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By Fax Only

January 23, 2017

Aaron Padnivalen
Manager of Settlement
Alberta Labour Relations Board
308. 1212 – 31 Avenue NE
Calgary, AB T2E 7S8

Dear Mr. Padnivalen:

RE: An application for declaration brought by the University of Lethbridge Faculty Association affecting the Board of Governors of the University of Lethbridge – Board File No. GE-07696 (Corrected version)

As directed in your letter of January 9, 2018, please accept this as the reply filed on behalf of our client, the University of Lethbridge Faculty Association (“ULFA”), to the response filed on behalf of the Board of Governors of the University of Lethbridge (the “University”).

General submissions to avoid a lengthy hearing – bifurcation of the case

Overall, ULFA disagrees with the position of the University and with many of the factual assertions set out by the University in its response dated January 16, 2018. Clearly, the parties have joined issue and will require the ALRB to decide whether one or two bargaining units were established between these parties when Part 9.1 was added to the *Code*.

The University’s response does not provide a detailed response to ULFA’s primary position, which is that, by operation of law, only one bargaining unit was created between employers and academic staff associations in Part 9.1 of the *Code*. Instead the University’s response raises considerable, and often disputed, factual assertions, including but not limited to those of bargaining history, past practice, community of interest, agreements between the parties, viability of bargaining structures, practice in other jurisdictions, and comparisons of the handbooks. ULFA will refer to this body of evidence and submissions generally in this reply as the University’s position regarding community of interest and past practice. A great deal of oral and documentary evidence will be required to address these factual assertions.

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Given that the parties cannot meaningfully engage in collective bargaining, essential services bargaining, and then potentially in mediation, strike or lockout before the issue raised is resolved, ULFA proposes that this matter should be bifurcated to potentially streamline the time needed to address it.

ULFA suggests that the ALRB first convene a hearing on the question of whether Part 9.1 of the *Code* creates only a single bargaining unit for an academic staff association and its corresponding employer when it states in section 58.3(1)(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 the exclusive authority to bargain collectively on behalf of the academic staff and to bind them by a collective agreement."

This hearing would involve a limited amount of contextual evidence and primarily legal argument. In the event that the answer to this question is yes, there will be no need for the ALRB to embark on the multi-day evidentiary hearing which the University's request that the Board establish two bargaining units of academic staff would require.

ULFA also suggests that in order to minimize delay the ALRB now schedule additional provisional hearing dates to address the position of the University, in the event that the ALRB were to find that Part 9.1 of the *Code* does provide for the possibility of an academic staff association being declared to be the bargaining agent for more than one bargaining unit. The nature of any such hearing might be focused by any guidance provided by the Board in answering the first question.

However, if the ALRB does not bifurcate the case, ULFA will be prepared to present its evidence in response to the submissions of the University. ULFA reserves the right to seek an order requiring the University to present its evidence first on the issues it raises of community of interest and past practice so that ULFA is able to know the case it will be responding to rather than having to anticipate it based on the reply document.

Detailed Reply

1. Generally, ULFA disputes the factual assertions presented by the University unless specifically agreed to in this response or the application itself. The University's response is broken down into two parts which are numbered separately, but the pages are not numbered. This reply will respond to the assertions in the order that they are presented in the University's response.

The first set of numbered responses:

2. **In response to paragraph 1, ULFA submits that the bargaining history prior to the time that the University designated sessional lecturers as academic staff under the *Post-Secondary Learning Act ("PSLA")* is irrelevant to the determination in this case. Under the *Universities Act (now repealed)*, section 25, the University of Lethbridge Faculty Association was continued as an academic staff association from February 1, 1982. Under section 24 of the *Universities Act*, academic staff associations consisted of the academic staff members of the university and they had the exclusive authority to enter into an agreement on behalf of the academic staff members. Under the *Universities Act*, "academic staff member", "academic staff" and "member of the academic staff" meant "an employee of the board who, as a member of a category of employees or individually, has been designated as an academic staff member by the board." When the *PSLA* was enacted, ULFA was continued by section 126(5) and its purpose and authority remained the same under sections 84 and 85. Section 1(c) defined academic staff in the exact same manner.**

ULFA had no authority to bargain on behalf of the sessional lecturers at the University until the University designated them as academic staff members in 2007. ULFA had no ability to compel the University to designate any group or individual as academic staff either, although it did have a right to consultation when the University was considering designation or changes to designation decisions. All decisions as to the composition of the academic staff or as to the members of the academic staff rested with the University.

ULFA also points out that the Faculty Handbook applies to the faculty members (otherwise known as the professoriate, including assistant, associate and full professors), Professional Librarians, Instructors, and Academic Assistants, not just to the faculty members. The Faculty Handbook is also applied to sessional lecturers in Schedule J which has and continues to place a financial burden on the sessionals.

3. **In response to paragraph 2, ULFA submits that it is aware of there being approximately 120 sessional lecturer positions in each of the fall and spring terms, however it is not certain of the actual or average number of actual sessional lecturers in a given term or year, because some of them will teach in both terms. The University has historically not applied the Sessional Handbook to sessional lecturers who work during the summer term so ULFA has no information as to the number of positions or persons working as sessional lecturers in summer. ULFA does plan to address this anomaly of representation regarding summer sessional lecturers going forward.**
4. **In response to paragraph 3, ULFA points out that the restriction on only one course per semester for Sessional Lecturers is due to a provision in the Sessional Handbook, which is always subject to negotiation between the parties. It is not a statutory restriction of any kind. ULFA agrees that many sessionals have other employment with other employers but argues that its historical surveys of Sessional Lecturers suggests the membership is more diverse than this simplistic characterization.**

The employment opportunities for sessional lecturers are determined by the provisions of the Sessional Handbook, Article 9.01 and 9.02 which provide for the only circumstances under which a sessional lecturer appointment is appropriate. A review of this Article shows that sessionals are employed generally to cover off for the absence of a professor or an instructor who would have taught that class under the Faculty Handbook. There is no doubt that the sessionals do the same teaching work as the professors and instructors do, in the same classrooms, with the same students and the same working conditions. The difference between these groups is the number of classes/hours of work and the fact that in addition to teaching duties, professors have additional obligations. There is a far greater difference between the responsibilities of sessional lecturers and professional librarians and academic assistants.

5. Further, many persons move regularly between Sessional positions under the Sessional Handbook and Instructor positions under the Faculty Handbook. Often these persons are seeking career positions in academia and accept whatever serial contracts are on offer. Further, some Sessional Lecturers are retired faculty members. The retired faculty members are required to choose between holding a post-retirement contract which would put them outside of both Handbooks, or holding an appointment under the Sessional Handbook (teaching only one course per semester) or under the Faculty Handbook (teaching more than one course per semester). This frequent and easy movement between Handbooks and positions also illustrates the similarity between the positions and the community of interest that they share.

6. In response to paragraph 4, ULFA states that there are far greater differences between different classes of faculty within the Faculty Handbook than between the Sessional and Faculty Handbooks. Further, ULFA does not understand the University's suggestion that the Handbooks are "entirely different in the terms and conditions of employment that they articulate". ULFA submits that there are no more differences between the terms and conditions of employment for faculty and sessionals than there are between faculty and librarians, instructors or academic assistants. Comparing the Faculty and Sessional Handbooks:

- There are 6 virtually identical articles (Objectives, 6 Communication and Information, 7 Delegation, 16 Holidays, 19 Annual Meeting, and Schedule D Copyright).
- There are 3 articles that are mostly identical (1 Interpretation, 2 Definitions, and 3 Amendments).
- In 13 Articles, the Sessional Handbook provisions are a clear subset or restricted case of the corresponding Faculty Handbook provision (4 Applications and exclusions; 5 Recognition; 8 Personal Files; 10 Academic Freedom, see FH 11; 11 Performance evaluation, see FH 13.11; 12 Termination, see FH 16; 13

Compensation, see FH 32; 14 Grievance Procedure, see FH 22; 15 Discipline, see FH 25; 17 Medical Leave, see FH 34; Schedule A Stipend, Schedule B Benefits, and Schedule C Negotiations and Impasse).

- There are 3 provisions unique to the Sessional Handbook (9 Appointments, Schedule E MOU teaching supplies and photocopying and Schedule F Conclusion of Bargaining 2015 Sessional Lecturers Handbook).
- 7. In further response to paragraph 4, ULFA points out that for the last three years, it has successfully negotiated the increase to the Sessional Lecturers stipend by applying the cost of living allowance formula set out in the Faculty Handbook to the Sessional Lecturer stipend set out in the Sessional Handbook.
- 8. In paragraph 4 the University points out that the rate per course negotiated in the Sessional Handbook is higher than the rate paid under the Faculty Handbook for teaching an overload course. However, there can be many justifications for such a difference given that the sessional is only allowed to teach one course but the faculty member already has a salary before being paid for the overload course. Much more interesting is that in Article 5.04 of the Faculty Handbook when ULFA is paying to have a member under the Faculty Handbook released for union business, the rate ULFA pays is the rate set out in the Sessional Handbook for the sessional stipend, not the overload course rate. This is but one of many examples of the overlap between the terms of each Handbook.
- 9. In further response to paragraph 4, achieving different wage and other economic benefits for different positions is not surprising or evidence of differences. The point is that economic benefits have been negotiated for each group.
- 10. The University relies on the fact that ULFA has historically had the Sessional Lecturers ratify the Sessional Handbook and the Professors, Librarians, Instructors and Academic Assistants ratify the Faculty Handbook. The private and internal union processes regarding ratification procedures in no way have ever been a part of the ALRB's consideration of how bargaining units are delineated.
- 11. In response to paragraph 5, ULFA first points out that by section 58.3(1)(c) of the *Code*, it still only represents the "academic staff members". Section 58.1(2) of the *Code* states that the definitions in section 1 of the *PSLA* apply to Division 9.1. Under section 1 of the *PSLA*, "academic staff member", "academic staff" and "member of the academic staff" are jointly defined as "an employee of the board of a public college, technical institute or university who, as a member of a category of employees or individually, is designated as an academic staff member in accordance with this Act". Before the Sessional Lecturers were designated as academic staff, ULFA approached the University to request that the University designate sessionals and negotiate terms and conditions for the sessionals within the Faculty Handbook. However, as the University states in its

response, the University insisted on having a separate handbook for sessionals and would agree to designate sessionals only after the separate handbook was negotiated. In light of the University's position, agreeing to a separate handbook was the only way to achieve bargaining rights for the sessionals who had asked ULFA for representation. ULFA states that in no way was it agreeing to a separate bargaining unit under the *Code* – a statute which had no application at the time.

12. In response to paragraph 6, ULFA states that it has never provided a separate notice to bargain for the sessionals and the faculty when there was bargaining in the same year. Further, the University has misrepresented and misstated the agreements with respect to the bargaining meetings and the topics in 2016. The schedule relied on by the University was a draft in place prior to the start of bargaining. This schedule changed following a cancellation of one week's bargaining between April 4-8, 2016. Instead of thirteen days of bargaining that concluded on April 11, 2016, as suggested by the University's draft schedule, there were eleven days of bargaining that concluded on April 14, 2016. The University's draft schedule indicated that SLH was discussed in isolation on April 4 and 11, 2016. ULFA's final schedule indicates that SLH language was introduced on April 1, 2016 along with FH language and discussed on April 11, 12, 13, and 14, 2016. Language for both FH and SLH were discussed at all meetings on April 1, 11, 12, 13, and 14, 2016.
13. ULFA also points out that the parties regularly bargained changes to one handbook only to then later, and after bargaining concluded, make changes to the other handbook so that they matched. For example, in 2016 the parties changed the language for Articles 2, 3, 5, and Schedule C in the Faculty Handbook. After bargaining concluded and in preparation for ratification purposes, the parties then modified the language in the Sessional Handbook to match the changes made to the Faculty Handbook for those articles without returning to the bargaining table or even obtaining formal written agreement. The parties recognized the overlap between the two handbooks and the need for this language to match.
14. ULFA states that the assertions in paragraphs 7 and 8 are incorrect.
15. In response to paragraph 9, ULFA states that its private, internal ratification procedures are irrelevant. Further, the Faculty Handbook was previously ratified by professors at all levels, librarians, lecturers and academic assistants, not just faculty.
16. ULFA disagrees with the submission in paragraph 10.
17. While ULFA does not dispute the content of Information Bulletin #9, ULFA submits that the question before the ALRB is not what is an appropriate bargaining unit in the context of a certification proceeding. Instead, in this case the ALRB must look to the language of the *Code* to determine whether ULFA's position that only one bargaining

unit was created in Part 9.1 for the academic staff association or not. ULFA relies on the submissions in its application in this regard.

18. In the alternative to ULFA's position that there is only one statutorily created bargaining unit for academic staff members, ULFA responds to paragraph 12 of the University's response as follows:

- a. **Community of Interest:** At the University, faculty members (assistant, associate and full professors), Professional Librarians, Instructors, Academic Assistants and Sessional Lecturers are designated as academic staff members. The University's community of interest arguments ignore the Professional Librarians, Instructors and Academic Assistants, all of whom are covered by the Faculty Handbook. There is nothing in the University's submission that delineates any community of interest difference between the sessional lecturers and the rest of the academic staff. In fact several of the differences noted between faculty and sessionals are also differences between faculty and librarians, lecturers and academic assistants.

The suggestion that only faculty members can be members of the School of Graduate Studies or teach graduate levels is simply wrong. Faculty members are not automatically members of the School of Graduate Studies, they, and all other members of the School of Graduate Studies, need to apply for that membership. Currently, not all members of the professoriate are members of the School of Graduate Studies. Not all of the staff covered by the Faculty Handbook teach at graduate levels, for example, librarians, instructors and academic assistants. However, there is no need to be a faculty member to be a member of the School of Graduate Studies and several persons who are not employed at all by the University are members. Sessional lecturers, provided that they have the necessary credentials can certainly be a member of the School of Graduate Studies as can members of other Universities. Not all staff covered by the Faculty Handbook do research and, in fact, instructors and academic assistants are not required to perform research duties similar to faculty members.

Many sessional lecturers have taught for years and years at the University, or have moved back and forth between the position of sessional and instructor and between the Faculty and the Sessional Handbook over many years. This illustrates the falseness of the suggestion by the University that sessional lecturers have no long term attachment to the University generally or no community of interest with the rest of the designated academic staff.

The University does not contest the community of interest shared by the professors (at all levels), librarians, instructors and academic assistants covered by the Faculty Handbook. There is simply no logic or factual foundation to their submission that the sessional lecturers do not share that same community of interest.

ULFA submits that the only real difference between the designated academics covered under the Faculty Handbook and those covered by the Sessional Handbook has to do with their hours of work and the number of the classes that they can teach in a given semester. This is, for all intents and purposes, more similar to the differences between full time and part time employees. There are no significant differences in working conditions or other terms and conditions of employment that impacts on the community of interest of the designated academic staff. The easy movement between sessional and instructor positions by persons illustrates the identity of the community of interest between all of the designated academic staff at this University.

- b. In terms of past collective bargain history, the letters that the University relies upon do not support their factual assertion. The parties have separated bargaining between monetary and language issues and then bargained both handbooks for language and both handbooks for money at the same tables. They have not had separate tables for the sessional and for the faculty handbooks unless they had decided to not bargain for one of the groups at all in that round.**

The University speaks of groups that are not certified by a union or statutorily included in a bargaining unit as if they are separate bargaining units, including the "exempt support staff", "non-academic senior administrators" and the "administrative professional officers". These non-union employees are not relevant to the consideration of the appropriateness of creating a separate sessional lecturer bargaining unit.

The fact is that combined effect of the *Code* and the *Public Service Employees Labour Relations Act ("PSERA")* already results in four bargaining units at the University: the academic staff (ULFA), the graduate students (Graduate Students Association), the postdoctoral fellows (Postdoctoral Fellows Association) and the non-academic staff (AUPE Local 53). The first three are statutorily created bargaining units in Division 9.1 and the last one, AUPE, is a certification under *PSERA*. There is no historical bargaining history, community of interest or labour relations purpose justifying the creation of another bargaining unit of only sessional lecturers.

- c. Viability of Bargaining Structures: The past situation has been that ULFA and its members have been denied their constitutional right to strike. The conclusion of past handbooks was assured by the imposition of binding arbitration. That is not evidence of stability or success or "a testimony to the lack of fragmentation embodied in the U of L's collective bargaining structures". It is simply testimony of the coercive impact of the denial of constitutional rights and forced interest arbitration and the lack of bargaining power that was granted. There is no historical evidence that suggests that the fragmenting of the ULFA bargaining unit into two parts will not lead to whipsaw bargaining, rotating strikes, instability and significant labour unrest that will have a serious destabilizing impact on the University as a**

highly respected institution of learning which attracts students from across Canada and from around the world.

- d. Agreement of the parties: First, ULFA submits that the ALRB, not the parties, has the exclusive jurisdiction to determine the scope of bargaining units. Second, ULFA has never had the power to freely enter into an agreement regarding the choice of one or two handbooks as the University would only designate the sessionals if ULFA agreed to negotiate a separate handbook and since that date ULFA has not had the bargaining power to change that situation.**

Further, the different expiry dates have, in addition to the submissions in the application, been in part due to the end date of the sessional contracts of April 30 and the end date of the academic schedule for faculty of June 30.

In further response to this submission, ULFA points to Schedule J of the Faculty Handbook which requires all members (see 2.2) to contribute to the daycare. Despite the inclusion of this requirement only in the Faculty Handbook, for many years now all sessional lecturers have also been required to contribute to the day care and the University has used the provisions of Schedule J of the Faculty Handbook as authority to make payroll deductions from sessional lecturers.

The University's response commences a new set of numbered paragraphs, beginning at 1 which respond to the paragraphs of the application. ULFA repeats its submissions in the application again and will not write them out here again in this reply to the University response. In addition to that, ULFA makes the following reply to the second set of numbered paragraphs:

- 19. In response to the second paragraph 5, ULFA states that it has no knowledge of the facts and circumstances of the University of Regina Faculty Association, the First National University of Canada, the Federated Collect of the Federation of Saskatchewan Indian Nations at the University of Regina and puts the University to the strict proof of these suggestions. there are multiple employers involved in this case, and that all but one of the collective agreements reached by URFA with those employers combine the equivalent of sessional and faculty positions in a single agreement. ULFA believes that the only exception is the First Nations University which is totally unique in that there are significant rights of First Nations governance and the constitutional and other rights of First Nations peoples at play.**
- 20. In response to the second paragraph 7, ULFA accepts that Part 9.1 refers to "the academic staff" not "all" academic staff. ULFA's reference to the phrase "all academic staff" was intended to use a phrase that ULFA anticipates would be the nature of the bargaining unit described by the ALRB in keeping with its standard practices of describing bargaining units, which often begin with the word "all". For example, reference can be made to the ALRB's active certificate table which can be found here: <http://www.alrb.gov.ab.ca/activecertificates.html>**

21. In response to the second paragraph 8, the point is that prior to the insertion of these parties into the *Code* in Part 9.1, there was no concept of bargaining unit between them under the governing provisions of the *PSLA*. There are no historical bargaining units that are confirmed or disrupted. Rather the question is whether inclusion of the academic staff, ULFA and the University by Division 9.1 of the *Code* allows for multiple academic bargaining units at a single post-secondary institution. If it does, the point that ULFA was making in the application is that there is no legislative indication of how such units would be determined. This can be contrasted to the provisions governing health care bargaining units and their transition, or the requirement on the enactment of the 1988 *Code* that the ALRB review and reissue all certificates (s.207(4)). Reference is also made to the decision in *City of Edmonton [1993] Alta. L.R.B.R. 362* where the ALRB decided to conduct a full review of the bargaining units at the City of Edmonton as part of the overall requirement to issue new certificates set out in section 207(4) (then section 205(4)).

In response to the suggestions that since ULFA may be raided by another union in 2022 or that had the University not designated the sessionals they might have been able to obtain a separate certification, ULFA states that these are not relevant or appropriate considerations. The *Concordia decision* referred to by University is of limited relevance as it was the certification of a private university under the *Code* and a relaxed standard for appropriateness was applied because it was a first certification of any employees for the institution.


More importantly, the University has failed to recognize that an application for certification of any of its employees who are not designated as academic staff must be made under *PSERA*, not the *Code*. Section 11 of *PSERA* creates a strong presumption for a single bargaining unit of all employees. As AUPE, under certificate E-5 dated December 3, 1993 is already certified as the bargaining agent of all employees when employed in general support services. If the sessionals had not been designated as academic staff, then it is highly likely that they would simply fall into the AUPE bargaining unit, especially given the impact of section 11 of *PSERA*. This is what happened when the non-academic staff association at the University of Alberta applied for certification for English as a Second Language instructors after the University of Alberta decided not to designate them as academics.

22. In response to the submission of the University regarding the remedy, the University is asking that the ALRB to declare that it has two bargaining units of academic staff comprising: (a) faculty members; and (b) sessional lecturers." However, even this statement causes concern. The Faculty Handbook covers faculty members, Professional Librarians, Instructors and Academic Assistants. Of the roughly 480 people covered by the Faculty Handbook, about 149 or 1/3 are not professors, which is the group that the University has been referring to as faculty members in their response.

ULFA requests that the ALRB order bifurcating the issues as set out above as a way to potentially avoid the detailed evidence that the University is proposing to call in to support the factual assertions in its reply and the detailed evidence that ULFA will be required to adduce to respond to those assertions. ULFA also requests that the ALRB consider the order of proceedings if the detailed factual evidence is to be called in that it is difficult for ULFA to guess what is relevant before it has the opportunity to hear the evidence that the University plans to rely upon.

ULFA repeats its request for an expedited hearing given the proximity of this issue to the start of collective bargaining. The University purported to serve Notice to Bargain for the sessional lecturers only on ULFA yesterday, January 22, 2018. ULFA is cooperating with the Board's Office in that expedited scheduling.

Yours truly,



Leanne Chahley

cc. Annabree Fairweather
Scott Harling