BCLRB No. B199/2010

BRITISH COLUMBIA LABOUR RELATIONS BOARD

KWANTLEN POLYTECHNIC UNIVERSITY

(the "Employer")

-and-

KWANTLEN FACULTY ASSOCIATION

(the "Union")

PANEL:	Ken Saunders, Vice-Chair
APPEARANCES:	Michael A. Coady, for the Employer Leo McGrady, Q.C., for the Union
CASE NO.:	61045
DATE OF DECISION:	November 1, 2010

DECISION OF THE BOARD

I. INTRODUCTION

1 The Union complains that the Employer has contravened Sections 6(1) and 11 of the *Labour Relations Code* (the "Code").

2 The complaint is that the Employer has unilaterally changed course hours and modes as well as a new timetable matrix. Those changes pertain to an initiative called the Course Modes Pilot Project. In this decision I will refer to the impugned initiatives as the "Pilot Project". The Pilot Project was implemented in the fall of 2010.

3 The Union complains the Employer has unilaterally imposed terms of employment on individual employees, thereby circumventing the Union's role as the exclusive bargaining agent. The Union submits that by acting unilaterally, the Employer has contravened the duty to bargain in good faith under Section 11 and interfered with the administration of the Union contrary to Section 6(1).

4 The Union seeks a declaration that the Employer has contravened Sections 6(1) and 11 of the Code; a cease and desist order; an order that the Employer distribute this decision to employees; an order for the production of documents concerning the Pilot Project between the Employer's Board of Governors, Administration and the Senate; and, an order that this decision be filed in Court.

5 This decision is based on the parties' written submissions. I find the material facts are not in dispute. Therefore, it is unnecessary to convene an oral hearing to decide this matter.

II. BACKGROUND

6 The Employer and the Union are parties to a collective agreement (the "Collective Agreement"). The term of the Collective Agreement is April 1, 2007 to March 31, 2010. Article 1.02 of the Collective Agreement provides that the Collective Agreement continues in force past its expiry "...until amended or superseded." Notice to bargain was deemed to be given on December 1, 2009.

7 The Union grieved the Pilot Project on January 13, 2010. The grievance alleges that the Employer acted in violation of the Collective Agreement and committed unfair labour practices. The Employer denied that grievance.

8 The Union emphasizes that the Employer had promised it would not make the impugned changes without first securing the Union's agreement. The Union submits as follows:

> The issue of the course modes, hours, and timetables has been the subject of discussions and negotiations between the parties for at least fifteen years – since 1995. It was the subject of discussions in 2002 and 2003 at Labour Management Relations Committee ("LMRC") negotiations in 2005 and discussions at LMRC in 2009. The KPU [the Employer] repeatedly assured the KFA [the Union] at their LMRC and elsewhere in writing, that the only changes that would be made to timetable/modes would be those that had been successfully negotiated with the KFA.

9 The Union further submits the Employer refused its request for information about the changes as well as its request to discuss the changes before they were implemented. The Union says the Employer responded by announcing changes under the Pilot Project to members of the Union.

10 The Union argues that by proceeding this way the Employer has bargained directly with employees contrary to Section 11. The Union contends that by doing so, the Employer has interfered with its affairs, contrary to Section 6(1) of the Code.

11 The Union originally understood from its correspondence with the Employer, that the subject of course modes is a matter within the exclusive jurisdiction of the Senate. The Employer has not taken that categorical approach in its reply to the Union's complaint. Instead, the Employer submits the implementation of the Pilot Project lies within its management rights under the Collective Agreement, regardless of whether the initiative stems from decisions made within the jurisdiction of the Employer's Board, the Senate or both. The Employer submits as follows:

> Although the development of the plan for a pilot project was an exercise of the Senate's powers, the resulting changes in timetables are matters for the administration to implement under the oversight of the Board of Governors. Kwantlen submits that the implementation of the pilot project does not involve any violation of the collective agreement.

12 The Employer also submits that it had no obligation to bargain the right to implement the Pilot Project as it already had the right to do so under the Collective Agreement. The Employer submits:

> In short, Kwantlen did not agree with the KFA's [the Union's] proposals for a joint KPU/KFA committee, and for negotiations over the issue of course modes, because Kwantlen considered that the implementation of the pilot project initiative was within its rights under the collective agreement.

13 The Employer further submits that any dispute about whether the Employer is correct in asserting its management rights is a matter properly left for an arbitrator to decide, consistent with the Board's policy in favour of deferral to arbitration: *Repap Camaby Inc.*, BCLRB No. B31/94, 22 C.L.R.B.R. (2d) 100.

14 The Union re-emphasizes in reply that the Pilot Project touches on matters that have been traditionally the subject of collective bargaining and imposes changes to working conditions established under the Collective Agreement. The Union submits that it is the Employer's unilateral implementation of those changes that contravenes its duty to bargain in good faith. The Union says that it waited to file the present complaint in an effort to persuade the Employer to bargain these matters during the current round of collective bargaining. The Union argues that the dispute is whether the Employer was obligated to bargain changes contemplated by the Pilot Project before their implementation. The focus of the remedy sought in this proceeding is to force the Employer to bargain those changes. Therefore, the dispute arises under the unfair labour practice provisions of the Code rather than the Collective Agreement. The Union submits accordingly, the issue for determination appropriately lies before the Board.

III. ANALYSIS AND DECISION

15 The issue to be decided is whether Sections 6(1) and 11 of the Code require the Employer to bargain changes imposed under the Pilot Project. The Union's central proposition is that the Employer contravened the Code by acting unilaterally in ways that significantly impact the employees' working conditions.

16 Section 11 of the Code requires that the parties bargain collectively in good faith and make every reasonable effort to conclude a collective agreement. Section 27 of the Code gives the Union the authority to act as the employees' exclusive bargaining agent. As a general proposition, it is a contravention of both Section 6(1) and Section 11 of the Code, for an employer to attempt to circumvent the union's role as the exclusive bargaining agent by negotiating directly with employees: *B.C. Sugar Refining Co. Ltd.*, BCLRB No. 49/78; *Insurance Corporation of British Columbia*, BCLRB No. 59/77, [1978] 1 Canadian LRBR 53; *AAF-Ltd.*, BCLRB No. 318/85; *BC Rail Ltd.*, BCLRB No. B524/99; *British Columbia Hydro and Power Authority*, BCLRB No. B395/94.

17 The duty to bargain in good faith is a global obligation in that it requires an assessment of the parties' overall course of conduct, recognizing that negotiations occur within a presumptive framework of rights and obligations.

18 In the present case, a key part of that legal framework includes rights and obligations under the Collective Agreement, which is in force under a continuation clause. Article 2.01 of the Collective Agreement gives the Employer the right to manage, operate and direct the working force provided it exercises that right in a manner consistent with the Collective Agreement. If the Union believes the Employer has acted outside the ambit of its right to manage the business, the general rule is to "work now, grieve later". If an arbitrator vindicates the Union's position, it is then up to the Employer to comply with the award and negotiate its preferred position in the next round of negotiations. If the Employer succeeds at arbitration, it then lies with the Union to obtain restrictions on the Employer's right to manage in the next round of bargaining.

19 In short, Article 2.01 of the Collective Agreement gives the Employer some scope to undertake unilateral initiatives in the management of the business. Those initiatives may have a significant impact on the employees' working conditions. Thus, the mere fact the Employer has acted unilaterally in the purported exercise of its management rights does not necessarily amount to interference for the purposes of Section 6(1) or a violation of Section 11 of the Code.

20 That is not to say that initiatives under a management rights clause are immune from review under the unfair labour practice provisions of the Code. For example, it may be inferred from the entire course of an employer's conduct that a particular initiative has the effect of unreasonably frustrating the collective bargaining process or effectively undermines a union's status as the exclusive bargaining agent.

21 The parties have met several times to discuss a bargaining protocol agreement. As far as can be determined from the submissions on file, there has been no exchange of bargaining proposals or collective bargaining sessions to date. Thus, it is too early to say that the Employer has refused to bargain in good faith about proposals concerning the Pilot Project. No proposals had been exchanged when the Pilot Project was implemented. So it is not fair to say the Employer has acted to circumvent the Union's exclusive bargaining agency by bargaining directly with employees. In these circumstances, I conclude the Pilot Project is properly characterized as a management initiative, as opposed to a collective bargaining proposal.

22 I acknowledge that the Pilot Project imposes changes to working conditions in a broad sense. However, the Employer's freedom to act under Article 2.01 of the Collective Agreement contemplates that sort of outcome. I conclude in these particular circumstances, the fact the Employer decided to unilaterally implement significant changes under the Pilot Project is not a failure to bargain in good faith or an act of interference, under Sections 6(1) and 11 of the Code.

23 The Employer asserts that it has already bargained the right to implement the Pilot Project under Article 2.01 of the Collective Agreement. Therefore, it says it had no obligation to engage in additional bargaining with the Union before making the changes at issue. The Union strongly disagrees with that position. It says the Employer has broken a promise to bargain about those matters before making the impugned changes and has acted inconsistently with the Collective Agreement. The Union has filed a grievance in that regard.

24 I find based on the materials on file and events as they have unfolded to date, that this aspect of the complaint pertains to a difference about the administration of Article 2.01 of the Collective Agreement. That difference should be decided by an arbitrator. An arbitrator will be in a position to provide an adequate remedy in the event she finds a breach of the Collective Agreement or finds that the Employer is estopped from exercising its legal rights. The parties' negotiations may then proceed on the basis of that outcome.

25 Before closing, I note the Union filed an unsolicited submission complaining that the Employer has refused to bargain until this complaint is decided. The Union contends this pre-condition is a separate contravention of Section 11. The Board's policy is not to consider unsolicited submissions. However, I have decided to quickly issue these reasons so the parties will be in a position to work together in an effort to move past this roadblock. Accordingly, I will refer the Union's most recent submission to the Board's Registry to be processed—if need be—as a separate complaint.

IV. CONCLUSION

26 The complaint is dismissed for the reasons given above.

LABOUR RELATIONS BOARD

KEN SAUNDERS
VICE-CHAIR