IN THE MATTER OF AN ARBITRATION UNDER THE
BRITISH COLUMBIA *LABOUR RELATIONS CODE,* R.S.B.C. 1996 c.244

BETWEEN:

Douglas College

(the "Employer")

AND:

Douglas College Faculty Association

(the "Union")

(Re: Dr. Peter Wilkins: Dean Selection Grievance)

ARBITRATOR:	Stan Lanyon, Q.C.
COUNSEL:	Colin G.M. Gibson for the Employer G. James Baugh for the Union
DATE AND PLACE OF HEARING:	December 18, 19 and 20, 2007, April 11, 17, 18, May 28, 29 and 30, June 12, September 17 and 30, November 27, 28, December 15, 2008 January 6, February 11, March 30 and 31, April 9, May 12, September 14, 2009 Vancouver, BC
WRITTEN SUBMISSIONS:	June 30, August 31, September 11, 2009
DATE OF AWARD:	December 9, 2009

A W A R D

I. Introduction

[1] The Douglas College Faculty Association, in both an individual and policy grievance, argues that the College has violated both the collective agreement and the *B.C. Human Rights Code,* when it stated clearly to a Dean's Selection Committee that it would not accept Dr. Peter Wilkins, the Grievor, as a candidate for the Dean's position in the Faculty of Language, Literature and the Performing Arts (LLPA) because he was married to another instructor in the same department (English) for which this new Dean would have responsibility.

[2] Secondly, the Union argues that the selection process itself was conducted in a bad faith manner.

[3] The Employer replies that Dr. Wilkins was disqualified in accordance with the College's Conflict of Interest policy, which states that the college should avoid hiring any employee who may be in a position of having to supervise a family member. Second, the Employer says that the candidate, who was ultimately successful in obtaining the Dean's position, was the best candidate for the position. The Selection Committee in choosing him acted in good faith.

[4] The Dean selection process was conducted between the months of October 2006 and February 2007. The committee was composed of eight voting members and two ex-officio members. Five of the faculty members who were involved in the selection process were called as witnesses. There were at least ten meetings of the selection committee, numerous emails and correspondence and a substantial number of documents.

[5] The allegations involve both bad faith and discrimination. They derive directly from the selection process. That, of course, necessitates an examination of the committee's actual processes and, in fact, many days of evidence were devoted to the examination of this selection process. Thus, in order to assess fully the allegations of bad faith and

discrimination, the totality of that process must be examined, and indeed, this was precisely the approach taken by the parties in this matter, both at the hearing, and in their lengthy written submissions.

II. Facts

A. Douglas College

[6] Douglas College is a public post secondary institution with two campuses – one in New Westminster and one in Coquitlam (David Lam Campus). There are approximately 13,000 students, 900 faculty, 800 support staff and 50 excluded administrators. It has an annual budget of approximately $86 million. It operates under a Board of Governors, some who are appointed by the Government, and others who are elected. It also has an Education Council consisting of elected faculty, students, staff and administrators. The college has six academic faculties: Faculty of Science and Technology; Faculty of Humanities and Social Sciences; Faculty of Health Sciences; Faculty of Commerce and Business Administration; Faculty of Child, Family and Community Studies; and Faculty of Language, Literature and Performing Arts (LLPA). Each of these academic faculties is overseen by a Dean. Some of the faculties also have an Associate Dean. These Deans and Associate Deans are excluded administrators.

[7] The subject matter of this grievance is the Faculty of Language, Literature and Performing Arts (LLPA). This faculty has ten departments: Communications, Creative Writing, English, Event Magazine, Modern Languages, Music, Performing Arts, Print Futures, Stage Craft and Theatre. The LLPA faculty has approximately 400 students, 123 faculty members (sixty-one regular faculty and sixty-two contract faculty). The English Department has about twenty faculty.

[8] The LLPA faculty is a mix of open and closed enrollment. Open enrollment includes university transfer programs in which students select their own courses. Closed enrollment, such as theatre, involves a prescribed program. The open enrollment departments elect a Chair of that department and that individual is a bargaining unit member. Closed

enrollment programs are headed by Coordinators who are selected by the college; they are not elected by their peers.

[9] Dr. Wilkins, the individual Grievor in this matter, served two terms as Chair of the English Department, beginning in 2005. Thus, he was Chair of the English Department at the time of his application for Dean, LLPA position. Dr. Wilkins set out a list of the Chair's duties and testified in respect to each one. A brief description of each of these duties is set out (some are self explanatory):

(a) Timetabling – The Chair sets the timetable for each member of the department and the department as a whole. This is the "most challenging" of the Chair's duties. It involves matching the requests of faculty with the needs of the departments, students and facilities.
(b) Student's Complaints – The Chair attempts to resolve these complaints informally. If unsuccessful they are referred to the Dean. Most complaints are resolved informally.
(c) Grade Appeals – Again, the Chair attempts to resolve these appeals informally. If unsuccessful they are referred to the Dean who establishes a Grade Appeal Committee.
(d) Faculty Education Committee (FEC) – All faculties have a Faculty Education Committee which deals with educational issues. The FEC consists of all the faculty department chairs and coordinators and a staff representative. The Dean sits on the FEC Committee as an ex-officio member. One important area of discussion would be curriculum development. Dr. Wilkins, as Chair of the English Department, would have sat on this committee.
(e) Departmental Meetings – The Chair of the Department chairs the department's meetings which are held once a month. He or she sets the agenda and deals with "the business of the department from top to bottom", as Dr. Wilkins stated.
(f) Outreach – The Chair coordinates with other faculties and reaches out to other external institutions.
(g) Course Transfers – the Chair, in conjunction with the Registrar, grants approval for credit for courses from other institutions.

(h) Pre-requisite Waivers – the Chair will waive the pre-requisite requirements of various courses.

(i) Provincial Articulation Meetings – These Province-wide meetings decide what credit is to be given for transfer courses from colleges to universities.

(j) Department Budget – Chairs have the authority for some smaller budgetary items, for example, approving honourariums, guest speakers, expense forms.

(k) Dean Designate – the Dean can designate a Chair to attend committee meetings on their behalf.

(l) Department Website – The Chairs maintains the Department website.

(m) Calendar Changes – Chairs update the college calendar.

(n) Review Course Outlines – The Chair reviews all course outlines to ensure they conform to department standards.

(o) Review Curriculum – The Chair leads the discussion on what courses to offer, add or cut back.

(p) Textbooks – The Chair monitors textbook orders to ensure, for instance, that there is no text duplication.

(q) Professional Development Proposals – The Chair conducts the initial review of the vacation time, professional development time and accountable time submitted by faculty.

[10] Dr. Wilkins testified that the areas where there is the greatest degree of overlap between the Chair of the English Department, and the Dean of LLPA, is in respect to student complaints, grade appeals, the Faculty Education Committee, outreach initiatives, the review of curriculum, and of course, when operating as the Dean Designate. Dr. Wilkins described the development of curriculum as a "highly collaborative endeavour", involving the Dean, the Chair and the Faculty. He stated that the best way to see the interrelationship between the Faculty, Chairs and Deans, and the College as a whole, is to view it as operating on a "collegial model".

B. Dean's Duties and Responsibilities

[11] The job description that was introduced into evidence for the Dean of Language, Literature and Performing Arts should be reproduced in full. It reads as follows:

> OVERALL PURPOSE
>
> The Dean of Language, Literature and Performing Arts is responsible for the Faculty of Language, Literature and Performing Arts and academic programs in the field of Language, Literature and Performing Arts. The Dean provides academic leadership in Language, Literature and Performing Arts and is responsible for the operation of the Faculty, including planning at the strategic and tactical levels. As an officer of the College, the Dean participates with other administrators in co-ordinating, advising, and deciding upon College-wide operations.
>
> RESPONSIBILITIES
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> This position is responsible for:
>
> 1. Academic curriculum in the Faculty of Language, Literature and Performing Arts.
>
> 2. Tactical and operational plans for the Faculty and assisting in the development of the Education Division's strategic plan.
>
> 3. The management of the Faculty, including human resources.
>
> 4. Operating structures, policies, procedures, and communications within the Faculty and, where appropriate, in the College.
>
> 5. Budgeting, resource allocation, and the financial management of the Faculty.
>
> 6. External relationships appropriate to the operations and directions of the Faculty, including joint ventures.
>
> 7. Divisional initiatives assigned by the Vice President.

8. Advising, coordinating, and decision-making on College wide operational matters.

9. Ensuring that decisions and issues are coordinated and communicated within the Faculty, other units of the College, Vice Presidents, and the external community.

10. Ensuring the quality of integrity of Arts and Languages programs and the College's reputation in the field of Language, Literature and Performing Arts programs.

11. Participating in development activities for the Faculty.

12. Interpreting and administering College policies and procedures, including contractual obligations.

PRINCIPLE DUTIES

1. Represents the Office of the Vice President, Education.

2. Ensures that new curriculum is planned, developed and implemented, and that existing curriculum is regularly reviewed and updated.

3. Promotes and supports curriculum initiatives and projects within the Faculty, with the external community, and on an interdisciplinary basis.

4. Ensures the Faculty's tactical and operational plans are developed and implemented.

5. Provides input into the Division's strategic plan.

6. Ensures that policies and procedures are developed and systematically reviewed.

7. Ensures there is planned, human resource development for employees in the Faculty.

8. Approves hiring decisions, performance evaluations and disciplinary decisions. Represents the College in grievance procedures.

9. Provides leadership and direction to supervisors and administrative personnel within the Faculty.

10. Ensure the Faculty's budget is prepared and recommends its approval.

11. Ensure Faculty expenditures and revenues are consistent with College parameters.

12. Represents the College, Division or Faculty on external committees, projects or organizations.

13. Participates in operational decision-making and coordination on a College wide basis.

MINIMUM QUALIFICATIONS

1. Established professional credibility as usually evidenced by a graduate degree, and/or a combination of education and experience.

2. Three to five years of experience in a range of senior and/or mid-level administrative positions in a post secondary institution or other relevant organization.

3. Knowledge of the teaching environment as usually evidenced by having taught at a post-secondary level and/or equivalent combination of formal and informal teaching and administrative experience.

[12] Dr. Janis Lindsay, the Vice-President of Education, is responsible for overseeing the college's six faculties; all the Deans report to her. She testified in respect to the various duties of the Dean's position in general.

[13] In respect to curriculum, Dr. Lindsay stated that the Dean has "ultimate responsibility for overall quality of curriculum". The curriculum from each department goes to the LLPA's Faculty Education Committee (FEC). The curriculum is discussed at the FEC and must be approved by the Dean before it goes forward to the Educational Council. The Education Council has the ultimate authority with regard to educational policy.

[14] In regard to the tactical and operational plans for faculty and the College's strategic plan, the Deans of each of the faculties, along with Dr. Lindsay, constitute the Vice-President's Academic Council (VPAC), the body responsible for developing the College's strategic plan. This academic planning involves a timeframe of three to five years. Once the plan is formulated (an analysis of industry needs, community needs, demographic needs) the Deans are responsible for implementing this plan in consultation with the Chairs and their respective faculty members.

[15] The Dean has responsibility for managing all personnel in their faculty. This includes faculty, staff, students and involves management decisions such as discipline, discharge, performance evaluation and probationary status.

[16] In respect to the implementation and communication of policies and procedures, the Dean has a significant role in ensuring the implementation of the college's policies.

[17] In respect to budgeting and financial management, Dr. Lindsay stated that each of the faculties has somewhere between $6 to $12 million dollars. Each Dean has responsibility for the budget of his or her faculty; and the Dean is responsible for deciding how these resources are allocated within their faculty.

[18] Dr. Lindsay stated that Deans represent both their faculties, and the college as a whole, in its relationship with other colleges, universities and public schools. The Dean can also sit as designate for the Vice President both internally and externally (i.e. attend a meeting, sitting on a committee). All the Deans are responsible for ensuring that the decisions made by the senior management of the college are implemented in each of the faculties. In concert with the Dean's ultimate responsibility concerning the academic curriculum, the Dean has responsibility for ensuring the quality of these programs within each of their faculties. This includes participating in the development of new programs and initiatives within their faculty. Finally, as the only excluded manager in the LLPA faculty, the Dean is responsible for the application and administration of all college policies and procedures within their respective faculties.

[19] The section in the Dean's job description, entitled "Principle Duties", is in many respects, a restatement of the responsibilities of the Dean; in effect, it particularizes these responsibilities. In respect to the category of Minimum Qualifications, one of the factors that had prominence throughout the selection committee's deliberations was the requirement that any candidate had to have "three to five years of experience in a range of senior and/or midlevel administrative positions." More will be said about this in the course of these reasons.

[20] Under Letter of Understanding 15 of the collective agreement, Deans serve a five year term and can be re-appointed for one additional five year term. They have the right to return to their professional department at the expiration of their term. Dr. Lindsay stated that most Deans choose to either retire, or move onto other administrative positions, at either Douglas College, or at other universities or colleges.

[21] In summary, Dr. Lindsay stated that the principle role of the Dean is to act as an "Officer of the College"; thus, they must act in the "best interest" of the college as a whole. Unlike the Chair of a department, who are members of a bargaining unit, the Dean is an excluded manager. The college has the right to expect from all Deans "an undivided loyalty to the College as a whole". Dr. Lindsay emphasized that this differed markedly from the role of the Chairs of the departments. Their primary focus, she stated, was to act as "facilitators", who attempt to achieve "consensus" among their faculty colleagues. No Chair has any actual supervisory authority. Indeed, she said many of the chairs are not willing to "cross lines" into management activities because of their relationships with their colleagues in their respective department. This, she explained, is clearly seen in all the duties and responsibilities of the Chair, whether it included timetabling, which is one of the more expansive duties of the Chair, to student's complaints, to the development of curriculum, all of which the Dean has ultimate authority.

C. Selection Committee – Process for a new LLPA Dean

[22] In April 2006, the incumbent Dean of the LLPA faculty, Dr. Lorna McCallum, completed her second term as Dean.

[23] Dr. Lindsay commenced the search process for a new Dean of the LLPA faculty in the early fall of 2006. This involved the establishment of a Selection Committee under Article 7.7.1 of the collective agreement. This provision sets out the scope of authority for the Selection Committee. These provisions are somewhat unique in that they establish a Selection Committee of both management and faculty for the appointment of an excluded managerial position.

[24] The union and the employer appoint an equal number of members to this Selection Committee (Article 7.7). The DCFA appointed the following faculty members from the LLPA faculty: Dr. Caldwell (Music Department); Dr. Lysell (Theatre); Dr. MacLachlin (English); and Dr. Wharton (Creative Writing). Dr. Lindsay appointed the following management representatives: Dr. Compton-Smith, Director of Library; Dr. Cowin, Director of Institutional Research; Dr. Denton, Dean Humanities and Social Sciences; Dr. James, Dean Department of Student Development. Barbara Sekhon, an Administrative Officer in the LLPA faculty, and a BCGEU member, was included on the committee as a staff representative. She had voice but no vote.

[25] Dr. Lindsay chaired the meetings of the Selection Committee in an ex-officio capacity; she also had voice but no vote. Article 7.7.1(c)(iii) states that the Chair of the committee "facilitates and administers the proceeding, ensures due process and that conflicts of interest are avoided". Due process is defined as ensuring that the selection process is not conducted in "a manner that is arbitrary, discriminatory or in bad faith" (Article 7.7.1(c)(iii)).

[26] Dr. Lindsay stated that she is "extremely familiar" with the selection processes for the position of Dean. In addition to having been through the process herself (she is formerly the Dean of Child and Family Community Studies) she has "hired five or six Deans under this [collective agreement] language". She explained that under Article 7.7.1(b)(iv) the Selection Committee has only the authority to "recommend". She stated that as the Vice President of Education she has the "responsibility to accept or not accept the recommendation" of the Selection Committee. Further, as Chair of the committee, she can

"veto processes or recommendations not in compliance with the collective agreement." Finally, she stated that in her role as Chair she sees herself as an active participant in the discussions when they concern the merits of individual candidates. Dr. Denton, a member of the Selection Committee, said that this was similar to President Susan Witter's participation when she chaired a search for the Vice President of Educational Services in 2002 – 2003. Dr. Witter participated fully in that selection committee. Dr. Denton said this differed in some respects to her participation in a selection process for Dean of Humanities and Social Sciences in 2002, where the Chair, Dr. McHendry, acted more as a facilitator.

[27] Finally, all the members appointed by the DCFA were serving for the first time on a Dean's Selection Committee.

D. Chronology of Meetings

[28] In a series of committee meetings (October 25, October 30, November 2, November 8, November 15, 2006, January 17, January 22, January 29, February 14, February 20 and February 28, 2007) minutes were prepared by Dr. Lindsay's administrative assistant, Laureen Daily. Often accompanying these minutes were the documents that had been considered by the committee at these respective meetings. The committee had ten members, eight voting and two non-voting. It is the discussions at these meeting, and the respective positions taken by the different parties, which is the subject of the allegations of bad faith and discrimination. Each side called members of the committee. A total of five members of the committee were called to give evidence. The chronology that follows is based primarily on the minutes and supplementary documents as well as the testimony of these committee members.

E. October 25, 2006 – Orientation Meeting

[29] Ms. Marian Exmann, Associate Vice President of Employee Relations and Susan Briggs, DCFA President, conducted an orientation for the Selection Committee. This included a review of the collective agreement, the Dean's job description, examples of prior

selection criteria for the selection of a Dean, and the BC Human Rights Code. Ms. Exmann advised the committee that if any members of the Selection Committee had a relationship with any prospective candidate, aside from the "normal collegial professional relationships", this should be disclosed to the committee in order to determine if any conflict existed. In respect to the *Human Rights Code*, Ms. Exmann stated that the committee could not discriminate against any candidate based on the "prohibited grounds" set out in the *Code*. Finally, Ms. Exmann offered to review the committee's questions prior to their interviews to assist in determining if they were "appropriate or not appropriate". She offered to "check the language of the questions".

F. October 30, November 2, November 8, 2006 Meetings

[30] During these three initial meetings the Selection Committee drafted criteria as well as the responsibilities and core competencies for the Dean, LLPA position. There was also discussion about the placing of an AD and its wording. Finally, the committee began to develop the questions that would be asked of the candidates and the format for the interviews. The committee also developed the five core responsibilities of the Dean's position: academic, planning, human resources, operation management and external responsibilities.

G. November 15, 2006 Meeting

[31] At this meeting the committee revised the questions to be asked of the candidates and had reduced them to twelve. The committee developed a point system (referred to as "anchor points") in which each candidate was to be marked on a scale of one to nine. On this scale, points of one to three were considered to be inadequate answers, and points seven to nine were considered to be superior answers. In addition, the committee developed a "Threshold" document for determining which candidates would proceed to the second round of interviews. (It was adopted from the Dean of HSS selection process). It was agreed that each candidate in order to proceed to the second round of interviews had to

achieve scores between seven and nine in the five areas of core responsibilities. This Threshold document reads as follows:

> Approved Threshold for Determining which Candidates will Proceed to the Second Interview
> (developed by H&SS Selection Committee, January 6, 2006)
>
> Given that we have agreed that technical abilities (planning and operational management) are more likely to emerge in the first cull of applications and the determination of who will proceed to the first interview and that interpersonal abilities trump technical abilities, the threshold for who makes it to the second interview should emphasize interpersonal abilities.
>
> Therefore, we should develop a scoring system for measuring the core competencies for all five responsibilities. Candidates must achieve "superior" scores (7-9) in these competencies in order to proceed to the second interview.
>
> The threshold should be applied prior to ranking the candidates. That is, each candidate must be judged on his or her own merits, not in relation to the other candidates. The candidates' scores can then be tallied and compared with each other.
>
> It may be that more than two candidates pass this threshold because more than two people may register superior scores in all these competencies. If this is the case, we can break ties and ensure that only two candidates move on to the second interview by scoring the candidates on other competencies, such as academic credentials and record and technical competencies. So if more than two candidates are judged to be equal in interpersonal qualities and abilities, the one with the better academic record, say, will proceed to the final interview. If more than two candidates have equal academic records, we could then score them on technical competencies to arrive at the final two candidates.

[32] Dr. Lindsay stated that the committee "spent a lot of time developing the criteria." She said that the committee agreed to look at only candidates "that met all the criteria at a superior level"; for example, someone who was "good at managing people but could not manage a budget was not going to work." She stated that the Threshold document reflected the fact that there was agreement that only two candidates would proceed to the second

round. She agreed this rule was not "absolute". For example, with respect to the Dean of Health Sciences, three candidates went to a public forum. This was also the evidence of Dr. Lysell. It should be noted that several of the DCFA witnesses referred to the words in the Threshold document that state that "… interpersonal abilities trump technical abilities."

[33] The committee set the next meeting for January 17, 2007 to determine the short list of candidates to be interviewed.

[34] On January 9, 2007, the closing date for the applications, Dr. Lindsay advised the committee that nineteen applications had been received (sixteen external, three internal). Dr. Lindsay had done a preliminary cut of six applications based on the fact that these candidates were not Qualified To Teach (QTT). She informed the committee that they could review all nineteen applications. She had four copies made of each of the remaining thirteen applications so that members of the committee could sign them out. Included among the thirteen applicants was an application from the incumbent Dean, Dr. McCallum. In an email dated January 10, 2007 Dr. Lindsay informed the Selection Committee of Dr. McCallum's candidacy, and stated that, "We have reviewed the collective agreement and clearly there is nothing to prevent this application being considered and in fact we would be in violation of Human Rights legislation if we didn't consider the application equally with all others."

[35] It had been agreed at the November 15th meeting that the Selection Committee members would conduct a Resume Review and set out "their top six choices using the ranking form provided." (minutes November 15, 2006). The Resume Review form had columns that said "yes, maybe and no", as well as a space for comments. Among the thirteen candidates were Dr. Wilkins (the Grievor), Dr. McCallum (the incumbent Dean) and Dr. David Duke (the candidate ultimately successful in being appointed to the Dean of LLPA).

[36] Several members of the Selection Committee gave evidence in respect to their review of the resumes. Dr. Lysell testified that he ranked McCallum first – "she was extremely sensible person to continue in the position." He ranked Dr. Duke second, Dr. Gess third,

Dr. Kristensen fourth, Dr. Wilkins fifth and Dr. Stainsby sixth. Dr. McCallum, Dr.

the highest total number of yes votes (nine plus one – this represented the total of eight voting members plus the two non-voting members). Dr. Wilkins received the third largest total of "yes" votes after Dr. Kristensen. Dr. Lysell described this meeting as a "free forum, an open discussion."

[41] Dr. Denton stated that "Duke was non-controversial, supported by everyone." Further, she said that in respect to Dr. Wilkins "everyone spoke well of Peter, doing a good job as Chair." However, she commented that Dr. Wilkins "lacked the administrative experience", and that was evident because he was only "starting his second year as Chair." He also had a weakness in the Performing Arts which was "an important criteria." Thus Dr. Denton stated the committee looked to "what else could count towards that [administrative experience] and apply as generous a standard as we could." Finally, Dr. Denton said that there was an opinion among some of the committee members that there should be an internal candidate because "people felt internal candidates had value."

[42] Two other matters arose at the January 17th meeting. First, Dr. Lysell, as representative of Douglas College Faculty Association, stated that the DCFA viewed the application of Dr. McCallum as being in conflict with the terms of the collective agreement. He stated that the Deans were only allowed to serve a maximum of two – five year terms. The second matter raised was a potential conflict of interest in the case of Dr. Wilkins. Dr. Compton-Smith asked about a potential conflict of interest in respect to Dr. Wilkins because he was married to another instructor in the English Department, Dr. Elizabeth McCausland. Dr. Lindsay stated that she was "taken aback" and "caught off guard" by Dr. Compton-Smith's remarks. She stated she had missed the comments in Dr. Wilkin's letter that accompanied his application, which referred to Dr. McCausland as his spouse. In view of the potential issue around Dr. McCallum, the selection committee was asked once again to assess the seven candidates shortlisted.

[43] Between January 18 and 22, Dr. Lindsay spoke to Dr. Witter, President of the College, and Ms. Exmann, about the potential conflict of interest involving Dr. Wilkins. They examined the College's Conflict of Interest Policy and each expressed a concern about

the potential conflict of interest between Dr. Wilkins and Dr. McCausland. Dr. Lindsay obtained copies of two prior arbitration awards: *Vancouver Community College and Vancouver Community College Faculty Association (Johnston Grievance)* 66 L.A.C. 4th 73 (Gordon); and *Langara College vs. Langara Faculty Association* [2005] B.C.C.A.A.A. No. 200 (McPhillips). Finally, Dr. Lindsay stated that herself, Ms. Exmann and Dr. Witter met as a group, discussing at length the potential conflict of interest issue, and reviewing "possible accommodations." Dr. Lindsay also said that she had sought legal advice in regard to this matter prior to her meeting with Dr. Witter and Ms. Exmann.

I. January 22, 2007 Meeting

[44] At the beginning of the meeting Dr. Lindsay informed the committee that the college had concluded that it would not accept Dr. McCallum's application for the Dean, LLPA position. Second, Dr. Lindsay, the minutes state, also raised the issue of a potential conflict of interest in respect to Dr. Wilkins. The section of the minutes concerning both Dr. Wilkins and Dr. McCallum is reproduced in part:

> J. Lindsay also raised the issue of a potential conflict of interest by internal applicant, Peter Wilkins, due to his marital relationship with a member of the English Department. She noted a previous situation involved an "emergent relationship" whereby both people were already in their individual positions prior to the conflict. It was suggested that perhaps P. Wilkins should be given the opportunity to rectify the conflict of interest situation. The Chair stated she needed more time to consider the College's Conflict of Interest Policy and to consult with Senior Management Team before making a decision on whether to accept this application.
>
> It was agreed to not consider Lorna McCallum's application any further, and to temporarily include Peter Wilkins on the list of short-listed candidates pending further review of the potential conflict of interest. It was further agreed to remove Peter Wilkins' name from the short-list if it was determined that hiring him into the position of Dean, LLPA would put him in a conflict of interest situation. The Chair pointed out that the Committee needs to ensure that they have a large enough pool of candidates to consider in case another application is removed from the competition.

…

[45] There are three matters to note from these minutes: first, Dr. Wilkins would be "temporarily" included on the short list, "pending further review of potential conflict of interest"; second, if it was decided that his appointment would result in a conflict of interest, then he would be removed from the list; and third, Dr. Wilkins, would be "given the opportunity to rectify the conflict of interest situation."

[46] The following short-list of candidates was arrived at by the committee:

> Short-listing of Candidates
>
> A review of members' top six candidates determined the following short-list of candidates for the first stage of interviews:
>
> 1. David Duke (Vancouver)
> 2. Randall Gess (Salt Lake City) – to be flown in
> 3. Eric Kristensen (Ottawa) – videoconference
> 4. Rhiannon Bury (Toronto) – videoconference
> 5. Anne Cumming (Courtenay) – videoconference
> 6. Peter Wilkins (pending the Chair's decision)

[47] As is apparent from this list, some candidates were to be interviewed personally and others were to be interviewed via videoconference. It was uncontested that the stronger candidates warranted a personal interview.

[48] The following members of the committee differed in respect to their recollections of the discussion concerning Dr. Wilkins potential conflict of interest.

[49] Dr. Lysell stated that in respect to Dr. Wilkins, and the College's Conflict of Interest Policy, the committee "felt that the policy had lots of room for accommodation"; further, that Dr. Wilkins should be given the opportunity to "resolve the conflict" and to "continue on the short list."

[50] Dr. MacLachlan stated that there were "questions, disagreements with respect to the language of the policy – whether it excluded him [Dr. Wilkins] from applying or whether it meant he would have to find ways of making decisions that addressed any potential conflict."

[51] Dr. Wharton stated that this was only a "preliminary introduction" to the issue of the conflict of interest and that the committee "needed more information in regard to the College's policy."

[52] Dr. Denton stated that there was a College policy and the College "had to figure out how to apply it." From her point of view the Selection Committee would "continue to conduct the search" and the committee itself would "let the lawyers decide outside the room" how to resolve the conflict. She agreed with the approach that permitted Dr. Wilkins the ability to remove any potential conflict of interest. Further, "Peter [Wilkins] and his wife [Dr. McCausland] had to decide together what to do"; for example, Dr. Wilkins wife could "work in a different part of the college or at a different college." She also stated that Dr. Elizabeth McCausland could elect to resign and stay "home with their children as did the spouse of another Dean [Dr. Vanderburgh – Dean of Science and Technology]."

[53] Dr. Lindsay stated that the potential conflict of interest was a "significant issue for the College and the Senior Management Team", and that "the Senior Management Team needed to look at the issue as a group." She referred to the Dr. Des Wilson and Dr. Adrienne Peacock situation, of which more will be said later in this Award.

[54] What Dr. Lindsay said she understood from the discussion, as set out in the above minutes, was that she was to come back with a decision as to whether or not Dr. Wilkins was "eligible or ineligible", and if the decision was that he was "ineligible, he would then be off the list." Dr. Lindsay stated, that although she recognized it did not amount to a "formalized ranking", it was her view that the order of the short-listed candidates in the minutes, reflected the committees "view of the strength of those candidates." Other members of the committee did not see the shortlist as a ranking of the candidates.

[55] Dr. Lindsay testified that she began to have concerns that "some committee members were not considering criteria carefully enough in relation to the applicants"; and further, that the "committee needed to be reminded to constantly check applicants against criteria." The example she gave was in respect to Dr. Wilkins' lack of administrative experience. She stated there was not "strong agreement" that Dr. Wilkins met the criteria, however, the committee was "stretching [the criteria] in order to get him on the list."

[56] Dr. Lindsay stated that Dr. Wilkins did not meet the three years of administrative experience. He had been Chair of the English Department at that point for only one and a half years. Although Dr. Wilkins' participation in the DCFA Executive "didn't meet exactly" the criteria of administrative experience, "it was added so that he was able to make it on the shortlist." Dr. Lindsay stated that Dr. Wilkins was the "last candidate to be put on the list because he technically did not meet the criteria"; he was "on the list temporarily".

[57] Finally, Dr. Denton felt that the six candidates shortlisted at the meeting of January 22nd could be broken down into two groups: Dr. Duke and Dr. Gess "at the top", and then the other four in no particular order. Dr. Duke was the "least controversial of the candidates"; further, "Dr. Duke and Dr. Gess ranked above all the others"; and that all the "others were in a second tier." She supported Dr. Wilkins in spite of his lack of "administrative experience."

J. <u>January 23, 2007: Senior Management Committee Meeting</u>

[58] The Senior Management Team consisted of: Susan Witter, President; Karen Maynes, Vice President of Finance; Blain Jensen, Vice President of Educational Services; Marian Exmann, Associate Vice President of Employee Relations; Hazel Postma, Associate Vice President of External Relations; and Dr. Lindsay, Vice President of Education. In preparation for the discussion in respect to Dr. Wilkins potential conflict of interest, Dr. Lindsay stated she assembled a legal opinion, the above noted arbitration cases and a copy of the College's policy. In respect to Dr. Wilkins potential conflict of interest, Dr. Lindsay stated the Senior Management Team soon "realized it was a difficult situation."

[59] The majority of the discussion concerned first, the "specific duties and roles of the Dean", and second, the question of "how to accommodate" any such potential conflict of interest that may arise in respect to the Dean's position – especially matters "very specific to the candidate" where "another Dean could step in." Dr. Lindsay stated that there were "problems with that." The example she gave was in respect to a disciplinary issue. It was possible for another Dean to step in in those circumstances, but it still would remain problematic, because "the Deans are a small group and disciplining the spouse of another Dean would be a difficult situation."

[60] Second, Dr. Lindsay explained that the Senior Management Team focused on the "pervasive" role of the Dean, and how it "touches all aspects of the College." The position involves "many discretionary decisions", and as a result, requires a Dean to have "undivided loyalty" to the best interest of the College; that is because the Dean is an "excluded manager" of the College.

[61] Dr. Lindsay testified that in reviewing the two arbitration awards the Senior Management Team felt that the *Vancouver Community College, supra* decision was "more relevant." Further, since the implementation of the Douglas College policy (2004) the team confirmed that no one had been hired in a familial relationship that contravened the policy (i.e. in a supervisory capacity). The committee discussed a wide range of the Dean's specific duties such as budget cuts (downsizing), growth of budgets (allocation of new resources), timetabling, funding of projects, educational leave, scholarly activity, discipline, student complaints, and in all these matters, it appeared to the Senior Management Team, given the pervasiveness and discretionary role of the Dean, that it was "next to impossible as to how you could ever resolve that conflict." She testified that the public had to be reassured that any decisions made by the College were "totally impartial and totally unencumbered" from any familial relationship.

[62] Dr. Lindsay explained that the Senior Management Team concluded they could not accommodate the Dean's position on a "piece by piece basis", and in view of the discretionary decision making of the Dean, it was not possible to accommodate the role and position because of the "day-to-day decisions that must be made by the Dean"; and further,

that all "general decisions" made by Dr. Wilkins "would be tainted by his relationship" with his wife, or at the very least, there would be a "perception of other faculty, rightly or wrongly, that the conclusions reached were influenced by his wife." For example, Dr. Lindsay testified that the Senior Management Team discussed the scenario of the English Department not suffering the same cuts as others; the perception would be that it was because his "wife works in the area and that is why they didn't suffer the same amount of cuts"; that it would be "very difficult to get a handle on" these views because these types of "conversations happen behind closed doors"; that they would "adversely affect morale"; and that the college would "never have the ability to confront these perceptions and views."

[63] Dr. Lindsay stated that the Senior Management Team was concerned with both internal and external perceptions. With an $86 million budget, the College must administer that budget in such a manner that "the public should not be able to raise an issue that there is a relationship in the College that undermines the appearance of impartial decision making." Dr. Lindsay explained that "more and more the Team discussed and reviewed, the more pervasive became the conflict, and the fact that the conflict was irreconcilable." The Senior Management Team concluded that it was "impossible" to resolve or manage this potential conflict of interest. They, therefore, "could not come up with an appropriate accommodation." Dr. Witter also raised the difficulties the College experienced in respect to the Dr. Des Wilson/Dr. Adrienne Peacock circumstances.

[64] Dr. Lindsay stated that the issue of "perception" was a significant part of the Senior Management Team's discussion because "perceptions are hugely important in a college

[65] The following day, January 24, 2007, Dr. Lindsay, as promised, sent an email setting out the college's position that Dr. Wilkins was an ineligible candidate for the position of Dean of LLPA because of his marital status. That email in full reads as follows:

> Security: Confidential
>
> Hello all,
>
> Yesterday I reviewed with Senior Management Team the potential conflict of interest that the LLPA Selection Committee has identified regarding one of the internal applicants for the position of Dean of Language, Literature and Performing Arts (LLPA). After carefully considering the circumstances in light of the Douglas College Conflict of Interest policy, and after receiving feedback from the Senior Management Team, I have concluded that Peter Wilkins is an ineligible candidate for the position of Dean of Language, Literature and Performing Arts. In my view, Peter's marital relationship with a member of the English Dept would place him in an unavoidable conflict of interest if he were appointed to the position. I am therefore recommending to the Committee that Peter be removed from the list of candidates short-listed for an initial interview.
>
> In our meeting Monday, we agreed to temporarily to include Peter's name on the list of short-listed candidates pending further review of the potential conflict of interest. We also discussed that his name would be removed from the short-list if it was determined that hiring him into the position of LLPA Dean would in fact place him in a conflict of interest. As the Selection Committee isn't scheduled to meet again prior to commencing the first round interviews, I am requesting that you respond by e-mail to indicate your agreement or disagreement with my recommendation to remove Peter Wilkins from the list of short-listed candidates. It is important that we have a record of the Committee's decision in regards to this matter. When you respond can you please respond to all members of the Committee so that everyone is aware of the position taken by each of the Selection Committee's members.
>
> Thanks,
> Jan

[66] In addition to communicating the decision of the Senior Management Team, Dr. Lindsay testified that she "wanted a clear record of where they [the committee members] stood on the issue of removing Dr. Wilkins from the shortlist."

[67] In response to Dr. Lindsay's email of January 24, 2007, a number of members of the Selection Committee (Lysell, Cowin, Denton, MacLachlan, Wharton) responded, expressing the view that Dr. Wilkins "should be given the opportunity to alter the circumstances and remove the conflict of interest" (Dr. Lysell). Later that same day, Dr. Lysell advised the Selection Committee that the DCFA was considering a challenge to the College's decision to exclude Dr. Wilkins based on his marital status. Dr. Lysell testified that it was his belief that one solution to the conflict was to have Dr. Wilkins' spouse work for another Dean. Dr. MacLachlan stated that members of the committee wanted to move from "ineligibility, to permitting Dr. Wilkins to speak to the conflict of interest policy", and she explained that the "committee members did not want to move to a conclusive interpretation." She did not think that Dr. Wilkins should be declared "ineligible because of his marital status"; and that "people felt uncomfortable about the policy and its application." Dr. Wharton viewed Dr. Wilkins circumstances as one where there "may be conflict" or "there may not be conflict"; and that if no conflict arose at all then Dr. Wilkins was "one hundred percent clear."

K. <u>January 29, 2007 Meeting</u>

[68] The January 29, 2007 minutes refer to the Selection Committee's meeting as a "single purpose meeting to discuss a conflict of interest concern regarding one of the shortlisted candidates (P. Wilkins)." Dr. Lindsay informed the committee that the Senior Management Team had decided that "… given the College's Conflict Of Interest policy, the candidate (P. Wilkins) could not be considered an eligible candidate for the position of Dean of Language, Literature and Performing Arts" (minutes January 29, 2007). Dr. Lindsay also distributed two arbitration decisions (*Vancouver Community College, supra* and *Langarga College, supra*).

[69] The committee agreed that Dr. Lindsay would contact Dr. Wilkins and explain the College's position in respect to a potential conflict of interest, and further, that Dr. Wilkins would be given the opportunity to decide if he wanted to proceed to the first round of interviews, notwithstanding the College's view that it would not accept a recommendation from the committee to advance to him the second round.

[70] As the minutes indicate "differing positions were expressed by members of the Committee in regard to the potential conflict of interest." Dr. MacLachlan stated that Dr. Lindsay went through excerpts of the two arbitration awards and that those decisions were referred to as "precedents or examples" of why Dr. Wilkins was in "clear conflict of interest." Dr. MacLachlan stated that "committee members disagreed about the policy" and that they were interested "in steps that could be taken to accommodate" Dr. Wilkins. Dr. MacLachlan testified that she "pushed" to keep Dr. Wilkins in the interview process because of the "uncertainty of the conflict of interest policy." She was also concerned about "an interpersonal conflict in Dr. Duke's prior place of employment."

[71] Dr. Denton testified that in response to a question about "allowing Liz [McCausland] to report to another Dean", Dr. Lindsay replied that the conflict of interest was "more complicated than that; Liz was a member of the English Department and anything that Peter does with the English Department makes it difficult." As a result of this reply, Dr. Denton stated she suddenly realized that "Senior Management had turned over in a fairly serious way" the issue of conflict of interest and that the "application of the policy was more complicated than I realized." She felt that Dr. Wilkins was a "man of integrity." She liked both "he and his wife", but thought about "someone who wasn't as hardworking and reasonable as Peter." In respect to the two arbitration awards she did not read them fully, "just the parts that were marked."

[72] Dr. Wharton admitted that he found the issue of "potential conflict of interest confusing." He wondered if there was a "potential conflict of interest", or rather, was it a "potentially a conflict of interest." If it was only "potential" then there was "necessarily" not a conflict of interest. However, if there was "a definite conflict of interest there would be a way to eliminate that and give Dr. Wilkins the opportunity to deal with that." Dr.

Wharton, however, stated that he "interviewed and scored all candidates based on their merits and was not distracted by the conflict of interest issue."

L. January 30, 2007 – Meeting Dr. Lindsay and Dr. Peter Wilkins

[73] As agreed in the Selection Committee's meeting the day before, Dr. Lindsay met with Dr. Wilkins to inform him of the college's position. The notes of the meeting reveal that Dr. Lindsay stated to Dr. Wilkins, that should the Selection Committee recommend that he should be hired as the Dean of LLPA, the College would have to reject that recommendation.

[74] Subsequent to the filing of his application for the position of Dean, LLPA Dr. Wilkins next involvement arose on January 30th when he received a phone call from Dr. Lindsay. She stated that he had "made the shortlist", however, his candidacy raised a potential conflict of interest, and that her understanding of the College's policy "would require him to withdraw from the list." They agreed to meet that same day. Prior to the meeting, Dr. Wilkins contacted the DCFA and they suggested that he have someone accompany him from the DCFA (Linda Forsythe).

[75] At their meeting, Dr. Wilkins indicated to Dr. Lindsay that he thought that the College's decision violated the *Human Rights Code*. He also thought that any potential conflict was "resolvable." The interview notes set out Dr. Lindsay's comments concerning the two arbitration awards, and her remarks concerning the general issue of a "perception of fairness", citing the accusations that were made continually against Dr. Des Wilson and Dr. Adrienne Peacock. Ultimately, Dr. Wilkins was unwilling to withdraw from the interview process. Dr. Lindsay, the notes record, replied that the committee "will proceed the same with you as with any other candidate" and that the committee "will do their job and choose [the] best candidate." Dr. Lindsay stressed that if Dr. Wilkins "feels strongly, then you

should proceed on." Dr. Wilkins thought that the process was "unequal and unreasonable" and that there was a "fundamental unfairness." She reassured him that "there will be absolute fair process for you." Dr. Wilkins response in the notes record him saying "I know that I won't get the job at the end of the process so it will affect my performance in the process", and then asks the question: what was "my guarantee it [College's position] won't affect process?" Dr. Lindsay responded "we've a number of mechanisms in place to keep it fair." Finally, Dr. Lindsay testified that the committee faced "two very delicate issues"; a reference to both Dr. McCallum and Dr. Wilkins. However, she stated "despite these challenging issues" she would make every effort to ensure that "the whole process acted ethically and correctly and that everyone was treated fairly."

[76] Dr. Wilkins testified "I wanted to remain in the competition for the experience, even if it was futile." He stated that the conversation between himself and Dr. Lindsay was "civil" but he was "angry at the end." He explained that there was "no discussion about accommodation"; in fact, a decision had been made that he could never be Dean. Dr. Wilkins commented that he "gambled in this competition; if I didn't win there was valuable experience for the future." He further felt if "he didn't win this time, five to ten years later he could have a very good shot at the job." However, if the policy applied he would never have an opportunity to obtain a position – "I reached the end of the line in this institution." He stated at the time that he felt that the policy violated the *Human Rights Code* and that at one point he "felt he should withdraw and save a lot of people a lot of trouble." However, in the end he said to Dr. Lindsay that "I would not withdraw and that I would fight the policy." He thus decided to "pursue the contest to the very end" and if he was the "winner" it would force Dr. Lindsay to "say no"; to in fact, reject the recommendation of the Committee. However, he realized it made him a "lame duck candidate", and he also thought that the College's position placed him in an "unfair position". Finally, he thought that the College could "draw up a list of protocols" that would address any potential conflict of interest that may arise. He was convinced that it was a matter of "perception, not that he would do something wrong."

[77] Later that day Dr. Lindsay informed the committee that Dr. Wilkins wanted to proceed. Dr. Wilkins was then scheduled into an interview on February 7 between 4:30 and 6:00 p.m. Dr. Wilkins initially sought to change the interview time because of his heavy schedule, although he also offered to rearrange his own personal schedule if a change in the time was not possible.

[78] The following day, January 31, 2007, Susan Briggs, President of the DCFA, wrote to Dr. Lindsay stating that the LLPA Dean Selection process has been compromised in respect to the issue of human rights and the exercise of management rights. That letter reads in full as follows:

> This letter serves as notice that the DCFA feels due process in the current Language Literature, and Performing Arts (LLPA) Dean Selection has been compromised with regard to human rights and unfair use of management rights. The DCFA is investigating and taking legal advice on the matter but will not withdraw from the process at this time. The DCFA reserves the right to grieve/arbitrate at a later date.
>
> As Chair of the LLPA Dean Selection Committee, you asked Dr. Peter Wilkins to withdraw his application. You told him, and the entire committee earlier, that should he be recommended for the position of Dean, you would exercise your prerogative and reject such a recommendation. The DCFA believes that your direction to Peter is incorrect and that those to the selection committee are premature and prejudicial to Peter's candidacy. In short, they most probably created bias in the committee members' minds.
>
> The DCFA further believes Dr. Wilkins is right to refuse to withdraw his application for LLPA Dean for the following reasons:
>
> 1. The Conflict of Interest Policy is not well publicized;
> 2. The College Conflict of Interest Policy is vague;
> 3. The College has already ignored this policy;
> 4. The College seems not to recognize that conflict of interest lies in behaviour, not in the fact of familial relationship; and
> 5. The College has violated Dr. Wilkins' human rights by requesting he withdraw from the LLPA Dean Selection based on a familial relationship.

Thank you.

[79] In response to the DCFA's position that a conflict of interest "lies in behaviour", and "not in the fact of a familial relationship", Dr. Lindsay testified that even in circumstances where a "person's behaviour is exemplary", if a potential conflict exists, it remains "still very hard to defend against public perception concerning that conflict."

M. February 5 – 7, 2007 – First Round of Interviews

[80] The candidates that were finally interviewed were Dr. Kristiansen, Dr. Cummings, Dr. Gess, Dr. Duke and Dr. Wilkins. The committee asked both the agreed upon questions and scored the candidates based on the nine point system that they had devised in their earlier meetings. Both prior to, and during the interview process, Dr. Lindsay stated that "no one expressed confusion about the system of grading and scoring" and that there was "no controversy about the spreadsheets or scores." This referred to the spreadsheets prepared by Dr. Denton which listed the scores of each committee member in respect to each candidate interviewed. Laureen Dailey tabulated and calculated the average scores. The score sheets indicate the total average of the eight committee members and then separate totals for nine members, which included Dr. Lindsay, and then the totals for all ten members, which included both Dr. Lindsay and Ms. Sekhon. All committee members understood that they were to base their decisions on the average of only the eight voting members.

[81] Subsequent to the interviews on February 9, 2007, Dr. Lysell emailed Dr. Lindsay and asked that the total scores of the candidates not be revealed to any of the committee members until the date of the next meeting, February 14, 2007. In his email he wrote that it was important to "preserve fair and transparent process" in view of the "cloudiness around potential conflict of interest issue" arising in this process. Dr. Lindsay agreed to this.

[82] On February 13, 2007, Dr. Lysell asked that the conflict of interest issue be dealt with as the first item on the agenda at the February 14, 2007 meeting. Once again, Dr. Lindsay agreed to this.

N. February 14, 2007 Meeting

[83] The two most important topics discussed by the Selection Committee at this meeting were the conflict of interest issue, and which two candidates would proceed to the second round of interviews. With respect to the issue of conflict of interest, I will begin with quoting the minutes:

> In response to A. Lysell's concern that the Committee may now be perceived as operating in bad faith, J. Lindsay replied that the next round in the interview process involves going public, and if the Committee recommends P. Wilkins to go forward, she will need to step in and make the final decision not to accept their recommendation. A. Lysell commented that he feels some wording in the Conflict of Interest policy is vague (i.e. "shall avoid"), and that it seems there is an opportunity for accommodation. J. Lindsay responded that the policy was put in place to enable the College to not hire people into a conflict of interest situation. Since the College would be acting based on established policy, it was felt that the College would not be violating human rights and discrimination principles. She reiterated that she would be unable to accept a recommendation to move P. Wilkins forward to the next round should this recommendation be made by the Committee.

[84] Dr. Lindsay testified that she repeated her conclusion that the conflict was "irreconcilable" and could not be accommodated. In response to Dr. Lysell's comment that the Committee may be perceived to be operating in bad faith her response was that Dr. Wilkins had been fully informed of the College's position and had made his own decision to continue in the process. Further, Dr. Lindsay stated that the conflict of interest was with the entire faculty; as a result, "people would perceive that he [Dr. Wilkins] would be favouring his wife or his wife's department." Two examples raised by Dr. Lindsay were timetabling and downsizing.

[85] Dr. Lysell stated that he thought that Dr. Wilkins had done well at the interview and was "neck and neck" with Dr. Gess. Dr. Lysell agreed that Dr. Wilkins was in a potential conflict of interest, however, he adopted the DCFA position that the conflict of interest arose ultimately out of conduct, not status.

[86] Dr. Wharton concluded that at the interviews Dr. Wilkins "was the best of the bunch". He was "impressed" that Dr. Wilkins had done so well "given the circumstances." He gave Dr. Wilkins the highest scores; Dr. Duke was his second choice.

[87] After the first round of interviews several of the DCFA committee members rated Dr. Wilkins considerably higher than they had at the Resume Review stage. Dr. Lysell had Dr. Wilkins tied with Dr. Duke in first place. Dr. McLachlan had Dr. Wilkins in second place.

[88] In respect to the conflict of interest discussion, Dr. Denton stated that "none of us in the room were lawyers" and she thought that "this discussion should be occurring outside the room." She testified that the Committee had been presented with both sides of the issue - "always both sides were presented to us." Dr. Denton stated that the "DCFA was not letting go of its position and the College was not letting go of its position." She stated, however, that "the Committee just wanted to go on with its business."

[89] She testified that Dr. Lindsay's raising of the conflict of interest issue did not affect the way she rated Dr. Wilkins, nor from the Committee's discussion, did it seem to affect the scoring of other members of the committee.

[90] In cross-examination, Dr. Denton acknowledged that she had a serious and protracted dispute with two other members of the Psychology Department. The Psychology Department was split into two factions – one supporting her, the other supporting another instructor in the department, Dr. Nancy Maloney and her common law spouse, Dr. Bruce Landon. The issue concerned seniority and after a 23 day hearing Dr. Maloney and Dr. Denton were assigned the same seniority. This dispute eventually ended up at the Labour Relations Board as a result of Dr. Denton's Section 12 complaint. It was ultimately

dismissed. Dr. Denton was later made Dean of Humanities and Social Sciences faculty in 2006, and no concerns of bias in respect to her conduct towards these individuals has ever been raised either prior to her appointment or subsequently.

[91] In respect to scoring the candidates' responses to the twelve questions (on a scale of one to nine) the three highest scores were obtained by Dr. Duke (7.048077), Dr. Gess (6.634615) and Dr. Wilkins (6.548077). Dr. Lindsay then moved that the top two candidates, Dr. Duke and Dr. Gess, proceed to a second interview. The minutes record the following comments in respect to the motion and the candidacy of Dr. Wilkins:

> A spreadsheet showing members' individual rankings and average scores from the first interview was distributed. J. Lindsay referred to the threshold document which states that "candidates must achieve 'superior' scores (7-9) in these competencies in order to proceed to the second interview." After review and comparison of the rankings, the top two candidates were determined to be David Duke and Randall Gess. It was noted that the internal candidate, Peter Wilkins, placed third and discussion followed. J. Lindsay advised that past practice has been to take two candidates forward and that, based on the rankings, two candidates had been determined.
>
> J. Lindsay moved that the two top ranked candidates, David Duke and Randall Gess, proceed to the second interview.
>
> A vote was taken on the motion and results were 7 in favour and 1 against.
>
> Several members felt it was unfortunate not to have an internal candidate going forward. The Committee recognized P. Wilkins' strong interpersonal skills and future potential, but agreed he lacked administrative and networking experience. J. Lindsay will meet with P. Wilkins to let him know he received fair consideration and was recognized for his strengths.
>
> It was noted that attributes like personality and enthusiasm would be a useful addition to the list of criteria in future selections. It was also noted that candidates who were unsuccessful in the first round will need to be informed of what criteria they did not meet. J. Lindsay will follow- up with the three unsuccessful candidates from the first round.

[92] Dr. Lysell voted in favour of the motion, stating he felt it was "important to proceed on with regret." He testified that but for the conflict of interest, Dr. Wilkins would have been brought forward to a second interview because there was "no hard and fast" rule that only two candidates, rather than three, could move forward.

[93] Dr. MacLachlan voted against the motion because the second two candidates (Dr. Gess and Dr. Wilkins) were so closely ranked. Secondly, she felt there was a lack of consensus around the conflict of interest policy. She thought that the "conflict of interest situation was affecting how Peter's scores were being interpreted." It was her view that they should "stop the process" until the conflict of interest situation was sorted out. Finally, Dr. MacLachlan felt that interpersonal abilities were not being allowed to "trump technical abilities."

[94] Dr. Wharton stated that he voted in support of the motion because the College had made up its mind in respect to Dr. Wilkins and the conflict of interest policy. He stated he "reluctantly accepted this" and therefore did not see any point in voting any other way.

[95] Dr. Denton acknowledged that the scores between "Dr. Gess and Dr. Wilkins were very close." She also stated that someone in the meeting commented "too bad Peter didn't make it to the next round; someone should make sure he knows when debriefing that he did a pretty good job." The Committee asked Dr. Lindsay to communicate to Dr. Wilkins his "future potential". Dr. Lindsay also understood her role was to contact Dr. Wilkins and "state to him that his candidacy was not going forward." She ultimately contacted Dr. Wilkins to relate the Committee's decision and to offer to meet him to discuss the merits of his candidacy; that meeting never took place.

[96] In respect to his first and only interview, Dr. Wilkins agreed "the interview was conducted properly – nothing improper." The one exception was the "elephant in the room – the marital relationship." In respect to the personal impact of the Dean Selection process he said that it had a "significant impact" – "not an expectation that I would have got the job this time around necessarily", however, his "future at the College was severely limited by

being cut out by the process." This was a reference to the fact that if the College's Conflict of Interest policy was sustained he would not be permitted to ever apply for the Dean of LLPA at Douglas College.

[97] In cross-examination, Dr. Wilkins acknowledged that with his DCFA experience he thought he would "squeak by" in respect to the administrative experience requirement. It was his hope that other things would "tip me over." Moreover, he agreed that the DCFA experience was not the same as his administrative experience when he occupied the position of Chair of the English Department. He acknowledged that serving on the Humanities and Social Science (HSS) Committee gave him a "close look at how administrators are selected." This was especially true in regards to both the Threshold document and the questions/scoring system. He acknowledged that the questions from the LLPA process were "surprisingly" similar to the questions asked during the HSS Committee process which he had served on. He stated that the budget questions were "virtually identical". He also knew the "qualities" that the Committee were looking for and that these were embedded in the questions. He also knew what the "successful answers were."

[98] Finally, Dr. Wilkins stated that he was uncomfortable "with Dr. MacLachlan on the Committee" and he raised the issue with the DCFA. Finally, he was not aware of the College's Conflict of Interest policy and had not read the policy prior to Dr. Lindsay and he meeting.

[99] The following day, February 15, 2007 a series of emails were exchanged (Dr. Wharton, Dr. MacLachlan, Dr. McCallum, Dr. Lindsay) raising the issue of having three candidates proceed to the second round of interviews (Dr. Wharton). In addition, Dr. Wharton raised the issue of the manner of scoring. He suggested dropping the highest and lowest scores. He noted that Dr. Wilkins scoring totals "are extremely close to those of the second of the two candidates [Dr. Gess]". He also wrote that "the discussion of conflict of interest has created an unconscious bias against him [Dr. Wilkins]."

[100] Dr. MacLachlan was concerned that the scoring averages were being used to justify going forward with only two candidates, instead of three, and also questioned the adherence

to the original decisions made concerning the Threshold document - that is, that all candidates who were going forward to the second round of interviews had to have a seven or better score in regard to all of the five competency areas. She noted that this was not the case.

[101] Dr. Wharton, in his testimony, stated that after the vote he reconsidered the situation. He made several points: first, that he thought that Dr. Wilkins was "the strongest candidate after all of the interviews"; second, that it was important "to advance someone from inside the College"; and third, that Dr. Wilkins was "operating under a disability other candidates didn't have and he still did a great job." Further, Dr. Wharton didn't think that budget skills "were an important area for a Dean to be familiar with." He acknowledged that Wilkins "didn't do as well" in this area. In response to a question that others on the Committee felt that Dr. Wilkins did not meet this requirement, his response was "I guess so."

[102] Dr. Cowin wrote as part of the email exchange that he had a "couple of thoughts that colour how I am viewing Peter's candidacy. If they are off base I'd actually feel relieved to be able to discard them." The first was that, whether or not he liked the collective agreement language about the number of terms a Dean could serve, he was still bound to honour the collective agreement. Second, whether or not he agreed with the Qualify To Teach requirements, he was still bound by them. As a result, is he not then bound to respect the College's Conflict Of Interest policy regardless if he were to write it "a little differently."

[103] Dr. Lindsay replied to the series of emails by stating that she was not prepared to revisit either the scoring or the decision to send two persons to the second round of interviews. She felt that the allegation of an unconscious bias by some Committee members was "basically speculation."

[104] On February 16, 2007, Dr. Gess withdrew from the competition. An emergency meeting was scheduled for February 20, 2007.

O. February 20, 2007 Meeting

[105] The opening paragraph of the minutes describe the nature of the meeting and the options which Dr. Lindsay stated the committee faced:

> An emergency meeting of the Dean LLPA Selection Committee was called to determine next steps following the February 16th withdrawal of Randall Gess from the competition. J. Lindsay advised the Committee they had several options to consider.
>
> 1. Recommend the 3rd candidate, P. Wilkins, notwithstanding the conflict of interest situation and the Chair's previously clarified position.
> 2. Reconsider the 4th candidate, E. Kristensen, since the Committee only had a chance to meet him via videoconference interview.
> 3. Proceed with the one remaining candidate, D. Duke, even though some possible concerns have surfaced following one reference check.
> 4. Collapse the search and start over.

[106] As a result of Dr. Gess' withdrawal, Dr. Lysell moved that Dr. Duke and Dr. Wilkins go forward to the second round of interviews (a check of Dr. Duke's past references confirmed his continued candidacy; in addition, in respect to any unresolved doubts, the committee decided these could be cleared up in a subsequent interview). A debate ensued about Dr. Kristensen, who placed fourth, moving ahead of Dr. Wilkins, who had placed third. The vote ended in a four-four split, and therefore was defeated. Dr. Lindsay, in her testimony, characterized this motion as one of "bad faith" because Dr. Wilkins could not "move forward" due to his "ineligibility".

[107] A second motion was proposed by Dr. Lindsay that stated that both Dr. Duke and Dr. Kristensen should move to a second round of interviews, and that Dr. Wilkins "be informed of his third place ranking and given the opportunity to remove the conflict." Once again, this vote was tied and therefore failed.

[108] Dr. Lysell testified that Dr. Duke was the "top" or "leading" candidate and that "everyone agreed to put forward his name" at the meeting. This was in part because of his administrative experience which exceeded the requirements of the position. However, with Dr. McCallum and Dr. Stainsby out of the race, the committee still wanted an internal candidate. Finally, Dr. Lysell stated at the meeting that he felt the decision had been based on "policy", not "merit". He still had concerns about the outstanding human rights issue.

[109] Dr. Wharton testified that he was concerned about "a red flag" which had arisen in respect to Dr. Duke's candidacy. He stated that there was an outstanding issue about whether Dr. Duke had been required to resign from the Chair's position at a former institution. He stated the committee couldn't "pre-judge" this issue but it did seem "potentially problematic." He stated that he opposed Dr. Kristensen "skipping" over the number three candidate, Dr. Wilkins. Finally, he thought that it was "best to start over" the Dean's selection process.

[110] Dr. James stated that he was "uncomfortable" with having Dr. Wilkins proceed to a second interview if it was the College's intention not to hire him. To proceed with a public interview process in these circumstances would amount to a "sham", and he thought that "cruel and unethical."

[111] Dr. Denton stated that the original plan had been to take two people forward, Dr. Gess and Dr. Duke, who were the "strongest before and after the interviews." It was her opinion that the "other candidates were significantly less qualified." With Dr. Gess' withdrawal, there was "one strong candidate left – Dr. Duke". It was Dr. Denton's opinion that the College should "recast the search" and "get more candidates". After the defeat of the second motion she stated that she "agreed to finish up with Duke"; that he was "strong enough to hire"; if it turned out that he was "not suitable", then they could recast the search; however, the Committee should "finish up with Duke, do not put him on hold." Dr. Denton testified that there were "no other suggestions advanced"; and "no further disagreements raised." In respect to Dr. Wilkins it was her view that "Peter hadn't cleared the threshold."

[112] Finally, Dr. Lindsay testified that after the second motion had failed, all that remained was the "default position"; that is, that the committee proceed solely with Dr. Duke. She stated, "No other motions were brought forward and no one opposed this."

[113] The following day, February 21, 2007, Dr. Lysell emailed Dr. Lindsay requesting that she put in writing her decision "not to include Peter Wilkins in the next round of the interview process." He stated this was pursuant to the collective agreement (Article 7.7.1(f)(vi)). Dr. Lysell testified that this was important because it would enable the committee to move forward in a "fair and genuine way." After a series of emails Dr. Lindsay issued the following written statement (February 28, 2007) in respect to Dr. Wilkins' candidacy:

> LLPA Dean Search Committee Chair
> Statement of Rationale
>
> The following statement is being provided to comply with Article 7.7.1,f.),(vi) of the Douglas College/DCFA collective agreement. Essentially this statement reiterates the statements documented in the LLPA Dean Search Committee meeting minutes of February 20th 2007.
>
> Statement of rationale:
>
> As a result of the second ranked candidate withdrawing from the selection process a motion was put forward to advance the third ranked candidate to the second round interview stage of the selection process. A vote was taken on this motion and the result was four in favour and four against.
>
> Given the absence of a majority vote, and the college's interpretation of the Douglas College conflict of interest policy relative to the candidacy of Peter Wilkins, the Chair determined that Peter Wilkins would not be advanced as a candidate in the second round of the selection process.

[114] Dr. Lysell testified that there was "a lot of confusion about the second interview", and that Committee members were feeling unhappy about both the "process and the result."

[115] On February 26, 2007 Dr. Briggs advised Dr. Lindsay that "any further participation by DCFA members on this selection committee is conducted under protest at your decision not to advance Dr. Peter Wilkins in this process."

P. Second Interview – February 28, 2007

[116] Dr. Duke was the only candidate interviewed on this date. The Committee had developed a list of agreed upon questions to be asked of Dr. Duke in much the same manner as they had in the first round. All Committee members attended the second interview and all participated in asking the questions. After the interview was completed, but prior to any discussion with respect to Dr. Duke's interview, the DCFA members walked out of the meeting, terminating their involvement in the Selection Committee's process. This was in furtherance to a letter written by Dr. Briggs on the same day, February 28, 2007, which reads as follows:

> This letter is to inform you that effective immediately, the DCFA is withdrawing its faculty members from the current LLPA Dean Selection Committee.
>
> The DCFA takes this action after much deliberation. Your decision to exclude a ranked and qualified candidate is, in our judgment, arbitrary, discriminatory, and in bad faith.

[117] Dr. Lysell stated that the DCFA members felt "uncomfortable" continuing with the process and saw it as "flawed". He stated that the Committee members withdrawal was at the "direction of the DCFA."

[118] Dr. Wharton, when asked if all of the members of the Committee had conducted themselves professionally and collegially, answered "yes". He also stated that he had no hesitation in speaking his own mind during the process and felt that others were not afraid to do so either. When asked if each member of the Committee had conducted a "proper, unbiased assessment of each candidate", Dr. Wharton commented that he was "not saying there was anything improper about other members in the vote on the Committee" but that "there is a possibility." However, in respect to the allegation of "unconscious bias"

operating in respect to Dr. Wilkins, Dr. Wharton stated that "it didn't affect the way he scored candidates."

[119] Dr. Denton testified that prior to the February 28th meeting commencing, Dr. Lindsay informed the College nominees that the DCFA members would attend the interview but not participate in the discussion after the interview. She stated the second interview "was designed specifically for him [Duke]" and its purpose was to "fill in the gaps" in respect to "clarification and matters ommitted." At the conclusion of the interview the DCFA left and the remaining Committee members "discussed Dr. Duke's performance". The remaining Committee members were "all the administrators", and they decided to "recommend him" [Dr. Duke]. She stated that it would have been awkward for Dr. Duke to do a public forum and therefore Dr. Lindsay made the decision that there should be no public forum. The remaining committee members agreed to this.

[120] Dr. Lindsay stated that she asked the committee members to provide her with a written confirmation of their recommendation. They did so the following day and she accepted that recommendation.

[121] On March 26, 2007 Dr. Lindsay issued a written announcement confirming the appointment of Dr. David Duke as the Dean of LLPA. That announcement reads as follows:

> I am pleased to inform you that I have now confirmed that the newly appointed Dean of LLPA, Dr. David Duke, will be commence his appointment July 16, 2007. Dr. Lorna McCallum is currently serving as Acting Dean through to the end of April. Beginning May 1, 2007, Dr. Kathy Denton will take over as Acting Dean for the LLPA Faculty and continue in this capacity to July 13, 2007. To assist Kathy in providing an appropriate level of coverage for both Faculties, some LLPA day-to-day and project management responsibilities will be delegated to Lorna. At this time I would like to thank Lorna for the tremendous contribution she has made to the LLPA Faculty and College over the past ten years in the role of Dean of Language, Literature and Performing Arts. It has been a pleasure working with Lorna, and I look forward to continuing to work with her as we plan for a smooth transition of the new

> Dean into the Faculty and when she returns to teaching in the Fall.
>
> I would also like to take this opportunity, as much as possible within the bounds of confidentiality, to address questions raised by the DCFA request for faculty to boycott a forum planned for introduction of the newly appointed Dean of Language, Literature and Performing Arts. While I am not able to provide detailed information, I can say that this was an extremely complex selection process. Throughout the four and a half month search process the committee was faced with many challenging decisions, not the least of which was deciding how to proceed when one of the two final candidates, scheduled to present in an open forum, was offered another position and dropped out of the competition. At this point a number of issues were considered, and it was ultimately decided to go forward with the remaining candidate (one of the two top candidates determined in the first round) and to cancel the forums, as we were now proceeding with a single candidate. In place of the previously planned forum and short interview format, the selection committee decided to conduct a much more extensive second round interview with the remaining candidate.
>
> I would like to thank all members of the committee (Jill MacLachlan, Calvin Wharton, Allan Lysell, Bob Caldwell, Kathy Denton, Ted James, Bob Cowin, Carole Compton-Smith and Barb Sekhon) for the time, effort and careful consideration they gave to all aspects of this lengthy and complex selection process.

[122] Dr. MacLachlan testified that she took issue with some of the specifics contained in this announcement. First, she didn't agree that the committee had dispensed with the public forum. She also didn't agree that the committee had confirmed Dr. Duke as Dean. Further, "she didn't feel comfortable" with the role that Dr. Lindsay played as Chair of the committee. In addition, she didn't like the "tone of her [Dr. Lindsay's] emails." She had previously contemplated resigning from the committee. Dr. Lindsay offered to meet with her but she declined.

[123] In her assessment of Dr. Wilkins' candidacy as a whole, Dr. MacLachlan stated that she did not see his lack of administrative experience as an issue. This was because in respect

to administrative experience it was her opinion that there was "no specific requirement of years of experience" for the Dean's position. When it was pointed out to her that there were specific requirements of administrative experience included in the job description, her response was that those requirements did not make it into "Threshold document" and therefore that requirement did not establish "the basis of who went to the next step."

[124] Finally, Dr. MacLachlan agreed that during the entire process she was a probationary employee in the English Department and that the Chair of the Department, Dr. Wilkins, would be involved in assessing her probationary status. She also acknowledged that she shared an office with Dr. Wilkins' spouse. However, she stressed that she had no social relationships with either of them outside of work. She decided not to declare either of these facts to the Committee because "she didn't see it as an issue." She successfully passed her probationary period in January 2008.

[125] Dr. Duke commenced the position of Dean of LLPA on July 16, 2007.

Q. The Grievor (Dr. Peter Wilkins) and the Current Incumbent of Dean LLPA (Dr. David Duke): Applications, Resumes, and Past Experience

(a) Dr Wilkins

[126] Dr. Wilkins joined Douglas College English Department as an instructor in 1995. He received his PhD in English from the University of California, Irvine, in 1997.

[127] In his application for the Dean LLPA position he referred to his experience as a representative from the LLPA on the Executive Council of the Faculty Association. He cited his participation as a member of the Faculty Recruitment and Retention Committee. He also served on the Humanities and Social Sciences Dean Selection Committee 2006. However, his most relevant experience was his current involvement at that time as Chair of the English Department. In that role he wrote that he had successfully managed some twenty faculty members of the English Department, which is one of the largest departments at Douglas College. He particularly noted his management of timetabling complexities and his ability to handle individual student and faculty problems. He stated his most "important

initiative" was the "process of modernizing the department's curriculum through the forming of a curriculum committee." He also noted his participation in BCCAT English Articulation Committee. From 2002 he was a member of the Women's Studies and Gender Relations Committee. This committee is multi-disciplinary and included not only the English Department but also the History and Criminology Departments.

[128] Dr. Wilkins admitted his weaknesses in areas such as Modern Languages, Theatre, and Stage Craft. However, he noted that being Dean of LLPA "does not require an expertise in all fields of the faculty." Rather, in those areas where he did not have an expertise he realized the importance of developing a sympathetic understanding of these areas. He concluded that his experiences, both at the DCFA, and at the LLPA Faculty Education Council, gave him the overall necessary strengths to perform the duties of Dean. He ended his application by noting that Dr. Elizabeth McCausland, his spouse, was also an instructor in the English Department.

[129] Several Letters of Reference accompanied Dr. Wilkins application for Dean. The following is an excerpt from a Letter of Reference from Dr. Roger Semmens, Chair of the Humanities Division at Langara College:

> However, I think Dr. Wilkins greatest strength is his ability to reach out to others and enlist their trust and support. His great ability then in sum is to motivate those about him, and to make them care about the issues and problems which confront and challenge them. This is certainly a quality that I value in any leader in any context.

[130] During the time that Dr. Wilkins was Chair of the English Department, his wife, as previously stated, was an instructor. He described this circumstance as "very common" in colleges and in universities, citing at Langara, UBC and the University of California, Irvine; indeed, he said this was "a fact of academic life", and had been for as long as he could remember.

[131] In respect to his participation in the search for the Humanities and Social Sciences Dean he stated that he played a "significant role" in drawing up the core competencies for the Dean's responsibilities in Humanities and Social Sciences. He testified that the current LLPA Dean's duties were in fact taken from those same Humanities and Social Sciences core competencies. In respect to that search committee, two names went forward initially. Later one person dropped out and they brought up the third candidate. There was also a public forum. Dr. Denton who testified in these proceedings, was ultimately the successful candidate in that process. Dr. Wilkins testified that he knew that the Dean of the LLPA position was "coming open". He was interested and "others encouraged him." He therefore thought he "would give it a shot"; if he "didn't get it this time" it would prove "useful to go through for later". He therefore "took the plunge".

(b) Dr. David Duke

[132] Dr. Duke was given notice of these proceedings. He attended only the final submissions.

[133] Dr. Duke was head of the School of Music for Vancouver Community College from 1998 – 2003. He was an instructor in the School of Music from 1984 – 1998 and then again from 2004 until his appointment at Douglas College. He received his PhD from the University of Victoria in Musicology.

[134] During his time at Vancouver Community College he built a scholarship fund for students (approximately $1 million) and was instrumental in establishing an applied music degree at the college. He has been active as a writer publishing upwards of "350 essays, articles and reviews …" He stated, in his letter of application, that as a "consultant, lecturer and adjudicator he has built up both national and international contacts." A particular area of interest in terms of research is Canadian music. He has been an adjudicator in regards to the Juno Awards, the Canada Council for the Arts and the British Columbia Arts Council.

[135] Dr. Kenneth Morrison, Head of the School of Music for Vancouver Community College, wrote the following comments in his Letter of Recommendation for Dr. Duke:

> As the Chair of the Department of Music at Vancouver Community College, Dr. Duke excelled as a leader with vision and demonstrated the ability to create a vibrant, progressive music school. I have taught music theory at McGill University, UBC and the University of Washington. I have never encountered a better run department than ours at VCC under the leadership of Dr. Gordon Duke. This is due in part to the fact that he is one of the most creative and effective problem solvers that I have ever met.

(c) Elizabeth McCausland

[136] Dr. Wilkins testified in respect to his spouse. As noted, Dr. McCausland and Dr. Wilkins were married in 1994. She joined the English Department at Douglas College in 1997. She is a full time instructor. Dr. McCausland was Chair of the Faculty Education Council while Dr. Wilkins was Chair of the English Department. Dr. McCausland was the Education Council representative on the FEC. Each faculty has a Faculty Education Council (FEC) which is comprised of Chairs of each Department. The Dean is an ex-officio member. It approves the curriculum from each department before going forward to the Education Council, the governing instructional body of the College. Dr. Wilkins stated that no concerns were raise in regard to their respective roles.

[137] Dr. McCausland was also Chair of the Curriculum Committee on the Educational Council and no concerns were raise in regard to their respective roles.

[138] Dr. Wilkins, as Chair of the English Department, dealt with all his responsibilities as set out previously (timetabling, courses, curriculum, student's complaints/appeals, professional development, etc) and stated that no concerns were raised with respect to either his or his spouses' respective roles at Departmental meetings.

[139] Dr. McCausland was, in addition, Chair of Academic Signature Committee which evaluates courses to ensure that these courses meet the required academic competencies that students must meet.

[140] Dr. Wilkins did agree in cross-examination that he accommodated Dr. McCausland in respect to childcare needs when creating the timetable. There was no objection to this by other members of the Department.

[141] He also agreed that he, and along with several other faculty members in the English Department, grouped three sections of courses into one, for a total of seventy-five students, instead of the normal twenty five students per course, for one of the two classes each week. Dr. Lindsay concluded that this could not continue, because it amounted to "off-matrix scheduling", meaning that it was in conflict with both college policy and the respective course outlines.

R. Dr. Des Wilson – Dean of Science and Technology, (1996 – 2006)/Dr. Adrienne Peacock

[142] Dr. Wilson was first hired as an instructor at Douglas College in the Faculty of Science and Technology (Geology) in 1971. He was Chair of the Faculty of Science and Technology from 1980 – 83. At that time the position was included in the bargaining unit. He was once again Chair in 1995 – 96, however, at this point the Chair's position was outside the bargaining unit. In 1996 Dr. Wilson was made Dean of the Faculty of Science and Technology. He was appointed for a five year term.

[143] Dr. Adrienne Peacock commenced employment with the College in 1979 as a faculty member in the Biology Department. Dr. Wilson and Dr. Peacock commenced a relationship in 1996 and they were married in 1999. The Biology Department is one of the departments in the Faculty of Science and Technology and it therefore fell under the supervision of the Dean of Science and Technology. Dr. Wilson retired at the end of 1996 and Dr. Peacock retired in 2007. Once they had commenced their relationship in 1996 they notified the College.

[144] As Dean of Science and Technology Dr. Wilson had responsibility for seven departments: Geology, Biology, Chemistry, Physics, Math, Computing Science and Sport Science. Dr. Wilson stated that as Dean it was his responsibility to work closely with the Chairs of each of the departments. In addition to monthly meetings with the Chairs there were continuous discussions as part of the day-to-day management about the faculty that concerned such issues as timetabling, course allotments, budgets, etc.

[145] Dr. Wilson testified that approximately a year into his first term as Dean in 1997 there commenced an "unhappy period" in the Biology Department. The lab technicians in the Biology Department were dissatisfied with their status and working conditions. In one instance he moved a Lab Technician from the David Lam campus to the New Westminster campus. This particular technician was upset with the transfer and lodged a harassment complaint against Dr. Wilson and three other persons in the Biology Department. The Lab Technician complained that the transfer had been made in bad faith, and further, that Dr. Wilson was showing favouritism to certain members of the Biology Faculty; in particular to Dr. Adrienne Peacock, and other faculty members who were supportive of both Dr. Peacock and Dr. Wilson. Essentially, the allegation was that Dr. Wilson had formed a "clique" with Dr. Peacock and some other faculty members, whose interests were directly opposed to the Lab Technician's. In January 1998 a second Lab Technician raised the issue of the relationship between Dr. Wilson and Dr. Peacock. This complaint also alleged that the Lab Technicians were unfairly treated by Dr. Wilson and Dr. Peacock. Two other faculty members were also alleged to be part of the clique: Dr. Millis and Dr. Peitso. The allegations were that this clique controlled the department, and the result was a poisonous work environment.

[146] Dr. Atkinson, then Vice President of Student Services, was charged with conducting an investigation into the complaint under the college's Standards of Conduct Policy. He issued an initial investigative report on October 2, 1997. This report was objected to by, among others, Dr. Wilson and Dr. Peacock. After subsequent meetings, President Susan Witter, issued an amended report that was agreed to by all of the parties on March 23, 1998. The findings and recommendations of that report read as follows:

FINDINGS

1. There is no direct or indirect evidence to support the complainant's allegations under the Standards of Conduct Policy, Article 2, subsection "a".

2. However, other issues unrelated to those alleged by the complainant arose in some of the individual interviews.

   (i) There is lack of clarity regarding the relationship of the Lab Technicians IV vis-à-vis the faculty.
   (ii) There are concerns about the decision making process in the Department and concerns about the control of decision making, with some people feeling intimidated and anxious.
   (iii) Many employees perceive that the Department is controlled by a small number of faculty members with the acquiescence of the Dean.

RECOMMENDATIONS

1. That an external review of the decision making process in the Department be concluded.

2. That the College engage in the services of a facilitator to work with the Department in an attempt to resolve the interpersonal conflicts that became apparent as a result of this investigation.

3. That the Dean consult and work with the Personnel and Labour Relations Department to clarify and articulate the roles/functions of the Lab Technicians IV vis-à-vis the faculty.

4. That the Dean consult with the Personnel and Labour Relations Department regarding his responsibilities in relation to a potential personal conflict of interest.

[147] In Dr. Wilson's discussions with Dr. Witter, President of Douglas College, he noted at one point that Dr. Witter made the comment in respect to Dr. Peacock, that "at least she is not Chair of the Department [Biology]." At no time during Dr. Wilson's tenure as Dean was Dr. Peacock Chair of the Biology faculty.

[148] Dr. Wilson stated that, in general, there is no direct supervisory or administrative relationship on a daily basis with faculty members and a specific Dean. He stated that the Dean is an "Officer of the College", and that that position is excluded from the bargaining unit. However, the Dean does have "ultimate responsibility in a variety of issues affecting the faculty." He explained that the Chair of the Department is elected by faculty and they remain within the bargaining unit. They do not supervise faculty or staff but are an important part of the "collegial decision making process."

[149] Dr. Wilson reviewed different aspects of his responsibilities as Dean. These include, budgeting, downsizing, timetabling, program funding, scholarly activity, professional development, student complaints, performance evaluations, special vacation requests and promotions, among others. In all of these cases he stated that no issue arose ("none whatsoever") with respect to his relationship with his wife, Dr. Peacock. However, he did acknowledge that on one occasion he recommended approval of Dr. Peacock's educational leave. He believes that he either informed the committee responsible for educational leave, or they already knew, that Dr. Peacock was his wife; however, he could not be certain. He also acknowledged that on one occasion he sat on a selection committee with his wife.

[150] Finally, Dr. Wilson stated emphatically that he had conferred "no favour or benefit on his wife during his term as Dean"; that that would have run afoul of different "rules or processes" and that it would have been a "foolish thing to do." He stated that the College has "very transparent processes" and that it operates in an "open and consultative environment"; as a result, no one can "hide things or dispense favours." He stated that the authority of the Dean ultimately "hangs on trust." If the Dean loses the trust of the faculty they are "very quickly not able to do their job."

[151] Dr. Wilson was up for renewal in 2001 (his first five year term was from 1996 – 2001). As a result, a survey was conducted which would form part of his performance evaluation, dated November 6, 2000. The survey recorded the comments of faculty members. It was done anonymously. The comments ranged from very favourable to very unfavourable:

Des is very kind, thoughtful and generous man. I have worked for many years in education and thank goodness Des is the head of Science and Technology. He is never on my back, leaves me to do my work and knows that I will get the job done. He is not a clock watcher – is never critical of my work. We have an excellent working relationship and I have nothing but the highest respect for him. He takes an interest in my life outside the college and has often offered me very good advice (after asking for his opinion). I sincerely hope he remains the Dean of this Faculty until I retire. (S)

(page 40)

Des inherited a Faculty with deep historical divisions where there had been no accountability for years. Character assassinations, based on rumour, were common. By looking to our strengths, as in the development of the Academic Plan, and dealing directly and honestly with our weaknesses, Des has provided the leadership to allow Science and Technology to grow. Des is directly responsible for acquiring the resources to allow us to [do] our jobs, as in acquiring computers – and for initiating the first new courses this Faculty has had since the 70's.

(page 41)

There is a definite conflict of interest resulting from the Dean's personal relationship with A. Peacock. A. Peacock is opposed to Biology staff's request to have scheduled labs (for greater efficiency) and the Dean refuses to implement this much needed change. (He does not <u>have</u> to have faculty agreement; he's supposed to be in charge.) A. Peacock has a personal grudge against some staff and is able to influence D. Wilson regarding unfair treatment. (S)

(page 40)

I do not feel that Des should seek another term as dean. I do not believe that he is well suited to be in a position of supervision and power. I think that his organizational skills are lacking. I feel that he is unable to maintain objectivity. I am uncomfortable having a dean who is married to a faculty member. This marriage is meant that he is unable to supervise either his wife or the entire department of which she is a member effectively. It also calls into question every decision that is made in regards to the Biology Department. (F)

(page 41)

[152] In February 2001 the Vice President of Instruction, Dr. John McKendry, prepared a summary report of Dr. Wilson's performance. He found that the "performance appraisal and the professional regard in which you are held as a colleague of those officers who were interviewed is very good." In respect to conflict in the Biology Department the report noted "Is demonstrating an ability to manage inherited conflict within the Faculty that will take time to resolve." In respect to his style and interpersonal relationships the report noted the following: "The Dean has really improved in recent years and established very productive working relationships whereas "trust" was not formerly present"; further, "A big change in building teams; assertive behaviour has been tempered and he better assesses situations and how he affects people i.e. improved self-awareness." Vice President McKendry recommended that he be renewed for a second five year term commencing April 2001.

[153] A mid-term evaluation, was conducted during his second term, and it also included a survey, which was issued September 30, 2003. Some of the following comments were made anonymously by members of the faculty and staff:

> … cutbacks in the Faculty of S & T were handled sensitively – he listened to everyone – and sensible decisions were made.
>
> (page 12)

> Des has impressed me as a thoughtful and effective Dean. He seems fair, attentive, and clearheaded.
>
> (page 23)

> I do not know of any incident when Des has taken advantage of his position in relation to another person. His integrity and honesty are impeccable.
>
> (page 8)

> Every other department had their lab tech time cut, except biology (biased).
>
> (page 12)

> No, sensitivity is not a strong point. He will adhere to where his wife and friends are going. Period.
>
> (page 17)

> If this were the case so many faculty and staff would not have left his area or stay only by keeping a low profile. He shows favouritism to "old guard".
>
> (page 9)

[154] Vice President McKendry reviewed the survey results in a memo dated June 17, 2003. He characterized the responses in the survey as "generally satisfactory", but also as "diverse". He stated that the comments can be viewed in the context of Dr. Wilson's relations with the BCGEU and the recent budget cuts. He notes that "it is time to set history aside" and provide leadership for the future. Dr. Wilson, in memo July 2, 2003, notes that the survey results in 2003 were generally an improvement over the 2000 survey results. In response, Dr. McKendry wrote the following:

> Regarding "opinions" expressed by respondents to the survey, I give "weight" to these for, as the record shows, their effect has been to: 1] dominate the Faculty and your agenda, 2] consume a significant amount of staff time to resolve personal if not petty grievances, and 3] deflect the Faculty and Disciplines from important strategic developments. This is not to assign fault to you; however, it is a state-of-affairs that has to end … now.

[155] Finally, on September 30, 2003 Dr. McKendry wrote Dr. Witter stating he was satisfied with the mid-term evaluation and recommended an increase in Dr. Witter's salary. Dr. Witter accepted the recommendation.

[156] Dr. Wilson denied that it was Dr. Witter's view that one of the reasons for the difficulties in the Biology Department was his relationship with his spouse. He stated that his relationship with Dr. Peacock was of "marginal importance", and that in the end it was "of no consequence to the dispute."

[157] Dr. Wilson agreed that Dr. Atkinson's report did not resolve the issue in the Biology Department with the Lab Technicians. He acknowledged that it only ended when the complainant, the two lab technicians and two faculty members, either resigned, retired or moved on from Douglas College. Although Dr. Wilson agreed that a Dean, who has a spouse in one of the departments for which he or she is responsible for faces a "difficult

problem", he disagreed that Dr. Witter had "brought forward the perception [of bias] in respect to his relationship with his wife."

[158] Finally, Dr. Wilson stated that in 2004 he was responsible for a $200,000 budget cut in respect to the Habitation Restoration Program. This cut resulted in the layoff of some Lab Technicians. In respect to the self-imposed restrictions that Chairs often place upon themselves in regard to managing faculty, Dr. Wilson stated that the various Chairs and faculty members did not want to be seen to be involved in the process of layoffs of their colleagues.

S. Senior Management Team – Dr. Susan Witter and Ms. Marian Exmann
Dr. Susan Witter

[159] Dr. Susan Witter was President of Douglas College from July 1997 until 2009. Prior to this she had been Associate Dean of the University College of the Fraser Valley from 1984 – 1997. She was also previously employed at both Kwantleen College and Vancouver Community College.

[160] Dr. Witter began her evidence by relating two past experiences that highlighted her professional experience with the issue of marital status in the British Columbia college environment.

[161] The first matter concerned herself. She was a Program Coordinator at Vancouver Community College in the early 1980's. She wanted to move into administration. One of her mentors was a Dean. She applied for the position of Director of Faculty which had responsibilities for two or three programs. The position was outside the bargaining unit. Her husband, however, was a faculty member in one of the program areas for which she would have responsibility. Her mentor, the Dean, who reported to the President, would not support her application because of a potential conflict of interest between herself and her husband. After several conversations with this Dean, she made the decision to withdraw her application for the position. She subsequently applied for another position at another institution.

[162] In 1984 Dr. Witter became Associate Dean at the University College of the Fraser Valley. She reported to the Dean of Instruction who in turn reported to the President. She became aware that this Dean's wife was a faculty member in one of the programs for which he had responsibility. Thus, the Dean's wife reported to her and she in turn reported to the Dean, the faculty member's husband. She stated that she quickly became aware that the Dean's wife "enjoyed a heightened status over other faculty." As a result, the faculty repeatedly came to her to complain about such issues as the assignment of office space, new computers, holiday time and professional development time. She would always listen carefully to the complaints, consider them, but "a good majority of them [complaints] were perceptions that weren't true." However, she stated the faculty always "thought they were true." It was also difficult "to speak to her boss" about these issues. She explained that "one thing after another always arose and in the end nothing ever got resolved." Finally, over time, the College was reorganized, she was made a Dean, equal to her former boss, the Dean of Instruction, and the Dean's wife now reported to her. Dr. Witter stated that for the first time in approximately six years the department moved from one that had a "poisonous environment" to one that "thrived."

[163] Dr. Witter stated that when she arrived to assume the position of President of Douglas College in July 1997 the acting President spent some time briefing her. She recalls him referring to one "very serious issue" - a relationship between two faculty members – Dr. Wilson and Dr. Peacock. She stated however, that there were other serious issues and these issues were prioritized "ahead of that issue" (Dr. Wilson/Dr. Peacock).

[164] She explained that approximately a month after she arrived a voice mail was left from an employee in the Biology Department. The message referred to a relationship between Dr. Wilson and a faculty member that was "causing problems in terms of working relationships." The message also indicated that she would be sent a letter setting down their complaint in writing.

[165] Dr. Witter did not receive any such letter, however, she subsequently received a phone call from the Ministry of Advanced Education stating that they had received a letter

"outlining a conflict of interest between a Dean and his wife who reported to him." The letter had also been copied to the Premier and all MLAs. She was read the letter over the telephone and asked what the College was doing about the "emerging relationship between the Dean and his wife." The Ministry stated they wanted "the situation corrected." If something wasn't done the author of the letter threatened to go to the press. She received advice from both Ministry officials and the Chair of the Board of Douglas College as to how to respond. Dr. Witter said she never did receive an actual copy of the letter.

[166] Dr. Witter described several meetings with Dr. Wilson and Dr. Peacock in the months of September and October 1997. Dr. Witter stated she first outlined what had happened (phone messages) and asked for a response. She described both Dr. Wilson and Dr. Peacock as angry, and adamant that "there were no issues concerning their familial relationship."

[167] Later in the Fall of 1997 three Lab Technicians asked to meet with her. She suspected that these were the individuals who had written the letter to the Ministry. Their basic allegation was that "Adrienne [Peacock] really ran the show"; and that Dr. Peacock "made decisions that hurt the Lab Technicians and their ability to do their work." These Lab Technicians "did not trust her [Peacock] and did not trust the Dean." This issue was intertwined with the Lab Technicians wanting more responsibility over the lab work and this had resulted in a number of grievances filed by the BCGEU. Thus, the allegations at this point, Dr. Witter stated, was that "all decisions were made by a clique and the Dean", which included his wife. The particular issues included curriculum, teaching schedule, office space and working conditions. Dr. Witter stated, that although there had been pre-existing problems concerning the issues surrounding the Lab Technicians, "these problems had escalated after they [the faculty and staff] had found out about the relationship between Wilson and Peacock." Dr. Witter commented that "a lot of people believe that all the conflict arose from that relationship." She said that both faculty and staff "referred to the Biology Department as a poisonous work environment to work in." That this remained "consistent throughout many years"; and "having his wife in the Biology faculty contributed very highly to a poisonous work environment." She further stated "most people were afraid

to raise complaints" so that these complaints "went underground." Further, that there was an "underground current" and you "couldn't get to the truth sometimes."

[168] In December 1997 Dr. Witter testified that Dr. Wilson and Dr. Peacock objected to a report prepared by Dr. Atkinson as a result of complaints filed by several Lab Technicians. After several meetings the report was amended and issued in March 1998. Dr. Witter stated that Dr. Wilson did "not acknowledge that a problem existed." However, "over time Des realized that there was a growing perception problem." She said that during this period of time there were many meetings and discussions. The administration "searched for accommodations"; however, "Adrienne did not want to be moved"; "I understood that, it would isolate her." Dr. Witter stated that "no result or accommodation" was ever found. She stated that this was "the most stressful issue that I dealt with in my first four years at Douglas College."

[169] In early 1998 Dr. Witter testified that she called a meeting of all faculty and staff of the Biology Department. In her view the situation had become a "crisis". In the meeting she stated that she "laid out an ultimatum"; "that this faculty was self destructing and that unless things improved this faculty was in danger of not being a faculty at Douglas College." By this time Dr. Witter stated some things had been put in place to alleviate the issue. The Lab Technicians were moved from Dr. Peacock's responsibility. In addition, the Lab Technicians hours and schedules were reviewed. Dr. Witter stated that people started to resign, including both Lab Technicians and faculty. She conducted several exit interviews with these former employees. One example of a complaint that was raised by one of these former employees was that Dr. Peacock had joined Dr. Wilson on a trip to China. This former employee was convinced that the College had paid for her to accompany Dr. Wilson to China. Dr. Witter stated to the individual that that was not true "Adrienne had paid her own way"; however, the faculty member continued to disbelieve Dr. Witter. She stated "I couldn't make progress against the perception of favouritism."

[170] Dr. Witter stated that Dr. Wilson did not get a "stellar evaluation" in 2001. He was repeatedly accused of having an "autocratic style of management"; of being "intimidating"

and "insensitive". She stated, however, that "nothing precluded his reappointment and there were no grounds to terminate Des at that time." Further, in respect to Dr. Wilson and Dr. Peacock, "most issues were resolved"; and events were "never at the crisis that it was in 1997 and 1998." She further stated that "both Des and Adrienne were doing all they could to alleviate the perceptions in the faculty in good faith." She also felt at the time that the "faculty treated them [Dr. Wilson and Dr. Peacock] unfairly"; and that these "erroneous perceptions" amounted to "a noose around their necks unfairly." Both "Des and Adrienne tried very hard to change those perceptions over the years." As a result, Dr. Witter renewed Dr. Wilson's term for another five years.

[171] Dr. Witter went onto explain that it would have been "very difficult not to extend his contract based on perceptions that were not true." She stated that issues that were raised in some cases were "very petty"; just "simply not the truth and wondered where people got these ideas." She felt that she wouldn't have wanted to be "in either of their shoes" and that she "doesn't believe that the perception ever went away even though they tried very hard." However, by the time of Dr. Wilson's renewal things had improved.

[172] Dr. Witter stated that this issue rose once again, however, when Dr. Peacock was elected to the Douglas College Board. She said that some "distrust emerged concerning confidentiality." Therefore, the College Board decided to hold closed meetings in respect to labour relations and employment matters. As a result, no elected members from the College were present during these discussions. This was instigated after Dr. Peacock's election. After she subsequently retired the bylaw was withdrawn.

[173] In 2003 Dr. Witter stated a further conflict arose with Dr. Wilson over the issue of budget cuts. She stated that he refused as Dean to implement the proposed budget cuts. She described his conduct as "the worst performance she had seen"; that he was "rude, condescending and disrespectful." Once again, allegations arose that he was "protecting his friends", and she stated, that "all the old stuff started to come back that I hadn't heard for awhile."

[174] Finally, Dr. Wilson was extended for an additional eight months at the end of his term because the incoming Dean, who was to replace him, could not start until January

[178] Ms. Exmann, Vice President of Human Resources, also "supported the direction of abiding by the Conflict of Interest policy", which in her view precluded Dr. Wilkins' candidacy. Dr. Witter concluded "after looking at accommodation there was not one that was available." She stated that the Senior Management Team was "absolutely sure we couldn't accommodate under the policy"; and that the Senior Management Team had "made sure that there were no exceptions under the policy." However, she acknowledged in cross-examination that different colleges with different experiences may have a different perspective in respect to similar potential conflict of interest issues.

T. Marian Exmann

[179] Ms. Exmann is the Associate Vice President of Employee Relations for Douglas College. She was responsible for reviewing and revising the Conflict of Interest policy, effective October 19, 2004. Ms. Exmann was asked by Dr. Witter to revise the Conflict of Interest Policy and "include a provision with respect to employees supervising family members." This request was the result of the difficulties faced by the College in respect to Dr. Wilson and Dr. Peacock's relationship.

[180] Ms. Exmann stated that she looked at the policies at both UBC and Simon Fraser. In respect to the final language of the policy, specifically paragraph 3 (1)(d) (avoiding appointments) she stated the intent of the language was that "supervisory relationships that involved a spouse should be avoided altogether, if at all possible." In respect to paragraph 4 of the policy she testified that the intent was to direct the responsible administrator to take steps "to accommodate the conflict up to the point of undue hardship."

[181] Ms. Exmann testified that she distributed the revised policy to the Senior Management Team, to the Faculty Association, to the Education Council, to the Student Association and to the BCGEU, in order to ensure that "everyone in the college had the opportunity to provide feedback." In the end, the only feedback she received was from the Senior Management Team. The final version of this policy then went to the College Board

for information and was posted on the College website with all of the other College's administrative policies.

[182] In respect to Dr. Wilkins' candidacy for Dean of LLPA she was asked by him to write a letter of reference. They had worked together on a task force examining recruitment and retention at the College. She stated to him that she would talk to Dr. Witter to see if such a letter of reference raised a conflict of any kind. She also indicated to him that any such letter would be limited to their participation on the Joint Task Force. She did not know at this time that Dr. Wilkins was married to Dr. McCausland. Dr. Witter indicated that as long as the letter of reference "stuck to the facts of the task force" no conflict existed. Ms. Exmann provided the Letter of Reference dated January 9th, 2007.

[183] Later in January 2007, Dr. Lindsay contacted her and asked if she was aware that Dr. Wilkins and Dr. McCausland were married. She replied that she did not know of their relationship. Her next involvement arose at the Senior Management Team meeting on January 23, 2007. She stated that the team undertook a "lengthy discussion of the issue" and "of the potential conflict of interest" in respect to Dr. Wilkins candidacy for Dean of LLPA. She explained that the discussion "looked at the section of the policy that refers to accommodation to identify any steps that we could take to accommodate the conflict." This included "Dr. Wilkins' spouse reporting to another Dean"; however, after a lengthy discussion [we] "did not see that there would be a reasonable accommodation." She stated that was because of the collegial nature of the relationships in the various departments and faculties and the fact "that everything is linked in some way." This meant that even if Dr. Wilkins' spouse reported to another Dean she would still be involved in departmental matters, and as a result, "it would not work to simply remove her from the English Department." Further, the Senior Management Team felt that even if Dr. Wilkins' spouse reported to another Dean this "may resolve a few of the issues but it would not resolve the larger issue of perception." The example discussed was the cutting of budgets. For example, "if each Dean was instructed to come back with section reductions in their faculty, and if the Dean came back with proposed reductions that made cuts in numerous departments, but not in the English [Department] for example, it would be virtually

impossible to prove that the lack of cuts in English was a decision made for good reasons and not because the Dean favours English."

[184] The second scenario that was discussed was "moving the English Department in its entirety." However, this was rejected because to separate English from "communication and creative writing did not make sense; not a workable solution." She stated, therefore, that the "Senior Management Team was unanimous; there were not reasonable steps that could be taken to accommodate the conflict."

[185] In cross-examination, Exmann was asked the following question in respect to a Dean having to make budget cuts under such circumstances: "no matter how reasonable the explanation for the cuts, some people [will] nevertheless believe there was a bias or favouritism going on", to which she replied "absolutely".

III. Positions of the Parties

A. Selection Committee Processes

[186] One of the Union's principle argument is that the College violated Article 7.7.1(c)(iii) because it conducted the Selection Committee process in an arbitrary, discriminatory and bad faith manner. Indeed, it says that the entire process amounted to bad faith because even if the Selection Committee had chosen Dr. Wilkins, his candidacy had already been excluded by the Employer. Further, the College's decision was arbitrary because it was based upon, first, speculation about potentially adverse perceptions of unknown persons, and second, the past conduct of a former Dean and his spouse (Dr. Wilson and Dr. Peacock), rather than any evidence of an actual conflict of interest between Dr. Wilkins and his spouse, Dr. McCausland. The allegations of discrimination are based on alleged Human Rights violations which are addressed as a separate ground of complaint.

[187] Second, the Union argues that the College violated Article 7.7.1(c)(v) because the decision to disqualify Dr. Wilkins took place outside the context of the Selection Committee -

[188] Third, the Union claims that the College violated Article 7.7.1(f)(i) and (ii) when it unilaterally imposed the Conflict Of Interest guidelines as qualifications for the Dean, LLPA. In addition, the College changed the threshold requirements and the criteria for scoring.

[189] Fourth, the Union argues that the College made a pre-determination that Dr. Wilkins could not be included in the final interview process prior to the Selection Committee's own processes, thus violating Article 7.7.1(f)(vi).

[190] Fifth, the Union argues that the College violated Article 7.7.1(f)(viii) because there was neither a consensus, nor a majority vote, recommending Dr. Duke as Dean LLPA. Further, no public forum was held with respect to Dr. Duke's candidacy.

[191] Sixth, the Union says the College violated Article 7.7.1(xii) because when it excluded Dr. Wilkins, the result was that it precluded the Committee from either recommending him, or adequately assessing his qualifications.

[192] Finally, the Union asserts that the Selection Committee was unable to fulfill its requirement, as set out in Article 7.7.1(g)(iv), requiring it to respect Dr. Wilkins' rights under the *Human Rights Code,* because of the College's decision to exclude him from the selection process.

[193] The Employer replies that all these violations are "red herrings", designed to disguise the fact that Dr. Duke was the "superior candidate". In respect to the bad faith allegations (Article 7.7.1(c)(iii)) the College says that it communicated its position in regard to Dr. Wilkins' potential conflict of interest at the earliest possible date. It did so openly and frankly. Further, it gave Dr. Wilkins the opportunity to address the conflict of interest, but made clear, that it would ultimately not be able to accept any recommendation to make Dr. Wilkins Dean, LLPA, if the potential conflict of interest could not be addressed.

[194] Second, in response to an alleged violation of Article 7.7.1(c)(v), the Employer says that it was entitled to apply the Conflict of Interest guidelines, and not to accept any recommendation inconsistent with those guidelines.

[195] Third, in response to the alleged violations of Article 7.7.1(f)(i) and (ii), the Employer argues the Committee properly determined all the qualifications, thresholds, and criteria for the determination of the ranking and the scoring of all candidates, and that it did so either by consensus or by majority votes. Further, Dr. Lindsay, as Chair of the committee, did not unilaterally impose any standards or criteria.

[196] Fourth, in respect to the alleged violations under Article 7.7.1(f)(vi), (vii) and (viii), Dr. Lindsay had the authority to approve or not approve any of the candidates going forward.

[197] Fifth, in regard to the allegations that the majority of the committee did not recommend Dr. Duke, this was the result of the DCFA instructing its members to withdraw from the process, thus making either consensus, or a majority vote, impossible. As a result of the DCFA's actions, Dr. Lindsay recommended, and the remaining members agreed, that a public forum would not be appropriate with respect to a single candidate.

[198] Sixth, the default position of proceeding only with Dr. Duke was agreed to by all members of the committee because all other motions had resulted in a tie vote.

[199] Finally, in respect to Article 7.7.1(f)(xii), the Selection Committee was well aware of Dr. Wilkins' strength and weaknesses; and Dr. Lindsay had agreed to meet with Dr. Wilkins to discuss his candidacy, however, he did not follow up on this offer.

B. KVP Co. (1965) 16 L.A.C. 73 Test

[200] The Union argues that the conflict of interest policy is inconsistent with the collective agreement, and that in the event of any conflict between the collective agreement and any regulations made by the College, the collective agreement takes precedence (Article 1.4). Alternatively, if the conflict of interest policy is not in conflict with the collective agreement,

it has been applied unreasonably; that is because the conflict of interest policy speaks to accommodation and the College has made no such accommodations in these circumstances. Finally, the policy has been applied inconsistently; for example, in respect to Dr. Wilson and Dr. Peacock.

[201] The Employer replies that the conflict of interest policy is clear and unequivocal. Its implementation was the result of a consultation process which included faculty, administration and students. It was created in response to the circumstances surrounding Dr. Wilson and Dr. Peacock. Because of that existing relationship it was not applied retroactively, but only prospectively, and since that time no other circumstances involving the supervision of one family member over another has arisen.

C. Alleged Human Rights Code Violations

[202] The Union argues that the College violated Article 11.3 of the collective agreement, and the British Columbia *Human Rights Code* R.S.B.C. 1996 (ch.) 210 (Code), when it excluded Dr. Wilkins' candidacy for Dean, LLPA because of his marital status. Further, it says that the College's Conflict of Interest p

[203] The Union claims that *prima facie* discrimination has been established because Dr. Wilkins' marital relationship was a primary factor in the College's declaration of his

occupational requirement test because it failed to accommodate Dr. Wilkins, both under the

[204] The Employer replies that the Union has failed to demonstrate *prima facie* discrimination because it cannot show that someone "no better qualified than Dr. Wilkins, but lacking the criteria of marital status, was appointed Dean, LLPA."

[illegible] Further, the Employer has not met the

[205] Alternatively, it states that if *prima facie* discrimination has been established, the College's discrimination was justified as a bona fide occupational requirement. Anti-nepotism policies, such as the conflict of interest policy in this case, are justified as a bona fide occupational requirement. The College's policy is therefore rationally connected to the position of Dean, LLPA, that it was adopted in good faith, and that no accommodation was possible because the very nature of the duties of Dean LLPA made his conflict of interest "irreconcilable".

[206] The Union relies on the following authorities: *Langara College v. Langara Faculty Association*, [2005] BCCAAA No. 200, Award No. X-026/05 (D. McPhillips); *British Columbia (Public Service Employee Relations Commission) v. BCGEU*, [1999] SCJ No. 46 (Meiorin); *Central Okanagan School District No. 23 v. Renaud*, [1992] SCJ No. 75; *Vancouver Police Board and Teamsters Local 31* (2002), 112 LAC (4th) 193 (R. Germaine); *Varma v. G.B. Allright Enterprises Inc.*, [1988] BCCHRD No. 14 (L. Barr); *B. v. Ontario (Human Rights Commission)* 2002 SCC 66; *Lang v. Canada (Employment and Immigration Commission),* [1990] CHRD No. 8, No. TD 8/90 (W. Kushneryk); *Canada (Employment and Immigration Commission) v. Lang*, [1991] 3 FC 65 (CA); *Chiang v. Natural Sciences and Engineering Research Council*, [1992] CHRD No. 3, No. TD 3/92 (S. Lederman); *Cashin v. Canadian Broadcasing Corporation*, [1988] 3 FC 494 (CA); *Kamsack (Town) and CUPE Local 1881* (2000), 89 LAC (4th) 153 (B. Pelton); *Victoria Times Colonist v. Victoria-Vancouver Island Newspaper Guild Local 30223*, [2006] BCCAAA No. 54 (R. Germaine); *Re: District of Guysborough Municipal School Board and CUPE Local 1116* (1982), 6 LAC (3d) 276 (J. MacLellan); *Cameron v. East Prince Health Authority*, [1999] PEIJ No. 44 (TD); *Down (Re)*, [1999] BCJ No. 1809 (SC in Bankruptcy); *Middelkamp v. Fraser Valley Real Estate Board*, [1993] BCJ No. 2965; *Middelkamp v. Fraser Valley Real Estate Board*, [1993] BCJ No. 1846 (CA); *Farmer Construction Ltd. (Re)*, BCLRB Decision No. B321/2003 (J. Hall); *International Union of Operating Engineers, Local 882 v. Burnaby Hospital Society*, [1997] BCJ No. 2775 (CA); *PPG Industries Canada Ltd. v. Canada (Attorney General)*, [1976] 2 SCR 739; *Ontario (Liquor Control Board) v. Ontario (Ontario Human Rights Commission)*, [1988] OJ No. 167 (High Ct. of Justice); *British Columbia Ferry Corporation and British Columbia Ferry and Marine Workers Union and Nicole Bowring and Janet Roberts*, BCLRB Decision No. B351/95 (L. Parkinson); *Ottawa (City) and*

CUPE Local 503 (2001), 102 LAC (4th) 160; *Robichaud v. Canada (Treasury Board)*, [1997] S.C.J. No. 47; *Deware v. Kensington (Town)*, [2003] PEIHRPD No. 1 (R. Noonan); *Ayangma v. Eastern School Board*, [2005] PEIHRBID No. 1 (R. Montigny); *Kickham v. Charlottetown (City)*, [1986] PEIHRBID No. 3 (J. Clark); *Grover v. Canada (National Research Council)*, [1992] CHRD No. 12, No. TD 12/92; *Re Board of School Trustees School District No. 39 (Vancouver) and CUPE Local 407* (1987), 30 LAC (3d) 257 (M. Thompson); *Jamieson v. Victoria Native Friendship Centre*, [1994] BCCHRD No. 42 (T. Patch); *O'Connell v. Canadian Broadcasting Corp.*, [1988] CHRD No. 9, No. TD 9/88.

[207] The Employer relies on the following authorities: *Oxley v. British Columbia Institute of Technology*, 2002 B.C.H.R.T. 33; *Bosi v. Township of Michipicoten et al*, [1983] 4 C.H.R.R. D/1252 (Ontario Board of Inquiry); *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] S.C.J. No. 79; *Vancouver Community College* (1997), 66 L.A.C. (4th) 73 (Gordon); *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)*, [1999] 3 S.C.R. 3; *Foerderer v. Mission Association for Community Living*, [1994] B.C.C.H.R.D. No. 25; *Greater Victoria Public Library* (2004), 135 L.A.C. (4th) 38 (Jackson); *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro- Québec, section locale 2000 (SCFP-FTQ)*, 2008 S.C.C. 43; *Sault St. Marie Board of Education and Sault St. Marie Women Teachers' Association* (1991), 22 L.A.C. (4th) 439 (Burkett); *Sudbury Catholic District School Board* (2006), 156 L.A.C. (4th) 54 (Burkett); *Langara College*, [2005] B.C.C.A.A.A. No. 200 (McPhillips); *Malaspina University College*, [2002] B.C.C.A.A.A. No. 14 (Burke); *Victoria General Hospital* (1991), 21 L.A.C. (4th) 185 (Slone); *Insurance Corp. of British Columbia v. Office & Professional Employees' International Union, Local 378 (McFadden Grievance)*, [2001] B.C.C.A.A.A. No. 285 (Germaine).

IV. Analysis and Decision

[208] There are three issues to be examined: first, whether the College's involvement in the Selection Committee's process amounted to bad faith or arbitrariness; second, does the College's Conflict Of Interest policy meet the KVP Test; and third, did the College's decision to declare Dr. Wilkins ineligible for the Dean LLPA position on the basis of

marital status, amount to *prima facie* discrimination, under the *Human Rights Code*, and if so, was this discrimination justified because it was based on a bona fide occupational requirement. In respect to this last issue I will address Court, Human Rights Tribunal and Labour Arbitration decisions.

A. The Selection Committee's Process for Dean, LLPA

[209] Article 7.7.1, it is fair to say, is a provision not commonly found in collective agreements. Its purpose is to establish joint selection committees composed of faculty, who are members of the Union (DCFA), and members of Management, to select excluded administrators, such as Deans and Vice-Presidents. This Article is comprehensive, addressing the scope, authority, structure and functions of these Selection Committees. The Article totals approximately forty sections and subsections over some six pages of the collective agreement. I will not reproduce the entire Article but simply those specific sections relied upon by the Union in its allegations that the College has acted in a bad faith and arbitrary manner.

[210] Article 7.7.1(b)(ii) states that the Selection Committee shall have an equal number of persons from the DCFA and management. The Committee is established by the person responsible for supervising the vacant administrative position (Article 7.7.1(c)(i)). In this case the Committee was established by Dr. Lindsay who supervises all Deans. The faculty members appointed are drawn from the area that the successful candidate will be assigned to supervise (Article 7.7.1(c)(ii)).

[211] The Administrator, Dr. Lindsay, chairs the meetings of the Selection Committee in an ex-officio capacity – voice, but no vote. Her role is to "facilitate and administer the proceeding" and to "ensure that due process is followed and conflicts of interest are avoided". Due process is defined as the absence of "arbitrary, discriminatory or bad faith" conduct (Article 7.7.1(c)(iii)).

> The administrator will chair the meetings of the Selection Committee in an ex officio capacity, i.e., without a vote. The

> administrator will facilitate and administer the proceedings and ensure that due process is followed and conflicts of interest are avoided. Due process shall mean that the selection process is not conducted in a manner that is arbitrary, discriminatory or in bad faith.

[212] A staff person (BCGEU member) can be added to the committee who would also have a voice but no vote (Article 7.7.1(iv)). The Committee's work must be done in an "inclusive, collaborative basis." All "significant decisions" are to be done within the context of the Committee unless otherwise agreed to (Article 7.7.1(c)(v)).

[213] Article 7.1.1(d) deals with temporary vacancies which did not arise in these proceedings. Article 7.7.1(e) deals with permanent vacancies of which the Dean, LLPA is one such position. No issues arose under this section of the Article.

[214] Many of the issues raised by the Union arose under Article 7.7.1(f), which addresses the "Functions" of the Committee, and Article 7.7.1(g) which deals with the Selection Committee's "Procedures".

[215] Under Article 7.7.1(f)(i) the Selection Committee is responsible for defining the "qualifications and criteria" required for the position. This includes establishing a Threshold which candidates must meet in order to advance to the final interviews (Article 7.7.1(f)(ii)). The Committee then posts and advertises the position (Article 7.7.1(f)(iii)). This is followed by a review of all applications and a selection of candidates for the initial round of interviews (Article 7.7.1(f)(iv)). The interviews must be conducted in accordance with the agreed upon "methods of evaluating, prioritizing and weighing qualifications and criteria." (Article 7.7.1(f)(iv). If there is a disagreement as to whether a particular candidate should be included in the interview process the Chair has the prerogative of deciding whether or not to include the candidate; however, the Chair must provide written reasons to the Committee for their decision (Article 7.7.1(f)(vi)). There are normally two rounds of interviews followed by a public presentation (Article 7.7.1(f)(vii)). The Selection Committee will make a recommendation by "consensus", and if consensus is not possible, a majority vote must be obtained in order for a recommendation to go forward (Article 7.7.1(f)(viii)). A written rationale must accompany the recommended appointment.

[216] Where there is a tie vote, the Committee forwards their respective decisions in writing and the Administrator reviews the votes and "makes the final decision". The Administrator or Chair then reduces their final decision and their reasons in writing to the committee (Article 7.7.1(f)(ix)). If no candidate is deemed qualified the selection process recommences (Article 7.7.1(f)(x)). Where an internal candidate hasn't been recommended the Committee will state the qualifications and criteria that were not met by that internal candidate (Article 7.7.1(f)(xii)). Members of the Committee must observe "strict confidentiality" (Article 7.7.1(g)(iii)) and must "respect *Human Rights Code* standards in evaluating candidates." (Article 7.7.1(g)(iv))

[217] If an "actual or reasonably apprehended conflict of interest exists" the Chair must require the appointee in question to step down from the Selection Committee. A conflict of interest can be raised by any member of the Selection Committee or by any applicant for the posted position. The conflict of interest guidelines that pertain to this issue is the same policy that arises in respect to the issues before this Arbitration Board (Douglas College Policy A02.01.01. (Article 7.7.1(g)(v)).

[218] Finally, and most importantly, the Selection Committee's authority is only "one of recommendation" (Article 7.7.1(b)(iv)).

> In all cases the Selection Committee's authority, in accordance with this article is one of recommendation.

B. Bad Faith and Arbitrariness

[219] In April 2006 the term of Dean McCallum expired. In the Fall of 2006 Dr. Lindsay commenced the search for a new Dean, LLPA. Dr. Lindsay, the Vice President of Education, is responsible for overseeing the College's six faculties; as a result, all Deans report to her. She established the Selection Committee for the search of the new Dean, LLPA, appointing four management representatives: Dr. Compton-Smith – Director of Library, Dr. Cowin – Director of Institutional Research; Dr. Denton – Dean Humanities and Social Sciences; Dr. James Dean – Department of Student Development. The DCFA

appointed four members from the LLPA faculty: Dr. Caldwell (Music Department); Dr. Lysell (Theatre); Dr. McLaughlin (English) and Dr. Warden (Creative Writing). Barbara Sekhon, a BCGEU member was appointed, having voice but no vote. Dr. Lindsay was Chair of the Committee and she also had voice but no vote.

[220] Dr. Lindsay was the most experienced member on this Selection Committee, having gone through the process herself when appointed a Dean, and also having sat on at least five other Dean Appointments. Dr. Denton, Dean, Humanities and Social Sciences, had also had prior experience. However, all the DCFA member appointments were serving for the first time on a Dean Selection Committee.

[221] There is no dispute that Dr. Lindsay properly structured the Committee; for example, the correct number of persons were appointed from both the faculty and from management; it was clear who was and who was not entitled to vote. Further, in the early meetings, especially those on October 30, November 2 and November 8, 2006, the Committee was able to decide by consensus the criteria, qualifications, responsibilities and core competencies for the Dean, LLPA position. The ad was drafted and the Committee developed questions that would be asked of each of the candidates. In addition, at the November 15, 2006 meeting, the Committee developed a Threshold document that determined the requirements that candidates would have to meet in order to proceed to the second round of interviews. They also established an agreed upon scoring system. A deadline of January 9, 2007 was set as a closing date for applications. The Committee had agreed to conduct a resume review and each member was to develop their own short list, setting down their top six candidates.

[222] Thus, the establishment of the Committee, and the very important task of setting the criteria and qualifications for the Dean, LLPA were all developed by consensus to this point. Therefore, there is no evidence of any bad faith or arbitrariness on the part of any members of the Committee. Indeed, the allegations of bad faith or arbitrariness arise only when there is an eventual split over Dr. Wilkins' candidacy; a split that divided Union and Management appointees.

[223] At the January 17, 2007 meeting a short list was developed which included; Dr. Duke, Dr. McCallum, Dr. Gess and Dr. Wilkins. The two leading candidates were Dr. Duke and Dr. McCallum, followed by Dr. Gess, Dr. Duke and Dr. McCallum had the most administrative experience; indeed, Dr. McCallum had been the incumbent Dean for ten years. Dr. Duke and Dr. McCallum also received the highest scores. As Dr. Denton stated "Duke was noncontroversial, supported by everyone." In respect to Dr. Wilkins, Dr. Denton stated, "everyone spoke well of Peter, doing a good job as Chair." However, she, along with Dr. Lindsay, noted Dr. Wilkins' lack of administrative experience. Dr. Lysell, the DCFA representative, also questioned whether Dr. Wilkins had sufficient budget experience.

[224] Two other matters arose at the January 17, 2007 meeting. First, Dr. Lysell as the DCFA representative, stated that it was the Union's view that Dr. McCallum was ineligible to be a candidate for Dean, LLPA. The reason was that the collective agreement limited a Dean to a maximum of two five year terms. It was also at this meeting that Dr. Wilkins' potential conflict of interest was first raised. The issue was that his wife was an instructor in the English Department, a Department for which he would have responsibility as Dean, LLPA.

[225] Between January 18 and 22, 2007, Dr. Lindsay conferred with President Witter and Ms. Exmann, reviewed the College's conflict of interest policy, sought legal advice and obtained two arbitration awards. Dr. Lindsay informed the Selection Committee on January 22, 2007 that management required more time to assess a potential conflict of interest in respect to Dr. Wilkins. At this meeting the committee shortlisted Dr. Wilkins; however, Dr. Lindsay thought that this was a temporary listing, dependent upon the review of his potential conflict of interest. If he was found to be in conflict of interest he would be removed from the list, or given the opportunity to remove any potential conflict of interest.

[226] The Senior Management Team met on January 23, 2007 and concluded that there was a conflict of interest, and further, that it could not be accommodated. Dr. Lindsay related this conclusion to the members of the Selection Committee in an email dated January 24, 2007. There was disagreement between the DCFA members and Dr. Lindsay

as to what the conflict of interest policy required and how it was to be applied. It is fair to say that the DCFA members thought that an accommodation was possible.

[227] At the meeting of January 29, 2007 Dr. Lindsay reiterated the Senior Management Team's view that Dr. Wilkins was ineligible as a candidate for Dean, LLPA because of the conflict of interest arising from his wife being an instructor in the English Department. Once again, there was disagreement with the DCFA members on the Committee including Dr. Lysell, Dr. Wharton and Dr. McLaughlin.

[228] Thus, the DCFA's allegations that the College's conduct amounted to bad faith and arbitrariness really begins with this period of January 18 to 29, 2007, in which the College concludes that Dr. Wilkins is in an "irreconcilable" conflict of interest, and as a result, he is ineligible as a candidate for the LLPA Dean's position. The DCFA says that this "significant decision" was not done in the context of the Committee (Article 7.7.1(c)(v)); further, that the College unilaterally, and after the fact, imposed the Conflict Of Interest guidelines as an additional criteria for the selection of Dean LLPA, a contravention of Article 7.7.1(f)(i) and (ii). It says that the original criteria selected by the Committee could only be varied by agreement of the Selection Committee (Article 7.7.1(f)(ii)(d)).

[229] Article 7.7.1 addresses the issue of conflicts of interest in two separate sections. One is in Article 7.7.1(g)(v) in respect to conflicts of interest that may arise amongst the Selection Committee members themselves. Any such conflicts can be raised by any member of the Selection Committee and by any candidate. It is the Chair of the Committee that must determine whether any conflict of interest exists in accordance with the Douglas College policy – the same policy which is in dispute in this matter. If so, the Chair asks any such member to step down.

[230] The second area where a conflict of interest is set out is in Article 7.7.1(c)(iii), which deals with the Chair's general responsibility is to ensure that due process is followed and "conflicts of interest are avoided". This provision is broader than the prior section which deals with potential conflicts of interest amongst only the members of the Committee. I conclude that this provision charges the Chair with ensuring that any and all conflicts of

interest are to be avoided. Indeed, it obligates not only the Chair, but all members of the Committee to ensure that no prospective candidate is in a potential conflict of interest should they assume the position of Dean. Thus it was quite proper for Dr. Compton-Smith to raise the potential conflict of interest of one of the prospective candidates, in this case Dr. Wilkins. Further, it was a reasonable exercise of Dr. Lindsay's role as Chair of the Committee to investigate the potential of a conflict of interest, obtain legal advice and confer with the Senior Management Team of the College. Her discussions with the Senior Management Team were an essential part of her responsibilities to determine whether or not Dr. Wilkins' candidacy fell within the terms of the College's Conflict Of Interest policy.

[231] Further, the Committee was obligated to ensure that all the College policies were considered in the selection of candidates. The Senior Management Team of the College is especially entrusted to ensure that no employee is placed in a position where they would be in a conflict of interest. Dr. Lindsay made clear the Senior Management's decision at the first opportunity. She was frank and forthright in informing the Committee of the reasons for the College's determination that Dr. Wilkins' was ineligibile under the Conflict Of Interest policy.

[232] The DCFA took a different view to the College determination of Dr. Wilkins' potential conflict of interest. It was clear that the members of the Committee on both the Union and Management side were uncertain about the terms of the policy and its application. Generally, the DCFA members took the position that Dr. Wilkins should be accommodated; either he would undertake certain actions to remove the conflict or the College could structure the position in such a way that the conflict could be avoided. The College on the other hand viewed the conflict as irreconcilable.

[233] Both sides, I conclude, held their views in good faith. Every member of the Committee attempted to understand and apply the policy; however, there were legitimate differences with regard to how the policy worked. I therefore conclude, that neither the conduct of the College, nor the conduct of the DCFA members, amounted to bad faith, or arbitrariness, simply because their views differed as to whether or not Dr. Wilkins was in conflict of interest, and if so, whether he could be accommodated. It may be stating the

obvious, but the Senior Management Team was entirely within its rights to consider the Conflict Of Interest policy, to arrive at a decision, and to communicate their decision to the Selection Committee.

[234] The interviews took place between February 5 and 7, 2007 and Dr. Wilkins was interviewed along with the other shortlisted candidates. There were no objections raised by any members of the Committee prior to the interviews in respect to the rankings and scoring. Questions had been devised and were asked and the nine point scoring system, all of which had been arrived by consensus, was applied to the interviews by all the Selection Committee members.

[235] On January 30, 2007, when Dr. Lindsay and Dr. Wilkins had met, Dr. Lindsay had related the College's view that he was in a conflict of interest. At that time Dr. Wilkins wondered whether the College's decision would affect his performance at the subsequent interviews. However, in his testimony, Dr. Wilkins stated that he felt the "interview was conducted properly – nothing improper". He said the only exception was the "elephant in the room", a reference to his marital status.

[236] Indeed, Dr. Wilkins' interview seems, if anything, to have enhanced his candidacy.

[237] In the scoring of the first interview, Dr. Duke came first (7.048077), Dr. Gess second (6.634615) and Dr. Wilkins third (6.548077). At the February 14, 2007 meeting of the Selection Committee, Dr. Lindsay moved a motion that the top two candidates move to the second round of interviews (Dr. Duke and Dr. Gess). The motion passed seven (7) to one (1).

[238] The following day, February 15, 2007, there were a series of emails that began to raise objections to the scoring system. As Dr. Denton stated, the difference between Dr. Wilkins and Dr. Gess was "very close". Dr. Wharton suggested the highest and lowest scores should be dropped. Dr. McLachlan, who had been the sole vote against the previous day's motion, thought that the conflict of interest issue was affecting Dr. Wilkins' scores;

further, she thought that the selection process ought to be stopped and the conflict of interest sorted out.

[239] Dr. Wilkins had not only had done well in the interview, but he was also an internal candidate, and Dr. Wharton felt that it was important to "advance someone from inside the College." There were also disagreements over the criteria of administrative and budget experience. Dr. Lindsay and Dr. Denton felt that this experience was important. Dr. Wharton admitted he gave it very little weight, and Dr. McLachlan admitted that she gave it no weight because she said it didn't make it in as one of the criteria. This was a reference to the three to five years experience which was contained in the original job description. Dr. McLachlan had also noted that no single candidate had obtained a score of between seven and nine on all five competency areas. Dr. Lindsay had finally stated that those with five or less on a particular criteria should not move forward in the interview process.

[240] In the end, Dr. Lindsay replied in an email of the same date (February 15, 2007) that she would neither revisit the scoring nor the vote to send two persons forward to the second round of interviews.

[241] In summary, Dr. Wilkins had done well in the first interview and placed a close second to Dr. Gess. He was an internal candidate. It was clear that the DCFA members were in favour of his candidacy. As a result, the scoring system became the focus of their objections. However, I conclude that it was a reasonable decision for Dr. Lindsay to stay with both the original scoring system and the vote that recommended that the top two candidates go forward to the second round of interviews.

[242] On February 16, 2007, Dr. Gess withdrew his candidacy and an emergency meeting was convened on February 20, 2007. Dr. Lindsay stated at the meeting that there were four options: first, advance Dr. Wilkins, notwithstanding the College's position; second, move the fourth place candidate (Kristiansen) forward; third, proceed with only one candidate; fourth, recommence the search.

[243] Dr. Lysell moved that Dr. Duke and Dr. Wilkins go forward to the second round. This motion ended in a tie vote, and therefore, was defeated. Dr. Lindsay then moved a motion that the fourth place candidate (Kristiansen) and Dr. Duke go forward. This also ended in a tie vote, and therefore was defeated.

[244] Dr. Lindsay testified that in her view it was "bad faith" to attempt to move Dr. Wilkins' candidacy forward due to the College's declaration of ineligibility. Dr. James stated that it would be a "sham" to proceed with Dr. Wilkins to a second interview, and to a public forum if he could not be hired. At the previous meeting of February 14, 2007, Dr. Lysell had also expressed the view that it would be bad faith to proceed with Dr. Wilkins if he could not be hired.

[245] An important factor in explaining the differences in voting among the Selection Committee members was their different views concerning the application of the Conflict Of Interest policy to Dr. Wilkins. As I have stated previously, neither the member's respective views, nor their votes, amounted to bad faith or arbitrariness. The "default position", that a single candidate would move forward, in this case Dr. Duke, was the eventual outcome. As Dr. Lindsay testified, and as the minutes revealed, no other motion was brought forward and no one opposed this default position. Dr. Denton testified that she was initially in favour of recasting the search but agreed to bring forward Dr. Duke. She also stated that no other suggestion was advanced and there were no further disagreements in regard to this default position.

[246] Indeed, Dr. Duke was interviewed by all the Selection Committee members on February 28, 2007. The entire Committee asked the agreed upon questions. However, at the end of the interview, all four DCFA members walked out. Dr. Lysell stated that this was under the direction of the DCFA. In a letter of the same date (February 28, 2007) the DCFA wrote that it instructed its members to walk out of the Selection Committee's processes because the exclusion of Dr. Wilkins' candidacy was arbitrary, discriminatory and in bad faith.

[247] The remaining management members of the Selection Committee discussed Dr. Duke's performance and decided to recommend him. In view of the circumstances, Dr. Denton stated that it would have been awkward for Dr. Duke to do a public forum. Dr. Lindsay decided that there should be no public forum. She asked that the Committee confirm its recommendation in writing and it did so.

[248] The DCFA argues that there was no consensus or majority vote for the selection of Dr. Duke as Dean, LLPA as is required by Article 7.7.1(f)(viii). The vote took place on February 28, 2007 the very day that the DCFA members withdrew from the Selection Committee. The DCFA is not at liberty to withdraw its members from the Selection Committee and then argue that the subsequent vote did not comply with Article 7.7.1(f)(viii). No consensus or a majority vote was possible once the DCFA members decided to walk out. Had they stayed, and there was a tie vote, they might have been in a better position to make such an argument.

[249] Finally, the DCFA argues that the internal candidate, Dr. Wilkins, was not informed of the criteria of qualifications which he lacked for the position as is required by Article 7.7.1(f)(xii). After the second round of interviews Dr. Lindsay contacted Dr. Wilkins, inviting him to meet with her to discuss the strengths and weaknesses of his application. Dr. Wilkins did not take her up on that offer.

[250] It is helpful to examine the definition of bad faith. These definitions do not include legitimate differences or differences in points of view.

[251] Blacks Law Dictionary, 9th Edition, 2004 defines bad faith as follows:

> bad faith (17c) 1. dishonesty, belief or purpose

[252] Ballantyne's Law Dictionary 3rd Edition, 1969 describes bad faith as follows:

> Bad faith: antithesis of good faith; a state of mind affirmatively operating with furtive design, with a motive of self interest, or ill will or for an ulterior purpose.

[253] I conclude that Dr. Lindsay chaired all of the meetings in good faith; and indeed, in the face of some considerable difficulties, her experience and knowledge proved invaluable. Each member of the committee, while they may have held different views of Dr. Wilkins candidacy, or the interpretation of the conflict of interest policy, or the scoring system, still attempted to do their best throughout the selection process.

[254] It should be remembered that the Selection Committee is a consultative committee. Dr. Lindsay has the authority to refuse to send a candidate to either the first or second round of interviews (Article 7.7.1(f)(vi)). Further, she also has the right, as she testified, to reject any recommendation made by the Selection Committee and is empowered to make the final decision as to who will be hired as Dean (Article 7.7.1(f)(ix)).

[255] Dr. Duke was ultimately the successful candidate and is currently the incumbent Dean, LLPA. There was no question that his administrative experience was greater than Dr. Wilkins'. Throughout the hearing there was a dispute as to the weight to be given to Dr. Wilkins' administrative experience. Dr. Lindsay was of the view that he did not comply with the minimum requirements of three to five years as he had only been Chair of the English Department for a year and a half. His DCFA experience was considered by Dr. Lindsay as a "stretch" in meeting this administrative requirement. Regardless of that dispute, Dr. Wilkins himself hoped that his DCFA experience would permit him to "squeak by" in respect to the administrative experience requirement; and that other things, as he stated, would "tip me over". For example, his participation on the Humanities and Social Sciences Committee gave him a close look at how administrators were selected. He was surprised at how similar the questions and the scoring system were to the Dean, LLPA process. He also knew what the "successful answers were".

[256] All of this, is of course, quite legitimate in terms of his preparation for applying for Dean, LLPA. As a result, he decided he "would give it a shot", and that if he didn't get it "this time", the interview process would prove "useful to go through for later". He also stated that he had decided that he was going to "pursue the contest to the very end", and that if he were the "winner", it would force Dr. Lindsay to "say no".

[257] I accept Dr. Wilkins evidence that he was pursuing the position of Dean, at this point in his career, for a number of reasons: first, as a strategy to gain experience in going through a Dean selection process; second, he entertained a serious hope that there might be a chance of obtaining the position; and third, as a matter of principle, he wanted to challenge the College's ruling in respect to the conflict of interest issue.

[258] The College has, as I have found, conducted the Selection Committee in good faith. It had the discretion to accept or reject the recommendation of the Selection Committee. In this case the Selection Committee had clearly made a decision to go with someone who has more administrative experience than Dr. Wilkins, and continually scored higher than Dr. Wilkins throughout the process.

[259] I therefore conclude that Dr. Duke, on the merits, was the superior candidate, and the College's hiring of him, properly fell within its management rights. Although the College, it may be argued, only had to meet the test of good faith in respect to the Selection Committee process, I conclude, on all the evidence, that they also met the higher test of reasonableness, both in respect to their conduct and to their selection of Dr. Duke as Dean, LLPA.

[260] But that does not end the matter. Before me is not just an individual grievance but also a policy grievance. Given the history of this issue at the College, the dispute is not simply about Dr. Wilkins and his application for the Dean, LLPA position. Rather, it is about the application of the College's anti-nepotism policy to the position of Dean, generally, at Douglas College.

C. Alleged Human Rights Code Violations

(a) Prima Facie Discrimination

[261] The DCFA argues that the College violated Section 13 of the *Human Rights Code* RSBC 1996 c.210 (Code), and Article 11.3 of the Collective Agreement, when it discriminated against Dr. Wilkins in respect to his application for Dean, LLPA, based on his marital status.

[262] Section 13 of the *Human Rights Code* provides in part as follows:

> 13(1) A person must not
>
> a) refuse to employ or refuse to continue to employ a person, or
> b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the … marital status … of that person
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

[263] And Article 11.3(a) of the Collective Agreement provides as follows:

> Human Rights/Discrimination
>
> a) With reference to the selection of faculty or to the rights, benefits or obligations of faculty, this agreement will be administered in a manner that is fair and reasonable and without discrimination, except where such discrimination is based on bona fide occupational requirements.

[264] The College replied that the DCFA has failed to establish a *prima facie* case of discrimination against Dr. Wilkins. It relies upon the three part test set out in *Oxley vs. British Columbia Institute of Technology*, [2002] BCHRT 33, where the tribunal noted that in order to establish *prima facie* case discrimination in the employment context, a complainant will usually be required to prove the following:

> In Shakes v. Rex Pak Limited (1982), 3 C.H.R.R. D/1001, the Ontario Human Rights Board of Inquiry set out a test for establishing a prima facie case in the employment context, as follows:
>
> ….
>
> a) that the complainant was qualified for the particular employment;
> b) that the complainant was not hired; and
> c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human

> rights complaint (i.e. sex, religion, race, etc.) subsequently obtained the position. (at D/1002)
>
> (para 69)

[265] The B.C. Human Rights Tribunal also cited the Canadian Human Rights Decision *Israeli vs. Canadian Human Rights Commission* (1983) 4 C.H.R.R. D/1616 (C.H.R.T.), which offers a slight modification of the test (the Employer continues to seek applicants with the complainant's qualifications). The B.C. Tribunal stated that neither test should be "rigidly applied" and that *prima facie* discrimination should be ultimately determined under the Supreme Court of Canada's decision in *O'Malley v. Simpson Sears Ltd.* (1985) 7 C.H.R.R. D/3102, which essentially asks the following question: is the evidence sufficient to justify a verdict in favour of the complainant in the absence of an answer from the respondent?

[266] In applying the test in *Oxley, supra,* the Employer concedes that if the Selection Committee had actually recommended Dr. Wilkins, and Dr. Lindsay had been required to veto the Committee's recommendations, then that would have amounted to *prima facie* discrimination. However, since the Selection Committee did not recommend Dr. Wilkins, and it was clear throughout the process that Dr. Duke was the superior candidate, it is not possible, therefore, for the DCFA to establish *prima facie* discrimination, because it cannot show that someone, "no better qualified" than Dr. Wilkins, but lacking the distinguishing feature of having a spouse in the LLPA faculty, was appointed to the Dean's position.

[267] In a more recent restatement of the test, the B.C. Court of Appeal in *Health Employer's Association of British Columbia v. British Columbia Nurses Union,* 2006 BCCA 57 set out the following three factors that must be established in determining whether *prima facie* discrimination exists:

> Discrimination is defined in s.1 of the Human Rights Code to include conduct that offends s.13(1)(a). A finding that there was a "refusal to continue to employ a person" on the basis of a prohibited ground is discrimination. Therefore, under s.13(1)(a), to establish a prima facie case of discrimination an employee must establish that he or she had (or was perceived to have) a disability, that he or she received adverse treatment, and that his or her disability was a factor in the adverse treatment: Martin v. 3501736 Inc (c.o.b. Carter Chevrolet

> Oldsmobile), 2001 B.C.H.R.T.D. No. 39, 2001 B.C.H.R.T. 37 at para. 22 (Martin).
>
> (para 38)

[268] However, in respect to family status (and I will apply, for the purposes of this decision, the same principles to marital status) the B.C. Court of Appeal has decided that a higher standard applies when determining *prima facie* discrimination. In *Health Sciences Association of British Columbia vs. Campbell River and North Island Transition Society,* [2004] B.C.J. No. 922 the Court stated the following:

> In the usual case where there is no bad faith on the part of the employer and no governing provision in the applicable collective agreement employment contract, it seems to me that a *prima facie* case of discrimination is made out <u>when a change in a term or a condition of employment imposed by an employer results in serious interference with a substantial parental or other family duty or obligation of the employee.</u> I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a *prima facie* case.
>
> (emphasis added) (para 39)

[269] The underlying rationale for this higher standard may involve several different considerations: first, not every distinction or every negative impact experienced by a member of a protected group amounts to discrimination *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,*2007 SCC 4, [2007] 1 S.C.R. 161, at paras. 47 – 50.

[270] Second, although Dr. Wilkins treatment was based on differences unrelated to his individual merits, the potential discrimination faced by him did not fall within the forms of historical discrimination faced by longstanding, disadvantaged and vulnerable groups (i.e. gender and race); nor was the primary purpose of that discrimination to demean him.

[271] Third, marital and family status may raise differences between competing valid public policies within the employment context. Thus, similar to the *Health Sciences Association, supra*, decision, the B.C. Human Rights Tribunal in *Miller v. B.C.T.F* (No. 2)

2009 B.C.H.R.T. 34, stating that it was bound by the B.C.C.A. decision in *HSA* in the employment context, but distinguishing it outside that context, stated the following:

> In the employment context, almost every work-related requirement has the potential to interfere, to some degree, with an employee's family obligations. Yet there are obvious societal and economic reasons why employers must be able to require their employees to work, and to do so at certain times and in certain places, regardless of the fact that employees might have conflicting childcare or other family responsibilities. Something more is necessary, in that context, to establish discrimination, and the Court of Appeal defined that something more as a "serious interference with a substantial parental or other family duty or obligation". This is a way of defining, in that context, what is necessary to establish discrimination in the **substantive or purposive sense**.
>
> (emphasis added) (para 26)

[272] Therefore, in order to establish *prima facie* discrimination in the employment context the complainant must show that there was a significant interference with a substantial familial obligation; thus the discrimination must be "substantive or purposive". The Tribunal decided to add this additional factor to the traditional three part test.

> In order to establish discrimination in the substantive or purposive sense in the circumstances of this case, Ms. Miller must demonstrate that:
>
> a. she is a member of a group characterized as having a particular "family status";
> b. she experienced adverse treatment;
> c. that adverse treatment was related to her family status; and
> d. it constituted discrimination in the substantive or purposive sense.
>
> (para 30)

[273] I will for the purposes of this decision adopt this four part test. (However, discrimination on the basis of marital or family status that does not involve the weighing of competing social values would continue to be addressed under the traditional three part test – a lower *prima facie* standard.)

[274] Does *prima facie* discrimination in these circumstance stand or fall on the fact that the Selection Committee did not make a formal recommendation that Dr. Wilkins be appointed Dean of LLPA; and therefore, Dr. Lindsay did not have to exercise any final veto over such a recommendation? I have concluded that it does not.

[275] In a course of conduct from January 24, 2007 to February 28, 2007, Dr. Lindsay, on behalf of the College, made clear that Dr. Wilkins could not remain as a candidate in the selection process for Dean, LLPA.

[276] As a result of the Senior Management Team's unanimous conclusion on January 23, 2007, Dr. Lindsay emailed the members of the Selection Committee on January 24, 2007 as follows:

> Security: Confidential
>
> Hello all,
>
> Yesterday I reviewed with Senior Management Team the potential conflict of interest that the LLPA Selection Committee has identified regarding one of the internal applicants for the position of Dean of Language, Literature and Performing Arts (LLPA). After carefully considering the circumstances in light of the Douglas College Conflict of Interest policy, and after receiving feedback from the Senior Management Team, I have concluded that Peter Wilkins is an ineligible candidate for the position of Dean of Language, Literature and Performing Arts. **In my view, Peter's marital relationship with a member of the English Dept would place him in an unavoidable conflict of interest if he were appointed to the position. I am therefore recommending to the Committee that Peter be removed from the list of candidates short-listed for an initial interview.**
>
> **In our meeting Monday, we agreed to temporarily to include Peter's name on the list of short-listed candidates pending further review of the potential conflict of interest. We also discussed that his name would be removed from the short-list if it was determined that hiring him into the position of LLPA Dean would in fact place him in a conflict of interest.** As the Selection Committee isn't schedule to meet again prior to commencing the first round interviews, I am requesting that

> you respond by e-mail to indicate your agreement or disagreement with my recommendation to remove Peter Wilkins from the list of short-listed candidates. It is important that we have a record of the Committee's decision in regards to this matter. When you respond can you please respond to all members of the Committee so that everyone is aware of the position taken by each of the Selection Committee's members.
>
> Thanks,
> Jan
>
> (emphasis added)

[277] A "single purpose meeting" was convened on January 29, 2007 and Dr. Lindsay informed the members of the committee once again that the Senior Management Team had decided that Dr. Wilkins "could not be considered an eligible candidate for the position of Dean of Language, Literature and the Performing Arts" (minutes January 29, 2007). On January 30, 2007, Dr. Lindsay met personally with Dr. Wilkins and informed him of the College's position.

[278] At the Selection Committee's meeting of February 14, 2007, Dr. Lindsay testified that she repeated her conclusion that the conflict of interest was "irreconcilable". The minutes of the February 14, 2007 record Dr. Lindsay's comments:

> In response to A. Lysell's concern that the Committee may now be perceived as operating in bad faith, J. Lindsay replied that the next round in the interview process involves going public, and **if the Committee recommends P. Wilkins to go forward, she will need to step in and make the final decision not to accept their recommendation.** A. Lysell commented that he feels some wording in the Conflict of Interest policy is vague (i.e. "shall avoid"), and that it seems there is an opportunity for accommodation. J. Lindsay responded that the policy was put in place to enable the College to not hire people into a conflict of interest situation. Since the College would be acting based on established policy, it was felt that the College would not be violating human rights and discrimination principles. **She reiterated that she would be unable to accept a recommendation to move P. Wilkins forward to the next round should this recommendation be made by the Committee.**
>
> (emphasis added)

[279] The February 20, 2007 motion to advance Dr. Wilkins to the second round of interviews resulted in a tie, and thus was defeated. Dr. Lysell requested Dr. Lindsay put in writing her decision not to include Dr. Wilkins in the next round of interviews. On February 28, 2007 Dr. Lindsay wrote the following:

> LLPA Dean Search Committee Chair
> Statement of Rationale
>
> The following statement is being provided to comply with Article 7.7.1,f.),(vi) of the Douglas College/DCFA collective agreement. Essentially this statement reiterates the statements documented in the LLPA Dean Search Committee meeting minutes of February 20th 2007.
>
> Statement of rationale:
>
> As a result of the second ranked candidate withdrawing from the selection process a motion was put forward to advance the third ranked candidate to the second round interview stage of the selection process. A vote was taken on this motion and the result was four in favour and four against.
>
> Given the absence of a majority vote, **and the college's interpretation of the Douglas College conflict of interest policy relative to the candidacy of Peter Wilkins, the Chair determined that Peter Wilkins would not be advanced as a candidate in the second round of the selection process.**
>
> (emphasis added)

[280] The College clearly made a decision that Dr. Wilkins could not proceed as a candidate in the selection process for Dean of LLPA. They communicated that decision both verbally and in writing to the Selection Committee.

[281] It is uncontested that Dr. Wilkins not only falls within the enumerated class of a married person, but also that he is married to Dr. McCausland, an instructor in the English Department. It is equally clear that his marital status was the primary factor in his being excluded as a candidate for Dean, LLPA. Thus based on the traditional three part test set

out in *Health Employers Association of British Columbia, supra, prima facie* discrimination is established.

[282] However, I also conclude that this adverse treatment based on marital status constituted discrimination in a substantive or purposive sense. The adverse treatment of Dr. Wilkins in these circumstances did not simply amount to a minimal impairment of his marital status balanced against a significant social policy of avoiding conflicts of interest in public educational institutions. In this case, the burden placed upon Dr. Wilkins, as a result of his marital status, was that he would be forever precluded from occupying the Dean, LLPA position at Douglas College as long as he remained married to an instructor in the English Department. Other potential and significant burdens were the potential transfer of his wife from her position; or that his spouse had to resign from her position, or that one, or both of them had to move to another educational institution. This is surely an undue burden and a significant interference with the marital status of Dr. Wilkins and his spouse. It is also a significant interference with his collective agreement rights. (This balance between competing social policies will be explored more fully in the second part of this analysis in respect to the issue of a bona fide occupational requirement and undue hardship. It may be argued that this is where the balancing of these competing interests ought to be examined.)

[283] I therefore conclude that the College's decision to exclude Dr. Wilkins from the interview process amounts to *prima facie* discrimination.

[284] Finally, there was at one time a debate that the enumerated ground of marital status applied only to the status of a person and not to individual characteristics. That is no longer the case. Discrimination on the basis of the characteristics of a persons' spouse (in this case Dr. McCausland's position as an instructor in the English Department) can amount to discrimination on the basis of marital status. (*B. V. Ontario* (*Human Rights Commission*) (2002) SCC 66.)

(b) <u>Bona Fide Occupational Requirement (BFOR)</u>

[285] In the alternative, the College argues that if *prima facie* discrimination is established, this discrimination was justified as a bona fide occupational requirement.

[286] The current test for determining whether a *prima facie* discriminatory standard is a BFOR was set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU) (Meiorin Grievance)*, [1999] 3 S.C.R. 3 as follows:

> Having considered the various alternatives, I propose the following three-step test for determining whether a prima facie discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> 1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> 2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
>
> 3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
>
> This approach is premised on the need to develop standards that accommodate the potential contributions of all employees insofar as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in *Central Alberta Dairy Pool, supra*, at p. 518: "(i)f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be a BFOR. It follows that a rule or standard must accommodate individual differences to a point of undue hardship if it is found to be reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.
>
> (at paras. 54-55)

[287] The Supreme Court of Canada in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro- Québec, section locale 2000 (SCFP-FTQ)*, 2008 S.C.C. 43 restated the test for undue hardship:

> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if they can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.
>
> (para 16)

[288] Dr. Lindsay stated that the Senior Management Team's decision was based on the College's Conflict of Interest Policy. On the first page of that policy the following statement appears:

> This policy is intended to prevent any real or perceived Conflicts of Interest that occur as a result of conflict between employees' personal or private interests and their employment responsibilities to the College.

[289] What follows is a definition of a conflict of interest; those parts that address anti-nepotism provide as follows:

> Conflict of interest exists where the activities of the College employee have the intention or effect of advancing his or her own interests or the interests of others with whom he/she has a familial, personal or business relationship (a related other), in a way that may be detrimentally or potentially harmful to the normal operations, the integrity or the fundamental mission of the College. **It includes activities that may be perceived as advancing the personal or private interests of an employee, or related others, contrary to the interests of the College.**
>
> Without limiting the generality of the above, the College recognizes the following as conflict of interest situations:
>
> d) Working relationships
>
> Douglas College **shall avoid appointments** that result in a College employee supervising another employee with whom he/she has familial relationship.

> Where a potential conflict of interest does occur due to appointment, promotion or emergent relationships, it must be reported in writing to the responsible administrator and **every effort taken to avoid the conflict of interest**. **This would involve, at a minimum, making alternative arrangements for evaluation, promotion, reappointment and/or discipline.**
>
> (emphasis added)

(c) Rational Connection

[290] The first step in this case, in determining whether a *prima facie* discriminatory standard is a BFOR, is to identify the general purpose of the impugned standard to determine if it is rationally connected to the performance of the Dean LLPA position. In this case the College has adopted a conflict of interest policy in order to address any "real or perceived conflict of interest" between an employee's personal interests and their employment responsibilities to the College. Douglas College is a post-secondary institution, publicly funded, and like all public institutions it has not only an interest, but an obligation, to ensure that all decisions made by its employees are free from any conflict of interest. It follows, therefore, that it is both appropriate and necessary to adopt conflict of interest rules of which anti-nepotism is but one example. The general purpose of such an anti-nepotism policy is to prevent a potential abuse of the power which may arise when a personal interest conflicts with the employment duties of those employed at the College.

[291] As stated by the Supreme Court of Canada in *Brossard (Town) vs. Quebec (Commission des droits de la personne)*, [1988] S.C.J. No. 79, (the Town of Brossard adopted a hiring policy which disqualified members of immediate families of full time employees or town councilors from securing employment with the town):

> … I believe that the aptitude or qualifications required of all candidates – an absence of real and potential conflict of interest and the appearance thereof – is rationally connected to employment with the Town.
>
> (para 70)

> It is appropriate and indeed necessary to adopt rules of conduct of public servants to inhibit conflicts of interest, which nepotism is one serious form.
>
> (para 74)

[292] I therefore conclude that the College's conflict of interest policy is rationally connected to the performance of an employees' duties at the College.

(d) Honest and Good Faith Belief

[293] At the second step, the Employer must demonstrate that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, and that it had no intention of discriminating against the claimant. This is referred to as the "subjective element" of the test.

[294] President Witter instructed Ms. Exmann, Vice President of Employee Relations, to develop a Conflict of Interest Policy that addressed the issue of anti-nepotism. This request arose from the issues surrounding Dr. Wilson and Dr. Peacock, whose marital relationship President Witter concluded, made managing the Biology Department very difficult. Ms. Exmann investigated the conflict of interest policies of other post-secondary institutions, created the existing policy, and circulated it for comment throughout the College. It was adopted in 2004 – several years before the selection of Dean, LLPA.

[295] Although there has been disagreement as to its interpretation, and unhappiness about its implementation, there is absolutely no evidence that the policy was adopted in bad faith. I therefore conclude that the College's Senior Administrators adopted the policy in an honest and good faith belief that it was necessary to ensure both the actual and perceived integrity of the decision making of employees at the College.

(e) Reasonable Necessity and the Duty to Accommodate

[296] Step three of the *Meiorin* test requires the Employer to demonstrate that the impugned standard is reasonably necessary for the accomplishment of its legitimate work related purpose. To establish reasonable necessity the Employer must demonstrate that it

cannot accommodate the claimant, and others adversely affected by the standard, without experiencing undue hardship. In other words, the Employer must demonstrate that its chosen standard, in order to be a bona fide occupational requirement, incorporates all reasonable accommodations; and if not, is there another standard that does so?

[297] The Policy begins with a definition of a conflict of interest, specifically in respect to anti-nepotism: any conduct where an employee puts their own personal or private interests ahead of their employment responsibilities at the College. It is essentially a breach of trust. The Policy states that the College shall avoid any such appointments. However, where a potential conflict of interest does arise as a result of an "appointment, promotion or emergent relationship", the College must make "every effort" to avoid a conflict of interest. At a minimum, this would include "making alternative arrangements for evaluation, promotion or re-appointment and/or discipline."

[298] As is clear, one of the primary focuses of this College's Conflict of Interest Policy is the avoidance of a direct supervisory relationships between family members. A conflict of interest policy that specifically targets this kind of supervisory relationship has been found to be a bona fide occupational requirement which justifies what would otherwise be discrimination on the basis of marital or family status: *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] S.C.J. No. 79; *Vancouver Community College* (1997), 66 L.A.C. (4th) 73 (Gordon); *Sault St. Marie Board of Education and Sault St. Marie Women Teachers' Association* (1991), 22 L.A.C. (4th) 439 (Burkett); *Sudbury Catholic District School Board* (2006), 156 L.A.C. (4th) 54 (Burkett).

[299] A good example of the application of such a conflict of interest policy in the post-secondary college setting in British Columbia is Arbitrator Gordon's decision in *Vancouver City College, supra*. A supervisor at the College had authority to hire auxiliary members, sign their time sheets, evaluate them, schedule them and generally supervise their work. Any such auxiliary instructor, if they achieved nineteen consecutive days of work, could achieve a term contract. This particular supervisor hired his son. The College objected to this supervisory relationship and the son's dismissal was upheld by Arbitrator Gordon who stated the following:

> Johnston is the Department Head and as such is responsible for hiring, scheduling, supervising, evaluating, and assigning work to auxiliary instructors, authorizing time sheets for payroll purposes, and handling student complaints about auxiliary instructors. The inherent potential for partiality, favoritism and conflict of interest in the performance of these functions was apparent. And, as was later revealed, the College's concerns were well-founded.
>
> (para 60)

[300] The objective of Douglas College's anti-nepotism policy is to prevent supervisory relationships from developing between family members. As I have found, it was created in good faith and is rationally connected to employment at the College. I also conclude that it is reasonably necessary to prevent real or potential conflicts of interest or abuses of power. Therefore, this specific aspect of the policy does not contravene the *Human Rights Code* and is justified as a bona fide occupational requirement.

[301] As can be seen, anti-nepotism policies can be justified, both in general terms (*Brossard, supra*) and also in particular circumstances (*Vancouver City College, supra*). Indeed, in respect to a direct supervisory relationship, where neither position can be modified, it is hard to conceive of a standard other than a direct prohibition against anti-nepotism. However, the general acceptability of such a rule, and its acceptability in regard to certain circumstances, does not exhaust the employer's duty to ensure that its interpretation and application of its policy, is consistent with its human rights obligations in a wide variety of other circumstances.

[302] Thus, as found by Arbitrator Jackson in *Greater Victoria Public Library* (2004) 135 LAC 4th 38 a policy, "otherwise sound", may still be misapplied.

> While I do not agree with the Union's argument referred to earlier that good faith is lost if the application of the policy is not flexible, I do agree that a policy that is otherwise sound can fail if the way in which it was applied in a particular case does not stand up to scrutiny.
>
> (pg 16)

[303] Arbitrator Jackson quotes from Madam Justice Wilson in *Brossard, supra* about the balance between anti-discrimination legislation and "rigid policies of anti-nepotism":

> The value designed to be protected by anti-discrimination legislation, namely that people be dealt with as individuals and on merit, seems to me to be too important and too fundamental to be overborne by a rigid policy of anti-nepotism if less drastic means are available to protect the integrity of the town's administration and the appearance of such integrity.
>
> (para 154, Brossard)

[304] Mr. Justice Beetz in *Brossard, supra*, determined that the interpretation/application of the town's anti-nepotism policy ultimately failed because it amounted to a "blanket policy" that allowed for no exceptions; and moreover, that the town's policy was not sufficiently "tailored" to the circumstances at issue – a daughter had applied for a life guard position whilst the mother was working as a typist at the police station. A similar view was expressed by the Supreme Court of Canada in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) (Grismer)* 1989 3 SCR 868 where the Court states: "The means must be tailored to the ends" (page 881).

[305] Thus, the Employer's standard or rules must be tailored to the employment context in question so that the rule can be said "to preclude real conflicts of interest, potential conflicts of interest which are reasonably likely to arise and the appearance of conflicts of interest founded on a reasonable apprehension of bias." (para 81, *Brossard*). And, as stated in *Brossard, supra*, the rules adopted to prevent such conflict should be "proportionate to the risk that such conflicts may in fact arise."

> As I have said, it is possible that a rule designed to inhibit conflicts of interest by limiting the harmful effects of nepotism in the hiring of new public servants and thereafter in the performance of their duties **could be properly tailored** to deem an otherwise discriminatory municipal hiring practice non-discriminatory. I agree with Jacques J.A. that the problems of conflicts of interest and nepotism vary considerably from one government employer to another and that **the rules adopted to prevent such conflicts should be proportionate to the risk that such conflicts may, in fact, arise.** As I have noted, Jacques J.A. indicates that the population of the municipality, the number of public servants it employs and any peculiarities of its administrative structure are relevant to determining whether the rule is properly designed in respect of the objective test. I

> would add to these criteria the nature of the positions occupied in respect of their potential for abuse of power and, to some extent, the nature of the family relationship in question. (Here the town did take these latter considerations into account by limiting the scope of its policy to candidates who had members of their immediate families among full-time municipal employees or on council.) By way of example, Jacques J.A. noted that the risk of conflict of interest is negligible as between two brothers who work as labourers for the federal government at opposite ends of the country but much more significant if the manager of a small town is the spouse of the mayor.
>
> (emphasis added) (para 83)

[306] Therefore, several principles emerge in the interpretation and application of conflict of interest policies. First, an anti-nepotism policy can amount to a bona fide occupational requirement because it addresses significant public policy issues – the avoidance of actual or potential abuses of power; second, such policies cannot be interpreted or applied as a blanket policy; third, any such policy must be tailored or designed so that it is proportionate to the "risk" that a conflict of interest may in fact arise. Thus, the issue of proportionality requires the balancing of competing social values; and the weight assigned to each of these values will depend upon the degree of risk of an abuse of power.

[307] For example, a direct supervisory relationship between family members has a high risk of a potential abuse of power. Conversely, family members at either end of the country present a low risk of any potential abuse of power. And we can see in some of the arbitral cases, the attempts by some parties to design a conflict of interest policy that address this direct and/or distant family relationship; for example, in *Sault St. Marie Board of Education, supra* the town's policy avoided placing family members in supervisory positions in respect to one another "unless there are two levels of supervision between the individuals."

[308] This examination of anti-nepotism policy must be seen, of course, in the context of step three of *Meiorin* in determining whether a *prima facie* discriminatory standard is a BFOR; in particular, the Employer's duty to accommodate. Thus, the College in this matter must demonstrate that the application of its conflict of interest policy was reasonably necessary in these circumstances to accomplish its purpose, and that it could not

accommodate Dr. Wilkins without experiencing undue hardship in seeking to achieve that goal; or to state it another way, the College must show that it could not meet the goals of its Conflict of Interest Policy if it accommodated Dr. Wilkins.

[309] This takes us to the appropriate balance between two competing social policies or values – conflict of interest policies versus anti-discrimination legislation. This issue was initially raised under *prima facie* discrimination but I will more fully explore it under the third step of *Meiorin*.

[310] It should be recognized that the Employer's conflict of interest policy is acceptable as a matter of general law. Indeed, it should be acknowledged that policies addressing conflict of interest are an essential part of public policy in order to avoid abuses of power. It therefore must be give significant weight. As previously stated, this is clearly not a case of discrimination involving the longstanding perpetuation of stereotyping, social prejudice, or the marginalization and devaluation of a vulnerable group. With respect to such historical and repugnant forms of direct discrimination the standard of undue hardship would surely fall at the "impossible" end of the policy spectrum.

[311] However, even in the circumstances of valid competing public policies, both of which have inherent value, the law has for some time made it clear that human rights legislation must take precedence. First, Section 4 of the B.C. *Human Rights Code* states that it "prevails" over other enactments.

> If there is a conflict between this Code and any other enactment this Code prevails.

[312] Thus, even if the College's conflict of interest guidelines were raised to the level of a legislative enactment the *Human Rights Code* would still take precedence.

[313] Second, the *Human Rights Code* is "fundamental law", and as a result, enjoys quasi-constitutional status (*I.C.B.C. v. Heerspink* [1982] 2 S.C.R. 145; *CNR v. Canada* (*Human Rights Commission*) [1987] 1 SCR 1114.

[314] Third, parties may not contract out of human rights legislation (*Etobicoke (Burrough) v. Ontario* (*Human Rights Commission*) [1982] 1 SCR 202).

[315] Fourth, human rights legislation is incorporated into in all collective agreements (*Parry Sound District Social Services Administration Board and OPSEU, Local 324* [2003] 2 SCR 157).

[316] Finally, Human Rights Codes are to be interpreted broadly and purposefully and are remedial in nature *Ontario (Human Rights Commission) v. Simpson Sears Ltd. (O'Malley)* 1985 2 SCR 536).

[317] In addressing this balancing of competing social values, I begin by noting the similarities between the Supreme Court of Canada's comment in *Brossard, supra*, that a conflict of interest policy may not be "disproportionately stringent", and the Courts comment in *Meiron, supra,* that an Employer's standard may not be "uncompromisingly stringent".

[318] The College took the position that no accommodation of any kind was possible. It did so by describing Dr. Wilkins' marital status as "irreconcilable" with the Dean's role. This was due to the "nature of the Dean's role", which it described as "pervasive". Further, the Dean makes "discretionary decisions on a regular basis". Finally, the "fundamental problem" raised by Dr. Wilkins' candidacy would be the "perception" that his marital status would be a factor in all decisions he had to make as Dean (para 376-396; pages 91 – 96 of the Employer's submission).

[319] Crucial to the College's decision was the issue of an "apprehension of bias". As stated in the Employer's submission:

> Apprehensions of bias could arise in connection with any of the discretionary decisions that Deans are required to make.
> (pg 95; para 390)

[320] Thus, the reason the College says the appointment of Dr. Wilkins could not be accommodated was because any decisions which he potentially made would be "tainted" by

his relationship to his wife. Therefore, the College argues its goals under the conflict of interest policy could not be accomplished should Dr. Wilkins be appointed to position of Dean, LLPA.

[321] Dr. Lindsay and President Witter devoted substantial parts of their testimony to the issue of the impossibility of the College to accommodate Dr. Wilkins because of the inevitable and the intractable problem of perception of bias. Dr. Lindsay stated that the Senior Management Team's discussion on January 23, 2007 concluded that all the "general decisions" made by Dr. Wilkins as Dean would be seen by faculty, "rightly or wrongly", to be "influenced by his wife." An example, which was offered repeatedly, was budget cuts. If the English Department did not suffer the same cuts as other departments, it would be because his "wife works in the area". Dr. Lindsay stated that it would be difficult to get a "handle" on these perceptions because they "happen behind closed doors", and ultimately, "adversely affect morale". Further, the Senior Management Team concluded that no member of the public should be able to raise an issue that there is a "relationship in the College that undermines the appearance of impartial decision making."

[322] President Witter recounted her experiences at other Colleges, and how that experience led her to conclude, that whenever there was a mix of a marital/familial relationship combined with supervisory relationship, there was the potential for a "poisonous work environment." In her view, Douglas College proved no different. She testified in respect to the martial relationship of Dr. Wilson and Dr. Peacock. She acknowledged that there were pre-existing problems with respect to lab technicians and faculty members but it was her view that the marital relationship between Dr. Wilson and Dr. Peacock exacerbated that dispute.

[323] President Witter thought that many of the perceptions were "erroneous", and that the faculty treated Dr. Wilson and Dr. Peacock "unfairly". In addition, she stated that she couldn't "make progress against the perception of favouritism". Moreover, although Dr. Wilson and Dr. Peacock did all they could to alleviate the mistaken perceptions of the faculty, and did so in good faith, she "doesn't believe that the perception ever went away, even though they tried very hard."

[324] Finally, Dr. Lindsay testified that the issue of "perception" was a significant part of the Senior Management Team's decision to disqualify Dr. Wilkins because "perceptions are hugely important in the College environment"; and that the impact of perception "is more important in that [College] environment."

[325] The Union rejects the College's view of the significance of perception. As it stated in its letter of January 31, 2007, its view of a conflict of interest "lies in behaviour", and "not in the fact of a familial relationship." What this means, in effect, is that the College need only concern itself with an actual conflict of interest, and not with any potential conflict of interest, or an apprehension of bias – especially those which are "unproven" or "unfounded". It should be noted that this view of actual, potential or an apprehension of bias was shared by more than one of the Selection Committee members. And, it goes without saying, that this is a very difficult area of public policy.

[326] First, I decline to follow the Union's position that a conflict of interest must be limited to an actual conflict of interest. As stated by Mr. Justice Beetz in *Brossard*, a conflict of interest concerns not only actual or real conflicts but also potential conflicts of interest and the appearance of such conflicts:

> It should be possible, in my view, for a government employer to establish rules of conduct designed to combat not only real or potential conflicts of interest but also the appearance of such conflicts. Dickson C.J. noted the importance of this appearance in Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at p.470, albeit a very different context:
>
> > …there is a powerful reason for this general requirement of loyalty, namely the public interest in both the actual, and apparent, impartiality of the public service.
>
> (para 76)

[327] Three types of conflicts of interest have been distinguished traditionally: actual or real, potential and apparent. In the *Law of Government, Federal, Ontario and British Columbia*, Gregory J. Lavigne, Canada Law Book, 2007, the author cites from the Sinclair Stevens Inquiry, (The Commission of Inquiry Into The Facts and Allegations of Conflict of Interest

concerning The Honourable Sinclair Stevens Report (Ottawa): Ministry of Supply and Services, 1987, Commissioner: (The Honourable W.D. Parker)), Mr. Justice Parker's description and definition of these three concepts:

> Notwithstanding the Federal Court decision to overturn the Report from the Commission of Inquiry into the Facts of Allegations Concerning the Honourable Sinclair Stevens (hereafter the "Parker Commission"), the definitions of conflict of interest provided by Justice Parker have had a critical influence on the development of government ethics law in Canada. Justice Parker defined and described the terms as follows:
>
> > [A *real conflict* was seen to have three prerequisites]. They are:
> >
> > 1. the existence of a private interest;
> > 2. that is known to the public office holder; and
> > 3. that has a nexus with his or her public duties or responsibilities that is sufficient to influence the exercise of those duties or responsibilities.
> >
> > ….
> >
> > If real conflict is a situation in which a public office holder has a private economic interest that could influence the exercise of a public duty or responsibility, what then is potential conflict? … *Potential conflict* is the situation that arises the moment the public office holder realizes that he or she has a private economic interest in some matter at hand and the moment the public office holder exercises a public duty or responsibility and places him or herself in a position of real conflict of interest.
> >
> > ….
> >
> > [An apparent conflict of interest may be seen when] a reasonably well-informed person could reasonably conclude as a result of surrounding circumstances that the public official must have known about his or her private matter.
>
> (page 10)

[328] Lavigne goes on to note that the concept of an apparent conflict derives from the administrative law notion of a reasonable apprehension of bias. The importance of this

doctrine is to protect the administration of justice; and as Lavigne comments, few things have the potential to destroy the integrity of the administration of justice more than the issue of bias. Thus, in a judicial or quasi-judicial context, personal interests, which may include both emotional and financial interests, clearly disqualify an adjudicator, no matter how open-minded or impartial they may actually be.

[329] And with respect to a reasonable apprehension of bias, Mr. Justice Parker in the Sinclair Stevens Inquiry, relied on the Supreme Court of Canada's decision in *Committee for Justice and Liberty v. Canada (National Energy Board)* [1978] 1 S.C.R. 369 test, namely "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?" (page 394)

[330] Although not expressly stated in these terms by the College, I conclude that the concern which informed the College's interpretation and application of its Conflict of Interest guidelines was a standard similar to that of a judicial or quasi-judicial model. The College's goal was to eliminate any and all potentially adverse perceptions. Thus, to appoint Dr. Wilkins, or even to accommodate him, made that goal impossible; and that is why his appointment was irreconcilable with the Conflict of Interest guidelines.

[331] Given President Witter's past experience at other colleges, and her experience in respect to Dr. Wilson and Dr. Peacock, Dr. Wilkins' exclusion would certainly provide the most effective solution to a very difficult problem. It was also a view, she said, that was shared by the members of the College Board, including the Chair of the Board, as well as the heads of other colleges with whom she conferred. Moreover, it was also the unanimous consensus of the Senior Management Team.

[332] However, the application of such an "uncompromisingly stringent" (*Meiorin*) or "disproportionately stringent" (*Brossard*) standard, resulting in no accommodation, weighs too heavily in favour of the conflict of interest policy over that of human rights. Thus, it does not adequately balance these competing social values, a balance which requires a different resolve. As stated in *Brossard*:

> This is not to say that all rules designed to combat real and potential conflicts of interest or the appearances thereof in government will be justified as occupational requirements. The special nature of work in public service means only that the purpose of such rules is rationally connected to public service employment. The rule must still be properly designed to ensure that the aptitude or qualification is met without placing an undue burden on employees or candidates for employment.
>
> (para 77)

> The answer to the second question which I have posed to evaluate the respondent's hiring policy, I believe the rule is disproportionately stringent in view of the aptitude or qualification which it seeks to verify.
>
> (para 78)

[333] Both Dr. Lindsay and President Witter spoke of erroneous and unfair perceptions. They said that both faculty and staff, even when given the actual facts, still disbelieved the College. The College stated, that although these perceptions of conflict may well be "unfounded", it was nevertheless reasonable for the College to consider them because it is an accurate assessment of what employees actually say and believe behind closed doors, all of which adversely affects morale, and the College is unable to do anything about this.

[334] It has long been the law that where the views of other employees are coloured by the very stereotypes and prejudices which human rights legislation was designed to overcome, these views will not provide justification for an employer's decision not to take steps to accommodate. As stated in *Meiorin, supra*:

> This leaves the evidence of the Assistant Director of Protection Programs for the British Columbia Ministry of Forests, who testified that accommodating Ms. Meiorin would undermine the morale of the Initial Attack Crews. Again, this proposition is not supported by evidence. But even if it were, the attitudes of those who seek to maintain a discriminatory practice cannot be reconciled with the Code. These attitudes cannot therefore be determinative of whether the employer has accommodated the claimant to the point of undue hardship: see generally Renaud, supra, at pp. 984-85, per Sopinka J.; Chambly, supra, at pp. 545-46, per Cory J. Although serious consideration must of course be taken of the "objection of employees based on well-grounded concerns that their rights will be affected",

> discrimination on the basis of a prohibited ground cannot be justified by arguing that abandoning such a practice would threaten the morale of the workforce: Renaud, supra, at p. 988, per Sopinka J.; R. v. Cranston, [1997] C.H.R.D. No. 1 (QL). If it were not possible to perform the tasks of a forest firefighter safely and efficiently without meeting the prescribed aerobic standard (and the Government has not established the contrary), I can see no right of other firefighters that would be affected by allowing Ms. Meiorin to continue performing her job.
>
> (para. 80)

[335] I accept President Witter's conclusion that such discussions do take place and do impose administrative difficulties. However, such views do not amount to a reasonable apprehension of bias and cannot form the basis for a refusal to accommodate. Moreover, some administrative and perceptual difficulties are contemplated as an essential part of the duty to accommodate; indeed, it is expected, as a matter of law, that there will be some hardship.

[336] The second issue raised in respect to undue hardship are the actual duties performed by the Dean, LLPA. The question that arises is: are there different ways to perform the job of Dean, while still accomplishing the legitimate goals of the College's Conflict of Interest Policy?

[337] Dr. Lindsay stated, that at the Senior Management Team discussion on January 23, 2007, they decided the role of Dean was so "pervasive" it could not be accommodated on a "piece by piece basis"; that in the end, this approach would fail to deal with the "taint" which would affect all the Dean's decisions; and that all Dr. Wilkins' decisions would be perceived as being influenced by his wife.

[338] However, the Management Team did in fact begin with matters specific to Dr. Wilkins, such as the power to discipline. They acknowledged that another Dean could intervene in such circumstances; however, they concluded that even this might prove to be problematic because the Deans were a small group and "disciplining the spouse of another Dean would be a difficult situation."

[339] I am not persuaded by this rationale. Even assuming this to be true, there are other levels of management which could properly fulfill this role. Indeed, in assessing the Deans themselves, and with respect to past reports concerning Dr. Peacock and Dr. Wilson, several of the Vice-Presidents were employed by the College to perform those functions (Dr. Atkinson and Dr. McKendry). Finally, it is clear that the Conflict of Interest Policy expressly contemplates that in cases of discipline, evaluation, etc., a person other than the spouse would step in. The Dean would still have responsibility for the other 123 faculty members, as well as staff and students.

[340] Another issue the Senior Management Team considered was the Dean's responsibility for budgeting and financial management. Several times Dr. Lindsay gave the example of downsizing, where the only department not cut by the Dean, LLPA was the English Department; and if Dr. Wilkins were Dean his decision would be tainted by his relationship with his spouse, Dr. McCausland.

[341] An unusual aspect of this workplace is that the operating budget of the College is addressed in Article 12.1 of the Collective Agreement. It provides as follows:

> The College Budget will be developed through an open and inclusive process which encourages the participation of faculty and fosters decentralized decision-making within fiscal and other funding restraints.
>
> a) Preparation of the budget include consultations with the Association and Faculties.
>
> b) For each fiscal year, budget guidelines will be developed for use in budget decision making. These budget guidelines will be developed in consultation with the Association and will provide for review by faculty throughout the College prior to final approval by Senior Management Team and the College Board.
>
> c) Faculty in the Faculty/Department will be consulted for feedback with respect to any proposed changes to the Faculty/Department operating budget prior to annual approval by the Board.

d) Prior to submission of the final budget documents by the Administrator, the Faculty/Department budget will be reviewed at a duly called meeting of the regular faculty of the appropriate Faculty/Department. During such duly called meetings, faculty will have the opportunity to vote in support or non-support of the Faculty/Department/Program budget. Where a faculty group elects not to vote in support or non-support of the budget, failure to hold such a vote shall not be grievable.

e) Representation from the Association shall be invited to the final internal presentation of the annual proposed budget prior to submission to the College Board.

f) The Association shall be provided with a copy of the annual budget approved by the College Board.

(emphasis in original)

[342] As is evident from Article 12, both the DCFA and the Faculty are involved in an "open and inclusive process", that "fosters decentralized decision making", regarding "fiscal and other funding restraints." This includes both the preparation of budgets, and the "development of budget guidelines". In addition, this Article provides for a review of the budget by the faculty throughout the College prior to any final approval by the Senior Management Team and the College Board. Both faculties and departments are entitled to be consulted regarding any proposed changes to operating budgets. Faculty have the ability to vote in support or non-support of any "faculty department and program budget". And the Association must be invited to the final internal presentation of the proposed budget to the College Board itself.

[343] Further, the College has its own Vice President of Finance. Additionally, the Vice President's Academic Committee (VPAC), which is comprised of all the Deans and Dr. Lindsay, also reviews the budget. This process can be best described as "very transparent", to employ the words of Dr. Wilson, in describing the College's decision making processes. Moreover, as described by Dr. Wilson, the interrelationship between the Chairs, the Dean, the Faculty and the College, as a whole, operates on a "collegial model". These descriptions are accurately captured in Article 12.

[344] I am not persuaded, therefore, that Dr. Wilkins, or any other Dean participating in the overall process of developing Department and Faculty budgets, would have the opportunity to manipulate or skew the budget in favour of his or her spouse. In other words, there is no real prospect for an abuse of power in the allocation of overall budgets affecting departments and faculties.

[345] What is far more likely to be open to abuse are the small expenditures related to an actual spouse. For example, the possibility that a Dean could manipulate the individual expenditures associated with his/her spouse in areas such as educational leave, scholarly activity, allocation of office space, professional development time, or equipment purchases. But once again, it is clear that the faculty are all aware of these particular expenditures. Who gets educational leave or is assigned a new office is known to everyone. But most importantly, these individual decisions would not be made by Dr. Wilkins when they concern Dr. McCausland; in accordance with the Conflict of Interest Policy, such decisions would be required to be made by some other person when they arose in respect to Dr. McCausland. This would also be true of any student complaints or student appeals in respect to Dr. McCausland. Dr. Wilkins would still be required to make such decisions with respect to all other faculty and staff.

[346] Another area of concern for the Management Team is timetabling. On the evidence it is clear that the Chair of each department is responsible for scheduling; however, the Dean has the final say. In practice, there is minimal supervision by Deans regarding timetabling. It is important to note that the Chairs are in the bargaining unit. Dr. Wilkins had responsibility for timetabling of the English Department which affected him and his spouse, Dr. McCausland, and no objection was made by the College. Further, there was no evidence of any objection made by faculty members about the timetabling done by Dr. Wilkins in respect to his spouse. Needless to say, all members of the particular department are aware of all the timetabling of all the courses in their respective departments. The Dean is once removed from this decision making and any improper interference by the Dean in favour of their spouse would be immediately be identified by both the Chair and all the faculty members.

[347] Another major area of responsibility for the Dean is curriculum. Each faculty has a Faculty Education Committee (FEC). Each FEC consists of the Chairs of each department in that faculty. The Dean sits as an ex-officio member of the committee. An important area of discussion at FEC Meetings is curriculum development. Curriculum proposals must go forward from the FEC to the Educational Council, which has final authority regarding all education policy. Dr. Wilkins described the development of curriculum as a "highly collaborative endeavour." The Dean participates in this consultative process but makes no final determinations about curriculum. Once again, there is no opportunity for the Dean to abuse his power to manipulate the curriculum development in order to favour his spouse. A wholly transparent process and diverse decision making in this area precludes any such abuse of power.

[348] Finally, the Deans participate with the Vice President of Instruction, Dr. Lindsay, in a Committee known as the Vice President's Academic Committee (VPAC). This Committee is responsible for the development of tactical and operational plans for the different faculties at Douglas College. This involves developing a three to five year plan for the College. The Deans are also responsible for the implementation of these College policies. This is an example of where all excluded managers must have "undivided loyalty" to the College. I conclude that there is little opportunity to manipulate a three or five year plan, for the entire College, in favour of one's spouse.

[349] However, the College, both at the time it made its decision, and in its submission to this Board, rejected the possibility there may be different ways to perform the position of Dean. At paragraph 392 of its written submission it once again reasserted the theme of an apprehension of bias:

> The simple solution of having another Dean step in if and to the extent that supervisory, investigatory or disciplinary action were required in connection with Dr. McCausland would not have addressed the apprehension of bias issues arising from the broad and discretionary nature of the Dean's role.

[350] Dr. Lindsay defended this approach repeatedly based on the Conflict of Interest Policy. In the Minutes of February 14, 2007 meeting, Dr. Lindsay is recorded as saying the following:

> J. Lindsay responded that the policy was put in place to enable the College to not hire people into a conflict of interest situation. Since the College would be acting based on established policy, it was felt that the College would not be violating human rights and discrimination principles.

[351] First, it is clear that the College's policy must conform to the B.C. *Human Rights Code*. The College cannot, in effect, contract out of it. And that is the case regarding the ground of marital status and the College's anti-nepotism policy.

[352] Madam Justice Abella (in *Ontario Public School Board's Association v. Ontario (Attorney General)* 175 DLR 4th 609) quoting from McLachlin J. in *Miron v. Trudel* 1995 2 S.C.R. 418, made the following comments about the enumerated ground of marital status:

> As for "marital status" specifically being an analogous ground, McLachlin J. stated, at p. 497:
>
> 1. …[D]iscrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals.
>
> [Emphasis in original]
>
> The key, then, to the conclusion that "marital status" is an analogous ground is found in the fundamental right of individuals to choose to have – or not to have – a spousal relationship. This choice ought not to result in individuals being treated in an exclusionary way based on irrelevant, stereotypical characteristics attributed to this choice, rather than on their actual ability. The human rights principle prohibiting arbitrary treatment was confirmed by McLachlin J. in Miron v. Trudel at pp. 495-6:

> 1. …Logic suggests that in determining whether a particular group of characteristic is an analogous ground, the fundamental consideration is whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual? An affirmative answer to this question indicates that the characteristic may be used in a manner which is violative of human dignity and freedom.
>
> In the case before us, individuals are being disadvantaged because they are spouses, and are therefore being disadvantaged based on their marital status, an analogous ground.
>
> (para 22-24)

[353] Although it should be readily acknowledged that discrimination on the basis of marital and family status, in circumstances such as these, does not involve the deep psychological and social scarring that can arise in respect to other enumerated grounds (and necessarily demands the protection of fundamental rights), it may nonetheless have similar and serious consequences in the employment context – a permanent barring from certain employment opportunities. Conversely, Dr. Wilkins and Dr. McCausland, as was repeatedly discussed by the Selection Committee, had some ability to address directly different aspects of the Conflict of Interest Policy. What, therefore, is ultimately at issue, is the reasonableness of the accommodations that all parties are required to make; in effect the balancing of interests.

[354] There would be little debate that a workplace free of any potential conflicts of interest, in respect to marital or family status, would not only be a preferred workplace, but also one that was more easily administered. However, a blanket anti-nepotism policy that does not accommodate human rights does not reflect the proper balancing of interests. Instead, what has emerged, is a spectrum in which conflict of interest policies must be

balanced with human rights legislation. At one end of the spectrum, conflict of interest policies, especially anti-nepotism policies, when properly "tailored", amount to a bona fide occupational requirement. The best example is a direct supervisory relationship where the accommodation of the respective duties is not possible. In those cases the conflict of interest policy predominates because the application of such a policy prevents real or potential abuses of power. Clearly it is not the intent of human rights legislation to impose accommodations that would permit any such abuse of power.

[355] However, at the other end of the spectrum, a conflict of interest policy that is "uncompromisingly stringent", or "disproportionately stringent", does not survive a human rights analysis because it has not been properly tailored according to the principles of proportionality; such a policy must take into account the "actual degree of likelihood that an abuse of power will take place." At this end of the spectrum the policy must, if it is to be justified under human rights legislation, accommodate individuals who fall under an enumerated grounds and are adversely affected.

[356] It is clear there will be difficulties with a spectrum of this kind; with achieving the proper balancing of interests. Of course, some hardship is acceptable. It is only at the point of undue hardship that it becomes no longer acceptable. For example, I accept President Witters evidence concerning the difficulties that she encountered throughout her career in respect to marital relationships in the workplace, including those presented by Dr. Wilson and Dr. Peacock. However, it appears that President Witters' management of that situation did, over a period of time, succeed in resolving the issue; although she stated, that in some respects, the critical comments and views of some faculty and staff members never completely disappeared. However, as I have found, that level of criticism, especially when it is of an unfounded nature, is part of the acceptable hardship. Indeed, to give credence to such unfounded criticism would be to undermine the very purposes of human rights protection.

[357] However, what it does make clear is that accommodation in these circumstances is not a static matter, but rather a dynamic one. As the Supreme Court of Canada has made clear in *Renaud, supra*, accommodation is a process that involves all the parties. Thus, in

respect to the grounds of marital status, it imposes obligations on both spouses when they occupy positions in the same workplace. For example, Dr. Witter expressed the view to Dr. Wilson that she was grateful that Dr. Peacock had never been Chair of the Biology Department. And as Dr. Wilkins explained there were many aspects of the position of Chair and Dean that overlapped. It may well be that Dr. McCausland would be prevented from occupying the position of Chair of the English Department so long as Dr. Wilkins remained Dean. Further, it may well be that everyone should be made aware of the relationship between Dr. McCausland and Dr. Wilkins in the event that they are sitting on committees together, or indeed, it may be that the best route is that neither sit on the same committees. I make no findings in this respect. I simply state that all these factors must be open for discussion on an ongoing basis, and decisions would need to be made, not only in the long term (i.e. cannot ever evaluate or discipline a spouse), but also on an ad hoc basis, in order to ensure such an accommodation works in everyone's best interest.

[358] As Dr. Wilson and Dr. Peacock demonstrated there has to be consistent good faith efforts made on an ongoing basis to address the perceptions of conflicts of interest; such perceptions may not preclude Dr. Wilkins from occupying the position of Dean, but it is clearly in everyone's interest to continually address all such perceptions; surely, that must be the lesson of President Witter's experience and evidence.

[359] And, of course, it should be said that no witness impugned the integrity of Dr. Wilkins to actually perform the position of Dean, LLPA, consistent with the College's Conflict of Interest guidelines.

[360] I conclude that the College must balance its Conflict of Interest Policy with the *Human Rights Code* and that any candidate for the position of Dean should not be disadvantaged based on their marital status.

KVP Test

[361] The Union says that contrary to *KVP Co. Ltd.*, [1965] O.L.A.A. No. 2; 16 L.A.C. 73 (Robinson) the College's Conflict of Interest Policy was "not applied in a consistent

manner", that it was not brought to the attention of faculty members, and that it is inconsistent with the Collective Agreement – Article 1.4. It further says that the policy was not clear and unequivocal.

[362] In *KVP, supra* Arbitrator Robinson set out the following conditions with respect to the imposition 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 company 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) such rule should have been consistently enforced by the employer from the time it was introduced.

[363] First, the policy clearly and unequivocally addresses the issue of supervisory relationships between family members and provides for accommodation should they occur.

[364] Second, the College went through a consultation process, circulating it throughout the College, including the Faculty and the DCFA. Once approved it was posted alongside all other College policies on its website. It is easily accessible to all employees of the College.

[365] Third, the Senior Management Team expressly conducted a search of all hiring since 2004 and found that no person had been hired into a position that involved supervising a family member. Indeed, the only case the DCFA was able to raise was Dr. Wilson and Dr. Peacock, a relationship that pre-existed the policy. The College did not apply this policy retroactively to them. At the end of Dr. Wilson's term as Dean he was extended for part of a year until the new Dean was able to replace him. I do not consider this temporary placement as a repudiation of the College's policy.

[366] Finally, the College's anti-nepotism policy is neither inconsistent with the Collective Agreement, nor is it unreasonable. This ground was made primarily in respect to alleged Human Rights violations and/or arbitrary or bad faith conduct – all of which I have rejected. The policy as a whole is a BFOR, although I have found that its application in the circumstances was not.

Remedy

[367] First, based on all the evidence I have concluded that the selection process was conducted in good faith. Beginning with the structuring of the committee itself, and then proceeding to the committee's creation of the criteria, the qualifications, the Threshold document, the scoring system, followed by the formulation of the interview questions, the conduct of the interviews, and finally, the assessment of each of the candidates, I find in respect to all these matters, there is no evidence of bad faith or arbitrariness. Each member of the committee attempted sincerely to do their best; there was no dishonesty of purpose.

[368] Second, implicit in this finding of good faith, is that the committee members did their best to accurately assess each of the prospective candidate's knowledge, skills and experience. It is clear from the evidence that Dr. Duke's candidacy had support, at all times, from at least a majority of the selection committee, and at other times in the process, there was a consensus among all the committee members that he was one of the leading candidates. Finally, at all times, throughout the selection process, by a majority vote, Dr. Duke placed ahead of Dr. Wilkins.

[369] Third, I have found that the College discriminated against Dr. Wilkins based on his marital status. It did so during the selection process. In such circumstances the question arises as to the soundness of the College's determination that Dr. Duke was, in fact, the "superior candidate". And even if it is a reasonable conclusion on all the evidence that Dr. Duke is the superior candidate, as I have found, does a policy that permits discrimination, notwithstanding the "right result" is achieved, a desirable public policy. I conclude that it is not.

[370] However, I am persuaded that in circumstances such as these, there is no requirement to apply the traditional remedies – either recommencing the selection process in whole or, in part (for example, at the point of the second interview), or a monetary award of damages.

[371] This matter is not the typical example that commonly arises under collective agreements in respect to a promotion grievance. In such cases, where a grievor has been wrongly disqualified on the basis, for example, of marital status, his/her seniority and qualifications, under the collective agreement, may actually entitle them to the position that was incorrectly awarded to another bargaining unit member.

[372] What must be remembered in this case is that the scope of authority of the Selection Committee is simply one of recommendation. Dr. Lindsay had full authority to appoint Dr. Duke, regardless of whether Dr. Duke had obtained a single vote; and even in circumstances where Dr. Wilkins had been selected by the committee, Dr. Lindsay still had the authority to appoint Dr. Duke. The duty owed by the College to the Selection Committee was one of good faith, and I found that to have been the case.

[373] In respect to the issue of a monetary award for Dr. Wilkins, the rationale is simple: the College discriminated against him and its conduct should be discouraged. And I take it from the Supreme Court of Canada's decision in *Parry Sound, supra*, that I have the jurisdiction to award damages under the *Human Rights Code*.

[374] I have concluded not to make such an award of damages. As I have set forth several times, this case does not fall within the historical forms of discrimination, most of which are meant to demean and harm members of vulnerable groups. Rather, this case involves the balancing of competing social policies, both of which have intrinsic value; and balancing those competing values is not without some considerable difficulty. However, it should be noted that had this been a case of historical stereotyping and marginalization than it would be appropriate to apply both collective agreement and human rights remedies.

[375] Finally, the Union's policy grievance, and in part, Dr. Wilkins' individual grievance, is about the future – would candidates, necessarily be excluded from the position of Dean at

Douglas College based on their marital status. As much as anything else, and indeed perhaps more so, it is this principle that Dr. Wilkins and the DCFA has sought to establish; that is, the blanket application of an anti-nepotism policy does not survive, either on its own terms, or under a human rights analysis.

[376] I therefore grant the DCFA's application for a declaration that the College has violated Article 11.3 of the collective agreement, and Section 13 of the *Human Rights Code*, when it disqualified Dr. Wilkins from the Dean, LLPA position, based on his marital status.

[377] The grievance succeeds in part.

[378] It is so awarded.

[379] Dated in the City of New Westminster in the Province of British Columbia this 9th day of December, 2009.

Stan Lanyon, Q.C.