

**Lakeland College v. Lakeland College Faculty Assn.
(Kaai Grievance)**

IN THE MATTER OF a grievance arbitration
Between
Lakeland College, and
Lakeland College Faculty Association with respect to
a grievance concering Wanjiku Kaai

[2003] A.G.A.A. No. 86
File No. Alta. G.A.A. 2003-094

Alberta
Grievance Arbitration
A.C.L. Sims, Chair, F. Day, Nominee of
Lakeland College, and L. Kanee, Nominee
of Lakeland College, Faculty Association

Heard: Edmonton, Alberta, April 3, 2003
Award: December 3, 2003
(90 paras.)

The grievor worked as a librarian in a College where she was designated as an academic. The academic staff agreement contained a clause saying "The Board may declare that a Faculty Member's position is redundant due to...lack of operational funding." The College's President advised the grievor that her position was redundant as part of a reorganization designed to reduce a substantial deficit. This deficit had been caused by a lack of expected new funds and increasing expenses even though base government grants had increased modestly. The Association argued the position had not been properly eliminated for two reasons: the declaration had to be by the Board itself, not the President and there was no lack of operational funding since grants went up. The Board accepted that operational funding involved more than base government grants, and involved the global funds available for operation. However, it held that, in this agreement where Board is a defined term and where other clauses specifically referred to the President, this power had to be exercised by the Board itself. The article, which was itself imposed by arbitration was designed to ensure a measure of debate before a partially representative Board of Governors before an academic staff member would lose

their position. In the face of this clause, any purported delegation to the President was insufficient to meet the intention of the article.

Appearances:

Brian Thompson, Counsel, Pauline Gillanders, V-P, Finance and Operations, Keith Passey, Director, H.R., and Brian Larson, V-P, Academic and Student Services, for Lakeland College.

Simon Renouf, Counsel, Shasta Desbarats, Counsel, Neil Maclean, President, Audra Baddock, Executive Assistant, Terry Sway, Labour Relations Officer, and Wanjiku Kaai, Grievor, for Lakeland College Faculty Association.

AWARD

¶ 1 Ms. Wanjiku Kaai worked for 18 years as a professional librarian at Lakeland College in Vermilion, Alberta; a position designated as part of the institution's academic staff. She was a "continuing" member of the faculty. On May 22, 2002 she received a letter of redundancy reading, in part:

This letter is notification that effective July 3, 2002, your position as a Full-Time Continuing Faculty Member in the Centre for Information and Learning Resources at Lakeland College will be redundant.

This declaration and related action is taken in accordance with Article 7 - Reassignment and Termination of Continuing Employees in the current Collective Agreement between the Board of Governors of Lakeland College and the Lakeland College Faculty Association. This redundancy has occurred primarily due to a lack of operational funding.

¶ 2 Article 7.2 provides:

7.2 The Board may declare that a Faculty Member's position is redundant (or will become redundant as of a certain date) due to decreased enrolment, course changes, technological changes, or lack of operational funding.

¶ 3 "Board" is a defined term

1.12 "Board" means the Board of Governors of Lakeland College;

¶ 4 "Continuing" faculty member is also a defined term and the definition is relevant particularly because of its reference to the Board of Governors.

1.19 "Continuing" member means a Faculty Member whose appointment is continuous from year to year, subject to clause 8.2, and subject to the right of the Board of Governors to dismiss for just and proper cause in accordance with Article 9, Suspension and Dismissal, and subject to the provisions of Article 7, Reassignment and Termination of Continuing Employees;

¶ 5 Ms. Kaai, represented by the Lakeland College Faculty Association, grieved the Employer's action. The grievance raises two basic objections to the College's action, each said to render the redundancy notice null and void.

1. Article 7.02 requires a declaration of redundancy from the Board of Lakeland College. In fact the decision was made by the President or the Executive Committee without Board involvement.
2. Article 7.02 is predicated on "a lack of operational funding" yet "operational funds" continued and increased over the period in question.

¶ 6 In answer to these points the Employer argues that 7.02 does not require the Board to act in person, rather, the Board is just used as a synonym for "Employer". The Board could and in any event had properly delegated its authority to make such decisions to the President. If Board authority was needed, that authority was given by the Board's approval of the budget. On the second issue the Association's interpretation of "operational funding" is too narrow. There was a demonstrable cutback in the College's revenues that were the direct cause of the decision to declare Ms. Kaai redundant.

¶ 7 The parties agreed that the Board should rule on whether the purported redundancy notice is valid and, if necessary, reserve jurisdiction to deal with any question of remedy.

Ms. Kaai's Evidence

¶ 8 Ms. Kaai testified about her personal circumstances and the impact this decision has had on

her and her family. She holds Bachelor of Education and a Master in Library Science degrees. On August 20, 1984 she moved to the town and started work at the College. She has two daughters; one 14 in grade 9 and the other 13 in grade 7. Seven years ago one of her daughters suffered an infection and became deaf. The Vermilion community has provided her daughter with strong support in terms of her subsequent schooling and her social life. The school has two aids who work with her and her classmates have learnt to sign. She has trained as a swimmer. Her speech therapist and her general practitioner live in Vermilion. Ms. Kaai has family in Vermilion who also provide support. Ms. Kaai is 49 years old with 10-15 years to go before retirement. Family life is, for her a major priority. In her view, moving from Vermilion would spell disaster for her daughter. She has applied for librarian positions elsewhere but so far without success.

¶ 9 Notwithstanding these compelling personal circumstances, the issues raised in Ms. Kaai's grievance turn on the interpretation of terms in the collective agreement that binds both parties. We have no discretion to assess or vary that interpretation based on personal circumstances.

The Association's Arguments

¶ 10 The Association argues that Ms. Kaai's notice of position abolishment is void because only the Board of Governors can declare a position redundant. This argument rests on what the Faculty Association says is the plain and unambiguous wording of Article 7.2 of the agreement set out above. It says "the Board" may declare that a Faculty Member's position is redundant. Article 1.12 defines Board to mean the Board of Governors of Lakeland College. Therefore, under this collective agreement, the Board is the only body with authority to make that declaration.

¶ 11 The Association refers to other places in the collective agreement where the parties have used terms that show they are conscious of the various different actors in the College's make-up and of the role they intend them to play. This shows, they argue, that when Article 7.2 says "the Board" it means just that.

¶ 12 Article 7.7 provides:

7.7 The President shall approve any reasonable proposal for retraining which would reasonably allow a Faculty Member who was declared redundant to be reasonably able and qualified to assume a comparable position that is vacant (or contemplated to become vacant) within the next 18 months.

¶ 13 This reference to the President is in contrast to section 7.2, 7.3, 7.4 and 7.5 where the reference is explicitly to "the Board."

¶ 14 The Association also refers to the following sections:

4.7 Initial appointment of a Faculty Member to probationary appointment or continuing appointment shall be by notice in writing from the President or his designee on behalf of the Board...

10.6 Neither the Board nor any person acting on behalf of the Board shall:

- a) refuse to employ or not continue to employ any Faculty Member or discriminate against any Faculty Member in regard to employment because the said Faculty Member is a member, officer or representative of the Faculty Association. [other prohibitions follow]

18.4.2 The Level I Grievance Officer shall be the Vice President, Academic (or designee).

18.5.2 The Level II Grievance Officer shall be the President (or designee).

¶ 15 The Association's position is that neither the collective agreement nor the College's Act, R.S.A. 2000, c.C-19 give the Board the authority to delegate the power to declare a position to be redundant. In its view Article 7 reserved this right exclusively for the Board to exercise. In support of that argument the Association refers to:

AUPE Local 0040 and The Mental Health Board Ponoka (Re Clark) (1986) Alta. G.A.A. 85-124G (Elliott)

¶ 16 The case involved the termination of a probationary employee of a Mental Health Board.

The statutory power to dismiss was vested in the Board. It had the power to delegate that power, and had done so, to its Executive Director. The termination was decided upon by a manager with the prior approval of the Director of Human Resources. The Union maintained the termination was a nullity because of a lack of properly delegated authority. The arbitrator agreed. He found the Board could and had delegated its authority to the Executive Director, but no further and without any authority to sub-delegate. The Human Resources Director therefore lacked authority to make the termination and it was a nullity.

¶ 17 The arbitration board ruled, however, that since the employee was probationary it had no authority to hear the grievance and declined jurisdiction. That decision was challenged in Court. The Alberta Court of Appeal ([1987] A.J. 436) found the Board erred in declining jurisdiction, and upheld the declaration that the termination was a nullity. Thus, on the point of significance to this case, the decision has judicial approval.

¶ 18 The arbitrator provided the following helpful review of the rules on delegation and sub-delegation.

In considering the question of delegation and sub-delegation of authority we start with the position that the following is an accurate summary of the law:

An element which is essential to the lawful exercise of power is that it should be exercised by the authority upon whom it is conferred, and by no one else. The principle is strictly applied, even where it may cause administrative inconvenience, except in cases where it may reasonably be inferred that the power was intended to be delegable. (Administrative Law by Wade, 5th Edition, p.319)

Professor Willis in his article "Delegatus non potest delegare" (1943) 21 Can Bar Rev 257 says on page 159:

When is delegation permissible? The answer to this question depends entirely on the interpretation of the statute which confers the discretion. A discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negated by any contrary indications found in the language, scope or object of the statute; to put the matter in another way, the word "personally" is to be read into the statute after the name of the authority on which the discretion is conferred unless the language, scope or object of the statute shows that the words "or any person authorized by it" are to be read thereinto in its place...

Professor Willis goes on to say that the principle will readily give way to "slight indications of a contrary intent" including:

- (a) the scope and object of the statute;
- (b) the nature of the authority;
- (c) in the situation in which the discretion is to be exercised, in the object intended to be achieved, is there anything in the legislation indicating that it was not intended that the power be exercised personally.

While a footnote to Reid and David on Administrative Law and Practice, 2nd Edition p.289 questions whether the maxim even amounts to a presumption we are satisfied from our review of the cases and texts that it does. We note in particular that the Supreme Court of Canada in Regina v. Harrison [1976] 3 WWR 536 at p.542 confirmed the presumption although stressed that

the rule can be displaced by the language, scope or object of a particular administrative scheme

The last summary of the law we wish to outline before applying it to the grievance before us is

- (a) extracts from Reid and David Administrative Law and Practice 2nd Edition p.288-289

"... legislation only rarely contains express authority to sub-delegate and when it does it is likely to be narrowly construed."

The modern significance of (*Leather v. Doolittle Co. Ltd.* [1928] DLR 805 [CA]) is the differentiation of "quasi-judicial" from other kinds of powers in terms of their re-delegability by implication. The view has been expounded with increasing frequency by Canadian Courts that, in the absence of express statutory authority, quasi-judicial or discretionary power - the terms are usually used synonymously in this context - may not be sub-delegated.

- (b) a further extract from Professor Wade's book when he says in referring to the delegation of powers:

They will be construed in the same way as other powers, and will not therefore extend to sub-delegation in the absence of some express or implied provision to that effect.

(Wade on Administrative Law, p.325)

¶ 19 The Association relies on the Alberta Mental Health Board case and three others to support the proposition that there can be no lawful delegation of authority unless the collective agreement provides for such delegation and unless the party has in fact delegated the authority in compliance with the terms of the collective agreement. The other three cases are:

The AUPE and The Board of Governors of Olds College (*Re Skurdal*), (September 13, 1988) unreported, Alta. G.A.A. 87-175(i) (Dubensky)

The Board of Governors of Mount Royal College and The Mount Royal Faculty Association (*Re Kirk S. and Cheong L.*) (July 8, 1988) unreported Alta. G.A.A. 88-079G (Jones D.P.)

Re Fort Saskatchewan General Hospital District 98 and United Nurses of Alberta,
Local 9 (1990), 12 L.A.C. (4th) 166 (W.D. McFetridge)

¶ 20 The Olds College case followed a circuitous route. It involved a tradesperson declared redundant by the College's farm manager. The Union raised similar objections to those raised here. Initially, on the mistaken belief that the College had no bylaws, the Board held that the College Board could delegate its authority, that the power had been exercised by the College's Executive Committee, not the farm manager, and that the principal of "administrative necessity" applied. Some time later it came to light that bylaws in fact existed and covered the issue of delegation and termination quite explicitly, saying:

Notwithstanding any of the above the President may subject to the Collective Agreements, suspend from duty and privileges any member of the staff at the College and shall forthwith report his action and reasons for it to the Board. The Board reserves for itself the right, subject to collective agreements, to appoint, promote, or dismiss any member of the regular staff at the College.

¶ 21 Based on this added information, the Board came to a different conclusion. This bylaw, the Board found, reserved to the Board the power to terminate and the Executive Committee's decision was a nullity. Later, in response to an argument that damages should be given in lieu of reinstatement, the arbitration board said, at p.8 of its January 18, 1990 decision:

As a Board we do not know for certain how the College Board would have reacted if it were called upon to terminate an individual who had been in their employ for over 12 years.

¶ 22 It went on to say, in support of the same point, that the College Board could have regularized the decision by acting itself once the challenge to the decision was known.

¶ 23 Similar challenges were raised in another College setting in the Mount Royal case. The grievors were both probationary members of the College's academic staff. The College's Vice-President (Academic) wrote to each of them terminating their employment. The Association argued that the Colleges Act did not allow the delegation of the Board's termination power, and that if the statute did allow such delegation to the V-P Academic, it could only be accomplished by formal Board resolution.

¶ 24 In assessing this argument the arbitrator referred to the following extract from Professor

John Willis's Article entitled "Delegatus Non Potest Delegare", (1943) 21 Can. Bar Rev. 257 at 260-261:

[If] the language of the statute does not, ex hypothesi, help it [a court], it is driven therefore to the scope and object of the statute. Is there anything in the nature of the authority to which the discretion is entrusted, in the situation in which the discretion is to be exercised, in the object which its exercise is to achieve to suggest that the legislature did not intend to confine the authority to the personal exercise of its discretion? This question is answered in practice by comparing the prima facie rule with the known practices or the apprehended needs of the authority in doing its work; the court enquires whether the policy-scheme of the statute is such as could not easily be realized unless the policy which requires that a discretion be exercised by the authority named thereto be displaced; it weighs the presumed desire of the legislature for the judgment of the authority it has named against the presumed desire of the legislature that the process of government shall go on in its accustomed and most effective manner and where there is a conflict between the two policies it determines which, under all the circumstances, is the more important.

Similarly, the text continues (at p.106):

...[T]he courts appear to be more prepared to accept that Parliament intended to permit sub-delegation of merely administrative functions, but not legislative or judicial ones. This approach necessarily involves characterizing the function whose sub-delegation is in doubt - a futile process which has been made obsolete in other aspects of Administrative Law. To some extent, however, this distinction makes good sense, because many merely administrative matters do not require the exercise of discretion or personal judgment, and it really does not matter which particular person in fact does the action in question. On the other hand, to the extent that the phrase "merely administrative" has been used in Administrative Law to encompass some discretionary functions which cannot be characterized as judicial or quasi-judicial, the policy underlying the rule against sub-delegation applies to require that particular administrator to exercise his own discretion. In short, it is submitted that the real question is whether discretion must be exercised by the delegate. If so, there would be a strong presumption against sub-delegation, whatever the appellation of the function involved.

¶ 25 The case referred to Arbitrator Dubensky's decision in Olds College, but only the initial decision which was subsequently reversed as explained above.

¶ 26 The Board in Mount Royal found the College's Act did contemplate sub-delegation, but by inference, based on the approach outlined above in the Willis Article. The Board's analysis of the Act, using that approach, is set out at page 22:

First, Section 19 specifically requires the Board to appoint a President, who is the Chief Executive Officer of the college, who undoubtedly discharges many of the functions which the statute formally confers on the Board. Secondly, Section 10(1)(h) authorizes the Board to do "anything that may be required to administer the college...", which Arbitrator Dubensky in the Olds College case held to be broad enough to permit a College Board to delegate its powers to an Executive Committee. Thirdly, Section 20(1) authorizes the Board to appoint officers and to prescribe their duties, which contemplates that those officers will perform duties which the Board otherwise might do itself. Fourthly, Section 21(3) contemplates that the Board's powers to prescribe the terms of employment of academic staff members will be subject to any collective agreement to which the Board becomes a party, which is a clear indication that the Board can lawfully enter into a collective agreement which provides that certain functions which otherwise could be exercised by the Board will be exercised by someone else or be subject to certain conditions. Finally, the "known practices" (to quote Professor Willis) of this Board have for a number of years included the Vice-President's exercise of the authority to terminate the employment of probationary employees. All of these factors make me conclude that the Legislature in this case clearly intended the Board to be able to delegate its powers.

¶ 27 The Board in Mount Royal also dealt with the relationship between the Board's statutory powers and the provisions of the collective agreement. The Association had argued that, absent a statutory power of delegation, any collective agreement power to delegate must be a nullity. That is the reverse of the argument in this case where the Association says the collective agreement provision is determinative. The Mount Royal Board held, at p.23:

Section 21(3) of the Colleges Act specifically contemplates that the Board's statutory power to prescribe the terms of employment of academic staff members is subject to any collective agreement to which the Board becomes a party. Accordingly, in cases of conflict, the collective agreement governs. This makes good Administrative Law sense, because such a collective agreement can only affect the Board's powers if the Board itself has become a party to that collective agreement. In other words, Section 21(3) of the Act indicates that the Legislature specifically contemplated that the Board could enter into a collective agreement that delegates or fetters the powers which the Act otherwise grants to the Board with respect to academic staff members.

¶ 28 The Board then held, based in part on the evidence of past practice and in part on the words of the collective agreement, that the Board had delegated its authority to terminate probationary employees to the Vice-President (Academic). The Board found, in the alternative and based on the statute, that the Board had delegated the power to terminate to the President along with the power to sub-delegate that authority. The Board said, at p.26:

In my opinion, it is not necessary for there to be a formal resolution of the Board specifically creating the office of Vice-President (Academic), or specifically indicating that this officer is to exercise this particular power.

¶ 29 The Fort Saskatchewan General Hospital case arose in the context of a Hospital Board not a College, but the arguments advanced were much the same. The employee in question was dismissed by an assistant executive director. The Union argued that neither the statute nor the hospital's bylaws allowed delegation below the office of the Executive Director. The issue was the Executive Director's power to sub-delegate the authority to terminate. The hospital's bylaws authorized the Executive Director to (in part):

...select, employ and control and to discharge when necessary any hospital employee subject to any restriction herein contained or provided by resolution of the board.

¶ 30 The Executive Director in fact purported to sub-delegate the authority to terminate to his assistant, but was found to have had no Board authority to do so. The Board canvassed the Mount Royal and Mental Hospital Board decision referred to above in detail. Unlike the situation in Mount Royal, the arbitrator found no indication of any intention that the power of termination might be exercised below the Executive Director level.

¶ 31 The Board in Fort Saskatchewan General Hospital accepted that the statutory power to "do whatever it considers necessary to operate the hospital" included the general power to delegate and allow sub-delegation of the authority to terminate. At page 177 the Board expressed the view that:

The presumption that an intention to subdelegate will not be found in the absence of some express or implied provision to that effect is not rebutted by evidence which at best indicates that the board did not consider it. Although the absence of such a provision may open the door to a finding that subdelegation is implied by the scope and object of the Act, silence with respect to the delegation of authority does not in itself effect it.

¶ 32 The Board weighed into its consideration of the intention of the statute the seriousness of termination to the employee involved:

As is discussed below the nature of the authority to which discretion is entrusted in this instance involves the termination of a long-term employee. This is a very important decision involving difficult and complex considerations with serious consequences for both the person terminated and the hospital itself.

¶ 33 The Association in this case builds on this point with its references to Wallace and Machtinger (referred to below). The arbitration board in the Fort Saskatchewan General Hospital case found no intention to sub-delegate the authority to terminate and, following the Mental Health Hospital case, found the termination a nullity, justifying reinstatement.

¶ 34 Dealing with the statute in this case the Association argues that it gives no express power to the Board of Governors to delegate the power to declare a position redundant. It acknowledges section 14 of the Act which states that a College Board "shall ensure that the business and affairs of the College are conducted in accordance with the Act and the regulation." It also acknowledges the sections providing for collective bargaining:

30 (1) In this section and in sections 31 to 36, "agreement" means an agreement in writing between a board and an academic staff association under this section or section 34 and includes an agreement under section 38.

(2) The board may employ any persons it considers necessary to serve as academic staff members at the college.

(3) A board may, subject to any existing agreement,

- (a) determine the salaries or remuneration of academic staff members,
- (b) prescribe the duties of academic staff members, and
- (c) prescribe the term of employment and the terms and conditions of employment of academic staff members.

34 (1) ...when an agreement referred to in section 38 expires, the board and the academic staff association of the college shall enter into negotiations for the purpose of concluding an agreement.

(2) An agreement shall with respect to the employment of academic staff members contain provisions respecting at least the following matters:

- (a) terms and conditions of employment;
- (b) teaching responsibilities;
- (c) vacation leaves, leaves of absence and sick leaves to be allowed;
- (d) salaries and remuneration to be paid and the establishment of salary and wage schedules for that purpose;

- (e) procedures respecting the settlement of differences between the parties arising from the interpretation, application or operation of the agreement;
- (f) conditions and procedures governing reassignment, suspension or dismissal by the board;
- (g) procedures respecting negotiations of future agreements, including procedures for the final resolution of disputes that may arise during negotiation of future agreements;
- (h) if a procedure referred to in clause (g) is compulsory binding arbitration, permission for either party to initiate binding arbitration for the final resolution of disputes that may arise during negotiation of the agreement.

(3) An agreement is binding

- (a) on the board,
- (b) on the academic staff association, and
- (c) on the academic staff members.

¶ 35 It relies upon the extract from the Mount Royal decision set out above to support the following proposition:

Even if the Colleges Act provided the Board with the authority to delegate the declaration of redundancy, which we assert it does not, the Collective Agreement would override any such delegation.

¶ 36 It goes on to argue that, in deciding whether delegation is allowed or intended one must look at the consequences of the decision, and thus the importance of the discretion being exercised. The Supreme Court of Canada has commented recently on the importance of employment and of the termination event, to employees. In:

Wallace v. United Grain Growers Ltd. [1997] 3 S.C.R. 701 (paras 93-94)

the Supreme Court said:

The vulnerability of employees is underscored by the level of importance which our society attaches to employment. As Dickson C.J. noted in Reference Re Public Service Employee Relations Act (Alta.) [1987] 1 S.C.R. 313 at p.368:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

This, for most people, work is one of the defining features of their lives. Accordingly, any changes in a person's employment status is bound to have

far-reaching repercussions.

¶ 37 The Court has since added the observation that:

"...not only is work fundamental to an individual's identity, but also the manner in which employment can be terminated is equally important.

Machtiger v. H.O.J. Industries Ltd., [1992] 1 S.C.R. 986 at para. 30.

¶ 38 The Association says there is a past practice that only the Board of Governors can declare a position to be redundant. The only support for this "known practice" (to which the Employer takes exception) comes from two reported decisions involving prior disputes. In the reasons for decision of the following case:

The Board of Governors of Lakeland College and The Lakeland College Faculty Association (Re Bennett) (1996), unreported Alta. G.A.A. 96-139G (Moreau)

the Board set out the applicable collective agreement provisions (7.2, 7.4 and 7.6) which are the same as those here, at p.2. At page 6 it noted:

Dr. Shillington then presented the faculty redundancy proposal to the Board of Governors, which approved it on March 29, 1995. It reads as follows:

Faculty Redundancy Process

1. Meet with program/course staff to advise of position redundancy, and if redundancy applies to more than one staff member, determine if any volunteers.

2. A redundancy committee consisting of senior manager (chair), dean(s), department head(s), and faculty association president or designate a) review instructional requirements of the program(s), and b) review individual staff regarding fit. Where the department head is affected by the potential redundancy, a department head from another area will be approached to sit on the committee.
3. The senior manager, in consultation with the redundancy committee, will identify the position to be abolished in situations where there is more than one position impacted. Any half-time or partial redundancies must comply with Article 5.7 of the Faculty Association collective agreement.
4. Senior manager to forward recommendations to the president.
5. President to take recommendations to the Board meeting in April.
6. President, on behalf of the Board, notifies instructors of redundancy effective date.
7. The redundancy committee described above will look for reassignment or comparable job that may become vacant within next 18 months.
8. The redundancy committee then files a recommendation with the president. President to initiate notification to instructors on decision to terminate or reassign.

Approved by Board of Governors on March 29, 1995.

¶ 39 In an earlier case:

The Board of Governors of Lakeland College and the Lakeland College Faculty Association (Re Komick J.) (1989), unreported, Alta. G.A.A. 89-008G (Lefsrud), certiorari granted Court of Queen's Bench, appeal allowed in part [1990] A.J. No. 30, rehearing at Alta. G.A.A. 90-027G.

¶ 40 The case report quotes the redundancy letter that initiated the case as follows:

The Board of Governors, following a report by the Reassignment Committee, passed a motion deeming you redundant as per Article 7.4.1. A strong effort was made to locate a suitable position within the College, unfortunately, without success.

¶ 41 At page 10, the Board expanded on the circumstances of that letter saying:

In any event, the recommendations of the Committee were forwarded to the Board of Governors who, at their meeting on the 13th of April, 1988, reviewed same and considered various presentations which were made. Thereafter, on motion duly made and seconded, the position of the Grievor was declared redundant and it was directed that he be paid out.

¶ 42 The Association also relies upon the history of the Article in question to support its interpretation of its meaning. Again, the Employer takes exception to this as evidence.

¶ 43 The issue of Article 7 went before an interest arbitration board in 1994.

Board of Governors of Lakeland College and Lakeland College Faculty Association (unreported decision D.P. Jones, Q.C., March 10, 1995)

¶ 44 The text of that decision shows that the agreement contained a clause dealing with "Reassignment and Termination of Full-Time Employees" that had remained unchanged since 1983. The College sought to change the wording because it felt "the existing provision is extraordinarily complex and does not address current concerns." The College's brief to that interest arbitration board details its arguments for abolishing the former criteria for redundancy. The brief speaks primarily to the way decisions to cancel programs should be made; in its view by the College Board not by an arbitration board engaging in an after the fact analysis of a

contractual formula. It submitted then, at p.16 of its brief:

It is also submitted that the current trigger is the most restrictive in the industry. It is so restrictive it conflicts with a basic tenant of democratic society. The legislature has provided that the Board of Governors is charged with the responsibility of managing the institution. At the same time the Board of Governors cannot make reasonable staffing decisions without offending Article 7!

It is clear that the clause was adopted in a very different era. It is now conceivable that whole programs may be eliminated. It is submitted that if these changes are to occur the debate should be focused on educational principles and not arbitrable ones.

The University of Alberta's decision to close the dentistry faculty represents an interesting illustration of how the system should work. The debate in that case was public and controversial. The goal of Faculty was to convince the Board of Governors that it was making a decision contrary to the public interest. The debate was an educational one focusing firmly on issues of public policy. It is not a legal debate over whether any of the "triggering" events occurred.

The College's proposal would work in the very same way. Educational debates would occur not through a technical and laborious arbitration process but through a process of public consultation of which the Faculty Association has representation on the Board of Governors.

It is submitted that all post-secondary institutions must have flexibility in determining their program content. This is particularly true in the face of declining funding. The College seeks through its proposal the flexibility enjoyed at other colleges in Alberta so that educators and not (ultimately) arbitrators determine which programs are offered. (emphasis added)

¶ 45 The arbitrator in 1995 awarded the current clause in response to these submissions by the Employer. The Association argues that this supports its argument that the decision by the Board was indeed intended to be made by the Board itself, not by a delegate. Only that interpretation allows the "a process of public consultation of which the Faculty Association has representation on the Board of Governors."

¶ 46 The Association argues that the requirement for Board approval was a matter of value and a point of protection for its academic staff members. The requirement for a debate, in an open forum, by a Board which includes faculty representatives affords important protections. In exchange for this the College received increased flexibility and the right to terminate an otherwise tenured faculty member without cause for 12 months pay.

¶ 47 Relying on the authorities set out above as well as:

Branigan v. Yukon Medical Council [1986] Y.J. 48 (Y.T.S.C.)

the Association argues that the letter purporting to declare Ms. Kaai redundant was written without authority and is null and void. As a result she is entitled to be reinstated to her former position and compensated for her loss.

¶ 48 As a second ground, the Association argues that, even if the letter was based on sufficient authority, there is no, or inadequate proof of the "lack of operational funding" that it argues is a necessary prerequisite to the exercise of any such authority under s. 7.2 of the collective agreement. In support of this it cites the decision in:

Re Kwantlen College and Douglas and Kwantlen Faculty Association (1982) 12 L.A.C. (3d) 115 upheld 85/83 B.C.L.R.B. (May 17, 1983)

¶ 49 In that case, a long term college employee was laid off permanently, terminated due to an alleged lack of funds following reorganization and "the changing economic environment." The arbitrator reviewed management's decision on a reasonableness test, not one based on correctness or just cause. He concluded on the facts of that case as follows:

In these circumstances, and after taking the evidence as a whole I find that the college's decision to terminate Mr. Long for the reasons it gave was unreasonable in the sense that its reasons were either entirely unsupported by the evidence or at least unsubstantiated by it. Therefore, I find that the action of the college in terminating Mr. Long was in violation of art. 6.01 of the collective agreement. I am satisfied that the association and Mr. Long have satisfied the onus which was on them in this respect. In so finding, I make it clear that I base my conclusions on the fact that the evidence gives no ultimate support to the existence of the reasons advanced by the college in the deciding to terminate Mr. Long.

¶ 50 The Association asks "what does operational funding as used in Article 7.2 mean?" If it is the same as grants, then it argues on the basis of Ms. Gillanders' evidence (summarized below) and the College's financial documents, that there has in fact been an increase. The Association acknowledges the 1995 Jones interest arbitration award did not define "operational funding," but argues that it was intended to mean base operating grants.

The College's Argument and Evidence

¶ 51 The College relies on the Olds College and Mount Royal cases cited by the Union for the proposition that the Colleges Act clearly contemplates that a College's Board of Governors may delegate a vast array of its powers including the authority to declare position redundant. It argues that the following sections, particularly, implicitly recognize this general power to delegate authority for administrative decisions including the right to lay off employees or abolish positions.

14 A college board

...

- (b) shall ensure that the business and affairs of the college are conducted in accordance with this Act and the regulations,
- (c) shall determine the general policies with respect to the organization, administration, operation and courses of instruction of the college,
- (d) is responsible, in respect of the expenditures made by it, for the operation of the college from the funds provided, and for accounting for those expenditures, and

...

15 Subject to this Act, a college board has the power to manage and control a college and its property, revenue, business and affairs.

16 (1) In addition to the powers given to it by this and any other Act, a college board may, subject to this Act,

...

(j) do any other things that may be required to administer the college and its property.

(2) A college board may, after consultation with the academic staff association, do one or more of the following:

- (a) designate categories of employees as academic staff members at the college;
- (b) designate individual employees as academic staff members at the college;
- (c) change a designation made under clause (a) or (b) or under section 40.

28 (1) For each college there shall be a president who shall be the chief executive officer of the public college.

29 A college board may

- (a) appoint any officers and employees it considers necessary for the purposes of the college,
- (b) determine the salaries or remuneration of the officers and employees,
- (c) prescribe the duties of the officers and employees, and
- (d) prescribe the terms and conditions of employment of the officers and

employees.

¶ 52 An implicit right to delegate functions can be found in the doctrine of administrative necessity. This was found and relied upon in the initial decision of the arbitration board in Olds College (supra) relied upon by the Association. Its scope is discussed in the following decision; although much of that decision concerns inter-delegation, a constitutional issue of no application here. We note also that it discusses the sub-delegation of ministerial powers which have sometimes been treated differently than powers given to other statutory delegates.

Peralta and the Queen in Right of Ontario (1985) 16 D.L.R. (4th) 259 at pp. 276-283 affd. 56 D.L.R. (4th) 575 (Ont. C.A.) at p.272:

When courts have considered whether delegation of ministerial powers was intended, considerable weight has been given to "administrative necessity", that is, it could not have been expected that the Minister (in this case the Governor in Council) would exercise all the administrative powers given to him. Further, in such cases the suitability of the delegate has been a material factor in determining whether such delegation is intended and lawful: see Lanham, "Delegation and the Alter Ego Principle," 100 L.Q.R. 587 (1984).

There is no rule or presumption for or against subdelegation": Driedger, "Subordinate Legislation", 38 Can. Bar Rev. 1 (1960), at p.22. The language of the statute must be interpreted in light of what the statute is seeking to achieve. As Professor Willis pointed out, the maxim *delegatus non potest delegare* "does not state a rule of law; it is at most a rule of construction' and in applying it to a statute there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects": Willis, "Delegatus Non Potest Delegare", 21 Can. Bar Rev. 257 (1943) at p.257.

¶ 53 The College argues that no formal Board resolution is required to delegate authority for administrative decisions to any particular office or individual. If such authority is needed, it is contained within the broad grant of authority from the Board to the President which is based on the "Carver principles." The Carver principles involve a policy of delegating plenary power, subject to express limitations or "fences" rather than delegating specific tasks and authorities.

¶ 54 This basic approach is set out in a series of policies. Policy BP-1 approved June 22, 2000 defines, in a global sense, the relationship between the President and the Board:

The Board's sole official connection to the operational organization, its achievements and conduct will be through a Chief Executive Officer, titled President

¶ 55 This is fleshed out in BP-3 dealing with the Accountability of the President

The President is the Board's only link to operational achievement and conduct, so that all authority and accountability of staff, as far as the Board is concerned, is considered the authority and accountability of the President.

Accordingly:

1. The Board will never give instructions to anyone other than the President.
2. The Board will refrain from evaluating, either formally or informally, any staff other than the President.
3. The Board will view President performance as identical to organizational performance, so that organizational accomplishment of board stated Ends and compliance with Executive Limitations will be viewed as successful President performance.

¶ 56 Board committees are restrained from interfering with the President's authority by GP-5 - Board Committee Principles:

Board committees, when used, will be assigned so as to minimally interfere with the wholeness of the Board's job and never interfere with delegation from Board to President. Committees will be used sparingly, only when other methods have been deemed inadequate.

...

3. Board committees cannot exercise authority over staff. Because the President works for the full board, he or she will not be required to obtain approval of a board Committee before an executive action. In keeping with the Board's broader focus, board committees will normally not have direct dealings with current staff operations.

¶ 57 The way the Board monitors the President's performance is further described in GP-3 - Board Job Contribution.

The job of the Board is to represent the ownership in determining and ensuring appropriate organizational performance. To distinguish the Board's own unique job from the jobs of its staff, the Board will concentrate its efforts on the following job "products" or outputs.

...

2. Written governing policies which, at the broadest levels, address:

2.1 Ends: Organizational products, impacts, benefits, outcomes, recipients, and their relative worth (what good, for which needs, at what cost).

2.2 Executive Limitations: Constraints on executive authority which establish the boundaries of prudence and ethics within which all executive activity and decisions must take place.

2.3 Governance Process: Specification of how the Board conceives, carries out and monitors its own task.

2.4 Board-President Relationship: How power is delegated and its proper use monitored, the President role, authority and accountability.

3. Selection of the President, and assurance of the President's performance in achieving the results defined in the Ends policies, and not exceeding the constraints in Executive Limitations policies, through monitoring and evaluation of the President as outlined in policies on Board-President Relationship.

¶ 58 In BP-4 the Board deals specifically with the issue of delegation to the President. That policy, also passed on June 22, 2000, provides:

The Board will instruct the President through written policies which prescribe the organizational Ends to be achieved, and describe organizational situations and actions to be avoided, allowing the President to use any reasonable interpretation of these policies.

Accordingly:

1. The Board will develop policies instructing the President to achieve certain results, for certain recipients at a specified cost. These policies will be developed systematically from the broadest, most general level to more defined levels, and will be called Ends policies.
2. The Board will develop policies which limit the latitude the President may exercise in choosing the organizational means. These policies will be developed systematically from the broadest, most general level to more defined levels, and they will be called Executive Limitations policies.
3. As long as the President uses any reasonable interpretation of the Board's Ends and Executive Limitations policies, the President is authorized to establish all further policies, make all decisions, take all actions, establish all practices and develop all activities.
4. The Board may change its Ends and Executive Limitations policies, thereby shifting the boundary between board and President domains. By doing so, the Board changes the latitude of choice given to the President. But as long as any particular policy is in place, the Board will respect and support the President's choices. This does not prevent the Board from obtaining

information from the President about the delegated areas, except for individual client-identified data.

¶ 59 The College advances an alternative argument that does not depend on delegation. It argues that the use of the word "Board", in s. 7.2 cannot be interpreted as specifically requiring formal "Board" action. Taking the collective agreement as a whole, it argues, this would make no labour relations sense. It too refers to other instances within the collective agreement. It suggests provisions such as Article 7.4 were clearly intended to identify the Board only as being the corporate entity, and not to restrict its ability to act through its various managers and officers. Article 7.4 reads:

7.4 The Board shall make every reasonable effort to place a Faculty Member whose position has been declared redundant in a comparable position which is being filled by the College and which the Faculty Member is reasonably able and qualified to assume.

¶ 60 This should not be so interpreted, the College argues, in a way that requires the Board itself to make these efforts at finding a comparable position. It is obviously something the parties contemplated would be handled by administrative staff.

¶ 61 The College called Ms. Pauline Gillanders, its Vice-President Finance and Operation. Her evidence covered the process of cutbacks that led to Ms Kaai's termination, the manner in which the decision was taken and by whom, and the College's financial position which touches on the question of operational funding.

¶ 62 Ms. Gillanders testified about the financial difficulties the College faced late in 2001 and early 2002 as the government announced cutbacks in funding, and how this affected the College's budget for the next fiscal year. Ms. Gillanders is a chartered accountant who came to the College in 2001. She is responsible for the budget and the strategic planning function. She began improving the College's monthly budget and accounting figures. In the Christmas break of 2001 her forecast disclosed a projected deficit of \$3.5 million for the current year plus an ongoing deficit into the next budget year. They called Alberta Learning and were told they had to make decisions to bring both the current and next fiscal year's budgets into balance. The President of the College divided the steps to be taken into three phases. Phase 1 involved \$800,000 of immediate cuts to things like travel, professional development and contingency funds. The second phase involved \$1.2 million and included positions that would be cut either from the current year or in the next fiscal year.

¶ 63 The third phase involved going back to the various departments and asking them to formulate plans and describe the consequences of cutbacks amounting to 5% and 10% of their

budgets. They were asked to identify any position that could be eliminated. On January 16, 2002 President Mark Lee sent out a detailed e-mail to everyone at Lakeland outlining the problem and the preliminary approach to finding a solution.

¶ 64 Ms. Gillanders described, in summary form, the College's long term strategy which involves fairly rapid growth, projected at 12%. The College has self-funded this plan by using its large (\$10 million) accumulated surplus to hire the necessary staff for new programs and to renovate its facilities. All this was in anticipation of getting access funding from the province to support these programs. Despite the cutbacks the College is still planning for growth.

¶ 65 The College faced several cost increases as well as provincial revenue cuts that contributed to its 2001-2002 deficit and 2002-2003 projected deficit. Its collective bargaining settlements were based on a three-year business plan formulated before the cuts were announced.

¶ 66 The operational costs of the College are about \$30 million per year, while base government funding runs at about \$15 million. Additional revenue comes from access funds, tuition fees, interest and investment income, grants from the Saskatchewan Government and tuition fees for continuing education programs. The base budget funding is not allocated specifically to individual expenditure items.

¶ 67 On March 13, 2002 the President presented the Lakeland College Board with a budget in principle and received approval. On March 21, 2002 President Lee communicated to everyone at Lakeland in an e-mail headed "state of union." This followed right after the Provincial budget tabled 2 days before. It said, in part:

I now advise you that the cuts have now been made and the Board of Governors has approved in principle the budget for next year. In total, we have cut about \$4 million out of our budget for next year. While the process was difficult and stressful, the reality is we are now in a position to weather the next 3 - 4 years, even if the Province's finances remain tight.

In total, about 20 fulltime positions were eliminated through attrition and layoffs, although we will be able to place some of these people in other open positions around the college as a result of the hiring freeze. As you read this message, know that the position cuts have been made, and the people impacts by these decisions have been informed.

The elimination of these positions has not been taken lightly. I know that individuals and families are impacted tremendously by these decisions, as is the morale of all of our employees. Unfortunately, given the circumstances, sweeping changes were required and it was inevitable that some positions had to be

eliminated. Throughout this process we have endeavored to do all we could to minimize the impact on our staff and faculty.

¶ 68 In fact Ms. Gillanders said, not all affected staff had been notified at this point as they still had to carry out parts of the third phase of the budget cutbacks. However, the reductions including that of Ms. Kaai's position were included in the budget approved in principle on March 13, 2002 and confirmed by Board resolution on April 17, 2002. The President was authorized by the Board to carry out the budget cuts.

¶ 69 Ms. Kaai's position was one of the positions identified for elimination. In addition, her immediate boss, Mircea Panciuk, the Director of the Learning Centre, was identified as holding a position to be eliminated. In some cases positions were eliminated, in other cases the incumbents were laid off but the positions were kept in a vacant state. Ms. Gillander cannot recall any specific discussion of the timing of faculty cuts, but says they recognized that cuts could not be made while programs were still being taught.

¶ 70 Ms. Gillanders was cross-examined on the operational funding figures listed in the College's budget as set out in the College's 2002-2006 business plan. It shows a 3% increase in operating grants for 2003-2004 over 2002-2003. The Annual Report for 2001-2002 shows an increase in grants, as a revenue item, from 2002 actuals over 2001 actuals. Ms. Gillander conceded the base grants had remained as they expected, but that other items beyond those base grants supplemented their operating funds since grants came to less than one half the total.

¶ 71 In terms of the impact of the cuts on faculty she says that most faculty were reassigned. Ms. Kaai was the only one actually terminated. She was unsure of what happened to Mr. Panciuk.

¶ 72 The budget put to the Board for approval was discussed by the Executive Committee before being presented. She cannot place that committee discussion in terms of when the President wrote his March 21st e-mail. The Executive Committee met several times over the budget period. She says the principle features of the budget did not change between the preliminary and final documents presented March 13 and April 17 respectively.

¶ 73 The Employer argues that Chair Jones, in making the 1995 Article 7 award (which was made without reasons) knew what base funding entailed and could have used that term if that is what he intended. Rather he used the term operating funds which has a broader meaning. It makes no sense from the point of view of this clause's purpose, to look only at the grant side of revenues ignoring the other half of the budget.

¶ 74 The Employer argues that the two arbitration boards said to show past or known practice are not properly evidence before the Board. First, like the Jones interest award, they are only admissible if the language is ambiguous, which it is not. Secondly, the two examples given both occurred before a major review of the College's style of governance and the adoption of the Carver system of plenary delegated authority subject to limitations.

¶ 75 The Employer introduced several cases dealing with the general question of funding reductions and cutbacks as they affect termination rights such as the ability allowed by s. 7.2. We do not need to canvas the Huron case from the Ontario Division Court [1998] O.J. 2290 since it has been reversed and the arbitrator's original Order both restored and enforced (see: [2001] O.J. 4966). The other cases are:

Re Corporation of the City of Hamilton and CUPE Local 5167 (2001) 98 L.A.C. (4th) 21 (Devlin)

and

Ontario Council of Regents for the Colleges of Applied
Arts and Technology v. Ontario Public Service Employees
Union (Lamothe Grievance) [2000] O.L.A.A. 220 (Simmons)

¶ 76 The City of Hamilton case involved a contract that allowed lay-offs due to lack of work or "other legitimate reason." The arbitrator held at page 29:

In my view, however, for purposes of this case, it is unnecessary to decide whether issues respecting "lack of work" can be determined without regard to the Employer's financial ability to have the work performed. Unlike the collective agreement in the Huron (County) Huronview Home for the Aged case, Article 3.5 of the collective agreement in this case provides that it is the exclusive function of the Employer to lay off employees due to lack of work or "other legitimate reason." In my view, this latter phrase would encompass a reduction in funding which necessitates adjustments in staffing.

¶ 77 The grievors in the Ontario Council of Regents case alleged that they were improperly laid off. They had been employed as special needs counselors for students at the College. The Province of Ontario allocated certain funds for special needs services which could not be reallocated elsewhere. For a time the College supplemented this provincial special needs grant from its general operating funds but, when faced with cutbacks, decided to revert to running the special needs program within the bounds of the special needs grant. As a result, the College told the grievors their positions had become surplus due to the College's financial position. The Union challenged the bona fides of this decision. The arbitrator upheld management's decision to lay-off in these circumstances, a decision it felt was reasonable given the cut in its general operating budget which justified a rethinking of its previous subsidy of the special needs program.

Decision

¶ 78 We find that this case turns upon the meaning of the words in Article 7.2. When that clause uses the words "the Board may declare a faculty member's position redundant" it either means the Board acting itself, or else it means the Board just as the Employer. If it is the latter, the College can act in any lawful way it chooses, including delegating the power to terminate to officials within the organization.

¶ 79 The Colleges Act does not, in our view, limit the Board's power to delegate such decisions. Section 14-16 of the Colleges Act are sufficient for this purpose. Beyond that, section 30(3) (previously numbered 21(3)) allows the College to enter into collective agreements setting out, among other things, how terminations will occur. This could include termination by the College as employer or by a designated officer. However, it could also include termination by the Board acting directly and addressing its collective mind to the specific question. This the Faculty Association argues to be the case here. If the collective agreement, properly interpreted, exhibits a commitment that the Board itself must make the Article 7.2 decision, then the question of whether the Board has the power to delegate its powers to terminate, and whether it has in fact done so, become redundant. This is because of what was said in Mount Royal:

Section 21(3) of the Colleges Act specifically contemplates that the Board's statutory power to prescribe the terms of employment of academic staff members is subject to any collective agreement to which the Board becomes a party. Accordingly, in cases of conflict, the collective agreement governs.

¶ 80 We agree with the analysis in Mount Royal. If the College is correct in its interpretation and the Board just means the College as employer then the grievance (on this point) must be dismissed. The Board has clearly delegated plenary powers to the President. The Act does not limit the Board's power to make such a delegation except by allowing the College to bind itself to some other commitment through a collective agreement.

¶ 81 Article 7.2 refers to "the Board". That is a defined term which means "the Board of Governors of Lakeland College." Article 7.2 speaks of "making a declaration" which connotes making some discretionary decision and pronouncement. That declaration can only be made on certain specified grounds; it is not an unfettered discretion. The collective agreement, beyond Article 7.2 is not a model of clarity. Each party was able to point to other sections in the agreement that use the Board or related terms in ways that go one way or the other. The use of "the President" in 7.7, which deals directly with the rights of someone declared redundant does imply that the use of the Board in 7.2 means the Board acting itself. Were it otherwise, one would expect the parties to use either the term "the Board" or some neutral term like "the College" or "the employer," in Article 7.7. The College is right to suggest that Article 7.4 is not intended to have the Board itself carry out the administrative functions involved in making "every reasonable effort to place a faculty member whose position has been declared redundant in a comparable position." However, it does not strain the language to assume the parties intended the Board itself to ensure that those efforts were made on its behalf.

¶ 82 In our view, on the wording of the agreement alone, the Faculty Association's interpretation is the more probable. Does this lead to an absurd or administratively unfeasible result? The notion of administrative necessity really amounts to much the same thing as the customary caution in interpreting agreements that one should not construe an agreement in a way that is unworkable in practice. One would presume parties would not intend such a result. This is a college faculty agreement. Termination of faculty members is a significant event in a college's affairs, as illustrated by the limited circumstances in which it can take place. The administrative burden this would place on the board is not so onerous as to be implausible. While Board level involvement in private industry would be unusual, it is not unusual in the academic world, and boards frequently have to be directly involved by statute law or contractual commitment in termination decisions in the school, college and university world. This is a consequence of the higher degree of tenure afforded such professionals.

¶ 83 In respect of the interpretation of base funding, the College argues that the arbitrator must be presumed to have known the meanings to be ascribed to the terms "base funding" and "operating funds." In the same vein, we are satisfied the arbitrator would have understood the fact that "Board" was a defined term under the agreement, or at least a term the use of which might cause conflict if it was intended to mean something other than that provided for in the definition. The evidence of the College's brief to the arbitration, if nothing else, explains the purpose and importance of vesting the power to declare a redundancy in the Board itself. It provides faculty with some assurance that the termination of what would otherwise be a tenured position would only be done with a certain degree of deliberateness following debate within a partially representational body.

¶ 84 While we do not need to resort to this evidence to arrive at the more probable interpretation, the history of past practice put before us supports the conclusion we have reached. It shows that in the past these issues were put before the Board in person. This speaks against any administrative necessity argument.

¶ 85 Our conclusion is that Article 7.2 means that the declaration of redundancy must be made by the Board of Governors of the College, acting themselves. This is solely due to the collective agreement they have entered into; it is not a conclusion forced by statute. Indeed we accept that aside from the contract they were free to delegate their powers to terminate and in fact purported to do so.

¶ 86 We find that the logic in the Mount Royal decision and the related decisions set out above, compelling. A decision taken by anyone other than the Board, contrary to the agreement, is void and of no effect.

¶ 87 The Board itself must deliberate on any Article 7.2 decision. We are therefore reluctant to express any view on how their discretion should be exercised. However, the parties placed before us a question of legal interpretation that is central to the Board's ability to act under that section. The Faculty Association interprets the words "lack of operational funding" as being a reference to base government funding. We find this too narrow an interpretation and contrary to its plainer meaning.

¶ 88 The phrase "operational funding" means, in our view, the funds available for the College's operations. While funds derived from government funding formulae fall within that term, it is not a term restricted to those funds. It might be possible for the government, as an example, to cut back on direct funding but at the same time remove the cap on tuition, allowing larger overall revenue. Under the narrower interpretation, this would still trigger the right to use Article 7.2 despite the availability, overall, of more money to fund operations. We reject such a narrow interpretation.

¶ 89 As requested by the parties, we reserve jurisdiction on the question of remedy.

¶ 90 Mr. Kanee concurs. Mr. Day concurs in respect to the interpretation of operational funding, but dissents for reasons that will follow on the ability of the Board to delegate its decision-making capacity.