

SUPREME COURT OF NOVA SCOTIA

Citation: *MacKinnon v Acadia University*, 2009 NSSC 269

Date: 20090908

Docket: Hfx 285651

Registry: Halifax

Between:

Paula Cook MacKinnon

Plaintiff

v.

Acadia University, a body corporate, and
Governors of Acadia University, a body corporate

Defendant

Revised decision: The text of the original decision has been corrected according to the erratum dated September 14, 2009. The text of the erratum is appended to this decision.

Judge: The Honourable Justice Gregory M. Warner

Heard: August 4, 5, 6, 7 and 12, 2009, in Halifax, Nova Scotia

Counsel: Lisa M. Gallivan and Jennifer Ronalds, counsel for the plaintiff.
Paula Cook MacKinnon
Nancy F. Barteaux and Krista K. Smith, counsel for
the defendants, Acadia University and Governors of Acadia
University.

By the Court:

A The Issues

[1] This case is about an alleged constructive dismissal of the Vice-President of a University. The issues are:

(1) What were the express and implied terms of the employment contract of this 19-year employee of Acadia University?

(2) Was the University President's decision to take direct oversight and responsibility for Enrollment and Admissions during a crisis, removing it from the Vice-President's portfolio, a breach of the Vice-President's employment contract? And, if so, was it a fundamental breach of the employment contract?

(3) If it was a fundamental breach, did the Vice-President act reasonably in mitigating her damages in all of the circumstances, including:

a) refusing to seek, or to consider, employment away from the University community where her husband worked;

b) commencing a consulting business, which in fact generated no income during the next two years; and,

c) declining to remain on her job while looking for other employment.

This last circumstance involves consideration of the impact of *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, on the often maligned *Mifsud v MacMillan Bathurst Inc.*, [1989] O.J. No. 1967 (O.C.A.) decision.

B. The Employment Relationship

[2] In December 1988, Paula Cook (now Cook MacKinnon) was a young chartered accountant working at a national firm in Halifax, Nova Scotia. She was hired as Assistant Director-Admissions and Student Aid at Acadia University in Wolfville, Nova Scotia, at a starting salary of \$27,860.00. The job description divided her time as follows:

- a) processing about one-third of admission applications - 30%;
- b) recruitment - 20%;
- c) marketing - 30%;
- d) market research - 5%;
- e) student assistance - 10%

[3] In December 1992, following a pay equity issue at the university, Ms. Cook MacKinnon was seconded to carry out an evaluation of all non-academic University jobs. This secondment was intended to last nine months. In April 1994, her comprehensive report was accepted by the university and led to the creation of a separate Human Resource Department, and the implementation of a formal system of job descriptions and training.

[4] In February 1995, she applied, unsuccessfully, for the position of Registrar. In May 1995, she was offered and accepted the newly created position of Deputy Registrar at a salary of \$43,000.00. She was responsible for admissions and scholarships, reporting to the Registrar. At the same time she was offered and accepted the additional appointment of Assistant to the Vice-President Academic and Provost with an addition to her salary of \$12,000.00. She was responsible for athletics and student affairs - student issues that would be assigned to her by the Vice-President Academic/ Provost.

[5] In March 1996, as a one-year secondment, she was appointed Project Manager for the implementation of the "Acadia Advantage" Initiative. This project, the first by a Canadian university, was launched to enhance the learning experience of students through the use of information technology to deliver academic programs (to teach), the wiring of the entire campus, and the supply of laptop computers to all students and faculty. At this time, few students had access to home computers or computer experience.

[6] Ms. Cook MacKinnon applied for, and in July 1997 was appointed, Provost for a five-year term at a salary of \$62,500.00. She became a full member of senior management. She reported to the President (at that time, Dr. Kelvin Ogilvie), attended weekly senior administration meetings, and assumed oversight for the following activities: liaison; recruitment; admissions; international students; student judicial processes; residence and student life; the medical centre; counselling services; student aid, scholarships and bursaries; athletics; and Special Projects Manager - Student and Academic Sector; and "special project activity as determined from time to time by the senior administration". She was particularly asked to direct her attention to: (1) developing a effective operating management process for residence life, free of territorial issues; (2) transition of recruitment duties in consultation with the Registrar; (3) developing a plan for Acadia's Medical Services unit; and, (4) developing an effective management plan for Athletics, including facility operations.

[7] She remained in this position until she left the University on the early morning of June 6, 2007. The title changed from Provost to Vice-President Student Affairs in August 2004 on the initiative of Dr. Gail Dinter-Gottlieb, who became President of the University in September 2003. The salary had increased from \$62,500.00 to about \$122,000.00 by 2006.

[8] Some changes -additions and deletions, were made to her portfolio over the last ten years. She also carried out several special projects assigned by the senior administration.

[9] Ms. Cook MacKinnon's position and responsibilities had been established by Dr. Gottlieb's predecessor to fulfill a vision he had, fully endorsed by Ms. Cook MacKinnon, that the University should not simply be a short-term academic experience but that Acadia should be part of the student lives "from the cradle to the grave". This apparently necessitated the coordination in one portfolio, the portfolio created under the title of Provost, of a broad range of duties: from liaison with parents and the outside community, recruitment, admissions, the student's total experience on the campus (residence, food, counselling, medical), and athletics, to coordination with the alumni (who were seen as the primary source of the next generation of students). That was the role assumed by Cook

MacKinnon as Provost in 1997. It appears to have included everything except academics, finance, and the development and maintenance of the physical facilities.

[10] Attached to the 1997 offer of employment was a “job fact sheet”, which described the job in five “activities” by percentage, the particulars of which are set out later in this decision. Ms. Cook MacKinnon says that Enrollment and Admissions constituted 40 to 50% of the job of Provost/Vice-President Student Affairs. Dr. Gottlieb says that oversight and responsibility for Enrollment and Admissions was, and should constitute, 15 to 20% of Cook MacKinnon’s job as Provost/Vice-President Student Affairs. Much of the evidence centred on this disagreement, which is central to the issue of whether the President’s decision on May 24, 2007, to assume personal responsibility for Enrollment and Admissions, constituted a breach of the plaintiff’s employment contract, and, if so, a fundamental breach.

[11] Over the ten years that Ms. Cook MacKinnon was Provost/Vice-President Student Affairs, the university experienced several changes. In the beginning, government provided about 70% of the University’s revenue; tuition provided about 30%. Those percentages reversed over ten years, and tuition accounted for about 60-65% of revenues.

[12] Enrollment at first grew, because of the growing number of university-age students (demographics), and in 2003, because of the cancellation by the Province of Ontario of Grade 13 (the “double cohort”). During the period of growth, the university built two new residences and renovated two residences. Recruitment and enrollment were not pressing or difficult issues. In and after 2004, enrollment dipped precipitously and at least one of the residences was without any residents.

[13] In 1996, Acadia received considerable favourable publicity as a result of the Acadia Advantage Initiative. It commenced when few students had personal computers or access to information technology. The advantage became a disadvantage when it led to the highest tuition fees in the country, and when it became common for students to have access to computers at home, computers that were far cheaper to own and with more and better software than the computers provided by the university to students for their use during the school year (which had to be turned in at the end of each school year). Students with their own computers could have whatever software they wanted and had access to their own computer year round.

[14] These changing circumstances, created externally by changing demographics and increased competition for students, and internally by the empty residences and very high tuition fees without the “Advantage”, are part of the factual matrix that led to the crisis of declining enrollment, and consequently decreased revenue. They affected Cook MacKinnon’s portfolio of responsibilities.

[15] In the fall of 2003, the new President made two changes that reduced Ms. Cook MacKinnon’s portfolio. When she became President, public relations were contracted to an outside public relations firm; on campus staff were in Ms. Cook MacKinnon’s portfolio. Dr. Gottlieb created a separate Public Relations Office, and took responsibility for liaison with the community through the public relations office. Dr. Gottlieb also moved Alumni Affairs from the Student Life portfolio

to the Development portfolio. This move was not discussed before the decision was made and was opposed by Cook MacKinnon. President Gottlieb's reasons for the change were:

a) It was her prior experience as a university administrator that Alumni Affairs functions were a better fit with the Development portfolio than Student Life.

b) She was commencing a \$50,000,000.00 capital campaign (under the Development portfolio), and believed that the university's alumni were the key to a successful capital campaign. She stated that the role of alumni in the capital campaign trumped the "cradle to the grave" philosophy of her predecessor (which philosophy she did not entirely buy into). She testified that the campaign carried out under the Development portfolio successfully reached its goal because of the alumni involvement.

c) When Dr. Gottlieb arrived at Acadia, she learned that a very public and bitter dispute between the Alumni and University had led to litigation and created considerable negative impact on the University - in recruitment, fundraising, and public perception. A settlement of this dispute between the university and its Alumni had not been finalized. Dr. Ogilvie was seen as the main University protagonist. He had refused to sign the settlement agreement. Dr. Gottlieb placed a high priority on completing the settlement. Ms. Cook MacKinnon, whose portfolio included Alumni Affairs was the spokesperson for Dr. Ogilvie in respect of alumni matters and perceived in a negative light by alumni. Dr. Gottlieb wanted to remove this impediment to reconciliation.

[16] There were some difficulties, evidenced by e-mail exchanges, with the transition of Alumni Affairs out of Cook MacKinnon's Student Life portfolio.

[17] Despite these changes, Dr. Gottlieb had considerable confidence in Ms. Cook MacKinnon and worked closely with her. All of the evidence heard - not just that of Dr. Gottlieb and Ms. Cook MacKinnon, supports the conclusion that Cook MacKinnon was perceived as the closest confidant of the President. Claude O'Hara, the Special Advisor on Government Relations, a witness called by the Plaintiff, described them as "sister-like"; while discussions sometimes became heated at PAC meetings with others, they were never heated between Ms. Cook MacKinnon and Dr. Gottlieb, except the occasion in early 2007 when Dr. Gottlieb was under pressure from the Board re enrollment and Dr. Gottlieb appeared to be frustrated with Ms. Cook MacKinnon's Task Force report numbers. In the weekly Wednesday morning senior management meetings (renamed by Dr. Gottlieb to President's Advisory Council or PAC), Cook MacKinnon was said by all witnesses to have been the most influential in discussions on planning and implementation of strategies and tactics respecting all portfolios. Cook MacKinnon met with the President privately on most Thursdays. Their offices were close together in the executive wing of University Hall.

[18] Shortly after arriving, Dr. Gottlieb promoted the development of a "Learning Commons". This project, to be centred in a unique multipurpose structure, was intended to provide an opportunity to enrich the academic, intellectual and community life at Acadia to students, faculty and the community by collaboration and dialogue in a setting outside of the classroom. Dr. Gottlieb put Cook MacKinnon, with the Vice-President Academic, in charge of implementing this project.

[19] In January 2006, a few years into the enrollment crisis that followed the “double cohort” (enrollment decreased from over 3,900 in 2003 to 3,200 in 2006), an enrollment task force was created, chaired by Ms. Cook MacKinnon, to consult, and recommend guidelines for undergraduate enrollment for the next five years. A draft report and final report, both prepared by Ms. Cook MacKinnon, were completed in the spring of 2007.

[20] In October 2006, the President established a commission under Cook MacKinnon to review the then ten-year-old “Acadia Advantage” Initiative and determine whether it met the needs of the students and faculty, and if not what to do about it.

[21] In addition to these assignments, in the spring of 2007, Dr. Gottlieb entrusted Cook MacKinnon with the development not only of the Student Affairs Strategic Plan, but with the development of a separate five-year plan for the Athletics program.

[22] In summary, it is clear that Ms. Cook MacKinnon’s role in the administration of Acadia University was crucial and continually changing with differing projects, assignments and responsibilities within the area of “Student Life”. From 1997 to 2007, she was the principal senior administrator, reporting to the President for all the activities of the University outside of academics, the physical facilities, and finance/administration.

[23] She did not shy away from work or responsibility. She maintained a broad portfolio of oversight and responsibility. She participated in the development of strategies and tactics in all aspects of university administration.

C. The leadup to the walkout

[24] Ms. Cook MacKinnon acknowledged that by the fall of 2006, enrollment was in crisis. It had an effect upon the number and allocation of faculty (with whom difficult labour negotiations were upcoming), the overall revenues of the university and the ability of the university to support the existing residences and food service. Mr. O’Hara stated that the Board of Governors was putting pressure on the President because of the lack of results, and while it was part of Ms. Cook MacKinnon’s portfolio, “everyone [on PAC] took ownership - Dr. Gottlieb worked her heart out at it also”.

[25] In Dr. Gottlieb’s March 31, 2006 written evaluation of Ms. Cook MacKinnon’s performance for the year 2005-2006, the only written performance review provided to the Court, she wrote that Ms. Cook MacKinnon had a good year and met many of her goals. It expressed concern about the challenge of enrollment and the necessity to initiate new approaches. It also expressed concern that the new Dean of Students should be encouraged to produce a Residence Life report that was timely as well as precise - the report was long overdue. It noted the success of the athletic teams and that Ms. Cook MacKinnon’s part in that success was underappreciated. It noted her greatest strength to be the ability to assimilate ideas and bring them to reality and referred specifically to the Learning Commons and community initiatives.

[26] In the fall of 2006, Ms. Cook MacKinnon and the Director of Enrollment Services prepared a recruitment strategy. Their plan was presented to the President and, in December 2006, to the Board of Governors. Among other things, the plan called for a doubling of the recruitment budget to over one million dollars. The Board approved the budget increase but expressed impatience and great concern about declining enrollment and its effect upon the operating budget (The minutes show that the CFO reported a revenue shortfall of about \$600,000.00 because of the lower-than-expected enrollment).

[27] In January 2007, Ms. Cook MacKinnon made a power point presentation on recruitment to the Board. After the Board meeting, the President, as was normal, met behind closed doors with the Board. Behind closed doors, members of the Board expressed dissatisfaction with Ms. Cook MacKinnon's projection respecting enrollment and recruitment. Dr. Gottlieb felt that she had been blindsided; she was unprepared for this attack from the Board. At least one of the Board members stated that Ms. Cook MacKinnon should be fired.

[28] Right after the Board meeting, Dr. Gottlieb called Ms. Cook MacKinnon. Ms. Cook MacKinnon noted Dr. Gottlieb's distress and invited her to her home "to comfort her". Ms. Cook MacKinnon acknowledges being advised of the view of Board members that she should be fired over the enrollment issue, being aware that the President was upset and under extreme pressure to solve the enrollment problem, and being told that Dr. Gottlieb supported her and intended to protect her. In her discovery examination of May 2008, she acknowledged that all sectors of the University were worried that enrollment could jeopardize the University's operation and that it had reached a critical stage.

[29] In February 2007, a draft report of the Enrollment Task Force (written by Ms. Cook MacKinnon) was delivered to the President and discussed by the PAC. Ms. Cook MacKinnon says that she felt rushed to produce the draft and was not ready to do so, but was under pressure to do so because of the Board's concerns. The draft report projected an increase in University enrollment from 3,200 in 2007 to 3,600 in 2011. Dr. Gottlieb was not happy with the Report and felt that the enrollment numbers were unrealistic and not supported in the report. At the PAC meeting that reviewed the draft Report, Ms. Cook MacKinnon says that Dr. Gottlieb made the only "unpleasant" words ever directed by her to Ms. Cook MacKinnon; specifically, in respect of the enrollment projections in the report, she described Ms. Cook MacKinnon as "Little Miss Mary Sunshine" and asked if she had taken her happy pill that morning. Mr. O'Hara testified that Ms. Cook MacKinnon was a "glass half full" individual, and he took Dr. Gottlieb's comments as a reference to Ms. Cook MacKinnon's always-positive outlook.

[30] Ms. Cook MacKinnon testified that she felt humiliated. She did acknowledge, as did other witnesses at the trial, that the discussions at PAC were often very frank. Mr. O'Hara said they were often "heated", but not between Dr. Gottlieb and Ms. Cook MacKinnon. She acknowledged that the Chief Financial Officer, Joan Masterson, also took great issue with the draft report.

[31] In late February 2007, Ms. Cook MacKinnon prepared, as she did annually, her own evaluation of her past year's performance. She reviewed her last year's goals and to what extent they were achieved, noted her disappointments and successes, and set out her goals for the next year.

Among her disappointments were:

- a) her lack of a working relationship with the Vice-President Academic;
- b) the lack of fiscal control in the Athletics Department; and,
- c) lack of an effective interface with the Board of Governors.

Among her successes, she listed:

- a) the Enrollment Task Force;
- b) the additional resources approved by the Board for new recruitment initiatives; and,
- c) the opening of the Learning Commons.

[32] In respect to this self-assessment Dr. Gottlieb testified, and the whole of the evidence confirmed, that Dr. Gottlieb sided with Ms. Cook MacKinnon, and vigorously protected her from the attack of the Vice-President Academic, and that she agreed that Ms. Cook MacKinnon's work on the Learning Commons was excellent. Dr. Gottlieb did however express concern that, under Ms. Cook MacKinnon's oversight, Athletic expenditures for several years (three-years, I believe) were double the budgeted amount and out of control. She was also critical of the draft Enrollment Task Force Report, and was of the view that it was not a success. She had not been aware that Ms. Cook MacKinnon had asked Richard Keeling, a consultant used by the university, to review the draft report, and that his critique contained observations (which observations were similar to Dr. Gottlieb's concerns) and suggestions for changes that were not incorporated into the final Report issued in April. When she became aware that Mr. Keeling's suggestions to Ms. Cook MacKinnon were not heeded, she was disturbed.

[33] Not only was enrollment having a destabilizing and critical impact on the University's finances, but students were choosing to live off-campus and not in the new and renovated residences or using the new food services. This was an additional financial burden on the university; it was part of Ms. Cook MacKinnon's portfolio.

[34] On May 13, 2007, Dr. Gottlieb had another frustrating meeting with the Board of Governors. They again questioned the enrollment projections and recruitment results. In this meeting, some members of the Board suggested that if Dr. Gottlieb did not provide better answers in respect of the enrollment crisis that her job, as well as Ms. Cook MacKinnon's, was in jeopardy.

[35] Shortly after this Board meeting, Dr. Gottlieb came to the conclusion that she had to take personal responsibility and oversight for Enrollment (and Admissions) - first, because it was a crisis, she was under pressure from the Board, and the "buck" stopped with her, second, to protect Ms. Cook MacKinnon, and third, to give Ms. Cook MacKinnon time to focus on the other serious problems in her portfolio, particularly with the athletic department and the empty residences.

[36] Dr. Gottlieb had made inquiries of the Director of Enrollment Services, who had been the source of many of the enrolment/recruitment initiatives, and learned that the relationship between her and Ms. Cook MacKinnon, was not entirely satisfactory, and that she was entertaining other job offers.

[37] I am satisfied that Dr. Gottlieb still believed in Ms. Cook MacKinnon, supported Ms. Cook MacKinnon in her job, believed they had a cordial working relationship, and intended that Ms. Cook MacKinnon would continue as Vice-President Student Affairs as a senior member of the university administration.

[38] On May 24, 2007, Dr. Gottlieb called Ms. Cook MacKinnon to a meeting in her office to advise of her decision. At the meeting, she told Ms. Cook MacKinnon that she had decided to take personal responsibility for Enrollment and Admissions, and explained why. Dr. Gottlieb advised that Ms. Cook MacKinnon needed to focus on important issues in the athletic department and Student Affairs (including the partly empty residences). Ms. Cook MacKinnon acknowledged these were big and serious issues. They discussed and they agreed that Ms. Cook MacKinnon's "plate was full" and Ms. Cook MacKinnon acknowledged that she could use more time for these other issues. Dr. Gottlieb advised her that she was taking direct oversight because of the pressure from the Board to deal with the issue, to protect Ms. Cook MacKinnon from the Board, and to protect her job. She did not advise Ms. Cook MacKinnon that there would be any changes in her title, salary or other responsibilities.

[39] Ms. Cook MacKinnon says she was caught off guard. She testified that she expressed her disagreement with the decision, how important enrollment was to the rest of her portfolio, and indicated the desire to discuss it further. She testified that she thought that she and the President would meet again to discuss it at their next regularly scheduled private meeting on May 31. I find that Dr. Gottlieb stated that she had made her decision, and said nothing to suggest that she might change her mind or would discuss it further.

[40] After the May 24 meeting, neither Ms. Cook MacKinnon nor Dr. Gottlieb approached the other to discuss the President's decision any further. Early in her evidence, Ms. Cook MacKinnon testified that it was unreasonable for Dr. Gottlieb to make the decision without discussing it with her first. When shown her discovery evidence of May 22, 2008, she acknowledged that Dr. Gottlieb had justification for saying that she had to take charge of enrollment at that time. Later in her evidence, she stated that she intended in any follow-up discussion with Dr. Gottlieb to suggest that enrollment should be tackled as a team effort but under her portfolio, and not under the President's direct oversight. It was clear to the Court that no solution to the enrollment crisis was, or would have been, acceptable to Ms. Cook MacKinnon unless enrollment and admissions remained under her oversight.

[41] Ms. Cook MacKinnon testified that she consulted a lawyer and obtain legal advice about her employment status on Tuesday, May 29.

[42] At the next regular PAC meeting on Wednesday, May 30, Dr. Gottlieb opened, by setting the agenda and then reporting that she had taken personal responsibility and oversight for Enrollment and Admissions. Ms. Cook MacKinnon testified that she was surprised by the announcement as she expected to have further discussions about Dr. Gottlieb's intentions before any decision was finalized. In any event, Ms. Cook MacKinnon responded to the President's announcement by challenging the decision.

[43] Mr. O'Hara testified that she was "confrontational" and that she stated that the President was making a grave mistake. Mr. O'Hara was surprised by the President's decision because for over four years, Dr. Gottlieb had "always been extremely supportive of her work". He stated that he (and at least Joan Masterson) were embarrassed for everyone at what he saw as the equivalent to a marriage breakup. He acknowledged on cross-examination that Ms. Cook MacKinnon had challenged the President.

[44] The recollection of Neil Carruthers (then Director of Planning and Development, now acting Vice President Administration) was that Dr. Gottlieb started the meeting, as usual, by setting the tone and what was to be discussed, then she said that she was taking responsibility for enrollment. Then Ms. Cook MacKinnon said she disagreed and wanted more dialogue. Dr. Gottlieb said the decision had been made. Then she stated that she did it to protect Ms. Cook MacKinnon. He was surprised but not shocked by the announcement. The enrollment issue was a crisis issue and the Board were not happy.

[45] The evidence of Ms. Cook MacKinnon, Dr. Gottlieb, Claude O'Hara and Neil Carruthers, all of whom were present at the meeting, leads me to conclude that the President was somewhat surprised at having her decision challenged and debated by Ms. Cook MacKinnon. My sense was that Mr. O'Hara and Mr. Carruthers were also embarrassed by the challenge to the President, not what the President announced. In response to Ms. Cook MacKinnon's challenge, Dr. Gottlieb felt obligated to explain her decision as one intended to protect Ms. Cook MacKinnon.

[46] The evidence of Mr. O'Hara and Mr. Carruthers was that Dr. Gottlieb and Ms. Cook MacKinnon had a very close working relationship and this incident was completely out of character for both.

[47] After the PAC meeting of May 30, Ms. Cook MacKinnon, with the help of her legal counsel, prepared a letter. The first page of the letter sets out her disagreement with the President's decision. She states two concerns: (1) removal of this responsibility would be detrimental to the coordinated approach of her team, and (2) her leadership and expertise were important (required) for development of an enrollment management strategy. The second page contains these two paragraphs:

While the well-being of Acadia is my first concern, I have also considered the implications of this change to my professional career. The removal of these two key functions from the Student Affairs sector significantly erodes my responsibilities as Vice-President Student Affairs and fundamentally changes the duties and responsibilities of my position. Given that there is a predominant institutional model of these departments reporting to the senior student affairs officer, this significant change will

be seen as a professional demotion both internally and externally. In my view your action constitutes constructive dismissal.

I leave these concerns with you to consider and I await your written response by 5 June 2007.

[48] The next day, Friday, May 31, Ms. Cook MacKinnon and Dr. Gottlieb held their regular scheduled private meeting. They reviewed Ms. Cook MacKinnon's portfolio in the usual way without any reference to the events of the May 30th PAC meeting. Dr. Gottlieb testified, and I accept, that it was her view from the way that meeting went that Ms. Cook MacKinnon had come to terms with Dr. Gottlieb's decision and they were moving on together. There was nothing unusual or out of order in the meeting until Ms. Cook MacKinnon got up to leave at the end. She handed Dr. Gottlieb the letter dated May 30th as she left. Dr. Gottlieb immediately read it and says that she realized from the language used that a lawyer had been involved in the drafting. She called the Director of Human Resources for the University, Glen Hirschfeld, to meet with her right away.

[49] Dr. Gottlieb advised Mr. Hirschfeld that she was leaving the country the next morning on a scheduled trip and returning on June 6. She advised Glen Hirschfeld that she wanted him to prepare a conciliatory reply for her to sign. She wanted it to say how important Ms. Cook MacKinnon was to the university, and was looking forward to continuing to work with her. It was Dr. Gottlieb's belief that they could continue to work together but that she was not prepared to change her decision. She asked Mr. Hirschfeld about the significance the June 5 date in the letter. Mr. Hirschfeld testified that he advised her that it was not a hard date, and she was not obligated to reply by that date. Neither appreciated that, if the deadline was not met, Ms. Cook MacKinnon might walk out. Mr. Hirschfeld agreed to have a reply drafted and on her desk before June 5. I find that a letter was prepared in accordance with Dr. Gottlieb's instructions and on her desk on June 5 for her to sign upon her return to Canada the next afternoon. The letter reads:

Dear Paula:

I acknowledge receipt of your letter dated May 30, 2007.

As you are aware, we are all very concerned about the declining student enrollment that Acadia has experience over the past number of years. It has now reached a critical point to where I feel that in the best interests of the University I take direct responsibility for the management of this function.

In our conversations you have agreed that your workload plate is full. It is my hope that with this direct management responsibility being removed from you that you will be able to focus on getting a financial operating plan in place for Athletics that will see this unit perform within its budget guidelines; something it has struggled to do over the past number of years. Also, you will now be able to provide more attention to the student life program. This is a very important area where there has been some improvement over the past year but more progress is needed.

Paula, as Vice-President of Student Affairs, you remain an integral part of the senior management of Acadia and with that come the expectation and obligation to provide your attention and expertise not only to your area of direct responsibility but to the overall university operations. I remain confident that you recognize this duty and I look forward to working with you as Acadia moves forward to remain a leading educational institution.

Respectfully yours,

Gail Dinter-Gottlieb, PhD
President and Vice-Chancellor

[50] The Defendants submit that I should draw a conclusion that Ms. Cook MacKinnon knew that Dr. Gottlieb would be out of the country from June 1st to June 6th because their offices were close together, and because Dr. Gottlieb's schedule was available to senior administrators. Ms. Cook MacKinnon says that she did not know that Dr. Gottlieb was going to be away from June 1st to June 6th. Ms. Cook MacKinnon did not attempt to contact Dr. Gottlieb or her office to discuss the contents of her letter. Having said that, I decline to draw the inference or conclusion that Ms. Cook MacKinnon knew that Dr. Gottlieb would be out of the country beyond the time Ms. Cook MacKinnon appears to have intended as the deadline for a reply to her letter before she walked out.

[51] At 11:00 p.m. on June 5th, Ms. Cook MacKinnon turned off her Blackberry. She says that at that point she did not expect a response from Dr. Gottlieb. Early next morning she attended at her office, cleaned out her personal belongings and left, all without advising anyone that she would not be returning. At about 1:00 p.m. her legal counsel faxed a letter to Dr. Gottlieb's office. It was on the President's desk, with Glen Hirschfeld's reply, when she arrived at her desk that afternoon.

[52] The letter from Ms. Cook MacKinnon's counsel was not tendered at trial. I asked if it was going to be tendered. Ms. Cook MacKinnon's counsel said no. There is no evidence of its contents before the court. I conclude that the letter that Dr. Gottlieb directed Mr. Hirschfeld to prepare, which was on her desk for signature, and which she intended to send, was not sent because the letter from Ms. Cook MacKinnon's lawyer foreclosed that option.

[53] Ms. Cook MacKinnon testified that she instructed her counsel to send the letter on June 6th. She was confronted with her discovery evidence of May 2008 where she was asked, after her counsel had objected to the questions of Defendants' counsel, about discussions between Ms. Cook MacKinnon and her counsel:

Q. I just want to know the timing of when you made arrangements to do that. [referring to making arrangements to have the lawyer's letter sent to Dr. Gottlieb on the June 6]

A. The . . . on the evening . . . the night of June 5th.

[54] I conclude that, when Ms. Cook MacKinnon turned off her Blackberry, she had decided to walk out on her job without further notice (which she did early the next morning), and at that time instructed her counsel to send the letter to Dr. Gottlieb that had the effect of terminating any further communication between them.

[55] The issue in this case is whether Dr. Gottlieb's action, on May 24, of taking personal oversight and responsibility for Enrollment and Admissions constituted a breach of Ms. Cook

MacKinnon's employment contract, and if so, a fundamental breach of the express and implied terms of her employment contract.

D. The Law of Constructive Dismissal

[56] The seminal text, *Quitting for Good Reason, The Law of Constructive Dismissal In Canada* by **Randall S. Echlin (now Justice Echlin)** and **Jennifer M. Fantini**, (Aurora: Canada Law Book, 2001) sets out the relevant principles, and synthesizes the case law (to 2001) onto its analysis. *Burns v Sobey's Group*, 2007 NSSC 363, at ¶¶ 42 to 81, contains a precis of those principles. I incorporate that precis into this decision.

[57] The issue in this case is not whether Ms. Cook MacKinnon "quit"; she walked out on the early morning of June 6, 2007, without notice to her employer after receiving legal advice. The first real issue was whether she had "good reason". The second issue is whether she acted reasonably in her duty to mitigate.

[58] Whether she had "good reason" depends on:

- 1) The express and implied terms of her employment contract;
- 2) Whether those terms were breached by the employer; and,
- 3) If so, whether the breach was a substantial or fundamental change to the essential terms of the employment contract.

[59] The analysis in each case depends upon the Court's finding of the express and implied terms of the contract, and whether, if the terms of that contract were changed, the changes were substantial and fundamental changes to the essential terms of that contract.

[60] In this case, whether the Plaintiff had good reason depends on whether the unilateral decision of the President to take personal responsibility and oversight for enrollment was a fundamental change to the Plaintiff's contract. The factual matrix involves no other changes to her employment. Her position, title, other duties, responsibilities, role, salaries and benefits, and place of work all remained the same.

[61] The test is an objective test and, essentially, a question of fact.

[62] Counsel have cited many decisions that they submit should guide this court. Case law provides helpful but limited guidance, and should be read with caution - in this case for two particular reasons.

[63] First, as noted in *Quitting for Good Reason*, at pp. 20 to 33, the general approach of courts to the determination of when a change is fundamental, has swung like a pendulum in concert with

the economy between (a) a “subjective test” (Echlin/Fantini’s term) that was protective of employee’s expectations that prevailed during the good economic times of the 1960s and 1970s, and (b) the “objective approach” (again Echlin/Fantini’s term) beginning with *Canadian Bechtel v Mollenkopf*, [1978] O.J. 1200 (OCA) and persisting throughout most of the 1980s and early 1990s, that recognized an employer’s legitimate business interests, or at least business necessity, and a broad entitlement to implement job reassignments in good faith. Since *Farber v Royal Trust*, [1997] 1 S.C.R. 846, the pendulum has swung back slightly to what Echlin and Fantini call the current test. Legitimate business interests can justify a degree of change in the employee’s duties, provided the degree of change is not fundamental to the employment contract.

[64] The economic times in which the decisions cited by counsel were made is a contextual factor that affects the application of those decisions to this matrix.

[65] A second reason that case law has limited value is that there are few reported decisions involving constructive dismissal with sufficiently similar elements so as to be truly comparable. Many of the decisions cited by the parties have some common elements to those in this case but those same decisions often contain other elements and factors that in my view are very dissimilar and which were influential in that court’s decision.

[66] The plaintiff’s submissions can be summarized in five points:

1. A constructive dismissal occurs where an employer unilaterally alters a fundamental term or condition of employment without reasonable notice (Echlin/Fantini, p. 15; a 1994 article by Justice Sherstobitoff cited in *Farber* at ¶ 34). She acknowledges that the test is objective and largely a question of fact.

2. An employee is not obligated to accept unilateral changes in employment contract, even if not a demotion, that are fundamental, unless the changes are permitted in the contract (*Hainsworth v World Peace Forum Society* (2006), 49 C.C.E.L. (3d) 262 (BCSC), at ¶ 47).

3. Where the parties have a history of discussing and negotiating changes in advance, such becomes an implied condition precedent to fundamental changes thereafter. (Echlin/Fantini, p. 199; *Schumacher v Toronto Dominion Bank*, 1997 CarswellOnt 1779 (OSCJ) at ¶ 188; *Burns*, at ¶ 84).

4. A reduction of duties, as opposed to a lateral transfer, is considered a demotion. (Echlin/Fantini, pp. 246-7; *Burns*, at ¶ 84). Examples cited by the plaintiff where this constituted constructed dismissal, include:

a) *Cox v. Royal Trust*, 1989 CarswellOnt 756 (OCA), where transferring the plaintiff’s management functions to a subordinate, while maintaining the plaintiff’s salary, constituted constructive dismissal;

b) *Eady v. TrekLogic Technologies*, 2008 CarswellOnt 2505 (OSCJ), ¶¶ 70 to 72, where a significant portion of the plaintiff’s management responsibilities, role and status were removed;

c) **Schumacher**, where three or five core functions were reassigned to a new employee, his status was reduced, 25 to 30% of his income was taken away and future earning capacity was reduced;

d) **Greaves v. OMERS** (1995), 129 DLR (4th) 347, where a change reduced the plaintiff from managing 50% of the defendant's assets to 25%, and where juniors were promoted to a higher level in the organization hierarchy;

e) **Tuchscherer v. Watson Distributors**, 2000 SKQB 290, where the plaintiff was replaced as service manager and offered the position of lead technician; and,

f) **Loehle v. Purolator Courier**, 2008 CarswellOnt 3636 (OSCJ), where a manager of internal audit (Employment Grade 11) was replaced after three years and told to find his own position in the company. He was offered jobs at a lower levels and a lower salary and eventually declined a final offer as a unit manager, two grades below his former job (Grade 9).

5. A *bona fide* business reason, or reorganization, does not justify a fundamental, unilateral change without notice. (Echlin/Fantini, p. 31; **Cox**, ¶ 17; **Gilbert v. Wittnauer Worldwide** (2002), 23 C.C.E.L. (3d) 35 (OCA); **Hainsworth**, ¶ 68).

[67] The defendants' submissions are summarized, as follows:

1. It is an implied term of employment contracts that reassignments may occur where there is either a history, practice or expectation or where financial circumstances require it. (**Burns**, ¶ 52; **Ellen Mole** in *Wrongful Dismissal Practice Manual*, 2nd Edition (Markham; Lexis Nexis; 2006; looseleaf), Section 3.71; **Brick v. Producers Pipeline**, [1995] S.J. 157, at ¶ 131; **Mifsud**, at ¶ 52; **MacKenzie v. Ralston Purina**, [1981] O.J. 657 (OSCJ), at ¶ 22 (affirmed on appeal); **Longman v. FBDB**, [1982] B.C.J. 1521 (BCSC), at ¶¶ 48, 56 and 57; **Reber v. Lloyd's Bank**, [1985] B.C.J. 2341 (BCCA); **Orth v. MacDonald Dettwiler & Associates**, [1986] B.C.J. 1144 (BCCA); **Pathak v. Jannock Steel Fabricating** (1996), 64 A.C.W.S. (3d) 605 (AQB).

2. The test for constructive dismissal is objective (**Farber**, ¶26) and not the employee's subjective perception (**Smith v. Viking Helicopter**, 1989 CarswellOnt 750 (OCA), at ¶8).

3. Not all changes or reductions in a manager's duties are fundamental. (**Pullen v. John C. Preston**, [1985] A.C.W.S.J. 442079 (OSCJ); **Black v. Second Cup**, [1995] O. J. 75 (OSCJ), at ¶¶ 28 to 34).

4. An employer has a right to make changes for *bona fide* business reasons, especially to meet business pressures. (**Lesuik v. British Columbia Forest Products**, [1986] B.C.J. 1241 (BCCA), at ¶¶ 16 and 20; **BMO Nesbitt Burns v. Bond**, [2002] O.J. 4093, at ¶18; **Zalusky v. Nestle Canada**, [1992] B.C.J. 2921 (BCSC); **Zifkin v. AXA Insurance**, 1996 A.C.W.S.J. 648624 (AQB); **Cadenhead v. Unicorn Abrasives**, [1984] O. J. 505 (OSCJ), at ¶31; **Ellen Mole**, at Section 3.68)

5. Not every reduction in duties constitutes a constructive dismissal. (**Reber**, at ¶¶ 39, 55 and 57; **Middleton v. Regal Greetings and Gifts**, 1996 CarswellBC 2380 (BCSC), at ¶¶ 27 and 28; **Lawn v. Algonquin College of Applied Arts**, [1982] O.J. 904 (OSCJ), at ¶ 16)

6. An employer may change, even reduce, an employee's responsibilities where the employee is not performing well. (*Canadian Bechtel*, at ¶ 12; *Black v. Second Cup*, at ¶¶ 22, 23, 27, 28, 29 and 34; *Gillespie v. Ontario Motor League Toronto Club* (1980), 4 A.C.W.S. (2d) 87 (OSCJ); *Ferdinandusz v. Global Driver Services*, [1998] O.J. 4225 (affirmed by the Ontario Court of Appeal); *Dykes v. Saan Stores*, [2002] M.J. 161 (MQB); *MacKenzie* (affirmed by the Ontario Court of Appeal))

7. An employer does not have an obligation to adhere to a deadline unilaterally imposed by an employee to avoid constructive dismissal, where an employee walks out prematurely. (*Brannan v. Exxon Mobile Corporation*, 2009 NSCA 53, at ¶¶ 56 and 70; *Hulme v. Cadillac Fairview Corp*, [1993] O.J. 2883, (affirmed by the Ontario Court of Appeal); *Longman*, at ¶ 61)

[68] The current test remains that described by Gonthier J. in *Farber* at ¶¶ 33 to 37. (See *Fiske v. Nova Scotia*, 2001 CarswellNS 244 (NSSC) ¶ 157).

[69] **Ellen Mole**, *Wrongful Dismissal Practice Manual*, 2nd edition (Markham: LexisNexis, looseleaf to 2009) at § 3.2 writes that, save exceptional cases, an employer's change must be fundamental ("severe, serious, unilateral and substantial and without reasonable notice") to amount to a repudiation of the employment contract. The onus of proving a fundamental breach is on the employee.

[70] Ultimately, the analysis of what is substantial or fundamental, viewed objectively, depends on the nature of the relationship between the parties as well as the express and implied terms of their contract.

E. Analysis

E.1 *What were the express and implied terms of the employment contract?*

[71] No formal written contract existed.

[72] While the position of Provost is common in the University setting, Dr. Ogilvie created a set of responsibilities and duties for the position of Provost which was unique to Acadia University when he offered it to the plaintiff in 1997. The bundle of responsibilities that went into that portfolio was a reallocation of responsibilities to meet his vision that the University should be involved in the life a student "from the cradle to the grave" and that the Provost should be the person, outside the classroom, who had oversight of all of those activities from processes that commenced before students selected or arrived at the University, to functions that affected their life at the University (outside the classroom), to following them after their graduation.

[73] The general description of the "areas of activities" in the "Job Fact Sheet" described the job offered to Ms. Cook MacKinnon. That description was created in 1997 and was reflective of the circumstances of the University at that time. The position was a term position. The Provost was a

Responsible for the management, development, and implementation of initiatives for providing service to students and the University and to managing Athletics, Liaison/Recruitment, Admissions, Student Support Services, Student Aid (Scholarship, Bursaries and related), Medical Services, Contract Education and International Student Advisor to this end.

Responsible for developing from these units a coordinated, effective, responsive, and efficient support service for students and for the University starting from the students first contact with Acadia University through to graduation. A proactive approach to identifying student needs is required.

Activity B: Special Project Management 15%

Overall, it is expected that such duties will not exceed 15%. However, at any given time such a project may occupy a high percentage of time.

Participate in the development of policies for the University. Attends regular meetings of the Senior Administration. Brings forward recommendations designed to ensure Acadia's leadership in all areas of student support.

In order to face the challenges of the next decade Acadia must work to manage its enrolment. This can be accomplished through collection and analysis of data, setting of targets and program development to achieve targets and retain students.

Establish a mechanism to identify targeted enrolment in all programs in the University and a process to deliver the enrolment targets. Develop programs to retain students once enrolled.

Activity E: Traditions and Ceremonial Responsibilities 5%

Arrange special university events and host special visitors in connection with the Office of Public Affairs.

Ensure a sensitivity to, and preservation of, the traditions of the university.

Has specific roles, assigned by the President, in Convocation.

[74] The Offer and Job Fact Sheet did not constitute a formal employment contract but it clearly described in a general way the duties and areas of activity proposed for the Provost in 1997.

[75] The Offer does not state that the job description is fixed. It acknowledges projects. As I will elaborate later, it must be viewed in the context of a university - a dynamic institution - and in the context of the Plaintiff becoming one of the few (six or seven) senior administrators who were jointly responsible to the President for developing strategies and tactics to better operate the university and to implement those strategies and tactics.

[76] The parties disagree about which activities in the Offer and Job Fact Sheet cover enrollment and admissions. The Plaintiff says that it described her "core" duties and did not change, without her prior agreement, at any time until May, 2007, with the exception of the change of her title, as initiated by Dr. Gottlieb and approved by the Board of Governors on August 17, 2004. Of the core duties, she described Enrollment and Admissions as taking 40 to 50% of her time and energy.

[77] The Plaintiff did not provide any empirical evidence as to the allocation of her time amongst the responsibilities described in the Job Fact Sheet. She was in the best position to provide more than a simple statement that she knew best. No diaries, calendars or other supportive oral or demonstrative evidence that might have raised her evidence from that of a submission or a conclusory statement of fact was provided. She and her counsel simply argued that it was her job and she knew it better than anyone. Dr. Gottlieb, Neil Carruthers and Glenn Hirschfeld, did not support her submission.

[78] Dr. Gottlieb was firm in her evidence, and not shaken on cross-examination, that, based on her regular private meetings with the plaintiff to review her portfolio, and on the weekly PAC meetings of the handful of senior administrators held to review each other's work and to make overall policy, tactical and strategic decisions, the plaintiff's areas of responsibility were far broader than the plaintiff states. The plaintiff had many important areas of responsibility and oversight. Oversight of Enrollment and Admissions - the administrative work of which was carried out by others and not her - did not occupy more than 20% of her time. Based on her broad area of responsibilities, it should not have occupied more than 20% of her time. To the extent that it might have occupied more of her time, the other areas of her responsibilities would not have been receiving the attention they required.

[79] The evidence of Mr. Carruthers and others was that enrollment was an important area of concern for the PAC and Board of Governors in the first part of the calendar year. As the enrolment crisis became greater, it attracted more attention from all senior management.

[80] Dr. Gottlieb's evidence, supported by Neil Carruthers (currently acting Vice President Administration), is that the portfolios of the senior administrators in the university were not static

and that it was customary that their portfolios change over time as priorities and needs changed. Dr. Gottlieb's experience was primarily in the universities in the United States and Mr. Carruthers' experiences were as a consultant and as an administrator in other Canadian universities.

[81] The Plaintiff's evidence is that in her 19 years at Acadia University changes in her portfolio were only made after consultation and her consent.

[82] I do not accept that a university model that provides almost unlimited freedom of action for the University President to reallocate amongst the senior administrators almost any of their responsibilities and functions is in accord with Canadian employment law. If the change is substantial or fundamental, then it may constitute a repudiation of the contract. I do accept from the evidence of Dr. Gottlieb and Neil Carruthers that in the university setting, it is normal for there to be re-allocations of responsibilities amongst senior administrators and their respective portfolios; said differently, it is an "industry" practice that responsibilities and duties may be reallocated. The reasons may include the particular vision of the University President and/or Board of Governors, or changes in the circumstances of the university that dictate changes in the administrative organizational chart.

[83] I conclude that, absent express restriction in a written employment contract, the portfolio of a senior university administrator may be expected to change to meet changing circumstances and priorities within the university. I further conclude that in the ten years that Ms. Cook MacKinnon held the position of Provost (retitled Vice President Student Affairs) that universities, and particularly Acadia University, experienced dramatic changes - changes in demographics, changes in what and how universities teach, changes in the role of Governments (reduced substantially as proportion to operating costs), in the change in the competitive landscape for post-secondary education, consequently changes in the vision of what a university is and how it will operate. This matrix leads inevitably to the creation of new spheres of responsibility, the deletion of others, and the reallocation of others. It was unreasonable for the Plaintiff to assume she had ownership of any of her spheres of oversight.

[84] Changing from the general to the particular, I reject Ms. Cook MacKinnon's evidence that her job functions never changed without prior consultation or her consent. In the first half of her career with the defendant (1988 to 1997) she progressed up the administrative ladder from Assistant Director - Admissions, to the position of Provost, which position she held for the last ten years. She had reached the peak of her status and role with the university when she became Provost in 1997. Thereafter, her role was not only oversight of a portfolio of departments but also as probably the most influential confidant and policy adviser to the President - first Dr. Ogilvie and then Dr. Gottlieb - on all aspects of University life, and she was the "go to" person for many *ad hoc* projects outside of her bundle of continuing responsibilities. The significant change in Ms. Cook MacKinnon's role after 1997 was the growth in her influence in the overall direction of the university through the President and PAC.

[85] I conclude that the time and energy that the plaintiff expended on any one part of her portfolio, whether it was of a continuing or *ad hoc* nature, was not static or constant. It fluctuated

with problems and priorities on a regular basis, some seasonal, some on a frequent but unpredictable basis. To describe, in her case, individual parts of her portfolio of responsibilities as “core” is inappropriate. The term means the essence or gist. Ms. Cook MacKinnon had oversight of a broad basket of important departments and an equally important role in the overall direction of the university. The fact that many of the departments in her basket of responsibilities were important, or even very important, to the overall success of the university does not make each of them “core” to her employment contract. The core of Ms. Cook MacKinnon’s job was her oversight of student life outside the classroom, and overall direction of the university through the President and PAC.

[86] Dr. Gottlieb became President in September 2003. In October 2003, she changed the way that Public Affairs was handled. From 1999, the Public Affairs office was under the oversight of Ms. MacKinnon as Provost. It involved a combination of in-house staff and an outside public relations consultant. Ms. Cook MacKinnon recommended that a new office of Public Affairs and Government Relations be created under a Vice President. Dr. Gottlieb did not follow this advice. She did not combine the functions of Public Relations and Government Relations. She made Mr. O’Hara a special advisor to the President on Government Relations, cancelled the arrangement with the outside public relations consultant, and created in-house an Office of Public Relations under her direct oversight.

[87] In November 2003, Dr. Gottlieb also decided to move the Office of Alumni Affairs from Ms. Cook MacKinnon’s portfolio to the Vice President Development. Earlier in this decision, I discussed the reasons. Ms. Cook MacKinnon attempted unsuccessfully to persuade her to leave Alumni Affairs under her portfolio.

[88] I find from all of the evidence, including my analysis of the e-mail exchanges, that even after Ms. Cook MacKinnon lost her fight to keep the Office of Alumni Affairs in her portfolio she caused difficulties for the President in the transition of that Office to the Development portfolio.

[89] I reject the submission that it was an implied term of Ms. Cook MacKinnon’s contract that there would be no change in her portfolio without prior consultation or her consent. The Office of Public Affairs was removed from her portfolio in a manner different from what she recommended and the Office of Alumni Affairs was removed from her portfolio without prior consultation and despite her vigorous opposition.

[90] I previously indicated that the bundle of responsibilities assigned to the Provost portfolio in 1997 was reflective of the circumstances and needs of the University at that time and was a reallocation from other portfolios of certain responsibilities to reflect Dr. Ogilvie’s vision of the University.

[91] Over her 10 years as Provost:

a) Parts of Ms. Cook MacKinnon’s portfolio were removed from her (Public Affairs and Alumni Affairs) and many other *ad hoc* or special assignments were entrusted to her (the Learning Commons and Acadia Advantage Renewal).

- b) Her title changed to Vice President Student Affairs.
- c) Her salary increased from \$62,500.00 to about \$125,000.00.
- d) The importance of the responsibilities assigned to the Provost in 1997 increased over ten years. In 1997, what happened in the classroom, under the oversight of the Vice President Academic, had a more significant impact on the success of the University. By 2007, what happened outside the classroom, that is, what was included in the basket of responsibilities of the Provost, played a more critical role in the success of the University. The increase in this impact increased the number, complexity, and consequently the time to focus attention on the solution to the issues and problems;
- e) her involvement in the overall policy direction of the university as the closest advisor to the President and the leader in PAC increased.

[92] It is normal and logical that, in any institution, private or public, profit or nonprofit, the handful of top administrators are expected to be generalists and more flexible in their contribution to their institution; said differently, those in leadership positions are expected to contribute to the big picture as part of a team to ensure the success of the institution. Their skill sets are such that they usually have a greater ability to affect the direction and success of their institution, and with that comes a comparative responsibility to respond in a flexible manner in their job. Flexibility in job functions, provided the employee has the appropriate skill sets, is an implied term in the employment of a senior employee in a position such as Ms. Cook MacKinnon occupied as Provost/Vice President Student Affairs with the Defendant. She in fact recognized this. She often appears to have acted on the basis that she was part of a team.

E.2 *Whether the employment contract was breached and, if so, was it a substantial or fundamental breach?*

[93] The second and third question cannot be usefully separated for the purposes of analysis.

[94] The major factual contest in this case was whether Enrollment and Admissions were a core function of Ms. Cook MacKinnon. The Plaintiff says it was 40 to 50% of her job; the Defendants say that it was a significantly smaller portion of a much broader job and roughly estimated it at 15 to 20% of her job.

[95] Ms. Cook MacKinnon was in the best position to present evidence to the Court as to what portion of her time was spent on oversight of the Enrollment and Admissions departments. Her role in respect of enrollment and admissions was not to carry out any of the functions, but to provide oversight to the departments that carried out the functions. It was her job to initiate ideas, recommend policy, implement policy, and report to the President, the PAC and the Board in respect of those departments. Ms. Cook MacKinnon provided no factual basis that would satisfy this Court that oversight of Enrollment and Admissions consumed 40 to 50% of her time.

[96] It was an important part of a very broad portfolio of responsibilities. It was clear that her plate was at least “full” as she acknowledged to Dr. Gottlieb - if not overflowing. There were crises in respect of several of her major responsibilities: declining enrollment; empty residences; an

Athletic department that was without a director, but with an out-of-control budget and with player eligibility issues. I accept Mr. Carruthers' evidence that when he assumed responsibility for Athletics, one of the areas that Dr. Gottlieb requested that Ms. Cook MacKinnon spend more time on, that it consumed approximately 30 to 40% of his time between June and November 2007. While I accept that enrollment and admissions were vital to the university and were a part of the Plaintiff's portfolio, I find that they were only a part of a very large portfolio.

[97] The witnesses and counsel spent considerable time talking about Enrollment and Admissions as a percentage of the time and effort of Ms. Cook MacKinnon. Despite the various numbers thrown out, I was not confident of any of them. Recognizing that the time spend on this issue varied with the time of year, I find that enrollment and admissions did not constitute more than 25% of her total portfolio of continuing responsibilities, and a lesser percentage of her total responsibilities which included ad hoc projects and her role in the overall direction of the university through the PAC and President.

[98] The use of the term "core" in relation to her job functions, as noted in paragraph 83, is not helpful in this case. In many cases an employee may have one function that is the essence or gist of their employment. Ms. Cook MacKinnon was a generalist with many important functions; it is a misnomer to say that Enrollment and Admission was "core" to her job description. It was no more core than her responsibility for residences, athletics, and many other aspects of student life, nor the many other ad hoc but important responsibilities assigned to her over ten years. As important to the University as her involvement with enrollment and admissions, and the involvement of the University in the students' lives outside of the classroom, all of which was under her portfolio, was her role as a policy advisor and confidant of the President and PAC in respect of the overall direction of the university.

[99] Ms. Cook MacKinnon had been involved in Admissions and Enrollment in some capacity from 1988. Her role in respect of those changed in 1997 and they became a much smaller portion of her job function after 1997. Possibly because Ms. Cook MacKinnon was always involved in Admissions and Enrollment she had an emotional attachment to it, but in terms of her role as Provost, it was one of many functions and not the center of her job.

[100] Ms. Cook MacKinnon's duties as Provost were not frozen in 1997. The Defendant was entitled reasonable leeway to alter the composition of her portfolio in response to changes in the University environment and the necessity to respond to these changes in a reasonable and businesslike manner. It was not an express or implied term of her contract that the mix of duties of Provost would remain the same. It was not a breach of her employment contract to assign her *ad hoc* or special projects or to remove some portions of her duties to meet the changing circumstances.

[101] To the extent that much of the case law focussed on the respective conduct of the employer and employee, I conclude that the decision of Dr. Gottlieb to remove Enrollment and Admissions from Ms. Cook MacKinnon's portfolio and to assume personal oversight of these departments was made in good faith both in terms of her duty as President to the University itself and to the plaintiff. It was good faith conduct in the sense that enrollment was a crisis issue that had grown significantly

overly three years and required the personal attention of the one who occupied the desk where the buck stopped. It might be suggested that Dr. Gottlieb would have been less than diligent if she did not assume personal responsibility for the issue that was described in the evidence, and which the Court accepts, was a critical issue with no easy solution. In my view, an implied term of this employment contract allowed for the kind of action the President took on May 24th - assumption of personal oversight of an issue that was critical to the university.

[102] The action of the President was effected in good faith in respect of her relationship with the plaintiff. There may have been no easy solution to the enrollment crisis, but the Plaintiff had come under pressure for that problem, had produced a draft report that did not have the confidence of the President or of the Board of Governors, and the President acted in part to protect the Plaintiff and her continued employment as her closest and most senior administrator.

[103] The plaintiff states that the removal of enrollment and admissions was a demotion. It was not.

[104] The plaintiff says that the removal of enrollment and admissions caused her to lose face and be humiliated. Humiliation is looked at from the perspective of a reasonable person in the plaintiff's position - not from this plaintiff's subjective perspective. In my view, the decision communicated to Ms. Cook MacKinnon on May 24, 2007, did not cause Ms. Cook MacKinnon to lose face or to be humiliated. Enrollment was perceived in the university community as a crisis issue that had festered and grown for three years. This was known to the Board of Governors and to the PAC. Everyone had been struggling with it, as had Ms. Cook MacKinnon, for some time. The decision of Dr. Gottlieb to take personal responsibility for this issue should not, looking at it from the point of view of a reasonable position with the knowledge that Ms. Cook MacKinnon possessed, have caused her humiliation. Any "loss of face" would have been temporary, at worst.

[105] The only evidence of embarrassment and humiliation arose during the May 30 PAC meeting, and I conclude that it was Ms. Cook MacKinnon's challenge to the announcement by Dr. Gottlieb of the change that created the embarrassment to all those in the room. Challenging the announcement of the President in that forum, a decision that I accept was clearly conveyed by Dr. Gottlieb on May 24, was not appropriate, and the exchange that followed likely would have been embarrassing, but it was not a humiliation that arose by reason of the assumption of the President of personal responsibility for enrollment, but by the plaintiff's reaction to it.

[106] The President's conduct did not undermine Ms. Cook MacKinnon's authority and it was not abusive or unfair. The response of the President at the PAC meeting early in the spring to the draft Enrollment Task Force Report and her response to Ms. Cook MacKinnon's challenge of her authority on May 30 were incidents that, judged objectively, should not be so humiliating as to cause a reasonable person to think that they could no longer work in harmony with their employer and with their co-workers. Not every reversal, in life or at work, justifies walking away.

[107] While I find that the removal of enrollment and admissions from the Plaintiff's portfolio was a change in her job, it was not a fundamental change to an essential term of her employment

contract. It was implicit in her job that responsibilities would be subject to changes - additions and deletions. The Plaintiff was not demoted.

F. Damages and Mitigation

F.1 *Damages in lieu of notice*

[108] If I am wrong, the plaintiff is entitled to damages in lieu of notice, subject to reasonable mitigation. Again, I apply the analysis in *Burns*, ¶¶ 100 to 103. Since this Court's decision in *Burns*, the Supreme Court of Canada, in *Honda Canada v Keays*, 2008 S.C.C. 39, has endorsed the approach for determining reasonable notice contained in *Bardal v Globe and Mail*, [1960] O.J. 149 (OCA).

[109] Ms. Cook MacKinnon was a 19-year employee of the Defendant. She was approximately 48-years of age when her employment ended. Her position was somewhat unique. There are relatively few senior administrative positions in post-secondary institutions near Wolfville or in Nova Scotia.

[110] While Ms. Cook MacKinnon has several well developed administrative skills, and an accounting background, it is not unreasonable that she looks first for employment in education administration. Her salary had increased from \$27,000.00 in 1988 and had only exceeded \$100,000.00 two or three years before her employment ended. These are a few of many relevant factors for determining the appropriate length for which damages might otherwise be payable.

[111] The "rule of thumb" has no place in this assessment. The plaintiff submits the totality of the circumstances and factors suggest that a reasonable period or notice would be 19 to 22 months.

[112] The defendant argues that a reasonable notice period is about 12 months based on the age of the plaintiff and the fact that she has skills and abilities which make her very employable.

[113] While counsel find merit in the "rule of thumb" approach for the purposes of settlement and the fact that it gives certainty to employers and employees of what the notice might be in the case of wrongful dismissal or constructive dismissal, the Supreme Court's recent endorsement of *Bardal* means that the assessment of the notice period is an individualized process.

[114] On the one hand, Ms. Cook MacKinnon has been a long term employee of the University; on the other hand, she has youth, health and many skills that make her very employable, not just in post-secondary education institutions but in any senior administrative position where an accounting background and vast administrative experience would be beneficial.

[115] But for the issue of mitigation dealt with separately below, I find that the reasonable period of notice for someone in the plaintiff's position, in these circumstances, would be sixteen months, plus the value of those benefits (other than the health and dental care which she kept through her

husband's continued employment at the University) that she lost by reason of the termination of her employment. To clarify, because of the plaintiff's failure to take reasonable steps to mitigate, the defendants would not be liable to the plaintiff for any damage in lieu of notice or other lost benefits.

[116] I find the University has not acted in bad faith and there is no evidentiary basis for aggravated or Wallace damages.

F.2 *Mitigation*

[117] The plaintiff has a duty to take reasonable steps to mitigate her loss. The onus is on the defendants to show, on a balance of probabilities, that she failed to make reasonable efforts to find such work and that work could have been found. (*Evans*, at ¶30).

[118] Mitigation is a very live issue in this case. It has two aspects. First, did the plaintiff fail to take reasonable efforts to find work outside of Acadia University, when work could have been found, and alternatively, should the plaintiff have worked with the University while seeking other employment.

[119] The relevant evidence respecting mitigation efforts (other than at the University) include:

a) Ms. Cook MacKinnon testified that she applied for only one outside job - an administrative position at the Nova Scotia Community College near Wolfville. She stated that her husband was a tenured professor at Acadia and her stepson was going to school in Wolfville and she was not prepared to move away from Wolfville.

b) Ms. Cook MacKinnon was approached by an administrator and later by the President of St. Francis Xavier University of Antigonish, Nova Scotia, to assume the same position at St. FX that she held at Acadia. This was apparently shortly after June 2007. She testified that she was not prepared to consider this employment because in her belief it would require her to move to Antigonish and she was not prepared to move away from Wolfville where her husband and stepson lived.

c) Ms. Cook MacKinnon commenced an educational consulting business in the summer of 2007 with two others. She has invested over \$13,000.00 in efforts to get it off the ground. Her first contract, with the Government of Guiana, commenced in the summer of 2009. In other words, she had no employment income from the business for two years.

d) Shortly after June 2007, Ms. Cook MacKinnon moved to a residence she already owned at Second Peninsula, near Lunenburg, Lunenburg County, Nova Scotia. This residence is located about one-hour, fifteen-minutes (by vehicle) from Acadia University. Her husband apparently keeps a small apartment in Wolfville during the school year. I presume he commutes on weekends, holidays and vacation periods. Second Peninsula, Lunenburg County, is about a one-hour drive from Halifax. Both Wolfville and Second Peninsula are about three-hours (by car) from Antigonish.

[120] I accept that there are few senior post-secondary administrative jobs available in Nova Scotia. I also accept that Ms. Cook MacKinnon's skills and experience, as a senior administrator,

with an accounting background, makes her very employable. The reasonableness of her mitigation effort must be considered in this context.

[121] I was troubled that Ms. Cook MacKinnon testified that she was approached not once, but twice, by St. Frances Xavier University to take on the same role she had just left at Acadia. She stated that she turned it down because she did not want to move away from Wolfville, where her husband and stepson worked and went to school. At the same time, she almost immediately moved to a home she already owned in Lunenburg, more than one hour from Wolfville, and her husband thereafter kept an apartment during the school year in Wolfville. That evidence did not make sense. If her husband was going to commute from Wolfville to Lunenburg, presumably on weekend and holidays, I do not understand why she did not consider the position with St. FX, about a three-hour drive from her home or from Wolfville, which would have allowed her to commute on weekends and holidays in the same manner that her husband did.

[122] I was equally troubled as to why she did not seek employment in the Halifax area if her home was as close, if not closer, to Halifax than it was to Wolfville. It is common knowledge that there is several post-secondary education institutions in Halifax and presumably many other opportunities for employment for persons with the administrative and accounting background that she had.

[123] These are considerations that cause the Court to question why she would fall back on a new education consulting business for which she had no background, as her only mitigation effort. It may have been reasonable to commence a consulting business, but I do not accept that it was reasonable to rely on this from the beginning as the only employment option after she did not obtain the NSCC job.

[124] The bottom line is that I do not accept that her mitigation efforts were reasonable and I am satisfied that if she had acted reasonably she would have given further consideration to the St. FX position which I find she would likely have secured based on her own evidence, or that, if she had looked, she would likely have found remunerative employment using her skill set in the Halifax area.

F.3 *Mitigation at Acadia University*

[125] The obligation to mitigate by working with the employer while looking for alternative work has been a contentious principle. The Ontario Court of Appeal decision in *Mifsud* has been much maligned and seldom applied. Recently the Supreme Court of Canada in *Evans* endorsed the *Mifsud* principles.

[126] According to the Supreme Court in *Evans*, absent bad faith or other extenuating circumstances, which in ¶30 were described as an atmosphere of hostility, embarrassment or humiliation, there is no juridical reason why an employee should not be expected to work out the notice while looking for other work. The Court suggests that this is an analysis that should be made on a case by case basis, but it does not start with the assumption, either in cases of constructive dismissal or wrongful dismissal, that an employee should not consider working the notice period.

The Court emphasized that the critical element is whether there was an atmosphere of hostility, embarrassment or humiliation.

[127] Applying that to the case at bar, I am satisfied that this one of those cases, whether rare or not, where Ms. Cook MacKinnon should have worked out her notice.

[128] I accept the evidence of Dr. Gottlieb, reinforced by the “Dear Paula” letter drafted on her instructions and intended to be forwarded to Ms. Cook MacKinnon on June 6th but for the intervening letter from her lawyers. Dr. Gottlieb was not hostile toward Ms. Cook MacKinnon. On the contrary, Dr. Gottlieb was supportive, and expected to continue to work with Ms. Cook MacKinnon after she took over direct responsibility for enrollment. I accept her evidence of the tone and nature of her meeting with Ms. Cook MacKinnon on May 31 - that it was a normal working relationship; she was satisfied that Ms. Cook MacKinnon had gotten over her decision to take direct responsibility for enrollment, and they both had the ability to continue on as before.

[129] Neither Dr. Gottlieb’s blunt assessment of Ms. Cook MacKinnon’s draft Enrollment Task Force Report in January 2007 (which Ms. Cook MacKinnon described as unpleasant) nor Dr. Gottlieb’s response to Ms. Cook MacKinnon’s challenge during the PAC meeting of May 30, would create an atmosphere that would prevent them from working together. Any embarrassment between the two of them, arising because of how close they had worked together up until that point, should, to reasonable people - including a reasonable person in the position of Ms. Cook MacKinnon, have been something they would have gotten over. Losing an argument can be humiliating, but the loss of the argument in this case, possibly hurtful to Ms. Cook MacKinnon’s pride (on a subjective analysis), was not an unusual circumstance in an institutional or business setting. The interaction between Dr. Gottlieb and Ms. Cook MacKinnon did not contain elements, objectively assessed, that should have interfered with Ms. Cook MacKinnon’s ongoing ability to work Dr. Gottlieb or her colleagues, at least while she looked for other work.

G. Summary

[130] An implied term of Ms. Cook MacKinnon’s employment was that all of the elements of her portfolio were not fixed or frozen as of July 1997 and that her mix of duties and responsibilities, may, and indeed did in fact, change over the ten years from 1997, sometimes without prior consultation or her consent, and sometimes with consultation and her consent. While Enrollment and Admissions were an important function in the university, it was a small part of her total portfolio. It is inappropriate to describe it as a “core” function.

[131] The Defendants did not breach her contract when Dr. Gottlieb took personal responsibility for enrollment at a time when it was a crisis requiring the attention of the President. The assumption of personal responsibility for enrollment was made in good faith. It was in the best interests of the University and affected for the purpose of protecting Ms. Cook MacKinnon and her employment.

[132] If the reassignment of enrollment from Ms. Cook MacKinnon to Dr. Gottlieb was a breach of the employment contract, it was far from fundamental and did not go to the root of the express or implied terms of her employment contract. Ms. Cook MacKinnon remained a close confidant and advisor to the President, and one of the senior, if not the senior, administrator at the university and in the PAC.

[133] The incidents - when Dr. Gottlieb criticized the draft Enrolment Task Force Report in the PAC in January 2007, and when she responded to the challenge by Ms. Cook MacKinnon to her decision to take personal responsibility for enrollment at the PAC on May 30, 2007, were not incidents that, objectively assessed, by a reasonable person in the position of the Plaintiff, should be perceived as so humiliating as to destroy the working relationship.

[134] The Plaintiff failed to take reasonable steps to mitigate her loss. Her refusal to seek more than one post-secondary education institution administrative appointment because of her desire to remain residing in Wolfville with her family makes no sense in light of her almost immediate move to Second Peninsula, Lunenburg County and the consequences that flowed from that. It would have been reasonable for her to consider commuting when the administration at St. FX approached her to take similar employment. It makes no sense that she did not inquire of possibilities of employment in the Halifax area, where most of the post-secondary education institutions are situate and where most of the institutions and industries that require the type of administrative and accounting skills that she had been found.

H. **Costs**

[135] If counsel are unable to agree on costs, then I will receive short written submissions (not over 5 pages) from the defendants within 20 days to this decision, a similar (five page) response from the plaintiff within 10 days thereafter, and shorter (2 page) rebuttal from the defendants within 5 days thereafter.

J.

SUPREME COURT OF NOVA SCOTIA

Citation: *MacKinnon v Acadia University*, 2009 NSSC 269

Date: 20090908

Docket: Hfx 285651

Registry: Halifax

Between:

Paula Cook MacKinnon

Plaintiff

v.

Acadia University, a body corporate, and
Governors of Acadia University, a body corporate

Defendant

Revised decision: The text of the original decision has been corrected according to the attached erratum dated September 14, 2009

Judge: The Honourable Justice Gregory M. Warner

Heard: August 4, 5, 6, 7 and 12, 2009, in Halifax, Nova Scotia

Counsel: **Lisa M. Gallivan** and **Jennifer Ronalds**, counsel for the plaintiff
Paula Cook MacKinnon
Nancy F. Barteaux and **Krista Smith**, counsel for the defendants
Acadia University and Governors of Acadia University

By the Court:

[136] In Paragraph 13 the word “Advancement” in the first sentence should read “Advantage”.

[137] In Paragraph 30 and 43, the name “Joan Masterton” should read “Joan Masterson”.

[138] In Paragraph 66, Point 1, the word “subjective” in the last sentence should read “objective”.

[139] In the second sentence of Paragraph 83 the words “and extent” should be deleted.

[140] The following sentence should be added to the end of Paragraph 115:

To clarify, because of the plaintiff’s failure to take reasonable steps to mitigate, the defendants would not be liable to the plaintiff for any damage in lieu of notice or other lost benefits.

[141] In Paragraph 119, subsection (a), the word “in” should be inserted between “school” and “Wolfville”.

[142] In Paragraph 126, second line, the word “as” should be inserted between “described” and “an”.

J.