IN THE MATTER OF THE LABOUR RELATIONS CODE
OF BRITISH COLUMBIA RSBC 1996

- AND -

IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIVERSITY OF BRITISH COLUMBIA

(the "EMPLOYER")

AND:

FACULTY ASSOCIATION OF THE
UNIVERSITY OF BRITISH COLUMBIA
ON BEHALF OF HUIMIN LIN, WEI XIA, TIANMING LI
ZHINING ZHENG AND TERENCE RUSSELL

(the "ASSOCIATION")

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ARBITRATOR: Dalton L. Larson

COUNSEL FOR THE EMPLOYER:

THOMAS A. ROPER, Q.C.
MURIEL HENRY

COUNSEL FOR THE ASSOCIATION:

ALLAN E. BLACK, Q.C.
SARA SMYTH

PLACE OF HEARINGS: Vancouver, British Columbia

DATES OF HEARINGS: June 27, July 8 & 11, 2003
AWARD

Under the Agreement on Conditions of Appointment for Sessional Lecturers and Part Time Appointees, the term “faculty member” is defined to include a wide range of persons who have the status of any of the following types of teacher: Instructor, Senior Instructor, Assistant Professor, Associate Professor and Professor or equivalent position. They may be full time or part time. Their duties and responsibilities are not defined by the agreement although it is clearly implicit that they share at least one such responsibility in common, which is that they all participate in the education of students at the university level. Not without significance, a faculty member must be appointed by the Board of Governors.

The appointment process is important because there are others who are involved in teaching who are not appointed by the Board of Governors and who are not members of the faculty. They include such classes of persons as: Teaching Assistants, Academic Assistants, Research Assistants and Markers. Since they are not faculty members, they are not in the Faculty Association bargaining unit. They are covered by a separate collective agreement negotiated by the Canadian Union of Public Employees, Local 2278 (Teaching Assistants Component). For the most part, they are graduate students, typically in a master’s program, who are employed, as their title suggests, to assist faculty members in the discharge of their duties. Under Article 2, the University has recognized CUPE as the exclusive bargaining agent for “Teaching Assistants, Tutors, Markers and Non-Credit Sessional Instructors”. It specifically excludes persons represented by other certified bargaining units, faculty members appointed by the Board of Governors appointed to positions “that include teaching responsibilities”, all post doctoral
fellows, persons invited to speak on a particular subject, and casual markers who are not appointed for at least one term of the Winter Session.

Beyond the rather structural distinctions, the lines of demarcation tend to blur somewhat when it comes to teaching responsibilities because the assistants generally perform their functions with a relatively high degree of independence. That comment requires some explanation because the most salient feature of their work is that it is done under the direction of a faculty member. It poses the question how they can be independent while functioning in an assisting capacity but the answer is that they tend to function without direct supervision, in the sense that a faculty member only occasionally will sit in on their labs, drills, tutorials and seminars, but they are closely controlled in other ways. For example, they may be required to sit in on the lectures of the faculty member so that they become familiar with the teaching goals of the faculty member; or the faculty member may meet regularly with the assistant to review what is being done and to give specific instructions on particular material; and informal audits may be conducted primarily, through input from the students. At the same time, there is no set formula which mandates how Teaching Assistants should be supervised and controlled, or that sets out precisely how they ought to be managed by a faculty member to provide an effective level of assistance for any particular course. The practice varies as widely as there are faculty members.

In a letter written to Deans, Directors, Department Heads and Administrators, dated March 25, 2001, Lisa Castle, Acting Associate Vice President, Human Resources, generally described what they do in the following terms:

Typically, Teaching Assistants assist course instructors by providing instruction to students in laboratories, discussion periods, tutorials, or lectures; marking examinations, tests, laboratory exercises, or assignments; invigilating examinations; and providing academic assistance to students in office hours. Teaching Assistants do not have the
responsibility to teach a course (including a section of a course); the work undertaken is
directly supervised by a course instructor.

It was vigorously asserted by the Faculty Association that Teaching Assistants do not
teach, an argument that I do not accept, even though I recognize that it is obviously based on the
premise that teaching necessarily involves a set range of typical teaching responsibilities.
Although he did not put it in these terms, the effect of the argument put by Mr. Black was that
one cannot be counted as a teacher if one is only responsible for a particular aspect of a course. It
assumes that teaching cannot be broken down into component parts or that the responsibility
cannot be divided, a proposition that I consider to be unsupported by the evidence. It may be true
that the teaching done by a Teaching Assistant can be easily distinguished, not necessarily on the
basis of the individual level of pedagogical skill exercised, but more properly by reason that the
type of teaching assignments available does not afford them an opportunity to teach at a high
functional level. But that is not to say that they do not teach at all. Notwithstanding the opinion
advanced by of Brian Green, Membership Services Officer for the Faculty Association, that
when he functioned as a Teaching Assistant he did not teach, I think that it is more accurate to
say, as did Ms. Castle, that it is limited. They teach but they do not teach courses.

The lines are further blurred by the fact that faculty members may also have limited
responsibilities. They may be full time or part time. Many lecturers and instructors do not have
continuing appointments but are appointed to teach credit courses or ‘perform related duties,
such as course co-ordination or laboratory supervision for a period of less than 12 months’,
called “sessional appointments”. It is also important to recognize that lecturers and instructors
have their own inherent limits relative to others who teach. They are confined essentially to
classroom functions. For example, they do not have the much wider mandate assigned to professors to conduct original research and to publish their findings.

The fact that the duties and responsibilities of Lecturers and Instructors are confined to classroom teaching and other related duties is clear from the appointment letters given to each of the five grievors which referred firstly, to the number of contact teaching hours assigned to them per week, and secondly:

.....you will be responsible for course preparation, test preparation, grading, record keeping, holding office hours (at least one hour per course, per week), and supervision of teaching assistants. On occasion, individual tutorial work with students, one to three hours per week, may become part of your duties.

Other occasional duties include administering placement tests/ interviews to incoming students, assisting in evaluating students’ proficiency for credit transfers and administering the language exemption examination for fulfilling the Faculty of Arts language requirement, as well as administering the language testing segments of the exchange programs.

The reference to the ‘language exemption’ is an indication that each of them teaches in the Department of Asian Studies, Faculty of Arts, the issue being that in each case part of their assignment was to teach Intensive Basic Chinese and/or Intensive Intermediate Chinese courses, each of which was intended, at least by Dr. Robert Chen, the Coordinator of the Chinese Language Program, to carry only three teaching credits. It is not disputed that the subject courses carry six credits for purposes of student qualification. In that respect, it should be noted that there is also an Intensive Advanced Chinese course. It is not a subject of dispute in this case but it has a degree of relevance because it demonstrates the symmetry of the program. The calendar published to students clearly indicates that all of the intensive courses carry six credits with all
other courses having three credits. The reason for the distinction was not given in evidence but it presumably is a measure of the complexity of the courses.

In those terms, to assign only three teaching credits to the intensive courses would appear, on its face to be anomalous except that, as was explained by Mr. Roper, it was a rational outcome of the fact that the grievors were not given the responsibility for teaching the full course. They were not given the drills. The prescribed methodology for the intensive courses is that the students attend four hours of lectures each week and four hours of drills to put into practice what is taught in class. Under that prescription, the grievors were assigned to do the classroom lectures and all other related functions. Teaching Assistants were designated to do the drills. Accordingly, the University considered it to be appropriate that the classroom lecturer would only get one half of the available credits because, in its view, they would only do half the work. By contrast, the Union took the position that contact hours is not an accepted measure of workload under the collective agreement and that, in reality, the grievors continued to be responsible for the whole course even though they did not do the drills, including the supervision of the Teaching Assistants, not to mention examinations and marking. Therefore, it argues that it could not be said that they only did half the work.

Those facts are not really in dispute but what happened to give rise to the grievance is that the University claims that it made a mistake, to the effect that in the 2002 – 2003 term, each of the grievors was sent an appointment letter by the clerical staff that purported to give them 6 teaching credits for each intensive course that resulted in an overpayment of salary which the Employer now seeks to recover in these proceedings. It contends that it was a mistake of fact because the grievors were told by Dr. Chen in a departmental meeting on August 28, 2002 that
they would only be given three teaching credits but the letters subsequently sent to them to confirm their teaching assignments indicated that the courses would carry six credits.

The University filed the grievance. It concedes that Section 21 of the Employment Standards Act prohibits an employer from making a payroll deduction in order to recover a disputed overpayment from an employee but it contends, correctly, in my opinion, that it is entitled to obtain an order from an arbitrator in proper circumstances that the monies are due and owing and that they may be recovered on such terms as may be specified by the board: Vancouver Hospital & Health Sciences Centre v. British Columbia Nurses’ Union [2002] BCCAAA No.420. Mr. Roper argues that there was a long practice going back to 1980 where the classroom teaching and the drills in the intensive language courses were similarly separated, and that the person doing the classroom teaching was consistently given only three teaching credits, without any complaint being made by the Association.

While that is somewhat of an oversimplification of the details, it is accurate in the result. The evidence of Dr. Chen was that in the period from 1980 to 1997 the intensive courses were team taught. As is the case today, they involved eight hours of instruction per week but in that period it was broken down into four hours of classroom lectures, two hours of drills by a different Lecturer and two hours of drills in the lab conducted by a Teaching Assistant. The classroom lecturer was given three teaching credits. I was not advised how many credits were assigned to the Lecturer who did the drills. In the 1997-1999 period, the drills were all done by a Teaching Assistant. None were done by a Lecturer. The classroom lecturer continued to receive three teaching credits. The big change was in the period 1999 to 2002 when the classroom lecturer also did the drills and was given six teaching credits. No Teaching Assistant was used. Then in the period giving rise to the dispute in this case, in the 2002–2003 academic year the
practice reverted to the one that had been in effect from 1997-1999 where the Lecturer did the classroom teaching and all of the drills were done by a Teaching Assistant.

The Faculty Association takes the position that if a mistake was made, it was a mistake of law, which does not provide a basis for recovery. Mr. Black argues that the mistake was that the Employer concluded that the number of credits assigned to the course could be reduced by using a Teaching Assistant. He does not assert that assigned lecturing responsibilities cannot be shared with another lecturer such that the available teaching credits can appropriately be divided between them, as was done in the 1980-1997 period, but he says that cannot happen with a Teaching Assistant because they do not teach. He points to the fact that earlier this year they went on strike during which time some Lecturers consented to do the drills and were paid extra, equivalent to the hourly rate paid to the Teaching Assistants under their collective agreement but they were not paid as if they carried the responsibility for the full six credit course. As a consequence, Mr. Black argues that the reduction should not be seen to have been the natural outcome of team teaching in any true sense but was more in the nature of a blatant attempt to reduce the compensation properly payable to the Lecturers.

The most immediate problem for the Faculty Association is the practice that persisted through nearly two decades from 1980 to 1997 where the courses were divided in precisely the same manner with one Lecturer doing the classroom teaching and another doing some of the drills. According to Mr. Black, that was not problematic because in that instance the persons doing the courses and those doing the drills had equivalent status so that it was properly seen to be team teaching. They were both faculty members. However, it is my view that it would be improper to have the test turn on the status of the individual teachers instead of addressing the
real issue, which is the division of duties and responsibilities. I agree that this collective agreement does not include a formula for the measurement of workload.

I accept that, as a matter of principle, under the structure prescribed by this collective agreement, a Teaching Assistant cannot team teach with a Lecturer, assuming that it implies a relatively equal division of duties, responsibilities and authority. Teaching Assistants do not have the responsibility for a course. They are confined to an assisting capacity. They have no authority to assume any independent teaching responsibilities but are always subject to the overriding direction and control of a faculty member. That is precisely the tenor of the Castle letter, that they assist course instructors by conducting drills, perform experiments in laboratories, lead discussion groups, do tutorials and mark examinations but they do not carry the responsibility for a course, which is to say, make sure that the requisite course material is covered and that the students are accurately assessed. Even though they had an equal number of contact hours between them, it would be unquestionably wrong to conclude that the Teaching Assistants in this case had equal responsibility to the Lecturers. The latter carried responsibility for the whole course, the assistants only for part.

On that view, if another Lecturer is used in the same manner, only to do the drills or lab work, it equally would not be team teaching because that person would not carry the responsibility for the course or part of the course, anymore than a Teaching Assistant. In those circumstances, the Lecturer would be functioning only in an assisting capacity because the drills support the classroom lecturers. It follows that it would not be proper to reduce the teaching credits available to the classroom lecturer just because the status of the person doing the drills is also that of a Lecturer. If team teaching implies a certain parity between the teachers, then what happened in this case was not in that category. The only area of parity between the Lecturer and
the Teaching Assistant was the number of student contact hours but there continued to be a considerable difference in the level and scope of their teaching responsibilities. In fact, even if one were to focus on contact hours, the assignment of the drills to a Teaching Assistant would not result in an equal division the work. The Lecturer continued to be required to maintain office hours, do tutorials, give assignments to the students, set examinations and mark papers.

An example of true team teaching in an intensive Chinese language course would be a situation where two lecturers are each assigned two contact hours of classroom teaching and each does two hours of drills each week, with equivalent responsibility for all other related activities. To assign all of the drills to a Teaching Assistant, or even to another Lecturer, and the classroom teaching to yet a different Lecturer, cannot properly be regarded as team teaching because it confuses status with responsibility.

Having reached that conclusion, it follows that in this instance there was no logical basis on which the University could properly have reduced the teaching credits assigned to this course from six to three credits, based solely on the fact of the assignment of the drills to a Teaching Assistant. Having said that, it cannot be the end of the matter for the simple reason that it is within the discretion of the University to determine the credits assigned to courses. There is no formula set out in the collective agreement or other wording by which teaching credits must be assigned. Contact hours is obviously not the sole basis of credit since, using the example of the Department of Asian Studies, many of the basic courses involve three or four contact hours of classroom teaching per week in the same way as the intensive courses, yet the basic courses carry three credits and the intensive courses carry six credits. Provided that it is not arbitrary, discriminatory or in bad faith, the University could assign three teaching credits to the intensive
courses. Moreover, it is an open field under the collective agreement in respect of which an arbitrator would not be entitled to take jurisdiction.

The collective agreement comes into play, however, once credits have been assigned because Article 2 of the Agreement on Conditions of Appointment for Sessional Lecturers and Part-time Appointees requires that vacant positions be posted, which implicitly has the effect of fixing the working conditions for those positions at that point in time. Once posted, they cannot be changed because the conditions advertised in the posting comprise the basic terms on which the position is awarded to the successful candidate. While an exception is made in Article 2.2 that appointments arising as the result of unforeseeable events do not have to be posted, the contractual underpinning of the posting can be most clearly seen from Article 2.3, which provides as follows:

The principal duties of an appointee will be set out in writing, e.g., (1) course(s) to be taught; (2) coordination responsibilities; (3) lab responsibilities. If the appointment is part-time, the percentage of that appointment in relation to the duties of a full-time appointment will be clearly stated. Part-time percent shall be calculated as a percentage of full-time employment for the period of the faculty member’s appointment only, that is, not as a fraction of the whole winter session or the full year. Any work required outside the period of appointment will be clearly stated and remuneration for the work will be provided for. If the final exam is scheduled within three (3) days of the end of the appointment or outside the appointment period, an additional $200 shall be paid for marking. A copy of this Agreement shall be supplied to the faculty member with the appointment letter.

The Union argues, in the alternative, that there was no mistake at all because the grievors were given letters of appointment clearly setting out the courses that they would teach during the year. In each case, the letters were signed by Joshua S. Mostow, Acting Head and Association Professor of the Department of Asian Studies. The grievors, all of whom were given assignments to teach intensive language courses, were advised by letter that they would receive six teaching
credits for each such course. In a couple of cases, their initial letter indicated that they would get three credits but all such letters were subsequently amended to show that they would be entitled to six credits. The procedure followed internally was similarly deliberate. The ‘Appointment Forms’ were filled out by Leilani Pantonial, a Financial Clerk who thought that the intensive courses carried six teaching credits. As with the letters, the forms that were originally completed with three credits were subsequently amended to show six credits. In each case they were then reviewed and signed off by Tamara Milicevic, the Administrator of the Department. After that they were sent to Faculty Relations, where they were signed by both Mark Oldham and the Dean of the Faculty of Arts.

Mr. Black invites me to draw an adverse inference from the fact that neither Mr. Oldham nor Ms. Castle were called by the Employer as witnesses, on the principles set out in Barbara-Jean Steele and I.O.U.E., Local 963 and Board of School Trustees of School District No.39 (Vancouver) BCLRB Decision No. B77/2001. Similarly, Mr. Roper argues that an adverse inference should be drawn against the Union for not calling one of the grievors, Zhining Zheng, who admitted that he had been overpaid. Both he and Mr. Russell paid the monies back except that Mr. Russell subsequently recanted his action and expressly agreed to permit the Faculty Association to prosecute his grievance.

Re Steele is generally regarded as the leading case on adverse inferences deriving from the failure to call a crucial witness. In that case the grievor alleged that the Union had breached its duty to fairly represent her but, at the hearing she failed to call a number of potential witnesses who had been involved in the negotiations leading to the collective agreement then in effect. A ‘will say’ statement from the local union president was put to her on cross examination but he was not called as a witness. The Labour Relations Board held that the general rule is that
if a party fails to adduce evidence, either through documents or witnesses, that one would naturally expect to be brought before the trier of fact, an inference may be drawn that the evidence would have been injurious or, at least not supportive of that party’s case, except that it is always open to the party who fails to produce the evidence to explain the omission. It said that the arbitrator should consider such things as: (a) the context of the missing evidence, (b) the extent of the witness’s involvement, (c) the importance of the issue in which the witness was involved and (d) the state of the evidence on that issue. Generally, only the failure to call a key witness or superior evidence will provide a basis for drawing an adverse inference.

If one were to conclude that the documentary matrix as outlined above formed a crucial part of the formation of a contract that was binding on the parties, I would be inclined to conclude that this was an appropriate case for the application of the doctrine. The problem is that while documents are relevant and cogent to the circumstances under which the hireings took place, any contract made between them was necessarily defeasible because of the existence of the collective agreement. We are not concerned in this case, whether the grievors were effectively hired by the University to teach in the Department of Asian Studies, that is not in dispute. What is in dispute is whether the assignment of duties and responsibilities and the resultant pay by the University were consistent with the collective agreement. In the circumstances, I am not prepared to draw an adverse inference against either party because nothing can turn on their evidence. Their evidence is not crucial. Even if Mr. Oldham were demonstrated to have the ostensible authority to bind the University to team teach a particular course, the real issue is whether the collective agreement permits the participants to be paid at a reduced rate. As for Mr. Zheng, his oral evidence is unlikely to advance the case of the Employer over the documents that were admitted into evidence that he accepted the claim that he had been
overpaid. Nor would it contribute to an advancement of the issue of interpretation whether an intensive language course is capable of being compensated at the level that they agreed.

As we have seen, Mr. Roper argues that it was entirely proper that the grievors be given only three teaching credits for their intensive courses where they did not do the drills because that has been the invariable practice since 1980. Moreover, he says their work load was half that of someone doing both the classroom teaching and the drills. He said that some of them would not have been able to do the drills in any event, because the drills conflicted with other teaching assignments. On that reasoning, they were able to attain full-time status by slotting other classroom teaching assignments to substitute for the time that would otherwise have been spent in doing drills.

The problem with that argument is that the number of contact hours is not the prescribed basis under the collective agreement for assigning teaching credit. As I have already observed, there is no formula, although it would be more accurate to say that there is no formula that uses contact hours as the basis for compensation. Appendix C of the Agreement on the Framework for Collective Bargaining sets out the minimum salary scale for sessionals per credit. The scale is two-dimensional with the number of years in the rank on the vertical axis and the courses per term for full time on the horizontal axis. Under the Agreement on Conditions of Appointment for Sessional Lecturers, "full time" is defined faculty by faculty 'as is given by the current pattern in different types of academic activities, although normally the primary focus is teaching.' In the Faculty of Arts, a person is considered to be full time who teaches three courses per term. Therefore, using the scale under the Framework Agreement, it is a simple matter of determining the point of intersection between the designated column for full time and the number of years in
the rank to find the amount of salary to be paid per credit. One then multiplies the amount thus determined by the total number of credits assigned to the Lecturer for any particular term.

Obviously, while that has the appearance of being a comprehensive formula, in point of fact, it does not speak to the manner in which teaching credits are to be assigned. What Mr. Black says is that we do not have to concern ourselves with that issue in this case because firstly, the assignment of the drills to a Teaching Assistant could not have the effect of reducing the number of course credits and secondly, the number of credits assigned to each of the intensive courses was six and there is no basis provided by the agreement to differentiate teaching credits from the course credits. He said that in either case the decision must turn on an interpretation of the collective agreement which means that they are questions of law. On that basis, an overpayment, if there was one, would not be recoverable since it was common ground between the parties that an employer is only entitled to recover an overpayment on the authorities as a result of an error of fact.

On his part, Mr. Roper argues that all of the grievors knew or ought to have known that they were being overpaid. He said that it ought to have been obvious to them that they were being paid substantially more than they had in the past. The problem with that argument is that it also presumes that they ought to have been aware of not only what Dr. Chen told them on August 28, 2002 immediately prior to the term commencing but their entitlement under the collective agreement, all of which reflects the real issue in dispute in this case which is whether one can rely on the past practice as a definitive indicator of their entitlement, in which case the overpayment necessarily results from a mistake of fact, or whether entitlement must be determined by reference to the collective agreement, in which case the mistake, if there was one, was one of law. In those terms, the identification of the issue would dictate the result because if it
was a mistake of fact, the Employer is entitled to recover the overpayment, but if it was a mistake of law, it would not, almost without regard to the interpretation that I might adopt. In other words, if I determine that the issue can be decided only by reference to an interpretation of the collective agreement, even if I agree with the interpretation asserted by Mr. Roper that the University is entitled to reduce the credits assigned to a course, it would not be entitled to recover because it involves a question of law. In order for the Employer to recover the overpayments, I must determine that there is no real interpretive issue to be decided and that it must necessarily turn on the existence of a practice which amounts to an implicit recognition by the Faculty Association that teaching credits are different from course credits and that they are within its discretion to decide.

On that issue, it is critical to observe at the outset that except for three years, from 1980 to 2002, a period in excess of two decades, the teaching credits given to classroom lecturers in the intensive language courses used to calculate their pay was different from the academic credits assigned to the course. The reasons for the distinction were different, depending on the period, as I have already noted. In the longest period, from 1980 – 1997 the classroom lecturer was given three teaching credits for teaching four hours per week and doing other related duties. The drills were shared between another Lecturer and a Teaching Assistant. Dr. Chen did not say how many credits the drill lecturer received but it is not material, given the position taken by the Faculty Association that faculty members are entitled to team share. What is not clear is whether a sharing can occur where the assignments are not equal, as in that period. On what rational basis would one assign unequal credits? From 1997 – 1999 the classroom lecturer again received three teaching credits, although in that period two Teaching Assistants were used to do the drills. They were paid an hourly rate under the terms of the Local 2278 collective agreement. They were not
paid on the basis of assigned credits. In the period from 1999 – 2002 the classroom lecturers were given the full six credits assigned to the course because, as Dr. Chen explained, they did both the classroom lectures and the drills, and it was for that reason that Mr. Roper argued that in the next year the grievors ought to have known that they were being overpaid because they were told they were only going to get three credits in the 2002 – 2003 term because they were only going to do the classroom teaching, yet they were paid essentially the same as they had been paid in the immediately adjacent period when they did both the classroom teaching and the drills.

While Mr. Black concedes the existence of the practice, what he says about it is that it should not been seen to have any effect in law because firstly, it has not been a consistent practice throughout the subject period. In particular, he says that there has been considerable variation in who has done the drills. Of course, that ignores that in its most material aspect the practice has remained remarkably consistent throughout the entire period, which is to say that the classroom lectures and related duties have always been separately attributed with a value of three teaching credits, and that would appear to have been true even in the 1999 – 2002 period when the classroom teaching and drills were done by the same person. Secondly, Mr. Black makes the rather more cogent point that even if the practice was consistent, it could have no contractual effect because the class of persons doing classroom lecturing was not entirely covered by the collective agreement until 1999 and by that time the same person was doing both the classroom lecturing and the drills. In the twenty year period from 1974 to 1994, only persons who were full time and those having appointments of at least 50% of the duties of a full time member were covered by the agreement. In 1995, entitlement was expanded to include persons teaching less than 50% of full time but it was not until 1999 that membership became mandatory for all full time and part time Lecturers, without regard to how much they teach.
The Union also raises the issue of estoppel that under the law of restitution where an employee is demonstrated to have relied upon a payment by an employer to his or her detriment by spending the money, it constitutes a good defence to claim by the employer that the monies had been erroneously paid: *Re Maple Leaf Meats Inc. and United Food & Commercial Workers International Union, Local 617P* [1998] 77 LAC (4th) 295 (Dissanayake); *Re Cancoil Thermal Corporation and United Food and Commercial Workers Union, Local 175* [1996] 59 LAC (4th) 213 (Starkman). The problem with that argument is that it rests upon essentially the same premise that has been the focus of this case, that the monies were paid under a mistake of fact, which the Union denies. It says that if there was a mistake, it was one of law. Even if that is wrong, I accept the arguments put by Mr. Roper on this point that the mistake itself cannot amount to a representation for purposes of estoppel: *Vancouver School District No. 39 and International Union of Operating Engineers, Local 963 (Harrison Grievance)* [2000] 92 LAC (4th) 182 (Dorsey) @ para.42; *Re Corporation of City of Belleville and Canadian Union of Public Employees, Local 907* [1994] 42 LAC (4th) 224 (Allison). Nor is enough for the employee to demonstrate that the monies paid had been spent or that it resulted in emotional upset: *Re Ottawa Board of Education and Federation of Women Teachers’ Association* [1986] 25 LAC (3d) 146 (P.C. Picher). It must be shown that any commitments made by the employee in reliance on the overpayments were made irrevocably and that they would not have been made but for the overpayment. That was not done in this case.

Mr. Roper takes the position that there can be no real issue of interpretation over whether the credits assigned to a course may be discounted because that has been the consistent practice of the parties, a proposition with which I have already agreed. For the University, it is a simple matter because that is what it has always done, without any objection from the Faculty.
Association. Indeed, it is precisely for that reason that it says that the mistake was one of fact. Mr. Roper argues that there can be no issue of interpretation because the Faculty Association must be seen to have accepted that teaching credits are not the same as course credits. Therefore, on that view, when the University assigned three teaching credits to the intensive language courses but paid the classroom lecturers on the basis of six credits, it did not result from an interpretive decision because that was already settled. It was a mistake of fact made by the clerical staff.

In my view, it is the simplicity that complicates the resolution of the issue. Both parties have a perspective that is diametrically opposed to that of the other. Yet it cannot be avoided that while the University responded appropriately to the issue of practice, it took no position on the proposition put by the Union that the practice cannot have any contractual significance because it was not until 1999 that all Lecturers came under the influence of the collective agreement. In other words, the Union made the point that the practice could not constitute acquiescence because it was in no position to mount a challenge throughout most of the period in question. Quite apart from that, it should also be pointed out that the evidence of the practice was limited to the manner in which teaching credits have been assigned to Lecturers in the Department of Asian Studies. There was no evidence that the University has a practice in other faculties of assigning fewer teaching credits than are prescribed for any particular course. The application of the component agreement for Sessional Lecturers and Part-time Appointees is not limited to one department. Therefore, it is difficult to see how it could be taken to be an interpretive aide on that issue with general application throughout the University. It is true that it is arguable that the practice could be binding only on the Department of Asian Studies as an estoppel against the Union but that argument runs up against essentially the same issue discussed above that it could
not be seen to have been acquiesced in by the Union because it did not have full representation rights until 1999.

In the circumstances, I am compelled to conclude that the issue has not been decided between the parties by practice. Nor should this decision be taken to be a definitive interpretation of the collective agreement on the issue whether the University is entitled to assign teaching credits that are different from the academic credits assigned to a course notwithstanding my discussion on the issue of principle earlier in this award. It is sufficient that I conclude that the mistake made was one of law which does not provide a basis on which the University may recover any alleged overpayments: *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.* [1976] 2 SCR 147. On that narrow basis, I hold that the grievance succeeds. I reserve jurisdiction to deal with any issue relating to the implementation of this award.

Dated this 13th day of August, 2003 at Vancouver, British Columbia.

"DALTON L. LARSON"

Dalton L. Larson
Arbitrator