

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Vancouver Community College Faculty Association v. Vancouver Community College,***
2005 BCSC 119

Date: 20050131
Docket: L040735
Registry: Vancouver

Between:

Vancouver Community College Faculty Association

Petitioner

And

Vancouver Community College

Respondent

Before: The Honourable Madam Justice Allan

Reasons for Judgment

Counsel for the Petitioner:

Leo McGrady Q.C.

Counsel for the Respondent:

Nitya Iyer

Date and Place of Hearing:

January 19, 2005
Vancouver, B.C.

[1] The petitioner Vancouver Community College Faculty Association (the "Faculty Association"), a certified trade union under the *Labour Relations Code*, R.S.B.C. 1996, c. 244, represents approximately 550 faculty and staff employed at Vancouver Community College ("VCC"). The respondent VCC is a college designated under the *College and Institute Act*, R.S.B.C. 1996, c.52 (the "*Act*"). As required by the *Act*, VCC has a President, a Board and, since April 4, 1995, an Education Council.

The relief sought

[2] The following relief is sought in the petition:

1. An order setting aside the decision of [VCC] made in or around April 2002 purporting to change the term length in the English Language Skills ("ELS") Department beginning in May 2002;
2. An order that [VCC] does not have the authority to make changes in the length of courses or programs it offers or any other matter in the development of educational policy as outlined in Section 23 of the [*Act*], unless the decision to do so is made by the Board of [VCC] after it has sought advice on the matter from the Education Council of [VCC] as required by Section 23 of the [*Act*];
3. A declaration that the draft policy proposal on changes of length or hours for course programs, revised February 9, 2004, and tabled for review/feedback at the Education Council Meeting of March 2, 2004, is contrary to the [*Act*], and is therefore void and a nullity.

[3] Written and oral submissions were made on those issues. Towards the end of counsel's submissions, there was a discussion as to whether the petitioner should clarify the relief it sought as the April 2002 decision referred in para. 1 and the draft policy referred to in para. 3 were replaced on April 29, 2004 by a written policy of the

Board. I am satisfied that the issues that the parties wish to be dealt with may be framed thus:

(1) Is the written policy of the Board dated April 29, 2004 entitled "Changes of Length or Hours for Courses or Programs Policy" (the "Policy") contrary to the *Act*?

(2) Can VCC institute administrative "operational decisions" with respect to changes of length or hours for courses or programs in the absence of a Board policy sanctioning those changes made in accordance with s. 23 of the *Act*?

[4] The critical issue is whether "changes in the length of or hours for courses or programs offered by the institution" are central to the advisory mandate of the Education Council, as provided in the *Act*.

Legislation

[5] The *Act* mandates that VCC have a Board and an Education Council. The Board is comprised of 14 members, including the President, the Chair of the Education Council, eight members appointed by the provincial cabinet, one faculty member, two students, and one member of the support staff. The Education Council is comprised of 20 members: ten faculty members, four students, four educational administrators (e.g., deans and vice-presidents), and two support staff. The President is a member of both the Board and the Education Council.

[6] Section 5(2) of the *Act* provides that, when a college or institute is designated by the Lieutenant Governor in Council, the institution is "a corporation consisting of the members appointed to its board under section 9".

[7] Part 4 of the **Act** sets out the powers and duties of Boards and Education Councils. Section 19 describes the broad management and supervisory powers of the Board. The relevant portions of that section are as follows:

Powers of board

S. 19(1) Subject to this Act, a board may do the following:

...

(b) manage, administer and control the property, revenue, expenditures, business and affairs of the institution;

...

(e) manage and promote the educational or training programs offered at the institution, subject to sections 24 and 25;

...

(i) perform other functions consistent with this Act that the board considers advisable for the proper administration and advancement of the institution.

[8] The powers and duties of the Education Council are set out in s. 24. Generally, they include policies regarding examinations and evaluation of student performance, criteria regarding academic standing and awards, and setting curriculum content. The Education Council also has an advisory role on certain issues, as set out in s. 23. As the wording of s. 23 is critical to the issues in this case, I will set it out in full:

Advisory role of the education council

23 (1) An education council must advise the board, and the board must seek advice from the education council, on the development of educational policy for the following matters:

- (a) the mission statement and the educational goals, objectives, strategies and priorities of the institution;
- (b) proposals about implementation of courses or programs leading to certificates, diplomas or degrees, including the length of or hours for courses or programs;
- (c) reports after implementation by the institution without prior review by the education council of
 - (i) new non-credit programs, or
 - (ii) programs offered under service contract;
- (d) priorities for implementation of new programs and courses leading to certificates, diplomas or degrees;
- (e) cancellation of programs or courses offered by the institution or changes in the length of or hours for courses or programs offered by the institution;
- (f) evaluation of programs and educational services;
- (g) policies concerning library and resource centres;
- (h) setting of the academic schedule;
- (i) policies on faculty member qualifications;
- (j) adjudication procedure for appealable matters of student discipline;
- (k) terms for affiliation with other post secondary bodies;
- (l) consultation with community and program advisory groups concerning the institution's educational programs;
- (m) qualifications for admission policies;
- (n) criteria for awarding certificates, diplomas and degrees;
- (o) other matters specified by the board.

(2) Advice given under subsection (1) must not conflict with policy or directives established under section 2 (1) (a).

(3) The board must request advice on a matter under subsection (1) by giving the education council, at least 10 working days before the board will deal with the matter, the following:

- (a) the agenda items concerning the matter for the meeting of the board at which the matter will be discussed;

(b) the date by which a statement setting out the advice of the education council must be given to the chair of the board.

(4) Despite subsection (3), if the board must deal with a matter under subsection (1) and there are substantial reasons why 10 working days' notice under subsection (3) cannot be given, the board must advise the education council, as soon as practicable, concerning

(a) the matter,

(b) the reason why notice could not be given under subsection (3), and

(c) the decision taken on the matter.

(emphasis added)

[9] Section 26 sets out the functions and duties of VCC as an institution:

Functions and duties of college or Provincial institute

26 Subject to this Act and the resources available to the board, an institution must do the following:

(a) establish and maintain courses of instruction;

(b) establish fellowships, scholarships, exhibitions, bursaries, prizes, awards and other aids to encourage proficiency in the subjects taught at the institution;

(c) provide a program of continuing education;

(d) generally promote the objects of the institution.

[10] Section 36 authorizes the Board to appoint a President to “supervise and direct ... the staff of the institution” and s. 40 permits the Board to authorize the President to appoint employees “necessary to carry on the business and operations of the institution”. The institution, through the President, must report to the Board and is subject to its supervision.

Background

[11] VCC's English Language Skills ("ELS") programs are designed for adult immigrant students. Approximately 900 students are registered in these courses which are taught by 40 full time instructors.

[12] Vice President Moira Henderson deposed that in the spring of 2002, in consultation with the Dean responsible for ELS programs, "several possible scenarios regarding cost cutting in that department were developed." It is not clear from the filed material who was involved in the development of those "scenarios".

[13] At a meeting of the Education Council on March 5, 2002, Cheryl Jibodh, a College Instructor in the ELS Department, raised the issue of proposed cuts to certain courses and suggested that the issue should be considered by the Education Council for the purpose of providing advice to the Board. At that meeting, Ms. Henderson stated that the same ELS courses were being run with three different term lengths and "rationalization" would make all ELS term lengths equal to the shortest current term length (September to December). She said that the issue would come to the Education Council for "information only" but, if the ELS terms were further shortened to less than the current fall term (which was 16 weeks), "the matter would come to the Education Council for approval and advice to the Board".

[14] At a further meeting of the Education Council on April 2, 2002, the following motion was carried:

That if the length of the May term in the ELS Department is being reduced below the number of hours of the 2001 Fall term, then prior to

Education Council giving advice to the Board, proper consultation with the Department must take place.

[15] In fact, the ELS term was shortened from 16-18 weeks to 13-14 weeks. It is common ground that the advice of the Education Council was not sought before changing the length of the terms, nor did the Education Council have an opportunity to provide any advice to the Board.

The Policy

[16] Two years later, on March 2, 2004, the following draft policy regarding changes of length or hours for courses or programs (the “Policy”) was tabled at an Education Council meeting:

CHANGES OF LENGTH OR HOURS FOR COURSES OR PROGRAMS POLICY

Policy	The Vice President of Education or delegate will approve: Changes in length or hours for courses or programs.
Applies To	Department Heads, Deans, Vice President.
Principles	The following principles will inform the decision of the Vice President or delegate: i) That quality and relevance of outcome for students is maintained ii) That efficiency and cost effectiveness for students and the College is improved or maintained iii) That there is no negative impact on employment outcomes for students

- iv) That there is no negative impact on transfer or laddering opportunities for students

Procedures

Changes, including rationale, will be presented to Education Council for information

(emphasis in the original)

[17] The second page of the Policy contains a signature line for approval of the Education Council chair. However, on that line is typed the notation "N/A".

[18] On April 6, 2004, the Education Council discussed the Policy. A motion to approve it was moved and seconded and then withdrawn. After further discussion, it was agreed that Mr. Hougham, Chair of the Education Council, would report to the Board that members of the Education Council wished to have a greater role in the development of the Policy.

[19] A public Board meeting was held on April 29, 2004. The minutes reflect the fact that the Board considered but rejected a motion that would amend the Policy to provide that "Changes, including rationale, will be presented to Education Council for "advice" rather than "for information." At that meeting, the Board approved the Policy:

The Standard of Review

[20] Both parties agree that the standard of review is correctness. The issue of whether the Policy contravenes the **Act** involves the correct interpretation of the requirements of the **Act**.

The petitioner’s submissions

[21] The petitioner’s primary complaint is that the Board cannot change the ELS term lengths without first obtaining the advice of the Education Council. The Policy itself undermines the legislative purpose of s. 23 of the **Act**, which clearly contemplates a mandatory advisory role of the Education Council on specified education policy matters that include “changes in the length of or hours for courses or programs offered by the institution.”

[22] Education Councils were introduced by the **College and Institute Amendment Act, 1994**, S.B.C. 1994, c. 18. In the debates of the Legislative Assembly, the Minister of Education described the Education Council as “a new body for institutional governance”. He stated in *Hansard*:

The creation of the education council...will enable faculty, students and support staff to participate formally and meaningfully in education decision-making...

(emphasis added)

British Columbia, Legislative Assembly, *Hansard*, Vol. 15, No. 24
(June 1, 1994) at 11258 (Hon. Dan Miller).

[23] Mr. McGrady submits that it is clear that the legislative purpose of s. 23 of the present **Act** is to ensure that a college board has the benefit of the advice of an education council, on the development of education policy regarding certain matters. Those matters include changes in the length of or hours of courses, or programs, and academic scheduling.

[24] Mr. McGrady submits that the Board's actions, not only breached s. 23 of the **Act** by delegating the approval of changes to the Vice President, but eviscerated the advisory role of the Education Council and, thus, its ability to participate meaningfully in educational policy decision-making.

[25] The petitioner cites the decision of the Alberta Court of Appeal in **Lakeland College Faculty Assn. v. Lakeland College** (1998), 223 A.R. 1, 1998 ABCA 221. Section 10(2) of the **Colleges Act**, R.S.A. 1980, c. C-18 permitted a college board to designate a college employee as an academic staff member only "after consultation with the academic staff association". After reviewing the history of the **Colleges Act**, the Court concluded at para. 80:

...the authority to make the decision about the academic status of persons was given to the board of governors of a college whose membership reflected all interests. But there is the specific requirement of a process that would inform that decision: a consultation. As D.P. Jones and A.S. de Villars have said in their textbook **Principles of Administrative Law**, 2d ed. (Scarborough: Carswell, 1994) at pp. 135-136:

Sometimes legislation prescribes specific matters that the delegate must attend to in the exercise of his or her powers. For example, the delegate may be required by statute to give notice to certain persons of his or her intended actions; to give a hearing prior to acting; to obtain someone else's approval; to keep a written record of his or her proceedings; or to do certain things within a prescribed period of time. Questions often arise as to the legal consequence of the delegate's failure to comply with such matters. On the one hand, if the statutory requirement is mandatory, failure to comply therewith will render the delegate's action void. On the other hand, breach of a merely directory statutory provision does not affect the validity of the delegate's action. ...

[26] The Court considered the statutory obligation to “consult” to be mandatory. It held that the College Board’s failure to adequately consult pursuant to s. 10(2) of the **Colleges Act** went to jurisdiction and its decision ran afoul of the correctness standard. It stated at para. 82:

Did the Board fall into error in making the decision as to the status of Ms, Kaai? I find it did. The purported consultation was so inadequate that it cannot be characterized as a consultation as required by the **Act**. Given the purpose, intention and scheme of the **Colleges Act**, the legislature could not have intended such an inscrutable exercise of authority by the Board. ...

[27] The petitioner submits that the duty on the Board in this case to “seek the advice” of its Education Council is parallel to the duty on the Lakeland College Board to “consult” with its faculty association.

[28] The petitioner further submits that the Board cannot avoid its mandatory statutory obligations to seek and receive advice by adopting an “information only” approach after the fact: **O’Callaghan v. Edmonton (City)** (1978), 12 A.R. 563, 6 Alta. L.R. (2d) 307 (Dist. Ct.) and **Cholod v. Regina (City)**, [1976] 2 S.C.R. 484, (1975), 59 D.L.R. (3d) 728.

The respondent’s submissions

[29] The respondent submits that both the 2002 decision to change the length of the ELS term and the 2004 Policy were valid and comply fully with the requirements of the **Act**.

(i) validity of the 2002 decision

[30] On behalf of the Board, Ms. Iyer suggests that there is a distinction between “educational policy” - which is within the advisory mandate of the Education Council - and individual “operational decisions” which are made by the institution itself. She describes the 2002 decision to change the term length of ELS courses as an administrative operational decision made by the institution, in contradistinction to a decision relating to an educational policy governing changes to the term lengths of courses. The respondent submits that the Education Council is an adjunct to the Board, not to the institution and neither VCC nor its administrators need obtain its advice before implementing operational decisions.

[31] Prior to 2004, there was no formal Board policy relating to “changes in the length of or hours for courses or programs offered by the institution”. Ms. Iyer submits that, because of the practical necessity of running the institution, whether or not the Board had developed specific policies with respect to a particular area, e.g., the library or the resources centre, it was left to VCC administrators to cancel courses and alter their length or hours as necessary, in order to ensure the proper operation of the institution. Making those changes, even repeatedly, did not constitute the institution making “educational policy” within the meaning of s. 23 of the *Act*.

[32] The Board’s position is reflected in Ms. Henderson’s affidavit. In describing the discussions at the March 5, 2002 meeting of the Education Council, she deposed that the proposed change in the length of ELS courses did not “relate to the development of educational policy”; rather, the discussion “focused on various

operational scenarios...the appropriateness of which was going to be determined by the Dean and the Vice President subsequently." (emphasis added).

[33] Ms. Iyer submits that nothing in the *Act* requires VCC to solicit the advice of the Education Council when it makes decisions, (including those relating to matters that are listed in s. 23(1)), that are necessary to carry on the business and operations of the institution. She says that pursuant to s. 26 of the *Act*, (set out above) administrative matters are within the jurisdiction of the institution or the Board.

[34] In my opinion, that submission is untenable. VCC is not an independent entity that is granted any power, duty or authority. Section 5(2) provides that an institution under the *Act* is a corporation consisting of the members appointed to its board under s. 9. Section 26, relied on by the respondent, merely describes the purposes of an institution. The Board acts through its delegates. An institution is not an entity that can make operational decisions or policies in a vacuum. Its employees are supervised and directed by the President (s. 36) and the institution, through the President, must report to, and is subject to the supervision of, the Board (s. 40). The Board is charged with administering the affairs of the institution (s. 19(1)(b)) and performing functions necessary for its proper administration (s. 19(1)(i)). Hence, the 2002 decision to change the length of the ELS term was a decision of the Board, for which it should have sought and received the advice of the Education Council.

(ii) validity of the Policy

[35] Ms. Iyer concedes that the Board was obliged to obtain the advice of the Education Council with respect to the development of the Policy. However, she

submits that Board did comply with s. 23 of the *Act*. The draft Policy was tabled for discussion and discussed by the Educational Council, which then sought a greater role in the approval of the proposed Policy. The Board considered and rejected that advice.

[36] Ms. Iyer submits that the Education Council is not entitled to review every change made under the Policy. She suggests that if, for example, the petitioner's interpretation of the role of the Education Council was correct, its advice would have to be sought on all admissions decisions because "qualifications for admission policy" is listed as one of the matters upon which the Education Council must provide advice to the Board.

[37] The respondent's example with respect to admissions decisions is, with respect, fallacious. Clearly, the Education Council would never be consulted with respect to the admission decisions of individual students. However, a proposed policy that students must have certain qualifications for admissions would fall squarely within the mandate of the Education Council. The Board could not circumvent the Council's required input by instituting a policy that said the President or his or her delegate would set the admissions qualifications. Such a policy would run afoul of the *Act*.

Conclusion

[38] At the heart of this dispute is the meaning of the opening words in s. 23 of the Act: "An education council must advise the board, and the board must seek advice

from the education council, on the development of educational policy” for certain specified matters.

[39] It is clear that if the Board chooses to develop an educational policy on a matter enumerated in s. 23(1), it must seek the advice of the Education Council. “Changes in the length of or hours of courses or programs offered by the institution” is specifically itemized as an educational policy and the subject matter falls squarely within the Policy developed by the Board.

[40] In this case, I conclude that the Board has improperly attempted to circumvent the legislation by developing a Policy that removes any input of the Education Council into the development of educational policy with respect to the subject matter specified in s. 23(1)(e).

[41] By delegating all decisions in this area to the Vice President of Education or his or her delegate, the Board purported to improperly transfer the statutory power given to the Education Council. Moreover, the Policy precludes the Education Council from any future role in matters that clearly come within its advisory mandate. The evisceration of the Education Council’s role is further underscored by the provision that all changes will be presented to that body only “for information.”

[42] The petitioner is entitled to a declaration that the Policy is contrary to the *Act*.

[43] Further, the Board cannot avoid consultation with the Education Council by characterizing changes in the length of or hours for courses or programs as administrative operational decisions made by the institution. All educational policy

decisions encompassed by s. 23 are to be made by the Board, after consultation with the Education Council.

[44] The petitioner will also have its costs.

“M.J. Allan, J.”
The Honourable Madam Justice M.J. Allan