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Filed by Email

November 27, 2020

Tannis Brown
Director of Settlement
Alberta Labour Relations Board
501, 10808 – 99 Avenue
Edmonton, AB T5K 0G5

Dear Ms. Brown:

RE: An application brought by MacEwan Staff Association affecting The Faculty Association of Grant MacEwan University and The Board of Governors of Grant MacEwan University
Board File No. GE-08377

RE: An application brought by MacEwan Staff Association affecting The Board of Governors of Grant MacEwan University and The Faculty Association of Grant MacEwan University
Board File No. GE-08378

Please accept this reply made on behalf of my client, MacEwan Staff Association ("MSA"), to the summary dismissal applications made in these two files by The Faculty Association of Grant MacEwan University ("GMUFA"). I want to underline that this reply is only to the summary dismissal applications as directed by the ALRB, and is not a response to the two responses to part of the merits of each application filed by the University on November 20, 2020.

1. On October 22, 2020 MSA filed an application regarding the Advisors, Board File No. GE-08377 (the "Advisors Application") and an application regarding those employees not included in any bargaining unit as well as those employees in the GMUFA bargaining unit who no longer meet the definition of academic staff, Board File No. GE-08378 (the "Remaining Employees Application"). Both applications were in regard to employees of the Board of Governors of Grant MacEwan University (the "University").

2. While the two applications were made separately and have separate focuses, the GMUFA's application for summary dismissal was made in regard to them jointly. As

such, we will reply to the applications jointly but will also address differences between them in these submissions.

The approach to a summary dismissal application

3. The ALRB has a long-standing approach to summary dismissal applications which was set out in *Re Good Samaritan Society [2009] ALRBD No. 1* where it said:

> **50** AUPE and the five named employers oppose the applications and also seek to have the Board exercise its discretion under section 16(4)(e) to summarily dismiss them. This provision states:
>
> > 16(4) *When a complaint is made under subsection (1), a reference is made under subsection (3) or any other application to the Board is made under the Act, the Board may do one or more of the following ...*
> >
> > (e) *where the Board is of the opinion that the matter is without merit, or is frivolous, trivial or vexatious, reject the matter summarily.*
>
> In *Carpenters, Local 2103 v. Garry Halicki* the Board stated, in part, at para. 5:
>
> > ... The test used by the Board in deciding whether to summarily dismiss a matter pursuant to section 16(4)(e) **has always been "is there a reasonable prospect of success" ... This test assumes the [applicant's] facts to be true and then asks whether there is a chance of success according to law.**
>
> **51** Although the Board, in deciding whether to summarily dismiss an application, assumes the applicant's facts to be true, it should be made clear that what is being assumed as true are the factual assertions contained in the application. This does not extend to accepting as true those assertions made at a hearing by the applicant or its counsel which purport to represent what is contained in the application or, of course, assertions of factual matters not contained in the application. Nor does the assumption of truth extend to those matters, even though contained in the application, that amount to nothing more than the applicant's interpretation of legislation, Board documents or decisions, or court decisions. (emphasis added)

4. The GMUFA has filed their applications for summary dismissal before any evidence has been called at a hearing. As such, it is not appropriate for the ALRB to accept any

statements of fact or to review any documents that the GMUFA has included in its submission in this matter.

5. The facts set out in the two applications of MSA are to be presumed to be true and are the only facts that can be relied upon at this stage.

Modern approach to statutory interpretation

6. MSA agrees that the modern approach to statutory interpretation must be used by the ALRB in this, and all cases, where the relevant statutory provisions are being interpreted and applied by the ALRB.

7. MSA submits that the ALRB's jurisprudence shows that the modern approach to statutory interpretation has been well entrenched and should continue to be applied.

A contextual analysis of the law and facts regarding what entity is a bargaining agent as contemplated in section 58.6(1) of the Code

8. The GMUFA's applications are based primarily upon its submission that MSA is not a "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" (see section 58.6(1) of the Code) and as such MSA cannot bring an application under section 58.6 of the *Code*.

9. MSA submits that the suggestion that it is not a bargaining agent as contemplated by section 58.6(1) of the Code flies in the face of the bargaining unit structure at the University and the related statutory provisions. That is a fundamental element of the contextual approach to interpretation that is required.

10. There are four possible bargaining agents in respect of four possible bargaining units at the University:

    - MSA is the certified bargaining agent under the *Public Service Employee Relations Act* ("PSERA") for "all non-academic employees" of the University.

    - GMUFA is the bargaining agent for all of the academic staff (section 58.3(1)(c) of the *Code*).

    - The GSA is the bargaining agent for the academically employed graduate students at the University (section 58.4(1)(c) of the *Code*).

    - The PDFA is the bargaining agent for the postdoctoral fellows of the University ((section 58.5(1)(c) of the *Code*).

However, the University has no graduate students or post-doctoral fellows, so in fact it only has two bargaining units – the MSA and the GMUFA units - at this time. The two actual bargaining units result in wall-to-wall coverage of the employees of the University. By law, the only employees who are not included in either one of the bargaining units are those excluded from the MSA bargaining unit by sections 12, 13 and 14 of PSERA and those excluded from the GMUFA bargaining unit by section 1(1)(l) of the Code as that section is modified by section 58.1(4) of the Code. In this reply these employees excluded by the operation of these sections will be generally referred to as the "employees excluded by law".

11. Over the last many years, MSA has made considerable efforts to protect the content of its bargaining unit and to ensure that the University has not excluded any employees except the employees excluded by law. The facts set out in the applications show that MSA has not abandoned any rights to represent all the employees who should be included in its certified bargaining unit.

12. As set out in the applications, MSA has worked hard to consult with and work with the University, to locate the employees who the University has not included in either of the two bargaining units, to request information about employees from the University, and to understand the job functions of such employees so that each situation can be assessed as against the legal exclusions to the MSA bargaining unit. All or most of those employees have been, in MSA's view, unjustly prevented from being included in the MSA bargaining unit and from having the protection of union representation by the University's categorization of them as "other", "out of scope", "dependent contractors" and "managerial".

13. This is not a case of a non-union group of employees who did not fit within one of the bargaining units already existing at an employer, such as was the case in the *Re Canadian Union of Public Employees Local 2157 [2018] ALRBD No. 40 (the "Keyano College decision")*. By virtue of the descriptions of the bargaining units at the University, all employees of the University who are not academic staff, excluded by law, fall within the MSA bargaining unit. MSA holds a bargaining unit that is tag-end in nature, as that term is used in relation to labour relations certifications. The tag-end nature of the MSA bargaining unit further supports the wall-to-wall nature of the bargaining unit structure at the University.

14. For that part of the application regarding those employees who are currently designated as academic staff but who no longer meet the definition of academic staff in the Remaining Employees Application GE-08378, MSA takes the position that given the length of time it has spent trying to resolve the content of its bargaining unit and given the change in the definition of academic staff passed by the University, it is appropriate that the Board also consider the employee status and the appropriate designation of

any employees who no longer fit within the academic bargaining unit at the same time as other employees left out of the bargaining units are considered.

15. In the case of the Advisors, Board File No. GE-08377, MSA's application states that there is actually only one set of prime functions and responsibilities that comprise the Advisor job, regardless of the number of different job titles. In fact, the MSA has collectively bargained on behalf of University Advisors for many years. The University recently decided to create a single job called Academic Advisor which would replace all the existing Advisor jobs. These are facts are set out in more detail in the applications and must be presumed to be true for the summary dismissal application.

16. For the Advisors, in addition to the submission that the Advising role is not an academic staff job, MSA submits that jobs with the same job functions and responsibilities are properly placed in the same bargaining unit. This concept is the core of the principle of community of interest that is applied by the ALRB in every application for certification and determination. There is simply no labour relations sense in having employees who perform the same prime functions in multiple bargaining units where they enjoy different terms and conditions of employment under different collective agreements. These principles are supported by all of the Board's jurisprudence around bargaining unit structure.

17. Another contextual factor to bear in mind is the impact of section 11(2) of PSERA. There is a strong statutory presumption of a single bargaining unit of the employees of the University who may select their bargaining agent under PSERA. Of course, the statutorily created bargaining units for the GMUFA, and possible future PDFA and the GSA bargaining units override this presumption in regard to the particular groups of employees statutorily placed in those bargaining units. Even still, this statutory presumption of a single PSERA bargaining unit underlines the wall-to-wall nature of the bargaining unit structure at the University. This is reflected in the description of the MSA bargaining unit as the flipside of the bargaining unit of the GMUFA. That is, MSA represents all non-academic employees and GMUFA represents the academic staff with both subject to the possible future small carve outs of specific employees for the PDFA and the GSA bargaining units.

18. As such, MSA has a real and present and ongoing legal and practical interest in the decisions of the University and the ALRB regarding which employees are in the GMUFA bargaining unit and which employees are out of the GMUFA bargaining unit. As such, MSA is a bargaining agent contemplated by section 58.6(1) of the Code.

19. Practically, the decision of the University to continue to designate as academic staff some of the employees who are Advisors and to continue to designate as academic staff those employees who no longer meet the definition of academic staff means that those two groups of employees have been improperly kept out of the MSA bargaining unit. Further, for the Advisors, the principles of community of interest and labour relations

good sense also demand that those employees with the same core functions belong in the same bargaining unit.

20. Legally, there is no doubt that the decision of the Legislature to articulate the rights and obligations of MSA, GMUFA, the University, any future PDFA and GSA, between PSERA, the Code and the *Post-secondary Learning Act* (the "PSLA") has added a degree of complexity to these applications.

21. However, the actual legal and factual issues raised in regard to the bargaining unit issues in the applications are simple and run of the mill labour board fodder. MSA is seeking to clarify the content of its bargaining unit given that several University employees have not been included in any bargaining unit, given that there are jobs which are the same in more than one bargaining unit and given that the definition of academic staff has been changed by the University. The ALRB has the jurisdiction to determine which employees are in a bargaining unit. Any concerns about the ALRB's ability to determine the content of bargaining units for the PPSIs in light of the designation power of the University under the PSLA have been addressed by section 58.6 of the Code.

22. A contextual review of the facts and the law must inevitably lead to the conclusion that, in a situation of the wall-to-wall bargaining unit structure at the University, MSA is a bargaining agent which has the ability to pursue these applications. Furthermore, given that this is a summary dismissal application, all the ALRB needs to find at this stage is that there is a reasonable prospect of success of MSA on the question of whether it is a bargaining agent as contemplated in section 58.6(1) of the Code and there certainly is one.

23. It is important to also make the distinction that the summary dismissal application is not made in respect of the merits of the two applications, but rather summary dismissal is made only in regard to the initial ability of MSA to bring those parts of the applications made under section 58.6(1).

The GMUFA's position logically leads to undue and inappropriate limits on which entities can make an application under section 58.6(1)

24. GMUFA's submission is, in essence, that the term bargaining agent in section 58.6 (1) of the *Labour Relations Code* (the "Code") does not include the bargaining agent representing a bargaining unit comprised of "all non-academic staff" of the public post-secondary institution ("PPSI") in question.

25. The GMUFA takes the position that since MSA has not yet practically represented those particular individual employees who the University has designated as academic staff, it cannot apply under s. 58.6 - not even in conjunction with applications under PSERA and the Code for determination of the content of its bargaining unit.

26. This submission unduly and inappropriate limits the right to apply to the ALRB under section 58.6 of the Code to faculty associations given that the vast majority of the employees currently included in faculty association bargaining units in Alberta were designated as such prior to the enactment of section 56.8, and as such were never included in another bargaining unit.

27. Further, the GMUFA approach to the interpretation of section 58.6 focuses on the wrong question. It proposes that the Board ask merely which union has already held bargaining rights for the specific individual employees in issue as opposed to which bargaining agent's rights are impacted by the designation decision.

28. If the Legislature intended to limit the right to apply under section 58.6 to faculty associations only, it could easily have said so. MSA is a bargaining agent as defined in PSERA (section 1(c)) and in the Code (section 1(1)(b)), and it is affected by the designation.

29. We need to be mindful of the requirement of section 10 of the *Interpretation Act* and give a large and liberal interpretation to the Code, not an overly restrictive one.

30. The ALRB regularly engages in the reconciliation of existing bargaining unit structures at a single employer. In the University's case, there are two existing bargaining units (and a possibility of four bargaining units in the future) and as such there is every reason to expect that over time the ALRB will be called upon to address the intersection of these bargaining units and to specifically determine where employees fit over time.

31. There is no authority presented, nor does the plain language, modern approach to statutory interpretation, as outlined above, support this restricted approach to section 58.6(1) advocated by the GMUFA.

32. There can be no doubt that MSA's bargaining unit is directly affected by the content of the GMUFA's bargaining unit. Those employees who are designated as academic staff are not non-academic staff and those employees who are no longer academic staff will automatically fall within the MSA non-academic staff bargaining unit (except for those few employees who are excluded by law or who might in future belong in a bargaining unit represented by the PDFA or GSA).

33. It makes no sense to interpret section 58.6(1) as limited to only allow the GMUFA to apply under s. 58.6(1) in regard to the University when any application of the GMUFA will almost always directly affect the MSA bargaining unit but not allow the reciprocal application by MSA.

34. An interpretation of section 58.6(1) as advocated by the GMUFA will have significant impact not only on MSA but on every non-academic union in Alberta, and as such it is not just and convenient to make such a decision on a summary dismissal basis absent a

full evidentiary record and absent the benefit of fulsome legal submissions made with the benefit of a factual context.

The jurisprudence does not support the position of the GMUFA

35. In the *Keyano College* decision, the ALRB specifically noted an application of this nature being available. The Board said, at paragraph 23 (emphasis added):

> **23** It is clear that on December 6, 2017, the Union had no representation rights nor any claim to be the bargaining agent for the Contract Instructors. **Had the Union been in the position to argue that the primary function of the Contract Instructors was support services, it could have applied to the Board pursuant to section 3(2)(p) of *PSERA* for determination that the Contract Instructors are included in its support services unit. No such application was made.** If the Union had made an application under section 3(2)(p) of *PSERA* it would have had to address the Board's jurisprudence in *International Brotherhood of Electrical Workers, Local Union 424 and International Brotherhood of Electrical Workers, Local Union 254 v. Siemens Building Technologies Inc.*, [2004] Alta. L.R.R.B. 141, where the Board stated at paragraph 83:
>
> > [83] A trade union's representative capacity may be lost by disuse, whether that disuse is a product of intention (like extended underbargaining), mistake, neglect or even inactivity forced upon it by employer strength (the long lost strike phenomenon). In that sense, "abandonment" may be an unfortunate term because it has the pejorative connotation of intentional or culpably negligent conduct. Instead, abandonment of bargaining rights should be understood as encompassing any situation in which through the passage of time the trade union has relinquished any realistic claim to be representative of the employees in the bargaining unit. Where that has happened, it is in our view necessary to the scheme of the *Code* that the Board be able to deny any ongoing force to those bargaining rights.

36. The applications by MSA are exactly the applications contemplated by the Board in *Keyano College*. The question of abandonment is not currently relevant as this is a summary dismissal application, but in any event the MSA applications set out a long factual history of efforts of MSA to represent the employees sought to be added to its bargaining unit, not inactivity or neglect.

37. The decision in *Keyano College* provides specific jurisprudential support for the MSA applications.

Does it matter that the designations were not made recently?

38. Within the GMUFA summary dismissal application suggests that the ALRB cannot address an application under section 58.6 if the designation decision was by the initial governing authority of the University (back when it was a college).

39. That position was specifically rejected in *Re Northern Lakes College (Board of Governors) [2019] ALRBD No. 16* at paragraphs 41 – 44 and the ALRB underlined that decisions of a PPSI regarding designation or failure to designate are continuing decisions, not one time decisions. The ALRB stated:

> **41** These same rationales apply to the suggestion there must be some formal refusal by a Board of Governors to designate before the Board may consider a "failure to designate". The Board's authority is clearly intended to apply to and remedy situations of inaction on the part of a Board of Governors.
>
> **42** The discretionary authority of the Board to refuse an application, as outlined below, can appropriately remedy circumstances where a Board of Governors has not been given an appropriate opportunity to consider the issue.
>
> **43** The Board of Governors further argues section 58.6(1) does not apply to the May 1997 designation decision. The May 27, 1997 designation decision was made by the Interim Governing Authority and not by the Board of Governors for the Employer. Section 42(2) of the *Colleges Act* stated:
>
> > *42(2) Notwithstanding anything in this Act, the initial governing authority of a public college or technical institute*
> >
> > *(a) shall do one or both of the following:*
> >
> > *(i) designate categories of employees as academic staff members of the public college or technical institute;*
> >
> > *(ii) designate individual employees as academic staff members of the public college or technical institute,*
> >
> > *(b) shall prescribe procedures respecting the election of*
> >
> > *(i) the first executive of the academic staff association at the public college or technical institute, and*
> >
> > *(ii) the first councils of the student organizations at the public college or technical institute,*
> >
> > *and*

> *(c) may, after consultation with the academic staff association, change a designation made by it under this subsection.*

44 The Board of Governors' argument ignores the continuing effect of the designation. The Board of Governors continues to fail to designate the subject persons as academic staff. Section 58.6 applies.

Summary dismissal is a discretionary decision

40. In light of all of the submissions and the facts as set out in the applications, MSA submits that it is not just and convenient for the ALRB to exercise its discretion to summarily dismiss either of the applications in these cases.

41. The legal context is very complex, including the involvement of several statutes – the Code, PSERA and the PSLA. Complex legal interpretations should not be made in haste, but rather in the context of a full factual context supported by fulsome evidence.

42. The summary dismissal requested in this case amounts to request for a determination that in almost every case, that no union except for a faculty association of the particular PPSI could ever apply under section 58.6. Such a startling and sweeping decision is of grave importance and would impact all non-academic staff unions, PDFA and GSA across Alberta. Again, such an important and far reaching decision should not be made on a summary dismissal basis.

43. The GMUFA has clarified that it believes that it has rights to participate in at least the Remaining Employees Application GE-08378 regarding all other employees even if its summary dismissal application were to be granted. There would be no reduction in the number of parties involved in the hearing and thus no judicial economy even if the summary dismissal application were granted.

44. There are few decisions of the ALRB to date regarding the interpretation of section 58.6 and this provision is quite unique in Canada. Such a new and unique provision should not be interpreted, especially in such a significant manner, on a summary dismissal basis.

Frivolous and vexatious

45. MSA points out that the ALRB cannot receive or consider the new factual statements or attached documents provided by the GMUFA in support of this argument on summary dismissal application.

46. MSA states and the fact is, that the ALRB has never considered a determination application to be impacted by the statutory freeze that arises during collective bargaining. GMUFA has provided no authority to the contrary as there is none.

47. Section 147(3) of the Code states:

> **(3)** If a notice to commence collective bargaining has been served pursuant to section 59(2), no employer affected by the notice shall, except
>
> (a) in accordance with an established custom or practice of the employer,
>
> (b) with the consent of the bargaining agent, or
>
> (c) in accordance with a collective agreement in effect with respect to the bargaining agent,
>
> alter the rates of pay, a term or condition of employment or a right or privilege of any employee represented by the bargaining agent or of the bargaining agent itself until the right of the bargaining agent to represent the employees is terminated or a strike or lockout commences under Division 13.

48. Section 46(2) of PSERA has a similar impact to section 147 of the Code.

49. Nothing in sections 12(3)(i) and (o), 58.6 and 147 of the Code or sections 3(2)(h) and (p) and 46(2) restrict the ALRB from addressing these applications during the collective bargaining freeze in place for either MSA or the GMUFA. Any restrictions set out in section 147 of the Code and section 46 of PSERA are only on the employer, not on the ALRB.

50. In addition, as indicated above, the essence of these applications is run of the mill supervision of the scope of bargaining units by the ALRB. Such applications are simply regular labour relations business, and typically these applications can take several months or more to be resolved. Additionally, the collective bargaining process can take several months or years to be completed. These time lines make it impractical to suggest that determination applications must wait to be filed until collective bargaining is not proceeding and must be completed before another round of collective bargaining begins.

51. Any impact on ongoing collective bargaining that continues to be occurring can be addressed by the ALRB in the scope of remedies it may decide to grant.

52. There is no basis whatsoever to suggest that these applications should be summarily dismissed because there is ongoing collective bargaining.

53. MSA submits that it is simply inflammatory and highly inappropriate for the GMUFA to suggest that these applications were filed with an improper motive or that they are an abuse of process.

54. For all of these reasons, MSA asks that the ALRB dismiss both summary dismissal applications and instead move forward with these applications.

Yours truly,

Leanne Chahley

Leanne Chahley

cc. Harry Oosterhoff / Donna-Mae Winquist
Geoff Hope
E. Wayne Benedict