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December 3, 2009

VIA FACSIMILE

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

Attention: Scott L. Nicoll, Chair, Board of Governors

Dear Sir:

Re: Letter to Kwantlen Faculty Association of December 1, 2009

I am writing to you as counsel for the Federation of Post-Secondary Educators (“FPSE”) and Kwantlen Faculty Association (“KFA”) with respect to your letter to the President of the KFA dated December 1, 2009.

My clients have carefully considered your comments set out in your letter. They have asked that I write to you and advise that they do not share your view that somehow some unidentified senate policy could in the future render parts of the collective agreement void. My clients assume that the Kwantlen Senate would carefully consult with the Kwantlen Board before adopting any such policy, to ensure it did not conflict with any legal obligation agreed to in the collective agreement.

Section 48(b) of the *Labour Code* provides that the collective agreement binds:

....an employer who has entered into it...

There is no provision in that statute that permits an employer to divide its structure into parts, some of which are governed by the *Code* in the collective agreement, and some of which are not. The same can be said of the *University Act*.

Your letter does not mention it but it may be that it has been prompted by the March 12, 2008 decision of Arbitrator McPhillips in the *UBC* case. As you may know, FPSE has intervened in that case through CAUT, in support of the UBCFA. The appeal is scheduled for March 9 and 10, 2010 in the British Columbia Court of Appeal. We are confident that the Award will be reversed as wrongly decided.

In any event, we note that the powers and duties of the special purpose teaching universities are set out under section 35.2 of the *University Act*. They are not covered by the powers of the senate under section 37 of the *Act*, the section covering UBC and considered by Arbitrator McPhillips.

Leo McGrady Q.C.**
G. James Baugh, Senior Counsel

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While my clients agree with your comments in paragraph 2 that Kwantlen Polytechnic University is now operated under a bicameral model, they do not agree that the bicameral model is the same as that governing UBC. We draw your attention for example to the language of section 35.2(6) of the *University Act*.

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

...

(f) the evaluation of educational services;

...

Evaluation of educational services - teaching evaluations - was the subject of the McPhillips Award. In the case of special purpose teaching universities that is a matter of overlapping jurisdiction, rather than exclusively the jurisdiction of the senate as was argued by UBC and accepted by the Arbitrator in the McPhillips Award (pages 17 and 43).

Finally, I have advised FPSE and KFA that they should engage in collective bargaining as usual. I have also advised them that they are not bound by, nor ought they to be guided by, the McPhillips Award.

As a courtesy, I am sending a copy of this letter to your legal counsel, Colin Gibson of Harris & Company.

Yours truly,

McGrady & Company


Leo McGrady Q.C.

LM/vb

cc: Lesley Burke-O'Flynn, FPSE (via e-mail)
Terri Van Steinburg, KFA (via fax)
Colin Gibson, Harris & Company (via fax)

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