

BOARD FILE NO: GE-07658

ALBERTA LABOUR RELATIONS BOARD

DESIGNATION APPLICATION BROUGHT BY NORTHERN LAKES COLLEGE
FACULTY ASSOCIATION AFFECTING NORTHERN LAKES COLLEGE

BETWEEN

NORTHERN LAKES COLLEGE FACULTY ASSOCIATION

(Applicant)

- and -

NORTHERN LAKES COLLEGE

(Respondent)

**BRIEF OF THE INTERVENOR, ALBERTA COLLEGES & INSTITUTES
FACULTIES ASSOCIATION**

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List of Authorities

I. Summary

1. The Board has invited intervenor submissions regarding an application made pursuant to s. 58.6 of the *Labour Relations Code*, RSA 2000, c L-1. It is pursuant to s. 58.6 that the Board can determine whether an employee of a post-secondary institution is an academic staff member, and thus a member of the relevant academic staff association.

2. These intervenor submission are on behalf of the Alberta Colleges & Institutes Faculties Association (“ACIFA”). Below, ACIFA submits,

- the Board has broad powers to determine for itself whether a position is an academic staff position;
- only the results of fulsome consultation under the *Post-secondary Learning Act* are relevant, although they are not determinative;
- an academic staff bargaining unit includes those who perform management and supervisory functions; and
- the term “academic” is broad and thus the term “academic staff” includes those whose main function engages a post-secondary institution’s pursuit and dissemination of knowledge.

II. About ACIFA

3. ACIFA is made up of the following fifteen faculty associations:

- Alberta College of Art & Design Faculty Association
- Bow Valley College Faculty Association
- Grande Prairie Regional College Academic Staff Association
- Grant MacEwan University Faculty Association
- Keyano College Faculty Association
- Lakeland College Faculty Association
- Lethbridge College Faculty Association
- Medicine Hat College Faculty Association
- NAIT Academic Staff Association
- NorQuest College Faculty Association

- Northern Lakes College Faculty Association
- Olds College Faculty Association
- Portage College Faculty Association
- Red Deer College Faculty Association
- SAIT Academic Faculty Association

4. Among other things, ACIFA assists its members with contract negotiation and dispute resolution, advocates for post-secondary education, and provides its members with a forum for exchanging information. ACIFA also offers its members training for grievance officers and negotiators and hosts a province-wide Negotiations Advisory Committee where chief negotiators convene to understand trends in post-secondary education labour relations and to share issues and strategies.

5. In terms of political activity, among other things, ACIFA,

- participates regularly in government's consultative processes on post-secondary education and makes submissions as new initiatives arise,
- attends government's annual budget consultations and makes recommendations on post-secondary education funding, and
- meets regularly with the Assistant Deputy Minister and periodically with the Deputy Minister and Minister.

III. The Statutory Provisions at Issue

6. While the application before the Board concerns the interpretation and application of s. 58.6 of the *Labour Relations Code*, the interpretation of s. 58.6 is informed by s. 60(2) of the *Post-secondary Learning Act*, SA 2003, c P-19.5, and ss. 58.1 and 58.3 the *Labour Relations Code*, reproduced below.

Post-secondary Learning Act, ss. 60(2)

General powers and duties

60(2) Subject to section 58.6 of the *Labour Relations Code*, the board of a public post-secondary institution other than Banff Centre may, after consulting with the academic staff association of

the institution and with any other bargaining agent representing employees of the institution affected by the designation or change in designation, do one or more of the following:

- (a) designate categories of employees as academic staff members of the public post-secondary institution;
- (b) designate individual employees as academic staff members of the public post-secondary institution;
- (c) change a designation made under clause (a) or (b) or under section 5(2) or 42(2).

Labour Relations Code, ss. 58.1(4), 58.3, 58.6

Interpretation

58.1(4) For the purposes of this Division, an employee referred to in sections 58.3(1)(b), 58.4(1)(b) and 58.5(1)(b) is an employee notwithstanding that the person

- (a) performs managerial functions,
- (b) is a member of the medical, dental, architectural, engineering or legal profession qualified to practise under the laws of Alberta and is employed in the person's professional capacity, or
- (c) is a nurse practitioner employed in the professional capacity as a nurse practitioner in accordance with the Public Health Act and the regulations under that Act.

Boards, academic staff and bargaining agents

58.3(1) For the purposes of this Act,

- (a) the board of a public post-secondary institution is an employer while it is acting as the employer of its academic staff,
- (b) the academic staff members of a public post-secondary institution are employees of the board of the public post-secondary institution, and
- (c) the academic staff association of a public post-secondary institution is, subject to the future effects of the application of Divisions 4 to 9 under section 58.2(2), the bargaining agent for the academic staff of the public post-secondary institution and has exclusive authority to bargain collectively on behalf of the academic staff and to bind them by a collective agreement.

(2) The academic staff association of a public post-secondary institution is deemed to be a trade union for the purposes of acting as bargaining agent for the public post-secondary institution's academic staff members.

Application respecting academic staff designations

58.6(1) A person or bargaining agent affected by a designation or change in designation made under section 5(2), 42(2) or 60(2) of the *Post-secondary Learning Act*, or a failure to designate, may apply to the Labour Relations Board to decide whether a category of employees or individual employees are academic staff members.

(2) On considering an application under subsection (1), the Labour Relations Board may decide whether a category of employees or individual employees are academic staff members, and in deciding may take into account any of the following:

- (a) the history of, and the employer's policies concerning, designations within the public post-secondary institution;
- (b) the results of any consultation referred to in section 5(2), 42(2) or 60(2) of the *Post-secondary Learning Act*;
- (c) the potential for significant conflict with the managerial responsibilities of the category of employees or individual employees, in the context of a collegial governance structure;
- (d) any arrangements made for any transition in status of categories of employees or individual employees;
- (e) the submissions and interests of any other bargaining agent representing employees of the public post-secondary institution affected by the designation;
- (f) any other factor the Board considers relevant.

(3) A decision of the Board under subsection (2) is final and binding.

(4) This section applies whether a designation or change in designation or a failure to designate by the board of governors occurred before or after the coming into force of this section.

IV. Analysis

7. The application before the Board concerns whether Chairs at Northern Lakes College fall within the academic staff association bargaining unit. In this context, ACIFA submits,

- the Board has broad powers to determine for itself whether a position is an academic staff position;

- only the results of fulsome consultation under the *Post-secondary Learning Act* are relevant, although they are not determinative;
- an academic staff bargaining unit properly includes those who perform management and supervisory functions; and
- the term “academic” is broad and thus the term “academic staff” includes those whose main function engages a post-secondary institution’s pursuit and dissemination of knowledge.

A. The Board’s Broad Power to Designate

8. ACIFA submits that, in putting s. 58.6 into the *Code*, the Legislature intended the Board to determine for itself whether a position is an academic staff position; it is not to defer to a board of governor’s designation under the *Post-Secondary Learning Act*.

9. The modern approach to statutory interpretation entails reading a statute’s words “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Lizotte v Aviva Insurance Co. of Canada*, 2016 SCC 52 at para 61 (TAB 1), citing E.A. Driedger, *Construction of Statutes* (2nd ed. 1983 at p. 87).

10. Section 58.6(1) provides that, upon a party’s application, the Board is “to decide whether a category of employees or individual employees are academic staff members” (emphasis added). This language is repeated in s. 58.6(2) which provides that the Board “may decide whether a category of employees or individual employees are academic staff members, and in deciding may take into account” the listed factors (emphasis added). Thus, the words of the statute, interpreted in their grammatical and ordinary sense, provide that it is the Board that is to determine whether certain employees are academic staff, not the affected board of governors or academic staff association.

11. The words of s. 58.6(1), interpreted in their entire context and harmoniously with the scheme of the Act, the object of the Act, and the Legislature’s intention, support this interpretation. Prior to the introduction of s. 58.6(1) into the *Code*, boards of governors had the power to unilaterally decide whether a position was an academic staff position, provided they

first consulted with the relevant faculty association. In inserting s. 58.6(1) into the *Code*, it can be presumed that the Legislature intended to change the status quo. That is, the Legislature intended to no longer allow boards of governors to make the final decision as to whether a position is academic.

12. Interpreting s. 58.6(1) as giving the Board the sole power to make binding academic staff determination decisions is also consistent with the scheme and object of the *Code*. The *Code*'s preamble provides that the purposes of the *Code* include to provide clearly established and understood statutory rights and responsibilities, and to encourage harmonious and mutually beneficial relations between employers and employees through fair and equitable resolution of matters arising with respect to terms and conditions of employment. Having an independent, neutral tribunal determine whether an employee is a member of the academic staff association bargaining unit furthers these goals.

13. Finally, interpreting s. 58.6(1) as giving the Board the power to determine, in its sole discretion, whether a position is academic is consistent with the scheme of the *Code* as a whole. The *Code* gives the Board broad powers, including the power to decide whether an employee is included in a bargaining unit (s. 12(3)(o)). This is the same language as is used in s. 58.6(1), indicating that the Legislature intended the Board to have the same degree of latitude when exercising its powers under s. 58.6(1) as it does when making other determination decisions.

14. For these reasons, ACIFA submits the Board has the power, in its sole discretion, to determine whether a particular position falls within an academic staff association bargaining unit; it is not to defer to a board of governors when making such a decision.

B. Only the Results of Fulsome Consultation are Relevant

15. As was set out above, the *Post-Secondary Learning Act* gives boards of governors the power to designate or de-designate a position as academic staff, but only after consulting with the affected academic staff association (s.60(2)). Section 58.6(2)(6) of the *Code* provides that, when determining whether a position is an academic staff position, the Board *may* consider *the results* of any consultation between a board of governors and an academic staff association. It

does not say that the Board of Governor's wishes with respect to those consultations take precedence or are relevant to the Board's determination, or that an agreement between a board of governors and faculty association is binding on the Board. Rather, in referencing only "the results" of any consultation, the Legislature appears to have intended that the results of such a consultation are relevant, but not determinative, to the Board's determination decision. This direction is of assistance when a board of governors and a faculty association have agreed on an academic staff designation and another union wants to challenge that designation, or when an individual is challenging an agreement between a board of governors and a faculty association regarding the characterization of his or her position.

16. While the results of consultation are relevant, ACIFA submits that they are only relevant if the consultation was fulsome, and ought to be given no weight if they were not, and little weight if the consultation occurred prior to the Legislature giving the Board the power to determine whether a position is an academic staff position. With respect to the fulsome nature of the duty to consult, the leading case is *Lakeland College Faculty Assn. v. Lakeland College*, 1998 ABCA 221 (TAB 2). In that case, the Court quashed the Board of Governors of Lakeland College's decision to change the appellant's designation from academic to non-academic staff because the Board of Governors had failed to adequately consult the Association prior to making the re-designation (para. 71). In this context, the Board made the following comments regarding the nature of the duty to consult under the *Post-secondary Learning Act*:

The words "consult" and "consultation" have received judicial consideration in a number of contexts, in legislation and in contracts. The following principles can be gleaned from them: consultation involves,

1. a fact-specific analysis to determine whether, under the circumstances, the measures taken do in fact constitute consultation: *Fletcher v. Minister of Town & Country Planning*, [1947] 2 All E.R. 496 (Eng. K.B.) at 500; *R. v. Sampson* (1995), 131 D.L.R. (4th) 192 (B.C. C.A.) at 218;
2. a duty upon the decision maker to fully inform the other side of its own position, as well as to fully inform itself of the position of the other: *R. v. Jack* (1995), 131 D.L.R. (4th) 165 (B.C. C.A.) at 188; *TransCanada Pipelines Ltd. v. Beardmore (Township)* (1997), 106 O.A.C. 30 (Ont. Div. Ct.), at 62 — 64 (Ont. Gen. Div.)

3. an opportunity for both sides to be heard and to state the factors they feel should guide the decision: *Rollo v. Minister of Town & Country Planning*, [1948] 1 All E.R. 13 (Eng. C.A.) at 17; *Johnson v. Glen* (1879), 26 Gr. 162 (Ont. Ch.) at 186

In summary, a consultation should involve a bilateral interaction by parties informed of each other's position where each has the opportunity to give and receive information. (paras 37-38)

The Court found that the Board of Governors failed to adequately consult for the following reasons:

The failure of the Board to consider the collective agreement and the impact of the redesignation on Ms. Kaai's collective bargaining rights; the failure of the Board to provide any reason for the exercise of its power under s. 10(2); the failure to provide any information for the basis for the redesignation; the narrowness of the criteria used to determine Ms. Kaai's status; and the one-sided nature of the hearing, all lead to the conclusion that the Board did not meet the standard required for a proper consultation under s. 10(2) of the Colleges Act. In the result, there was no consultation as required by the Act. (para 71)

Thus, consultation under the *Post-secondary Learning Act* requires a board of governors to fully inform the affected faculty association of its position and to fully inform itself as to the faculty association's position; to account for the impact on individuals' collective bargaining rights; to allow the faculty association to be heard and to state the factors it feels should guide the decision; and to provide reasons for its decision. ACIFA submits that only when a board of governors engaged in such a fulsome consultation can there be a "result of consultation" for the purpose of s. 58.6(2)(b), of the *Code*. Consultation which was not fulsome does not conclude in a "result" and thus ought to be given no weight under s. 58.6(2)(b).

17. Moreover, consultation under the *Post-secondary Learning Act* will be qualitatively different following the amendments to the *Code*, and thus ACIFA submits that the results of consultations prior to those amendments ought to be given little weight. Prior to those amendments, faculty associations had little recourse when they disagreed with a board of governor's designation decision; provided a board of governors engaged in fulsome consultation with the faculty association and even if the faculty association disagreed vehemently, the board of governors could unilaterally make a designation decision. This reality influenced the nature of

such consultations. The changes to the *Code* will encourage boards of governors to seek agreement with faculty associations rather than to simply consult them and act unilaterally. That is, because faculty associations can now bring a determination application to the Labour Relations Board, boards of governors will be motivated to seek consensus with faculty associations. Because the nature of consultations following the *Code* amendments will be qualitatively different than pre-amendment consultations, ACIFA submits that the Board should give little weight to the results of consultations that occurred before the *Code* amendments.

18. In sum, ACIFA submits that only the results of a fulsome consultation under the *Post-secondary Learning Act* are relevant when the Board is determining whether a position is an academic staff position. Because fulsome consultation is more likely now given the amendments to the *Code*, ACIFA submits that the results of consultations prior to that date should be given little weight.

C. Those with Management Duties are included in Academic Staff Associations

19. The *Code* directs that the Board is to treat post-secondary academic management and supervisory employees differently when making determination decisions than it does similar employees in other workplaces. In this way, the Legislature has taken into consideration the unique governance structures of post-secondary institutions.

20. This Board recognized that unique structure in *University of Calgary (Re)*, [2008] ALRBD No 30 (Wallace) (**TAB 3**) when determining who employed the University of Calgary's "trust" employees. In that context, the Board observed that, "much of the managerial oversight of the faculty rests in the hands of faculty and department committees dominated by academic staff and operating to a high degree by consensus" and that "Collegial administration and academic independence combine to minimize the incidence of normal managerial control that is familiar to most labour relations practitioners" (para 17). The Board went on to note the other instruments of collegial management set out in the *Post-Secondary Learning Act*: advisory deans' councils (s. 27); a council on student affairs that may be delegated initial jurisdiction over student affairs (s. 32); and students' and graduate students' associations responsible for the administration of student affairs under the supervision of the Board of Governors: ss. 93-97 (para 25). The Board

concluded that, because of this collegial management structure, “Authority over key aspects of the relationship between University and academic staff is difficult to locate with precision. Managerial power is diffuse” (para 48).

21. In recognition of this unique governance structure, s. 58.1(4) of the *Code* provides that an employee of a post-secondary institution is included in a bargaining unit of academic staff, notwithstanding that he or she performs managerial functions. But for this section, s. 1(1)(l)(i) would apply which excludes from the definition of “employee” “a person who in the opinion of the Board performs managerial functions.” Thus, a person who would otherwise have been included in the academic staff bargaining unit is not excluded merely because he or she also performs managerial functions.

22. Section 58.6(2)(c) reinforces the Legislature’s intent that academics with managerial or supervisory responsibilities be included in an academic staff association. It provides that, in making a determination decision, the Board may consider “the potential for *significant* conflict with managerial responsibilities...in the context of a collegial governance structure” (emphasis added). Thus, the potential for a conflict between a person’s managerial responsibilities and his or her membership in the academic staff association is an insufficient basis on which to exclude that person from the academic staff association; only a *significant* conflict may result in exclusion.

23. If the Legislature intended positions such as that of department chairs to be excluded from academic staff associations, it could have done so as the Ontario Legislature did in the *Colleges Collective Bargaining Act*, 2008, SO 2008, c 15. Section 1 of Schedule 1 of that Act creates the presumption that Chairs and others are excluded from the bargaining unit:

1. The full time academic staff bargaining unit includes all persons employed by an employer as teachers, counsellors or librarians, but does not include,

(a) chairs, department heads or directors;

(b) persons above the rank of chair, department head or director;

(c) other persons employed in a managerial or confidential capacity within the meaning of section 5 of this Schedule;

(d) teachers, counsellors and librarians who are included in the part time academic staff bargaining unit;

(e) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity; or

(f) a person employed outside Ontario.

(TAB 4)

24. Presumably, in declining to include such a provision in the *Code*, and instead specifying that a member of the academic staff is not excluded from the bargaining unit because he or she performs managerial functions, the Alberta Legislature intended a different result. In this way, the Legislature has implicitly recognized the unique nature of post-secondary institutions. Indeed, faculty members are often, and are often expected, to be involved in the governance and management of their institution.

25. Faculty members who move into front line supervisory positions ought to stay within the academic staff association, not just because of the Legislature's intent, but also because after serving in a supervisory position for a defined period they often return to the teaching group. Indeed, front line supervisors remain academics first, as opposed to managers, and ask different questions than managers such as "how can we optimize the development of intellectual capacity," in contrast to "how can we minimize cost."

26. On this basis, ACIFA submits that the only academic managerial personnel who may be excluded from an academic staff bargaining unit are those with ultimate hiring, firing and disciplinary authority. It is only such individuals who may have significant conflicts between their managerial responsibilities and their memberships in a faculty association.

D. "Academic" is a Broad Term

27. Neither the *Code* nor the *PSLA* define "academic" or "academic staff." Dictionaries define "academic" as follows when describing an individual or a kind of work:

academic, adj. 1a scholarly; to do with learning ... n. a teacher or scholar in a university or institute of higher education.

Oxford English Reference Dictionary

(TAB 5)

academic, adj. 1. Of, relating to, or involving a school or a field of study ...

Black's Law Dictionary, 10th ed.

(TAB 6)

academic: adj. 1. Of, relating to, or characteristic of a school, esp. one of higher learning.

2a Relating to studies that are liberal or classic. B. Relating to scholarly performance ...

n.1. A member of an institution of higher learning 2. One who has an academic viewpoint or a scholarly background.

Canadian Dictionary

(TAB 7)

Based on this alone, an academic position relates to the pursuit and dissemination of knowledge at a post-secondary institution.

28. An assessment as to whether a position is academic also entails considering the post-secondary context. As the Court held in *Lakeland College Faculty Assn v Lakeland College* (TAB 2), the decision as to whether an individual or position is academic should be based on a context-specific analysis and objective criteria such as:

- the institution's criteria, standards, job description, or expectations of an academic or non-academic;
- comparisons with other academic or non-academic positions;
- characteristics of the position, or of the individual's functioning in the position.

(para 50)

29. ACIFA submits that, while the Legislature could have restricted the definition of "academic staff" it chose not to and thus the broad definition applies. Labour boards in other jurisdictions have likewise applied a broad definition of "academic" when making determination decisions. For instance, in *Saskatchewan Polytechnic and Saskatchewan Institute of Applied Science and Technology Faculty Association* (2015), 258 CLRBR (2d) 246 (Schiefner) (TAB 8), the Saskatchewan Board determined that a new Instructor-Assistive Technology position fell

within the academic staff association's bargaining unit. Individuals in the disputed position were "responsible for the prescription and instruction of assistive technologies and alternate media that students with disabilities require to support their academic activities." The Board noted that the academic unit includes individuals engaged in the art and science of teaching, education and instructional methods; the supervision of instructors, quality assurance and auditing; the development of curriculum, courses and programs; and supporting students and removing barriers to their educational outcomes (para 29-30). With respect to the disputed position, the Board found that it was in the field of pedagogy; the target audience was academic staff, including educational psychologists, councilors and instructors; and the individual in the position would most likely find their peers and colleagues in the faculty association (para 31). The Board thus concluded that the position of Instructor, Assistive Technologies, fell within the faculty association's bargaining unit.

30. The Nova Scotia Board took a similar approach in *Acadia University and AUFA*, Re, 2016 NSLB 199 (Richardson) (TAB 9). In that case, the disputed position was that of Art Gallery Director. The employee in the position worked at the University's Art Gallery and her major activities were:

- plan exhibits and events program (30%);
- coordinate exhibition process (30%);
- develop the university's collection of art (15%);
- facilitate understanding and appreciation of art (15%); and
- maintain relations with gallery audiences (10%).

(para 6)

The individual in the position also worked with professors so that the University's art collection supplemented and complemented the curriculum the professors were teaching. In finding that that Art Gallery Director position was in the faculty association bargaining unit, the Board found,

Notwithstanding the differences in their working conditions and core duties, the full- and part-time occupations falling within the current AUFA bargaining unit are part of a larger "operation"-that being the production and dissemination of knowledge. A university is in some sense a factory of knowledge and information. Its librarians and archivists collect, preserve and organize primary and secondary information; professors mine and process

that information both to generate new information and to train students on how to use it; and instructors assist in that training. All are part of the preservation, creation and passing on of knowledge. One of the core purposes of that enterprise is the training of students to use that information and knowledge in their lives. In the Board's opinion it is their role in that operation that makes it possible for the various occupations to fit reasonably comfortably (if not perfectly) within the AUFA bargaining unit. (para 93)

Thus, because of the Art Gallery Director's role in the University's collection and dissemination of knowledge, the Board included the position in the faculty association's bargaining unit.

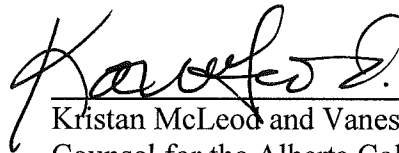
31. For these reasons, ACIFA submits that the term "academic staff" includes a broad range of positions and is not restricted to only those individuals teaching at post-secondary institutions. Rather, it includes all those individuals whose main function engages the post-secondary institution's pursuit and dissemination of knowledge.

V. Conclusion

32. In sum, ACIFA submits that, in inserting s. 58.1 into the *Code*, the Legislature intended to give the Board the power, in its sole discretion, to determine whether a position falls within the academic staff bargaining unit. In doing so, the Board may consider the results of a true, fulsome consultation between a board of governors and an academic staff association, but ACIFA submits that the results of such consultations pre-dating the *Code* amendments are to be given little weight. Moreover, in light of the unique nature of post-secondary institutions, the Legislature has intended that the academic staff bargaining units include those exercising managerial and supervisory functions, and that the term "academic staff" be broadly defined.

All of which is respectfully submitted this 10th day of April, 2018.

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List of Authorities

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