

IN THE MATTER OF A MEDIATION/ARBITRATION

BETWEEN

KWANTLEN UNIVERSITY COLLEGE

(the "Employer")

AND

KWANTLEN FACULTY ASSOCIATION

(the "Association")

(Arbitration under Paragraph 8(b) of the Memorandum of Agreement dated
March 23, 2005)

MEDIATOR/ARBITRATOR:

Vincent L. Ready

COUNSEL:

Colin G.M. Gibson for
the Employer

Weldon Cowan for
the Association

HEARING:

April 14 and 16, 2005
Vancouver, BC

PUBLISHED:

June 17, 2005

This arbitration arises from a Memorandum of Agreement (MOA), signed by the parties on March 23, 2005, to submit five issues to this Board of Arbitration for a final and binding resolution, as part of an agreed process for concluding their new Collective Agreement.

The governing provisions guiding my deliberation of the issues are set out in paragraph 8(d) of the MOA and read as follows:

- 8 (d) In reaching his decisions on the outstanding issues in dispute, Mr. Ready shall be guided by the following: provisions negotiated in the post-secondary sector, except where differences at Kwantlen University College would make such provisions inappropriate to the Collective Agreement between the parties, or where amendments to those provisions would better address specific circumstances at Kwantlen.

The issues in dispute are identified in paragraph 7 of the MOA:

- a. All issues related to regularization;
- b. Parental and compassionate leave;
- c. Targeted labour adjustment;
- d. Distributed learning; and
- e. Language related to Article 1.2 of the previous Collective Agreement (Common)

I met with the parties both jointly and separately on April 14, 2005 to determine if any of the outstanding issues could be resolved through mediation. After several hours of mediation I concluded that there was no

basis for a mediated resolution and, therefore, this arbitration was convened on April 16, 2005. Both parties made written and oral submissions in support of their respective positions.

KWANTLEN UNIVERSITY COLLEGE

Kwantlen is a university college governed by the *College and Institute Act*, R.S.B.C. 1996, c. 52.

Kwantlen's roots go back to the early 1970's, when Douglas College was established as a community college, serving New Westminister, Burnaby, Coquitlam, Port Coquitlam, Port Moody, Maple Ridge, Surrey, Langley and Richmond. In 1975, the Douglas College Faculty Association was certified by the Labour Relations Board to represent instructors, counsellors and librarians at Douglas College. The BC Government & Service Employees' Union (BCGEU) was certified to represent a separate bargaining unit of support staff.

In 1981, the BC government split Douglas College into two separate community colleges: Douglas College serving New Westminister, Burnaby, Coquitlam, Port Coquitlam, Port Moody, and Maple Ridge, and Kwantlen College serving Surrey, Langley and Richmond. The bargaining unit was divided in the same manner, with each unit being covered by the same Collective Agreement. After the split, however, Kwantlen and Douglas bargained separately, and the name of the faculty association at Kwantlen was

changed to Kwantlen College Faculty Association and later Kwantlen Faculty Association.

Like Douglas College, Kwantlen College was initially a community college, offering certificates and diplomas. It offered academic courses that could lead to diplomas and/or be used to transfer to universities, as well as trades and clinical programs.

In 1995, Kwantlen became a university college (joining Malaspina, Fraser Valley, Okanagan and Cariboo, that had been converted earlier). Kwantlen has developed and grown significantly since that time. It is now the largest university college in Canada, with campuses in Langley, Newton, Richmond and Surrey, and over 17,000 students.

Kwantlen currently has ten bachelor degree programs. Four new bachelor degree programs will be offered starting in September, 2005, and at least nine additional degrees are currently under development or being planned for implementation over the next several years. In addition, Kwantlen is now permitted under the *College and Institute Act* to offer Masters' degrees.

HISTORY OF THE NEGOTIATIONS

The current Collective Agreement between Kwantlen and the Kwantlen Faculty Association (KFA) had a three-year term, from April 1, 2001 through

March 31, 2004. It is made up of two components: a local Collective Agreement negotiated by Kwantlen and the KFA, and a Common Agreement negotiated at a common table between a group of 14 institutions and their respective associations.

When the current round of bargaining commenced in 2004, only eight of the 22 institutions governed by the *College and Institute Act* elected to participate in multi-institute bargaining, commonly referred to as the MID or Common Agreement Table. The rest of the institutions – including all of the university colleges – declined to bargain on a multi-institutional basis, instead they bargained separately with the local associations.

Collective bargaining between Kwantlen and the KFA commenced on February 2, 2005 pursuant to a protocol agreement.

From the outset, Kwantlen indicated to the Association that its goal in this round was to achieve a new Collective Agreement that would enable Kwantlen to take the next step in its evolution from a community college to a four year degree-granting undergraduate institution – an institution that is respected as a first class university college, that delivers excellent service to its students, and that is viewed as an institution of choice by both students and faculty.

Kwantlen also took the position that it was seeking significant changes to the Collective Agreement – particularly in the area of regularization.

Including the meeting on February 2, the parties had 3½ days of bargaining, ending on February 17, 2005. At those meetings, each party began tabling specific language proposals regarding the concepts identified in its initial package. By the end of the February 17th meeting, the parties had exchanged language on less than half of the issues described in their respective proposals. They had not yet tabled language regarding regularization and many of the other key issues in dispute.

In March, the parties' next bargaining meetings were pre-empted by a process initiated by the Minister of Labour that saw several individual institutions, and the MID table institutions, reach tentative agreements through the assistance of mediators Vince Ready and Peter Cameron.

After the MID table Memorandum of Agreement was reached on March 18, 2005 (the "MID Memorandum"), Kwantlen and the KFA commenced mediation, with a view to establishing a framework for concluding a new Collective Agreement. Each side had over 50 issues outstanding at the beginning of this mediation process. However, with the able assistance of Mr. Peter Cameron, the outstanding issues were narrowed to the five issues identified in paragraph 7 of the MOA.

Although the parties at the MID table had agreed to make a number of changes to the Common Agreement, Kwantlen and the KFA agreed to incorporate only a few of those changes into their next agreement, as identified in paragraph 6(a) of the MOA.

Before delving into the issues, it can be said without reservation, that the most contentious issue is that of regularization. As can be seen from the above the Employer staked out its ground on this issue early in negotiations.

The faculty association, on the other hand, was equally adamant that there were to be no concessions regarding the current regularization language. Further, the Association asserts that the language should be improved.

The result is that the parties are at polar extremes on this issue.

REGULARIZATION

I will briefly describe the current regularization process.

“Regularization” refers to a mechanism under which non-regular faculty gain the right to obtain regular faculty positions without having to compete for them through a posting/selection process. Put simply, when coupled with the definition of a non-regular position and the right to access additional non-

regular work as per the Collective Agreement, it puts non-regular faculty on a continuous stream towards becoming a regular faculty member, subject to certain specified requirements.

The Collective Agreement creates three categories of faculty: regular, non-regular type 2 (“NRT2” – formerly known as “temporary”) and non-regular type 1 (“NRT1” – formerly known as “contract”).

Article 1.04(a) of the Collective Agreement states that regular faculty positions exist or are established “to meet the ongoing needs of the Employer on a half-time basis or greater basis”.

Under Article 1.04(d) of the Collective Agreement, non-regular faculty are those who do not hold a regular position, or who have not satisfied the requirements for regularization.

NRT1 faculty are hired to teach one or more discrete courses. They are not paid on the regular faculty scale, and they are excluded from some provisions of the Collective Agreement. The definition of NRT1 faculty is found in Article 1.04(d)(i).

NRT2 faculty are hired for a period of one year, and have an annualized workload of 50% or greater. Articles 1.04(d)(i) and (ii) define NRT2 faculty and

describe the circumstances under which NRT1 faculty, who are assigned or are reasonably anticipated to be assigned a certain level of workload, are entitled to obtain NRT2 status.

NRT2 faculty receive the same salary and benefits as regular faculty and are covered by most of the provisions of the Collective Agreement. A notable exception is that regular faculty have additional protection from layoff, in Article 7.

At Kwantlen, NRT1 faculty are hired through the search process described in Article 4.04. Once the NRT1 faculty member has accumulated two years of FTE service (assuming satisfactory evaluations), he/she becomes entitled to:

- a. be retained on the inventory of qualified NRT1 faculty (4.04(c)(iii));
- b. a preference for NRT1 assignments pursuant to a relative equality standard (4.04 (d)); and
- c. a preference for NRT2 positions, providing he/she is qualified for the position (4.02(n)).

If an NRT1 faculty member is assigned or reasonably anticipated to be assigned an annualized workload of 50% or greater for a future 12 month period, Kwantlen must issue the individual an NRT2 appointment: 1.04(d)(ii).

Under 1.04(d)(i), there are three assessment dates for determining whether an NRT2 appointment should be offered, depending upon the appointment year.

Once an NRT2 faculty member has successfully completed his/her appointment, Kwantlen is obliged to offer the incumbent another NRT2 appointment if an NRT2 position continues to exist and is filled by Kwantlen: 4.02(m).

When Kwantlen posts a regular position, the selection language contained in Article 4.02(i) applies:

In the event a regular position is advertised and the position has been filled by a non-regular type 2 faculty member for two or more years, the non-regular type 2 faculty member who has been filling the position will be given preference over other applicants providing the qualifications, abilities, and experience of the non-regular type 2 faculty member are equal to the other applicant(s).

The current provision dealing with regularization without posting is Article 1.04(e), which provides as follows:

(e) Entitlement to Conversion to Regular Status

The conversion of status from non-regular to regular will occur when the faculty member has a workload of 50% or greater for each of two (2) consecutive appointment years of work, or who has worked at a

workload equivalent of 120% in total over a period of two (2) consecutive years, provided that:

- (i) there is a reasonable expectation of ongoing employment at a workload level of at least 50% in each of two semesters within the appointment year subsequent to that in which the entitlement to conversion arises or there is a reasonable expectation of an ongoing workload assignment of at least 50% on an annualized basis within the appointment year subsequent to that in which the entitlement to conversion arises, and
- (ii) the employee is qualified for the work in question, as determined by the Search Committee at the time of initial hire or subsequent review, and
- (iii) the employee's most recent evaluation for regular employment within the preceding twelve (12) month period has been satisfactory. The employee will be deemed to have received a satisfactory evaluation if one has not been undertaken by the employer. The employer may evaluate a non-regular employee at least once each 12 month period and the employee may request an additional evaluation not more often than once in each 12 month period.

Nothing in the section above prohibits the employer's rights to regularize any position as it deems necessary.

The current language in Article 1.04(e) – as well as other provisions in the Agreement pertaining to regularization – flowed from Article 6.1 of the Common Agreement, and two arbitration awards issued by Don Munroe, QC, in 2000: *Malaspina University College v. Malaspina Faculty Association*, [2000]

B.C.C.A.A.A. No. 100 (Munroe); and *Kwantlen University College v. Kwantlen Faculty Association*, [2000] B.C.C.A.A.A. No. 218 (Munroe).

POSITION OF THE EMPLOYER RE REGULARIZATION

The Employer argues that the current regularization process creates two groups of regular faculty within Kwantlen: (a) fully qualified regulars, many of whom have PhD-level qualifications, research records, and areas of expertise that meet the department's needs and directions; and (b) less qualified generalists, who do not have needed areas of specialization or expertise, and are qualified to teach primarily introductory level courses.

The less qualified generalists are often hired to fill vacancies for non-regular positions; which typically attract local candidates with lesser qualifications and/or experience than those attracted by regular position vacancies. The result is that the individuals hired to fill non-regular positions often have lesser education qualifications (e.g., Master's degree instead of a PhD), and are typically hired to teach only introductory level courses. They often do not have the necessary qualifications and experience to teach upper level courses. Yet, because of the regularization process these lesser qualified instructors are automatically placed into regular teaching positions.

Also, it is argued that, when departments are designing their work assignments, the work that is available to be assigned to non-regular faculty

usually includes either introductory courses (because the pool of candidates is not qualified to teach beyond this level), or very specialized courses (where the candidate is hired as an NRT1 to teach only that particular course).

Because introductory level courses continue to be available from year to year, non-regular faculty are able to continue accumulating non-regular work through the combined operation of 4.02(m) and 4.02(n). Once they are on what the Employer terms this “conveyor belt”, they are then able to achieve regularization by virtue of Article 1.04(e).

Under 1.04(e), non-regular faculty are often regularized at a part-time workload level. Once this has occurred, they can then expand their workloads by claiming additional available work under Article 4.12. Again, the difficulty here, in the submission of the Employer, is that these regularized faculty members are often qualified to teach only introductory level courses.

The Employer argues that the change of Kwantlen from a community college to a university college with the ability to grant bachelor degrees necessitates recruiting more highly qualified instructors than it did in the past. The dearth of faculty with Doctoral degrees at Kwantlen may impact the transferability of its courses, prejudice its application for accreditation and adversely affect its ability to compete with other educational institutions for

students. The Employer submits that Kwantlen needs more highly qualified faculty to develop into a research centre.

The Employer argues further that this structure creates hardship and unfair work assignments for fully qualified regular faculty members. Because regularized faculty are often only qualified to teach the introductory courses, this means that the better qualified regulars are required to teach the more demanding and academically rigorous third and fourth year courses. This results in significantly increased preparation time, and more difficult work assignments.

It also makes timetabling more difficult, as it results in the forced and artificial creation of regular positions, instead of enabling Kwantlen to create such positions based on the needs and plans of its departments.

The Employer submits that another problem with the existing regularization language lies in the words “or who has worked at a workload equivalent to 120% in total over a period of two (2) consecutive years” in Article 1.04(e). Under this language, a non-regular faculty member who obtains a 25% NRT1 appointment (2 courses) in the first year, and a 100% NRT2 appointment in the second year (e.g., replacing a regular faculty member who has gone on leave) satisfies the initial threshold for regularization.

Once this threshold has been met, the non-regular faculty member is entitled to regularization if he/she has received “satisfactory” evaluations (which is usually the case), if he/she is qualified for the available work (which they usually are, because this work usually involves introductory level courses), and if there is a reasonable expectation of ongoing employment at a workload level of at least 50% on an annualized basis within the next appointment year. Under the Munroe arbitration awards, it is argued that available work in the third year includes replacement work. This enables a non-regular faculty member to become regularized where work is available in the third year replacing a regular faculty member who has gone on leave. The Employer argues that this is an absurd and onerous result, because when the regular faculty member returns from leave, it creates a surplus of regular faculty, unless the department has grown. If Kwantlen needs to lay off the regularized individual when the regular faculty member returns from leave, it is then subject to the five month notice requirement and additional severance pay requirement described in Article 7 of the Collective Agreement. At a time of declining enrolment (which Kwantlen is currently facing), this is particularly challenging.

If a regular faculty member with a particular area of expertise is retiring, Kwantlen says it would typically want to take some time to search for a replacement with the same or a greater level of expertise. This process could

take a considerable period of time to complete. If non-regular faculty are entitled to conveyor belt regularization in the meantime, however, this will consume the available regular positions, and will preclude the department from seeking the necessary expertise.

This method of regularization, argues the Employer, significantly impairs flexibility and promotes adequacy instead of excellence. As noted below, most degree-granting institutions are not subject to this burden. This has harmed Kwantlen's reputation, as well as its ability to compete and develop.

Consequently, the Employer proposes that in order to seek relief from the problems identified above, the following amendments be made to the Collective Agreement:

- a. Amend Article 1.04(d)(i) to provide Kwantlen with greater leeway to offer a NRT1 appointment without being forced to group courses together artificially and offer an NRT2 appointment;
- b. Revise the status assessment language in 1.04(d)(i) to create one assessment date, that corresponds with Kwantlen's budget year;
- c. Delete the automatic regularization provision in 1.04(e);
- d. Amend 4.02(m) to enable Kwantlen to post an NRT2 position instead of always having to offer it to the incumbent without posting;
- e. Delete the conveyor belt provision in 4.02(n);

- f. Make consequential changes as necessary to related provisions in the agreement; and
- g. Delete Article 6.1 of the Common Agreement.

POSITION OF THE ASSOCIATION RE REGULARIZATION

The Association strongly disagrees with the Employer's contention that regularization prevents them from hiring the best candidates. The Association points to publications from Kwantlen describing the excellence of its faculty: "Our strength is teaching and service excellence. We have the best teachers supported by the best services for students" (Kwantlen Service Plan 2004/05-2006/07); and "Our instructors are not only experts in their fields, they are passionate professionals who love to teach—and it shows. Their inspiring and relevant instruction can turn ordinary ideas into extraordinary experiences. Our dedication to teaching excellence makes our classes stimulating, sought-after and worthy of serious consideration" (Kwantlen 04/05 Viewbook).

It follows, says the Association, that Kwantlen's claims of teaching excellence are based on the performance of the current members of the KFA – the regular, the regularized, and the non-regular. The KFA maintains that its members are indeed excellent, that the search process and performance review system ensure excellence and are not in any way tarnished by the regularization process contained in the Collective Agreement.

With respect to the issue of the competitive advantage, the Association points to Kwantlen's acknowledgement in its Service Plan that "Faculty Recruitment is going to be a significant issue for Kwantlen" and "Kwantlen anticipates that almost 25% of its faculty will be over 60 in the next five years" (Page 9). Therefore, given the challenges of faculty recruitment, Kwantlen should want to enhance the compensation, job security and working conditions of its faculty members in order to be the "institution of choice". Other lower mainland institutions, in the submission of the Association, have equal or better language on regularization with Langara College having the best. Malaspina Faculty Association recently concluded bargaining with its Employer and was able to achieve improvements on regularization.

It is also argued that, since the establishment of the regularization in the 1998-2001 Collective Agreement, regularization has been maintained or improved at most locals throughout the province since then. The circumstances at Kwantlen are not unique.

The only college that has successfully argued special circumstances on the issue of regularization is the Nicola Valley Institute of Technology (NVIT). The institute is a small college in Merritt. The Institute, says the Association, serves a student population that has a significant aboriginal component. The institute wanted to develop a faculty that reflected the aboriginal make-up of the student body. The Institute was granted a unique status within the

Common Agreement on the issue of regularization. However, this was done because NVIT is genuinely different in terms of its mandate, size and student demographic. There is no comparable argument for Kwantlen.

In response to the Employer's proposed changes to the definition of non-regular type 1 faculty members, the KFA proposes the elimination of this category of employee. The Association also strongly objects to the Employer's proposed rewording of this definition. The changes would mean, in the Association's view, the increased use of non-regular type 1 faculty members and the virtual elimination of non-regular type 2 faculty positions. Whereas the Association proposes that the current definition limits the hiring of non-regular type 1 faculty members to certain limited purposes and the current understanding is that most non-regular work should be allocated to non-regular type 2 faculty.

The KFA also firmly objects to the decreased number of status re-assessment dates from three to one because Kwantlen does its hiring all year and needs to ensure staffing for each of the three semesters. The three re-assessment dates make it possible to assess the status of a non-regular type 1 employee at an appropriate interval based on when they were hired. Kwantlen hires new employees throughout the year.

The Association also submits that the Employer's proposed changes to Article 4.02 are further assaults on the rights of non-regular faculty members, eliminating any entitlement (as limited as it currently is) for non-regular faculty members to gain additional work.

When read as a whole, the Association asserts that the Employer's proposals are an attempt to turn back the clock by more than 15 years. Put another way, the Association argues that the Employer seems intent on creating a disposable workforce who is underpaid and insecure. This direction would not make Kwantlen an institution of choice and excellence. Furthermore, there are no unique characteristics of Kwantlen that would justify these changes. Rather than yielding to the Employer's request to alter the current language the Association proposes the following changes to the Regularization provisions in the Collective Agreement:

1.04 (c) Regularization

Regularization Entitlement

An employee will be regularized if they have met one of the following criteria:

- (i) The employee has worked at least 50% of an FTE workload in each of the two preceding 12 month periods; or
- (ii) The employee has worked at least a total of 120% of an FTE workload over the previous 24 months; or

- (iii) The employee has worked at least 20% of an FTE workload each of the preceding four 12 month periods.

Effective Date of Regularization

Regularization of an employee under the provisions of 6.1.3.1 will be effective on the first day of the month following the month in which he/she has met one of the criteria for regularization.

Regular Position Percentage

An employee who is regularized as per 6.1.3.1 will be regularized at a minimum of the average percentage of full-time work he/she has performed over the eligibility period.

Increase in Part Time Position Percentage

If a regular employee's average annual workload, in the preceding 12 month period, is greater than that employee's current regular workload percentage, the employee's regular workload percentage will be increased to a minimum of the higher workload percentage to a maximum of 100%. The increase in regular position percentage will be effective on the first day of the month following the month in which he/she has met the criterion for increase position percentage.

If a part time non-regular employee is allocated additional work, the increased percentage will become effective immediately until the end of their appointment period.

THE ROLE OF THE INTEREST ARBITRATOR

Before issuing my decision, on the disputed matters, I should pause to outline my task as an interest arbitrator in this case.

Typically an interest arbitrator stands in the shoes of the negotiators and attempts to divine a Collective Agreement which would replicate one that the parties themselves would have negotiated had they been left on their own to do so.

In replicating what the parties might have done in 11th hour negotiations, with all of the inherent pressures brought to bear, the question becomes what would such an agreement look like? In other words, what compromise would the parties have made in order to achieve a freely negotiated agreement?

In this case, I am aided by paragraph 8(d) of the MOA which requires me to examine and decide the issues in dispute based on “provisions negotiated in post-secondary sector, except where differences at Kwantlen University College would make such provisions inappropriate to the Collective Agreement between the parties, or where amendments to those provisions would better address specific circumstances at Kwantlen”.

I have attempted to follow the guidance set out above in making my award by examining comparative language in both the MID-table Common Agreement along with other Post Secondary Institutions.

That said, I make the following award:

DECISION RE REGULARIZATION

As noted previously, this is the most contentious issue separating the parties.

I am obligated by the parties' terms of reference to review "provisions negotiated in the post-secondary sector." I am then required to consider whether differences at Kwantlen would make such provisions inappropriate to the Collective Agreement between the parties, or whether the proposals advanced by the parties would better address the specific circumstances at Kwantlen.

With this mandate in mind I have carefully reviewed and compared Collective Agreements from other post secondary institutions such as:

- University College of the Fraser Valley
- Malaspina University College
- Emily Carr Institute of Art and Design
- Thompson Rivers University
- Okanagan University College (now UBC-Okanagan)
- The provisions of the Common Agreement negotiated by the parties at the MID or common table

Those comparisons reveal that some of the institutions have no regularization language and others have language that is different from that proposed by either of the parties in this dispute. I have considered the

strongly-held views of the parties on this issue in attempting to blend all of the interests, along with a consideration as to whether an amendment to the regularization provisions would better address the specific concerns at Kwantlen.

I have decided the appropriate amendments I will award are tailored after the language at Malaspina. This language resulted from an arbitral award issued by Don Munroe, Q.C.: *Malaspina University-College v. Malaspina Faculty Association*, [2000] B.C.C.A.A.A. No. 100 Award No. A-69/00, and was refined slightly by the parties in the recent round of negotiations which, in the present circumstances, strikes a proper balance.

I observe that the regularization language in Malaspina University-College (which was previously a signatory to the MID or Common Agreement) does not include the “120% in total over two consecutive years” concept that appears in 1.04(e) of the Kwantlen agreement.

The other notable distinction is that at Malaspina – and at a number of community colleges that have similar regularization language – the continuous stream provisions that appear in Kwantlen’s Articles 4.02(m) and 4.02(n) do not exist. Whereas non-regular faculty at such institutions are entitled to be regularized *if they achieve* a specified amount of workload, they do not have the same *rights to claim* available non-regular work that Kwantlen’s non-regulars

enjoy. This “right of first refusal” for available non-regular work was specifically rejected by Arbitrator Munroe in the *Malaspina* award as “inappropriate”, “wrong” and “unfair” in the context of regularization language:

10. Right of First Refusal (Article 9.2.2): I accept Malaspina’s argument that temporary faculty are not always drawn from the same broad hiring pool as regular faculty and may be hired with lesser or different qualifications than would be required or expected for a regular position; that the retention of the “right of first refusal” (which can arise after only one year of temporary pro rata employment) along with the new regularization provision could result in lockstep progressions from temporary to regular status which are inappropriate; that the bargaining history between the parties reveals Article 9.2.2 as the hard-fought compromise of past collective bargaining disputes about regularization of the person – in effect as the parties’ bargaining surrogate for a regularization provision; and that it would be wrong and unfair to the institution as a whole, including its student body, to continue in force the “right of first refusal” contained in Article 9.2.2 in addition to the new regularization provision.

Therefore, I award the following:

1. Article 1.04(e) of the Collective Agreement is amended by deleting the words “or who has worked at a workload equivalent of 120% in total over a period of two (2) consecutive years” in the first paragraph.
2. Article 4.02 (m) is replaced with the following:

If a non-regular type 2 position that has been filled by a non-regular type 2 faculty member continues to exist and if filled by the Employer, the Employer may elect to either:

- (i) offer the incumbent another non-regular type 2 appointment, provided that he or she has filled the position satisfactorily; or
- (ii) post the non-regular type 2 position.

3. Article 4.02(n) is deleted.

4. The amendments described above will take effect on January 1, 2006. Until then, the current 1.04(e), 4.02(m), and 4.02(n) will remain in place.

5. If any consequential changes need to be made to the Collective Agreement to facilitate the proper implementation of the amendments described above, these are also awarded.

After carefully considering the agreed terms of reference governing my deliberations, I decline to award any of the other changes sought by the parties relating to regularization.

PARENTAL LEAVE

With regard to Parental Leave, the parties disagree on the following four issues:

1. The Employer's proposal 13.05(n) to extend, at its sole discretion, the length of a pregnancy/parental leave to coincide with the beginning or end of a semester or term of instruction.
2. The Employer's proposal 13.05(q) requiring Faculty members on maternity/parental leave to provide at least four months' notice of their intent to return to work.
3. The Employer's proposal 13.05(v) requiring faculty members to sign an agreement that he/she will return to work and remain in the employ of the Employer for a period of at least six months or equivalent to the leaves taken, whichever is longer, after his/her return to work.
4. The Employer's proposal 13.05(w) that should the faculty member fail to return to work and remain in the employ of the Employer for the return to work period described above, the faculty member shall reimburse the Employer for the Supplemental Employment Benefits received, on a pro-rata basis.

POSITION OF THE EMPLOYER RE PARENTAL LEAVE

The Employer submits that it needs the language contained in its proposal for Article 13.05(n) because it would allow departments to properly plan and schedule work assignments. This language is necessary for planning purposes, argues the Employer, because most of Kwantlen's semesters are four months in duration.

The Employer's proposal for Articles 13.05(v) and (w) requiring an employee to work for six months following his/her pregnancy/parental leave, ensures that faculty members who receive Supplemental Employment Benefits make an ongoing commitment to the institution. The Employer asserts that this language was agreed to in the recent collective bargaining between Kwantlen and the BCGEU.

POSITION OF THE ASSOCIATION RE PARENTAL LEAVE

The Association submits that new parents would be significantly affected by the Employer's proposal for Article 13.05(n) to allow the college to extend a pregnancy/parental leave to coincide with the beginning or end of a semester or term of instruction at its sole discretion. This proposal would create a situation where members would be denied income for up to a semester. The provision would impact women in disproportionate numbers. Effectively, the proposal would constitute discrimination based on sex under the *Human Rights Code*.

The *Employment Standards Act*, in the submission of the Association, provides a clear cut right to have a leave of any length up to a maximum of 52 weeks. The Employer does not have the right to deny a request for leave. The provision sought by the Employer seeks to grant them a right they are expressly denied under the *Act*.

The Association's proposal, as well as the current language, requires the parties to reach mutual agreement on the extension of the leave. This is the provision that exists in the Common Agreement.

Article 13.05(q) of Kwantlen's proposal states that faculty members on maternity/parental leave must provide at least four months' notice of their return to work. There are several problems, says the Association, with this proposal. First, pregnancy leave is 17 weeks long. If a faculty member were to take only maternity leave, they would need to provide notice of their return before the leave started. Second, pregnancy and parental leaves are, by their very nature, entirely different than most other types of leaves. The nature of the leaves means that they are somewhat unpredictable. The *Employment Standards Act* treats pregnancy and maternity leave differently than other leaves for this very reason. Requiring faculty members to provide a minimum of four months' notice of their return date does not recognize the realities and challenges new parents face. There is no comparable provision in the Common Agreement.

With respect to the Employer's proposal regarding Articles 13.05(v) and (w), the Association argues that both proposals are unreasonable and unenforceable. Pregnancy and parental leaves are statutory leaves. Employees have a right to take the leaves under the *Employment Standards Act* when they meet the leave requirements. In this proposal, the Employer seeks to strip

employees of the financial benefits of those leaves obtained under the Supplemental Employment Benefits Plan.

DECISION RE PARENTAL LEAVE

The language of the Common Agreement has evolved over several rounds of bargaining to harmonize with the requirements of the *Employment Standards Act* and to balance the needs of members taking pregnancy and parental leaves with the operational needs of Employers. The Association's proposed language is the language that is in operation in all the Collective Agreements negotiated at the MID table. There is nothing about Kwantlen that would make the Association's proposal an inappropriate provision in the Collective Agreement, nor are there specific circumstances at Kwantlen better addressed by the Employer's proposals.

Moreover, the Employer at the MID table did not propose significant changes to pregnancy/parental Leave. They did not propose a four month notice of return nor did they propose language similar to parts (v) and (w) of Kwantlen's proposal. There is no significant difference between Kwantlen and the other post secondary institutions which would support the changes to the Article that Kwantlen seeks in parental leave.

In sum, I see no compelling reason to award the proposal advanced by the Employer. I therefore award the same language as found in the Collective Agreement negotiated at the MID table.

COMPASSIONATE LEAVE

POSITION OF THE EMPLOYER RE COMPASSIONATE LEAVE

Sub-paragraph (b) is the first paragraph of Article 7.8.1 of the MID Memorandum, and provides the eight week unpaid compassionate care leave that has been agreed at the MID table. The Employer submits that the remaining provisions in Article 7.8 of the MID Memorandum should not be awarded, because the relevant subject areas are dealt with adequately by the unpaid leave provisions in the Collective Agreement (Articles 1.04(i), 13.03 and 13.04 of the Local Agreement and Articles 7.1 through 7.5 of the Common Agreement).

POSITION OF THE ASSOCIATION RE COMPASSIONATE LEAVE

The Association proposes the same language as the Common Agreement negotiated at the MID table which provides for a compassionate leave without pay of up to eight weeks. This coincides with the new Employment Insurance provisions for compassionate leave. The proposal requires the Employer to continue benefits and pension payments as if the employee were still at work. This provision is now in force for all colleges, which are part of the MID table Collective Agreement as well as Capilano College. The Association submits that

there is no demonstrable difference between Kwantlen and the other post secondary institutions concerning this leave. The leave represents the standard in the post secondary institutions for compassionate leave.

DECISION RE COMPASSIONATE LEAVE

I agree with the Association that there is no compelling reason to depart from the provisions negotiated by the parties at the MID table. Therefore, I award the same provisions be incorporated into the renewed Collective Agreement between the parties.

TARGETED LABOUR ADJUSTMENT

POSITION OF THE EMPLOYER RE TARGETED LABOUR ADJUSTMENT

Article 6.4 of the Common Agreement contains language regarding targeted labour adjustment. The Employer seeks to roll that language over into a Letter of Understanding, with consequential changes to reflect the two-party nature of the Collective Agreement. The only substantive change is found in paragraph 4, where Kwantlen has proposed that the canvassing be conducted by a subcommittee of the parties' Labour Management Relations Committee (LMRC) instead of the entire LMRC. This is consistent with past practice between the parties.

The Employer argues that, in practice, the current targeted labour adjustment language works well at Kwantlen. It enables Kwantlen to provide

the five months' notice under Article 7.09, and then engage in the targeted labour adjustment canvassing process with the KFA before the actual layoff occurs. This is one of the longest layoff notice provisions in the post secondary sector – the vast majority of the other collective agreements require less than five months' notice of layoff. The Employer submits that the provision in Article 6.4.1 of the MID Memorandum requiring that the targeted labour adjustment canvassing occur prior to the issuance of layoff notice to employees under the Local Agreement is untenable and unnecessary at Kwantlen. If the canvassing had to occur prior to the issuance of layoff notice, this would delay the layoff even more than it is already delayed under Article 7.09.

The other difficulty with the MID Memorandum, in the submission of the Employer, is that it divides the menu of labour adjustment strategies into items where availability of funding may be considered, and items where availability of funding may not be considered. Kwantlen submits that this is inappropriate at Kwantlen, where availability of funding is a factor that always needs to be available for consideration in relation to faculty layoffs.

POSITION OF THE ASSOCIATION RE TARGETED LABOUR ADJUSTMENT

The Association proposes the Common Agreement language for Article 6 of the Collective Agreement. The recently adopted Common Agreement language represents minor changes to the existing provisions of the Article. The recently negotiated Common Agreement language does the following:

- Clarifies the fact that the canvassing of options to reduce or avoid layoff must occur before layoff notices are issued.
- Separates the menu of options to reduce or avoid layoffs into two separate lists depending on the availability of financial resources.

Beyond the points above, the Article remains substantially unchanged from what existed in the previous Collective Agreement.

In contrast, argues the Association, the Employer's proposal seeks to do the following:

- Eliminate the requirement to canvass employees before layoff notices have been issued.
- Eliminate the applicability of this Article to non-regular type two faculty members
- Move the Article to a Letter of Understanding
- Reduce the options available in the menu of options

The Association in its submission addressed each of these points separately.

1. Eliminating the Requirement to Canvass Employees Before Layoff Notices Have Been Issued

The Common Agreement establishes a standard for the sector. Nothing in Kwantlen's operation requires different language in this area. The Common Agreement lays out two separate conditions for canvassing employees in order to reduce layoffs. The conditions are not onerous or difficult for the Employer to meet.

2. Eliminating the Applicability of this Article to Non-Regular Type Two Faculty Members

The Employer proposes that the labour adjustment language apply only to regular faculty covered by the provisions of Article 7. The Association argues that the layoff of non-regular faculty, governed by Article 8, does not contain a notice of layoff provision. By eliminating the requirement to explore options before issuing a layoff notice, non-regular faculty could be laid off before any canvassing of options to mitigate layoffs had occurred.

With respect to the provision that requires that regular faculty receive a five month lay off notice under the provisions of Article 7.09, the Association points to other colleges which have similar layoff provisions.

In terms of regular faculty, the Association seeks to provide for a two week period during which options to layoff can be explored in accordance with the provisions of the proposal. The same provision applies to all the colleges

that are part of the MID Agreement as well as Capilano College. Long notice periods are not unusual in the post secondary sector. There is no operational consideration that would require a different treatment for Kwantlen.

3. Moving the Article to a Letter of Understanding

There is no reason to move the Article to a Letter of Understanding. The Article exists in the body of all the Common Agreement contracts.

4. Reducing the Options Available in the Menu of Options

The Association argues that there is no reason to reduce the menu of options contained in the Common Agreement. If any option is inappropriate for Kwantlen, the language in the Common Agreement addresses that.

DECISION RE TARGETED LABOUR ADJUSTMENT

Having carefully reviewed the submissions on this issue I accept that these provisions are fairly standard at other comparable institutions such as Capilano and all of the collective agreements negotiated at the MID table. Therefore I award that the provisions contained in the Collective Agreement at the MID table be incorporated into the renewed Collective Agreement with the exception in that the menu of options be canvassed following the five months' notice of layoff. I assume that the practice of using a subcommittee of LMRC to canvas the options will continue, so I decline to make any specific award in that regard.

DISTRIBUTED LEARNING

The Collective Agreement contains a Letter of Understanding on distributed learning in Letter of Understanding No. 9.

LOU No. 9 contemplated the establishment of a labour-management sub-committee to address issues related to faculty teaching distributed learning (on-line or mixed mode) courses. This sub-committee met and was able to find a significant amount of common ground regarding distributed learning, although it could not reach agreement on all the issues.

POSITION OF THE EMPLOYER RE DISTRIBUTED LEARNING

On February 7, 2005, Kwantlen tabled its proposal for revising Letter of Understanding No. 9. The KFA responded with its proposal on February 8, 2005.

In its latest proposal Kwantlen has deleted the reference to faculty participation in on-line or mixed mode being voluntary because this language is void under sections 2(b) and 4(2) of the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3.

Kwantlen submits that it is not necessary or appropriate to include the MID Memorandum language. Many of the MID provisions cover subject areas

that are similar to those contained in Kwantlen's proposal. The language sought by Kwantlen is derived from the existing Letter of Understanding No. 9 and the work of the labour-management sub-committee, and is tailored to the particular needs of Kwantlen and its faculty.

In addition, the definition of "distributed learning" in Article 6.7.1 of the MID Memorandum is inconsistent with the definition used historically at Kwantlen, where distributed learning means the delivery of courses on-line or in mixed mode. This was recognized in paragraph 1 of the proposal tabled by the KFA on February 8, 2005.

Finally, the Employer submits that paragraph 6.7.3 of the MID Memorandum is inappropriate in a two-party Collective Agreement.

POSITION OF THE ASSOCIATION RE DISTRIBUTED LEARNING

The Association is proposing a new Article for distributed learning which flows from the proposals exchanged by the parties earlier in the year.

The Association submits with respect to the proposals exchanged between the parties on February 7 and 8, 2005 that the Employer's latest proposal moves backwards from their February 8, 2005 proposal for two reasons as follows:

- The proposal regarding their #1 has changed from “Faculty participation in an on-line or mixed mode delivery model is voluntary” to “The Employer shall make the final determination about on-line offerings”.
- Their #2 has changed from “Faculty may, if necessary, use professional development time for such learning” to “With the approval of the Dean, the instructor may use professional development time for such learning”.

The parties are close on many other provisions of this Article.

However, the KFA seeks the inclusion of the principle of the MID provision 6.7.8 which reads as follows:

Where an employee has been assigned an on-line course and agrees to the employer’s request to teach all or part of that course from home, the employer shall provide the appropriate technology and pay for the reasonable and approved costs of delivering those courses from home.

The KFA proposes to reword this to the following:

Where a faculty member has been assigned an on-line or mixed-mode course and chooses to teach all or part of it from home, the employer shall pay for the cost of communications equipment and internet service required to deliver the programs/courses.

In addition, the KFA notes that the Employer has included in their #13 some part of Article 6.7.9 (MID, previous 6.7), but the KFA prefers the complete wording of the MID because it is inclusive of both distributed learning and educational technology:

No regular employee will be laid off as a direct result of the introduction of distributed learning or education technology.

The KFA also urges me to award the inclusion of the definition of distributed learning from Article 6.7.1(MID):

Distributed learning includes, but is not limited to, print based education courses, online or web-based instruction, video-conferencing, teleconferencing, instructional video and audio tapes, hybrid or mixed-mode programs and courses.

Counsel submits that the Association is seeking these particular provisions in addition to the others listed below because the pattern has been set by the MID, Capilano and Malaspina agreements that include these provisions. Counsel refers to the following documents in support of its position:

1. Employer Proposal Feb. 7, 2005
2. KFA Proposal Feb. 8, 2005

3. MID Article 6.7 Educational Technology/Distributed Learning

DECISION RE DISTRIBUTED LEARNING

After reviewing the provisions of several Collective Agreements in this sector, I am of the view that there are no distinguishing characteristics at Kwantlen compelling me to award the Employer's proposal. Distributed learning is a common feature in most Collective Agreements in the sector. Therefore I award the language negotiated by the parties at the MID/Common table, with the amendments to such language that were negotiated between Malaspina University College and the Malaspina Faculty Association.

LANGUAGE RELATED TO ARTICLE 1.2 OF THE PREVIOUS COLLECTIVE AGREEMENT (COMMON)

POSITION OF THE EMPLOYER RE LANGUAGE RELATED TO ARTICLE 1.2 OF THE PREVIOUS COLLECTIVE AGREEMENT (COMMON)

The Common Agreement negotiated at the MID table contains the following provision in Article 1.2 dealing with future legislation:

1.2 Future Legislation

In the event that any future legislation renders null and void or materially alters any provision of this Agreement, the Parties hereto will negotiate a mutually agreeable provision to be substituted for the provision so rendered null and void or materially altered. All other provisions of the Common Agreement shall remain in full force and effect.

It is the position of the Employer that since that language was agreed to, the Collective Agreement between the parties has become subject to the *Public Education Flexibility and Choice Act*, which renders certain provisions of the Collective Agreement void (s. 4(2)), and prohibits the parties from negotiating replacement provisions (s. 4(3)).

In order to update Article 1.2 of the Common Agreement to reflect both current and future legislative restrictions, Kwantlen submits that the language contained in its April 14, 2005 proposal should be awarded. That language reads as follows:

In the event that any legislation renders null and void or materially alters any provision of this Agreement, such provision shall be deemed to be void or so altered while the applicable legislation is in effect. All other provisions of this Agreement shall remain in full force and effect. The parties hereto will negotiate a mutually agreeable provision to be substituted for the provision so rendered null and void or materially altered. Where legislation prohibits the negotiation of a substitute provision, the requirement to negotiate does not apply.

POSITION OF THE ASSOCIATION RE LANGUAGE RELATED TO ARTICLE 1.2 OF THE PREVIOUS COLLECTIVE AGREEMENT (COMMON)

The Association is proposing a roll over of the current language in the Common Agreement. No changes were proposed to this Article during MID table negotiations. The Article has been in the Common Agreement in its

present form since 1998. During that time there has been no problem with either its interpretation or its application.

The Employer wants to secure changes to this Article. To do so they must prove that the provision would be inappropriate to Kwantlen or that the amendment is necessary to better address specific circumstances at Kwantlen. There can be no basis of such an argument in this case.

Article 1.2 is a legislative change clause. Any legislative change would apply equally to all post secondary institutions including Kwantlen. In the event of legislative change, the clause would be in effect for all colleges governed by the Common Agreement as well as the colleges that were once part of the Common Agreement and who did not modify this Article in their local negotiations. For example, Malaspina University College and Capilano College are not part of the current Common Agreement. However, in both cases, they have the same legislative change Article as the Common Agreement.

DECISION RE LANGUAGE RELATED TO ARTICLE 1.2 OF THE PREVIOUS COLLECTIVE AGREEMENT (COMMON)

I am not persuaded that there is any need to grant the language proposed by the Employer.

Under the *Public Education Flexibility and Choice Act*, certain provisions in post-secondary Collective Agreements are currently void, and any provisions that require the parties to negotiate their replacement are also void.

The experience in the public sector in this province, particularly over the past several years, is that when the government decides to pass restrictive legislation that has as its purpose and intent to render null and void certain provisions of Collective Agreements, it has done so in a manner that overrides the language contained in such collective agreements. While this type of legislation is in effect, the Collective Agreement is to be read as if the void provisions did not exist.

If certain provisions in the Collective Agreement between Kwantlen and the Association are rendered void by the *Public Education Flexibility and Choice Act*, then they are currently void as a matter of law. The language the Employer has asked me to award would not change this result.

Article 1.2 was not amended by the parties at the MID table, and there is nothing unusual about Kwantlen that would warrant a different result. In the result, I award no change to the current language of the Article.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this
17th day of June, 2005.

Vincent L. Ready

Vincent L. Ready