McGown Cook
Barristers & Solicitors

120 7260 12 ST SE
Calgary AB T2H 2S5

Phone: 403.255.5114
Fax: 403.258.3840

File #538112

VIA EMAIL & COURIER

Alberta Labour Relations Board
Attn.: Tannis Brown, Director of Settlement
501, 10808 – 99 Avenue
Edmonton, Alberta, T5K 0G5
T: 780.422.5926
F: 780.422.0970
E: Tannis.Brown@gov.ab.ca & ALRB.EDM@gov.ab.ca

December 11, 2020

Dear Madam:

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-083337

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-083338

Further to the Board's letter of 30 November 2020, this is the Reply of the Faculty Association of Grant MacEwan University (the "**Association**") to the MacEwan Staff Association's (the "**Union**") 27 November 2020 Response to the Association's 5 November 2020 application for summary dismissal of all aspects of the Union's *Labour Relations Code*, s 58.6 [the "**Code**"] applications in Board File Nos. GE-083337 and GE-083338 that pertain in any way to "academic staff", under both the *Public Service Employee Relations Act* ["**PSERA**"] and the Code.

In Reply to paras 3-5, 45 of the Union's Response, before 29 July 2020 the Code s 16(4)(e) read:

> 16(4) When… any other application to the Board is made under this 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.[1]

[1] *Labour Relations Code*, RSA 2000, c L-1, s 16(4)(e), in effect before 29 July 2020 (**Tab 1**).

Effective on and after 29 July 2020, when the *Restoring Balance in Alberta's Workplaces Act, 2020*,[2] received Royal Assent and s 11(5) went into force, the Code s 16(4)(e) reads:

> 16(4) When … any other application to the Board is made under this 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, vexatious, **filed with improper motives or an abuse of process**, reject the matter summarily.[3]

Although the Board's most recent iteration of its Information Bulletin #2 Processing of Applications… is "Effective: October 29, 2020", it does not contemplate the 29 July 2020 statutory amendment adding "filed with improper motives or an abuse of process" as grounds for summary dismissal:

> VI. SUMMARY DISPOSITION OF APPLICATIONS
> Sometimes it is clear **from the filed documents or the Officer's discussions with the parties** that there is an important issue that should be addressed before the Board holds a formal in-person hearing on the application's merits. Examples include:…
>
> **Summary Dismissal**
> The Director of Settlement can recommend or **a party can ask for the summary dismissal** of a matter. This option is available where a party fails to provide any real particulars. It can also occur where there is non-compliance with a directive from the Director of Settlement or the Board about particulars, or where the matter is, on its face, without merit, or is trivial, frivolous, or vexatious. An example is where the facts alleged, even if proven, could not amount to a violation of the Code or the Act. Another example would be where an applicant has failed to comply with procedural directives of the Board and, in essence, abandoned the application. See: Section 16(4)(e); *Rules of Procedure*, Rule 24; *Steelworkers Local 7226 v. Handleman Company of Canada* [1989] Alta.L.R.B.R. 38.[4]

There is nothing in the Board's approach to summary dismissal applications, Rules or jurisprudence, that precludes the applicant from including evidence supportive of its factual particulars as pleaded. In fact, the Board's process expressly compels inclusion of evidence with a Union's response to duty of fair representation complaint:

> PART XI: DUTY OF FAIR REPRESENTATION COMPLAINTS
>
> Document disclosure
> 49. Subject to any claim of privilege, the union shall provide with its response to the complaint, copied to the complainant, any and all documents in its possession which are relevant and material to the union's representation of the complainant concerning the matters raised in the complaint.[5]

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[2] *Restoring Balance in Alberta's Workplaces Act, 2020*, SA 2020, c 28, formerly 2020 Bill 32. Authority relevant to s 11(5) coming into force on 29 July 2020 are at **Tab 2**.
[3] *Labour Relations Code*, RSA 2000, c L-1, s 16(4)(e), in effect on and after 29 July 2020 (the "Code") (**Tab 3**).
[4] Alberta Labour Relations Board, "Information Bulletin #2: Processing of Applications, Complaints and References", online: <http://www.alrb.gov.ab.ca/bulletins/2bulletin.pdf>; emphasis added (**Tab 4**).
[5] Alberta Labour Relations Board, "Rules of Procedure", online: <http://www.alrb.gov.ab.ca/bulletins/rulesprocedure.pdf> at para 49; excerpt (**Tab 5**).

The application before the Board at this stage is not the Union's Code, s 58.6 applications in Board File Nos. GE-083337 & GE-083338; rather it is the Association's 5 November 2020 summary dismissal application:

> The Association hereby applies to the Alberta Labour Relations Board (**the "Board"**) pursuant to the *Labour Relations Code,* s16(4)(e) "to reject the matter[s] summarily" (both Board File Nos. GE-083337 and GE-083338) on the grounds that the MacEwan Staff Association's (**the "Union"**) applications seeking representation of "academic staff" under the Code s 58.6 are "frivolous, trivial, vexatious, filed with improper motives or an abuse of process."…
>
> The Association reserves the right to seek further particulars and file substantive responses to the Union's applications in the event that the Board dismisses its summary dismissal application.

The Board's Information Bulletin #2 reads in part:

> An *application* is a request for the Board to carry out a procedure or determine a matter according to a specific provision of the Code or the Act…
>
> An application must include:…
>
> - the details, or particulars, of the application. These are explained below…
>
> **Particulars**
> Particulars are the details, the "who, what, when, where and how," of the application. They are the facts and events the applicant relies on to justify the Board giving the relief the applicant seeks. The applicant's particulars should set out these facts and events in plain English. This should include: what did or did not happen, who was involved, and when and where these facts and events took place. The applicant must allege facts that, if true, establish the section of the legislation in question may apply or may have been violated…
>
> Particulars are not the same as evidence. Particulars only set out what facts and events the applicant intends to prove. **They do not have to** say how the applicant intends to prove them. Nor do they have to disclose the identities of the applicant's witnesses. However, if the application alleges someone said something, the applicant must provide a description of what was said, who said it, and when and where it was said…

Applications "do not have to" contain evidence supporting the "particulars" that "set out what facts and events the applicant intends to prove", but there is no reason why an applicant cannot include such evidence with its application. In fact, it is common in the context of duty of fair representation complaints that unions will concomitantly apply for summary dismissal of complaints along with their responses which must include "any and all documents in its possession which are relevant and material", and administrative panels of the Board will consider those records in deciding whether or not to "reject the matter summarily" under the Code s 16(4)(e)—without those records having been formally admitted as evidence before the Board.

In its summary dismissal application, the Association pleaded the "particulars" that "set out what facts and events the applicant intends to prove", and although it did "not have to", it included evidence supportive of those particulars. The pleaded particulars are:

- All of the "academic staff" employees that the Union seeks to obtain representational rights over through its applications were designated as academic staff years and decades ago, by the "initial governing authority" of the Grant MacEwan College under the Colleges Act, or by its successor the BOG[GMU], before or after the PSLA replaced the Colleges Act in 2003, all designations occurring before 4 May 2017 when s 58.6 was inserted into the Code.

- …the Union does not now represent, and **has never represented**, any of the academic staff employees—designated as such long ago—that it seeks to obtain representational rights over through its applications to the Board…

- …the Union has [no], and never has had, any relationship with the academic staff employees that it seeks to represent…

- MSA gave notice [pursuant to PSERA] to commence collective bargaining on September 27, 2019. Collective bargaining is ongoing.

- On 6 March 2020 the Association gave notice to the BOGGMU to commence collective bargaining pursuant to the Code, s 59(2)

- On 8 April 2020 the BOGGMU wrote the Association regarding its intention to "commence a review of the Faculty School Advisor and Instructional Assistant designation as academic staff members"; "review of designation and the potential changes to the terms and conditions of affected employees."

- On 16 April 2020 the BOGGMU promulgated its "Student Advising Model – Hub and Spoke Model Overview."

- On [22] April 2020 the Association wrote the BOGGMU [sets out specific communication]

- On 24 April 2020 the BOGGMU requested that "the Faculty Association … abstain from the adversarial step of pursuing complaints at the Labour Relations Board" pending a "substantive and detailed response to your letter with input from the necessary University representatives [that] will explain our perspective and intentions…"

- "MSA and the University began discussion the position of University Advisors, Faculty Advisors and Instructional Assistants. The first meeting on this issue was on April 27, 2016." "On May 14, 2020 MSA filed a grievance objecting to the consideration of persons outside of MSA for filling the Academic Advisor positions."

- On 29 May 2020 the BOGGMU wrote the Association, in part: "The University has decided to set aside the designation and jurisdiction of the employees involved in the advising work during the implementation period and while faculty bargaining is underway."

- "… on June 30, 2020 the University advised MSA that it had decided to set aside the de-designation decision…" "The University's reason for not placing the Advisors in the MSA bargaining unit as it had announced was because of collective bargaining. It stated 'the University has decided to set aside the designation and jurisdiction of the employees involved in advising work during the new model implementation period and while collective bargaining is underway.' And also said 'The University intends to revisit the designation of the positions in the Faculty Agreement and the jurisdiction of these positions after negotiations for the new collective agreements for both Association are completed'."

Regarding Responses to Applications, the Board's Information Bulletin #2 reads:

> **Replies**
> In all proceedings, except …, the party or parties against whom the application is filed must file a written reply unless the Director of Settlement exempts them from filing one. The reply must include:…
>
> - an admission of any facts alleged by the applicant that are uncontested;
> - particulars in reply. The respondent must make a concise statement of the facts and events the respondent relies upon, where those facts and events are different from the applicant's (see Particulars, above)…

The Union's 27 November 2020 Response to the Association's 5 November 2020 application for summary dismissal contains no "admission of any facts alleged by the applicant that are uncontested", nor does it set out "particulars in reply." Further, the Union does not contest the veracity of any of the evidence that the Association (gratuitously) included with its application to support the particulars it pleaded. Rather, the Union suggests that "it is not appropriate for the ALRB to accept any statements of fact or to review any documents that the GMUFA has included" with its application for summary dismissal, and that "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." With respect, the proposition is absurd. Again, it is the Association's summary dismissal application that is before the Board "at this stage". The Association's summary dismissal application is predicated on two propositions:

1. the Union's Code s 58.6 applications "are without merit, or is frivolous, trivial, vexatious" because the Union does not have standing to make such applicant because, (while it is a "bargaining agent" under PSERA and "non-academic staff association" under PSLSA) it is not and has never been "affected by a designation or change in designation made under section 5(2), 42(2) or 60(2) of the Post-secondary Learning Act"; and

2. the Union's Code s 58.6 applications are "filed with improper motives or an abuse of process" because of the timing of the applicants during collective bargaining with the Board of Governors, both the Association under the Code and the Union under PSERA in light of the "statutory freezes" in both statutes.

Obviously, the Association must plead factual particulars to support its summary dismissal application, and it is those facts that "are to be presumed to be true" by the Board where no conflicting facts are pleaded by the Respondent Union (which it has not). It is self-evident that a person filing a complaint or application is *not* going to plead facts showing that their application or complaint "is without merit, or is frivolous, trivial, vexatious, filed with improper motives or an abuse of process"; rather the respondent to such application or complaint (applicant for summary dismissal) must plead the facts necessary to support summary dismissal, and the Board is obligated to consider those particulars.

In Reply to paras 8-34 of the Union's Response, the Association does not suggest that the Union "is not a *bargaining agent* as contemplated by section 58.6(1) of the Code". "The MacEwan Staff Association is a 'trade union' that is certified under PSERA as 'bargaining agent' to represent a unit of 'employees' (as defined in PSERA, which expressly excludes 'academic staff') of the BOGGMU described as 'All non-academic employees'." By virtue of that status (a certified bargaining agent under PSERA), it becomes a "non-academic staff association" under PSLA. While it is a "bargaining agent" for the purposes of Code s 58.6, it 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*." The Association has pleaded as facts (particulars) that "…the Union does not now represent, and has never represented, any of the academic staff employees—designated as such long ago—that it seeks to obtain representational rights over through its applications to the Board…" and "…the Union has [no], and never has had, any relationship with the academic staff employees that it seeks to represent…" While failing to admit these facts, the Union's response contains no contrary "particulars in reply."

None of the academic staff members that the Union seeks to represent through its Code s 58.6 applications have been "de-designated" by the BOGGMU—they statutorily remain "academic staff", having been designated as such by the BOGGMU or its predecessor(s), notwithstanding that the Union *alleges* they do not meet the "Criteria for the Designation of Academic Staff" unilaterally promulgated by the BOGGMU effective 5 March 2020. The statutory presumption against tautology is trite law:

> **73** … the presumption against tautology stands for the proposition that words found in legislation are not generally considered redundant. As Côté, supra, writes (at pp. 275 and 277):
>
> > Assuming a statute to be well drafted, an interpretation which adds to the terms of its provisions or deprives them of meaning is not recommended...
> >
> > It must also be assumed that each term, each sentence and each paragraph have been deliberately drafted with a specific result in mind. Parliament chooses its words carefully: it does not speak gratuitously. See *Subilomar Properties (Dundas) Ltd. v. Cloverdale Shopping Centre Ltd.*, [1973] S.C.R. 596, at p. 603.[6]

[6] Schreiber v. Canada (Attorney General), [2002] S.C.J. No. 63 at para 73 (QL) (**Tab 6**); excerpt; emphasis added.

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178 It is a well-established principle of statutory interpretation that the legislature does not in-tend to produce absurd consequences. "[A] label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile": *Rizzo & Rizzo Shoes*, at para. 27. In addition, this Court has time and time again recognized the presumption against tautology: it is presumed that the legislature avoids superfluous or meaningless words, phrases and larger units such as paragraphs, sections and parts of a legislative scheme (see, e.g., *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at para. 28; *Degelder Construction Co. v. Dancorp Devel-opments Ltd.*, [1998] 3 S.C.R. 90, at paras. 26-27).[7]

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45 Under the presumption against tautology, "[e]very word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose": see R. Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994), at p. 159. To the extent that it is possible to do so, courts should avoid adopting interpretations that render any portion of a statute meaningless or redundant: *Hill v. William Hill (Park Lane) Ld.*, [1949] A.C. 530 (H.L.), at p. 546, per Viscount Simon.[8]

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38 The interpretation adopted by the Tribunal makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation de-scribed in each of those paragraphs. This interpretation therefore violates the legislative presumption against tautology. As Professor Sullivan notes, at p. 210 of her text, "[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose." As former Chief Justice Lamer put it in R. v. Proulx, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28, "[i]t is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage." See also *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.[9]

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32 It is thus clear to us that if Parliament's intent in defining "solicitor-client privilege" in s. 232(1) ITA as it has were not to exempt accounting records from the protection of this privilege, that definition and the apparent exemption would essentially serve no purpose. This would violate the presumption against tautology, according to which "[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain" (R. Sulli-van, Sullivan on the Construction of Statutes (6th ed. 2014), at p. 211, citing Attorney General of Quebec v. Carrières Ste-Thérèse Ltée, [1985] 1 S.C.R. 831 at p. 838). Instead, every word has "a specific role to play in advancing the legislative purpose" (Sullivan, at p. 211)…[10]

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[7] *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] S.C.J. No. 26 at para 178 (QL) (**Tab 7**); per Major, Bastarache and Charron JJ. dissenting; excerpt; emphasis added.
[8] *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, [2006] S.C.J. No. 20 at para 45 (QL) (**Tab 8**); excerpt; emphasis added.
[9] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] S.C.J. No. 53 at para 38 (QL) (**Tab 9**); excerpt; emphasis added.
[10] *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] S.C.J. No. 21 at para 32 (QL) (**Tab 10**); excerpt; emphasis added.

The Code s 58.6 set out clearly who "may apply" (and thus who may not apply) under the section:

> 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.

The Union asks the Board to interpret the provision in a manner that would render the qualifying words "affected by a designation or change in designation" meaningless, and hold that by the mere fact it is a "bargaining agent" of "employees" at Grant MacEwan University it has standing to apply under Code s 58.6 to have the Board decide that employees who *are* academic staff members no longer are so, and thus fall into the Union's bargaining unit. Such an interpretation would "violate the presumption against tautology" in the words of the Supreme Court of Canada. The Association submits that it must be presumed that the Legislature chose its words carefully, and deliberately drafted the Code s 58.6 with a specific result in mind—to prevent free-for-all applications by "bargaining agents" that have not been "affected by a designation or change in designation made under section 5(2), 42(2) or 60(2) of the *Post-secondary Learning Act*"; as is evident in the Union's applications here.

The Union has effectively launched a partial "raid" against the Association, misusing the Code s 58.6 application process to obtain what it is presently precluded statutorily from attempting. The Code reads, in part:

> Application
> 58.2(1) Divisions 4 to 9 and section 156 **do not apply**
> (a) with respect to the board of a public post-secondary institution while it is acting as the employer of the academic staff members of the public post-secondary institution or with respect to those academic staff members, …
> (2) Notwithstanding subsection (1), **Divisions 4 to 9 apply effective July 1, 2022** unless a later date is determined by the Lieutenant Governor in Council after the Minister has consulted with affected parties.[11]

The Code Part 2, Divisions 5-9 are:

- Division 5: Certification;
- Division 6: Voluntary Recognition;
- Division 7: Modification of Bargaining Rights;
- Division 8: Revocation of Bargaining Rights;
- Division 9: General Provisions on Certification and Voluntary Recognition.

[11] The Code, *supra* note 3, s 58.2 (**Tab 3**).

Through the combination of the PSLA and the Code, the Legislature has effected a statutorily designated bargaining model[12] in relation to academic staff associations in Alberta's public post-secondary industry, and has protected academic staff associations from being raided by other unions until July 1, 2022.

The *Public Service Employee Relations Amendment Act, 2018*,[13] ss 5-7 comes into force on July 1, 2022, the same date that the Code Part 2 Divisions 4 to 9 apply to academic staff associations. 2018 Bill 29, ss 5-7 moves the regulation of (PSLA) non-academic staff associations' labour relations from being under PSERA to being under the Code. The entire statutory scheme—across the statute book as a whole—comprises part of the "entire context" of Code, s 58.6 when the Board applies "Driedger's modern approach" to statutory interpretation of same:

> **30** …in considering the "entire context" of s. 72(1) and the intent of Parliament, it is important to keep in mind the principles for harmonizing different statutes. Professor Ruth Sullivan expressed these principles as follows, in Driedger on the Construction of Statutes (3rd ed. 1994), at p. 288:
>
> > The meaning of words in legislation depends not only on their immediate context but also on a larger context which includes the Act as a whole and the statute book as a whole. The presumptions of coherence and consistency apply not only to Acts dealing with the same subject but also, albeit with lesser force, to the entire body of statute law produced by a legislature... . Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred…[14]
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> *****
>
> **32** Given the somewhat complex statutory scheme that governs the Commission, it is also necessary to consider how the various pieces of legislation operate together. Statutes dealing with the same subject matter should be interpreted in a manner that ensures harmony, coherence and consistency among them: *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559 at para 27. The various amendments to the AUC Act, the Electric Utilities Act, and the Hydro and Electric Energy Act must be read harmoniously together…
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> **38** In a complex legislative scheme such as this one, it is necessary to have regard to the entire scheme in order to ascertain legislative intent…[15]

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[12] "The *Wagner Act* model…is not the only model capable of accommodating choice and in-dependence in a way that ensures meaningful collective bargaining. The designated bargaining model … offers another example of a model that may be acceptable. Although the employees' bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining": Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC 1, [2015] S.C.J. No. 1 at para 95 (QL) (**Tab 11**); excerpt; emphasis added.

[13] *Public Service Employee relations Amendment Act, 2018*, SA 2018, c 21 (**Tab 12**).

[14] *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] S.C.J. No. 55 at para 30 (QL) (**Tab 13**); excerpt; emphasis added.

[15] *Shaw v. Alberta (Utilities Commission),* 2012 ABCA 378, [2012] A.J. No. 1259 at paras 32, 38 (QL) (**Tab 14**); excerpt; emphasis added.

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26 In addition, defining "arm's length" consistently regardless of whether it appears in the BIA or ITA accords with the view that courts may consider the legislature's "statute book" in giving meaning to a term. This approach relies on the logical assumption that Parliament knows what other statutes say when it passes an enactment, and perhaps even more so when it amends a statute (i.e. the BIA) to incorporate a term that has been defined in the courts in another context (i.e. the ITA). This approach also minimizes the potential for unnecessary conflicts in interpretation.

27 The Supreme Court recognized the utility of this principle in *R. v. Ulybel Enterprises Ltd*, [2001] 2 SCR 867, at para 30…[16]

The Association submits that interpreting Code s 58.6 in the context of the Alberta statute book as a whole, the Legislature's intention is clear: standing to make a Code s 58.6 application is limited to a bargaining agent "affected by a designation or change in designation", and that section cannot be misused to effect a raid, in whole or in part, against an academic staff association. That is precisely what the Union is attempting with its applications here.

If the majority of academic staff in a unit wish to change their bargaining agent they must wait until after July 1, 2022 and resort to the procedures under the Code Part 2 Divisions 5-9. If such academic staff wish the non-academic staff association to be their bargaining agent, they must wait until after July 1, 2022 and the non-academic staff association must follow the procedures under the Code Part 2 Divisions 5-9 to become certified under the Code. It is trite that under the *Wagner Act* model (as opposed to the statutorily designated bargaining model), the principle of majoritarianism is based on employee choice, not on the preference or choice of a particular trade union. It should be noted that not a single one of the 18 employees who made representations to the Board in this matter expressed a desired to be represented by the Union.

The Union complains that some "academic staff" perform similar or the same duties as other employees who have not been designated academic staff and as such the Board should apply general principles such as "prime functions and responsibilities…regardless of the number of different job titles" and "the core of the principle of community of interest that is applied by the ALRB in every application for certification and determination" in a Code s 58.6 application. With respect, this would ignore the markedly different statutory scheme in Alberta's public post-secondary education sector—governed by PSLA, PSERA and the Code. There are only 2 ways that an employee of a board of governors may become "academic staff": the BOG "designates" the employee as academic staff under the PSLA, or the Board "decides" they are academic staff under the Code s 58.6. Under the PSLA the BOG may either: "(a) designate *categories of employees* as academic staff members of the public post-secondary institution;" OR "(b) designate **individual employees** as academic staff members of the public post-secondary institution." There is nothing

[16] *Piikani Energy Corp. (Trustee of) v. 607385 Alberta Ltd.*, 2013 ABCA 293, [2013] A.J. No. 891 at para (QL) (**Tab 15**); excerpt; emphasis added.

in the statutory scheme that prevents a BOG from designating some individuals as academic staff who perform identical duties as other individuals that are not designated as academic staff. The Union's application is premised on the assumption that all employees of a BOG whose "prime functions and responsibilities" are similar or the same must either be academic staff or non-academic staff, but may not have some employees in each. The Association submits that this is an incorrect assumption on a correct interpretation of the statutory scheme as a whole; "the actual legal and factual issues raised in regard to the bargaining unit issues in the applications are [***not***] simple and run of the mill labour board fodder."

In Reply to paras 35-37 of the Union's Response, in the *Keyano College*,[17] CUPE was certified under PSERA to represent "All ["non-academic staff"] employees of the Board of Governors of Keyano College when employed in general support services." In relation to "general support staff" "non-academic staff" employees of the BOGKC only, CUPE was a "non-academic staff association" under PSLA. "On December 6, 2017 after discussions between the Employer and KCFA, the Board of Governors of the Employer designated Contract Instructors employed by the Employer as Academic Staff Members pursuant to section 60 of the PSLA."[18] CUPE was in the midst of an organizing campaign under PSERA to obtain certified representational rights in relation to the "Contract Instructors." CUPE did not represent the "Contract Instructors" when they were designated as "academic staff" by the BOGKC. The Board considered the "issue is whether the Union as the bargaining agent for support services employees is a "... a bargaining agent affected by the designation ..." The Board held: "Since section 58.6(1) references the application is to be by '... a bargaining agent affected by a designation ...', the Union cannot file a section 58.6(1) application on the basis that the December 6, 2017, designation affected it by affecting its organizing campaign";[19] and "The Board concludes the Union was not affected by the December 6, 2017 designation. Pursuant to section 16(4)(e) of the Code the Board summarily dismisses the section 58.6(1) application."[20]

It is uncontested that "…the Union does not now represent, and has never represented, any of the academic staff employees—designated as such long ago—that it seeks to obtain representational rights over through its applications to the Board…" and "…the Union has [no], and never has had, any relationship with the academic staff employees that it seeks to represent…" In addition, there has not been a single specific academic staff designation(s) that the Union has even alleged that it has been affected by—none. Rather, it makes the sweeping assertion that it has been affected by every academic staff designation throughout the history of Grant MacEwan University, and its predecessor Grant MacEwan College merely because it is the "bargaining agent" of non-academic staff. The Association submits that such proposition is incorrect in both fact and law.

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[17] *Re Canadian Union of Public Employees, Local 2157*, 2018 CanLII 32145, [2018] A.L.R.B.D. No. 40 (QL) ["*Keyano College*"] [Tab 29 appended to the Association's Summary Dismissal Application of 5 November 2020].
[18] *Ibid* at para 13; emphasis added.
[19] *Ibid* at para 20.
[20] *Ibid* at para 29.

In Reply to paras 38-39 of the Union's Response, the Board is mandated to apply "Driedger's modern approach" to statutory interpretation in relation to the PSLA, to determine those aspects of it that have retrospective effect.

> **3 - Presumption Against Retroactive Legislation**
>
> 45 The presumption against *retroactive* legislation is stated as follows in *Gustavson Drilling, supra*, in which Dickson J. wrote at p. 279:
>
> > The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances the statute operates *retrospectively*.[21]

The Code Part 2 Division 9.1 Post-secondary Academic Bargaining was added to the Code by An *Act to Enhance Post-secondary Academic Bargaining*,[22] s 1(2) which was, in part, retroactively effective to 6 April 2017 once it received Royal Assent on 4 May 2017 per s 1(4):

> 1(4) Section 1(2) with respect to the enactment of section 58.7(2), (3) and (4) of the *Labour Relations Code* is deemed to have come into force on the day the Bill to enact An Act to Enhance Post-secondary Academic Bargaining received first reading [6 April 2017].

The rest of the amendments became effective on 4 May 2017, including the Code s 58(6), which operates retrospectively, but only in relation to "a designation or change in designation made under section 5(2), 42(2) or 60(2) of the *Post-secondary Learning Act*" by a "board of governors." The Code ss 58.6(1) and 58.6(4) must be read and interpreted together:

> 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....
>
> 58.6(4) This section [58.6] 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 [on 4 May 2017].[23]

The Code s 58.6 is retrospectively operative in relation to academic staff designations made by "the **board of governors**", pursuant to PSLA s 60(2). It is not retrospectively effective in relation to academic staff designations made by an "*initial governing authority*" of a university pursuant to

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[21] *Quebec (Attorney General) v. Quebec (Expropriation Tribunal)*, [1986] 1 S.C.R. 732, [1986] S.C.J. No. 33 at para 45 (QL) (**Tab 16**); excerpt; emphasis added.
[22] *Act to Enhance Post-secondary Academic Bargaining*, SA 2017 c 4 (**Tab 17**); excerpt.
[23] The Code, *supra* note 3 (**Tab 3**), s 58.6(4); emphasis added.

PSLA s 5(2), or by an "*initial governing authority*" of a "comprehensive community college or polytechnic institution" pursuant to PSLA s 42(2). It is also not retrospective in relation to academic staff designations made by an "*initial governing authority*" of a college under the predecessor *Colleges Act*, including those by the predecessor "initial governing authority" to the BOGGMU.

The Board undertook no interpretational analysis of the Code ss 58.6(1) and 58.6(4) in *Northern Lakes*,[24] pursuant to "Driedger's modern approach" to statutory interpretation, or at all, to determine the scope of the retrospective operation of the Code s 58.6. Further, the issue before the Board was not a "designation or change in designation", but rather an alleged "failure to designate" which the Board held was of a continuing nature (*viz.* beyond 4 May 2017 to the date of the hearing on 14-17 May 2018, and the decision on 21 February 2019): "The Board of Governors' argument ignores the continuing effect of the [failure of] designation. The Board of Governors continues to fail to designate the subject persons as academic staff. Section 58.6 applies."[25]

Sincerely,

E. Wayne Benedict Professional Law Corporation
EWB/

c.c. - **Faculty Association of Grant MacEwan University**
Attn.: Jasmine French, Executive Director (via email & courier)
Attn.: Graham Baker, Professional Officer (via email)

c.c. - **Alberta Labour Relations Board**
Attn.: Kent Nelson, Labour Relations Officer (via email)

c.c. - **Board of Governors of Grant MacEwan University % Field Law**
Attn.: Geoffrey M. Hope, Barrister and Solicitor (via email & courier)
Attn.: Jason Kully, Barrister and Solicitor (via email)

c.c. - **MacEwan Staff Association % Blair Chahley Lawyers**
Attn.: Leanne Chahley, Barrister and Solicitor (via email & courier)

[24] *Re Northern Lakes College (Board of Governors)*, [2019] Alta. L.R.B.R. 46, [2019] A.L.R.B.D. No. 16 (QL) (**Tab 17**); excerpt.
[25] *Ibid* at para 44; emphasis added.