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September 10, 2008

VIA E-MAIL ONLY

Kwantlen Polytechnic University
12666 - 72nd Avenue
Surrey, BC V3W 2M8

Attention: **Sandi Klassen**
Executive Administrator, Offices of the Board & President

Dear Ms. Klassen:

Re: Establishment of Faculties at Kwantlen Polytechnic University

You asked us to provide advice and address the issues arising in respect of the establishment of faculties at Kwantlen Polytechnic University ("the University"). Our discussion is set out below.

It should be kept in mind that what we have outlined is the legal framework. However, how the University structures its faculties within that framework is a matter for decision by the University. Careful consideration must be given to the overall effect of any particular faculty structure and how that structure impacts the interests of all parties involved and the operation of the University as a whole.

Establishment of Faculties

The power to establish faculties rests with the Board, subject to the recommendations and approval of Senate.

Section 27(2) of the *University Act* provides as follows:

(2) Without limiting subsection (1) or the general powers conferred on the board by this Act, the board has the following powers:

...

(i) to consider recommendations from the senate for the establishment of faculties and departments with suitable teaching staff and courses of instruction;

(j) subject to section 29 and with the approval of the senate, to provide for the establishment of faculties and departments the board considers necessary;

Section 29 of the *University Act* is a limit on expenditures, thus making the establishment of faculties subject to available financial resources. Section 29 provides as follows:

29 (1) The board must not incur any liability or make any expenditure in a fiscal year beyond the amount unexpended of the grant made to the university and the estimated revenue of the university from other sources up to the end of and including that fiscal year, unless an estimate of the increased liability or over-expenditure has been first approved by the minister and Minister of Finance.

The power of the University Senate with regards to faculties is found in section 35.2(6)(e) of the *University Act* which provides:

(6) The senate of a special purpose, teaching university must advise the board, and the board must seek the advice from the senate on the development of educational policy for the following matters:

...

(e) the establishment or discontinuance of faculties at the special purpose teaching university.

Section 39(1) of the *University Act* combines the above and provides:

39 (1) The faculties of each university may be constituted by the board, on the recommendation of the senate.

Key Definitions

"Faculty" and "faculty member" are defined terms in the *University Act* and these definitions must be kept in mind when establishing faculties. Section 1 of the *Act* defines "faculty" differently for special purpose, teaching universities than it does for the other universities governed by the *University Act*:

"faculty" means,

(a) in the case of a university named in section 3(1) [The University of British Columbia ("UBC"), University of Victoria

("UVic"), Simon Fraser University ("SFU"), University of Northern British Columbia ("UNBC"), an academic administrative division of a university constituted by the board as a faculty under section 39, or the dean and faculty members of a faculty, as the context requires, or

(b) in the case of a special purpose, teaching university, an educational administrative division of a university constituted by the board as a faculty under section 39, or the dean and faculty members of a faculty, as the context requires.

Thus, a faculty at a special purpose teaching university is an "educational administrative division" and a faculty at UBC, UVic, SFU and UNBC is an "academic administrative division".

The government has not provided any guidance as to what distinction is to be drawn here. However, it would appear that a faculty at a special purpose, teaching university is intended to be focused on educational pursuits rather than academic pursuits generally, which would include research as well as teaching. Section 47.1 of the *University Act* reflects this and appears to limit the extent to which special purpose, teaching universities will conduct research and other scholarly activities given that these are to be carried out only "so far as and to the extent that ... resources from time to time permit". Section 47 of the *University Act* applies to universities other than special purpose, teaching universities, while section 47.1 applies to special purpose, teaching universities:

47 A university must, so far as and to the full extent that its resources from time to time permit, do all of the following:

- (a) establish and maintain colleges, schools, institutes, faculties, departments, chairs and courses of instruction;
- (b) provide instruction in all branches of knowledge;
- (c) establish facilities for the pursuit of original research in all branches of knowledge;
- (d) establish fellowships, scholarships, exhibitions, bursaries, prizes, rewards and pecuniary and other aids to facilitate or encourage proficiency in the subjects taught in the university and original research in all branches of knowledge;
- (e) provide a program of continuing education in all academic and cultural fields throughout British Columbia;
- (f) generally, promote and carry on the work of a university in all its branches, through the cooperative effort of the board, senate and other constituent parts of the university.

47.1 A special purpose, teaching university must do all of the following:

(a) in the case of a special purpose, teaching university that serves a geographic area or region of the province, provide adult basic education, career, technical, trade and academic programs leading to certificates, diplomas and baccalaureate and masters degrees, subject to and in accordance with regulations under section 71 (3) (c) (i);

(b) in the case of a special purpose, teaching university that serves the whole province, provide applied and professional programs leading to baccalaureate and masters degrees, subject to and in accordance with regulations under section 71 (3) (c) (ii);

(c) provide, in addition to post-secondary programs referred to in paragraph (a) or (b), post-secondary programs specified in regulations under section 71 (3) (c) (iii);

(d) so far as and to the extent that its resources from time to time permit, undertake and maintain applied research and scholarly activities to support the programs of the special purpose, teaching university.

The other important definition in section 1 of the *University Act* is "faculty member":

"faculty member" means a person employed by a university as an instructor, lecturer, assistant professor, associate professor, professor, or in an equivalent position designated by the senate.

The differences between the definition of "faculty member" in the *University Act* and the definition in the *College and Institute Act*, should be kept in mind. The *College and Institute Act*, which governed the University prior to September 1, 2008 has a broader definition of "faculty member":

"Faculty member" includes an instructor, librarian, tutor, counsellor, research associate, program co-ordinator or other employee of the institution that a collective agreement between the bargaining agents, as defined in section 1 of the *Labour Relations Code*, for the institution and faculty members specifies to be a faculty member."

Note that "librarian, tutor, counsellor, research associate, and program co-ordinator" are not specifically referenced in the *University Act*. Under the *University Act*, it is up to the Senate to designate persons as equivalent to an "instructor, lecturer, assistant professor, associate professor, professor". Under the *College and Institute Act* who is a faculty member is largely determined by the collective agreement. The issue for the Senate is what positions the

Senate should designate as being equivalent to an "instructor, lecturer, assistant professor, associate professor, professor". Of course, the Senate will want to determine which of these positions are applicable and define the terms, before setting up equivalent positions.

We have not had time to fully research the issue, but we do not believe that UBC, UVic, SFU or UNBC have gone so far as to designate as "faculty", all the persons who would be "faculty" under the *College and Institute Act*.

It should be noted that neither a board nor a senate is given the power to establish "faculties" under the *College and Institute Act*. Moreover, the word "faculty" is not defined in the *College and Institute Act* and given the wording of section 9(1)(b), "faculty" is in fact used as a term that refers to all faculty members. Section 9.1(b) provides that the board is composed of, among other things, "one person on the faculty of the institution elected by the faculty members". The term "faculty member" is relevant with regards to the composition of the Education Council (which includes 10 faculty members elected by faculty members).

Powers and Duties of Faculties Under the *University Act*

Part 8 of the *University Act* includes specific provisions governing faculties and provides as follows:

Part 8 - Faculties

Faculties

39 (1) The faculties of each university may be constituted by the board, on the recommendation of the senate.

(2) A dean of a faculty is the chair of the faculty of which he or she is the dean.

Powers and duties of faculty

40 A faculty has the following powers and duties:

(a) to make rules governing its proceedings, including the determining of the quorum necessary for the transaction of business;

(b) to provide for student representation in the meetings and proceedings of the faculty;

(c) subject to this Act and to the approval of the senate, to make rules for the government, direction and management of the faculty and its affairs and business;

(d) to determine, subject to the approval of the senate, the courses of instruction in the faculty;

(e) subject to an order of the president to the contrary, to prohibit lecturing and teaching in the faculty by persons other than appointed members of the teaching staff of the faculty and persons authorized by the faculty, and to prevent lecturing or teaching so prohibited;

(f) subject to the approval of the senate, to appoint for the examinations in each faculty examiners, who, subject to an appeal to the senate, must conduct examinations and determine the results;

(g) to deal with and, subject to an appeal to the senate, to decide on all applications and memorials by students and others in connection with their respective faculties;

(h) generally, to deal with all matters assigned to it by the board or the senate.

Approval of rules

41 A general rule made by a faculty is not effective or enforceable until a copy has been sent to the senate and the senate has given its approval.

Advice to president

42 Any of the faculties may advise the president in any matter affecting the interests of the university, whether academic or disciplinary, but that advice does not limit the powers and authority of the president.

Section 39 restates the rule that faculties may be constituted by a board on the recommendation of a senate and specifies that a dean of a faculty is the chair of the faculty. Section 40 sets out the powers and duties of a faculty. It should be noted that the power to make rules for the government, direction and management of the faculty and its affairs and business are "subject to the Act and the approval of the senate". Likewise, in section 40(d) the power and duty to determine the courses of instruction is "subject to the approval of the senate". Section 40(f) governs the appointment of examiners "subject to the approval of the senate".

It should also be noted that under section 41 any general rule is not effective until it is approved by the Senate. Thus, it can be seen that the Senate has significant control over the way that faculties operate.

Composition of the Senate

Section 35.2(2) dictates the composition of the University's Senate and provides as follows:

35.2 (2) The senate of a special purpose, teaching university is composed of the following:

- (a) the chancellor;
- (b) the president, who is its chair;
- (c) the academic vice president or equivalent;
- (d) the deans of faculties;
- (e) the chief librarian;
- (f) the registrar;
- (g) two faculty members for each faculty, elected by faculty members of the faculty;
- (h) four students elected by the students;
- (i) one alumni member who is not a faculty member, appointed by the president on nomination by the alumni association;
- (j) two support staff elected by the support staff;
- (k) one non-voting member of the senate, if appointed to the senate by the board to serve for one year.

Note that the deans of the faculties are members of the Senate. Each faculty is then entitled to elect two (2) members.

The Senates of the other universities under the Act, namely UBC, UVic, SFU and UNBC, have a more flexible composition, particularly with respect to faculty members. This is because the number of faculty members is determined on a proportional basis relative to the number of deans and certain other persons sitting on the Senate. Section 35(2) provides as follows:

35(2) The senate of each university other than the University of British Columbia or a special purpose, teaching university is composed of the following:

- (a) the chancellor;
- (b) the president, who is the senate's chair;

- (c) the academic vice president or equivalent;
- (d) the deans of faculties;
- (e) the chief librarian;
- (f) the director of continuing education;
- (g) a number of faculty members equal to twice the number of senate members provided in paragraphs (a) to (f), to consist of 2 members of each faculty elected by the members of that faculty, and the remainder elected by the faculty members in the manner that they, in joint meeting, determine;
- (h) a number of students, equal to the number of senate members provided in paragraphs (a) to (f), elected from the students who are members of an undergraduate student society or a graduate student society, in a manner that ensures that at least one student from each faculty is elected;
- (i) 4 persons who are not faculty members, elected by and from the convocation;
- (j) one member to be elected by the governing body of each affiliated college of the university;
- (k) additional members, determined by the senate, without altering the ratio set out in paragraphs (g) and (h).

Note that under section 35(2)(g) the faculty members generally have a right to determine the manner in which members are elected to Senate other than the two members that must be elected from each faculty. We have not verified this but suspect that this is why UNBC, for example, has faculty members at large.

Given the set structure of 35.2(2), it is not possible to add additional members to the University's Senate. Members of the University's Senate must fit into the specified formula.

Understanding What Constitutes a Faculty

A faculty is generally understood to be an administrative unit overseeing the delivery of courses of instruction and examinations and, where appropriate, research. The fact that a faculty oversees instruction and examinations is reflected in Part 8 of the *University Act*. Likewise, the definition of "faculty member" in the *University Act* contemplates persons involved with instruction and research, although it also allows for the designation of "of an equivalent position".

division" that does not include any of the persons specifically enumerated as falling within the definition of "faculty member".

Thus, there may be reason for librarians, co-op counsellors and instructors within a learning center to constitute an administrative division, but it would be unusual to constitute such persons a "faculty". If the only reason for creating the faculty is to give those persons a voice on Senate, that may not be sufficient reason to designate the group a "faculty". Seeking an amendment to the composition of the Senate may be more appropriate, although that would involve a legislative change. Alternatively, allowing these persons to vote as "support staff" may be reasonable. It would also be open to the Senate to seek input from such persons when conducting its business, although this would not be any actual vote or voice on the Senate.

Relationship to the Collective Agreements

Finally, it should be noted that the continuation of Kwantlen University College as a university and the designation of faculties will not affect the validity, term or content of the two collective agreements. Those remain in place. What is now at issue before the Senate is the structure of the university itself.

The University is facing a difficult issue. Whatever decision is made must ultimately fit within the legal framework as discussed above, but this framework does not dictate the answer.

We trust the following is of assistance and look forward to hearing from you.

Yours truly,

CLARK WILSON LLP

Per:


D. Lawrence Munn

LM/dlu

Approach of Other Universities

It is our understanding that the University of the Fraser Valley ("UFV") and Vancouver Island University ("VIU") are, at least for the time being, seeking to preserve the status quo so as to allow a full debate on what should constitute a faculty.

UFV will not be having Senate elections until next spring. UFV had recognized four faculties before becoming a university and the Board has "continued" those four faculties. Persons such as librarians and counsellors will be assigned to the existing faculties. The UFV's Senate and Board will now consider the possibility of creating a new faculty.

Likewise, VIU intends to continue its nine existing faculties and then have a debate as to whether a new faculty should be created. Both UFV and VIU will be facing the same challenges with respect to the creation of a new faculty that the University is now facing.

We recommend that the University Senate take some direction from how the UBC, UVic and SFU Senates have defined faculty membership. In that regard, there are various documents on the universities' websites, including:

1. The UBC Senate policy on Voting Membership in Faculties (which states that membership includes "other members of the teaching or administrative staffs of the Faculty or University as the Faculty shall appoint in conformity with rules determined by the Faculty and approved by the Senate" as well as student representatives);
2. The UBC Senate policy on Guidelines for the Establishment of Faculties;
3. The UVic Senate policy regarding Membership in Faculties (which allows for participation by persons such as sessional lecturers and students); and
4. Certain provisions of the SFU Senate's Election Rules regarding Faculty Members and Continuing Employees who are not Faculty Members (but note that these specifically govern elections).

Some further research would be appropriate. For example, a better understanding of the faculty structure at each of British Columbia's universities may be warranted. Also relevant would be how these universities handle, for example, continuing education, within their faculty structures.

Establishment of a Faculty Without Curriculum and Program

It would be unusual within the Canadian university system to establish a faculty that does not itself oversee teaching, examinations and co-ordinating research. It may be technically possible to create such a faculty, given the wording of section 40 of the *University Act* and the control the Senate has over the approval of courses of instruction and the rules for the government, direction and management of a faculty. However, it would seem to move outside the spirit of the *University Act* to create a "faculty", even an "educational administrative