

LABOUR RELATIONS CODE  
(Section 104 Appointment)  
ARBITRATION AWARD

UNIVERSITY OF BRITISH COLUMBIA FACULTY ASSOCIATION  
UNION

THE UNIVERSITY OF BRITISH COLUMBIA  
EMPLOYER

(Re: Dr. Mary Bryson and Master of Educational Technology)

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Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Allan E. Black, Q.C. S. Michelle Blendell
Representing the Employer:	Thomas A. Roper, Q.C. Graeme McFarlane
Dates of Hearing:	July 14; October 27 - 28, 2003; January 15 - 16; February 2, 2004
Date of Decision:	February 18, 2004

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### **1. Grievances and Appointment**

These grievances arise from the employer's actions and requirements placed on faculty members in the development of courses for an on-line graduate degree program.

The union grieves that in the course development for the Master of Educational Technology program the employer has negotiated directly with bargaining unit members contrary to the employer's obligation to deal with the union as exclusive bargaining agent under Article 3 and other provisions of the 2001 - 2004 Framework Agreement for Collective Bargaining. The union also grieves that, in retaliation for Dr. Mary Bryson's refusal to enter into an individual agreement with the employer, she was removed from performing certain work contrary to Articles 4 and 12.

The employer says the union's exclusive bargaining agency and the collective agreement deal with terms and conditions of employment. They do not extend to intellectual property rights and the rights of individual faculty members in their intellectual property. The employer says it did not discriminate against Dr. Bryson.

On June 24, 2003 I was appointed arbitrator of these grievances pursuant to section 104(4) of the *Labour Relations Code*. The union and employer agreed that I am properly appointed as an arbitrator under the *Labour Relations Code*. The hearing commenced July 14, 2003 and continued on five mutually convenient dates until final summations were made on February 2, 2004.

## **2. Recognition and Agreement on Framework for Collective Bargaining**

The University of British Columbia Faculty Association is a trade union and there has been a history of "arms-length 'collective bargaining' between the University and Faculty Association" since, at least, 1979 (*University of British Columbia* [2000] BCLRBD No. 220, ¶ 58, 14 and 60). In December 1999 the members of the Faculty Association voted to seek recognition as a union with all the rights and obligations as the exclusive bargaining agent for employees covered by the collective agreement.

At the time, there was an application before the Labour Relations Board by the Canadian Union of Public Employees, Local 2278 to include approximately 500 sessional lecturers in its bargaining unit of teaching assistants, tutors, markers and non-credit sessional instructors (*University of British Columbia* [1999] BCLRBD No. 446 reconsideration applications by all three parties denied [2000] BCLRBD No. 85).

On January 20, 2000 the Board of Governors of The University of British Columbia extended voluntary recognition to the Faculty Association as a trade union under the *Labour Relations Code*. The employer's voluntary recognition of the Faculty Association to represent a bargaining unit including sessional lecturers led to a Board decision to dismiss CUPE's application.

The voluntarily recognized bargaining unit described in the collective agreement consists of over 2,500 full and part-time faculty members (sessional lecturers, lecturers, instructors, assistant professors, associate professors and

professors) professional librarians and program directors "in the Centre for Continuing Studies" or equivalent positions (Article 2.01(a)).

The current collective agreement for the term July 1, 2001 to June 30, 2004 consists of several documents. One of the documents is the *Agreement on the Framework for Collective Bargaining*, the Preamble of which states:

THE UNIVERSITY OF BRITISH COLUMBIA and the FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

DESIRING to promote fair and proper economic conditions and terms of appointment for faculty at The University of British Columbia;

RECOGNIZING that the University is a community of scholars whose essential functions are the pursuit and dissemination of knowledge and understanding through research and teaching and that academic freedom is essential to carry out these functions; and

BEING DETERMINED not to interfere with that academic freedom;

HAVE AGREED AS FOLLOWS:

Articles 3 and 4 in Part A, dealing with Association Recognition Rights, state:

### **3. Bargaining Agent**

The University recognizes the Association as the sole collective bargaining agent for all members of the bargaining unit. Further, it is recognized by the Parties that the ratification of the document (letter dated November 10, 1999, from Vice President Academic and Provost to the President of the Association) by the Parties had the effect of voluntarily recognizing the Faculty Association under the British Columbia Labour Code.

### **4. No Discrimination**

The University, Faculty Members, Librarians and Program Directors are committed to fostering an environment of tolerance and mutual respect in which all members of the University Community - students, faculty, staff and visitors - are able to study and work free from harassment and discrimination. The University and the Association agree that there shall be no discrimination against any Faculty Member or member of the bargaining unit in relation to the matters covered by this Agreement because of race, colour, sex, sexual orientation, place of origin, creed, marital status, political or religious affiliation or belief, age (other than the normal provisions relating to retirement) or membership or non-membership in, or activities on behalf of, the Association.

Article 12 in Part C, dealing with Preservation of Rights and Practices, states:

### **12. Non-Interference with Rights under Agreement**

The University shall not impose any condition upon the appointment of a Faculty Member or member of the bargaining unit that would restrain that person from exercising rights under this Agreement, or under any Collective Agreement or subsidiary agreement.

A "subsidiary agreement" is "an agreement between the University and the Association concerning members of an academic unit" (Article 1.01).

### **3. Agreement on Conditions of Appointment for Faculty**

There is a specific agreement on Conditions of Appointment for Faculty, which includes criteria for appointment, reappointment, tenure and promotion. The principal activities to be considered are teaching, scholarly activity and service as agreed in Article 4.

### **4. Criteria for Appointment, Reappointment, Tenure and Promotion**

#### **4.01 General**

(a) Candidates for appointment, reappointment, tenure or promotion, other than those dealt with in paragraph (b), are judged principally on performance in both teaching and in scholarly activity. Service to the academic profession, to the University, and to the community will be taken into account but, while service to the University and the community is important, it cannot compensate for deficiencies in teaching and in scholarly activity. Competence is required both in teaching and in scholarly activity, provided that a candidate who does not meet the criterion of scholarly activity but who is judged to be an excellent teacher may be given a tenured appointment as Senior Instructor when, in the view of the University, its needs will be best served by that appointment. Appointments without term are granted to individuals who have maintained a high standard of performance in meeting the criteria set forth below and show promise of continuing to do so.

(b) Candidates for appointment or reappointment to the rank of Instructor I are judged principally on performance in teaching. Service to the academic profession, to the University, and to the community may be taken into account. Instructors I who are candidates for a tenured appointment are judged on the ground of excellence in teaching.

(c) Judgments of an individual should be made objectively.

(d) The decision to grant a tenured appointment shall take into account the interests of the Department and the University in maintaining academic strength and balance but no person holding a term appointment with review shall be denied reappointment or a tenured appointment on the ground that the University has established quotas in a Department or Faculty for those holding a tenured appointment.

(e) A person holding a term appointment with review may be denied reappointment or a tenured appointment on the grounds of financial exigency or redundancy. This shall be done in accordance with any applicable criteria and procedures established under Section 12 below.

#### 4.02 Teaching

Teaching includes all presentation whether through lectures, seminars and tutorials, individual and group discussion, supervision of individual students' work, or other means by which students, whether in degree or non-degree programs sponsored by the University, derive educational benefit. An individual's entire teaching contribution shall be assessed. Evaluation of teaching shall be based on the effectiveness rather than the popularity of the instructor, as indicated by command over subject matter, familiarity with recent developments in the field, preparedness, presentation, accessibility to students and influence on the intellectual and scholarly development of students. The methods of teaching evaluation may vary; they may include student opinion, assessment by colleagues of performance in university lectures, outside references concerning teaching at other institutions, course material and examinations, the calibre of supervised essays and theses, and other relevant considerations. When the opinions of students or of colleagues are sought, this shall be done through formal procedures. Consideration shall be given to the ability and willingness of the candidate to teach a range of subject matter and at various levels of instruction.

#### 4.03 Scholarly Activity

Evidence of scholarly activity varies among the disciplines. Published work is, where appropriate, the primary evidence. Such evidence as distinguished architectural, artistic or engineering design, distinguished performance in the arts or professional fields, shall be considered in appropriate cases. In professional or clinical studies scholarly activity may be evidenced by research on or the creation of

(a) significant applications of fundamental theory; or

(b) significant forms and applications of professional or clinical practice. Work with professional, technical, scholarly or other organizations or with scholarly publications which falls within the definition of scholarly activity may also be considered. Judgment of scholarly activity is based mainly on the quality and significance of an individual's contributions.

#### 4.04 Service to the University and the Community

This includes service performed for the benefit of Departments, Faculties, the Centre for Continuing Education, or other parts of the University (including the Faculty Association), and for professional organizations and the community at large. Such service might include administrative or supervisory work, service on committees and university bodies, all continuing education activity in the community including professional education, special work with professional, technical, scholarly or other organizations or with scholarly publications not falling within the definition of scholarly activity, membership on or service to governmental or public councils and boards, and other forms of academic, professional, and public service.

While what constitutes "teaching" and "service" are set out in Articles 4.02 and 4.03, "scholarly activity" is defined in Article 1.01as "means research of quality and significance, or, in appropriate fields, distinguished, creative or professional work of a scholarly nature; and the dissemination of the results of that scholarly activity."

#### 4. Copyright, Academic Freedom and UBC Policy #88

An author of a work is presumptively the first owner of the copyright in the work. If the work is commissioned and paid for by another, in the absence of any agreement to the contrary, that other person will be the first owner. Similarly, if the work is produced in the course of employment, in the absence of any agreement to the contrary, the employer is the first owner of the copyright.

Section 13(4) of the *Copyright Act* RSC 1985, c.C-42 states, in part:

Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright...

Faculty members are expected to engage in scholarly activity and to produce and disseminate their scholarly work. Because of this expectation and to protect the unfettered pursuit of knowledge that is necessary for scholarship, it is accepted, in the context of employment at a university, that academic authors have copyright ownership of their writings, unless they agree to assign the copyright to the university, a publisher or someone else. This can be

characterized as the academic or teacher exception to the presumption of first ownership of copyright in the employer or it may be treated as an implied agreement to the contrary based on custom, tradition, practice or a common and shared understanding. Whether grounded in an exception or implied agreement, academic authors are the first owners of the copyright of their work. (See the review and analysis in *Dolmage v. Erskine* [2003] OJ No. 161 (Ontario Superior Court of Justice - Small Claims Court)).

Ownership of the copyright in work produced in the course of employment by an academic author, rather than the university employer is important to support, foster and preserve academic freedom as defined in the University's *Calendar 2003/04 (Part IV - Academic Regulations)*:

The members of the University enjoy certain rights and privileges essential to the fulfilment of its primary functions: instruction and the pursuit of knowledge. Central among these rights is the freedom, within the law, to pursue what seems to them as fruitful avenues of inquiry, to teach and to learn unhindered by external or non-academic constraints, to engage in full and unrestricted consideration of any opinion. This freedom extends not only to the regular members of the University but to all who are invited to participate in its forum. Suppression of this freedom, whether by institutions of the state, the officers of the University or the actions of private individuals, would prevent the University from carrying out its primary functions. All members of the University must recognize this fundamental principle and must share responsibility for supporting, safeguarding and preserving this central freedom. Behaviour which obstructs free and full discussion, not only of ideas which are safe and accepted but of those which may be unpopular or even abhorrent, vitally threatens the integrity of the University's forum. Such behaviour cannot be tolerated.

Faculty members might require funding provided by the University or procured from sources external to the University to pursue scholarly activity and avenues of inquiry. The University-Industrial Liaison Office, of which Dr. Angus Livingston is Managing Director, assists faculty members to secure external research funding and reviews research within the University for its potential for commercial application. Under various arrangements, the University-Industrial Liaison Office currently is involved with over 1,000 projects and \$46 million in funding from industry. The University-Industrial Liaison Office seeks to balance the needs and aspirations of funding sponsors and members of the University

community.

One of the responsibilities of the University-Industrial Liaison Office is to secure and protect ownership in various types of intellectual property that result from the work of faculty members, staff and students. The University has a 1993 policy: "To encourage the public use and commercial application of inventions, and in so doing to protect the rights of the inventor and the University" (*Policy #88: Patents and Licensing*). This policy replaced an earlier policy that existed with modifications since 1975. Policy #88 states, in part:

Members of faculty or staff, students and anyone connected with the University are encouraged to discuss and publish the results of research as soon and as fully as may be reasonable and possible. However, publication of the details of an invention may make it impossible to seek patent protection. Public use and commercial application are frequently facilitated by patenting and licensing arrangements.

*Discoveries, Inventions, Audiovisual and Computer Materials:* If any member of faculty or staff, any student, or anyone connected with the University proposes to protect or license an invention or discovery in which University facilities or funds administered by the University were used, a disclosure must be made to the University and the rights assigned to the University. The University may decide to protect or license the discovery or invention, in return for a share of any proceeds arising. If the University decides not to protect or license, the rights may be reassigned to the inventor, who may then develop commercial application of the invention or discovery as he/she sees fit. Where it is anticipated that inventions or discoveries may ensue from a particular research enterprise, it may be necessary to undertake special agreements concerning patent or licensing rights before the research funds are accepted for administration by the University.

*Literary Works:* Ownership of and intellectual property rights to "literary works" produced by those connected with the University are invested in the individuals involved.

Policy #88 is administered by the University-Industrial Liaison Office. Dr. Livingston testified that the Faculty Association has never been involved in securing research funding or rights over the outputs of the work of faculty members.

The University has regularly signed agreements with individual faculty members and staff pursuant to Policy #88. Some research funding agencies also

have agreements they require the University to sign that address the funding agency's share in intellectual property rights in research outputs. Others do not. The Natural Sciences and Engineering Research Council of Canada (NSERC) does not. Its *Policy on Intellectual Property* "expects that any IP resulting from research it funds wholly or in part will be owned by the university or inventor, according to university policy" and encourages grantees and their institutions to negotiate and enter into agreements. The NSERC Policy states, in part:

In order to determine whether a project is eligible for NSERC support, and to ensure that the partners have a common understanding of each partner's rights and responsibilities, NSERC generally requires that a copy of a signed research agreement be submitted before grant funds are released. Research Agreements are kept confidential, and are not part of the peer review.

Neither NSERC, the Canadian Institute of Health Research nor the Social Sciences and Humanities Research Council of Canada retains or claims ownership or exploitation rights in intellectual property developed under their funding.

The University-Industry Liaison Office has developed a specific form for Invention Disclosure and Assignment for Life Sciences, which requires faculty members, staff and students to assign intellectual property rights to the University. It states, in part:

For valuable consideration as set forth in UBC Policy #88, Patents and Licensing, we, the contributors as identified in Section #3 of this document, assign all of our interest in and to the invention herein described, together with any future improvements, to The University of British Columbia.

Each inventor and the University sign a royalty sharing agreement.

Dr. Livingston testified that, through the University-Industry Liaison Office, the University is primarily involved with patents, copyright, trade marks and trade secrets. Some inventions, such as software, will involve some aspect of all four - patenting the functionality; copyrighting the program instructions; trade marking the name and file; and protecting the source code as a trade secret. The

University is less involved with industrial design, circuit topography and plant breeder's rights. In registering a patent and trademark with the United States Patent and Trademark Office, an assignment by the faculty member to the University has to be filed because that Office wants to know with whom it is to deal and to have the inventor's signature on file.

This grievance does not raise intellectual property issues beyond copyright. The grievances raise issues about copyright in material authored by a faculty member in the development of a credit course and the course development as a creative work authored by one or more faculty members.

Traditionally, course materials for teachers who meet face-to-face with students have consisted of lecture notes, printed readings, assignments, exams and criteria for evaluation and grading. Today, many courses include several media, e.g. text, graphics, film, computing. The development of a course includes sequencing, the forms of interaction and teaching techniques. Faculty member ownership of the copyright in course materials gives faculty members a significant measure of control over the content and delivery of university courses.

Faculty members develop courses and the varied materials that are used in teaching the courses. They use materials they developed in other courses, materials colleagues have developed, other's original work and public knowledge. They may have to obtain permission from a copyright owner to use some of the materials they wish to include in a course.

Dr. Livingston testified that, because of the role of academic freedom and scholarship in the University, Policy #88 says that ownership and the intellectual property rights to "literary works" are vested in the individuals involved rather than the University.

Faculty members frequently assign their copyright in a work to a publisher and give the publisher the right to copy and publish the material and often assign derivative rights, such as translation, to the publisher. In some situations, faculty

members retain ownership and license the right to publish, but most publishers insist on assignment of copyright to them. The author or creator retains, but can waive in whole or in part, the moral rights to claim paternity of the work and to ensure the work is used in a way that is not detrimental to its integrity (*Copyright Act* RSC 1985 C-42, s. 14.1).

Dr. Livingston testified the University encourages faculty members to retain residual rights but does not become involved in negotiations between faculty members and publishers. The University is also a publisher and in the form of agreement used by UBC Press, the author grants the publisher an exclusive license to publish and "So that we may represent your interests, you assign to us the entire copyright in the work and authorize us to register it in our name." The standard form of agreement also states:

### **5. Copyright**

We will take all necessary steps to ensure copyright protection for the work and will print a copyright notice in each copy of it. We will also provide copyright protection for forms of publication other than print, including computer-readable forms. Purchasers of rights or licenses will also be required to make this same undertaking in writing.

The University-Industrial Liaison Office is not involved in the output of faculty members developing face-to-face courses, whether they use mixed media or have the courses fully or partially online or the courses are developed and taught by one or more faculty members in collaboration.

Dr. Livingston acknowledges there could be an issue over the categorization of audiovisual and computer materials. On-line course are arguably covered by Policy #88, which defines "audiovisual and computer materials" as "include, but are not limited to, audio and video tapes, films, slides and photographs, computer programs and computer-stored information." However, the University takes the position that the storage medium is irrelevant and treats them as "literary works" owned by the authors.

This ambiguity in Policy #88 is symptomatic of some of the complexity in

the area of intellectual property as modes of publication and course content change with technological evolution. The University's policy has lagged developments and did not address the copyright concerns raised during course development in 2002 for the Master of Educational Technology that gave rise to these grievances. As described below, this graduate program is offered online through the internet (<http://met.ubc.ca>).

## **5. CAUT Bargaining Advisory and Other Collective Agreements**

The copyright, academic freedom and other concerns and issues that were raised by Dr. Bryson and other faculty members in 2002 and these grievances as described below are not new. They have received attention at other universities.

The Faculty Association is a member of Canadian Association of University Teachers (CAUT), which works to promote and protect academic freedom. CAUT has concluded that: "Online education has the potential to facilitate the redefinition of the role of faculty in post-secondary education" ([www.caut.ca/english/publications/bargaining/200101\\_onineed.asp](http://www.caut.ca/english/publications/bargaining/200101_onineed.asp)). It expresses concern about the "unbundling" of instructional activities, commoditization of course content, privatization of course delivery and commercialization of advanced education.

In January 2001, CAUT issued a Bargaining Advisory with its perspective on some of the issues raised by these grievances. It states, in part:

### **Overview**

While online education can be a very useful supplement for faculty and students in traditional classroom settings, many university administrations, private sector entrepreneurs and the federal and provincial governments are interested in it for other reasons. Driven by the lure of revenue - and the opportunity to impose labour market flexibility on academic staff - the campaign to "virtualize" post-secondary education is underway.

Administrators recognize that Internet technology creates the potential to take apart - or "unbundle" - the faculty member's job. This technology allows the role of teacher to be divided into course creator, deliverer,

reviser, tutor and grader. Each of these job fragments, other than creator (which can be outsourced), can be assigned to different low paid contract employees.

Faculty can and must prevent this dismantling of their profession. Currently, academic staff own the course content - class outlines, lecture notes, overheads, assignments and the like - that they produce. As long as staff maintain this control over course material and by extension over the delivery of university courses - online education cannot be easily used to undermine the proper role of faculty.

University administrations realize this and at a growing number of institutions are pressing for ownership rights to online course content. Administrators assert that the mixing of staff-owned content with administration-owned software entitles them to an ownership share. Administrations have also advanced an ownership claim on the basis of the technical assistance they supply to faculty to bring course content online. Finally, administrators have also raised concerns about those academic staff who offer their online courses through other institutions. Administrators view such staff as competing against their own university and raise this as a reason for stripping faculty of course content ownership.

From a legal perspective, these arguments are insufficient to justify any employer share of ownership in course material (in respect to the competition issue in particular, such concerns can adequately be addressed in "Conflict of Interest" or "Outside Employment" provisions of the collective agreement). Nevertheless these claims are being advanced, and faculty associations must guard their members' rights.

The first step is to strengthen collective agreement language in respect to course content ownership. Such ownership is implied in most collective agreements by general language indicating that academic staff own the copyright to the works they create. The prudent course of action is to explicitly list course content - in all forms - as belonging to faculty.

However, this is just the starting point. In and of itself faculty ownership guarantees nothing, for it still allows employers to accumulate a critical mass of course content by simply buying it from other academic staff or "off the shelf" from external commercial enterprises.

In addition to tightening up ownership language, it is also imperative to strengthen collective agreement language on the actual use and delivery of course content over the Internet or by other electronic means. Associations must ensure that all such matters are governed by the collective agreement and not by private deals between individual faculty and employers.

In practice this means negotiating language that, at a minimum, mandates the creation and delivery of online courses only by bargaining unit members. A further step is language that stipulates that only the faculty member who develops course content can use it. Such a proviso would effectively prevent the "unbundling" of the teaching profession.

As of yet, most associations do not have this language. Given the threat that the loss of control over course content represents, the coming rounds of negotiations over the next several years will be critical. (pp. 1 - 2)

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### **Ownership**

Maintaining member ownership of course content is one of the most important faculty association tasks associated with online education.

Such ownership protects academic freedom. It ensures that faculty are free to revise the content when appropriate - to reflect changes in the literature and advances in their own thinking on the topics covered in the course. Individual ownership of course material also supports an educational pedagogical tradition in which each course, for the most part, is a unique creation, and its public offering is built upon the desire and availability of its creator to teach it. Without the creator of the course content, there is no course. This is the foundation of a model of teaching based on professional academic staff who are protected by guarantees of academic freedom.

In the classroom environment course content, consisting as it does of an amorphous collection of notes, ideas and one-time performances of lectures, is a difficult thing to commodify. In contrast, course content in an electronic environment is digital code on a hard drive, compact disk or other storage mediums. It can literally be placed in a box.

Contract language is thus necessary to specify ownership rights as clearly as possible. Currently such ownership is implied in most collective agreements by general language indicating that academic staff own the copyright to the works they create. Such language should be augmented to explicitly indicate that course content - in all forms - belongs to faculty. (pp. 3 - 4)

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### **Rights to Delivery**

The exclusive right of the member who develops online course material to deliver the material is of critical importance to the teaching profession. The alternative is the casualization of university teaching wherein course content is separated from its creator and its delivery is performed by a pool of contract employees with little or no job security.

Course content can be separated from its creator in a number of ways.

The first is its outright seizure by university administrations. Strong collective agreement language on academic staff copyright protects against this.

A second threat is the demand by employers for the right to offer online course content after its creator has left the university. In the case of such initiatives it is important to remember that with a traditional lecture or seminar-based course there is no expectation that departing academic staff members will leave behind their course material for other staff to

present. Similarly, faculty are under no obligation to sign over online course material so that it can be offered after their departure from the institution. The offering of course material "online" must remain contingent on the availability and desire of the faculty member who developed and owns it to teach it. If the university administration wants to continue offering the same course title after a faculty member leaves, it should have another faculty member develop and teach the course - the same practice as is followed in traditional campus-based courses.

The third means by which university administrations separate course content from its developer is by buying it from willing academic staff. This is a more difficult issue to address.

One solution is an appeal to the individual consciences of academic staff members. The hope is that, by underlining the danger the sale of online course material represents, staff members will choose not to do so. However, the promised income from selling course material is a powerful attraction.

The alternative solution is to place in collective agreements or handbooks tight control on the use and sale of online course content. For example, provisions could stipulate online course offerings must be developed by the university's faculty and that only the faculty member who developed the course content could use it.

We are not currently aware of language that achieves this goal. However, progress is being made in the desired direction. At Mount Saint Vincent, for example, delivery by anyone other than the member who prepared the course requires the consent of that member and the approval of the department: ... (pp. 5 - 6)

Some of the issues CAUT identifies to be addressed in collective bargaining are: definitions, ownership, licensing agreements, rights to deliver online courses, workload, compensation for preparation and delivery, choice of technology, approval of online courses and training.

CAUT offers a model collective agreement clause on copyright ([www.caution.ca/eng/member/bargaining/mc\\_copyright.asp](http://www.caution.ca/eng/member/bargaining/mc_copyright.asp)), which contains the following:

### **3 Presumption**

#### **3.1**

The parties agree that the copyright to all forms of scholarly, scientific, literary, dramatic, musical, artistic and recorded works shall belong to the employee(s) responsible for the creation of the work. The employer acknowledges that it has no interest in and makes no claim to any

copyright for works created by a member except as set out in clause 3.2 below.

### **3.2**

All copyright belongs to the Employee who creates the work even if it was produced solely on the Employer's time and with the Employer's facilities and resources except in those cases where:

- a) there is a contract to the contrary between the creator and the Employer or third party which assigns the copyright;
- b) there is a contract to the contrary between the creator and the Employer or third party which assigns the use of the copyright; or
- c) the Employee has agreed to assign ownership rights or user rights as consideration for the provision of resources and facilities beyond the provision of normal salary, customary staff, customary overhead costs, internal research grants, work space or equipment.

### **3.3**

All agreements pursuant to clause 3.2 shall be in writing and copied to the Faculty Association.

### **3.4**

All agreements pursuant to clause 3.2 shall provide that the employee responsible for the creation of the work shall retain the exclusive right to rework, revise, or amend any work.

CAUT also offers a model clause on technologically-mediated courses taught by correspondence, teleconferencing or videotape or broadcast, televised, transmitted or received via the internet or World Wide Web.

CAUT has a collective agreement database accessible to members. The union introduced copies of excerpts from several faculty association collective agreements.

<b>Association</b>	<b>Article</b>	<b>Subject</b>
Dalhousie	23	Copyrights, Patents and Author's Rights
Laurentian	4.71 - 4.73	Patents, Copyright
Manitoba	14; 19	Patents and Copyrights; Academic Freedom
Mount Saint Vincent	25	Distance Learning
St. Mary's	15.1.6; 15.4	Technologically Mediated Course and/or Programs; Intellectual Property, Patents and Copyright

Ottawa	35	Patents and Copyrights
Western Ontario	Definitions; Intellectual Property	Intellectual Property
York	23	Patents and Copyrights

The norm in these agreements is that the author's copyright ownership is recognized in a manner similar to the University's recognition of author ownership of literary works in Policy #88.

Several of these collective agreements expressly recognize there can be or should be a written agreement between the university and individual members concerning the member's intellectual property rights. For example, at Queen's University: "All intellectual property is owned by the Members who create it, unless some other arrangement has been agreed to in advance for certain types of funding or by individual contract" (Article 16.2.1).

Some agreements require that copies of individual agreements are to be sent to the faculty association. At York University: "Copies of any agreements between the Employer and employees pursuant to clauses 23.03, 23.04, or 23.05, above, shall be sent to the Association" (Article 23.06). Similarly, at Laurentian University: "A copy of the contract between the Member and the University shall be sent to the Association" (Article 4.72).

There is an express role for the faculty association in assisting members to negotiate individual contracts at St. Mary's University: "... in which case the member shall, with the assistance of a representative of the Faculty Association, come to agreement with the Vice-President (Academic) on sharing ownership rights to the intellectual property with the Employer" (Article 27.2.2).

The collective agreement at the University of Western Ontario circumscribes what can be included in individual contracts between the university and faculty association member:

The development of materials by a Member that are commissioned by the Employer shall be governed by a special agreement between the Employer and the Member. This special agreement shall be in writing, shall be consistent with the provisions of this Article, and shall specify Copyright ownership and the terms of any licensing arrangements under the agreement. (Article "Copyright", s.4.0)

Not all arrangements give copyright to the university in the materials used for distance education courses. At St. Mary's University there is an agreed procedure and compensation for the development and delivery of credit distance education televised and multi-modal courses by the Department of Distance Learning and Continuing Education (DLCE). The copyright in course content is addressed as follows:

A member who develops a course for DLCE shall retain copyright on the content of the course subject to the conditions of Article 27.

25.3.1 With the consent of the member and the agreement of her Chair and Dean, the University may sell the course material developed by the member for delivery by another institution. An appropriate division of royalties between the member and the University will be determined by DLCE in consultation with the member, her Dean, and a representative of the Faculty Association. (Article 25.3)

At The University of British Columbia, faculty ownership of copyright has not been an active agenda issue for the Faculty Association. There is no specific intellectual property rights clause in the current collective agreement. Norma Wieland is the Chair of the Personnel Services Committee of the Faculty Association. She was President of the Faculty Association from 2000 to 2002 and has been actively involved with the Faculty Association for nine years. She testified that no demand for inclusion of an intellectual property clause has been advanced by the Faculty Association in negotiations with the University.

Ms Wieland recalls receiving only one call from a faculty member concerned about signing an individual contract related to the use of technology in a course that he was teaching. She advised him not to sign. She followed-up a few months later and was told he had not signed and had developed the course.

## 6. Open Learning and Distance Education

Most university teaching is done in face-to-face encounters between the students and teacher. However, some students are unable to meet the schedule and demands of campus-based learning.

Open learning is a policy or objective to provide students with flexible learning opportunities centered on the students' availability, not the schedule of the teaching institution. Some open learning arrangements include a mixture of face-to-face contact and independent study. While there are always some constraints on access and independence, an open learning approach to education permits study and accreditation for the study without having to regularly attend an institution at a specific geographic location.

Distance education enables students to study at a distance from the persons who prepared the teaching material. Students can study at home or elsewhere on their schedule. Students do not have to attend a specific place at set times for face-to-face contact with teachers.

The means by which open learning and distance education have been possible have evolved. Printing presses and publication of books opened the path for the dissemination of knowledge without face-to-face contact and created the opportunity for self-study. Students who could read no longer had to attend to listen to the lecturer read from a manuscript. Teachers continued to be essential to teach individuals how to read and write, but once students learned to read they could read to learn.

Correspondence through the postal service, radio broadcasting, film, audio tapes, television and video cassettes each provided new means to deliver courses of study and educational programs at a distance. The study materials are prepared by a teacher who does not interact with the students. The students study on their own or recruit the assistance of a tutor who interacts with the students face-to-face or, perhaps, by telephone or electronic mail or a

combination of methods of communication.

Open learning and distance education have application in grade school, post-secondary education, job training, common interest communities and continuing professional education. Today's communications technology - computer programs, electronic mail, internet file transfer, video conferencing, interactive data bases - enables distance education with more communication between the student and teacher and among students distant from one another. The distance can be around the globe or across town. With computers as the tool and the internet as the media, the communication can be instantaneous. Today, technology is central to delivering distance education.

## **7. Distance Education and Technology Unit, Continuing Studies Division**

Dr. A.W. (Tony) Bates has been active in issues related to the use of technology and how educational institutions organize around its use throughout his career. He was a founding member of the staff at the British Open University in 1969 before becoming Executive Director of the Open Learning Agency in British Columbia. The Open Learning Agency began in 1979 as a provincial government funded consortium effort of the three universities in British Columbia, at the time, to coordinate and deliver distance education courses. In 1995 Dr. Bates joined the faculty of the University in the Division of Continuing Studies where he was Director Special Projects for Distance Education and Technology until his retirement in 2003.

The persons employed in the Distance Education and Technology (DET) unit provide services to eight of the eleven faculties. Its works is to make credit courses available to students for distant learning through the effective use of technology. Almost all of the courses it offers are credit course. Dr. Bates expects that the two percent that are not will become credit courses. Courses offered are print-based, online or use other media. The DET unit provides student support, advocates for distance education and manages approximately one hundred active courses at a time.

Each course to be offered through Distance Education and Technology is approached as a distinct project with a project manager, web designers and programmers and the faculty member who develops the instructional material. While the faculty member determines the course content and method of teaching, the project manager or designer might influence the extent of resources to be used. The media and such things as bandwidth, processor and memory speeds and capacity will limit the extent to which instructional material can be delivered online to the distant learner. The designer will usually prepare a template and suggest options to the faculty developer. For some media production, it is necessary to contract for the services of experts outside the University.

Dr. Bates testified that it is recommended that twelve days of work by a faculty member will be required for development of a "standard low graphic online course." He underscores that good course design requires a deep understanding of the subject area and the personnel in the Distance Education and Technology unit does not presume to know the subject content of eight faculties. Their role is to guide and advise on distant education.

For each course to be developed and offered through Distance Education and Technology, this unit provides the development and instructional funding from its budget and pays for the resources to be used by the team and to provide learner support. The amount of time or workload of a faculty member that DET "buys out" from the faculty member's department is a matter of negotiation between the faculty dean or department head and DET. This is an arrangement similar to the buy out of time with research funding. The department will use the funds transferred to it from DET to "buy out" or provide "release time" to the faculty member by hiring a sessional to teach in the faculty member's place.

Alternatively, the faculty members might choose to do the development and course instruction as an addition to their workload. In that case, Distance Education and Technology will pay the faculty member an honorarium for development and sessional rates for instruction. Although it prefers not to, in

exceptional circumstances, DET will hire a sessional to develop the course under the supervision of the faculty member.

The Distance Education and Technology unit has no authority over faculty members in the faculties and departments it services. An individual agreement is negotiated among DET, the department or faculty and the individual faculty member to define the development work, the time or money for the faculty member to participate in the development of the course and to engage the faculty member to teach the course for at least one section. Most often, subsequent sections are taught by sessional lecturers. In each case, the final agreement must be approved by the Office of the President of the University.

Dr. Bates testified that he located sixty-five signed agreements in the files, but believes that, over the years, there have been more than one hundred. He vividly recalls one situation where there was no written agreement that produced litigation involving the faculty member, the university and an external interface designer. The faculty member procured money to develop a CD-Rom to deliver German courses and in 1996 or 1997 Distance Education and Technology contributed \$40,000 to the project without a written agreement. It was before the online learning environment provided by WebCT and the money was used to engage an external interface designer to work with the faculty member. Later, the faculty member decided to sell the course manual and CD-Rom to a publisher. The interface designer claimed intellectual property rights in the design. Litigation followed and consumed hundreds of hours before the faculty member recanted. Since then, Dr. Bates has been vigilant to have agreements signed using standard language he inherited and refined.

While these agreements were an integral part of the arrangements for funding, assistance and support from the Distance Education and Technology unit, Ms Wieland was unaware of their existence. She does not know if any member of the executive of the Faculty Association over the years developed or taught a distance education course.

Rosanne Hood is Executive Director of the Faculty Association. Although she has been with the Faculty Association for fourteen years, she had not seen any of the individual agreements between faculty members and the Distance Education and Technology unit prior to these proceedings. She was aware that some faculty members teach courses in addition to their regular load for extra remuneration.

Brian Green, Faculty Association Membership Services Officer agreed that faculty members do enter into agreements about research and publication of their work that the Faculty Association has not been involved in and does not assert it must be party or privy to.

A distinct difference from the traditional academic environment in the development and delivery of distance education courses through the Distance Education and Technology unit is that, by agreement, the ownership of the copyright in the course materials is given to the University. The course author certifies that the materials are original or copyright clearance has been obtained. The copyright for the product of each project is passed to the University with a license for the author to use and publish the work in other forms. The following is representative of the terms of agreement in use until at least 1992.

- I This is to confirm our understanding with regard to your involvement in the preparation instructional materials for the distance education project:

Counselling Psychology 426: The Role of the Teacher in Guidance

- II This agreement is subject to the availability of funds for project development in the fiscal year 1<sup>st</sup> April, 1992 to 31<sup>st</sup> March, 1993.
- III It is my understanding that you are in agreement with your responsibilities as course author and the development schedule as specified in the attached Project Schedule. (Appendix A).

Compensation for your participation in this project will be as follows:

#### COURSE DEVELOPMENT

\*An honorarium of \$5000 in lieu of royalties will be paid to you as follows:

\$1500 following approval of Phase 1 by the academic department and the project team;  
\$3000 following approval of Phase 2 by the academic department and the project team;  
\$500 following approval of Phase 3 by the project team.

NOTE: If student assistants and/or typists are used in preparatory work, you shall be responsible for such arrangements and for appropriate compensation to the assistants and/or typists.

#### OFFERING THE COURSE

\*Tutoring will be reimbursed at UBC ACCESS rates in effect at the time the course is offered.

- IV If you fail to observe the conditions of this agreement, The University is entitled to terminate this agreement without notice and without payment in lieu of notice.
- V I understand further that you are hereby certifying that the materials prepared by you for the project are original. Any materials borrowed from other sources must be clearly identified as such so that copyright clearance may be obtained prior to use. The responsibility for identifying all borrowed material is solely yours and you agree to save The University of British Columbia harmless in any dispute.

The University agrees to assume any reasonable legal costs incurred by you where any action arising out of the contents of the project materials is brought by a third party with respect to the project. However, if your action is found to be intentional or negligent, The University will seek to be indemnified by you for any judgment against it, including all legal costs.

- VI The University of British Columbia is the owner and holds copyright in perpetuity on all materials developed and produced for the project. Reproduction of any of the project materials in whole or in part, without the written permission of the Associate Vice-President, Continuing Studies, or his designate, is forbidden. However, you retain the right to utilize the information presented in the materials and to pursue its publication in other forms.
- VII The University of British Columbia, as owner, has sole right to make any arrangements it deems advisable concerning the use of all project materials.

This departure from Policy #88 in the ownership of literary works is not mentioned in Policy #88. There is no evidence that it was the subject of discussion on campus. This is likely because the funding and participation was similar to arrangements with external grant funding agencies.

Over the years, the terms of the agreement became more detailed with Distance Education and Technology exercising more control and direction of the process. A sample of the current form of grant letter of agreement is published in the Distance Education and Technology unit's *Project Development Manual For Faculty Developing Distance Education or Distributed Learning Courses* (pp. 33 - 35), which has been posted on the unit's website for the past four or five years.

The agreement includes the following clauses:

1. Description - a description of the course.
2. Participating Groups and Their Responsibilities - agreement to collaborate between the department and DET with assignment of responsibilities to each.
3. Project Team - a list of individuals and responsibilities.
4. Media/Technology - the media to be used.
5. Development Schedule - when the course will open, a production schedule and the consequence if there are delays.
6. Budget - a detailed budget is appended with payments tied to completion of specific phases and approval by reviewers.
7. Intellectual Property - the provisions with respect to copyright in paragraphs V to VII above have remained essentially the same. In 1997 the following statement was added: "Computer software invented for use in this project, and which can be used again as a 'shell,' will fall under University Policy #88, Patents and Licensing." An example is WebCT.
8. Review Procedures - academic reviews of the materials by someone appointed by the department.
9. Marketing and Advertising - listing in University publications.
10. Fees and Revenue - tuition fees to be credited to DET and credit for student enrolments to be credited to the department.
11. Tutoring/Student Services - to be appointed by the department and paid by DET.
12. Maintenance - a hold back on course author honorarium to be paid after the author's review of the material after the course has been offered for

- one year. It might be that readings are changed or World Wide Web universal resource locators are refreshed or updated.
13. Evaluation - project and development process to be evaluated under DET guidelines. On-going evaluation of course materials, delivery, tutoring and student satisfaction to be conducted by DET. Student evaluation after the final examination.
  14. Length of Agreement - usually five years after which there will be a joint review by the department and DET.

Funds are available to faculties and departments from the Distance Education and Technology unit for course development in the form of direct funding support from DET for undergraduate credit courses or repayable loans for cost recoverable graduate and professional programs. DET receives approximately \$1 million a year from the University's General Purpose Operating Revenue for undergraduate courses.

The direct funding support - cash, access to staff and resources in the Distance Education and Technology unit and access to facilities - are allocated by a bid process that involves a call for an initial concept paper followed by a fully costed proposal. The proposal process and funding timeline for direct support funding on the DET website was last revised in September 2000. The Advisory Committee on Distance Education that selects proposals and allocates funds has been in place since 1995. The timeline starts with a call for proposals in January with full proposals to be submitted by April 21<sup>st</sup>. This process ends in August when the "Course development process begins with the negotiation of formal Letters of Agreement between DE&T and academic departments." The first funding priority is for courses that complete existing distance education programs and new programs that meet the University's strategic priorities.

The distance education loan scheme provides "initial funding which will need to be repaid from revenues or grants generated by the program over a five to seven-year period" and requires a "full business plan." "Projects funded through the loan scheme have to cover full costs from revenues, including those

of DE&T staff assigned to the project, use of facilities such as multimedia production, and university overheads."

The funding structure and language - grants and loans - is based on the premise that the Distance Education and Technology unit is providing funds desired by departments, faculties and individual faculty members, analogous to external sources of funding. For repayable loans the letter of agreement has more detail on revenue splitting as exemplified by the following clause in a 1999 agreement concerning a single course between the Faculty of Education, its Department of Counselling Psychology and DET:

#### **10. Fees and Revenue**

All student tuition fees associated with this course will be credited to the Office of Continuing Professional Education, Faculty of Education for the delivery of the course materials, tutoring services and other student services.

Revenue obtained from sources other than student tuition fees will be first used to recover the development costs.

Distance Education and Technology, Continuing Studies will then take a sum equivalent to 15% of the development costs as a contribution toward general Distance Education and Technology overheads.

Additional revenues will be split 75% for the Department of Counseling Psychology and 25% for Distance Education and Technology, Continuing Studies.

The Department of Counseling Psychology will receive FTE credit for UBC students enrolled in the distance education course.

The language is more evolved in the Sample Loan Letter of Agreement in the *Project Development Manual For Faculty Developing Distance Education or Distributed Learning Courses* (p. 44).

Dr. Bates testified there is no compulsion for faculties or individual faculty members to come to the Distance Education and Technology unit or to do distance education courses. The Faculty of Education has its own distance education courses and does not receive DET funding for these courses. However, if a faculty and faculty member wants to teach a distance education

course and wants funding from DET it must sign a project letter of agreement.

At the same time as the University was approving the Master of Educational Technology program, it was also approving a Master of Adult Learning and Global Change (ALGC) program. This online program is a collaborative effort of the University, Lingkoping University (Sweden), University of Western Cape (South Africa) and University of Technology, Sydney (Australia). Students take courses in English from the four universities, but receive their degree from the university at which they are enrolled. The courses are developed at each university by individual faculty members and are not jointly owned.

Dr. Bates testified that the Distance Education and Technology unit was approached about the ALGC program, but did not participate because the Faculty of Education did not want DET resources and would not sign an agreement. And DET was unable to make a business plan to recover any funds it expended.

Dr. Bates testified that project letters of agreement and the accompanying negotiations are used to identify, clarify and achieve a shared acceptance of the role and responsibilities of the participants in a project. Following proposal approval, Distance Education and Technology uses a five phase project process to develop and deliver courses - planning, production, final preparations, implementation and first revision. The purpose of the project planning and management is explained as follows:

There is a major difference between 'experimenting' (R&D) and delivering cost-effective technology-based teaching (operations). The challenge is to encourage innovation while at the same time maintaining quality control and cost-effectiveness in the delivery of distance teaching or distributed learning.

While new technologies require new applications, a great deal is already known about the process of producing high quality, cost-effective multimedia learning materials. This knowledge has been developed both in the large autonomous distance teaching

universities, and also in private sector multimedia companies in areas such as advertising and film and television making.

The answer is project management. This means establishing each course or teaching module as a project, with the following elements:

? a fully costed proposal, which identifies:

- o the number and type of learners to be targeted (and in particular their likely access to technology),
- o clear definition of teaching objectives
- o choice of technologies,
- o a carefully estimated budget allocation (including staff time, copyright clearance, use of 'fixed' media production resources, such as video-compression, as well as actual cash),

? a team approach, involving any combination of the following:

- o subject experts / faculty,
- o project manager,
- o instructional designer,
- o graphics designer,
- o computer interface designer,
- o text editor,
- o Internet specialist,
- o media producer.

Depending on the design of the project:

- an unambiguous definition of intellectual property rights and a clear agreement on revenue sharing,
- a plan for integration with or substitution for face-to-face teaching,
- a production schedule with clearly defined 'milestones' or deadlines, and a targeted start date,
- an agreed process for evaluation and course revision and maintenance,
- a defined length of project before redesign or withdrawal of the course.

A project is not defined in one step. In the Distance Education and Technology unit, we have a five stage approach to project definition. Following an invitation to all faculties to bid for funds (see Call for Proposals), a department or individual academic is invited to submit a short proposal (usually two to four pages) requesting funds or assistance. We provide a short questionnaire to help faculty at this stage (see Proforma for Project Proposals).

One of our project managers then works with the lead academic to develop a fully costed proposal. This is a critical stage of the process, where objectives are clarified, alternative modes of delivery are explored, and resources are identified. (See sample Grant and Loan Proposals.)

The project proposal then goes in competition with all the others to a university-wide committee of academics for adjudication. A set of criteria for selection has been developed, including the number of students to be served, strategic positioning in terms of technology applications, innovativeness, potential for revenue generating, etc.

Following allocation of funds, a detailed letter of agreement is drawn up between the academic department and the Distance Education and Technology unit, which clearly sets out responsibilities on both sides, and ties down production schedules, intellectual property, sharing of revenues, etc. The detailed schedule includes lists of tasks and responsibilities for the academic team members through the several phases of production. (See sample Letters of Agreement, with their project schedules.)

Once the project is funded, DET managers work closely with faculty members throughout the development process, and liaise with them and other project team specialists (see Course Author Guide).

DET managers also track progress, in terms of number of projects in production in any one year, number of projects completed in any one year, funds disbursed against funds allocated for each project (so unspent funds can be re-allocated), date of first course offering, and enrolments for each new course and for all courses combined. Final evaluation of each project is a separate but equally important process. This stage provides a measure of accountability for the unit that can be easily checked. (*Project Development Manual For Faculty Developing Distance Education or Distributed Learning Courses*, pp. 11 - 12)

The *Project Development Manual For Faculty Developing Distance Education or Distributed Learning Courses* includes a guide for course authors written by Dr. Mark Bullen and Beverley Gropen. It explains the six course development stages - proposal, planning, production, final review, implementation and first revision. The review process, as it relates to the course author, is explained as follows:

Your completed drafts are submitted to the course developer who circulates them for review and comment by both the academic department and project team. The developer is responsible for the instructional design and editing of the materials, and with input from you and other team members, for decisions concerning web-site or multi-media design or print layout.

Following this second review, you will consider and address any changes or additions proposed by either the academic department or project team.

It is only after all revisions have been made as a result of this review that technical production begins. (p. 69)

This development and production process involves the surrender of some of the autonomy that a faculty member might or might not enjoy in traditional course development. Collaboration is a common characteristic of academic pursuit in team teaching, research, writing and other endeavours. Collaboration does not necessarily equate to compromise of academic freedom.

The faculty member's role in teaching a distance education course is characterized as tutoring in the Distance Education and Technology materials. The *Guide for Course Authors* explains the tutoring role for the course author who teaches the initial course and includes *Guidelines for Online Teaching* (p. 70).

Mr. Green testified that in 2001 the Faculty Association realized that the tutors in the Distance Education and Technology unit were teaching credit courses. The Faculty Association considered them to be doing the same work as sessional lecturers doing face-to-face teaching. Effective May 5, 2002, the Faculty Association and University concluded a Memorandum of Agreement covering tutors in DET. It changed their characterization or classification from Tutor to Sessional Lecturer. There is no express mention if there was an accompanying change in role or method of teaching.

In 2002, practices and agreements developed by the Distance Education and Technology unit were imported into a newly approved Master of Educational Technology program in the Faculty of Education. A clash emerged over whether these practices and agreements furthered or compromised the University's and faculty members' values and goals as exemplified by CAUT's Bargaining Advisory.

## **8. Master of Educational Technology (MET)**

In 1995, while at the Open Learning Agency, Dr. Bates published a book in his field that led to an approach to him by the Tec de Monterrey to develop five

courses in distributed learning. The Tec de Monterrey was also talking to the University. After Dr. Bates joined the University, a delegation from the University visited the Tec de Monterrey, which offered a Master of Educational Technology. Tec de Monterrey wanted to offer a joint degree, but the University was unwilling at that time.

Instead, the Distance Education and Technology unit with Tec de Monterrey jointly developed a certificate program consisting of five graduate courses that was first offered in 1997 online through the internet - Technology-Based Distributed Learning (TBDL). The cost was shared equally by the University and Tec de Monterrey. The University offered the courses in English with world wide rights outside Latin America and the Tec de Monterrey offering the courses in Spanish. The five course and seven others were offered by Tec de Monterrey as part of its Master in Educational Technology. The University offered an on-campus master's program in technology studies through the Department of Curriculum Studies in the Faculty of Education.

In 2000 the Tec de Monterrey approached again to develop a joint graduate degree program. Dr. Bates testified there was a new dean at the Faculty of Education who was more engaged by the proposal. It was agreed the Faculty of Education would pursue the idea in collaboration with Distance Education and Technology. Talks between the University and Tec de Monterrey resulted in an agreement to develop and offer courses in technology based distributive learning that lead to a degree jointly conferred by the two institutions. The program opened in September 2002.

The Master of Educational Technology is the first degree offered by the University entirely at a distance. It is offered online through the internet. It is the first degree offered by the University in English and Spanish and the first joint degree with a foreign university. The target niche market is professionals who have a master or doctorate degree in education. It is intended to be fully cost recoverable. The cost of \$12,500 is twice the cost for on-campus courses and includes a 15% margin for risk, but no planned profit. Any profit realized is to be

directed to further courses and scholarships.

The program could not be developed and launched using short term funding from the budgets of Distance Education and Technology and the Faculty of Education. The University treasury gave loans of capital, repayable with interest, to pay for course development. Dr. Bates testified borrowing costs have been minimized through careful management of the timing of cash withdrawals. The entire development and delivery cost is \$2 million, including a share of departmental overhead attributed to the program, over the seven year business plan.

The Master of Educational Technology program is thirty credits. Twelve credits for four core courses are required. These four courses were to be developed jointly and are offered in both English and Spanish. Each institution is to develop the electives to be offered either in English or Spanish.

This international partnership to deliver a program in two languages to qualifying students anywhere in the world online through the internet is an example of new educational opportunities without borders. The partners believe the "potential international market for a new master's program is large, given current interest in educational technology."

The terms of the first five year (2002 - 2007) agreement between the University and Tec de Monterrey are set out in a terms sheet for agreement dated October 24, 2001. A final agreement between the institutions has not been signed. Drafts have been, and continue to be, exchanged and reviewed by both institutions and their lawyers. The intellectual property terms for agreement are:

### **Intellectual Property**

- ?? UBC and Tec de Monterrey hold joint ownership of the core courses.
- ?? Each institution has sole ownership of the electives it has developed.
- ?? Each institution will reach intellectual property agreements with its faculty that do not restrict the use of courses for the duration of the agreement.
- ?? Individual course authors retain the right to use the course material in

- other forms, subject to agreement of contributing course authors.
- ?? The use of each institution's trademark will be limited to the marketing of this program.
- ?? Each institution has a veto on how its trademark is used.

\*\*\*\*\*

### **Sale of Courses or Program**

- ?? The partners will consult with each other before selling the program or individual core courses to other institutions or organizations.

The agreement on costs and revenues provides that each institution will supply one-half the personnel necessary to develop the four core courses and revenues from the sale of core course is to be split equally. The core courses are to be "jointly developed by course teams with representatives from both institutions" and the team members are listed as content experts, project manager, Web Programmer, Graphic Designer and others as required. The four core courses to be developed jointly are:

- ETEC 510 Design of Technology Supported Learning Environments
- ETEC 511 Foundations of Educational Technology
- ETEC 512 Application of Learning Theories to Instruction
- EDUC 500 Research Methodology in Education

The eight elective courses to be developed by University faculty are:

- ETEC 520 Planning and Management of Technology-based Distributed Learning
- ETEC 521 Indigeneity, Technology and Education
- ETEC 522 The Business of E-Learning
- ETEC 530 Constructivist Strategies for E-Learning
- ETEC 531 Curriculum Issues in Cultural and Media Studies
- ETEC 532 Technology in the Arts and Humanities Classroom
- ETEC 533 Technology in Mathematics and Science Classroom
- ETEC 540 Text Technologies: The Changing Spaces of Reading in Writing

At the University, the program is offered through the Faculty of Education. It is not housed in any department of the Faculty. The participating Departments

within the Faculty of Education are Curriculum Studies (CUST), Education and Counselling Psychology and Special Education (ECPS), Educational Studies (EDST) and Language and Literacy Education (LLED).

The agreement with Tec de Monterrey was that opening date "will be August/September 2002 subject to approval of the program by UBC."

## **9. MET Approval and Individual Course Development Contracts**

Within the University, the roles of the Faculty of Education and the Distance Education and Technology unit in the development and delivery of the Master of Educational Technology (MET) had to be defined and agreed. Because the Master Program and the two associated Certificate Programs are the responsibility of the Faculty of Education the dean was to appoint a MET Coordinator and an Advisory Committee, including one member from DET.

Dr. Rita Irwin of the Department of Curriculum Studies was the first MET Coordinator. While she did not testify, the evidence was that initially she had seen this collaboration as an opportunity for her department and the Department of Educational Studies. When the full significance of the program was realized, the Master of Educational Technology program became a Faculty responsibility after review and discussion within the Faculty.

This new graduate program required review and approval by several committees within the Faculty of Education and external to the Faculty. Dr. Bryson was involved in the discussions within the Faculty and was aware of its joint nature and the intention to develop some courses jointly and some at each university. She had concerns about the Master of Educational Technology program that she voiced within the Faculty. She was concerned about the commercialization of a degree program and how that would be reconciled with offering a pedagogically sound program developed and delivered in accordance with sound labour practices. She had "substantial concerns" and a number of critical questions that she voiced. She recalls seeing multiple iterations of the

program proposal in 2001.

A substantial amount of the program development was done before July 1, 2001 when Dr. Jim Gaskell, Associate Dean, External Programs and Technologies, returned from sabbatical. He was asked to shepherd the program through the University's internal approval processes. Agreement within the Faculty of Education was achieved in October 2001 and the terms sheet for agreement with Tec de Monterrey was agreed on October 24, 2001. Dr. Livingston testified that the University-Industry Liaison Office was not involved in these negotiations with Tec de Monterrey. Dr. Bates was on sabbatical. Dr. Gaskell testified that the terms were essentially settled before he became involved. The impetus to conclude them was the hiring of a person to be MET Coordinator. That person subsequently resigned and a signing ceremony arranged for November 2001 in Mexico was cancelled and not rescheduled.

In October 2001, Dr. Bryson was a representative of her department on the MET Advisory Committee. In an email to Dr. Irwin she inquired about committee meetings. Dr. Irwin replied on October 31<sup>st</sup>:

We haven't had any meetings yet this semester as the work that needed to be done wasn't really committee work. Now that the program has been accepted by the Faculty, I'll need to pull together a timeline for implementation and with that the committee will need to be involved. However, I have to be careful about how quickly we act on this and how vocal we are about this because technically, we shouldn't be proceeding until it has gone through Senate. However, we can't wait for senate so everything has to happen in tandem. What I am saying is that we will be meeting, maybe as early as this semester, but definitely early in January. I'll be in touch. And thank you so much for being on the committee ....it's important that you are there and involved.

In October 2001, Dr. Gaskell had been guiding the Master of Educational Technology program through the Faculty approval process - Graduate Curriculum Advisory Committee (GCAC) (October 23<sup>rd</sup>), Dean's Advisory Committee (DAC) (October 25<sup>th</sup>) and formal Faculty meeting (October 25<sup>th</sup>). The next steps were to the Faculty of Graduate Studies Grad Council Curriculum Committee, Senate Committee Sub-Committee, Senate and Board of Governors.

Once University approval was obtained, it was necessary to have approval from the provincial Ministry of Advanced Education.

In tandem with that process, the program delivery partners, the Faculty of Education and Distance Education and Technology, concluded an unsigned agreement last revised January 7, 2002, setting out the terms of their partnership in the MET program and its two associated certificate programs - Technology-Based Distributed Learning (TBDL) and Technology-Based Learning for Schools (TBLS). Dr. Bates testified that he negotiated the agreement with the MET Coordinators in the Faculty of Education and others from the dean's office. This agreement has not been signed. Dr. Gaskell testified that there were efforts to renegotiate certain terms by new players in the process and then when DET was reorganized after Dr. Bates retired it was decided to continue on the basis of the agreement.

Under the agreement, Distance Education and Technology is responsible for "managing and ensuring the quality of the online course development process, providing instructional design support, web programming and other technical support." The Faculty of Education is responsible for the academic content of the courses. Because of the expertise of DET staff, they "may play a central role" in the development and teaching of courses. This is because Dr. Bates and other DET staff have expertise in distributive learning. If given a teaching assignment, they are to be Faculty of Education adjunct appointments. The team-based, project management approach followed by DET, with team members mirroring the agreement between the University and Tec de Monterrey, is to be used in course development.

The agreement addresses risk and profit sharing, distribution of profits, general terms and course development. There are to be letters of agreement between the Faculty of Education and Distance Education and Technology for each course to be developed. "Copyright of the underlying works remains with the author. The university is given the right to produce a derivative work of an online course whose sole copyright will reside with UBC." Dr. Bates agreed that

this presumed the individual authors would agree.

An outline of each course containing an overview, objectives, scope and sequence, assignments, evaluation and readings was prepared within the Faculty of Education for Senate approval.

In anticipation of Senate approval, Dr. Irwin sent an email to the members of the MET Advisory Committee, including Dr. Bryson, Dr. Marv Westrom, Dr. Dan Pratt and Dr. Teresa Dobson, on January 22, 2002. She informed them of the dissolution of a committee that had never met and the intended constitution of a new smaller committee. She wrote, in part:

Although I made sure that the MET Advisory Committee was reconstituted in September, it turned out that there wasn't any need to hold a meeting. The work that needed to be done could be handled outside the committee. However, as the program moves forward, a MET Advisory Committee will need to convene.

In discussing how to proceed with Rob Tierney, it was decided that a smaller Advisory Committee would be beneficial. Therefore, I am thanking you for your hard work and dedication toward this program and look forward to witnessing your involvement in it as the years progress. Rob is in the process of asking a few people from across the Faculty to form the new MET Committee.

Again, thank you for all your hard work. I believe we have created an excellent program that will make this Faculty proud. It wouldn't have happened without each of your contributions.

Dr. Bryson testified that, in her opinion, a collegial process was being replaced by a "straw committee" hand picked by the dean that would not stand in the way of the administration's vision.

At the time, Dr. Bryson was not on campus. She was on sabbatical from September 2001 to August 2002 and taking her leave at the University of Western Sydney, School of Cultural Inquiry. In March 2002 she gave invited presentations at the University of Queensland and University of Western Sydney.

In February 2002, Dr. Gaskell replaced Dr. Irwin as the MET Coordinator.

The dean appointed a new MET Advisory Committee after the University approved the program. Ministry of Advanced Education approval followed within a month or so. The first courses were to be offered in September 2002.

Dr. Gaskell was familiar with making a copyright assignment. He had done so for publications as recently as October 2001 to the University of Toronto Press and November 2001 to the Ontario Institute for Studies in Education, the publishing name for the University of Toronto Faculty of Education. He was also familiar with having a faculty member's time bought out. In the past he had entered into a contract with the University Office of Research Studies and Industry Liaison under which his time was bought out by the provincial government in 1990-91 to allow him to undertake a project.

Dr. Gaskell was familiar with both the MET and Adult Learning and Global Change programs and the different circumstances under which faculty members were to develop courses for each. As MET Coordinator, it was his responsibility to ensure courses for the MET program were developed and ready to be offered in September 2002 as planned and agreed with Tec de Monterrey and presented to the Board of Governors.

Normally a period of one year is allowed for the development of a course. A speedier process was required to meet the September offering. Dr. Gaskell testified it was decided to start the course offerings with courses related to ones already developed for other programs. An implication of this was that the University would be seeking assignment of copyright in existing course material not simply work to be developed.

Dr. Gaskell worked with department heads to prepare a development schedule for the next four years with four courses to be developed in each of the first two years and two in each of the third and fourth years. His concern was to ensure it was agreed when faculty member's time would be bought out by funds from Distance Education and Technology as faculty member's workloads were planned from year to year. He does not know if this is how it was presented

within the Faculty or if it was referred to as "release time" or "buy-out" by department heads responsible to assign workloads. He later used the term "buy-out" in a September email to Dr. Bryson and believes everyone involved knew it was a cost recovery program.

Dr. Gaskell had hoped to offer the core course ETEC 512 Application of Learning Theories to Instruction in September 2002 but delayed this course to September 2003 in anticipation that a new faculty member, Dr. Jennifer Shapka, would be interested when she arrived. However, Dr. Shapka was not able to commit and the department nominated Dr. Bryson to work with Dr. Dan Pratt on this core course.

The core course ETEC 510 Design of Technology Supported Learning Environments was developed by Dr. Bates and Dr. Marv Westrom in the Department of Curriculum Studies. They signed an agreement for the production, development and delivery of this course to open in August 2002. The agreement was signed by them in August and September 2002, respectively. While no Tec de Monterrey personnel are listed among the team members in the agreement, Dr. Bates testified that the course was developed in collaboration with two members of the faculty of Tec de Monterrey.

Dr. Gaskell knew that Dr. Stephen Petrina, Associate Professor, Department of Curriculum Studies had introduced a course on Cultural and New Media Studies. Dr. Petrina, who had developed this popular course as a mix mode course with a website and large volume of materials, testified he knew it was extremely compatible with the Master of Educational Technology program. He anticipated and was approached by Dr. Gaskell in 2001 after University approval of the program to "roll it over" into ETEC 531Curriculum Issues in Cultural and Media Studies . The plan was to have him teach it with Dr. Bryson, who was in Australia at the time.

Dr. Petrina had no previous involvement with the Distance Education and Technology unit and assumed the development of a graduate course for the

Master of Educational Technology program would be no different than for other graduate courses in the Faculty of Education. He has developed courses offered entirely online and agrees that the pedagogy is different because it is necessary to work within the medium. For example, the techniques that work to inspire student participation in face-to-face teaching cannot be used to inspire participation in online courses. It is necessary to use other techniques.

Dr. Bryson was qualified to be involved in the development and teaching of both ETEC 512 Application of Learning Theories to Instruction and ETEC 531 Curriculum Issues in Cultural and Media Studies. However, the Faculty wanted to involve as many members as possible in the program.

There were unsuccessful efforts to find someone other than Dr. Bryson to work with Dr. Petrina on ETEC 531 before Dr. Gaskell suggested to Dr. Petrina that they stay with the original plan to include Dr. Bryson in both. On March 7, 2002, Dr. Petrina emailed in reply: "OK-- We'll see what Mary can do from Australia. I'm sure you feel like you're going in circles...." Dr. Petrina recalls that he emailed Dr. Bryson in Australia and she agreed to work on ETEC 531.

On March 21, 2002 Dr. Gaskell emailed Dr. Petrina that he had spoken to Jeff Miller, a Distance Education and Technology Course Developer, and wanted to confirm that Dr. Petrina had received a copy of the contract and whether he had any questions about it. Dr. Gaskell added: "I haven't actually seen a copy so don't know the exact detail of it." Dr. Petrina replied that he had not received a copy.

At the time Dr. Petrina was on sabbatical from July 2001 to June 2002. Dr. Bryson was not sent a copy of this email exchange. Dr. Petrina first saw a copy of the contract when he met with Rick Kenny, a Distance Education and Technology Course Developer. Dr. Petrina did not send a copy to Dr. Bryson. However, Dr. Gaskell assumed that he had.

This agreement for the development of ETEC 531 is substantially the

same agreement as the sample agreement in the Distance Education and Technology *Project Development Manual for Faculty* (pp. 33 - 35). The course authors were to be Doctors Petrina and Bryson. The Instructional Designer/Project Manager was to be Rick Kenny. The attached draft budget itemized a nine year projected development and maintenance cost of \$54,370. The allotted amount for subject expert development was \$7,500 for 12.5 days work. The subject expert maintenance budget for the second to ninth years is \$2,500 per year.

While the intellectual property clause of the sample agreement in the *Project Development Manual for Faculty* provides that the University "as owner, has the sole right to make any arrangements it deems advisable concerning the use of all project materials for which it holds copyright" the agreement presented to Dr. Petrina states the University "in consultation with the author(s), has the right to make any arrangements it deems advisable concerning the use of all project materials for which it holds copyright." The explanation and source for this change in language is alluded to in a June 7, 2002 email from Dr. Dobson to Dr. Gaskell reproduced below.

Dr. Petrina had not previously been confronted by a document similar to this contract during his years at the University and he was alarmed by the assignment of copyright to the University. He had developed the course on Cultural and New Media Studies and "put countless hours into it." He immediately asked Mr. Kenny questions and a couple of days later contacted Dr. Gaskell, who heard and understood his concerns about losing control, especially of certain graphics he had developed. Dr. Gaskell thought it might be possible to meet his concerns by inserting a link from ETEC 531 course materials to Dr. Petrina's website.

On April 17, 2002 Dr. Gaskell sent an email to Mark Crosbie, Legal Counsel in the University Counsel Office with a copy to Dr. Petrina and Mr. Miller. Speaking about the intellectual property clause "developed for professors working to develop MET courses" he wrote, in part:

The key issue that needs to be written in, as I mentioned on the phone, is the right of the faculty member to continue to use and modify graphic materials and other written objects such as lesson plans, that were developed for regular teaching purposes prior to MET course development but that the faculty member would like to have as part of the MET online course. As I understand our conversation, the faculty member would not have the right to modify the graphic within the online course but could retain the right to modify a similar graphic for his or her own use in teaching and scholarly work outside the online course.

I am attaching the file of the final legal agreement you drafted that you sent on to Tec de Monterrey. The relevant clause is 43.

I will also fax a copy of the graphic Dr. Petrina provided to me as an example to illustrate his concern.

Dr. Petrina testified that Dr. Gaskell had echoed his concerns correctly.

In April 2002, Dr. Perry T. Leslie, Head, Educational and Counselling Psychology and Special Education, was working out teaching assignments for the 2002-03 year. On April 19<sup>th</sup> he emailed Dr. Bryson about her assignment. There was to be a MET Advisory Committee meeting on April 22<sup>nd</sup> at which Dr. Gaskell was to recommend her to work with Dr. Dan Pratt on ETEC 512 and on ETEC 531 - "you are already working with Steve."

Dr. Bryson continued to discuss her 2002-03 assignment with Dr. Leslie in email exchanges. The final resolution set out in a memorandum of May 13, 2002 from Dr. Leslie did not include working with Dr. Petrina on ETEC 531, but did include working with Dr. Pratt on ETEC 512. The same day, Dr. Leslie sent a memorandum to Dr. Gaskell informing him that "Mary Bryson will work with Dan Pratt on development and execution of ETEC 512" and would claim 1.5 credits for the development portion this year. Dr. Leslie asked Dr. Gaskell to arrange to transfer funds to the Faculty to cover this assignment.

This left the development of ETEC 531 unsettled. Dr. Gaskell recruited Doctors Teresa Dobson and Carl Leggo to develop ETEC 540 Text Technologies: The Changing Spaces of Reading in Writing with Jeff Miller as Academic Consultant to be offered in September 2002 instead of ETEC 531. Mr.

Kenny was the Instructional Designer and Project Manager on ETEC 540. Doctors Roger Boshier and Mark Bullen were to develop the core course ETEC 511 Foundations of Educational Technology to be offered in January 2003. Diane P. Janes was the Instructional Designer on ETEC 511. Mr. Miller was the Instructional Designer and Project Manager on ETEC 510 being developed by Doctors Bates and Westrom.

The proposed course developers were not strangers to the Master of Educational Technology program. Doctors Westrom, Dobson, Pratt and Bryson had been members of the MET Advisory Committee that did not meet in 2002 and was disbanded in January 2003. However, they were not prepared for the conditions under which they were to be asked to develop the courses.

The faculty members developing courses for opening dates in 2002 and early 2003 were presented with agreements to sign. A new intellectual property issue was raised by Dr. Dobson. She wanted to develop a face-to-face course as well as the ETEC 540 course and wanted to develop the face-to-face course first so she would not lose her copyright. Dr. Gaskell went back to the University Counsel Office and circulated a new draft clause to this author group by email on April 30, 2002. He sent a copy to Dr. Petrina to keep him informed.

The draft clause was intended 'to say that the authors will give up copyright over everything to the university but that the university will then license back use of these materials to the authors.' His email concluded:

Please read the new clause carefully. I would like to create a standard clause that is acceptable to everyone. If you have any concerns, please get back to me ASAP. It is essential that we get these contracts signed so everyone is clear on the expectations and timelines.

The proposed language did not satisfy faculty member concerns. Dr. Gaskell sought assistance from Dr. Neil Guppy, Associate Vice President, Academic Studies, through an email on May 3, 2002 in which he raised some concerns about Policy #88.

As I get closer to online course development, the issues of copyright seem to get trickier. My effort to clarify what I thought was a reasonable request has produced language that is threatening to alienate the people I need to develop courses. I don't pretend to be an expert, but it does seem to me that there are some issues around producing online courses that are different from producing what we usually think of as an "invention." Three come to mind. One is that online courses probably fade faster than the professors producing them and professors bring things to the courses that they need to keep using in other contexts long after the online course has become defunct. Secondly, online courses in a hypertext environment are not well bounded. Within a course you can build in links to other sites that you don't own or license. Professors can put stuff on their own websites and then link to those sites from within the course. Three, some profs are building online courses at the same time as they are building the same course for face-to-face mixed mode. If they built the f2f course first, artefacts for it would be protected if they were subsequently used in the online courses. But the relationship is not symmetrical. Therefore it is in the interests of the profs to delay creating the online courses. This is not in the interests of the MET program.

All of this is to say that I think it might be useful to have a meeting with yourself, Mark Crosbie, Angus Livingstone, Tony Bates and several of the authors in the MET program who have raised issues with me. We need to look at specific examples related to online course development. We need to strike a balance between the interests of the profs and the interests of the university. We need to create an environment in which profs feel supported in their efforts to build online courses and are not constantly worried that their work will be alienated from them. Lawyers have to worry about worst-case scenarios because that is what they end up dealing with. Often times, though, this approach warps normal relationships.

After discussion with Dr. Guppy, he sent the following email to Doctors Dobson, Petrina, Bates and Westrom and Mr. Miller on May 3, 2002. He did not include Dr. Bryson and others committed to develop a course.

I have spoken to Neil Guppy about the complex issues arising around copyright and IP as we develop online courses. He agrees that UBC does not have a policy that encompasses the complexities of this area and that work needs to be done to clarify the UBC policy in language that encourages faculty to engage in online course development rather than discourages them. He would like to set up a workshop/meeting so that authors can discuss specific examples of their concerns with appropriate people responsible for developing the UBC policy. What we develop for MET will become part of a larger UBC policy. We need to work quickly. He has proposed one of two dates: ...

Dr. Livingston who works with Policy #88 daily agrees that the policy only superficially addresses the issues presented by course development in the

Master of Educational Technology program and, more importantly, no procedures are in place. He characterized the MET program as having layers of copyright - single authored materials, derivative works, design elements, collaboratively developed works and the entire program as a combined work. This is similar to other projects on campus where there are multiple inventors and ownership is vested in the University. Unity of ownership enables commercialization and agreement on revenue sharing.

Dr. Bates testified that Policy #88 has, or would, only apply to the work of Distance Education and Technology if software were developed for a course, as was the case with WebCT. It has not applied to the content of the courses. Dr. Gaskell disagrees. He understands that when a course is developed by a team using University resources Policy #88 will apply, although the practice might be not to apply it.

In Dr. Livingston's opinion, it is essential that the University have ownership so the Master of Educational Technology program can be maintained, revised and kept current in the future and the University can recover its development costs. The MET program is unique because it is a program with multiple authors and courses and a third party and the program is not solely for use at the University.

Dr. Livingston was involved with the development of the MET Letter of Agreement for the Production, Development and Delivery of an Online Course that was ultimately drafted and that Dr. Bryson refused to sign. He believes it conforms to Policy #88 in all respects except for an anomaly dealing with audio-visual works.

An intellectual property workshop was held on Friday, May 17, 2003. Dr. Petrina was unable to attend, but outlined his main concern and situation in an email for discussion at the workshop. Dr Livingston recalls that approximately twenty to twenty-five faculty members attended. The workshop consisted of a primer on intellectual property, copyright and Policy #88 and a review and

discussion of several scenarios. Dr. Gaskell testified that the Faculty Association was not alerted or invited because the focus was current and future University policy. He believed he was doing path breaking work for alter wholesale revision of Policy #88.

After the workshop, Dr. Guppy agreed there was a need for a policy review, but Dr. Gaskell could not wait for a full blown review and revision of Policy #88. He wanted an agreement signed by faculty members. They agreed he was to work with Dr. Livingston and the Master of Educational Technology course developers to construct a template for that program that would then be considered in a wider review of policy.

Dr. Gaskell formed a working group to address the immediate concerns of the Master of Educational Technology consisting of Doctors Livingston, Gaskell, Bates, Bullen, Leggo, Dobson and Westrom. The group developed principles by early June and Dr. Gaskell pressed for an agreement on contract language. He testified he mediated among the group in an effort to achieve a consensus.

Dr. Livingston does not recall any reference to the collective agreement or its reference to academic freedom in the working group discussions, but concerns about academic freedom were discussed. His goal as a subject expert was to understand the environment and fashion language to meet everyone's concerns. He began with education through the workshop and analysis of scenarios of concern followed by discussion with individuals and language revisions prepared by in house counsel to achieve a level of comfort for everyone.

Doctors Livingston and Gaskell characterize the discussions as consultation, rather than negotiation. Their goal was to find the language that best met the University's needs while addressing the concerns of the faculty members. For Dr. Livingston the outcome was a subscription document - one that individuals were welcome to sign, but not negotiate. Dr. Bates characterized the participation by the Distance Education and Technology unit as a passive

observer. He regards the final form of agreement as simply a clarification of existing policy.

On June 7, 2002, after a meeting the day before at which proposed agreement language was discussed, Dr. Dobson expressed continuing concerns in an email to Dr. Gaskell:

I believe I should make you aware of my thoughts respecting yesterday's meeting and the contract that appears to be in the works. I don't wish to create difficulties, but you should know that I am philosophically and pedagogically opposed to the franchising of courses. I deem this sort of activity -- particularly when it involves the sale of courses developed in privileged countries to universities located in underprivileged countries -- to be a form of intellectual or cultural colonization. The fact that the colonizer is at times welcomed or even courted does not, as Tony seems to think, justify the process. My concern is for those academics whose positions are usurped by such activities, as well as for those students whose education is modified as a result of the entrepreneurial manoeuvrings of university administrations.

A clause indicating that authorial consultation will precede the sale of the course beyond this institution will do little to alleviate my concerns because this form of consultation is, if I understand Angus Livingstone correctly, merely a gesture of good will. Is it not possible for MET, as an academic unit within UBC, to hold copyright of the courses so that they might stay in the setting for which they were designed?

By email on June 11<sup>th</sup>, Dr. Gaskell invited Dr. Petrina to join him and Dr. Dobson in discussion: "Teresa worries that she is alone on this and would like to talk to others that she respects. One of those is you." Dr. Gaskell has had extensive involvement in the Faculty Association executive since 1985 and was President of the Conference of University Faculty Associations of British Columbia from 1998 to 2000. He did not direct Dr. Dobson to the faculty Association or seek its involvement.

ETEC 531 was rescheduled to 2003-04 and Dr. Petrina's interest had waned. He gave moral support to Dr. Dobson, but the three did not meet. Dr. Dobson expressed some of her other concerns in an email to Dr. Petrina on June 12<sup>th</sup>.

As I said, I'm being worn down (as, it would seem, are you). Given my tight time line, I don't have the luxury of thinking through the issues clearly. I also have precious little clout in these negotiations given my rank/age/gender. I nevertheless feel we are in a critical moment -- a moment in which we can help fashion a reasonable policy for the future, and that we should not let the rush to get a contract in place before September prevent us from doing so.

An intellectual property clause was developed and included in the MET Letter of Agreement. Dr. Gaskell describes it as compromise wording that no one was happy about, but all were prepared to sign. Dr. Dobson signed on September 19, 2002 and other faculty member authors have signed since that date.

## **7. Intellectual Property**

### **7.1 Contributions by Authors**

Each author of academic course materials that are used in this course ("Author") must only contribute materials that are either original or in respect of which copyright clearance has been obtained prior to use. This is solely the responsibility of each Author and each Author agrees to save the University harmless in any dispute. The University agrees to assume any reasonable legal costs incurred by an Author where any action arising out of the contents of the project materials is brought by a third party with respect to the project. However, if that Author's actions are found to be intentional or negligent, the University will seek to be indemnified by them for any judgement against it, including all legal costs.

The University, acting in its discretion, will decide which of the materials contributed by an Author it will use in this course.

### **7.2 Original materials**

Original materials used in this course that attract copyright protection in Canada may be:

- created solely by an Author ("Author Materials"); or
- created jointly by an Author and individuals at the academic or service units of the University working to develop and deliver MET ("Course Materials").

For greater clarity, Author Materials include:

- works created by an Author before this course was contemplated; and
- works created by an Author specifically for this course, but without significant input from individuals at the academic or service units of the University working to develop and deliver MET.

For example, Author Materials include, without limitation, course outlines, case studies and student exercises.

Each Author owns copyright in Author Materials. Each Author agrees that Author Materials may be used, in perpetuity:

- By the University and/or by Tec de Monterrey in connection with their joint MET; and
- By the University in connection with other courses to be offered in either electronic or paper media. If the University uses Author Materials in connection with courses to be offered by a third party outside of the University, then the University will:
  - o use reasonable efforts to consult with Author of those materials before such use; and
  - o negotiate in good faith with the Author of those materials to determine that Author's appropriate entitlement to any resulting revenues received by the University.

The University owns copyright in Course Materials. The University agrees that those elements of Course Materials that comprise "content" (including without limitation the syllabus, but excluding the "look and feel") may be used, in perpetuity, by an Author who contributed to the creation of those materials, for the purposes of teaching and/or publication.

The University owns copyright in the MET courses as a collective work.

### **7.3 Attribution and revision of materials**

If an Author wants to contribute original copyright materials comprising creative works or critical commentaries for use in this course, the Author may choose to contribute those materials for use by the University on the following conditions:

- the Author is identified as the creator of those materials; and/or
- the University will not make use of any revised or modified version of those materials without the Author's consent.

For all other copyright materials provided by an Author for use in this course, each Author acknowledges and agrees that the University may:

- use those materials without attributing authorship; and
- use revised or modified versions of those materials, or use those materials in a different context, without the Author's consent. The University will use reasonable efforts to consult with that Author before such revisions or use.

### **7.4 Dispute resolution**

Any dispute arising in connection with this paragraph 7 (Intellectual Property) must be referred for mediation, at the request of either an Author or the University, to:

- An agreed mediator; or
- If the Author and the University cannot agree on a mediator, a mediator appointed by the Vice President Academic and Provost.

The role of any mediator is to assist in negotiating a resolution of the dispute. A mediator may not make a decision that is binding unless the Author and the University have so agreed in writing. The cost of any mediator engaged must be shared equally between the Author and the University.

Dr. Gaskell described the second paragraph in section 7.1 as a dispute resolution procedure: "The University, acting in its discretion, will decide which of the materials contributed by an Author it will use in this course." He testified it is intended that the "University" will decide through the MET Advisory Committee in the event there is a dispute among the team members. Dr. Livingston described this reservation to the University as "editorial control." Later Dr. Gaskell testified that the University in the first instance was the course development team and he was not certain why the drafting lawyer used the words in the document. There was no explanation in the evidence how this provision operates when the team includes members from the Tec de Monterrey.

## **10. Dr. Bryson's Assignment and Refusal to Sign Individual Contract**

Dr. Bryson was appointed to the faculty in 1988 is an Associate Professor with tenure in the Department of Educational and Counseling Psychology, and Special Education (ECPS). For the period 2002-04 she is Coordinator, ECPS Graduate Program in Human Learning, Development and Instruction (HLDI). In this role, she is responsible to staff courses.

For more than the past decade, Dr. Bryson has conducted competitively funded, collaborative research on "the significance of new information technologies for the transformation of pedagogy and learning environments and related implications for the social and cultural contexts of education - with a specific focus on teachers, professional development, and equity issues" ([www.educ.ubc.ca/faculty/bryson/cv.html](http://www.educ.ubc.ca/faculty/bryson/cv.html)).

Dr. Bryson has developed several courses over the years, including courses using WebCT, an online platform learning environment for course development. WebCT course are accessed by faculty and students with a password. Dr. Bryson has multiple WebCT sites on the Faculty of Education server that she has designed. Each course site includes various tools that are more significant than materials appended to face-to-face teaching. The tools include bulletins, chat rooms and various materials such as class notes and

Power Point presentations. She testified that none involve commercialization to third parties - "absolutely not." She had never before designed a distance education course.

Dr. Bryson testified that in this medium a course developer must use the same skills and thought processes in developing courses for face-to-face teaching and have technical knowledge to apply principles of effective website design. The Faculty of Education has a unit of employees who provide technical skills and knowledge to augment the skills of the faculty members. In developing a course for the Master of Educational Technology program, Dr. Bryson assumed she would be developing a WebCT course as she had previously for her regular course load and would have technical assistance as needed.

Over the years, Dr. Bryson's annual course load within the department and teaching outside the department has been determined through collaborative discussion with her department head. Her experience is that if a faculty member is productive and a good citizen of the department a consensus is achieved. Since she has been HLDI Coordinator she has selected and has been allocated her selected workload.

In course development, following University approval, she has produced the syllabus, selected materials, decided on the modes of assessment, chosen the forms of interaction and selected the pedagogical techniques. She uses public knowledge, including elements from other courses such as modes of assessment that have proven to be efficient and effective, in her course development. She describes the ethos of the university as collaboration, not one in which there is a focus on separating course content and ownership. She testified that all of her work is about sharing and making knowledge public - collaborative inquiry and public knowledge. Dr. Bryson has not experienced administrative intervention into this work, interference with her academic freedom in course development or interference with the use of elements developed in previous courses or by colleagues.

Dr. Bryson had never been asked before 2002 to sign a contract concerning course development or teaching courses she developed, even when she taught during the summer above her normal load for additional remuneration.

Dr. Bryson recalls receiving emails and discussing the Master of Educational Technology program during its review and approval within the Faculty of Education. She was aware it was a collaborative effort with Tec de Monterrey. She saw several versions of the program and business plans to maximize funding up front and to sustain the program from program revenue not general University funding.

While Dr. Bryson was on sabbatical in April 2002, it was proposed that, with Dr. Pratt, she develop ETEC 512 Application of Learning Theories to Instruction as part of her course load for the next academic year. She was to be assigned 1.5 credits to teach one of the sections the following year. Her department head, Dr. Leslie, asked Dr. Gaskell what he intended to recommend to the MET Advisory Committee on April 22<sup>nd</sup>. He replied by email on April 16<sup>th</sup> that he was recommending her for ETEC 512 and ETEC 531 with Dr. Petrina. The next day Dr. Perry replied that he would contact Dr. Bryson, which he did through email on April 19<sup>th</sup>. By April 21<sup>st</sup>, Dr. Bryson confirmed her workload for 2002-03 would include ETEC 512, but she wanted to "ditch ETEC 531." She asked Dr. Perry to inform Dr. Gaskell, which Dr. Perry confirmed he had in an email on April 22<sup>nd</sup>.

Dr. Bryson testified that she decided to forego ETEC 531 because she decided one Master of Educational Technology course was enough to engage in with her other teaching responsibilities. The 1.5 credit for developing ETEC 512 nicely rounded her load to twelve credits (EPSE 571 (3 credits); EPSE 503 (3 credits); CSCI 601 (a doctoral seminar in another department - 3 credits); PBL (providing technology components to a pilot in Problem Base Learning - 1.5 credits); and ETEC 512 (1.5 credits)). Dr. Leslie confirmed this twelve credit assignment in a memorandum on May 13, 2002.

Typically, in Dr. Bryson's experience, there was no separation between course development and teaching. It was unique to the Master of Educational Technology program that they were separated. Her assignment for the 2002-03 year included teaching EPSE 503 Learning Instruction and Education, a graduate course oriented to HDLI students. She had not developed this course, but had updated the selection of readings, assessment and other elements. Some of the content of this course overlapped with the content intended to be encompassed by ETEC 512 Application of Learning theories to Instruction.

Dr. Bryson was not compelled to accept an assignment involving course development for the MET program. As she testified, compulsion is not consistent with her experience in the annual course allocation process. The primary consideration is the relationship between subject area expertise and the courses.

During the spring, Dr. Bryson started to conceptualize the content of ETEC 512, review other ETEC courses and to initiate contact with Dr. Pratt. She was not on campus when the intellectual property workshop was held on May 17, 2002. On July 16<sup>th</sup> Dr. Bryson sent an email to Dr. Gaskell inquiring about apparent overlap between ETEC and ETEC 512. Dr. Gaskell replied on July 18<sup>th</sup>, in part, as follows:

... my understanding is that the focus of 512 is on learning theories applicable to instructional design. The focus of 510 is on issues of design. Originally, the plan was to have students take 512 before 510 but you were on sabbatical and Jennifer Shapka did not arrive until January and wasn't available to develop the course for next September. So we had to go with 510 first. This means that there is probably more learning theory in 510 at the moment than there might be in the future. I am copying this message to Tony Bates because he is both developing 510 but also has had experience teaching a similar course as part of the original TBL certificate in the past and was one of the people pushing for a separate course to introduce students to more work on learning theories applicable to design.

The dialogue continued on July 18<sup>th</sup> with Dr. Gaskell asking Dr. Bryson if she had copies of the final course outlines approved by the Senate. If she did not, he would send them to her. She replied on August 6<sup>th</sup> that she did not. He forwarded them on August 15<sup>th</sup>. The delay was because he had been out of the

country.

On September 11, 2002 Dr. Richard Young, the new department head, sent Dr. Bryson a memorandum with a revised teaching assignment because a course she was to have taught in the first term was undersubscribed and cancelled. That morning Dr. Bryson sent an email to Dr. Pratt suggesting times to meet to begin their collaborative development of ETEC 512. She had not worked with Dr. Pratt before, but had spoken on the telephone about ETEC 512 and both had extensive experience authoring courses. He suggested a day the following week.

Also on the morning of September 11<sup>th</sup>, Dr. Bryson sent the following email to Dr. Gaskell wondering why limited credit was allocated to faculty for the development of a significant course:

Hi Jim:

Could you clarify the FTE for MET course creation and instruction?  
Is it really 1.5 fte for course creation, if it is co-created, and 1.5 fte for instruction?

I was explaining this to someone the other day, and it seemed out of sync with generalized accounting of the number of hours involved in creating a new online course that only 3 fte in total would be allocated to the total task. I have seen anywhere from 600 to 3000 hours listed as a rough estimate of the amount of time that it takes to develop a high quality online course. And all the research I have come across indicates that with new courses, it is much more labor intensive both to develop and to teach an online course.

Thanks

Mary

With her request, she appended an excerpt from *The Economics of Online Learning* ([www.atl.uaberta.ca/downes/future/economics.htm](http://www.atl.uaberta.ca/downes/future/economics.htm)) which states it "is not uncommon to see course development costs in the range of \$50,000 to \$100,000" and another extract from BUBL Information Service (<http://bUBL.ac.uk/mail/digcopy/isso37.txt>).

That afternoon, Dr. Bryson asked Dr. Gaskell for the URL, userid and password to a MET course that was "up and ready to run." He forwarded the request to Mr. Miller. Dr. Bryson testified she did not know Mr. Miller or his role. Dr. Gaskell replied to her earlier email as follows:

Mary,

For each of the MET courses being developed, there are 6 credits available for the course authors to develop and teach the first section. That means that with a team of two, there are 3 credits available for development and teaching per person. The teaching can be split in different ways. You can each take half the students (i.e. 10 in the first section of 20) or you can split the weeks.

I appreciate that there is more work to develop a course than is covered by this, but remember that you are working with a team of designers, web programmers and graphic artists that are also getting paid. There is also assistance in getting copyright permission for the articles you want to use. The library has some money to help search for suitable materials. So the total budget is higher than the buy-out for the course authors. Your main responsibility is to provide the academic content to the rest of the team. We have developed a standard contract that lays out the responsibilities of the different members of the team and also clarifies issues of copyright and ownership of course materials. If you haven't seen it yet, you should ask your project manager for it. It should be signed before you get too far along.

Regards,

Jim

This was the first time that Dr. Bryson heard about a contract. She replied after 10:00 p.m. that night: "This is the first I have heard either of a contract, team of designers, or project manager. Could you please send me a copy of the contract and let me know who our project manager is?"

Dr. Bryson testified that to this point she had been engaged in familiar, generic activities associated with preparation for course development. A new parameter was being introduced and she was keenly interested whether this was a different species of course development.

The next afternoon Dr. Gaskell replied that he was forwarding her request to Mr. Miller and asking him to forward a copy of the contract template for the

MET program to her. He continued:

We developed this in consultation with Neil Guppy, Angus Livingston, Tony Bates and the first group of MET course authors. It won't have the specific dates for the timetable, etc, in it but as soon as the project manager for the course is designated for ETEC 512 he/she will work with you to fill in the blanks. We should know within a week who that person will be. Jeff Miller is the overall project manager for the MET program with DE&T."

Mr. Miller corresponded by email with Doctors Bryson and Pratt at the end of the day on September 12<sup>th</sup>.

Dr. Bryson testified that upon reading the contract template she saw there was a distinction, which she considers artificial, between the course author and course material ownership. At the time, she did not understand that when she developed a course she had a copyright. She associated copyright with the public expression of ideas and did not view course materials in the same way as books and articles. She considered pirating of course materials as plagiarism, not infringement of copyright.

Dr. Bryson testified that under the contract her role was reduced to providing content, which for her is foreign to the culture of teaching and, in her opinion, is likely to adversely affect teaching. This distinction between author and course materials caused her to become concerned with issues of ownership and control over "author materials" that had not previously concerned her. She considered it bizarre and narcissistic for faculty members to be focused on ownership and authorship, typically a minor part or issue in any course development.

In Dr. Bryson's experience, course design requires rigorous decision making that consumes hundreds of hours and, in her opinion, he proposed contract rewrote her job. She was reduced to providing content. She did not see the contract as reconcilable with the way courses are developed and redesigned in a university, which involves extended and heated public dialogue.

Dr. Bryson had routinely obtained copyright permission without difficulty. She had worked with minimal technical assistance in the past. She testified that at this point "everything stopped" while she entered into an extended email dialogue with Dr. Gaskell because the proposed contract "redefined my job in ways I was not prepared to accept." She believed the intellectual property provisions of the contract template unbundled the job of professors in developing and instructing and separating author and course materials. The contract gave the University rights of undue intrusion into the pedagogical expertise of faculty with a right to censorship by deciding "which of the materials contributed by an Author it will use in this course."

Dr. Bryson testified that once the Senate approves a course it is unheard of for the University to intervene. It has "never" happened and this right fundamentally redefines the relationship between faculty member and university. Dr. Bates testified that in his experience the University had not intervened in any course he taught and the right for the University to intervene is not a normal part of a course taught face-to-face.

Dr. Bryson acknowledged that in collaborative teaching of a single course and in teaching a course with multiple sections there is collegial decision making. She acknowledged that on occasion it happens that the department head must make a decision when the instructors involved cannot arrive at a consensus. She testified that it is bad practice, but it does happen.

On Friday, September 13<sup>th</sup> Dr. Bryson forwarded the message from Mr. Miller to Dr. Petrina with the following message: "What do you think of this contract? Are there any women involved in leadership roles in MET at all? I had no idea about the contract until yesterday. Do you know if our University or Faculty Association has any position about authorship and online courses and academic freedom etc...."

Dr. Bryson testified she set out to find a way to work or interpret the contract that would enable her to continue as planned. On Saturday afternoon,

September 14<sup>th</sup> she sent an email to Dr. Gaskell and Mr. Miller:

I have been perusing the contract, and I have a question.

If one or more faculty develop an online course for MET, draw substantively on courses created by said faculty prior to the contemplation of MET in creating the MET course, and make no use of MET web designers, then am I right in reading the contract to imply that:

(a) All materials in the course [are] by definition Author materials

And in a situation like this,

(b) What part of the course is owned by the University as copyrighted material?

Mr. Miller replied that afternoon with a copy to Dr. Gaskell.

I'm copying Jim on this so that he can add any responses he might have to your questions or my responses.

The example you describe below would, in my opinion, be defined as author materials, and would likely be integrated at arms length within the actual course site, in order to ensure that the division was clear. For example, in the current ETEC510 course, we are using some materials authored by Tony Bates and Gary Poole that are in-press. We have linked into them as resources as opposed to positioning them within the narratives of the course modules. Once that material is published, we will have students buy the book from the bookstore.

For core courses, it is highly unlikely that any one author would entirely write a course, as the intention is to have faculty collaborating in the creation of course materials. In ETEC512, there will be 4 course authors, including yourself, so I doubt that it would be the case that "all the materials in the course" would be from 1 author. The collaborative text as well as any multimedia materials created to support it, as expressed in the web-site for the course would belong to the university. As for the ideas contributed by any individual author, they could be taken and worked up in another publication or purpose in accordance with the contract language.

As I don't see the first situation arising, I don't think I can answer your second question.

Jim, what are your thoughts?

Dr. Bryson clarified the next afternoon, Sunday, September 15<sup>th</sup>, that her question was about "faculty members' intellectual property, academic freedom, the development of MET courses and the contract." She elaborated and raised the issue of academic freedom. Her remarks disclose that she did not appreciate

or had forgotten the parameters within which the course was being developed within the Master of Educational Technology program under the agreement between the University and Tec de Monterrey.

When I develop a non online course for the University, I don't sign a contract, and I am the sole designer, and for many years now, all my courses have had significant online resources, all of which I have created myself. As a Faculty member, the content of the course is all these things, not just textual artefacts that my students read. It is also the pedagogy that the course embodies.

So then I think about creating MET 512. I had assumed the 2 authors would be Dan and me. Now I hear there are four authors. Who are the other two authors? Why do we need two extra authors? I certainly don't need the assistance of a design team, necessarily, and I do have academic freedom, so what happens if, hypothetically, Dan and I let you know that we have decided to create the whole course ourselves?

Presumably the other two authors are part of the design team, and they are paid by the program. What is their substantive contribution to the course, beyond implementing what, in this case, Dan and I would like to see in the course and its tools?

This is the gist of what I would like you to clarify for me

Dr. Gaskell replied later that day with a copy to Dr. Pratt. He began with the foundation arrangements for the course and ended with an apology if she had not been having previously aware of the implication of working on a core course.

ETEC 512 is one of four core courses in the MET program. (ETEC 510, 511 and 500 are the other three.) As you know, the MET program is a joint program with Tec de Monterrey. The agreement with Tec de Monterrey stipulates that the 4 core courses will be developed jointly by the two institutions and will have both Spanish and English versions. Over all the four core courses, there will be equal representation of design team members from Tec de Monterrey and from UBC and each design team will have some representation from each institution. If we follow the rotation that we have started with ETEC 510 and ETEC 511 then ETEC 512 will be developed in WebCT and located on a server operated by DE&T so that they can run the technical support for the students; however, I don't think a final decision on this has been made yet. The design team for ETEC 512 should have a reasonable mix of people from both institutions.

Because ETEC 512 is a core course then there will be 4 equal course authors--two from UBC (you and Dan) and two from Tec de Monterrey (yet to be determined). Given this mix, there will be a fair amount of discussion and negotiation about the content and nature of the

course. The idea that UBC authors would write the course alone and then have it translated into Spanish would not be acceptable to Tec de Monterrey. Their needs and contexts need to be taken into account. As you can imagine, they are quite sensitive to ways of operating that look like first world domination.

I believe that faculty members' intellectual property is protected within the MET contract. Intellectual ideas are not copyrightable – only the particular expression of them. Particular pieces or objects written or developed by any of the 4 course authors that they want protected from future modification can be designated as author materials. Authors also have the right to continue to use these elements in other teaching and publishing that they do. However, the course as a whole is ultimately created and put on the web by a team of people employed by the universities and the two universities together will hold joint ownership to the course as a collective work.

I hope this clarifies the situation for you. My apologies if you were not previously aware of the implications of working on a core course. We have been scrambling to get this year's courses up and running on time and perhaps have not communicated with the authors for next year's courses as well as we might have.

Dr. Bryson testified that she faced a Hobson's choice and did not want to be concerned with ownership of parts of the course or to work with a team whose assistance she did not request and did not require. She was willing to proceed without signing an agreement. She expressed her concern about censorship and academic freedom more specifically in an email the next morning, September 16<sup>th</sup>, to Dr. Gaskell with a copy to Dr. Pratt which states, in part:

Yes, hence my questions. The design of a course embodies a particular expression of the ideas, which is augmented by content in the form of assignments and texts. Of greater concern to me at this point is academic freedom, which seems precarious in the contract.

The contract reads: "The University, acting in its discretion, will decide which of the materials contributed by an Author it will use in this course."

Who is the "University"? Since when does the University interfere in the choice of materials and have a final word on a course Author's design? How is academic freedom of Faculty in designing courses protected in this clause?

That afternoon, before receiving a response from Dr. Gaskell, Dr. Bryson sent a specific request. She had discussed her situation with Doctors Richard Young and Cay Holbrook in her department and sent a second email to Dr.

Gaskell, which states, in part: "A suggestion arose, which I would like to put to you, in the form of a direct question. Since I don't sign any contract preceding the development of non-MET course, can I opt to develop ETEC 512, and not sign the MET or any other contract?" Within an hour Dr. Gaskell replied, with copies to Doctors Young, Bates and Bullen and Messrs. Miller and Kenny, that she could not. He wrote:

Since the development of MET core courses is a collaborative process involving four course authors, various support staff, and two institutions and since our agreement with Tec de Monterrey stipulates that the final collective work will be jointly owned by the two institutions a contract is necessary so that issues of timeliness, responsibilities, intellectual property and copyright are clear in advance.

Dr. Bryson testified that, at this time, she did not have any inkling that it might be considered by the Faculty Association that it was inappropriate for the University to ask individual faculty members to sign individual agreements.

On September 17<sup>th</sup> Dr. Petrina replied to Dr. Bryson's inquiries on September 13<sup>th</sup>.

The contract was developed over the summer Mary -- Teresa and Carl had more to do with it than anyone else. I think this was by far the best they could do in the short amount of time they were working.

You're right, there are no women in MET admin. The faculty and CUST hired Don Krug from OSU to administer and take over Jim's position.

On September 25<sup>th</sup>, after discussion with Dr. Livingston who he had difficulty contacting, Dr. Gaskell responded to Dr. Bryson's first email inquiry of September 16<sup>th</sup> about academic freedom. In his response Dr. Gaskell did not mention the MET Advisory Committee which was central to his explanation at the hearing of the meaning of the sentence that concerned Dr. Bryson in Article 7.1 of the MET Letter of Agreement for the Production, Development and Delivery of an Online Course. He pressed Dr. Bryson to decide to sign or not. He wrote, in part, as follows:

I think the primary issue is that course development for the MET is a team effort not an individual responsibility. The team includes at least

two course authors, as well as instructional designers, graphic artists and web programmers and its members come from both the Faculty of Education and Distance Education and Technology at UBC and, for core courses, from Tec de Monterrey as well. It is assumed that the team will operate by consensus in making its decisions about the development of the course. If it works this way then the collective "we" of the team is the university. In those rare cases where agreement cannot be reached in this way, then the team needs to find a way to make a decision and move on. The clause you refer to provides for the collective to make such a decision.

I hope this helps.

It is important that all the authors read the contract carefully and understand its implications. Having done that they need to decide whether they can sign or not sign. I would like to know within the next week or so whether you will agree to sign this contract or not.

Dr. Bryson continued to test the limits of the contract and broadened distribution of her email response on September 30<sup>th</sup> to include the copy recipients of Dr. Gaskell's email. For the first time, she raised the role of the Faculty Association.

On 9 / 25 / 0211:51 AM, "Jim Gaskell" wrote:  
If it works this way then the collective "we" of the team is the university.

Jim:

I don't know why the email is being forwarded to so many people, however, since you are doing so, so too will I.

Re. the above, am I correct then, in interpreting what you have said to mean that we could alter the contract so that the four author names of the course replace "the University"?

I can not let you know about the contract and whether I can sign it until I understand its implications, and get accurate legal/ policy feedback from the Faculty Association and CAUT.

There are very significant ramifications that follow from the contract that have proven major ground for discussions at other major universities. It is too bad that this contract came out of the blue, with no input from faculty intending to teach in the program.

Dr. Bryson testified that, despite the contents of Dr. Gaskell's email of September 12<sup>th</sup> and Dr. Petrina's of September 17<sup>th</sup>, at that time she did not know the role the first MET course authors had played during the spring and

summer in developing the specific language of the MET Letter of Agreement. She testified that she understood faculty members, including one or more who signed the agreement, were not happy. She was not happy that the circle of persons included in her communications resisting signing had widened.

Dr. Gaskell's reply on the afternoon of September 30<sup>th</sup> reflects impatience with the discussions:

The questions you are asking are significant and I am copying them and my answers to people in DE&T who are responsible for administering the contracts and to Rob Tierney and Richard Young to keep them informed. I am also copying Dan Pratt so that you both have the same understanding of the contract.

This contract did not come "out of the blue, with no input from faculty intending to teach in the program." As I said in my email to you of September 12 and as I assume you know from talking to other authors, all the authors that were involved in developing courses for MET last year were involved in negotiating the contract. They all accepted the contract as it is currently written.

In response to your direct question, the answer is no, you cannot substitute the names of the four authors for "the University." As I have said in several emails before, the team that is responsible for the course development constitutes more than the four authors. Suggestions and recommendations can come from many sources and, in the end, the collective as a whole is responsible. That is, I think, implicit in the distinction between "author materials" and "course materials."

This is a contract that has been developed in consultation with the other authors to date, with DE&T and with the President's office. You can choose to sign it or not after you seek advice, but at this point I think it is inappropriate for me to negotiate substantive changes with individual authors.

I would appreciate your giving me your sense of a timeline when you think you will be able to make a decision.

Dr. Gaskell's view that it was inappropriate to negotiate different terms with each author was echoed in Dr. Bates' testimony. Under his leadership, Distance Education and Technology insisted on individual agreements when it providing resources and for this program of ten course he wanted a common arrangement for all the authors. He is aware that for courses offered at a distance by others at the University that do not use DET resources , like the Faculty of Education,

faculty members are not required to enter into individual agreements.

Dr. Gaskell testified that his view was that Dr. Bryson had a choice to do the work or not to do it. The agreement spells out her obligation to do work for which, as MET Coordinator, he is buying her time from the Faculty of Education. He is not her department head and was acting as an independent provider of funds outside the University's General Purpose Operating Fund. He believed Dr. Bryson knew the Master of Educational Technology was a self-sufficient program, with a stand alone business plan operating outside the General Purpose Operating Fund. Its courses were not like other courses offered by the Faculty of Education. He had not spoken directly to Dr. Bryson about developing any of the courses. However, he understood from her department head that she had insisted that she wanted to be involved and his decision to recommend her in April for ETEC 512 and ETEC 531 came "after several forceful discussions" with her department head.

On September 30<sup>th</sup> Mr. Kenny forwarded a copy of the agreement to Dr. Pratt because he was uncertain if Dr. Pratt had received a copy. Dr. Pratt's prompt reply the same day was as follows:

Just to be clear about this, I've never seen, nor heard about any such contract until it came up in this conversation/ exchange with Mary. Nor do I remember any discussion about the kind of contractual arrangements that are now in place, when we were initially designing the program. Quite the contrary. As a member of the initial planning and development team it was my impression that the FTE reimbursement for development and delivery of a course would not be so impoverished as it is in this contract. Further, as a member of a committee that the Vice-president established four or five years ago to consider the ways in which UBC might get more people to consider using technology in their teaching, it was my impression that the university was committed to 'paying' more than this for the development of courses, especially if the course was new and would be delivered on-line. So, it's been interesting and more than a little discouraging to see the details emerge only under the press of Mary's questioning. It gives me pause to re-consider my own involvement.

On or about October 7, 2002 Dr. Gaskell telephoned Mr. Green to determine whether the Faculty Association had a position on individual contracts in the Master of Educational Technology program. Mr. Green recalled the call,

but not what was said. Dr. Gaskell recalled and noted at the time that Mr. Green informed him that the Faculty Association had not received a formal complaint and there would be general policy discussion in the future because Dr. Bryson had indicated she had withdrawn and would not be teaching the course. The Faculty Association had no existing policy on academic freedom and intellectual property, but intended to discuss a policy as it relates to online courses.

In October, Doctors Bryson and Pratt discussed the situation with colleagues and consulted Dr. Petrina who accompanied them to a meeting with the Faculty Association. In mid-October, Dr. Bryson took another tact with Dr. Gaskell. On October 17<sup>th</sup> she pressed her concerns as HLDI Coordinator in an email to him.

As coodinator of ECPS' HLDI graduate program. I am here asking you to respond to the concern that exists in my department, and more specifically in the Human Learning, Development and Instruction Graduate Program, that ETEC 512 (Application of Learning to Instruction), which has not yet been developed, duplicates a course that already exists, EPSE 503.

503(3) Learning, Instruction and Educational Technologies. Critical examination of current research and instructional design and exemplars, in which new and emerging concepts of learning, media, knowledge, facilitative environments, and instruction are being influenced by - and in turn, are influencing - educational technologies across age levels and across subject area boundaries. A major focus of the course will be hands-on exploration of online learning cultures, and practice in the design of digital teaming cultures, artifacts, and instructional tools.

The HLDI group here requests that MET make use of EPSE 503, rather than develop a course that would duplicate in copyrighted form, a course we already "own". Our interest in this course is not about turf, but about the fact that we are able to exercise quality control over EPSE 503, whereas we can have no such control over ETEC 512, even if we participate in its development, because of the exclusionary language of the contract. ETEC 512 could defacto become the online version of EPSE 503, which would not be an outcome beneficial to our graduate students or our program.

Dr. Gaskell replied by email on October 23<sup>rd</sup>:

ETEC 512 went through a full consultation process during its development and was passed by the GCAC, the Faculty of Education, FOGS and Senate. While there were some concerns raised about its

outline, my recollection is that the issue of duplication with EPSE 503 was not raised. In the end, ECPS signed the consultation form for ETEC 512 supporting the course. While there may be some overlap, I do not accept the argument that they are duplicates. In addition, EPSE 503 has EPSE 501 and EPSE 592 as prerequisites. There are no such prerequisites for ETEC 512 and to have such prerequisites would make the course unworkable within the MET program.

As I have said before, ETEC 512 is a core course in the MET program and, as such, must be developed equal collaboration with authors from Tec de Monterrey. The idea that we would take an existing UBC course and present it to a Mexican university and say that this is the course that will be taught is not a process that I would want to be involved in. I think we need to be more sensitive in terms of our concept of partnership, particularly with respect to institutions in third world countries.

Behind your request seems to be a concern about control over quality in ETEC 512 and possible loss of EPSE 503. The authors and other production team members as a collective are responsible for the development of the course. They are responsible for its quality. Money has been set aside for an annual review and update using the original authors if they are available and interested. Other than having to collaborate and negotiate with authors from Tec de Monterrey, I find it difficult to understand your argument about not being able to exercise quality control. I have heard of no issues about loss of quality control over any of the existing courses within the TBDL program or of the courses developed so far within the MET program. The old TBDL courses were developed under a much worse contract with respect to the protection of author intellectual property.

As you know, copyright applies to a particular expression of an idea. The material within ETEC 512 will be a different expression of ideas than will appear in EPSE 503. In addition, the language of the MET contract specifies that certain critical material can be designated as "author material" and the copyright of that material will reside with the author. It is only the collection of components as a whole that the university owns. I see no problem with ECPS developing an online version of EPSE 503 in the future for use in its own programs.

Given the above, I intend to continue with the development of ETEC 512 for first offering in September of 2003.

You ask for an extension of time until the end of October to make a decision about whether you intend to sign the standard contract and be a member of the course development team. I continue to hope that you will agree to work with us. I await your decision.

On October 24<sup>th</sup>, the Faculty Association advised its members not to sign individual contracts with the employer and Mr. Green sent the following email to the University's Faculty Relations unit:

With regard to the issue of a separate contract governing the teaching of courses in the MET program, the Association's position is as follows:

The Association is the sole bargaining agent for its members. It is, then, inappropriate for the University to ask members to sign a separate contract, with distinct provisions, in order to teach any courses - on-line or otherwise - as part of the faculty member's regular course-load. If the University believes that a particular program or course requires agreement on specific provisions not included in the Collective Agreement, then the University should approach the Association regarding collective bargaining of such provisions.

We will be advising our members of this position as well, and will continue to recommend they not sign any individual contracts with the University.

The MET Advisory Committee discussed this turn of events on October 25<sup>th</sup> and decided "to suspend all development activities until we had signed contracts from relevant faculty members." On October 28<sup>th</sup>, Dr. Gaskell sent an email notice to several people, including affected department heads, which states, in part:

The immediate implications of this are that the 3 credits for Roger Boshier, Mary Bryson and Dan Pratt that were to be paid out this year by the MET program will not be paid unless contracts are signed in time for the necessary work to be done. Heads may want to consider the implications for this year's workload for these faculty members.

Dr. Bryson replied she was prepared to develop ETEC 512 "under the express conditions within which ETEC 512 was presented to me when I agreed to do so as part of my 02/03 load, which is, without signing any kind of contract."

Dr. Gaskell's reply states:

There will be no money from the MET program for your course development buyout unless a contract is signed that specifies responsibilities, deadlines, and intellectual property issues. We will not lay ourselves open to future law suits in this area. If you do not wish to sign a contract, you do not have to do the work. There is time to renegotiate your workload. As far as I am concerned, you have done no work for the MET program this year because you have yet to sign a contract.

On November 14, 2002 the University replied to the Faculty Association:

We have reviewed the Faculty Association's position with respect to the MET Letter of Agreement that you outlined in your e-mail dated October 24, 2002 to Tammy Brimner. The University administration does not share

your view that agreements such as this are encompassed by the Collective Agreement or the Association's status as sole bargaining agent.

The MET Agreement as well as agreements for distance education courses in general applies only to distance education programs and to issues peculiar to the development and delivery of those programs. Agreements of this nature have a long-standing history at UBC and are in common usage throughout the University.

When a faculty member executes the MET Agreement the terms and conditions of the faculty member's appointment as set out in the Collective Agreement with the Faculty Association continue to govern; they are not affected by this agreement. The University administration's position is that this is a curriculum matter outside the purview of the conditions of appointment for faculty. The MET program was subject to the usual Senate and Senate Curriculum Committee approval.

The University administration has not engaged in any conduct that interferes with the Faculty Association's role as sole bargaining agent. We ask the Faculty Association to reconsider its position on this issue and to refrain from counseling members against executing the MET or similar agreements that are outside of the ambit of the conditions of appointment for faculty.

On November 27<sup>th</sup> Dr. Gaskell asked Doctors Bryson and Pratt to confirm they would not sign the MET Letter of Agreement and expressed regret "because I believe that the two of you would have produced an excellent course." They did not sign and Dr. Gaskell took steps to have ETEC 512 developed by someone else.

Dr. Bryson met with her department head and took on another assignment in place of the 1.5 credits for developing ETEC 512. The union grieved on December 11, 2002.

In 2003 faculty members in the Faculty of Education signed letters of agreement to produce, develop and deliver ETEC 500 Research Methodology in Education, ETEC 522 The Business of E-Learning, ETEC 532 Technology in the Arts and Humanities Classroom. Agreements to produce, develop and deliver other courses were signed by Dr. Bates and others in Distance Education and Technology. Dr. Gaskell testified that several faculty members have not developed courses because they would not sign an agreement following advice from the Faculty Association not to sign

Dr. Gaskell testified that there is active interest in the courses and Master of Educational Technology program by other universities and real potential for there to be new revenue.

## **11. Union and Employer Submissions**

Counsel agree that the Faculty Association's status as a voluntarily recognized bargaining agent grants it the same rights as certified exclusive bargaining agent.

Counsel for both the union and employer made written submissions supplemented with extensive oral argument and reference to numerous authorities. The purpose here is to highlight the submissions without exhaustively restating them.

The union states the questions to be addressed as follows:

- a) Did the University contravene the Collective Agreement between it and the Faculty Association when it negotiated directly with Faculty Association members regarding the specific terms and conditions of their employment respecting their participation in the Masters of Educational Technology ("MET") Degree Program?
- b) Did the University contravene the Collective Agreement when it required Dr. Bryson as an express condition of her participation in the MET Program, to sign an individual contract addressing terms and conditions of her employment which terms were not negotiated or even raised or discussed between the University and the Faculty Association as bargaining agent?
- c) Did the University contravene the Collective Agreement when it removed Dr. Bryson from her assignment of developing and teaching a course for the MET Program expressly because of her refusal to sign an individual contract of employment following a recommendation to that effect by the Faculty Association?

The union submits:

- ?? An employer cannot negotiate terms and conditions of employment directly with bargaining unit employees, regardless whether the issues being negotiated are covered by the collective agreement (*MacMillan*

*Bloedel Industries Ltd.* [1974] 1 Canadian LRBR 3131 (BC);  
*Government Employee Relations Bureau & Ministry of Human Resources* BCLRB No. 3/80; *Pacific Press Limited* BCLRB No. 6/83).

- ?? There is no capacity left in individual employees to negotiate and contract with the employer (*McGavin Toastmaster Ltd v. Ainscough et al* (1975), 54 DLR (3d)1 (SCC); *Syndicat Catholique Des Employes De Magasins De Quebec, Inc. v. Compagnie Paquet Ltee* (1959), 18 DLR (2d) 346 (SCC); *Cariboo College* BCLRB No. 396/83).
- ?? Direct dealing between an employer and individual employees over terms and conditions of employment undermines the employee's perception of the union's ability to regulate and control the employer's conduct on terms and conditions of employment (*Westar Timber Ltd.* BCLRB No. 58/86; See also *Bell Canada* [2003] CIRBD No. 1).
- ?? The clear law is that the prohibition against an employer negotiating terms and conditions of employment with individual employees "applies whether or not the collective agreement covered the subject matter of the negotiations" (*Simon Fraser University* IRC No. C133/90).

The union acknowledges there can be negotiations between an employer and individual employees about the routine administration of the provisions of a collective agreement. In *Province of British Columbia* (1987), 30 LAC (3<sup>rd</sup>) 138 Arbitrator Hope reasoned:

Clearly there is a line to be drawn between the routine application of the agreement and the alteration or subversion of its terms in private deals made with employees. Supposing an employer were to offer to increase the hourly rate of any employee who was willing to forgo coverage under the health and welfare provisions of a collective agreement, or to cash in pension benefits for a discounted value. Those initiatives might very well benefit an employer financially and might very well be enticing to some short-sighted employees. But it seems clear to me that an employer would be unable to enforce any such arrangements on the basis of the reasoning in *Pacific Press*.

But, on the other hand, where an employee agrees with his employer to have the provisions of the agreement apply to him in a particular way, he is bound by that agreement unless it is in conflict with or subverts some

provision of the agreement. Employers and employees routinely make agreements without the intercession of the bargaining agent with respect to such matters as the scheduling of vacations, the allotment of overtime, including the enforcement of agreements to work overtime where it is voluntary under the collective agreement, job transfers and similar matters having to do with the organization and direction of the work-force.

In such cases the question is whether an individual agreement as to the application of the collective agreement to an employee is a breach of the agreement's terms. That is the question posed in this dispute. But it was not the question posed in Pacific Press. There the board was not addressing a grievance or dealing with the interpretation and application of the terms of the agreement. (pp. 147 - 8; See also *Province of British Columbia* (1988), 2 LAC (4<sup>th</sup>) 247 (Hope) at p. 268)

The Industrial Relations Council elaborated in 1991 as follows:

The exception carved out by Arbitrator Hope recognizes the frailty of the language used in most collective agreements and is designed to allow them to operate smoothly and effectively without constant intervention by the contracting parties. Contract negotiators simply cannot be expected to address every eventuality which may arise out of the provisions of the bargain struck. Moreover, no business could operate efficiently and no union could properly service the employees in its bargaining units if the employer is required to seek the union's approval for even minor adjustments in the application of the agreement to individual employees. Arbitrator Hope gives examples of routine matters where an employer and employee may be required to come to an agreement without the intervention of the bargaining agent: "... scheduling of vacations, the allotment of overtime, ... job transfers and similar matters ...". We accept Arbitrator Hope's analysis. The routine administration exception described by Hope clearly applies some common sense principles to labour/management relations. An interpretation of exclusive bargaining authority which compels the parties to negotiate and reach an agreement on every facet of the employment relationship cannot be sustained. Neither the employer nor the union could function effectively without this mid-term window for direct dealings between employer and employee. Provided the routine administration of the collective agreement applies strictly to the existing terms of the agreement and does not violate or subvert any of its terms, whether express or implied, there is no interference with the union's exclusive right to bargain on behalf of the employees.

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...the only exception to the absolute prohibition against private agreements between employers and employees is the routine administration of existing provisions of the collective agreement. (*Simon Fraser University, supra* at pp. 11 & 14 of the QL version)

An application for reconsideration was dismissed in *Simon Fraser University* IRC C41/91. The two Industrial Relations Council decisions were set aside on judicial

review and the appeal from that decision was dismissed (*Association of University and College Employees, Local 2 v. Simon Fraser University* [1994] BCJ No 1093 (BCCA)).

The Court of Appeal deliberately did not express any opinion on "the dimensions of residual management rights and the exclusive bargaining authority to be defined, as they are in the course of being defined, by the arbitration process or by collective bargaining. I do not express any opinion on those interesting questions" (¶ 34). The Court carefully circumscribed the scope of its judgment:

It may be that the conclusion of the s. 108 panel on the scope of the routine administration exception is correct. If that is so then the arbitrator was clearly wrong in his resort to that exception in this case. I decline to express an opinion on that question in this context, preferring to leave such an important question to be decided in a more suitable context. (¶ 40)

In 2001 Arbitrator Stevenson held that an agreement to reduce an employee's hours of work was a layoff not a routine administrative exception.

The "routine administration" exception is just that – an exception. Considering the broad based policy and statutory considerations upon which the principle of exclusivity of bargaining authority is based, such an exception should be strictly construed, and applied only where it is clear that the individual agreement will not subvert or contravene any of the express or implied terms of the collective agreement or undermine or compromise the role of the bargaining agent. If it cannot be said that the individual agreement does not meet those requirements, the exception cannot apply and the prohibition applies. (*University College of the Cariboo* (2001), 99 LAC (4<sup>th</sup>) 12 at p. 23)

The union submits negotiation about terms and conditions of employment that are not addressed in the collective agreement, such as intellectual property rights, is not routine administration of the collective agreement. And negotiations about academic freedom, remuneration, methods of performance evaluation and dispute resolution processes distinct from those in the collective agreement are not routine administration.

The union submits the relationship between the faculty members and the

employer throughout was as employee and employer. It was not as author and publisher or some other relationship related to scholarly activity that individual faculty members generally pursue individually. The union submits that it was in the opening statement at arbitration of employer counsel that it first heard the relationship characterized as publisher and author. This late-date characterization is simply concocted without basis in the facts.

The union submits the MET Letter of Agreement has terms and conditions of employment different than both those in the collective agreement and Policy #88. These terms and conditions were not imposed in an exercise of residual management rights. They were negotiated and drafted into legal language in a structured bargaining process. If a faculty member failed to adhere to the agreement there would be consequences as an employee through the department head, not as an author or freelancer.

The union submits faculty member's intellectual property rights are not a subject or term and condition of employment beyond the reach of collective agreement. The *University Act* RSBC 1996, c. 468, s. 27(2)(v) recognizes that intellectual property rights can be a term of employment. The courts have recognized this (*Gage Ltd. V. Sugen* (1967), 62 DLR (2d) 671 (Ont. H.Ct.); *Spiroll Corp. Ltd. V. Putti et al* (1975), 64 DLR (3d) 280 (BCSC) affirmed (1976), 77 DLR (3d) 761 (BCCA)). The *Copyright Act*, s. 13 recognizes that employment contracts can contain provisions regarding the ownership of copyright. The definition of "conditions of employment" in the *Employment Standards Act* RSBC 1996, c. 113 recognizes some conditions of employment can be set by statute, such as the *Copyright Act*. Some statutory conditions are incorporated into each collective agreement (*Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324* [2003] SCJ No. 42). There is no statutory or other prohibition against including provisions dealing with intellectual property rights in a collective agreement. They are included in several faculty collective agreements in Canada.

The union submits faculty members' copyright is a negotiable subject at

the collective bargaining table that could be taken to a collective bargaining impasse. The union as agent for the faculty members could bargain about copyright, which is assignable to an agent under the *Copyright Act* (although moral rights are not).

The union submits intellectual property rights are terms and conditions of employment and the employer was prohibited from negotiating about them directly with faculty members.

The union submits academic freedom is a term and condition of employment specifically identified in the Agreement on the Framework for Collective Bargaining and recognized by the Supreme Court of Canada (*McKinney v. University of Guelph* (1990), 76 DLR (4<sup>th</sup>) 545). It submits that sections 2 and 7.1 of the MET Letter of Agreement substantially restrict the faculty member's academic freedom and transfer control of course content from the faculty member to the employer. The transfer is not to collaborative faculty members engaged in collegial development and teaching, but to University administrators. In Dr. Bryson's case, she was denied the freedom to use her skills to develop the website as she saw fit.

The union submits the cumulative effect of the MET Letter of Agreement is to redefine the faculty member's role from "free and fearless search for knowledge and the propagation of ideas" and "removes their responsibility for determining the course content and pedagogical design of a course" to providing "material for possible inclusion in a course, with the University making the final decisions."

The union submits Sections 7.4 (dispute resolution), 7.2 and 11 (remuneration) and 8 (performance evaluation) of the MET Letter of Agreement deal with terms and conditions of employment expressly addressed in the collective agreement (Article 18 of the Framework Agreement; Agreements on Salaries and Economic Benefits; Conditions of Appointment for Faculty Agreement, s.4).

The union submits the employer did not purport to exercise any residual management right or create a new or amended policy in accordance with its established processes for policy promulgation. It chose to, and did, negotiate directly with individual bargaining unit members and insisted they sign individual agreements about the terms and conditions of work they were performing as employees. The employer was obliged to negotiate with the union and did not contrary to Article 3 of the Framework Agreement for Collective Bargaining.

The union submits the employer discriminated against Dr. Bryson because of union activity contrary to Articles 4 and 12 of the Framework Agreement when she refused to sign the MET Letter of Agreement and took her concerns to the Faculty Association. The union acknowledges it bears the onus to establish the discrimination and submits that the test is no longer action based solely on anti-union motivation as in *Wire Rope Industries Ltd.* (1983), 13 LAC (3d) 261 (Hope). The union submits that the human rights law on which the analysis in *Wire Rope Industries Ltd.* was based has evolved so that "... if discrimination forms any part of an employer's reasoning for its actions, the courts will find that the employer has discriminated against the employee. Arbitral jurisprudence must now recognize that shift."

In support of this proposition, the union relies on *Alberta Hospital Ponoka* (1994), 46 LAC (4<sup>th</sup>) 231 (McFetridge). The arbitration board decided:

We are of the view that the tests for discrimination which have been developed by the courts in human rights cases are useful to arbitrators when they are interpreting anti-discrimination provisions in collective agreements. Much the same way as human rights legislation declares public policy regarding fundamental principles of free and democratic societies, the anti-discrimination provisions of a collective agreement are fundamental to the principles of free collective bargaining and should not be subject to a restrictive interpretation. ....

... We note that both the Alberta Labour Relations Code, S.A. 1988, c. L-12 (s.147), and the Public Service Employee Relations Act, R.S.A. 1980, c. P-33 (70(3)), contain provisions which prohibit discrimination on the basis of union membership. These legislative provisions suggest to us that where a collective agreement includes similar anti-discrimination

objectives, they too should be interpreted liberally. In our view, arbitration boards should not take a narrow view of anti-discrimination provisions or search for ways to minimize their impact. Subject always to the specific language of the collective agreement, the principles established by the courts in interpreting human rights legislation should be considered by arbitrators when interpreting anti-discrimination provisions in collective agreements so that the objects of these provisions can be attained. (pp. 244-5)

On judicial review the Alberta Court of Queen's Bench agreed that adverse effect discrimination could breach collective agreement prohibition against discrimination (*Alberta Hospital Ponoka v. Alberta Union of Provincial Employees, Local 42* [1995] AJ No. 350 appeal dismissed [1997] AJ No. 491 (Alta C.A.))

The union submits that, in seeking advice, Dr. Bryson was acting as a member of the Faculty Association and engaged in activities on behalf of the Association. In refusing to sign the MET Letter of Agreement she was acting in defence of her rights under the collective agreement. Requiring her to sign the MET Letter of Agreement, despite the union's advice not to, discriminates against those who heed their union's advice. Removing Dr. Bryson because she went to her union, when she remained willing to do the assigned work without signing the MET Letter of Agreement, was discriminatory.

The union submits the employer acted for this reason, not because of an unsigned agreement with Tec de Monterrey or an unsigned agreement between the Faculty of Education and Distance Education and Technology. The result was harm to both Dr. Bryson and her department in lost opportunity to work in an area of interest and to participate in a faculty program.

The union submits the employer's insistence that individuals sign the MET Letter of Agreement restrained them from exercising their rights under the collective agreement contrary to Article 12 of the Framework Agreement.

The employer submits there has been no violation of the union's exclusive bargaining agency or the Framework Agreement. The employer submits that the

intellectual property matters dealt with in the MET Letter of Agreement are not within the scope of the Faculty Agreement, but, if they are, they are within management's residual rights under the Faculty Agreement or are matters of routine administration. The employer submits there is no evidence that it discriminated against Dr. Bryson because of union activity.

The employer identifies the primary issue as "whether the matters dealt with in the MET Agreement and specifically those relating to intellectual property rights are terms and conditions of employment within the union's bargaining agency." The employer submits:

This case is not about faculty members' abilities to develop these courses, nor should the University's position be taken as reflecting in any way on the integrity of faculty. The University has great respect for its faculty, their abilities and talent. This case is about the scope of the Faculty Association's bargaining agency and the extent to which the University can deal directly with faculty with respect to intellectual property.

The employer acknowledges it could enter into agreements with the union about faculty members' intellectual property rights as other universities have. However, the fact others have does not mean that it must. The employer submits that the union's exclusive bargaining authority does not extend to the intellectual property rights of bargaining unit faculty members.

Intellectual property rights relate to the ownership of the expression of ideas; they are not rights relating to terms or conditions of employment.

There is no dispute that faculty members are employees when they are developing courses for MET. Faculty members are employees when they write books, or arrange research funding or engage in research. It is expected that faculty members will engage in these functions as a component of their employment. However, there is a line between work as a component of employment, and ownership rights related to the work product. The output of work is not a term or condition of employment, nor are rights about it within the Faculty Association's exclusive bargaining agency.

The employer submits:

... when it dealt with faculty with respect to their intellectual property rights, it was doing so not as employer dealing with conditions of employment but rather as the provider (or publisher) of the MET program

in conjunction with Tec de Monterrey. It was dealing with rights related to work product, not terms or conditions of employment relating to the creation of the work product.

The employer submits this is one of many relationships it has with faculty members, such as publisher through UBC Press or protector of intellectual property rights under Policy #88 and not all aspects of all relationships fall within "the rubric of terms and conditions of employment." The employer submits that the Master of Educational Technology program is a variation on an invention. "It is the joint creation of a program that has commercial aspects, requiring all involved to deal with intellectual property rights related thereto."

The employer submits the union cannot claim the right to represent faculty members with respect to intellectual property rights or the right to negotiate about their intellectual output or scholarship. The employer submits that the historical demarcation between collectively bargained and individually negotiated issues is the nature and property right over the publication or scholarly output. This is the boundary where the union's bargaining agency ends.

When the University dealt with faculty with respect to their intellectual property rights in MET program it was not dealing with faculty qua employee with regard to terms and conditions of employment but rather was dealing with the faculty qua scholar with respect to their scholarship. This distinction is demonstrated by the historical practice concerning distance education courses. In the context of those courses, as is the case with the MET program, the University's interaction with the faculty member is not employer-employee but rather involves the University as publisher (or co-publisher with Tec de Monterrey) of a program or course, with the faculty member acting as a provider of scholarship to the program. ... Again, as with DET, funding was arranged (external to the University's General Purpose Operating Fund) so that MET could "buy out" time for faculty members to work on the program. And, as with DET, faculty who wish to participate signed an agreement to deal with their IP rights.

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In both cases, DET and MET, UBC obtains IP rights from faculty, in the same way that a publisher would (UBC acting as publisher of an online program), so that the University's substantial financial investment is protected, and in the case of MET, so that UBC can fulfill its commitment that courses will be jointly owned by the two universities. UBC is publishing a program, a program that is developed by teams of contributors. This is no different than a publisher publishing a book with chapter contributions from various authors or teams of authors.

If the union was unaware of the historical practice relating to agreements between the employer through Distance Education and Technology and individual faculty members, it should be taken to be aware of it (*Insurance Corporation of British Columbia* (2002), 106 LAC (4<sup>th</sup>) 97 (Hall)).

The employer submits the personal nature of intellectual property rights, such as the inability to assign moral rights, precludes the union from collective bargaining about these rights. Copyright enforcement mechanisms under the *Copyright Act* are incompatible with grievance arbitration. Intellectual property rights are to be dealt with on an individual basis. "Intellectual property rights are not employment rights and are therefore beyond the scope of the union's bargaining agency." Because intellectual property rights over scholarship rests with faculty members, as an exception to the general law of employment, the union cannot claim exclusive bargaining agency to deal with copyright as a condition of employment.

The employer submits all matters touching on the "working life of an employee" are not encompassed by the union's exclusive bargaining authority. For example the union is not obliged to represent bargaining unit members in employment insurance claims or claims under the *Employment Standards Act*, or *Workers' Compensation Act*. Therefore, the employer submits some matters are beyond the scope of collective bargaining (*Re Billinghamurst* [1999] BCLRBD No. 404; *Re Werhun* [2001] BCLRBD No. 105; *Speckling v. British Columbia (Labour Relations Board)* [2003] BCJ No. 909 (BCCA)).

The employer submits that matters personal to the employee are beyond the union's exclusive bargaining authority. In *Valdi Foods (1987) Inc.* (1992), 26 LAC (4<sup>th</sup>) 279 (Carrier) an employee obligation to authorize a payroll deduction as security against failure to return an employer supplied uniform was required under a regulation under the Ontario *Employment Standards Act*. Having the employee sign the authorization was not an infringement of the union's exclusive bargaining authority or contravention of the collective agreement.

The employer submits that intellectual property rights are not within the union's exclusive bargaining authority and therefore the employer did not breach that authority by dealing directly and individually with faculty members.

Alternatively, the employer submits the collective agreement does not deal with intellectual property rights and, in the absence of a collective agreement provision, the employer is not precluded from dealing directly with faculty members concerning their intellectual property rights.

The employer submits it is a foundation pillar of the doctrine of residual management rights and employer authority to make rules that it can act unilaterally and impact employment relationships with respect to matters that are not expressly or impliedly dealt with in a collective agreement (Brown and Beatty, *Canadian Labour Arbitration*, ¶ 4:2310; *British Columbia Hydro and Power Authority* [1994] BCCAAA No. 109 (Hope)). The employer submits that, as in *Province of British Columbia* (1988), 2 LAC (4<sup>th</sup>) 247 (Hope), the employer simply made contracts available to employees.

The case at bar is no different. The evidence of Angus Livingstone demonstrated that while faculty members were consulted on the intellectual property rights language that would best accommodate the interests of all concerned, the University ultimately determined the language it required to meet its obligations to Tec de Monterrey and left it open to faculty members as to whether they wished to enter into the Agreement. There was no obligation to do so.

In doing so, it "consulted", but did not "negotiate" with, the faculty members about a matter addressed by or within the ambit of the collective agreement.

Accordingly, even if intellectual property rights are "terms and conditions of employment" (and our primary submission is that they are not), management is at liberty to implement terms of employment, or make terms and conditions of employment available to employees to choose to take up or not, where those terms concern matters that are not addressed in the collective agreement. In this case, the University outlined the terms on which participation in the MET program was available, and faculty were free to accept those terms or not, to participate in the MET program or not. Those aspects of the MET agreement to which the Faculty Association objects, concerning intellectual property rights, are matters

not addressed in the collective agreement. They fall within the residual rights of the University to deal with in an individual way with faculty, consistent with the longstanding practice pertaining to DET programs, and consistent with the way in which faculty have historically dealt with their intellectual property rights.

Other aspects of the MET Agreement also fall within the “routine administration” principle and do not contravene the Association’s exclusive bargaining agency for that reason as well. For example, provisions relating to timelines reflect the practice in the faculty, as testified to by Dr. Petrina and others, where faculty negotiate with their Head about course preparation and delivery deadlines. Provisions dealing with evaluation reflect the practice in the Faculty to evaluate courses (evidence of Dr. Gaskell), and provisions relating to plagiarism apply to any form of published material. Many of the provisions of the Agreement outline the obligations of DET or the Faculty of Education, and not the individual faculty member. Those that apply to the faculty member either fall within the routine administration principle or deal with matters (intellectual property rights) that are either beyond the scope of the Faculty Association’s bargaining agency (our primary argument) or relate to a subject matter not covered by the collective agreement and therefore are within the scope of residual management rights.

The employer submits the evidence is consistent with it having unilaterally implemented rules (*KVP Co. Ltd.* (1965), 16 LAC 73 (Robinson)). Unilaterally implemented rules can deal with employees' personal rights as happens when the rule requires mandatory immunization, undergoing a functional assessment, submitting to alcohol and drug testing or subscribing to a selective early retirement plan (*Chinook Health Region* (2002), 113 LACV (4<sup>th</sup>) 289 (Jolliffe); *Health Care Corporation of St. John's* (2002), 103 LAC (4<sup>th</sup>) 227 (Christie); *Fording Coal Ltd.* [2002] BCCAAA No. 9 (Hope); *Imperial Oil Ltd.* [2001] AGAA No. 102 (Sims); *Fraser Valley Milk Producers Co-operative Association (Dairyland Foods)* (1989), 9 LAC (4<sup>th</sup>) 376 (Munroe); *Aliant Telecom Inc.* [2002] CIRBD No. 29). The employer submits the broad approach and outcome in *Bell Canada* [2003] CIRBD No. 1 is wrong because it, in effect, eliminates the doctrine of residual management rights.

The employer submits intellectual property is covered by Policy #88, which was unilaterally implemented by the employer and contemplates individual agreements with faculty members. The MET Letter of Agreement is simply an expression of that policy and signing the MET Letter of Agreement is simple

acceptance of that policy. "The fact that a faculty member was required to execute an agreement conforming to the employer's 'rule', does not render the action unreasonable. Accordingly, from a *KVP* perspective, there is no violation of the union's exclusive bargaining authority."

The employer submits it was a reasonable rule to protect the employer's investment in online courses. Further, unlike as urged by the Canadian Association of University Teachers, the union has not made any proposal in collective bargaining to deal with intellectual property rights. The employer submits:

In this case, the University's initiative, as set out in the MET Agreement, does not infringe on any matters negotiated in the Framework Agreement or in the Agreement on the Conditions of Appointment for Faculty. Accordingly, there is no infringement on the Faculty Association's exclusive bargaining authority.

The employer's require to sign the MET letter of Agreement simply "fosters the employment of workers in economically viable businesses" (*Labour Relations Code*, s. 2(b)).

The employer submits there was no more constraint on the academic freedom of those who collaborated to develop the Masters of Education courses than in any of the common circumstances when courses are jointly developed or taught. The faculty members are completely unconstrained because they can choose to participate or not. And there has never been any suggestion that dealing with individual faculty members under Policy #88 interferes with a faculty member's academic freedom.

The employer submits there is no express evidence of anti-union animus, and none that can be inferred, as part of the reason for any actions by Dr. Gaskell or any other employer representative. And the employer did not impose any condition upon "the appointment of a faculty member ... that would constrain that person from exercising rights" under the collective agreement. Even if "appointment of a faculty member" is read as "appointment of faculty", which it

cannot, nothing in the MET Letter of Agreement constrains a faculty member from exercising rights under the collective agreement.

## **12. Analysis and Decision**

### **?? *Exclusive Bargaining Authority Grievance***

The Faculty Association is the exclusive bargaining agent for its members. It has entered into a collective agreement with the University. A collective agreement is a written and binding agreement about some, but not all, of the terms and conditions of employment of the employees covered and bound by the agreement.

The *Labour Relations Code* under which this collective agreement was negotiated does not limit the scope of permissible collective bargaining. Unlike section 27 of the *School Act* RSBC 1996, c.12, it does not exclude any facet of the employment relationship from being the subject of collective bargaining and a provision of a collective agreement. And, with exceptions to advance the public policy of industrial stability, the *Labour Relations Code* does not direct what employers and unions must include in their collective agreements.

Over the decades, an arbitral consensus has emerged that, in the absence of terms in the collective agreement to the contrary, the employer has reserved managerial rights to act unilaterally on matters related to the management of its enterprise. Provided there is nothing to the contrary in a collective agreement and within accepted principles, the employer can promulgate rules as part of its managerial prerogative. In the administration of the collective agreement and directing daily work activities, the employer is expected to deal directly with individual employees on routine matters related to the administration of the collective agreement.

Collective agreements are written in response to varied working circumstances and employment relationships. They are negotiated in a working context against the background of practices and behaviour that shapes the

understandings and expectations of the parties.

Intellectual property rights, and specifically copyright, is not an aspect of employment that attracts attention at the collective bargaining table in most employment contexts. The sole focus in this grievance is on copyright. It is not moral rights which can be bequeathed, but not contracted away, or other intellectual property.

The question whether the employer or employee owns the copyright for the creative work of the employee is a matter of employment context and contract. The legal context for negotiations about copyright is that Parliament has decided that authors, not publishers will be the first owners of their work. And employers of authors will be the first owners of the copyright in works made in the course of employment, "in the absence of any agreement to the contrary."

Whether the employer or the employee owns copyright in works produced in the course of employment is not unique to universities. It is an important subject in several employment contexts - journalism, entertainment in its many facets, broadcasting, publishing, software development and other endeavours. As submitted by the employer and reviewed above, a unique aspect of employment in a university is that there is an implied term in each contract of employment that the employee, not the employer, owns the copyright in works produced in the course of employment. It is not necessary to explore here which employees or what works. This employer adopted a broad approach to recognizing employees as first owners of copyright in "literary works", which includes course development, under its Policy #88.

An outgrowth of this uniqueness is that a union representing employees, who author literary works including course development, does not have to negotiate to have the employer agree to give first copyright ownership to the employees. The employer has to negotiate to obtain first copyright ownership. The employer has to negotiate to obtain that ownership both at law and under its Policy #88.

In other employment contexts, a union clearly has the right to bargain that the employer agree to assign copyright ownership to individual authors or that the employee authors share in the benefits of the copyright their work has produced. At first blush, it may appear more problematic to conclude the union could negotiate away copyright ownership of individual bargaining unit members. However, it is equally problematic to consider that the employer could use its position to negotiate directly with individual employees to demand assignment to it of copyright in all or specific works. The range of bargaining clout individual employees have varies widely from junior, un-established authors to those whose reputation gives them star or celebrity status in their field of work.

Whether the first copyright ownership of a work produced in the course of employment presumptively resides with individual employees or the employer is not determinative of whether it can be the subject of collective bargaining and provisions of a collective agreement. It is simply the starting point for discussion about how copyright ownership is to be dealt with in the employment relationship and a collective agreement.

A collective agreement regulates the relationship between the union and employer and the employees and the employer. It cannot address or remedy copyright infringement by third parties. By negotiating collective agreement provisions about copyright, as several faculty unions and employers have, access to civil or statutory remedies under the *Copyright Act* against third parties are not supplanted. The union does not become the exclusive bargaining agent for each employee on each copyright as it does not become the exclusive bargaining agent for each bargaining unit employee on each workers' compensation or employment insurance claim or right under the *Employment Standards Act*.

At the same time, the fact the union is not the exclusive bargaining agent, with a duty of fair representation to each bargaining unit employee, in work related dealings with persons and agencies other than the employer does not

mean the union cannot negotiate with the employer with respect to those matters.

For example, unions representing pilots, or drivers or divers cannot negotiate about the conditions of personal licensing by external agencies, but they can and do negotiate with employers about many aspects of work that impact the licensing requirements and the use of the license. Unions cannot negotiate workers' compensation entitlement, but they can and do negotiate many matters related to the employer's timely participation in processing of workers' compensation claims, alternate insurance and benefit coverage and return to work. Unions may not be able to negotiate whether an employer can obtain a wage assignment as security against a uniform it supplies to an employee, but unions can and do negotiate many matters related to uniforms. Unions may not be able to negotiate about various individual income tax forms with obligations unique to each employee that employees must sign, but they can and do negotiate about many related aspects of pay and pay statements.

Copyright is personal to the author of a work, but it is no more complex or different an employment related issue than the many talent, tax, benefit insurance and other issues in collective agreements in numerous work contexts. This, like so many other issues in work, can challenge unions and employers and the law to find the balance between collective and individual employment rights and processes for meeting the needs of both employers and creative employees. Characterizing the issue as one of "intellectual property" relating to the "ownership of the expression of ideas" clouds, rather than clarifies, the question. Similarly, the issue is not about output of work or work product.

For employees who, in the course of their employment, produce work that is subject to copyright, the identity of the work, the ownership of the copyright in the work, any exceptions to the works or ownership, compensation for transfer of copyright to the employer or others, participation in future revenue from the copyright, reassignment of the copyright, reversionary rights, dispute resolution processes with the employer and numerous other issues constitute part of the terms and conditions of employment of the employees. They do not supplant,

but complement the *Copyright Act* and if a conflict arises between statutory and contractual rights or processes the conflict can be resolved as many routinely are.

The many issues related to copyright are all susceptible to collective bargaining and in some work contexts and for some employees - perhaps employees engaged exclusively in online course development - they can be central and significant terms and conditions of employment. This collective agreement is built on a determination "not to interfere with academic freedom." Academic freedom is essential "to instruction and the pursuit of knowledge." Questions of copyright are inimical to academic freedom and scholarly pursuits.

In the university employment context, because of the importance of the expression of ideas to academic freedom and the presumptive first ownership of copyright in faculty, issues related to copyright are part of the core of the relationship between employer and employee. They are part of the conditions of employment.

I conclude that the scope of the union's exclusive bargaining authority includes the right to negotiate about matters related to the copyright ownership of bargaining unit employees in works made in the course of their employment.

In the discourse in this grievance, Dr. Bryson speaks of the free exchange of ideas to be shared by the community, not owned by the person who discovers or creates them. The University speaks of protecting the property rights in what it has invested and that making an investment requires authors to assign their copyrights to the University, which then gains control over the work product. There are dimensions of private rights and public domain in the discourse. There are dimensions of individual rights and return on investment in ideas and author materials. When faculty member expression of ideas is mixed with University resources how is academic freedom and the integrity of the University forum to be preserved? Is copyright to be used as an instrument to promote scholarship and learning or to protect economic interests of authors/owners or those to whom

they choose or must assign their copyright? What is the balance? How is it to be achieved? Who is to be in control and to what end? These are questions for another forum - the collective bargaining table or the University forum or both - not for this arbitration.

There are no provisions related to copyright in the current collective agreement. The employer has Policy #88 which recognizes that "Ownership of and intellectual property rights to 'literary works' produced by those connected with the University are vested in the individuals involved." This includes faculty developing courses as part of their normal teaching.

This grievance does not require a decision about whether there is any violation of the union's exclusive bargaining authority when a faculty member approaches UBC Press to publish a work or makes a proposal to Distance Education and Technology to develop a course online. The faculty member takes the initiative and deals with these units of the University as it would with an external publisher or a grant funding agency. The faculty member seeks to do something in addition to, or in lieu of, their regular workload. The faculty member is compensated for the extra work, which the union characterizes as work extra-to-load outside the coverage of the collective agreement. In its written outline of argument, the union states:

The Association is aware that some Faculty Members also teach in the DET unit. The Association understood that they take on that teaching work in DE&T, in addition to their regular teaching assignments with their departments, to earn extra income. The Association considers that work to be outside of their appointment as regular faculty. It is not part of their normal work assignment and is not covered by the Collective Agreement. The Association is aware that they may have completed individual employment contracts with the University to perform that work extra-to-load.

This is consistent with Ms Hood and Ms Wieland not being aware or concerned about the past practice in Distance Education and Technology. Even if they were aware, the work was voluntary and outside regular teaching assignments.

This grievance arose and is concerned with employer activities related to

work that was part of the regular teaching assignment of Doctors Bryson, Pratt and others as defined in Section 4.02 of the Conditions of Appointment of Faculty. The fact Dr. Bryson or others selected to do this "teaching" does not equate to the circumstances of the proposal and selection process followed to obtain resources from Distance Education and Technology, which she did not know about.

These grievances arose because of a failure in communication within the Faculty of Education. For some unexplained reason there was active debate about the Master of Educational Technology program within the Faculty of Education without attention to the details how the courses were to be developed and delivered. There does not appear to have been discussion about how delivering a distance education program in collaboration with Tec de Monterrey through the Distance Education and Technology server would be different than the distance education courses offered within the Faculty of Education.

Other circumstances contributed. Dr. Gaskell was on sabbatical for the year prior to July 1, 2001. Dr. Bryson went on sabbatical when he returned. She and Dr. Bates were on sabbatical when Dr. Gaskell achieved terms of agreement with Tec de Monterrey after the conclusion of discussions within the Faculty of Education and when he guided the program through the approval processes. The MET Advisory Committee did not meet throughout the fall of 2001 and early 2002 when all the critical agreements and approvals were being finalized.

The MET Coordinator was changed. Dr. Gaskell had to scramble to get the core courses up and running on time for a September opening. As late as March 21, 2002, Dr. Gaskell had not seen the MET Letter of Agreement. He did not see the proposed agreement until Dr. Petrina raised concerns.

The University Senate and Board of Governors did not act as publishers when they approved the proposed new program and graduate degree proposed as "distinct from the MA and MEd degrees currently offered by the Faculty of Education." They were not simply approving a co-publishing arrangement with

the Tec de Monterrey to make available to the world the scholarship of its faculty. The University was engaged in its core pursuit of educating students and was intending to use its faculty to teach the program, which included developing and delivering the courses. The MET Letter of Agreement correctly captures the character of what was being done as "the development, production and delivery" of a distance education course.

The facts are clear. There was no mention in the new program proposal that this program would require a departure from Policy #88 or that the collective agreement or normal process for course development in the Faculty of Education were not to apply. At no time was the University or Dr. Gaskell on its behalf, dealing with Dr. Bryson or other faculty members simply in the aspect of a publisher of scholarly works.

The uniqueness and innovativeness of the Master of Educational Technology program was heralded in the program proposal, but the fundamental question about who would develop and deliver the program under what terms and conditions was not aired. There was no mention or plan that the course would be developed and taught extra-to-load by volunteers within the Faculty of Education or that if the teaching was done as part of regular assignments Policy #88 would not apply. It was assumed the subject area experts in the Faculty of Education would develop and teach the courses, perhaps with some adjunct appointments from Distance Education and Technology.

How the courses were to be developed and taught was clear to Dr. Bates who had been involved with the two certificate programs offered jointly with Tec de Monterrey. Courses would be developed and delivered as he had established in Distance Education and Technology. It was clear to Dr. Gaskell. It would be as he had done in the past when his teaching time was bought out and as he had agreed with Tec de Monterrey. There was a different clarity among faculty members in the Faculty of Education which had done online distance education courses without the formalities of project management agreements or assignment of copyright to the University.

Co-development of ETEC 512 was assigned to Dr. Bryson as part of her regular teaching load for 2002-03 without any mention at the time that she would be developing the course outside Policy #88 and would have to assign copyright to the University. There was no reason why she should have thought she would. She had developed other online courses and had not worked with Distance Education and Technology or sought funds from it. Her colleagues in the Faculty of Education were equally unaware. Dr. Petrina knew he would be asked to develop ETEC 531, but knew nothing about operating outside Policy #88 or other aspects of the terms of his assignment. Doctors Dobson, Petrina and Pratt were similarly unaware.

Only when course development work began did this dimension of the program surface. Dr. Gaskell had to scramble to gain acceptance of the arrangements and a willingness to proceed by the faculty members. His efforts searching for acceptable language and approaches, convening a workshop and pressing for acceptable contract language were much more than "consultation." He was negotiating against a deadline with the moral suasion of a professional and legal commitment to deliver. The employer through Dr. Gaskell was negotiating individual terms and conditions of employment for this teaching assignment that for some might have been extra-to-load, but for others was part of their regular assignment.

Dr. Gaskell was negotiating with a representative group of faculty members in the summer of 2002 about the conditions under which work was to be done, not just the ownership of the work product. For all intents, he could have as easily been negotiating with a committee of the Faculty Association. Education, participation by subject experts and counsel, shared principles and legally binding language were the steps in the process. The outcome was a document to which each faculty member would have to subscribe in the future whether they were included the negotiations or agreed with the outcome. A significant feature of the negotiations is that the employer chose who it would negotiate with, rather than have the faculty members make that choice through

their Faculty Association.

The negotiations were to transfer to the employer copyright that was owned by individual faculty members as an incident of academic freedom, their employment and University policy. The goal was not a new rule or policy to be unilaterally promulgated by the University. It was a specific agreement attached to a specific teaching assignment. It was an encroachment on academic freedom and deviation from published policy without adherence to the established processes for dialogue and debate prior to adopting new policy.

Neither the process nor the outcome was routine administration of the collective agreement. The process of dealing with individual employees with the assistance of the University-Industry Liaison Office, University Counsel Office and Associate Vice-President, Academic Studies was not routine administration of the collective agreement. The outcome changed copyright ownership. It created a limitation on academic freedom. It granted the employer a previously non-existing right under the collective agreement or prior Distance Education and Technology agreements to act "in its discretion" to "decide which of the materials contributed by the Author it will use." It created a new remuneration for teaching work by introducing potential future payments to be negotiated and other unspecified compensation (Section 7.2 and 11). It introduced methods of evaluation that might conflict with the evaluation processes and methods in the collective agreement. It introduced a dispute resolution process alien to the collective agreement and *Labour Relations Code*.

The negotiations were about more than copyright. They were about the conditions on which the faculty members would do their teaching. They were about these faculty members' conditions of employment on this assignment. They were negotiations between the employer and the employees in those capacities about the employees' performance of their teaching assignments. The circumstance was no different than an employer negotiating with employees covered by a collective agreement about the different conditions of employment under which they would perform their next project or work assignment.

I find and declare that the University negotiated directly with individual faculty members contrary to Article 3 of the Agreement on the Framework for Collective Bargaining. The Faculty Association's grievance is allowed.

The Faculty Association requests, in addition to this declaration, an order that the "University refrain from asking Faculty Association members to sign individual employment contracts or letters of agreement in respect of work assigned to them as part of their regular teaching load" and an order that the "University refrain from negotiating terms and conditions of employment regarding participation in MET courses (or similar online courses) directly with Faculty Association members."

Because of the uniqueness of the events that gave rise to this breach of the collective agreement, I do not consider it either necessary or useful in response to this breach of the collective agreement or in furtherance of the purposes of the *Labour Relations Code* to make such an open ended order. I have decided that the declaration and finding of breach of the collective agreement with this extended account of the events is appropriate.

#### **?? *Discrimination Grievance***

Dr. Gaskell testified that he assumed Dr. Bryson had a literacy about how things worked within the Faculty of Education. Unfortunately, her literacy was within a different frame of reference than his. He was immersed in bringing into being the Master of Educational Technology program and obtained passage through the approval process in an exemplary period of time. One cost was the absence of a shared understanding of the implications of making the program operational. He and Doctors Bates and Livingston shared a common perspective on how this innovative program was to be made ready to be offered. It was a perspective rooted in the Distance Education and Technology approach. However, the Master of Educational Technology program was not simply an extension of the previous two certificate programs. It was a different species of

program.

In the communications between Doctors Gaskell and Bryson they did not bridge the divide between their different perspectives rooted in their differing frames for viewing the questions. Dr. Gaskell was focused on the fact that the development of online instructional materials requires highly technical knowledge and skills; the development costs are high; and the costs to maintain, deliver and administer the course are ongoing. Dr. Bryson has the requisite skills and experience. She has the subject area expertise. Her focus was on the impact on the role of the traditional face-to-face classroom teacher.

When Dr. Gaskell pressed his position with the authority to cut the funding to Dr. Bryson's department, his focus was on accomplishing the goal of development and delivery of the program. He had no motivation to discriminate against Dr. Bryson because she was asserting collective agreement rights that he did not believe applied. Nor was he seeking to interfere or retaliate against Dr. Bryson for having consulted the Faculty Association. The information he obtained when he contacted the Faculty Association on October 7<sup>th</sup> was that there was no live issue. When he suspended activity on October 28<sup>th</sup> it was following a determination by the MET Advisory Committee on October 25<sup>th</sup>.

The final act in November to have the development of ETEC 512 reassigned was consistent with the University's position in response to the communications by the Faculty Association. The lines of communication were blurred. The University was treating the matter as an administrative buy out or release time matter between the MET Coordinator and Distance Education and Technology and Dr. Bryson's department. As the same time, unlike Dr. Bates in his routine dealings on behalf of DET, Dr. Gaskell was dealing directly with the faculty members, not their department heads. In the end, Dr. Gaskell on behalf of the University effectively fired Dr. Bryson from the assignment and she had to go back to her department head to find a substitute assignment.

There was an adverse effect on Dr. Bryson who was excluded from a

program in her area of expertise, in which she had taken an interest and for which she had once sat on the advisory committee. The basis for her exclusion was because she refused to sign an agreement covering part of her regular teaching load that was negotiated contrary to, and that conflicted with, the collective agreement.

When Dr. Bryson was removed by Dr. Gaskell in November 2002 from the assignment given to her by her department head Dr. Perry in May 2002, it was because she was insisting on doing this portion of her assigned teaching, like the rest of her regular teaching load, in accordance with the terms of the collective agreement. The decision to remove her was punishment for her refusal to agree to work under terms different than those in the collective agreement.

Membership in the Faculty Association includes accepting and insisting on adherence to the collective agreement. Every bargaining unit member has a right, and perhaps a responsibility, to ensure the University complies with the terms of the collective agreement. This is an activity each bargaining unit member performs on behalf of the bargaining agent. Vigilance in ensuring the terms of the collective agreement are abided by and refusing to make private agreements to different conditions of employment are activities on behalf of the bargaining agent.

I find that Dr. Bryson was removed from work assigned to her as part of her regularly teaching load her because of her membership in and activities on behalf of the Faculty Association contrary to Article 4 of the Framework Agreement for Collective Bargaining. There is no need to make any finding with respect to Article 12. The grievance is allowed.

The Faculty Association does not seek any compensation for Dr. Bryson. ETEC 531 has been developed. Dr. Bryson lost the opportunity to develop and teach a course in the Master of Educational Technology program. She is qualified and was recommended to co-develop and teach ETEC 531 with Dr. Petrina. That course has not been developed for the MET program. To remedy

the lost opportunity suffered by Dr. Bryson by taking away her assignment, I order the University to assign to Dr. Bryson, as part of her regular teaching load, development and teaching ETEC 531 with Dr. Petrina as recommended by Dr. Gaskell in April 2002.

I reserve and retain jurisdiction over all aspects of the implementation of this award.

FEBRUARY 18, 2003, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey