

This Arbitration Board was appointed pursuant to Section 104 (Expedited Arbitration) of the British Columbia Labour Relations Code, R.S.B.C. 1996, c.244. The parties agree this Board has the jurisdiction to determine this matter which involves a grievance filed by the Langara Faculty Association on behalf of the English Department, protesting the decision of the President of Langara College in April, 2005 to refuse to appoint Julia Denholm as Department Chair of the English Department for the term from May 1, 2005 to April 30, 2007. The Administration refused her appointment on the basis of College policies addressing "Employment of Relatives" and "Conflict of Interest".

FACTS

The President of Langara College is Linda Holmes and she has been in that position since 1994. There are a number of administrators who report directly to the President including the Dean of Student Support Services, the Bursar, the Dean of Continuing Studies and the Director of Human Resources (Ken Jillings). As well, there are two Deans of Instructions (Linda Arnold and Martin Gerson) for the regular academic programs who report directly to President Holmes.

Each of the Deans has three academic divisions for which he/she is responsible. Dean Arnold is responsible for the Creative Arts Division, the Humanities Division and the Health, Applied Science and Human Services Division. The three Divisions under Dean Gerson are the Mathematics and Science Division, the Business and Community Programs Division, and the Social Sciences Division. Each of the Divisions has a Division Chair who is a member of one of the Departments within that Division.

The relevant Division with respect to this arbitration is the Humanities Division which is comprised of the departments of English, Modern Languages Philosophy and Interdisciplinary Studies. The Division Chair of Humanities is Roger Semmens, who is a member of the English Department. Paul Headrick, a member of the English Department and former Department Chair and Assistant Department Chair, testified that the Division Chair in Humanities has always, as a matter of practice, come from the English Department.

One of the members of the English Department is Julia Denholm who is the common law spouse of Mr. Semmens. In the spring of 2005, Ms. Denholm was elected by her colleagues to be the Chair of the English Department. That selection was rejected by President Holmes due to her relationship with Mr. Semmens.

The Board heard evidence that in 1996, the Administration and the Langara Faculty Association established a Joint Committee on Administrative Duty Time and created job descriptions for Department Chairs and Division Chairs, based on mutually agreed upon administrative duties.

The documents agreed to by the College and the Association in 1996 state that the "Division Chair provides leadership to the Division, and is responsible for departmental and program adherence to College policies, procedures and practices, as established in Collective Agreement(s) and the Policy and Procedures Manual. The Division Chair also performs other essential duties as may from time to time be assigned by the Dean(s) of Instruction." The Division Chairs are members of the bargaining unit and continue to teach a ¼ load while they are seconded to be Division Chair.

With respect to academic duties, the Division Chair is expected to encourage and facilitate departments' updating of curricula and prepare new programs and other proposals and, in consultation with departments, advisory committees and other Division Chairs, approves and submits course, program and other proposals to the appropriate Dean, the Education Council and Langara Council for approval and implementation. The Division Chair has College wide responsibilities such as communicating, coordinating and sharing issues and responsibilities with other Division Chairs, and participating and contributing to: 1) standing committees, such as the Registration Committee, Langara Council, Dean and Division Chair Meetings, Education Council, Board of Admissions; 2) special committees and projects assigned from time to time which reflect the needs of the College, including strategic planning, facilities usage and budgeting; 3) self-initiated activities which meet the administrative needs of the College.

The divisional functions of the Division Chair involve ensuring that departments are informed regarding special projects and funding opportunities, and projects that are available from time to time, communicating College policies, initiatives and decisions, representing the division's needs and concerns to other departments, divisions, and other parts of the College, holding divisional department chair meetings at regular intervals, and forwarding minutes to the Dean, orienting and training a successor, and accounting for communication to and from all division members regarding College wide issues.

The Division Chair must also approve course schedules, vacation, instructional assignment and non-instructional schedules for faculty and monitor the enrolment process. The Division Chair also has responsibilities with respect to external relations, students, and facilities.

The Division Chair also has financial responsibilities including planning, recommending and determining priorities for capital expenses in the division, in consultation with Department Chairs, and cooperates with other divisions and College area in the allocation of the capital budget, managing grant applications, managing PD funds, participating in budget resource group (for selected Division Chairs), planning, recommending and monitoring departmental annual section plans in consultation with Department Chairs, ensures that faculty contracts reflect plans and planning, and recommending and monitoring departmental operating expense budgets in consultation with Department Chairs.

Finally, with respect to personnel, the Division Chair resolves conflicts/disputes between faculty members, ensures that evaluation procedures consistent with the Collective Agreement and "Guidelines for Evaluation" are implemented, monitors evaluation procedures, ensures that procedures for selection committees consistent with the Collective Agreement are in place, monitors the operation of selection committees, expedites accurate completion and submission of Faculty Appointment Recommendation Forms, participates in departmental selection recommendation committees and faculty evaluation committees as per the Collective Agreement, approves faculty vacation and non-instructional schedules in such a way that departmental and College needs are met, approves and recommends where appropriate leave requests, assists department chairs in personnel matters relating to CUPE staff in the department

areas, expedites submission of substitute faculty and CUPE timesheets, deals with personal concerns of faculty and staff which pertain to/affect assigned duties and supervises the Division Chair secretary.

The position of Division Chair is also summarized in the "Job Postings" forms for the position.

It states, in part:

Position Summary

Division Chairs are collegial managers responsible and accountable for carrying out the various duties as defined in the October 16, 1996 document approved by the College and the LFA. In addition, the Division Chairs are expected to ensure that the Department Chairs' duties and responsibilities are carried out and that departments and programs adhere to the College policies, procedures and practices established in Collective Agreements and the Policy and Procedures Manual. Division Chairs are expected to represent their division as well as take a cross-college perspective when providing advice and assistance to the Deans and President regarding the overall management of the College. Division Chairs are further responsible and accountable for the management of their Divisions within the parameters established by budgets, Collective Agreements and College Policies and Procedures and for representing the Division and College on committees. These six faculty positions are available in the Divisions identified in Attachment A, and are subject to the terms and conditions of the LFA Collective Agreement (Article 10.7).

The Collective Agreement also contains provisions with respect to the Division Chairs. The

Agreement states:

- 10.7 Division Chair
- 10.7.1 A Division Chair must be a full-time regular faculty member.
- 10.7.2 The President shall initiate the selection process at least twenty-six (26) weeks prior to the December 31st date preceding the date of vacancy. This date may be altered by mutual consent of the President and the Association. The application closure date shall not be before September 15th.
- 10.7.2.1 The President shall appoint a Division Chair. Before making such appointment the President shall consider the advice of a joint administration/faculty recommendation committee established for the purpose.
- 10.7.2.1.1 The recommendation committee shall be composed of a non-voting chair appointed by the President; the appropriate Dean; a regular faculty member of the Division selected by faculty members of the Division; a regular faculty members not belonging to the division selected by the Association.
- 10.7.2.1.2 The recommendation of the recommendation committee shall initially be forwarded to the President, who may make the appointment and advise the College Board.

- 10.7.2.1.2.1 If the President is not willing to appoint the person recommended by the recommendation committee, the President shall meet with the committee and an attempt shall be made to come to accord. Should agreement not be reached, the matter shall be referred to the College Board and the appointment, if any, shall be made by the College Board.
- 10.7.3 The term for appointment as a Division Chair shall normally be two (2) years commencing May 1st in an odd-numbered year and terminating April 30th in the subsequent odd-numbered year. An appointee shall be limited to three (3) consecutive two-year terms.
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- 10.7.4 The appointment of a Division Chair ceases in such capacity simultaneously with cessation of the appointee as a full-time regular faculty member.
- 10.7.5 A Division Chair normally shall instruct one-quarter of full-time. The determination of actual instructional time will be determined in each case by the President to meet the needs of the division and the College.

Each of the Departments within a Division has a Department Chair and in the case of larger Departments, such as English, there is also an Assistant Department Chair. The Chair of a Department continues to teach a $\frac{3}{4}$ load while in that position. The 1996 Agreement between the College and the Association addressed the Department Chair position. For our purposes, the most relevant “Duties and Responsibilities” for the Department Chair are as follows:

Department Chair

The following list of activities has been divided into **duties** and **responsibilities**. **Duties** define those activities Department Chairs would be expected to carry out themselves. **Responsibilities** define those departmental activities for which the Department Chair is ultimately responsible, but which may be delegated or assigned to other members of the department. In the Academic category, the duties would include “approves departmental publications”. The responsibilities are as follows: develops program curriculum – researches, redesigns and updates; updates university transfer; prepare/reviews program evaluation; prepares for program accreditation; prepares new program proposals; represents curriculum proposals at Education Council.

There are issues with College wide liaison and that includes liaising with Deans, Registrar, Division Chairs, other administrators, other instructional departments (eg: support courses), student services (for calendar updates), substituting for Division Chair during absence and participating in campus-wide meetings and committees. Responsibilities include: liaising with Communications, Computing Centre, Counselling, Bookstore, College Foundation and Student Services.

With respect to Departmental functions, the duties are set out as follows: ensures coordinators and assistant department chairs are informed about budgets and other relevant issues; organizes and liaises with departmental committees; disseminates information (by memo, phone, e-mail, meetings); manages correspondence; plans (academic and facilities); creates, develops and maintains departmental data bases (files); chairs department meetings (ensures minutes are prepared and circulated; maintains department and program policies and procedures; interprets, implements and communicates College policies and procedures; ensures textbooks are selected and orders are placed in a timely fashion; manages LARS (eg: updates and proofs LARS guide, monitors).

The responsibilities related to those responsibilities include arranging scholarship nominees, arranging visiting lecturers and readers, managing departmentally sponsored projects, mandatory department projects (eg: Studio 58, Voice), voluntary department projects (eg: Display & Design Grad Show, 49th Avenue magazine), chairing program area meetings, organizing seminars and department PD days, handling internal publicity (eg: posters, course outline booklets) and preparing grant and special funding applications.

The Department Chair also has external responsibilities which include liaising with prospective employers, maintaining Alumni Liaison, maintaining professional affiliations, managing department PR (eg: newsletter, journal articles, high school visits) and organizing recruitment activities.

The Department Chair also has Faculty/Staff duties which involve assigning office space, implementing evaluation process, implementing the hiring process, dealing with absent faculty and replacements, monitoring faculty and staff responsibilities, participating in Department Chair orientation/training/PD, orienting new faculty to College and department, organizing PD/Vac scheduling and reporting, fostering a positive work environment (eg: recognizes and encourages success, awards nominations), supervising other department administrators and staff, interpreting and implementing the Collective Agreement(s), (LFA and CUPE), chasing exams, chasing grades, encouraging career development, providing personal reference letters (for faculty), obtaining course outlines from

department members and approving and recommending where appropriate to Deans/President short term alternate duty/leave requests. The responsibilities in that regard are identified as training and orienting new staff, managing student aides, workstudy students and staff (including timesheets), organizing conferences, mentoring, supervising lab, resolving conflicts, solving personnel problems, and coordinating group Professional Development Projects.

The Department Chair also has duties and responsibilities with respect to financial issues (plans supplies and capital requirement and prepares budgets), scheduling (course schedules and teaching assignments, liaising with other department, preparing enrolment projects, scheduling, setting the final exam schedule) and facilities (communicating facilities needs).

The Department Chair must also deal with students' grade appeals and has responsibility for selecting students, advising students and applicants, advising students about employment opportunities, advising and assisting students during registration, assessing background credentials and placement in courses and handling complaints and problems.

With regard to the position of Department Chair, the Collective Agreement states:

- 10.6 Department Chair, Assistant Department Chair, Co-ordinators
- 10.6.1 A Department Chair, Assistant Department Chair or Coordinator must be a regular faculty members who has met the conditions of Article 10.3.6.1 and who works a minimum of one-half time, unless otherwise mutually agreed to by the parties, and shall be appointed by the President on the recommendation of the faculty of the department or program.

Owing to the unique circumstances existing in the Library, the Association agrees that the position of Chair of this department may be held by a person holding a part-time appointment.
- 10.6.2 The Division Chair (or appropriate Dean if there is no Division Chair) shall initiate the recommendation/appointment process at least twelve (12) weeks prior to the date of vacancy.
- 10.6.2.1 The faculty member shall be selected for recommendation by a process agreeable to the faculty of the department or program.
- 10.6.2.1.1 The President may seek the advice of the appropriate Dean and the appropriate Division Chair and shall make the appointment without further consultation with faculty if: the faculty of a department or program so request, the faculty of a department or program number less than three (3)

full-time equivalent members, the faculty of a department or program fail to recommend a faculty member for appointment by a date which is two (2) weeks prior to the date of vacancy.

- 10.6.3 The term for appointment as a Department Chair shall normally be two (2) years commencing May 1st in an odd-numbered year and terminating April 30th in the subsequent odd-numbered year. An appointee shall be limited to three (3) consecutive two-year terms.
- 10.6.3.1 The term for appointment as an Assistant Department Chair/Coordinator shall normally be two (2) years commencing May 1st in an even-numbered year and terminating April 30th in the subsequent even-numbered year.
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- 10.6.4 The appointment of a Department Chair, Assistant Department Chair, or Coordinator, ceases with his/her status no longer meeting the conditions of Article 10.6.1, unless the parties agree to the contrary.
- 10.6.5 A Department Chair normally shall instruct three-quarters of full-time. An Assistant Department Chair, and a Coordinator normally shall instruct full-time. The determination of actual instructional time will be determined in each case by the President or delegate to meet the needs of the department or program.

The English Department has 40 faculty members (full-time equivalents) and from 2003 to 2005, the Chair of the Department was Megan Otton. Ms. Otton was stepping down at the end of April, 2005. As a result, an election was scheduled in the spring of 2005 to choose her successor. The evidence is that the President has always appointed as Chair the individual recommended by the faculty of that department as long as that individual met the stated requirements of being a regular employee who was working a minimum of one-half time.

In January, 2005, Division Chair Semmens issued a memo to the members of the English Department calling for nominations for Department Chair and two candidates put their name forward. One of them was Ms. Denholm. On February 2, Professor Semmens circulated a ballot with the two names on it. Mr. Semmens determined that he would not cast a ballot or be involved in the tallying of the vote due to his relationship with Ms. Denholm.

On February 8, Dean Arnold met with Professor Semmens and indicated she had heard about developments in the English Department and that, in her opinion, the ballot did not adhere to the

“Employment of Relatives” Policy of the College. That Policy (No. 4.1.1.2) was established in 1972 and was amended in 1983. It states:

GOVERNING BY-LAW

EMPLOYEES OF THE COLLEGE

Subject to the by-laws, rules and regulations established by the Board, the College Principal or such person as he may designate may appoint and define the duties and tenure of such employees as are necessary to carry on the business and operations of the institution, except for senior administrators who report directly to the College Principal, in which case the appointment is made by the Board upon recommendation of the College Principal.

POLICY:

- A.1 It is a policy of the College Board to hire the best qualified applicants available for all jobs. However, it is necessary that judgment be used in the placement of employees who are directly related, subject to the provisions of the respective collective agreements.

DEFINITIONS:

- B.1 For the purposes of this policy, a direct relative is defined as a spouse (including common law spouse as hereinafter defined), parent, grandparent, brother, sister, son, or daughter. A person married (or in a common law relationship) to one of the above is considered a direct relative only if residing in the same household.
- B.2 Common law spouse – An employee who does not have a legal spouse shall be deemed to have qualified as a spouse, a partner who is publicly maintained and represented as his or her spouse and who has continuously been so maintained and represented for at least the previous twelve months.

PROCEDURES:

- C.1 Without the written approval of the President, no employee may participate in the selection process where his or her own direct relative is an applicant for the position.
- C.2 This policy does not preclude the employment or promotion of direct relatives in the service of the College within the same jurisdiction or area provided:
- (a) that direct relatives are not appointed, transferred or promoted to the same work unit (i.e. under the same supervisor);
 - (b) that a supervisor/subordinate relationship is not created. A supervisor/subordinate relationship is considered to exist where two or more levels of supervision do not intervene between the direct relatives;
 - (c) that no special considerations or privileges are granted in such matters as vacation or duty scheduling, time off, etc.;
 - (d) that where the supervisor is a step in the grievance or discipline procedure affecting a direct relative, the supervisor shall be excluded

- from the direct involvement in the matter and the College shall designate an alternate for that purpose;
- (e) that the supervisor shall not participate in the performance evaluation and review procedure affecting a direct relative, in which case, the College shall, at the time of appointment, designate an alternate for that purpose.
- C.3 The College may so direct and organize the staff to minimize a close working association of direct relatives and shall make every reasonable effort to relocate an employee where a direct relationship is created by marriage (or common law) of two present employees who are in a direct supervisor/subordinate relationship.
- C.4 Where a direct relationship is created by marriage (or common law) of two present employees in a supervisor/subordinate relationship, they must choose which one is to transfer or give thirty (30) days' notice of resignation.
- C.5 The College may transfer or terminate the employment of one of the spouses under C.4 above if neither of the employees voluntarily chooses to transfer or resign.

APPEAL PROCEDURE:

- D.1 Requests for exception to the foregoing policy may be considered by the President provided the proposed appointment and/or the involvement of the direct relative can be shown to be in the best interests of the College.

Professor Semmens told Dean Arnold that he felt it was proper for the balloting to go forward and that he would meet with the English Department and inform members about the Policy and identify problems that could potentially arise. Dean Arnold stated that should the Department decide the ballot would stand and Ms. Denholm was the successful candidate, it would be wise to have a meeting with the President before Professor Semmens made a formal recommendation for her appointment. The evidence is the executive of the Langara Faculty Association also became aware of this issue in the English Department around this point in time.

Balloting for the Department Chair position in English closed on February 10 and the ballots were sealed. On February 11, Professor Semmens met with the members of the English Department. He provided them with copies of the "Employment of Relatives Policy" and discussed the potential problems which might arise. Professor Semmens indicated the Department should discuss the matter and decide whether the ballots should be counted or destroyed. Professor Semmens indicated to the

Department that if Ms. Denholm was selected, the choice might be rejected by the College Administration. He suggested they could have a week to consider the matter. Professor Semmens and the two candidates then left the meeting.

Mr. Headrick testified that this was the first time he had ever heard of the “Employment of Relatives Policy”. Professor Headrick testified that about half the Department members were at the meeting on February 11 and they discussed whether they could see any potential problems and whether they were at all concerned with the issue. He indicated no one raised any specific concerns and that they could not think of any reason why the President would invoke the Policy. It was by a “unanimous or close to it” vote that it was decided that the ballots which had already been cast for Department Chair should be counted.

Following the discussion, Ms. Otton summoned Mr. Semmens and the candidates back into the meeting and informed them the Department members wanted the ballots counted. The ballots were then counted and Ms. Denholm was declared the successful candidate.

On February 22, Dean Arnold and Professor Semmens met with President Holmes. President Holmes indicated to Mr. Semmens that she could not appoint Ms. Denholm in face of the “Employment of Relatives Policy” and also the “Conflict of Interest Policy”. The “Conflict of Interest” Policy (No. 4.1.0.3) was issued in 1995. It states:

POLICY

- A.1 All employees of Langara College shall conduct themselves in a manner that will avoid potential conflict of interest.
- A.2 A conflict of interest shall be deemed to have occurred when:
 - a. employees of the College take undue advantage of their position with the College to derive, directly or indirectly, material benefits;
 - b. as a consequence of undertaking activities in addition to their college duty and responsibility, the performance of college duties and responsibilities is compromised.
- A.3 Without limiting the generality of the above, examples of conflict of interest include:

- a. where an employee authorizes the purchase by the College of equipment, supplies or services from a source in which the employee or any member of the employee's family has a substantial interest;
- b. where an employee influences an employment opportunity within the College for family or personal advantage;
- c. where an employee uses College resources for anticipated or actual family or personal gain;
- d. where an employee of the College purveys, for material gain, goods or services to students, either directly or as the agent of another, with the exception of textbooks or other instructional materials which have been approved by the procedure set out below and sold through a college authorized agency;
- e. where an employee influences the awarding of a contract by the College, or the approval of a Non-Base Funded activity of the College, for family or personal gain.

PROCEDURES:

- B.1 Full disclosure in writing to the relevant Dean or Bursar is expected of each employee before the start of an activity with potential for conflict of interest.
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- B.5 Where disagreement arises regarding a question of conflict of interest, the matter shall be referred to a Review Committee. The Review Committee shall be composed of college employees as follows:
 - a. 2 peers selected by the employee's bargaining agent or association, if applicable;
 - b. 1 representative selected by the employee;
 - c. 1 representative selected by the senior college official named under B.6;
 - d. 1 representative selected by the College President, or two representatives if the conditions in B.8 apply.
 - B.6 The Review Committee shall make recommendations regarding the existence of the conflict of interest and any appropriate disciplinary action, to the senior college official responsible for the employee (College President, Bursar, Dean of Instruction, Dean of Student and Education Support Services, Dean of College Services), who shall determine whether a conflict of interest exists, and if so, whether or what type of discipline should be imposed.

If the Review Committee recommends suspension, such recommendation shall be put before the College President for final determination. The employee shall be given the opportunity to present his or her case to the College President. If the College President suspends an employee for breach of this policy, the President shall immediately report the action to the College Board with a statement of his/her reasons for so doing.

If the Review Committee recommends termination, such recommendation shall be put before the College President for his/her review. The employee shall be given an opportunity to present his/her case to the College President. If the College President determines that termination is warranted, the College President shall recommend such action to the College Board, which shall make

the final determination on whether termination is warranted in the circumstances.

- B.7 Except in cases where the discipline imposed is a suspension or termination, non-union employees may appeal discipline rulings made under section B.6 to the College President.

A person suspended under section B.6 has the right of appeal to the College Board. Such appeal must be instituted within ten (10) working days of implementation of the suspension.

Appeals arising out of this policy will be heard only so far as they relate to procedure followed and/or disciplinary action imposed. Neither the College President nor the Board will hear appeals regarding the determination of fact, unless the appellant was unable, for valid reason, to present his/her case initially.

- B.8 Where the employee is one of the senior college officials named under B.6, the recommendation of the Review Committee shall be submitted directly to the College President. In the case of conflict of interest involving the College President, the College Board shall decide the matter.

President Holmes informed Professor Semmens and Dean Arnold that her decision was not a reflection in any way on the merits of Ms. Denholm. President Holmes instructed Mr. Semmens that another ballot should be held in the English Department which excluded the name of Ms. Denholm.

On March 11, the English Department held an “emergency meeting” which Professor Semmens did not attend. Professor Headrick testified that about thirty Department members attended and they discussed a number of options. One group wanted to proceed and see if the President would formally reject their choice. If that occurred, then one or two members of the Department felt they would have to decide what to do while most of the others were prepared at that point to commit to filing a grievance. There was also a “small group” who felt that Ms. Denholm’s name should not have been on the ballot and that the Department “should follow the President’s direction”. One instructor, who had specific interpersonal issues with Ms. Denholm, felt he would have no one to go to with problems if Ms. Denholm became Chair. Another member expressed the view that the way the Department operated was that individuals would go to either the Division Chair or Department Chair depending on who was likely to be more sympathetic but if Ms. Denholm was Chair, she and Mr. Semmens would more likely act in

concert. Mr. Headrick testified a vote was ultimately held and there were twenty-five in favour of proceeding with the nomination of Ms. Denholm, four were against and one abstained.

After the meeting, Professor Otton informed Professor Semmens that the Department had voted to uphold its original choice and that Ms. Denholm should be recommended for appointment as English Department Chair.

On March 15, Professor Semmens provided the formal recommendation of Ms. Denholm as English Department Chair to Dean Gerson, as Dean Arnold was away on leave. Dean Gerson passed that recommendation on to the President.

On April 5, President Holmes formally rejected the recommendation and wrote to Mr. Semmens as follows:

This memo is written as an instruction to you to hold another ballot for the position of Department Chair for the English Department. The reason for this written instruction arises out of the fact that neither I nor the Dean of Instruction will approve the recommendation of the Department that you have signed.

The rationale related to this decision, put simply, is the fact that my appointment of the selected candidate would violate the College's anti-nepotism policy – Policy No. 4.1.1.2 – Employment of Relatives, the application of which I will not grant an exception for.

This Policy was created to avoid the inherent potential for favoritism and conflict of interest, or the perception thereof, and thus helps to ensure the efficient operation of the College, a condition required for the performance of the job.

The standards outlined in the policy regarding the employment of relatives in superior/subordinate positions are necessary to ensure the efficient operation of the College. The College cannot accommodate individual employees who are directly related and who have a superior/subordinate relationship because the very nature of the direct family relationship in such a situation gives rise to the potential for favoritism and conflict of interest, or the perception thereof.

What follows is an example of a situation that gives rise to the potential for a claim of favoritism and conflict of interest.

- The Department Chair reports to the Division Chair. Division chairs “are expected to ensure that the Department Chair’s duties and responsibilities are carried out”. This is a superior/subordinate relationship from the point of view of evaluation and supervision.

In addition, many of the College's policies follow the concept of "progressive decision-making and appeal", that is, issues are referred to the level where they occurred, and if the individual is not satisfied, they then are referred to the next level supervisor, and so on. Therefore, approval of appointments to positions in the College organization that result in direct family relationships between successive decision-makers is not a situation that allows for the efficient operation of the College.

From a review of all of the responsibilities of the Division Chair, both as agreed by the College and the LFA in 1996 and as recently articulated by the LFA in 2004, it is clear that the Division Chair has both supervisory and monitoring functions with respect to certain work performed by the department chair. If those functions are performed by a direct family member, the potential for the perception of favoritism or conflict of interest, both within the department and division, as well as outside them, cannot be avoided.

Roger, as we discussed previously, my refusal is not related to the candidate as a person. Neither is it to be construed to be an evaluation of her merit as an employee. Rather, it is an issue of College operations and the avoidance of the creation of a situation that has the potential for favoritism and conflict of interest or the perception thereof.

Please conduct the ballot by April 10, 2005 so that the Assistant Department Chair position may also be dealt with in a timely fashion.

On April 7, Cheryl McKeeman, the Chief Steward of the Union, filed the following grievance on behalf of the English Department:

The Langara Faculty Association grieves the April 5, 2005, memo in which you state that you will not appoint the faculty member recommended by the English Department.

We see this as a violation of Articles 1, 10 and 17 of the Collective Agreement.

The English Department has selected its Chair according to the procedures described in the Collective Agreement. They have departmental matters which need to be addressed immediately, including schedules, articulation, training of new chair, and selection of assistant chair. We therefore request a response within the five day timeline specified in the Collective Agreement.

Our proposed remedy is that the College appoint the faculty member recommended by the English department.

The English Department did as instructed and conducted a new ballot without Ms. Denholm's name on it. Glenn Isaak was chosen to serve as the new English Department Chair for the period May 1, 2005 to April 30, 2007.

The parties agreed to stipulate that there have been a number of familial relationships within the academic unit at Langara College. During the period May 1, 2001 to April 30, 2005, Karen Heiderich was the Physics Department Chair and the spouse of Mark Holzer, who was an instructor in the Physics Department. In that situation, Ms. Heiderich recused herself and did not participate on the selection/evaluation committee with respect to Mr. Holzer. For a six year period ending April 30, 2005, Gordon Trick was the Fine Arts Department Chair and the spouse of Leslie Finlayson, who was an instructor in the Fine Arts Department. The evidence is that when Mr. Trick became the Chair, all the evaluations of Ms. Finlayson had already been completed. President Holmes indicated that if any other problems developed, Ms. Finlayson could have dealt with the Division Chair. During May 1, 2003 to April 30, 2005 period, Sue McBride was the Psychology Department Chair and her daughter Kathleen McBride was an instructional (lab) assistant in the Psychology Department. During that time, Kathleen McBride reported directly to the Assistant Department Chair. There was also evidence of a situation where Ken McMillan was the Humanities Division Chair while his wife Sybil was a member of the English Department and his daughter Tess was hired as an instructor. In that case, Mr. McMillan had absented himself from the selection/evaluation process with respect to Tess McMillan. It is agreed by the parties that the familial relationships of the above-noted persons were known to the College during the stated time periods.

President Holmes, began her career at Langara College in 1972 when it was part of Vancouver Community College. She was an instructor in the Nursing Department and became Department Chair (1978-80) and Division Chair (1980-86). Her evidence is that the Department Chair position involves a number of responsibilities including advocating on behalf of the Department, representing the College to the department, implementing College policy, dealing with budget matters, liaising with other

departments, and overseeing curriculum changes. Ms. Holmes testified the Department Chair must work closely with the Division Chair and that is “the strongest interrelationship in the administration”.

President Holmes views that role as a mediator between the departments within the division and that there is a balancing act between the needs of each of the departments. It is critical that the Division Chair be fair and also be seen to be fair.

President Holmes testified that a familial relations between a Department Chair and the Division Chair could lead to perceptions of favouritism and could compromise the abilities of those individuals to perform their duties. It is even possible that there may be “overcompensation” to the detriment of the department in question.

President Holmes also testified she felt Professor Semmens was in violation of the Conflict of Interest Policy when he did not inform the Administration that Ms. Denholm’s name initially appeared on the ballot in the English Department as well as when he attended the meeting in the English Department to discuss the application of the College Policy on the “Employment of Relatives”.

Ms. McKeeman, the Chief Shop Steward, testified that in any case where a true conflict or potential conflict arises involving a Division Chair, another Division Chair could become involved. This, in fact, is done every summer during vacation periods when people are away. Ms. McKeeman testified the six Division Chairs “work as a team”.

Professor Headrick testified that the relationship between the Division Chair and the Department Chair is a collegial one involving advice and checking that errors are not made and is not a supervisor/subordinate relationship.

The Board heard extensive evidence concerning a number of specific areas which have been identified by the Administration where it feels potential conflicts of interest may arise between a Division Chair and a Department Chair who are in a familial relationship. For reasons of brevity, that evidence will only be summarized here.

First, the Division Chair has significant budgetary responsibilities which involve the needs of the faculty and the students, particularly with respect to resource allocation involving member of sections, offering of courses and maximizing F.T.E.'s. There may also be matters of office allocation. President Holmes testified that there would potentially be perceptions of favouritism in the making of these decisions if the spouse of the Division Chair was one of the Department Chairs in the Division. Professor Headrick testified that in his opinion the Department Chair has little involvement in budgetary matters and that the Division Chair is generally given a budget which has already been allocated for specific purposes.

The second area identified related to the area of curriculum development which covers new course development, minor course revisions, discontinuance of programs, changes to course prerequisites, and the introduction of new programs. President Holmes testified that these changes are initiated within departments and must be approved by both the Department Chair and Division Chair before being sent to the Administration and the Education Council for final approval. Professor Headrick testified that curriculum matters are decided by the faculty members in the Department and ultimately approved by the Education Committee at the College level. The Department Chair and Division Chair simply deal with the bureaucratic aspects of moving those departmental decisions forward.

Third, there are a number of leaves of absence provided under the Collective Agreement for which application forms must be completed. These include leave from duty, alternate duty, attendance at a college related activity, leave of absence without pay (partial or full-time), and renewal leave for excellence. In each case, the application of a faculty member must be approved by the Department Chair and then the Division Chair before being sent to the administration. Some of the leaves also involve approval of expenses which may have budgetary consequences.

President Holmes testified both the Division Chairs and the Department Chairs act as independent "filters" and ensure that the leaves and any related expenses are appropriate and within the

budget. Professor Headrick testified that the final approval for leaves comes from the Dean of Instruction and that there were never any leave problems when other familial relationships existed. He also stated that leaves tend not to be contentious as a regular faculty member can be replaced with a less-expensive part-time instructor.

A fourth area that was identified was the appeal of grades by students. The evidence is there is an average of two such appeals each term in the English Department. The "Appeal of Final Grades Policy" (No. E 2006) states, in part:

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- B.2.4 Department and Division Handling
Appeal requests will be forwarded to the appropriate Department Chair, whose responsibility it is to see that all appeals are dealt with as expeditiously and fairly as possible.
- B.2.5 After receiving a request for Formal Appeal of Final Grades from the Registrar's Office, the Department Chair will:
- a) Collect from the instructor concerned, the final grade determination scheme and all available assignments, exams, exam keys, and other material/records used in the final grade evaluation related to the course work being re-evaluated. These will be added to the material submitted by the student with the appeal request.
 - b) Request that the Division Chair convene a Department Appeals Committee of two instructors who are familiar with the course content but who did not teach the course to the student who has requested the appeal. Within four working days of receipt, the instructors will be asked to assess independently the submitted material, taking note of the evaluation instruments and application of the marking criteria.
 - c) Provide a copy of all data assessed to the instructor of the course and the student requesting the appeal.
 - d) Convene and act as Chair of a meeting, if requested, among the two independent readers, the student and the instructor. This meeting may be requested by any of the parties involved that is, the student, the instructor, or the independent readers. The purpose of the meeting is to clarify any questions that the independent readers may have after their reading of all data, and to provide an opportunity for the student and the instructor to speak relative to the

submitted materials. The student and the instructor may bring a representative who will only act as a resource person who may not speak or participate in the meeting. The College will not be liable for any fees or expenses incurred by the student or instructor for the attendance of the representative at the appeal meeting.

e) NOTE:

If a meeting, as defined in (d) above, is convened, the Chair of the meeting will automatically become the third independent decision-maker of the Department Appeals Committee.

If a meeting, as defined by (d) above, is not convened, and the two independent readers arrive at different letter grade assessments, the Department Chair or alternate will automatically become a third independent decision-maker of the Department Appeals Committee.

B.2.6 The Department Appeals Committee Members will:

- a) Make independent judgements of all data assessed, including any verbal clarification (if applicable).
- b) Submit a written description of the final decision and the reasons therefore, along with a letter grade, to the Division Chair within ten (10) working days' of receipt of the Appeal request in the Registrar's Office.

• • •

President Holmes testified that both the Department Chair and Division Chair have distinct roles to play in this process and that there could be a possibility of bias and certainly a perception on the student's part that such bias may exist if a familial relationship existed between those two individuals. Professor Headrick testified that the process of grade appeals at the College is well established and the Division Chair and Department Chair have essentially clerical and administrative roles. The actual decisions are made by the specific Appeal Committee which is created within the relevant department although, in certain circumstances, the Committee might include the Department Chair.

The fifth area involves the appointment and evaluation process of new faculty with respect to Three-Year Regular Contracts (Article 10.3.1), Continuing Contracts (Article 10.3.3), Additional Regular Contracts (Article 10.3.4) and Temporary Contracts (Article 10.3.5). The evidence is that a

selection committee is appointed for each vacancy and once an individual is hired, that Committee (or as many members as possible) becomes an Evaluation Committee which monitors that faculty member and makes recommendations concerning future appointments.

Article 10 – Selection, Appointment, Evaluation, Termination – contains the following:

10.1 Authority

The President or delegate shall appoint and promote faculty members. The College Board, on the recommendation of the President or delegate, shall terminate faculty members.

10.2 Selection

10.2.1 Before making an **appointment** of a regular or a temporary faculty member likely to be appointed for one (1) term or longer, the President or delegate shall consider the advice of a joint administration/faculty selection committee established for the purpose. **The authority of the selection committee shall be limited to making a recommendation for appointment. Such recommendation shall be forwarded to the President or delegate, for approval prior to an offer of employment being made to the successful candidate.**

10.2.2 The selection committee shall consist of the **Dean or Dean's** delegate; the Division Chair, where applicable, or delegate; the Department Chair or the Assistant Department Chair or the Coordinator, named by the Department Chair (or by the Division Chair where there is no Department Chair); two faculty members from the area involved, selection by the department, and one faculty member at large named by the Association. The function of the Dean's delegate shall be restricted to monitoring the selection process. The Dean's delegate shall have voice, but not vote on the committee. The number of faculty members from the area involved, selected by the department, may exceed two with the approval of the President. The area is the subject or program area (or department if subject or program area is too small).

In cases where, due to time constraints, a selection emergency arises, the composition of a selection committee may be altered by mutual agreement of the parties.

President Holmes testified that it is critical that process be carried out in a fair and equitable manner. Further, once an individual is hired, decisions must be made by the Administration regarding

placement on the salary scale and both the Department Chair and Division Chair may have input into that process. As a result, if a familial relationship existed, it may be perceived that “they are just agreeing with each other”. Professor Headrick testified that whenever conflicts had arisen in the past, individuals would simply recuse themselves and there has never been a problem. In this case, Professors Semmens and Denholm are both past the evaluation stages and, therefore, there would be no individual problems in that regard.

Sixth, the matter of scheduling of courses and vacations has been identified. With respect to courses, faculty members submit preferences (courses and time slots) to the Department Chair who then develops a teaching schedule for the department. Once the schedule is prepared, it is shared with the department members and any issues addressed. It is then submitted to the Division Chair for approval. As well, the Department Chair coordinates vacation scheduling for the faculty members in accordance with both their wishes (Article 8.1.3.2) and the need to staff the academic courses over three academic terms. Once that is done, it is approved by the Division Chair.

President Holmes feels these are both areas where potential for a perceived conflict of interest arises and the perception of favouritism could be created. Professor Headrick testified that the English Department has a scheduling committee which reviews the schedule drawn up by the Department Chair and there would be no effect on this process if the Department Chair/Division Chair had a familial relationship. He indicated that individual schedules are a critical matter for faculty members and the schedules are closely scrutinized by each member of the entire department. In his view, because of that it is critical that fairness does exist and there is little room for manipulation.

Finally, there is the matter of the relationships within the English Department. President Holmes testified that if Ms. Denholm was Department Chair and an individual faculty member had any problems with her, then that individual would not be comfortable approaching the Division Chair to deal with whatever dispute may have arisen. The Union witnesses testified that these types of problems, if they

were to arise, could be dealt with by using the Assistant Department Chair in the English Department or Dean Arnold to deal with the conflict.

In summary, President Holmes asserts the right of appointment is hers and she is able to consider many factors, including College policies. The Administrations feels that the main difficulty is the potential for a perception of bias, favouritism or partiality on the part of students and faculty rather than with any actual conflicts of interest. The Union asserts that there are no real conflicts which will arise in this situation, and if they do, there are other individuals within the administrative structure who can deal with them.

DECISION

Counsel for the parties have provided this Board with a number of interrelated arguments and case authorities with regard to the interpretation of the Collective Agreement, the application of the Employer's policies and the effect of human rights legislation.

The beginning point, as always, is the Collective Agreement of the parties. The pivotal section in this matter is Article 10.6 of the Agreement dealing with the appointment of the Department Chair.

The relevant sections state:

- 10.6 Department Chair, Assistant Department Chair, Co-ordinators
- 10.6.1 A Department Chair, Assistant Department Chair or Coordinator must be a regular faculty members who has met the conditions of Article 10.3.6.1 and who works a minimum of one-half time, unless otherwise mutually agreed to by the parties, and shall be appointed by the President on the recommendation of the faculty of the department or program.

Owing to the unique circumstances existing in the Library, the Association agrees that the position of Chair of this department may be held by a person holding a part-time appointment.
- 10.6.2 The Division Chair (or appropriate Dean if there is no Division Chair) shall initiate the recommendation/appointment process at least twelve (12) weeks prior to the date of vacancy.
- 10.6.2.1 The faculty member shall be selected for recommendation by a process agreeable to the faculty of the department or program.

- 10.6.2.1.1 The President may seek the advice of the appropriate Dean and the appropriate Division Chair and shall make the appointment without further consultation with faculty if: the faculty of a department or program so request, the faculty of a department or program number less than three (3) full-time equivalent members, the faculty of a department or program fail to recommend a faculty member for appointment by a date which is two (2) weeks prior to the date of vacancy.

(underlining added)

The Union asserts that this is mandatory language and requires the President to appoint the individual selected by his/her colleagues. The College argues that this is permissive language in that it is only a "recommendation" which is made by the members of a department to the President.

There is some merit to the Employer's argument that the term "recommendation" indicates this is not a "decision" which is made by the department. However, the language of Article 10.6 states that the person recommended by the department "shall be appointed by the President". On its face, this appears to be a mandatory obligation. It is also clear from Article 10.6.2.1.1 that the President does have some discretion to seek advice and make a decision concerning the appointment of the Department Chair in certain cases, specifically if the faculty in the department makes a request, the department or program has less than three faculty members or the department members fail to make a recommendation prior to two weeks before the vacancy will exist. This provision would appear to indicate that it is only if one of these conditions is met that the President will be in a position to impose her own choice for the position of Department Chair.

Second, when one considers the actual nature of the position, the Department Chair is a member of the bargaining unit who is still teaching $\frac{3}{4}$ time. She is only released from $\frac{1}{4}$ of her teaching to perform these administrative duties as Department Chair and, therefore, the fact this selection would be left to colleagues is not particularly surprising.

Third, the selection of the Department Chair can be contrasted to that of the Division Chair.

Article 10.7 of the Collective Agreement states:

- 10.7.2.1 The President shall appoint a Division Chair. Before making such appointment the President shall consider the advice of a joint

administration/faculty recommendation committee established for the purpose.

- 10.7.2.1.1 The recommendation committee shall be composed of a non-voting chair appointed by the President; the appropriate Dean; a regular faculty member of the Division selected by faculty members of the Division; a regular faculty members not belonging to the division selected by the Association.
- 10.7.2.1.2 The recommendation of the recommendation committee shall initially be forwarded to the President, who may make the appointment and advise the College Board.
- 10.7.2.1.2.1 If the President is not willing to appoint the person recommended by the recommendation committee, the President shall meet with the committee and an attempt shall be made to come to accord. Should agreement not be reached, the matter shall be referred to the College Board and the appointment, if any, shall be made by the College Board.

The parties clearly contemplated that in the case of a Division Chair, the President may have a different opinion from the “one” recommended to her and they have established in the Collective Agreement a process to address such an occurrence. It should be noted, however, that even in that case, the President does not simply appoint her choice; the matter is referred to the College Board for appointment. The existence of this language for the selection of the Division Chair when combined with the absence of any comparable language with respect to Department Chairs further supports the conclusion that the parties intended that the President would appoint as Department Chair the individual recommended by the department.

Therefore, this Board concludes that the language of the Collective Agreement is clear and requires the President to appoint the individual recommended by the department to be the Department Chair. Thus, the College must establish that there is a proper basis for not fulfilling that contractual obligation.

This brings us to the effect of the “Employment of Relatives Policy”. It must be observed immediately that such anti-nepotism policies do not offend against human rights legislation unless they are too broad and there is no bona fide operation requirement present: Brossard (Town) v. Quebec (Commission des droits de la personne), [1988] 2 S.C.R. 279 (S.C.C.); Lang v Canada (Employment and

Immigration Commission), [1991] 3 F.C. 65 (Federal Court of Appeal), reversing [1990] C.H.R.D. No. 8 (Canadian Human Rights Tribunal); Chiang v Natural Sciences and Engineering Research Council, [1992] C.H.R.D. No. 3 (Canadian Human Rights Tribunal); Caskin v Canadian Broadcasting Corporation, [1988] 3 F.C. 494 (Federal Court of Appeal).

There are a number of problems associated with the application of the “Employment of Relatives Policy” in the particular circumstances of this case. First, there is Article 1.4 of the Collective Agreement which states that “(i)n the event of a conflict between the contents of this Agreement and any policies made by the College, the terms of this Agreement will prevail.” In the same vein, Section A.1 of the “Employment of Relatives Policy” itself states that “it is a policy of the College Board to hire the best qualified applicants available for all jobs. However, it is necessary that judgment be used in the placement of employees who are directly related, subject to the provisions of the respective collective agreements.”

It appears from both these documents that these parties explicitly acknowledged that the Collective Agreement provisions override anything contained in the “Employment of Relatives Policy”. That would, of course, include the mandatory appointment of Department Chairs selected by their colleagues.

In Co-Op Atlantic, 35 L.A.C. (3d) 217 (Haines), the arbitration board dealt with a similar case in which a promotion was refused on the basis of a familial relationship. The board concluded the employer’s anti-nepotism policy breached the terms of the collective agreement. The board stated, at pp.226-7:

This board of arbitration’s sole mandate is to determine whether or not there has been in this particular instance a breach of the collective agreement. The collective agreement, as we have stated earlier, contains an article (art. 14) dealing with promotions and transfers which provides that in such cases preference in filling a posted vacancy shall be given to the senior employee where ability, skill and competence to perform the work are relatively equal. We are of the opinion that art. 14 of the collective agreement has imposed some restrictions on the right which the employer would otherwise have had, I the absence of the particular article in the collective agreement, to select candidates

of its own choosing to fill vacant positions. We do not believe a restriction such as that imposed unilaterally by the employer in this case (we refer here to the disqualification of the grievor on the basis of his relationship to an employee in the grocery department) to be related to his ability, skill and competence to perform the work. The “company rule” in our view is inconsistent with the collective agreement. It is our conclusion that the employer has breached art. 14 of the collective agreement in not awarding one of the two posted vacancies to the grievor.

That decision was upheld on appeal by the New Brunswick Court of Appeal: 250 A.P.R. 53.

Similarly, in Essex County Roman Catholic Separate School Board, 8 L.A.C. (3d) 322, (Hinnegan), the arbitration board concluded the recall provisions of the collective agreement overrode the religion preference in hiring policy of the Catholic school board. The decision stated, at pp.332-3:

In any event, be that as it may, regardless of the board’s policy and practice of preferring catholic teachers as a general condition of employment otherwise, it has by express contract effectively superseded that policy at least when it comes to the specific matter of recall rights of redundant teachers on the recall list. It has clearly given such rights to various individuals, including this grievor, without reference to denomination. Indeed if this teacher was considered not eligible from the outset, due to denomination, to attempt to exercise the recall rights provided in art. 9:21(c) with respect to any available position, it is difficult to conceive of any reason to have included her in the agreed-upon recall list. If she was to be some type of special case among the redundant teachers entitled to recall rights, surely it was incumbent upon the parties when they made their agreement with respect to those rights and expressly listed the teachers entitled, to have so stated. If it had been the parties’ intention that she would only be considered for recall upon becoming Roman Catholic within the period of her recall rights, it would have been a relatively simple matter for the parties to have set that out in some manner at the time the agreement was struck.

The second area of difficulty with respect to the “Employment of Relatives Policy” is that it has not been applied in the past by the College as it is written. Section C.2. indicates that “this policy does not preclude the employment or promotion of direct relatives in the service of the College within the same jurisdiction or area provided: (a) that direct relatives are not appointed, transferred or promoted to the same work unit (i.e. under the same supervisor); ...” With respect to this requirement, the evidence is clear that the College has had a number of relatives employed in the same academic work unit, eg. the English, Psychology, and Fine Arts Departments.

As well, in KVP Co. Ltd., 16 L.A.C. 73, Arbitrator Robinson set out the following conditions with respect to the promulgation of unilateral rules by an employer:

- (1) it must not be inconsistent with the collective agreement;
- (2) it must not be unreasonable;
- (3) it must be clear and unequivocal;
- (4) it must be brought to the attention of the employee affected before the employer can act upon it
- (5) the employee concerned must have been notified that a breach of such rule could result in his discharge (termination) if the rule is to be used for that purpose; and
- (6) the rule should have been consistently enforced by the employer from the time it was introduced.

We have already addressed the inconsistency between the “Employment of Relative Policy” and the terms of the Collective Agreement, specifically Article 10.6. However, that is not the only difficulty with the administration of the Policy. There is also a requirement in Section C.2(b) of the “Employment of Relatives Policy” that “a supervisor/subordinate relationship is not created”. The Policy then states that a “supervisor/subordinate relationship is considered to exist where two or more levels of supervision do not intervene between the direct relatives”. This brings us to the need to characterize the positions in question.

If it is concluded that the Department Chair is not a supervisor and it is the Division Chair who is the direct supervisor of the faculty members (which is the opinion of President Holmes), then in at least two instances, there have been Division Chairs in Humanities (Professor McMillan and Professor Semmens) who have had their spouses and/or children directly reporting to them, which would have violated the Employment of Relatives Policy. On the other hand, if Department Chairs are supervisors then there have been instances where Department Chairs have directly supervised their relatives (Professor Headrick in Physics, Professor Trick in Fine Arts and Professor McBride in Psychology) in violation of the Policy.

Another alternative is that neither of these positions are really supervisory ones, particularly in the sense that they have authority over the members of the department as in the ability to hire, fire, and evaluate which are among the normal indicators of a supervisory relationship: Sault Ste. Marie Board of Education, 22 L.A.C. (4th) 439 (Burkett). Indeed, in the job descriptions for these two positions, the only explicit reference to supervision is the responsibility of the Division Chair to supervise the Division Secretary. It must also be remembered that both the Division Chair and Department Chair are members of the bargaining unit and continue to teach in their respective departments while in those positions. However, if there is no supervisory responsibilities with either of them, then there is no real basis for the concerns of perceived conflict of interest.

Therefore, the “Employment of Relatives Policy” also fails on two other of the KVP grounds. It is not a clear policy in the sense that it is obvious how it will be applied with respect to the academic units, specifically, which situations will be overlooked and which will not be. Second, and in any event, the Policy has not been applied consistently by the College: see also; District of Guysborough Municipal School Board, 6 L.A.C. (3d) 276 (MacLellan); Kamsack (Town), 89 L.A.C. (4th) 153 (Pelton).

Another issue which briefly arose at the hearing was whether the Union had applied for an “exception” under the terms of this Policy. In that regard, the Policy states:

APPEAL PROCEDURE:

- D.1 Requests for exception to the foregoing policy may be considered by the President provided the proposed appointment and/or the involvement of the direct relative can be shown to be in the best interests of the College.

In the opinion of this Board, this section, which is entitled “Appeal Procedure”, would contemplate a decision being made from which an appeal could be taken. In this case, the decision was formally made by President Holmes in her April 5 memo. In that memo, President Holmes explicitly states that she is not prepared to make the appointment as it would violate the anti-nepotism policy “the application of which I will not grant an exception for”.

Therefore, on that basis, it would be unreasonable to expect the Union to have applied for an exemption which had already been in effect denied. It would only have been logical to anticipate, and there is no subsequent evidence to contradict this, that any appeal to President Holmes in this situation would have been futile: I.U.O.E., Local 882 v. Burnaby Hospital Society, [1997] B.C.J. No. 2775 (B.C.C.A.); Young v. British Columbia College of Teachers, [1999] B.C.J. No. 1908 (S.C.B.C.).

We now turn to address the “Conflict of Interest Policy” and its application in these circumstances. The first thing to note is that in the formal reasons for the rejection of the appointment of Ms. Denholm (President Holmes’ memo of April 5) there is no mention of the Conflict of Interest Policy, although it appears this Policy was brought up in the President’s February 22 meeting with Professor Semmens and Dean Arnold. President Holmes stated in her memo on April 5 that “the rationale related to this decision, put simply, is the fact that my appointment of the selected candidate would violate the College’s anti-nepotism policy – Policy No. 4.1.1.2 – Employment of Relatives, the application of which I will not grant an exception for.” It appears that the Conflict of Interest Policy was not actually relied on at this point to reject Ms. Denholm’s nomination.

Putting that aside for the moment, however, there are still problems with the application of the “Conflict of Interest Policy” in these circumstances. Once again, the Policy states:

POLICY

- A.1 All employees of Langara College shall conduct themselves in a manner that will avoid potential conflict of interest.
- A.2 A conflict of interest shall be deemed to have occurred when:
 - a. employees of the College take undue advantage of their position with the College to derive, directly or indirectly, material benefits;
 - b. as a consequence of undertaking activities in addition to their college duty and responsibility, the performance of college duties and responsibilities is compromised.
- A.3 Without limiting the generality of the above, examples of conflict of interest include:

- a. where an employee authorizes the purchase by the College of equipment, supplies or services from a source in which the employee or any member of the employee's family has a substantial interest;
- b. where an employee influences an employment opportunity within the College for family or personal advantage;
- c. where an employee uses College resources for anticipated or actual family or personal gain;
- d. where an employee of the College purveys, for material gain, goods or services to students, either directly or as the agent of another, with the exception of textbooks or other instructional materials which have been approved by the procedure set out below and sold through a college authorized agency;
- e. where an employee influences the awarding of a contract by the College, or the approval of a Non-Base Funded activity of the College, for family or personal gain.

Section A.2 of the Policy appears to indicate that the Policy is directed at either behaviour which will result in direct financial benefit to employees through the misuse of their position at the College or the undertaking of outside work (likely for remuneration) which conflicts with the rights of the College. This is particularly apparent when one reviews the listed examples set out in Section A.3. This Policy on its face does not appear to address the type of perception issues which President Holmes feels are critical in the case of the Department Chairs being related to Division Chairs (eg., students' perceptions of not getting proper grade appeals, the perception that one department may get more resources etc.).

It also does not appear that the Procedures set out in Section B of the Conflict of Interest Policy were intended to apply to this type of situation. For example, Section B.1 states that "(f)ull disclosure in writing to the relevant Dean or Bursar is expected of each employee before the start of an activity with potential for conflict of interest." It is difficult to see how that could apply to the situation of Ms. Denholm becoming Department Chair.

Moreover, the Policy contemplates that if a perceived violation has occurred, the issue will be referred to a Review Committee. Section 6.5 of the Policy states:

Where disagreement arises regarding a question of conflict of interest, the matter shall be referred to a Review Committee. The Review Committee shall be composed of college employees as follows:

- a. 2 peers selected by the employee's bargaining agent or association, if applicable;

- b. 1 representative selected by the employee;
- c. 1 representative selected by the senior college official named under B.6;
- d. 1 representative selected by the College President, or two representatives if the conditions in B.8 apply.

Such a Committee was not created in this case nor would it really have made any sense to do so. Finally, the Policy also contemplates the potential for disciplinary action such as suspensions and termination. Once again, that is simply not applicable to the issues of the appointment of a Department Chair. Finally, if the College had intended the Conflict of Interest Policy to include nepotism situations, one would have expected that there would either have been a cross-reference in the Conflict of Interest Policy to the Employment of Relatives Policy or the latter would have been rescinded as being redundant when the Conflict of Interest Policy was established in 1995. As a result, this Board concludes that the Conflict of Interest Policy does not have application in the circumstances of this case.

For all of the above reasons, this Board concludes that the Union's grievance should succeed in this case. The failure of the College to appoint Ms. Denholm as English Department Chair violated the express provisions of the Collective Agreement and there has been no basis established which would have permitted the President to disregard that obligation.

As an aside, it should be noted the concern of the College that there is a potential conflict of interest in this situation has to be considered in light of the context. First, the Humanities Division Chair, Mr. Semmens, is already a member of the English Department and continues to teach a ¼ load each semester. Furthermore, once his secondment to the Division Chair position is over, he will return as a full-time member of the Department. That, in and of itself, would give rise to all sorts of concerns and perceptions about potential conflicts. Moreover, Ms. Denholm, his spouse, has been a member of the English Department while he has been Division Chair. That would be further grounds for a perception of a potential conflict of interest with regard to many of the concerns raised by the College at the hearing such as the approval of leaves, curriculum matters, scheduling, budgets, grade appeals, and course planning. Therefore, while Ms. Denholm's appointment as Department Chair may create some

additional issues, the fact of the matter is that a potential perception of bias or favouritism already exists within the College structure.

Some attention must also be paid to the distinction of an actual bias from one of an unjustified perception on the part of others particularly where there are so many bureaucratic processes in place to ensure matters are properly dealt with: Vancouver Police Board, 112 L.A.C. (4th) 193 (Germaine); Varma v. G.B. Allright Enterprises Inc., [1988] B.C.C.H.R.D. No. 14, August 4, 1988; Cameron v. East Prince Health Authority, [1999] P.E.I.J. No. 44 (P.E.I. Supreme Court); P.P.G. Industries Canada Ltd., v. Canada (Attorney General), [1976] 2 S.C.R. 739 (S.C.C.); Re Down, [1999] B.C.J. No. 1809 (S.C.B.C.); Middlekamp v. Fraser Valley Real Estate Board, [1993] B.C.J. No. 2695 (S.C.B.C.), upheld at [1993] B.C.J. No. 1846 (B.C.C.A.); Re Farmer Construction Ltd., [2003] B.C.L.R.B.D. No. 321, B.C.L.R.B. Decision No. B321/2003.

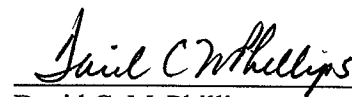
To the extent that any potential areas of difficulty can be mitigated in the future, the parties might wish to address this in a joint manner at the bargaining table and through amendments to the College policies, which, of course, would have to conform to the requirements of the human rights legislation: British Columbia (Public Service Employee Relations Commission), v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance), [1999] 3 S.C.R. 3 (S.C.C.); Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre), [1996] 2 S.C.R. 3 (S.C.C.); B. v. Ontario (Human Rights Commission), [2002] 3 S.C.R. 403 (S.C.C.); Russel Zinn, "Law of Human Rights in Canada", Canada Law Book, para. 15:20.2; British Columbia (Meiorin Grievance), *supra*; Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970 (S.C.C.).

AWARD

On the basis of the reasons set out above, the Union's grievance is upheld. This Board declares that the College has breached Article 10.6 of the Collective Agreement and orders that Ms. Denholm be placed in the position of Chair of the English Department for the May 1, 2005 – April 30, 2007 term. Ms. Denholm should also be compensated for any losses incurred, such as the stipend for being Department Chair, for the period between May 1, 2005 and the date of her appointment.

This Board retains jurisdiction to deal with any problems arising from the interpretation or implementation of this Award.

Dated this 11th day of July, 2005.



David C. McPhillips
Arbitrator