IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Capilano University Faculty Association v. Capilano University,* 2014 BCSC 712

Date: 20140428
Docket: S138692
Registry: Vancouver

Between:

Capilano University Faculty Association

Petitioner

And

Capilano University

Respondent

Before: The Honourable Mr. Justice Savage

Reasons for Judgment

Counsel for the Petitioner:	G.J. Baugh
Counsel for the Respondent:	D.L. Munn
Place and Date of Hearing:	Vancouver, B.C. April 8 - 9, 2014
Place and Date of Judgment:	Vancouver, B.C. April 28, 2014

I. Introduction

[1] The petitioner Capilano University Faculty Association (the "CUFA") asks the Court for declarations that the respondent Capilano University, a special purpose teaching university, acted contrary to s. 35.2(6) of the *University Act*, R.S.B.C. 1996, c. 468 in not seeking the advice of the Senate on the development of educational policy for the discontinuance of courses before discontinuing courses and programs for the 2013-2014 academic year. Capilano University argues that it is not required to do so or, in the alternative, that its budgeting process satisfies the requirements of the *University Act*.

II. Background

[2] CUFA is a trade union certified under the *Labour Relations Code*, R.S.B.C. 1996, c. 244, which represents instructors, instructional associates, librarians and others employed by Capital University at its North Vancouver, Squamish and Sunshine Coast campuses and other centres. Capilano University was a college designated as such under the *College and Institute Act*, R.S.B.C. 1996, c. 52 until it was designated a teaching university in September 2008 under the *University Act*. As a college it had a board of governors and an educational council. It now has a board of governors and a senate.

[3] The Capilano University senate is composed of 27 voting members, including the University Chancellor, 10 members of the Faculty Association, the President of the Faculty Association, the University President, Academic Vice-President, Deans of Faculties, other members of the university administration, students, an alumni member and support staff as described in s. 35.2(2) of the *University Act* (the "Capilano Senate"). The Capilano Senate has the powers and duties described in s. 35.2(5) of the *University Act*.

[4] The Capilano University board of governors is comprised of 15 voting members as described in s. 19(1) of the *University Act* (the "Capilano Board"). The Capilano Board exercises the general powers described in s. 27 of the *University Act*.

III. The Issue

[5] S. 35.2(6) of the *University Act* provides as follows:

> (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:
>
> (a) the mission statement and the educational goals, objectives, strategies and priorities of the special purpose, teaching university;
>
> (b) the establishment, revision or discontinuance of courses and programs at the special purpose, teaching university;
>
> (c) the preparation and presentation of reports after implementation by the special purpose, teaching university without prior review by the senate of
>
> (i) new non-credit programs, or
>
> (ii) programs offered under service contract;
>
> (d) the priorities for implementation of new programs and courses leading to certificates, diplomas or degrees;
>
> (e) the establishment or discontinuance of faculties at the special purpose, teaching university;
>
> (f) the evaluation of programs and educational services;
>
> (g) the library and resource centres;
>
> (h) the setting of the academic schedule;
>
> (i) the qualifications for faculty members;
>
> (j) the adjudication procedure for appealable matters of student discipline;
>
> (k) the terms for affiliation with other post-secondary bodies;
>
> (l) the consultation with community and program advisory groups concerning the special purpose, teaching university's educational programs;
>
> (m) other matters specified by the board.
>
> [Emphasis added.]

[6] At the June 11, 2013 board meeting, the Capilano Board adopted a budget for the April 1, 2013-March 31, 2014 fiscal year (the "2013-2014 Budget"). The 2013-2014 Budget provided for the discontinuance of several courses and programs across all faculties.

[7] The Capilano Board did not specifically seek the advice of the Capilano Senate on the development of an educational policy for the discontinuance of courses, programs or faculties prior to passing the 2013-2014 Budget. The Capilano Senate did not specifically advise the board on the development of an educational policy for the discontinuance of courses, programs or faculties prior to passing the 2013-2014 Budget.

[8] The Capilano Board did not seek the advice of the Capilano Senate and the Capilano Senate did not provide advice to the Capilano Board on the development of an educational policy for the consultation with community and program advisory groups concerning the University's educational programs prior to the passing of the 2013-2014 Budget.

[9] Capilano University argues that it is not required to do what CUFA says it is required to do. Capilano University is a young university and is still in the process of establishing its bicameral model of government and developing educational policy. Capilano University has not yet developed an educational policy on each of the matters enumerated in section 35.2(6) of the *University Act*, nor does the legislation require a specific educational policy on each of the matters.

[10] Alternatively, Capilano University argues that educational policy can be developed informally through practice and custom. That is what is occurring. Even if educational policy is required, consultation by the Capilano Board with the Capilano Senate during the budgeting process can satisfy the requirements of section 35.2(6). Capilano University says that the consultation which occurred here does satisfy the statutory requirements.

IV. Standard of Review

[11] The parties agree that what is at issue here is the proper interpretation of section 35.2(6) of the *University Act*. The asserted failure to comply with a statutory duty is reviewable based on a correctness standard: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paras. 42-44, 53-54 and 238-239. As the

parties are in agreement I will not review the jurisprudence. I am content to treat the matter as subject to the correctness standard.

V. Interpretation of section 35.2(6) *University Act*

[12] CUFA says that section 35.2(6) requires that the Capilano Board and the Capilano Senate do something with respect to each of the enumerated matters in subsection (6). That is, there must be consultation and advice on the enumerated matters. That is important to CUFA because it wants to engage the board and the senate in discussion on policy germane to course discontinuance.

[13] CUFA relies on a decision of Madam Justice Allen of this Court in *Vancouver Community College Faculty Association v. Vancouver Community College*, 2005 BCSC 119 ["*VCC*"]. What was at issue there, as here, was the interpretation of legislation regarding the governance of an educational institution, a community college. Capilano University was formerly a community college. It is now a special teaching university. The legislative provision at issue there is very similar to the statutory provision here. For convenience, I compare the provisions in the following table:

VCC case, s. 23(1) ***College and Institute Act,*** R.S.B.C. 1996, c. 52	*CUFA* case, s. 35.2(6) ***University Act***, R.S.B.C. 1996, c. 468
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: … (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; … (h) setting of the academic schedule;	35.2 (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: … (b) the establishment, revision or discontinuance of courses and programs at the special purpose, teaching university; … (e) the establishment

	or discontinuance of faculties at the special purpose, teaching university;

[14] CUFA compares the educational council and boards of colleges with the senates and boards of special teaching universities. In the *VCC* decision, the powers of the educational council and boards are referenced as follows:

> [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.
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> [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. …

[15] Capilano University says that section 35.2(6) has no requirement to actually establish policies. The section does not have an article such as “the” or “an” before the word “educational policy”. Moreover, there is no time frame enunciated for the development of policy. In such a case the only reasonable interpretation is that educational policy can be developed informally through practice or custom, and that the budgeting process itself can satisfy the requirements of the consultative process of the *University Act*.

[16] In *VCC*, the Court observed:

> [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*.
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> [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.
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> [Emphasis added.]

[17] In *VCC* the college argued, as Capilano University argues here, that the process undertaken satisfied the consultative requirement. Madam Justice Allen rejected that argument:

> [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.*

[18] Capilano University in places argues that the Capilano Board and Capilano Senate were, in effect, developing educational policy during the course of the budget-making process. Elsewhere, however it seems to be acknowledged that the Capilano Board and Capilano Senate were not developing educational policy during the course of the 2013-14 Budget. Specifically, Capilano University argues that even

if it were required to seek the advice of the Capilano Senate regarding the development of educational policy for the discontinuance of courses and programs, the Capilano Board did so by consulting with a committee of the Capilano Senate, the Senate Budget Advisory Committee (the "SBAC").

[19] I agree with the submissions of the CUFA that any reasonable interpretation of the record does not support this interpretation. The Capilano Board did not seek the advice of the SBAC on the development of a policy for the discontinuance of courses and programs. Rather, the Capilano Board directed the Capilano Senate to "attempt to balance the 2013-2014 budget without cuts to programs and sections in order to allow the next year for consultation". The SBAC did not engage in any in-depth assessment of suggestions that involve academic choices. Neither the SBAC nor the Capilano Senate provided any advice to the Capilano Board regarding the discontinuance of courses or programs. The actual recommendation from the SBAC to the Capilano Board was not with respect to policy but to determine if Capilano University could successfully apply its reserves to avoid the shortfall. The SBAC indicated that the Vice President and Deans should effectively develop a policy for the next budget year. As noted by CUFA, at the June 10, 2013 Capilano Senate meeting, the only recommendation to the Capilano Board passed by the Capilano Senate was that the Capilano Board accept the revised proposed budget.

[20] In my opinion the following observations in the *VCC* case also apply to the provision at issue here:

> [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.
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> [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.
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> [Emphasis in original]

[21] I do not think that the interaction between the Capilano Board and the SBAC can be characterized as the Capilano Senate advising the Capilano Board, and the

Capilano Board seeking the advice of the senate on the development of policy for the discontinuance of courses and programs. That is supported by the University's own evidence that "none of the senate's committees has a mandate to develop educational policy, or more particularly, address issues regarding the cancellation and discontinuance of programs and courses". There is no mention of the SBAC or other committees reviewing or making recommendations on matters related to the discontinuance of course and programs.

[22] Capilano University argues that there is no time frame for the board to develop, or to seek the advice of the senate, or for the senate to provide advice to the board, regarding educational policy for the discontinuance of courses and programs in the legislation. As there are no timelines, this suggests that the development of educational policy begins with the board. Since there are no timelines under the *University Act* the board does not have an obligation to initiate development of educational policy under the *University Act*.

[23] In my view this argument flies in the face of the mandatory language of section 35.2(6) of the *University Act* which, in two places, uses the term "must". The argument of Capilano University entails that the absence of a statutory timeline converts mandatory language into permissive language effectively transforming the term "must" into "may" in section 35.2(6). I disagree. In my view a more reasonable interpretation is that such consultations must take place within a reasonable time. Logically that would take place before the discontinuance of courses and programs.

[24] Capilano University says that the *VCC* case is distinguishable in that as a college there was a requirement for the board to request the education council's advice at least 10 days before the board dealt with the matter. The Capilano Board has no such obligation, and no similar timeframe.

[25] In my view, section 23(3) of the *College and Institute Act* does not require colleges or institutes covered by that Act to develop policies on the enumerated matters within a particular time frame. College boards are simply required to give their educational councils at least ten working days' notice regarding the date the

board will be dealing with the policy matter and the date by which a statement setting out the advice of the educational council must be given to the board. Provided the ten working days' notice is given, there is no requirement as to when the meeting must be held and there is no time frame for when the policy is to be implemented.

[26] College boards are subject to the same statutory duty as the university board in this case. They must seek advice from their education councils or senate, and their education council or senate must advise the boards on the development of educational policy with respect to the enumerated matters.

[27] Counsel for Capilano University referred to decisions such as *Kulchyski v. Trent University* [2001], 204 D.L.R. (4th) 364 (ONCA) and *Faculty Association of the University of British Columbia v. University of British Columbia*, 2010 BCCA 189. The ultimate power over such matters as are of concern here, it says, belongs to the Capilano Board. While that may be so, I am unable to conclude that the ultimate residence of authority obviates the need to abide mandatory statutory provisions regarding advice and consultation.

[28] In the result, I agree with the interpretation of section 35.2(6) of the *University Act* advanced by CUFA.

VI. Orders

[29] The petitioner seeks various declaratory orders as set out in the petition. The petitioner in its submissions before me said it was not challenging prior budgets or seeking to force Capilano University into adopting deficit budgets. For example, it is not seeking to set aside any portion of the 2013/2014 budget. In my view those concessions are entirely appropriate, given the timing of the hearing of the petition.

[30] In my view the petitioner is entitled to the following declarations:

1. The decision of Capilano University made on or about June 11, 2013 to discontinue various courses and programs was made without complying with section 35.2(6) of the *University Act*;

2. Capilano University does not have the authority to discontinue courses and programs as outlined in section 35.2 (6) of the *University Act*, unless the decision to do so is made by the board after seeking advice on the matter from the Capilano Senate and the Capilano Senate has so advised the Capilano Board;

3. The Capilano Board must seek the advice of the Capilano Senate and the Capilano Senate must advise the Capilano Board on the development of an educational policy for the discontinuance of courses and programs before the university can discontinue any courses or programs, including those purported to be discontinued by the 2013/2014 budget.

[31] The petitioner is entitled to its costs.

"The Honourable Mr. Justice Savage"