to grandparent existing academic administrators who had permanent positions. This proposal reflected the Association's desire to maintain the Chair-type model in the Academic Division in order to ensure academic administrators would remain focused on teaching and the educational mandate of the College.

At the LMRC meeting on June 20, 1995, the College advised the Association that the new Vice-Presidents would determine whether a Dean position was a new job or substantially similar to the former job such that job postings and selections were not required and incumbents could be confirmed in the positions. The College said that disagreements between the parties would be discussed at LMRC meetings and, if necessary, referred to the dispute resolution mechanism in the 1991 Protocol.

At the LMRC meeting on December 3, 1995, the Association's representatives raised several concerns about the new Dean positions. The Association wanted all Deans to be selected and it expressed concern that the incumbents in the three former Director positions would be confirmed as Deans. The Association felt the new management structure introduced another layer of management into the relatively flat organizational structure that had existed previously, and the new structure allocated funding to administration as opposed to education. The Association also made several recommendations: the Deans should be academic or instructor-type positions as opposed to administrative-type positions; and, as the Deans are quite distant from teaching, they should carry a one-quarter teaching load and be appointed to renewable term positions to a maximum of five years. These recommendations reflected the above-described University Model whereby faculty move into academic administrator positions for a defined period of time and then return to teaching responsibilities when their terms end. The Association also asked the College to maintain the *status quo* at least for a period of time.

The College's representatives at the LMRC meeting were not prepared to maintain the *status quo* and advised that "the time has come for implementation": see the December 3, 1995 LMRC meeting minutes. The College announced that three of the six Dean positions would be posted as new positions (Dean, Humanities and Social Sciences; Dean, Arts and Language; and, Dean, Pure and Applied Science and Technology), and that the incumbents in the remaining three Dean positions (Dean, Commerce and Business Administration, Dean, Health Sciences, and, Dean, Child, Family and Community Studies), as well as a Director of Psychiatric Nursing position, would be confirmed in their positions. The Director of Psychiatric Nursing position was acknowledged to be an anomaly in the new structure. The Vice-President viewed the latter four positions as sufficiently similar to the incumbents' former positions that job postings were not required under the parties' Agreement for Administrative Staff Appointments. In response to all of these announcements, the Association requested an

opportunity to review matters and provide a response to the College. That response was subsequently communicated in three ways.

First, in a letter dated December 13, 1995 to Vice-President McKendry, the four Chairs in the Instructional Division acknowledged faculty support for grandparenting the existing Directors as Deans without teaching requirements, thereby respecting the conditions of their appointments. The Chairs then asked for that same type of "respect" for the existing Chairs who might become Deans in the new structure. The Chairs also sought the application of the following conditions for Chairs who became Deans: in the academic areas, Deans would be elected, not selected, would have faculty rank, and would continue to accrue seniority; Deans would serve five-year terms with some additional service possible; and, Deans would have a commitment to teaching/research. In respect of the election versus selection issue, the Chairs acknowledged that a decision to use a selection process may have already been finalized, but they reiterated their preference for election.

Second, in a letter dated December 18, 1995, the Association's then President, Roslyn Dixon, informed Peter Sanderson, the then Director of Personnel and Labour Relations, about three motions that had been passed at the Association's December 13th Executive Council meeting in relation to the terms of employment for the Deans. Those motions recommended the following: all Deans in the College should be selected; the Dean positions should have a specific renewable term; and the Dean positions should include an annual teaching requirement, funded through administrative sources not base sources.

Third, at the December 18, 1995 LMRC meeting, the Association circulated a written response recommending the following: all Dean positions should be posted; Deans should be paid the same as Directors/Chairs; Deans should be appointed to a set term which could be renewed once, and then the Deans would return to faculty rank; current Directors, if appointed, could retain their permanent positions; and, Deans should be regularly engaged in teaching. In response, Mr. McKendry stated that all of the Vice-Presidents had decided to appoint the Deans to ongoing positions, and the determination of which Dean positions would be posted or confirmed had been based on the Protocol Agreement and legal advice. Mr. McKendry allowed that, the issue of an annual teaching component for the new Deans could be reviewed in the future, but he questioned whether it was realistic, given current administrative workloads, for Deans to carry a regular teaching load now or in the future.

In the mid-1990s, Anna Jajic represented the Faculty of Health Sciences on the Association's Executive Council and she attended the LMRC meetings at that time. In her evidence in cross-examination she acknowledged that Mr. McKendry was not prepared to grandparent the four Chairs in the Academic Division as requested by the Association, and she agreed the Director of Psychiatric Nursing, Milo Mitchell, continued to hold her ongoing position which was grandparented during the re-organization and later transferred to the Faculty of Child, Family and Community Studies under Dean Miller.

Mr. Sanderson, left the College effective January 1, 1996, and Marion Exmann became Acting Director of Personnel and Labour Relations. Ms. Exmann replaced Mr. Sanderson in the discussions with the Association about the College's re-organization. At the January 8, 1996 LMRC meeting, Ms. Exmann provided the College's response to the Association's December 18th letter to Mr. Sanderson. She stated that all of the Deans would be appointed to ongoing positions which would be posted or confirmed as discussed earlier. Mia Gordon, Vice-President of College Development, confirmed that the College had not changed its position with respect to excluded administrator appointments. The Association reiterated its concern about the permanency of the academic Dean and Director positions, and both parties agreed to take the matter back to their respective constituencies for a final discussion. Ms. Gordon stated that, if the parties were unable to agree about these matters, the President would ultimately decide; and, if management did not change its view on these issues, the matter would be referred to the President prior to the next LMRC meeting: see the January 8th LMRC meeting minutes.

Four days later, Ms. Dixon wrote to Ms. Exmann expressing the Association's concern about the College's unwillingness to accept any of their recommendations. Ms. Dixon asked for the matter to be referred to the President for further discussion, and she (Dixon) reported that the following motion had been passed unanimously by the Executive Council: all Deans should be posted and selected; all Dean positions should have a specific renewable term; and, all Dean positions should include an annual teaching requirement funded through administrative sources. The first of these three issues was referred to President Hunter-Harvey for decision on January 15, 1996. She limited her decision to the Dean positions in Mr. McKendry's Instructional Division because Mr. Atkinson, Vice-President of the Educational Services Division, was unwilling to consider a term appointment for the Dean of Student Development position in his Division. (By

then the Dean of Student Development position had already been posted as an ongoing position.) The President decided that, as the Deans of Health Sciences, Commerce and Business Administration, and Child, Family and Community Studies did not involve fundamental changes from the previous positions, they were not new positions for the purposes of the parties' Protocol and Selection of Academic Administrator Agreements. The incumbents would therefore be confirmed in the Dean positions. The President also decided that, as the Deans of Pure and Applied Sciences and Technology, Humanities and Social Sciences, and Arts, Languages and Student Development were new positions, they would proceed through the selection process.

Upon receipt of these decisions, the Association's representatives requested an opportunity to meet with the President to outline their views on the outstanding issues. That opportunity arose at the January 26th LMRC meeting where the President attended as a special guest for this purpose. By that date, the three former Directors had been confirmed as Deans, but the President said the issues of term appointments and teaching responsibilities for the Deans were still "open for discussion." When Ms. Dixon expressed the Association's ongoing concern about the confirmation of the incumbents in three Dean positions, Mr. McKendry confirmed that the decision had been based on legal advice about the application of the Protocol Agreement: see the January 26th LMRC meeting minutes.

Following the January 26th LMRC meeting, the senior management team had further discussions. Ms. Exmann participated in some of those discussions. She recalled in her evidence that most of the members of the senior management group felt strongly that the Deans should be ongoing positions, but the President and Vice-President McKendry felt the Deans could be term positions consistent with the University Model. The outcome of those discussions was that President Hunter-Harvey and Vice-president McKendry changed their minds and agreed to establish term Dean positions for the Instructional Division (as noted above, the Faculty of Health Sciences is in the Instructional Division). They also decided the term Dean positions in the Instructional Division should have some scholarly component if workload allowed, but no regular teaching assignment. Mr. Atkinson's earlier decision to create the Dean of Student Development position in the Educational Services Division as an ongoing position was not affected.

During the February 5th LMRC meeting, Mr. McKendry announced that the College was prepared to change the Dean positions in the Instructional Division from

ongoing to term positions "provided we can come to an agreement about how to deal effectively with back-filling, and provided we can agree that the incumbents can return to teaching." Mr. McKendry also flagged the issue of regularization -- i.e., the process by which casual or sessional appointees move into regular ongoing faculty positions. He noted that, as the Dean positions would be five-year terms, replacement faculty, if filled by internal candidates, would become regularized prior to the expiry of their terms. Consequently, this issue, as well as the issue of accrued service in the bargaining unit, would also require agreement. Ms. Exmann and Ms. Jajic were appointed to reach an agreement relating to these issues and Mr. McKendry announced that the three new Dean positions would be re-posted as term positions to be filled through a selection process. He said the three former Directors who had already been confirmed as Deans would be grandparented and their positions would become term positions when vacated by the current incumbents. He further confirmed the Dean positions in the Instructional Division would include some teaching responsibilities dependent on workload. See the February 5th LMRC meeting minutes.

Thus, the six Dean positions in the Instructional Division were established as term Deans, and the one Dean position in the Educational Services Division was established as an ongoing Dean. Three Deans in the Instructional Division were grandparented in permanent positions, which would become term positions when the incumbents vacated them. Ms. Holmwood was grandparented in the Dean, Health Sciences position. The Director of Psychiatric Nursing position was maintained as an ongoing position. It was against this backdrop that Ms. Exmann and Ms. Jajic prepared the Agreement. I turn now to their evidence in this regard.

The Negotiation of the Agreement

Ms. Jajic was the Association's spokesperson for the purposes of the Agreement. In the early stages of the parties' discussions, she was assisted by Bruce Landon, Vice-President of Negotiations for the Association. Ms. Exmann was the College's spokesperson. Her evidence was that "no one else" represented the College during the negotiation of the Agreement, and more specifically, Mr. McKendry did not attend any of the meetings where the various drafts of the Agreement were discussed.

Based on her initial consultation with the President, Mr. McKendry, and the Mia Gordon, Vice-President of Human Resources, Ms. Exmann prepared a first draft of the Agreement dated March 8, 1996. That document was entitled "Memorandum of

Agreement between Douglas College and Douglas College Faculty Association -- Dean Positions (Term Only)". Paragraph A of the Agreement identified the purpose of the document in these terms: "The purpose of this Memorandum is to set the terms of reference for individuals holding Dean positions moving into faculty positions." Paragraph D, Affected Positions, stated as follows:

This Memorandum of Agreement applies to the following positions:

- Dean, Arts and Language
- *Dean, Child, Family and Community Studies
- *Dean, Commerce and Business
- *Dean, Health Sciences
- Dean, Humanities and Social Sciences
- Dean, Pure and Applied Sciences and Technology

* These positions will convert to term positions when vacated by the current incumbent(s).

This draft was circulated to Ms. Jajic and Mr. Landon for comment. When Ms. Jajic and Ms. Exmann reviewed this draft there was no discussion of the Dean positions the Agreement applied to. Two issues raised by Ms. Jajic and Mr. Landon were the notice period for a Dean's return to the bargaining unit and placement on the faculty wage scale on return to the bargaining unit.

Based on the parties' discussion of the first draft, Ms. Exmann prepared a second draft. She reviewed that draft with Mr. McKendry. He adjusted the title of Dean, Arts and Languages, to Dean, Language, Literature and Performing Arts, and he adjusted the title of Dean, Commerce and Business, to Dean, Commerce and Business Administration. He also added the Sentence to paragraph D -- i.e., "These positions (title/responsibility) may vary in accordance with College growth and organizational change." According to Ms. Exmann, when Mr. McKendry added the Sentence to the draft he told her "his concern was to ensure that, if there were changes to the positions, for instance, if a position was split in two or two positions were merged, the Letter [Agreement] would still apply."

Ms. Exmann then prepared a third draft dated April 2, 1996. Paragraph A, the Purpose provision, was amended as follows:

The purpose of this Memorandum is to set the terms of reference for individuals holding Dean positions moving into faculty positions. This document therefore supersedes the provision in the Selection Procedure for Academic Administrators which states: "In the case of Administrative personnel, unsuccessful candidates for these new positions may not have the opportunity to return to their original positions".

It is understood that this Memorandum of Agreement will not result in the creation of new faculty positions.

During the parties' next meeting Ms. Exmann explained the College's reason for adding the Sentence to paragraph D. She testified that she told Ms. Jajic the Sentence was needed "to ensure that the positions listed, regardless of their title or if they shrank or were merged, would continue to be addressed by the Memorandum of Agreement." Ms. Exmann then said: "So, if the Faculty of Humanities and Social Sciences was split in two, the Memorandum of Agreement continues to apply; or, if two areas are merged into one, the Memorandum of Agreement continues to apply." Ms. Exmann recalled that, other than her explanation for the inclusion of the Sentence, she and Ms. Jajic did not discuss the College's intent for the Sentence. However, in cross-examination Ms. Exmann agreed she told Ms. Jajic that, if a listed Dean position was "split in two" the Agreement would continue to apply, and if an additional Dean position was created to take on half an area from an existing Dean, the Agreement would apply. Ms. Exmann also agreed she did not mention the idea of an Associate Dean position to Ms. Jajic.

Ms. Jajic's evidence in direct examination was that "[the Sentence] relates back to our concern about management putting in extra layers of management and they could use a name change to change the meaning of a document." She said:

Basically, this [the Sentence] was the protection that if any re-organization, change or name change occurred, this document would stand. And, we discussed what if another layer between the Dean and faculty occurred because many universities have Associate Deans. The philosophy would not change. Faculty need the opportunity to move into these positions, try them and move back into faculty; and also, faculty [want to] work with and report to their supervisors who are staying in contact with education and teaching issues. So, to me, this was the clause to meet our talks about what happens if you [the College] want to do another re-organization. Philosophically, we wanted the positions faculty were reporting to, to still fit within this Letter of Understanding. John McKendry and I talked about this and how to make this document applicable for the future. I remember talks with John well and I talked with Marian about it too.

In cross-examination Ms. Jajic acknowledged that, when she and Ms. Exmann met to discuss the April 2nd draft, Ms. Exmann explained how the Sentence was intended to ensure the Agreement would continue to apply if the title or responsibility of the six listed Dean positions changed. And, Ms. Jajic agreed Ms. Exmann explained how the Sentence was intended to capture programs that might move around between the listed Deans and lead to title changes. However, Ms. Jajic stated there were more discussions about the intent of the Sentence such as, "if there is any other change in organization as had occurred in this re-organization [such as] an additional layer of management [being] put in, and if that occurred again, this clause would apply because it talks about growth." When it was put to Ms. Jajic in cross-examination that Ms. Exmann disputed that evidence, and that Ms. Exmann's example of growth was the combination of two Dean positions into one Dean position, Ms. Jajic said, "I do not specifically recall." When it was put to Ms. Jajic that Ms. Exmann had explained that the Agreement would continue to apply if the College split one Dean position and created two Dean positions, Ms. Jajic said "probably and more." And, when it was put to her that Ms. Exmann's instructions to counsel were that there was no discussion of the Agreement applying to any specific positions other than the listed Dean positions, Ms. Jajic said she was "not sure" because she does not recall her talks with Ms. Exmann as clearly as she recalls her conversations with Mr. McKendry. Ms. Jajic said Association's "wish" was to have the Sentence apply to a new layer of management if the College created one below the Deans to whom faculty reported. She said she discussed this desire with Mr. McKendry and "thought" she had communicated his remarks to Ms. Exmann; but Ms. Jajic also said she was "not sure" she had done so.

Also in cross-examination, Ms. Jajic agreed that, although the Director of Nursing position was in the Instructional Division at that time, the Agreement did not apply to it. However, she explained that the Association knew this ongoing position would "leave when the incumbent left", and the Association did not include language in the Agreement excluding that position because it was recognized as "an anomaly" that would end when the incumbent left.

On April 15, 1996, Ms. Exmann sent a revised draft of the Agreement to Ms. Jajic. Hand-written notes on the Dean positions in paragraph D indicate that the Dean, Literature and Performing Arts had been changed to Dean, Language, Literature and Performing Arts, the Dean, Child, Family and Community Studies had been changed to Dean, Child, Family and Community Studies and Psychiatric Nursing and, the title Dean,

Pure and Applied Sciences and Technology had been changed to Dean, Sciences and Technology.

On July 2, 1996, Ms. Exmann and Ms. Jajic accepted the Agreement as complete for internal candidates for term Dean positions, but they acknowledged issues relating to externally-hired Deans required further discussion. As the six Dean positions in the Instructional Division had been filled by that time, the preparation of the final document was put on the back burner. The Agreement was eventually signed on April 7, 1998 by Ms. Exmann for the College and Ms. Jajic for the Association.

As of April 7, 1998, Psychiatric Nursing was still included in the Dean, Child, Family and Community Studies position in paragraph D of the Agreement. I find none of the witnesses who testified about the Director of Psychiatric Nursing position had a clear recollection of the precise date when that position ceased to exist. Ms. Holmwood recalled that it was the Dean of Child, Family and Community Studies who "eliminated" the position which led to the termination of the incumbent. Ms. Jajic thought the Director of Psychiatric Nursing position had been eliminated by October 20, 1997, but the minutes of the LMRC meeting that day still show the position included in the Dean of Child, Family and Community Studies. The best that can be said on the evidence as a whole is that the Director of Psychiatric Nursing position was eliminated after the Agreement was signed in April 1998 and before the Psychiatric Nursing Department was moved into the Faculty of Health Sciences effective the 1999-00 college year.

As indicated above, when the parties concluded their current collective agreement in May 2005, they agreed to include the Agreement as Letter of Understanding #15. They also included a reference to it in Article 7.7.1.

The Faculty of Health Sciences and the Discussion of the Associate Dean Position

I find the facts relating to these matters to be the following.

Prior to the re-organization in the mid-1990s, Ms. Holmwood was the Director of Health Sciences reporting to Mr. McKendry. Ms. Holmwood was confirmed in the Dean of Health Sciences position in 1996.

The Faculty of Health Sciences is large and complex. It is the largest faculty at the College. The faculty comprises six Departments -- Dispensing Optician, Dental

Assisting, Home Support Resident Care Attendant, General Nursing, Health Information Services, Psychiatric Nursing, and an integrated health-related Continuing Education Unit.

The Faculty of Health Sciences has experienced significant growth and expansion since the mid-1990s. The Psychiatric Nursing Department was transferred to Faculty of Health Sciences sometime prior to the 1999-00 college year, and at about that same time, the number of students in the General Nursing Program increased. Since 1999, the number of instructional faculty has increased by approximately one third, and the faculty is currently the largest faculty group at the College. The number of funded FTEs has increased from a total of 614 in 1998/99 to 925 in 2006/07, with the largest increase in the General Nursing Program. The number of instructional sections has increased in the same period from 591.54 to 762.22, excluding Continuing Education which employs 150 contract Instructors and two Community Programmers. In 2000, the Faculty of Health Sciences had funding for 13 instructional sections of Co-ordinator release time, and by 2006, that had increased to 34 instructional sections. I find this growth and expansion has concomitantly increased Ms. Holmwood's workload.

Due to the Faculty of Health Sciences' integration in the external health care sector and its linkages to external educational institutions, the Dean of Health Sciences position has responsibility for extensive and significant external relationships in addition to all of the internal relationships and functions associated with the Faculty's six departments, program offerings and Continuing Education Unit. Like other Deans, the Dean of Health Sciences also has various cross-college functions. In her evidence Ms. Holmwood confirmed that these numerous external relationships and functions are a distinctive feature of the Dean of Health Sciences position as compared to other Deans at the College. Due to Ms. Holmwood's ever-increasing workload as the Faculty has grown and expanded, she was unable to attend to those external relationships and functions. She spent all but about 10 percent of her time as Dean working with faculty and the Co-ordinators on internal faculty matters including the day-to-day operation of the programs.

Following the re-organization in the mid-1990s, Ms. Holmwood identified some consequential problems in the organizational structure of the Faculty of Health Sciences. These problems were summarized at page 9 of her paper entitled "Faculty of Health Sciences, May 1990 and Beyond" in this way:

The current Co-ordinator model is unable to deal with many faculty issues, because of the lack of authority accorded to the Co-ordinator positions. Personnel issues involving the faculty are referred directly to the Dean. This model of co-ordination is problematic and may be increasingly so as the faculty expands and the span of control for the Dean is amplified. The expansion of the faculty will affect the ability of the Dean to maintain her current level of involvement with all its units. As well, she will not be able to provide the amount of administrative support to Psychiatric Nursing that was possible and necessary when the Department was situated within the Faculty of Child, Family and Community Studies. The combination of the limitations of the Co-ordinator model and an expansion of the Dean's scope of responsibilities could have a negative impact on the decision-making timeline within the faculty and lead to an inefficient/ineffective organization. In addition, the ability to provide adequate support for ongoing activities and new initiatives may be curtailed.

Included in this paper was a diagram depicting the Dean of Health Sciences' numerous external and internal relationships and functions. Ms. Holmwood forwarded a proposal to senior management for a new administrative structure for the Faculty of Health Sciences. The proposal was not approved at that time, and Ms. Holmwood was asked to explore her proposal with faculty. Consultations with faculty commenced in September 2000, and over the course of the next several years, Ms. Holmwood proposed several other options for a new structure.

In or about 2002, the Faculty of Health Sciences learned it was to receive approval for two, new degree-granting programs in General and Psychiatric Nursing. A request for funding for an excluded administrator for the Faculty of Health Sciences was included in the College's funding request to the Ministry associated with the new degree-granting programs.

In the spring of 2003, and at the conclusion of a review process of the Co-ordinator's structure in the Instructional Division, Mr. McKendry made a proposal to split the Faculty of Health Sciences by creating a School of Nursing headed by one full-time Dean of Nursing and re-assigning the remaining smaller health sciences programs to another existing Faculty headed by one full-time Dean. According to Ms. Holmwood, Mr. McKendry's goal was to "equalize the Deans' workload" by reducing her responsibility to Nursing and assigning other programs to other Faculties. Ms. Holmwood did not support Mr. McKendry's proposal and in the fall of 2003, she proposed two different options involving Associate Dean positions. One option proposed two Associate Deans while a second option proposed one Associate Dean. Mr.

McKendry recommended she should proceed with her second option for a single Associate Dean. Accordingly, she prepared and circulated a paper advocating for her second option. Ms. Holmwood's evidence in cross-examination was that, as many of her responsibilities and functions as Dean had remained "undone" for many years, her desire at that time was to create a subordinate position to "free up" some of her time so she could attend to those responsibilities and develop and promote the Faculty's new degree-granting process. However, her proposal was not approved.

From January to February 2004, Ms. Holmwood was on study leave. Sylvia Wilson was appointed Acting Dean in her absence. Ms. Wilson was a faculty member and Co-ordinator for the Home Support Resident Care Attendant Program who was returning to the College from maternity leave. When Ms. Holmwood returned to the College in March 2004, she found the General Nursing Programs were experiencing difficulty due to negative feedback from external institutions relating to the approval of the Bachelor of Science in Nursing Degree Program ("BSN") for the College. Mr. McKendry asked Ms. Wilson to stay on and provide assistance to Ms. Holmwood in a temporary position entitled Academic Assistant to the Dean of Health Sciences. Several months later, Ms. Wilson was appointed to an excluded one-year term position with that same title. The one-year term was September 2004 to October 2005. In that role Ms. Wilson administered the smaller programs in the non-nursing, allied health departments, excluding the College's Vision Centre, and handled the preferential acceptance process. Ms. Holmwood focused on the development of the two new degree-granting programs and the administration of the Continuing Education Unit.

By early 2005, the development of the BSN Program was nearing completion. Jan Lindsay was the new Vice-President of the Instructional Division, and funding for an additional 195 FTEs over three years had been received by the Faculty of Health Sciences. In preparation for discussions with faculty and a Retreat where organizational structure was to be discussed, Ms. Holmwood forwarded a proposal for an excluded Associate Dean position to Ms. Lindsay. Ms. Holmwood also proceeded to prepare a job description for an Associate Dean position. Her evidence was that, her draft job description for that position was "always" for an ongoing position.

In early March 2005, Ms. Holmwood met with the Faculty of Health Sciences Education Committee and advised that an excluded Assistant or Associate Dean position would be proceeding. Ms. Holmwood explained that she did not yet have a job description available for review, but she was prepared to receive feedback from faculty

on the excluded position. Ms. Jajic testified that Ms. Holmwood's presentation at that meeting included the comment that the excluded position would be a term position. That comment is not, however, recorded in the minutes of that meeting.

The Associate Dean position was discussed at a senior management team meeting on March 11.

On April 25, Ms. Holmwood discussed the position at the Bi-Annual Meeting of the Faculty of Health Sciences. She did not circulate the draft job description at that meeting, but her description of the principal duties and responsibilities of the position is recorded as follows in the minutes of that meeting:

Principal duties for this position would be working with Co-ordinators, faculty and Joy to ensure that new curriculum for programs is planned, implemented and updated; assisting in implementation of Department's tactical and operational plans; addressing complaints and conducting/chairing grade appeals; carrying out performance evaluations; managing the faculty review process; revising and recommending faculty PD [professional development], vacation, sick leave and leaves of absence; working with Program Co-ordinators to ensure full intake into each program; participating in promotional and marketing activity; working on development of budgets. This position should enable the Dean more time to work on external projects. The [Associate] Dean would be on campus and continuing to support group in key ways. Joy will be on campus and continuing to support group in many key ways. *This position would be a five-year term.*

(emphasis added)

In her evidence Ms. Holmwood agreed she told those present at the meeting that the Associate Dean would be a five-year term position. She testified that she mistakenly described the position that way in response to a question asked during that meeting. Ms. Holmwood said her intention was to delegate to the Associate Dean her (Holmwood's) duties and responsibilities associated with the ongoing management of all of the Departments in the Faculty of Health Sciences, except the Continuing Education Unit, in order to "free up" time to attend to other duties including clerical support functions, laboratory support and the College's Vision Centre, and to provide support for academic leadership, scholarly activity and external relationships/special projects. Ms. Holmwood assured the faculty members at that meeting that the Associate Dean position would have administrative authority to make decisions and move forward with issues.

On April 27, a Special Meeting of the Department of General Nursing was convened with Ms. Lindsay, Ms. Holmwood and others. At that meeting Ms. Lindsay told faculty there was "a need for a better balance between 29 sections of co-ordination and one Dean and [the] formation of the Associate Dean position would help to balance this structure." Faculty was also told the Associate Dean could make day-to-day managerial decisions the Co-ordinators could not make due to their inclusion in the Association's bargaining unit. Ms. Holmwood confirmed in cross-examination that while the Dean is still responsible for the overall operation of the Faculty of Health Sciences, the Associate Dean has authority to make immediate decisions which faculty can "rely on" in relation to the ongoing management of issues associated with all of the Faculty's credit programs.

Linda Pickthall has held a Program Co-ordinator position for many years in the Faculty of Health Sciences. She attended both of these meetings in April 2005. She acknowledged in her evidence that the current job description for the Associate Dean position says "ongoing", but she said the Associate Dean position was presented as a five-year term position on April 25, and thereafter, she "always understood" it to be a term position. Her evidence was that the distinction between the roles of the Associate Deans and the Deans has never been clarified, and from her perspective, the two positions perform "the same job."

On April 29, the draft job description for the Associate Dean position was reviewed at a senior management team meeting. Ms. Holmwood also received feedback and input from Ms. Lindsay who queried where authority rested as between the Dean and Associate Dean for a number of tasks including performance evaluations and hiring decisions. Ms. Holmwood amended the draft job description based on Ms. Lindsay's input and approximately two weeks later, circulated the draft job description to faculty.

On May 12, the Program Co-ordinators reviewed draft job descriptions for both the Dean and Associate Dean positions. Several potential amendments to the Dean's job description were identified in bold letters, but those amendments were never approved. Ms. Holmwood was not present at that meeting. Ms. Pickthall attended the meeting and she testified that the Co-ordinators expressed the view that the Dean and Associate Dean job descriptions established "two people doing the same job, with one person having more authority." She noted that the five responsibilities listed in the Associate Dean job description had formerly "belonged to" the Dean, and that the job descriptions revealed "the duplication" of many duties and responsibilities. In terms of principal duties, Ms.

Pickthall noted that the Dean had previously performed all of the principal duties listed in the Associate Dean job description save for duty 18 -- i.e., "assumes specific staff functions in the Faculty as assigned by the Dean." Ms. Pickthall said the Co-ordinators did not understand what that duty meant and were concerned that they would now be required to report to the Associate Dean instead of the Dean.

In June, a BSN Program workshop was held. Ms. Holmwood circulated the ongoing Associate Dean job description in a form that had been approved by the Employee Relations Department, and she stated that the selection process for the position would start at the end of August.

Ms. Holmwood also advised that, as the Program Co-ordinator position would be reduced from full-time to three-quarter time, that position would now work with the Associate Dean on staffing matters. In her evidence Ms. Pickthall explained that, prior to 1996, the Dean had performed the staffing function for faculty teaching assignments. In 1996, the Dean delegated that responsibility and associated duties, without the requisite authority, to her (Pickthall). Then, at the June 2005 BSN Program workshop, the Dean "delegated [this staffing function] back up to the Associate Dean position."

On September 1st, the Bi-Annual Faculty of Health Sciences Meeting was held. That was the first full faculty meeting following the April 25th meeting where Ms. Holmwood had stated that the Associate Dean would be a five-year term position. Ms. Holmwood advised faculty that the Associate Dean position was proceeding for 2006. In cross-examination Ms. Holmwood accepted that she could have corrected her earlier statement about the term Associate Dean position, but did not do so. She denied, however, any intention to mislead faculty on this issue.

The College approved the ongoing Associate Dean job description sometime prior to September 15. The Selection Committee for the Associate Dean position met on several occasions in September 2005. At one meeting, Ms. Holmwood reviewed the Associate Dean job description with the Selection Committee, and after one meeting, Ms. Holmwood circulated an electronic copy of the approved job description to faculty. On or about September 20, Ms. Exmann and Robin Wylie, the Association's new President, met with Ms. Holmwood to discuss the Protocol and Procedures for the Selection Committee for the Associate Dean position. The Selection Committee met on September 27. During that meeting, Jean Cronin, a member of faculty in the BSN Program, queried Ms. Holmwood about the "ongoing" versus "term" nature of the Associate Dean position.

Ms. Cronin's evidence was that she queried this issue because this meeting was the "first time" she had ever seen a job description for an ongoing Associate Dean position, and it "surprised" her to hear that the position had been "changed to an ongoing position." Ms. Exmann and Ms. Wylie attended the first portion of the September 27th meeting, but had left by the time Ms. Cronin queried Ms. Holmwood about this issue. Ms. Holmwood testified that, in an effort to bring this issue "to an end once and for all", she left the meeting and went to see Ms. Exmann who confirmed that the Associate Dean position had been approved as an ongoing position. Ms. Holmwood returned to the meeting and confirmed this information to those present.

The Associate Dean position was discussed in November and December 2005 with the BSN Program Co-ordinators and faculty. At those meetings, Ms. Holmwood, discussed ways in which the Associate Dean could provide support to the Co-ordinators who were expressing workload difficulties.

The Implementation of the Associate Dean Position

In her evidence Ms. Holmwood said she understood the Associate Dean position had been approved as an ongoing position for two reasons: operational stability in the Faculty's programs; and, operational consistency to ensure safe graduates. She noted that Program Co-ordinators are appointed to three-year terms, Nursing Co-ordinators are appointed to one-year terms, and her position will convert to a five-year term when she vacates it. Comparing the job descriptions for the Dean and Associate Dean positions which, I find, specify many of the same or similar duties and responsibilities, Ms. Holmwood agreed the intent of the new structure is for the Associate Dean to perform the work the Dean previously performed. She said the overall difference between her role and the Associate Dean's role is:

... breadth of responsibility, external relations and cross-college issues. I retain responsibility for the entire Faculty, not just part of it. I do not deal with daily details and activities as the Associate Dean does. ... The Associate Dean can approve professional development plans for individual faculty members, but has no responsibility for funding and external relationships.

I find Ms. Holmwood's evidence in cross-examination established the following. Prior to the institution of the Academic Assistant to the Dean of Health Sciences and the Associate Dean positions, she spent approximately 80-90 percent of her time working

with faculty, staff and the Co-ordinators on programs and associated activities, and on internal faculty matters including: ensuring new curriculum was created, planned and implemented; performance evaluations; the faculty review process; reviewing and recommending personal and professional development proposals for faculty; reviewing and approving vacation and other leave requests; working with Co-ordinators to ensure full intake into programs; and, student recruitment. That time estimate does not include dealing with complaints and grade appeals which took up more of her time depending on their complexity. The remainder of her time was spent on cross-college issues and external relationships. She estimated that she has delegated approximately 60 to 70 percent of those previously-performed duties and responsibilities to the Associate Dean. Ms. Holmwood previously performed 100 percent of the Associate Dean's duties and responsibilities. In the Dean's job description, the Dean position retains responsibility for the Continuing Education Unit and overall responsibility for the functions performed by the Associate Dean. The Dean is now able to focus on the scholastic activity and educational leadership components of the Dean's role.

Referring to the Associate Dean's job description, Ms. Holmwood agreed that, prior to 2004 when the Academic Assistant to the Dean position was created to provide leadership to the non-nursing programs, she (Holmwood) was the sole administrator providing leadership to faculty. (Virtually all of the duties and responsibilities of the former Academic Assistant to the Dean job description are included in the Associate job description.) Ms. Holmwood also agreed that aspects of the Associate Dean position contemplate involvement in some external relationships, although none have yet been identified. Additionally, direct contact with students about grade appeals and complaints now fall within the Associate Dean's role.

Faculty must now report to the Associate Dean. Miriam Tinsky became the BSN Program Co-ordinator in mid-August 2005. From September to December 2005, she reported to the Dean. Ms. Tinsky testified that, when the Associate Dean commenced in January 2006, it was "never clear" who she (Tinsky) "reported to."

The Associate Dean position deals with collective agreement matters for specific programs -- i.e., Psychiatric Nursing; General Nursing; Dispensing Optician; Dental Assisting; Health Information Services; and, Home Support Resident Care Attendant. Nine million of the Faculty of Health Sciences' 10-million dollar budget is attributed to the credit programs; the remaining one million dollars is attributed to Continuing

Education. The programs offered by the Continuing Education Unit are revenue-producing programs.

In her evidence Ms. Pickthall identified several duties and responsibilities in the Associate Dean's job description which were previously performed by the Dean: new faculty recruitment; evaluation of probationary faculty; clarification of the Student Co-ordinator's role; and, the new immunization program for students in the Faculty.

Ms. Exmann testified about the College's pay band system. She said several factors determine which pay band applies to a position: education; experience; scope of authority; supervision; responsibility; accountability; and, effort. Deans are currently paid at pay band 10. The Associate Dean of Health Sciences is currently paid at pay band 8. Ms. Exmann also noted there are other Associate-type positions within the College's structure performing duties delegated by positions which are higher in the management structure.

As mentioned earlier, Ms. Wilson was selected as the Associate Dean in the fall of 2005, and she assumed that position effective January 2006. In December 2005, Ms. Holmwood asked Ms. Wilson to work with the Co-ordinators on timetabling, budgeting and staffing for the January 31st deadline, while Ms. Holmwood worked on faculty recruitment with the Selection Committee.

Ms. Wilson did not testify at the hearing. Ms. Pickthall testified that, prior to assuming her role as Associate Dean, Ms. Wilson had held two administrative positions in the Faculty of Health Sciences: Director of Allied Health and Academic Assistant to the Dean of Health Sciences. In the former role, Ms. Wilson was not responsible for the Nursing Programs. In the latter role, Ms. Wilson was not involved in the Nursing Programs other than the issue of preferential admissions.

Effective January 2006, Ms. Wilson's role as Associate Dean extended across all credit programs, and her priority was faculty recruitment for the new Community Mental Health Worker and Health Information Systems Programs. She also investigated a complaint relating to some personnel issues. Ms. Wilson did not do any timetabling or staffing for the BSN and Psychiatric Nursing Programs because Ms. Holmwood handled those matters as a transitional matter.

From March to April 2006, Ms. Holmwood was on vacation and Ms. Wilson became Acting Dean in Ms. Holmwood's absence.

Ms. Holmwood returned to work for a few days in early April, and was then off work on sick leave from April 7 to mid-September 2006, at which time she began a graduated return to work. Ms. Wilson became Acting Dean from April 7 to mid-May 2006 when she went off work on sick leave. Effective June 2006, Mia Gordon became Acting Dean for Ms. Holmwood. In addition to other roles, Sue Nicholson was Acting Associate Dean from May to September 2006 at which time Mike Turko became Acting Associate Dean for Sylvia Wilson. In cross-examination Ms. Holmwood agreed that one of Mr. Turko's roles as Acting Associate Dean was to provide leadership to the Psychiatric Nursing programs. As of the last day of the hearing, Ms. Wilson was still off work on sick leave.

In her evidence Ms. Pickthall described what she characterized as "a duplication of services" by the Acting Dean and Acting Associate Dean relating to the finalization of her 2006-7 academic teaching assignment. Ms. Pickthall explained that traditionally, Program Co-ordinators worked with faculty to identify proper teaching assignments in accordance with faculty's expertise. Then, in the summer of 2005, Dean Holmwood took over this task. In the summer of 2006, Ms. Holmwood was off work on sick leave and Mia Gordon was the Acting Dean. Ms. Gordon directed Ms. Pickthall to finalize her 2006-7 teaching assignment with Ms. Nicholson, Acting Associate Dean. Ms. Pickthall did so, and she believed her teaching assignment had been finalized. Then, the Acting Dean requested a meeting to discuss her academic assignment. The Acting Associate Dean was present at that meeting and, in Ms. Pickthall's words, "we started at square one with the Acting Dean and re-negotiated my teaching assignment." In cross-examination it was established that the need to re-negotiate Ms. Pickthall's 2006-7 teaching assignment arose due to a new policy within the Faculty of Health Sciences against planned overload. The new policy in turn necessitated a change to Ms. Pickthall's teaching assignment.

Analysis

This case was extensively and very ably argued by counsel. All of counsel's submissions and authorities have been thoroughly considered during my deliberations. I will not separately summarize and refer to those submissions and authorities in this award, although the salient features of the parties' positions will be addressed below.

At issue in this dispute is whether the Associate Dean of Health Sciences position falls within paragraph D of the Agreement. If it does, then pursuant to paragraph E of the Agreement, section 1.3, appointments to the position must be made for a term of five years.

A critical factual issue is the proper characterization of the Associate Dean position. Is it, as the College contends, a new, operations-manager position that is qualitatively different from the Dean's position? Or is it, as the Association contends, an academic Dean with an Associate Dean title to whom the core duties and responsibilities of the Dean have been assigned by way of splitting the Dean's position in two in accordance with College growth and organizational change?

I accept the College's submission that the arbitral awards on which the Association relies relating to the assignment of bargaining unit work and job classification disputes are not directly applicable because the integrity of the Association's bargaining unit is not at issue here -- the position in issue is an excluded position. Nonetheless, a principle integral to the analytical approach taken by arbitrators in such disputes is of assistance here, namely, in assessing the evidence to reach a factual conclusion about the proper characterization of a disputed position, an arbitrator should focus on substance, not form. Thus, it is not the name of a position or the way the duties, responsibilities and authority are described in the job description that is determinative of its proper characterization. The focus of inquiry is instead on the substance of the way in which duties, responsibilities and authority are actually performed and exercised.

Having thoroughly reviewed the extensive evidence presented by the parties, the job descriptions for the Dean, the Associate Dean and the Academic Assistant to the Dean positions, as well as the authorities counsel referred to in their submissions, I find the Associate Dean position cannot fairly or reasonably be characterized as a new operations-manager position that is qualitatively different from the Dean's position. In my view, the evidence leads inexorably to the conclusion that the College has effectively split the Dean's position into two academic Dean positions, one primarily responsible for internal faculty relations, functions and activities, and one primarily responsible for external relations and functions, cross-college matters, and the Continuing Education Unit.

On the evidence, the Associate Dean of Health Sciences position is neither a new nor a qualitatively different position from the Dean's position. The Dean previously performed, fulfilled, and exercised all of the duties, responsibilities and authority that have been delegated to the Associate Dean. Virtually all of the duties and responsibilities temporarily assigned to the former Academic Assistant to the Dean have been delegated, or assigned to, the Associate Dean; and, when that temporary/term position was instituted, it was not viewed as a new, operations-manager type position. It was clearly identified as an academic administrator position. The evidence is clear: the Dean previously performed all of the Associate Dean's current duties and responsibilities, and the Dean's performance and fulfillment of those duties and responsibilities occupied approximately 80-90 percent of her working hours. Certain aspects of those duties and responsibilities may be appropriately characterized as operational, or non-academic, in nature. Nonetheless, I am satisfied that many aspects of the duties and responsibilities are appropriately characterized as academic -- e.g., approval of faculty's personal and professional development plans; leadership and direction to the faculty; approving leaves of various sorts; teaching assignments; curriculum development; and so forth. While the Associate Dean is not performing and fulfilling all of the Dean's duties and responsibilities, the reality is that, the Associate Dean position is performing and fulfilling, via delegation, the duties and responsibilities formerly performed and fulfilled by the Dean and formerly occupying the bulk of the Dean's working hours, including the direct reporting relationship with faculty members.

I find the evidence supports a distinction between operational and academic duties and responsibilities, but it does not support a distinction between "higher-level" or "senior" functions, and "lower-level" or "junior" functions. It is the case that for many years the Dean focused primarily on administering and managing internal faculty relationships and matters leaving the administration and management of some of her duties and responsibilities associated with the external relationships and cross-college-function components of her position "undone." However, there was no evidence Dean Holmwood was ever at risk of losing her title and/or remuneration due to the fact that, year after year, she focused on this aspect of her duties and responsibilities and left the other aspect "undone". Indeed, the Dean's chosen focus must surely be viewed as reflecting the critical importance of the Associate Dean's duties and responsibilities to the academic enterprise of the Faculty of Health Sciences. I find it is primarily that focus and those duties that have been delegated to the Associate Dean position, including the requirement that faculty report to Associate Dean. The evidence establishes that, in relation to many academic matters and decisions having a real impact on faculty as

Instructors, it is the direct reporting relationship to the Associate Dean that is crucial. In this regard faculty must turn to, and can rely on, her immediate decisions even though the Dean's position retains overall authority and responsibility. And, the Associate Dean becomes Acting Dean in the Dean's absence.

I accept Ms. Holmwood's evidence that, due to the greater integration of the Faculty of Health Sciences with the external healthcare sector and other post-secondary institutions, the associated duties and responsibilities of her Dean position require more time and attention than is the case for other Deans at the College who work under the generic Dean job description. I also find that these requirements, in combination with the growth and expansion of the Faculty of Health Sciences since the re-organization in the mid-1990s, created an unmanageable workload for one excluded academic administrator. Various organizational models were proposed and discussed over time as means to address the Dean of Health Sciences' expanding scope of responsibility and particular circumstances, and the College eventually approved the current model.

For the foregoing reasons, I find, however, that the Association's factual assertion finds support in the evidence. The proper characterization of this management decision is that, due to the significant growth and expansion in the Faculty of Health Sciences since the mid-1990s, the College re-organized the administrative structure by effectively splitting the Dean of Health Sciences position in two, one academic administrator, or Dean, is now responsible for the management of many of the internal faculty relationships and functions, and one academic administrator, or Dean, is now responsible for the management of external relationships, cross-college functions, and the Continuing Education Unit.

On the evidence, a clear line between these two roles has not, as yet, been delineated, and it will no doubt take some time for a clear delineation of these roles to develop. While the two positions may not be entirely equal in terms of their scope of responsibility and authority, and while the way in which the two positions may evolve over time in this regard remains somewhat unclear at this point due to the unfortunate periods of illness and absence of the incumbents, I must decide the issues referred to me for determination. It will be recalled that, one of the ongoing problems of the previous organizational model in the Faculty of Health Sciences was the lack of decision-making authority in the Co-ordinator positions. This meant that many decisions were pushed up to the Dean. The alleviation of this situation and consequential delay in administrative decision-making was discussed during the parties' collegial consultation about the

Associate Dean position, and faculty were assured the position would address this issue. Thus, I find it can reasonably be inferred that the organizational change in Faculty of Health Sciences was intended to be, and will become, an effective academic administrative model with one Dean responsible for internal faculty matters and one Dean responsible for external relationships, cross-college functions, and the Continuing Education Unit. I am persuaded that, viewed from a substantive perspective, and due to College growth and expansion, management split the Dean of Health Sciences position in two. In my view, the evidence supports a distinction between internal and external duties and responsibilities. Despite the title Associate Dean, I am satisfied that in substance, the position is an academic Dean, not a new, operations-manager position.

Unlike the cases counsel for the College referred to in argument, the facts of the case at hand establish much more than an overlap of functions between two positions, one of which has broader responsibility and/or accountability. I am persuaded that the facts of this case establish that the Associate Dean position represents the substance of the Dean's position as it was functioning when the language of paragraph D and the Sentence were being discussed, and that academic administrative position, with the requisite authority to make decisions faculty can rely on, has been split off from the remaining Dean's functions which were, at that time, left undone.

Did the parties intend this position to be captured by the Agreement? For ease of reference, paragraph D of the Agreement is repeated here:

D. Affected Positions

This Memorandum of Agreement applies to the following positions:

- Dean, Language, Literature and Performing Arts
- Dean, Child, Family and Community Studies
- Dean, Commerce and Business Administration
- Dean, Humanities and Social Sciences
- Dean, Sciences and Technology
- *Dean, Health Sciences

These positions (title/responsibility) may vary in accordance with College growth and organizational change.

* This position will convert to a renewable term position when vacated by the current incumbent.

As summarized above, the parties presented extensive extrinsic evidence in support of their interpretive positions. In British Columbia labour law, it is well settled that arbitrators are not strictly bound by the common law approach to the interpretation of collective agreement provisions. Arbitrators are expected to appreciate the inability of written contractual language to address precisely all of the real-life disputes which might arise in the life of a provision of a collective agreement. Due to the inherent imprecision of contract language as well as the need in industrial relations to satisfy the real-life expectations of the parties plus the availability of useful information from the bargaining process, labour law has gradually moved away from the strict common law rule excluding extrinsic evidence. Arbitrators are entitled to admit and utilize extrinsic evidence as an aid to the interpretation of a collective agreement provision in cases where there is a *bona fide* doubt about the proper meaning of the language parties adopted to express their agreement. The principles associated with the admission and use of extrinsic evidence as an aid to the interpretation of disputed collective agreement language were confirmed in the decision of the British Columbia Labour Relations Board (the "Board") in *Nanaimo Times Ltd. -and- GCIU, Local 525-M*, [1996] B.C.L.R.B.D. No. 40, which referred to the Board's earlier decision in *University of British Columbia -and- Canadian Union of Public Employees, Local 116*, [1976] 1 Can. L.R.B.R. 13. In *Nanaimo Times Ltd.*, the Board summarized the proper arbitral approach in this way at page 6:

The fundamental point, as we have emphasized, is that arbitrators approach their interpretive task with the full appreciation of the circumstances relevant to the disputed contract language. The arbitrator may then determine how, if at all, the extrinsic evidence is of assistance. For example, the collective agreement language may not admit of ambiguity, such that the extrinsic evidence is properly disregarded; alternatively, where ambiguity is found, the evidence may be used as an aid to interpretation.

In order to serve as an aid to interpretation, extrinsic evidence must evince the parties' mutual intention. Subjective evidence of one party's impression of what was achieved during negotiations may have no interpretive value in the absence of other evidence validating that impression. See *Corporation of the City of Cranbrook -and- International Association of Firefighters, Local 1253*, [2001] B.C.L.R.B.D. No. 294, and authorities cited therein ("*Cranbrook*").

When read both in isolation from, and together with, the extrinsic evidence, I have some *bona fide* doubt about the parties' intention respecting the application of the Agreement to the real-life issue in this dispute. Did they intend the Agreement to apply to the Associate Dean of Health Sciences position as I have found it to be? Does the extrinsic evidence assist in deciphering the meaning the parties mutually intended for the language of the Agreement? If not, what standard applies to the determination of the issue in dispute?

The factual context in which Ms. Exmann and Ms. Jajic negotiated the provisions of the Agreement was management's implementation of the second stage of the College's structural re-organization. In that context, and for the purposes of the Instructional Division only, the Association had succeeded in persuading the President and Vice-President McKendry to change the prior management decision to appoint the new Deans to ongoing positions and to adopt the University Model whereby faculty move into excluded Dean positions for a term, and return to teaching when their term ends. The task of negotiating an Agreement resolving the consequential issues associated with this model was assigned to Ms. Exmann for the College and Ms. Jajic for the Association. These two individuals were, I find, the parties' sole spokespersons for the purposes of the Agreement.

The Sentence was included in the second draft of the Agreement. According to Ms. Exmann, it was Mr. McKendry who suggested the inclusion of such language in paragraph D. He explained that the suggested language was intended to "ensure that, if there were changes to the positions, for instance, if a position was split in two or two positions were merged, the Letter [Agreement] would still apply." Mr. McKendry apparently envisioned at least two types of future changes to the listed Dean positions in Paragraph D and wanted to ensure that such changes would continue to attract the application of the Agreement.

The College apparently accepted Mr. McKendry's suggested language and incorporated the Sentence as suggested into the next draft of the Agreement. When Ms. Jajic and Ms. Exmann next met to discuss the draft Agreement, Ms. Exmann explained why the Sentence had been added to paragraph D. Ms. Exmann told Ms. Jajic the Sentence was needed to ensure that the positions listed, regardless of their titles or if they shrank or were merged, would continued to be addressed by the Agreement. Despite Mr. McKendry's focus on changes to the listed "positions", Ms. Exmann gave examples of the Faculty of Humanities and Social Sciences splitting in two, and two "areas" merging

into one Faculty. However, Ms. Exmann also told Ms. Jajic "if a listed Dean position was split in two" the Agreement would continue to apply, and if an additional Dean position was created to take on half an area from an existing Dean, the Agreement would still apply. Ms. Exmann did not specifically raise the concept of an Associate Dean.

Ms. Jajic recalled Ms. Exmann making these remarks when they were discussing the purpose of the additional Sentence. Ms. Jajic also recalled discussions with Mr. McKendry about the application of the Agreement to extra layers of management which had faculty reporting to them. Those discussions occurred in some unclarified context where Ms. Exmann was not present, and there was no evidence Mr. McKendry's represented to Ms. Jajic in that context that she could rely on his private comments to her where they differed from, or were more expansive than, Ms. Exmann's comments -- i.e., the College's spokesperson. In her evidence Ms. Jajic initially thought she had communicated Mr. McKendry's expansive and protective remarks to Ms. Exmann during their discussions, but Ms. Jajic candidly agreed in cross-examination she was "not sure" she had done so.

Where Ms. Exmann's and Ms. Jajic's evidence in this regard differs, I find I must prefer Ms. Exmann's evidence. Her recollection was certain, and although I find her evidence in direct examination was materially augmented in cross-examination, her denial of any discussion of Ms. Jajic's private talks with Mr. McKendry was not shaken in cross-examination. In contrast, Ms. Jajic candidly agreed in cross-examination she was not certain she had communicated Mr. McKendry's remarks to Ms. Exmann.

I pause to address the Association's submissions relating to Ms. Jajic's evidence about Mr. McKendry's private remarks to her relating to the future application of the Agreement to other positions. The Association maintains Mr. McKendry's remarks to Ms. Jajic should be viewed as an admission against the College's interest. The Association further maintains Ms. Exmann's explanation to Ms. Jajic that the application of the Sentence was intended to ensure the Agreement would continue to apply if a Dean's position was split in two shifted the onus to the College to call Mr. McKendry as a witness.

I find I cannot uphold either of these submissions. In my view, the evidence is not sufficient to support a finding that Mr. McKendry was acting as the College's spokesperson when he discussed this issue with Ms. Jajic. It is the case, as the Association notes, that Mr. McKendry is senior to Ms. Exmann within the College's

organizational structure. However, the evidence was that Ms. Exmann was to be the College's authorized spokesperson in respect to the issues to be resolved in the Agreement, and the signatories to the Agreement were Ms. Exmann for the College and Ms. Jajic for the Association. As I have said, the evidence does not establish Mr. McKendry ever represented to Ms. Jajic that his remarks to her in Ms. Exmann's absence could be relied on as reflecting the College's intention where they differed from, or were more expansive than, Ms. Exmann's remarks on a particular issue. While Mr. McKendry's remarks to Ms. Jajic may have been consistent with the Association's desired outcome, absent evidence establishing that he was indeed acting as the College's authorized spokesperson when he had his private discussions with Ms. Jajic, and there is none, the hearsay evidence about Mr. McKendry's remarks to Ms. Jajic cannot be viewed as an admission against the College's interests. As to the Association's second submission, the Association bears the onus of establishing that the Agreement was intended to apply to the Associate Dean position as I have found it to be. In my view, Ms. Exmann's remark to Ms. Jajic cannot reasonably be viewed as shifting the onus to the College to call Mr. McKendry as a witness in its case.

Hence, I find the parties' negotiators did not discuss and agree on the general application of the Sentence to the College's creation of extra layers of management with faculty reporting to them. Nor, I find, did they discuss and agree on the specific application of the Sentence to a position with the title Associate Dean. However, Ms. Exmann and Ms. Jajic did discuss the future application of the Agreement if a listed Dean position was split in two, and Ms. Exmann's example was a split along subject matter lines. What they did not discuss was the specific real-life problem presented in this dispute -- splitting a listed Dean's positions in two along internal and external relationship/function lines. I am satisfied that, when Ms. Exmann and Ms. Jajic were discussing the intent behind the Sentence and the continued application of the Agreement in the future to circumstances where a listed Dean position was split in two in accordance with College growth and organizational change, the specific type of split that was instituted in 2005 in the Faculty of Health Sciences was not within their contemplation.

The extrinsic evidence does not, therefore, enable me to decipher any reciprocal assent about the meaning of the Sentence as applied to the specific issue that arose when, as I have found occurred in 2005, the College split the Dean of Health Sciences position into two academic Dean positions, one with the title Associate Dean. Ms. Exmann and Ms. Jajic mutually understood that, by virtue of the added Sentence, the Agreement would continue to apply in the future if a listed Dean's position was split in two, but they

did not achieve a meeting of the minds about the application of the Sentence to the specific type of position split I have found has occurred here. In the context of collective agreement negotiations, this is not an entirely unusual situation. And in the context of the parties' discussions, this is not understandable. After all, this specific organizational model for the Faculty of Health Sciences had not previously been proposed and discussed by the parties.

Thus, the extrinsic evidence establishes that the parties did not achieve a meeting of the minds on the real-life problem facing them in this dispute. This does not mean that this board should decline to go further. I agree with the Association's submission in this regard. Where, as here, there is a finding of no real consensus in fact, arbitrators typically apply an objective test to the interpretive task: see *Cranbrook*. Where the extrinsic evidence fails to establish a mutual intention, the arbitrator must nonetheless fulfill the mandate under sections 82(2) and 89 of the *Labour Relations Code* to "have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties" and to "provide a final and conclusive settlement of the dispute" respectively. The question becomes, what would a reasonably informed labour relations practitioner say the contractual language means in the circumstances? See *Cranbrook*. Arbitrator Hope applied this objective test somewhat distinctively in the *Cranbrook* case, and the Association sought a similar application of the test to Ms. Jajic's evidence in this case. In my view, Arbitrator Hope's approach reflected the particular facts of the case before him. It does not assist here because Ms. Jajic's impression that the Sentence was intended to broadly capture new layers of management with faculty reporting to them was based on her discussions with Mr. McKendry, the content of which was not, I find, communicated to Ms. Exmann.

This latter finding provides a useful point of commencement for an assessment of the reasonableness of the parties' differing contentions regarding the application of the Agreement to the position at issue in this dispute. I find there is merit to aspects of both parties' contentions.

I find a reasonably informed labour relations practitioner would not say the language in issue was intended to generally capture the College's creation of new layers of excluded management with faculty reporting to them. The College's willingness to change its initial decision about the terms and conditions associated with the new Dean positions in the Instructional Division was a notable event, and the express terms of the Agreement represent a significant restriction on management's right to organize and re-

organize the academic Dean structure in the Instructional Division. In these circumstances, a reasonably informed labour relations practitioner would likely expect to see some additional clear language in the Sentence, paragraph D, or elsewhere in the Agreement, reflecting this even more significant restriction on management's right to organize and re-organize its excluded workforce.

This conclusion is reinforced when the language of the Agreement is read in the context of the above-quoted provisions of the collective agreement. Those provisions reflect that, when the parties mutually intend to generally capture excluded positions with faculty reporting to them, they have devised language expressing that intention. No such language was included in the Agreement. However, I do not find the College's submission in this regard relating to the absence of any language excepting the Director of Psychiatric Nursing position from the Agreement to be persuasive. I find the parties acknowledged that that position was an anomaly which would be eliminated from the organizational structure. Nor do I find the existence elsewhere in the College at that time of other management positions with faculty reporting to them to weaken this contention. The Agreement constitutes a distinctive agreed-to approach limited to the Instructional Division.

Lastly, this conclusion is reinforced by my factual finding that Ms. Jajic did not communicate her talks with Mr. McKendry about a broader meaning of the Sentence to Ms. Exmann. If those talks occurred before Ms. Exmann's explanation, Ms. Jajic would reasonably have added the broader meaning to Ms. Exmann's explanation of the College's intent. If those talks occurred after the meeting where this issue was discussed, there was plenty of time prior to the execution of the Agreement for Ms. Jajic to communicate the broader application of the Agreement to Ms. Exmann. On the evidence, this did not occur.

Thus, if a new, excluded operations-manager position had indeed been created in the Faculty of Health Sciences in 2005, I find a reasonably informed labour relations practitioner would not conclude that management has bargained away its right to establish the terms and conditions for that position.

At the same time, I find for several other reasons that a reasonably informed labour relations practitioner would say the Agreement was reasonably intended to apply to the type of Dean position split that was given effect here in 2005. I begin by

considering the focus, factual context, and purpose of the parties' discussions leading to the Agreement.

The Agreement was negotiated on the heels of the parties' protracted consultations about the College's decision to institute the new Dean positions as ongoing positions. During that consultation process, which in itself constitutes a distinctive and extraordinary process given the excluded status of the positions under discussion, the Association successfully persuaded the President and Vice-President McKendry to adopt the University Model of administration in the Instructional Division. The Association was not able to persuade Mr. Atkinson to do so for the Dean position in the Educational Division, but the evidence was that Mr. Atkinson's Dean was viewed as a distinctive "hybrid" position.

As the University Model contemplates faculty moving into term Dean positions and then returning to their teaching positions at the end of their terms, management's decision to adopt the University Model for the Instructional Division had real implications for the Association's members. The President and Vice-President McKendry recognized this and conditioned the adoption of the term Dean model on the parties' successful negotiation of an agreement addressing necessary and consequential issues. I find Paragraph A, the section defining the purpose of the Agreement, clarifies that the Agreement was intended to address consequential issues arising from the adoption of the University Model in the Instructional Division.

When the parties were negotiating the Agreement, and more particularly Paragraph D and the Sentence, the Association's members in the Faculty of Health Sciences reported to Dean Holmwood. Her job description as Dean specified duties and responsibilities involving externally-focused relationships and functions as well as internally-focused relationships and functions, but the reality was that the work she performed on a day-to-day basis in her position as Dean was limited to the latter. That was what the Dean of Health Sciences position, as listed in paragraph D, was understood to be when Ms. Jajic and Ms. Exmann discussed the purpose of the Sentence and the continued application of the Agreement if a listed Dean position was split in two. I have found that the bulk of the duties and responsibilities Dean Holmwood actually performed and fulfilled at that time have been assigned, or delegated to, the Associate Dean. Thus, the Associate Dean position comprises what the Dean's position was understood to be at the time the Sentence was agreed to.

The focus of paragraph D is on positions -- "these positions" -- and I find the language and structure of the Sentence refers back to title and responsibility variations to positions -- "these positions." While it is true, as the College notes, that the Faculty names were changed and programs were shifted around during the negotiation of the Agreement and afterwards, paragraph D and the Sentence do not focus on, or refer back to, Faculties or programs. The Sentence does not state "These Faculties/programs ...".

Thus, adopting a purposive approach, reading the Sentence in the context of paragraph D and the Agreement as a whole, and viewing the Agreement against the factual backdrop in which it was discussed, I am persuaded that a reasonably informed labour relations practitioner would say the Agreement was meant to apply to the Associate Dean of Health Sciences position as I find it to be.

The College submits that the remedy the Association seeks is "extraordinary" because it interferes with management's right to create new, excluded management positions on the terms it sees fit. I will address the Association's remedial request in more detail below. Suffice to say for present purposes that, given the outcome of the application of the objective test to determine the reasonably intended meaning and application of the language of the Agreement, the Association is seeking the enforcement of a deal that was to the real-life problem at issue in this dispute, mandated by management at the College, one term of which is that appointments to the excluded academic administrator positions listed in paragraph D must be made for five-year terms, once renewable based on satisfactory performance. See paragraph E, section 1.3. The reasonableness of this finding of intention is also reinforced by other agreements the parties have negotiated in relation to excluded academic administrators at the College.

Under Article 3.1, management must exercise its rights consistent with the provisions of other articles of the collective agreement. The Agreement has been incorporated into the collective agreement as Letter of Understanding #15. Thus, the Association is not seeking the implication of a restriction on management's rights in the absence of clear language. The Association is instead seeking the enforcement of an agreement in which the College has expressly agreed to certain terms and conditions for the listed academic Dean positions in the Instructional Division.

Remedy

Although this grievance relates solely to the Associate Dean of Health Sciences position, the Association seeks a declaration that all Faculties listed in paragraph D of the Agreement, save for the Faculty of Commerce and Business Administration which the Association recognizes as a unique situation, or are covered by the Agreement. In seeking this broad declaration, the Association refers to evidence that the job description for the Associate Dean of Health Sciences is intended to be a model for the College. The Association submits that the Associate Dean of Health Sciences position is a variant of the Dean of Health Sciences position, and therefore, all Associate Dean positions in the other listed Faculties will be variants of those Dean positions.

In addition, the Association seeks a cease and desist order and an order with prospective effect that all future Associate Dean positions other than Commerce and Business Administration be appointed pursuant to the Agreement. Relying on the following five awards, the Association maintains this board has the jurisdiction to grant these remedies: *Re Sparton of Canada Ltd. -and- United Automobile Workers, Local 27* (1982), 6 L.A.C. (3d) 205 (McLaren); *New Westminster School District No. 40 v. New Westminster Teachers' Union*, [1995] B.C.C.A.A. No. 628 (Germaine); *Stadco Forest Products Ltd. -and- Industrial Wood and Allied Workers of Canada, Local Union No. 1-3567*, B.C.L.R.B. Decision No. B395/96 (B.C.L.R.B., December 20, 1996); *Board of School Trustees of School District No. 70 (Alberni) -and- British Columbia Teachers' Federation* (2002), 103 L.A.C. (4th) 395 (Jackson); and, *Re Amalgamated Clothing Workers of America -and- Polax Tailoring Ltd.* (1972), 24 L.A.C. 201 (Arthurs).

The College objects to the remedies sought by the Association. The College emphasizes that, at this time, the only other Associate Dean position is in Commerce and Business Administration. The College also submits that in the absence of any evidence about any other Associate Dean position(s) that may be created by the College in the future, the requested remedy rests on hypothetical facts. The College says while this award may guide the parties in the future, no remedy should be granted based on positions that are not yet in existence.

I am persuaded that the College's position on this issue has merit and should be upheld. As stated at the outset of this Award, the outcome of this dispute turns on my findings of fact. There is no similar factual foundation for any other Associate Dean positions the College may establish. The way in which the Association asks this board to

exercise its remedial jurisdiction falls outside the scope of the typical remedies granted in similar disputes. Without reaching any conclusion about the scope of my jurisdiction to grant such remedial relief, I decline to do so in the absence of a factual foundation on which to exercise such a jurisdiction.

I hereby declare that the Agreement was reasonably intended to apply to the Associate Dean of Health Sciences position as I have determined it to be in this award. The terms of the Agreement apply to that position at the College. For the foregoing reasons, I decline to exercise my remedial authority to grant a cease and desist order and/or a prospective order to the effect that all future Associate Dean positions other than Commerce and Business Administration be appointed pursuant to the Agreement.

I retain jurisdiction to assist the parties with any issues arising out of the implementation of this Award.

It is so awarded.

DATED this 26th day February 2007 at Vancouver, British Columbia.

Joan M. Gordon
Arbitrator