

Indexed as:

Lakeland College Faculty Assn. v. Lakeland College

Between

**Lakeland College Faculty Association and Wanjiku Kaai,
appellants (applicants), and
Board of Governors of Lakeland College, respondent**

[1998] A.J. No. 741

1998 ABCA 221

162 D.L.R. (4th) 338

[1999] 1 W.W.R. 555

62 Alta. L.R. (3d) 52

223 A.R. 1

80 A.C.W.S. (3d) 792

Docket: 9603-0083-AC

Alberta Court of Appeal
Edmonton, Alberta

Conrad, Russell and Picard JJ.A.

Heard: October 2 and 3, 1997.

Judgment: filed July 2, 1998.

(21 pp.)

Appeal from Lefsrud J.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 753.09(1)(c).

Canadian Charter of Rights and Freedoms, 1982, s. 2(d).
Colleges Act, ss. 10(2), 21.1(2), 21.4(2), 21.4(3), 21.6, 21.9.

Labour law -- Industrial relations -- Collective agreement, interpretation -- Redesignation of employees -- Consultation requirements -- Consultation, what constitutes.

Appeal by Kaai from dismissal of her application for judicial review of a decision of the Board of Governors changing the designation of her librarian position from academic to non-academic. Kaai had been a librarian with the College since 1984. She was classified as a member of the academic staff, and therefore, a member of the appellant Faculty Association. She had a master's degree in library science, and had been a school teacher. In 1994, she was informed that she was being redesignated as the Board wanted all librarians excluded from the faculty Association. Kaai was invited to make a presentation in support of her status as an academic, which she did. After the redesignation, Kaai's duties remained the same, but she was removed from the collective agreement, her hours were increased, and her salary, benefits and vacation were significantly reduced. The respondent was authorized to act pursuant to section 10(2) of the Colleges Act, which provided that a college board, after consultation with the academic staff association, was permitted to designate categories of employees, or change their designation. The chambers judge decided the legislation represented a marked departure from normal labour relations. He found the board properly complied with the statutory requirement.

HELD: Appeal allowed and decision to alter the appellant's designation was quashed. The appellant was directly affected by the proceedings and had standing. The problem in this case was there was no definition of consultation in the Colleges Act. Consultation required bilateral interaction by parties informed of each other's position, where each had the opportunity to give and receive information. In this case, there was absolutely no evidence the respondent provided any rationale for the change in designation, or that the appellants received any information about the reasons for redesignation. The board failed to consider the collective agreement, and the impact of the redesignation on the appellant's collective bargaining rights. It failed to provide a reason for the exercise of its power. The criteria used to determine the appellant's status were very narrow, and the hearing was completely one-sided.

Counsel:

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D. Noel, for the Association of the Academic Staff of the University of Alberta.

F. Slatter, for the Northern Alberta Institute of Technology Academic Staff Association and the Grant MacEwan Community College Faculty Association.

D. Chomyn, for the Board of Governors of Lakeland College.

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M. Unsworth, for the Attorney-General of Alberta.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

PICARD J.A.:--

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1 The appellant, Ms. Kaai, appeals the dismissal in the Court of Queen's Bench of her application for judicial review of a decision of the respondent, Board of Governors of Lakeland College ("the Board"). The decision was to change the designation of her librarian position from academic to nonacademic.

I. ISSUES RAISED

2 This appeal is brought by both Ms. Kaai and the Lakeland College Faculty Association ("the Faculty Association" or "Academic Staff Association") of which she was a member. The respondent challenges her standing to participate in this appeal.

3 The appellants allege that the Queen's Bench judge, sitting in chambers, erred in concluding that the Board had not erred in law, or alternatively, had not made a patently unreasonable error in exercising its authority under the Colleges Act, R.S.A. 1980, c. C-18 (hereinafter cited as the Colleges Act).

4 The appeal raises issues of the appropriate standard of review for this Court and the Court of Queen's Bench in reviewing the decisions brought before each court.

5 The appellants also allege breaches of the rules of natural justice and the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 2(d).

6 In view of my disposition of the appeal, I find it unnecessary to deal with the topic of natural justice. Also, nothing in this judgment should be taken as saying anything about Ms. Kaai's ability or inability to exercise her common law or contractual rights for being redesignated a nonacademic. This issue is not before this Court.

II. FACTS

7 Ms. Kaai, a librarian with the College since 1984, was classified as a public service librarian and was a member of the academic staff and was, therefore, a member of the Faculty Association. As such, she came within the collective agreement between the academic staff and the College. She has university degrees: a Master's degree in library science and a Bachelor's degree in education. She had been a school teacher and has been a professional librarian since 1980. She has worked at educational institutions in Africa and in Alberta.

8 On April 5, 1994, Ms. Kaai's supervisor told her she was being redesignated. Various justifications were given. Initially the College wanted the flexibility to require her to teach evening and week-end classes and the collective agreement did not permit that. But later, after Ms. Kaai agreed to teach as requested, and thus flexibility was no longer the issue, consistency was given as the reason; namely the Board wanted all librarians excluded from the Faculty Association.

9 On April 10, the Faculty Association told her of a meeting to take place on April 12, between its representatives and a committee of the Board. It was decided that Ms. Kaai should make a presentation in support of her status as an academic. She did so both at that meeting and at a meeting on April 29 of the full Board of Governors. The Board accepted the recommendation of the committee and redesignated her. The result was that, while Ms. Kaai's duties remained the same, the terms and conditions of her employment were changed. She was, by that action of the Board, removed from the collective agreement between academic staff and the College; her hours of work were increased; and her salary, benefits and vacation were significantly reduced.

10 The Board was acting under s. 10(2) of the Colleges Act which reads:

- (2) A college board may, *after consultation* with the academic staff association, do 1 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 21.91.* [Emphasis added.]

11 Because other statutes, which affect universities and technical institutes, contain provisions similar to s. 10(2), a number of interveners participated in this litigation.

III. DECISION IN QUEEN'S BENCH

12 Because the Faculty Association had standing to bring the application for judicial review, the chambers judge found that it was of no particular concern whether Ms. Kaai had standing to do so. The chambers judge reviewed the legislation, noting that it represented "a marked departure from normal labour relations" [A.B. 265] in that it empowered the Board, after consultation, to move individuals in or out of a bargaining unit with the result that the Faculty Association would no longer be permitted or authorized to bargain on behalf of a member. He found that the interpretation of the term "consultation" was critical and that it must be given a "substantial meaning and as such the contemplated consultation must amount to considerably more than a form of lip service." [A.B. 276] He held that the question to be determined was: "did the Board properly comply with the statutory requirement that prior to redesignating her [Ms. Kaai], it consulted properly with the [Faculty] Association." [A.B. 277]

13 He reviewed the evidence of one committee meeting and one Board meeting as well as the affidavit evidence Ms. Kaai filed for the hearing before him. It is noteworthy that no affidavit evidence was provided by the Board. He found that at the meeting with the committee, "a full discussion ensued and that a meaningful exchange of views, questions and answers took place." [A.B. 278]

14 There was an issue as to whether Ms. Kaai was precluded from remaining at the meeting with the Board after making her presentation. He found that while it had not been established that she was told to leave, she was given the "impression" that having heard her the Board would consider the situation and reach a decision. In fact, she did leave after her presentation and, although there was no affidavit evidence from anyone at the meeting about what occurred after she left, he said it appeared that no representations were made, other than those of the committee.

15 The chambers judge found that the Board had discharged its obligation to consult with the Faculty Association. He said [at A.B. 282]:

I am not unmindful of the fact that since her redesignation, Kaai's salary, benefits and vacation periods have been reduced and more working hours have been imposed. However, I am satisfied that the Board made its decision based on its views as to what steps would be in the best interests of the College. Moreover, I find that the Board has made no error in law, nor has it made a patently unreasonable error of law in interpreting its powers pursuant to s. 10(2) of the Colleges Act. In the circumstances, I am satisfied that the decision is one which could reasonably be reached by a conscientious Board.

16 The chambers judge made rulings on two other points raised on this appeal. He found that the consultation required did not go so far as to necessitate the application of the rules of natural justice. He also found that the power conferred under the Colleges Act did not breach the right to freedom of association under s. 2(d) of the Charter.

IV. DOES MS. KAAI HAVE STANDING?

17 Ms. Kaai is both directly affected, and is an interested party, for the purpose of determining whether she has standing to bring the instant application for judicial review. The *Bibeault v. McCaffrey* (1984), 7 D.L.R. (4th) 1 (S.C.C.) case on which the respondent depends is distinguishable because of the legislation considered therein. There is no similar statutory limitation here. The instant case raises an issue of importance to the colleges and universities of the province who presented full argument on it. Moreover, the Board's decision "directly affects" Ms. Kaai by reducing her salary, benefits and vacation entitlement. The argument that Ms. Kaai does not have standing thus ignores the rule that "every person directly affected by the proceedings" must be served with an application for judicial review: Alberta Rules of Court, r. 753.09(1)(c). If Ms. Kaai had to be served with an application for judicial review pursuant to the Rules of Court then, absent statutory limits, Ms. Kaai surely has standing to bring the instant application.

18 In any event, I agree with the chambers judge that whether or not Ms. Kaai is a named appellant is of no practical concern since the Faculty Association has standing and supports her position on behalf of all of its members.

19 I find this argument of the respondent is without merit.

V. THE LEGISLATION : The Colleges Act

20 The first step in the resolution of this appeal must be to review the relevant legislation. Such an analysis is necessary to a determination of the appropriate standards of review and to answer the critical question of whether this appeal has merit. Driedger on the Construction of Statutes, R. Sullivan ed., 3rd ed. (Toronto: Butterworths, 1994) supports the importance of looking at a statute as a whole (pp. 245-250), and in context (pp. 193-195), and the presumption that the parts of a statute are meant to be complimentary and not conflicting (pp. 176-177). The court should look for a plausible and coherent plan disclosed by the statute and find interpretations consistent with it (pp. 248-250).

A. An Overview

21 The Colleges Act was enacted in 1969 and has been amended several times. Like the Colleges Act, the Universities Act, R.S.A. 1980, c. U-5 and the Technical Institutes Act, S.A. 1981, c T-3.1 establish a legal framework for management by boards of advanced educational institutions. All three give boards of governors the power to designate employees into academic bargaining units pursuant to the legislation.

22 The statute in issue in this appeal, the Colleges Act, establishes a distinctive framework for labour-management relations. It sets up a system for collective bargaining and dispute resolution between academic staff associations and colleges. The operation of general employment and labour statutes is precluded by s. 21.6 of the Colleges Act; thus, the Employment Standards Code, S.A. 1996, c. E-10.3 and the Labour Relations Code, S.A. 1988, c. L-1.2 do not apply to the Board, Faculty Association or academic staff, and the Public Service Employees Relation Act, R.S.A. 1980, c. P-33 does not apply to academic staff.

23 The labour scheme contemplated by the Colleges Act has two hallmark features. First it creates a collective bargaining unit for academic staff of the college and declares that the academic staff (i.e. faculty) association is the exclusive bargaining representative for them. Second, the Colleges Act vests the Board of Governors (i.e. the employer) with the power to designate individual employees or categories of employees as academic staff or to change those designations. Thus, the Board is both party to the collective agreement between itself and the Faculty Association, and has redesignation power as the employer of the academic members of that association. The Board of Governors wears two hats.

B. The Evolution

24 Changes in the legislation since 1969 resulted in the transfer of powers and responsibilities from College Commissions to the Minister of Advanced Education and finally to the boards of governors of colleges. Membership on the boards was modified to include college presidents, students, academic and nonacademic staff as well as persons nominated by the Lieutenant Governor in Council. One does not need to refer to any extrinsic aids to conclude that the effect of these amendments was to involve the institution, faculty, staff, students and the public in the decision-making of colleges. In the result, the Board is representative with some members having some expertise in education and administration.

C. The 1981 Amendments

25 It was the amendments to the Colleges Act in 1981 which established the powers of the employer Board to designate and redesignate. See Colleges Amendment Act, 1981, S.A. 1981, c. 43, s. 5, amending the Colleges Act, R.S.A. 1980, c. 18, s. 10.

1. The Collective Agreement

26 A board of governors is required to enter into negotiations for the purpose of concluding a collective agreement with an academic staff association. An academic staff association is declared to be the exclusive bargaining agent for all academic staff members. The collective agreement must contain provisions dealing with: terms and conditions of employment, leaves, salary and remuneration and have procedures for the settlement of differences between the parties arising from the interpretation, application or operation of the agreement and for the negotiation of future agreements: Colleges Act, s. 21.4(2). It is noteworthy that conditions and procedures governing reassignment, suspension and dismissal by the board are required to be contained in the collective agreement which is expressly said to be binding on the board, the academic staff association and the academic staff member: Colleges Act, s. 21.4(3).

27 Section 21.9 of the Colleges Act says that if a collective agreement does not provide for procedures to settle differences, then certain provisions are deemed to apply and these include dispute resolution procedures, including arbitration.

28 This legislative framework for the functioning of the college and its academic staff seems exhaustive. However, in 1981, the legislators also granted a power to college boards which impacts profoundly on the relationships under the collective agreement.

2. The Authority to Designate and Redesignate

29 Section 10(2) of the Colleges Act was set out in paragraph 10. It says a college board may, after consultation, designate categories or individuals as academic staff. It also says a college may, after consultation change a designation so made. There is no definition of "consultation" in the Colleges Act.

3. Response to Amendments

30 It appears there was some discussion between the government and the affected parties about the inclusion of the designation and redesignation power in the amendment to the Act. There was concern on the part of academic staff (faculty associations) about the amendments and their effect resulting in the Confederation of Alberta Faculty Associations filing a complaint about the 1981 amendments with the International Labour Committee on Freedom of Association. That Committee did not specifically address redesignation but did recommend that the Government of Alberta repeal those sections authorizing board designation and replace them with sections requiring designation by an independent body.

D. The Powers of the Board Under the Colleges Act

31 The essence of this case is an attempt to understand the intention and scope of legislation which gives the board of a college the power to remove an academic person from the collective agreement thereby changing the terms of her employment and reducing her benefits. Specifically, in what way is the redesignation power in s. 10(2)(c) affected by the presence of a collective agreement? What flows from the Board wearing two hats: as a party to the collective agreement and as an employer with redesignation authority?

32 Since the power to redesignate can only be exercised after a consultation, it is critical that the requirement be given meaning.

VI. CONSULTATION UNDER SECTION 10(2)

A. Definitions of "Consultation"

33 What did the legislators intend take place when they required a consultation? Because the Colleges Act contains no definition of consultation the court must refer to dictionary definitions and judicial considerations and the purpose of the statute.

34 Arriving at a functional definition of consultation is essential to the disposition of this case, for all parties agree that adequate consultation is a necessary precursor to designation or redesignation under s. 10(2). In other words, the statutory interpretation of the word "consultation" confers power on the Board to exercise its designation and redesignation authority.

35 The statutory interpretation of s. 10(2) -- a power conferring provision -- is a question of law which this Court reviews for correctness because of that section's jurisdictional consequences: *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1088.

36 The Oxford English Dictionary, vol. 3, 2nd ed. (Oxford: Clarendon, 1989) sets out the meaning of "consult" to be "[to] confer about, deliberate upon, debate, discuss, consider (a matter)",

and the meaning of "consultation" as "[a] conference in which the parties consult and deliberate; a meeting for deliberation or discussion". It was essentially these definitions that the chambers judge referred to when he concluded that the term consultation must be "afforded a substantial meaning" and "must amount to considerably more than a form of lip service."

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

1. a fact-specific analysis to determine whether, under the circumstances, the measures taken do in fact constitute consultation: *Fletcher v. Minister of Town and Country Planning*, [1947] 2 All E.R. 496 at 500 (K.B.); *R. v. Sampson* (1995), 131 D.L.R. (4th) 192 at 218 (B.C. C.A.);
2. a duty upon the decision maker to fully inform the other side of its own position, as well as to fully inform itself of the position of the other: *R. v. Jack* (1995), 131 D.L.R. (4th) 165 at 188 (B.C. C.A.); *Trans Canada Pipelines Ltd. v. Beardmore (Township of)* (1997), 106 O.A.C. 30 at 62 - 64 (Ont. Gen. Div.)
3. an opportunity for both sides to be heard and to state the factors they feel should guide the decision: *Rollo v. Minister of Town and Country Planning*, [1948] 1 All E.R. 13 at 17 (C.A.); *Johnson v. Glen* (1879), 26 Gr. 162 at 186 (Ont. Ch.).

38 In summary, a consultation should involve a bilateral interaction by parties informed of each other's position where each has the opportunity to give and receive information. This definition is as much founded in common sense as in dictionaries or learned judicial writings and would seem unlikely to cause discomfort to anyone charged with consulting before making an important decision, especially those responsible for administering an educational institution.

B. Purpose of the Colleges Act

39 It is trite law to say that in construing part of a statute one must consider the purpose of the statute: *Driedger on the Construction of Statutes*, R. Sullivan ed., 3rd ed. (Toronto: Butterworths, 1994) at 44-45. The Colleges Act creates and provides the structure for important educational institutions in the Province of Alberta. Colleges are meant to be institutions of learning and are founded on a commitment and responsibility to "teach". While the Act does not define teaching, article 1.20 of the collective agreement does so in the following words; "the art, practice or profession of any individual who develops, instructs, causes to know the knowledge of, or guides the studies of another individual by precept, example or experience". [A.B. 320] A board of governors has the general power to govern a college. The administrative and support staff facilitate the teaching and learning but the principal players are the "student" and the "teacher".

40 The power to determine which positions and persons fulfil the "teaching function" is one of

the most important, if not the most important, decision to be made by an educational institution. This decision is critical to the public, "student" and, of course, the "teacher" and those who would hope to be, or remain, teachers. The legislation provides for the decision as to who is to be a "teacher" or academic to be made by the Board, but not unilaterally. There must first be a consultation. The Board members, defined by legislation, represent the institution, the public, the students and the staff, both academic and nonacademic, but the legislation requires that the academic staff association be consulted. Clearly the members of that association, representing the "teacher," are expected to be knowledgeable about the educational requirements of the students and the role for teachers in the institution as well as the rights of the academic under the collective agreement. It seems logical that the legislators intended that the two parties, the Board and the Faculty Association, bring to any consultation the perspectives for which each is responsible, their training and experience, and a common commitment to provide excellence in teaching and educational opportunities.

C. Specific Features of the Colleges Act

41 There are specific features of the Colleges Act which are relevant to understanding the scope of the powers of the Board and the process of consultation.

42 The power of the Board to govern is not unlimited but is circumscribed in a number of ways. For example, by no means does a the Board have unbridled fiscal or managerial discretion, for the Minister may approve or disapprove Board expenditures and changes to programs of study: Colleges Act, ss. 33-35.

43 While the Board is required to, and hence given the power to, enter into a collective agreement with the academic staff, that power is circumscribed by the requirement that certain terms be in the agreement including terms that protect the rights and privileges of academics: Colleges Act, s. 21.4(2). The Board is given the power to designate and redesignate a person as an academic but that power is circumscribed by the requirement of a consultation: Colleges Act, s. 10(2).

44 The legislature cannot have failed to recognize the potential for the exercise of one of these powers to affect others: Driedger on the Construction of Statutes, R. Sullivan, ed., 3rd ed. (Toronto: Butterworths, 1994) at 247-250. Specifically, exercising the power to redesignate could remove benefits under the collective agreement. The legislators cannot have intended that the Board be able to circumvent one part of the Act by exercising its powers under another, without a proper process. The requirement of a consultation could expose any such difficulties and be the basis for a resolution which respects the intention and objectives of the statute.

45 There are two realities which may not be explicit in the Act which may also affect the exercise of authority by the Board and be relevant to a consultation: fiscal responsibilities and the need for academic freedom. It is a notorious fact that the fiscal responsibilities of the board of an educational institution are a heavy burden in these times when funding for education is limited. A board must deal with the maintenance of educational and fiscal commitments and also with change and

planning for the future. Academic freedom is an important aspect of the collegial environment and supports institutional autonomy and a reluctance on the part of the courts to interfere with the decision-making power of an educational institution: *Students' Union (University of Alberta) v. University of Alberta* (1988), 89 A.R. 379 at 382 (Q.B.), affirmed (1990) 105 A.R. 340 (C.A.).

46 Finally, it is appropriate to consider that the designation power available to colleges, universities and technical institutions in Alberta has, for sixteen years, rarely been invoked. This evidence came from the seven interveners who could recall only two instances of redesignation: (1) this respondent, Lakeland College, designating a vacant position, and (2) the University of Alberta redesignating an incumbent. There was no evidence of any other redesignation ever having taken place in Alberta.

47 In conclusion, although the Colleges Act does not define consultation, the combination of dictionary and judicial definitions, an analysis of the statute and the use of the critical section provide some guidance.

VII. THE REQUIREMENTS OF THE BOARD IN A CONSULTATION

48 Using the description of a consultation set out earlier, and keeping in mind the purpose of the legislation as outlined, it is possible to set out the requirements for the Board in the consultation that took place between itself and the Faculty Association.

49 Given that the Board was proposing change -- with adverse consequences for Ms. Kaai -- it had a responsibility, or onus, to be informed, inform her and enter into a bilateral communication that would complete the informational process. The Board delegated some of its responsibility to a committee so we must look at the process before that body as well as before the Board.

50 Since the decision about whether a person at a college is an academic cannot be made with a litmus test or by a gut reaction, it can be assumed that the Board or its delegate would bring forward some objective criteria as a tool for evaluating Ms. Kaai's status. Such information was certainly within the Board's domain. Each case will dictate the nature and scope of such information. However, some of the following are obvious concerns. What were the College's criteria, standards, job description, or expectations of an academic? an academic librarian? a nonacademic? a nonacademic librarian? What change had occurred to require the Board to change the designation of the position occupied by Ms. Kaai? What comparisons, if any, were made to other nonacademic or academic positions? What characteristics of the position occupied by Ms. Kaai or her functioning in that position did the Board find relevant in making its decision? Put simply, did the Board have any objective criteria to bring to the consultation? Did they before or during the consultation process inform the Faculty Association or Ms. Kaai of these objective criteria?

51 Was the collective agreement considered? Specifically, were the repercussions including the effect on salary and other benefits considered?

52 Was there the opportunity for bilateral communication in order for both parties to become fully informed and outline their positions to each other before a decision was made?

VIII. THE NATURE OF THE CONSULTATION

A. The Evidence

53 Accepting that the consultation involves a bilateral process, an assessment of that process is best done by reviewing the evidence properly before the court. In this case the Board chose to file no affidavit evidence. The Return contains: a memo from the President of the College informing Ms. Kaai of the redesignation decision; a letter from the College to the Faculty Association requesting a consultation; the report of the committee delegated by the Board to meet with Ms. Kaai; minutes of the Board evidencing the redesignation; a memorandum from a teacher, an academic, in support of Ms. Kaai stating that she was "a professional in her instruction" and an asset to the students; and a document prepared by Ms. Kaai outlining among other things her teaching functions. Ms. Kaai also filed an affidavit in support of her application before the Court of Queen's Bench.

54 In summary, the evidence put forward on behalf of the Board of its function and role in the consultation required under s. 10(2) comes from the minutes of the committee to whom it delegated its responsibility and the motion it passed after accepting the recommendations of the committee.

B. The Committee Meeting

55 At the committee meeting, Ms. Kaai gave an oral presentation and provided a document outlining her functions, including her statement that she spent eighty percent of her time working with students. There is nothing in the record to indicate that the committee or the Board provided any rationale for the redesignation prior to, or during, this meeting. Indeed, Ms. Kaai deposes in her affidavit to an exchange between the President of the Faculty Association, who was at the hearing with her, and the Chairman of the committee. The President asked why the redesignation was being done and whether it was a money issue. While recognizing the limited value of Ms. Kaai's hearsay evidence regarding this exchange, I observe that the chairman answered that her redesignation was not a money issue. Ms. Kaai was questioned by members of the committee.

56 The only evidence as to the details of this questioning comes from the cross-examination of Ms. Kaai on her affidavit. Ms. Kaai said she was expecting a dialogue but ended up doing most of the talking. It appears that the chair of the committee required clarification as to the title and positions of other librarians at the College. Ms. Kaai presented her job duties and said there were "questions back and forth in trying to clarify the duties that everybody did". There was then a general discussion about her duties and those of other librarians arising out the questioning. Ms. Kaai said afterwards she was not aware of what precipitated the redesignation. A review of this cross-examination makes it clear that not only did the committee not bring any objective criteria forward itself, but that the general discussion of the duties of other librarians required correction and clarification. There is no evidence of any discussion with Ms. Kaai as to the criteria for

academic designation.

57 The only evidence of how this committee of the Board exercised its delegated power of consultation comes from the minutes of the committee and the motion that followed. The minutes read as follows:

After the Faculty Association representatives left the meeting the committee continued with its discussions. All of the points raised by the Association were reviewed and considered for each of the positions under discussion.

The committee members agreed that the nature of the work and function of the reference librarian position [Ms. Kaai's position] was much more similar to the professional work done by the assistant manager and manager of the Learning Resource Centre than to other faculty positions. The opinion of the committee members was that the similarities are sufficient to warrant a change in the designation of the category of the reference librarian from academic staff member.

58 The committee went on to recommend the motion that the Board eventually adopted, redesignating the position occupied by Ms. Kaai and therefore redesignating her from being an academic to being a nonacademic.

C. The Board Meeting

59 There is no evidence that either Ms. Kaai or the Faculty Association received any information from the Board as to the reasons for the redesignation or the criteria that would be used prior to the meeting at which it considered Ms. Kaai's future with the Board. All that appeared to have been offered by the Board was an opportunity for either Ms. Kaai or the Faculty Association to present a case against redesignation. Once again Ms. Kaai made the presentation. The minutes of the Board meeting support this interpretation, characterizing it as her viewpoint.

At 3:00 p.m., R. Gorrie welcomed W. Kaai to the meeting whereby she made a presentation in support of her position remaining a faculty position. Members thanked W. Kaai for providing information and *her viewpoint of the issue*. [Emphasis added.]

60 Ms. Kaai left the meeting after her presentation. The Board minutes suggest that Faculty Association representatives accompanied her, but it is unclear when those representatives left the meeting. As discussed earlier, Ms. Kaai believed she had to leave the meeting after her presentation while the Board said it did not require it. The chambers judge found that she was given the impression that her presence was no longer required.

61 If there were presentations made by others at this meeting, neither Ms. Kaai nor the Faculty Association were made aware of them.

D. The Decision of the Board

62 The minutes of the Board are instructive. The relevant portions are:

R. Gorrie outlined the meeting held with the Faculty Association whereby a committee of the Board had consulted with them reference the redesignation of the Public Services Librarian ... faculty positions to non-academic. The Faculty Association stated that it was their opinion that the major portion of W. Kaai's position was record keeping, serving students and library instruction and tutoring. R. Gorrie noted that *there is no timetabling for W. Kaai to provide instruction, no daily lesson plans to prepare, no marking, etc. and in fact her duties were much more similar to the professional work done by the assistant manager and manager of the library than to other faculty.* [Emphasis added.]

63 In summary, the minutes of the committee and the Board provide the following basis for the redesignation: her work and function were more similar to that done by managers in the library; specifically, there was no timetabling, lesson plans or marking. There is no reference to the collective agreement and the effect of the reduction in benefits on Ms. Kaai. No reason for the Board exercising its authority under s. 10(2) was given.

IX. WAS THE CONSULTATION ADEQUATE?

A. Conclusion of the Chambers Judge

64 The chambers judge concluded that the Board had discharged its obligation to consult because: (1) the parties before the committee knew the purpose of the meeting and that there would be a report sent to the Board; and (2) before the Board the parties knew the subject matter of the meeting, Ms. Kaai was permitted to make a presentation, and she left the meeting with the knowledge that the Board would consider the situation and reach a decision.

B. A Review of What the Board Did Not Do

65 Accepting those findings of the chambers judge, did they meet the standard required for an adequate consultation? Did the Colleges Act require something the Board did not do?

1. The Board Did Not Consider the Collective Agreement

66 By redesignating Ms. Kaai using its authority under s. 10(2) the Board removed her from the collective agreement without any reference to the terms of that agreement. It did under one section of the Act what it could not do under another. The effect was to use one part of the statutory scheme

to nullify another. There is no other interpretation to be put on the Board's actions. While the Legislature has given the Board such a unusual power, it must be exercised responsibly.

2. The Board Did Not Consider or Make Provision for the Impact on Ms. Kaai

67 The evidence is clear that the redesignation had a significant impact on Ms. Kaai's salary and benefits which were protected under the collective agreement. Her salary was reduced and frozen for several years; her health care coverage is no longer totally covered; her vacation entitlement is reduced. There is no evidence that the effect on Ms. Kaai was considered. Obviously, no offers to ameliorate the consequences were made.

3. The Board Did Not Come to the Consultation With Objective Criteria

68 Neither the committee nor the Board provided or brought forward any kind of job description of Ms. Kaai's position or the nonacademic one used for comparison. The Board did not have any criteria or considerations to guide itself and the parties in the difficult determination of "teaching" or academic functioning. There are some who would say that such definitions are too elusive. The difficulties of definition are obvious, but if the Board of an advanced learning institution cannot or will not make an effort to provide some guidance for itself and those affected by such decisions, it is hard to imagine another person or institution that could. Indeed the public is entitled to expect the Board to do so.

C. Conclusion

69 As an employer and as the body proposing to change the status of an employee protected under a collective agreement, the Board had an onus going into the consultation to inform and be informed. The Board seems to have relied on Ms. Kaai to provide information regarding her functions. It did not provide any material or information to her before either of the two meetings other than the goal of redesignation. The reason that the Board chose to exercise its power under s. 10(2) remains a mystery. It is possible to speculate, based on the conversation the Director of Student Services had with Ms. Kaai, that the goal was "consistency", that is, that all librarians be nonacademics. However, the job descriptions and functions of those other librarians who were nonacademic were not presented as the basis for the determination of Ms. Kaai's status. The minutes of the Board meeting indicate that Ms. Kaai's functions were compared to those of the assistant manager and manager of the library and found to be "much more similar" to those than to "other faculty". There is no indication that Ms. Kaai or the Faculty Association were advised that those positions would be the determining ones.

70 Besides that comparison, the only other criteria referred to by the Board were "no timetabling for W. Kaai to provide instruction, no daily lesson plans to prepare, no marking, etc.". There is no evidence that Ms. Kaai or the Faculty Association was advised that such criteria would be the measure of an academic person. The narrowness of the criteria is obvious when compared to the

definition of "teaching" in the collective agreement; "the art, practice or profession of any individual who develops, instructs, causes to know the knowledge of, or guides the studies of another individual by precept, example or experience". It would no doubt be a shock to many academic members of colleges, universities and technical schools to find that timetabling, lesson plans and marking are the critical measures to determine whether a person is an academic. Teaching and evaluation take place in many forms and forums.

X. SUMMARY

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

72 The consequences of the failure to enter into a consultation with the academic staff prior to making the decision to redesignate Ms. Kaai will be considered under the next portion of this judgment.

XI. STANDARDS OF REVIEW

73 The role of this Court in examining the judicial review done by the chambers judge is to review the record before the administrative tribunal to the extent necessary to measure that decision; and to examine the record before the chambers judge and to determine whether he or she applied the proper principles.

74 The application before the Court of Queen's Bench was an application for judicial review of the decision of the Board of Governors of Lakeland College. Under the same Rules of Court that authorized that application there is provision for an appeal from such a decision to this Court: See Alberta Rules of Court, r. 753.17. Two features of the Colleges Act are apparent; there is no privative clause and there is no provision for appeal within the statute itself.

75 The Supreme Court of Canada's decision in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 was not cited by the parties in their materials, nor was it raised in oral argument. Very recently, the Supreme Court of Canada released its judgment in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (4 June 1998), No. 25173 (S.C.C.). The panel is aware of these decisions. However, I find it unnecessary to comment on either in order to address the issues on appeal. Nothing should be taken from this given the circumstances of the instant case and the scope of argument before the panel.

A. The Decision of the Board

76 The appropriate standard of review of the Board's decision made under s. 10(2) of the Colleges Act depends upon the purpose of the legislation. What was the Board given authority to do by the legislature? What was the nature of the decision the Board was making when it decided the status of Ms. Kaai? To put it another way, if the Board made an error in doing what it did, was that error jurisdictional? In making its decision did the Board make an error in the interpretation of the provisions of the legislature which conferred jurisdiction upon it?

77 The Court must use a "functional and pragmatic" approach in coming to an answer. That means looking at the entire statute, including the reason for it and its purpose. Specifically, it means looking at the nature of the question before the Board and the expertise and ability of its members: *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1088. It is very difficult to determine what constitutes a question of jurisdiction, and the decision that the actions of a Board raise a jurisdictional issue should not be made lightly: *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Labour Relations Board)*, [1984] 2 S.C.R. 412 at 441.

78 The key question to be answered is: Did the legislature intend to leave the determination of who was or was not an academic to the Board of Lakeland College?

79 I have earlier reviewed the Colleges Act and will summarize those features relevant to this question. The history of the legislation shows a transfer of power from government to the boards of colleges. The composition of the boards was changed to make them representative of interested parties including educators and administrators, as well as those affected by the operation of a college, including the public. The Board, while required to enter into a collective agreement with academic employees, was also given the authority to determine the status of employees as academic or nonacademic. Since such a determination could affect vested rights where an academic was being redesignated, the legislature required that a consultation take place with the entity representing the academic. Since the teacher, or academic, is one-half of the reason for the existence of a college (the other being the student), the decision about who will be an academic is central and basic to the Board, the Faculty Association and the public. A proper consultation, anticipated by s. 10(2), would bring the appropriate parties into an informed process. It is significant that the Colleges Act does not fetter the Board with any definition of academic, nonacademic, consultation nor did it protect the Board with a privative clause. The Legislature anticipated that in operating colleges, decisions would have to be made as to whether employees or categories of employees were academics or non-academics. Moreover, it is patently clear that such decisions are critical to the healthy life of a college and are relevant to fiscal responsibility, as well as academic freedom and institutional autonomy.

80 My conclusion from this analysis is that the authority to make the decision about the academic status of persons was given to the board of governors of a college whose membership reflected all interests. But there is the *specific requirement* of a process that would inform that decision: a *consultation*. As D.P. Jones and A.S. de Villars have said in their textbook *Principles of Administrative Law*, 2d ed. (Scarborough: Carswell, 1994) at pp. 135-136:

Sometimes legislation prescribes *specific matters* that the delegate must attend to in the exercise of his or her powers. For example, the delegate may be required by statute to give notice to certain persons of his or her intended actions; to give a hearing prior to acting; to obtain someone else's approval; to keep a written record of his or her proceedings; or to do certain things within a prescribed period of time. Questions often arise as to the legal consequence of the delegate's failure to comply with such matters. On the one hand, *if the statutory requirement is mandatory, failure to comply therewith will render the delegate's action void*. On the other hand, breach of a merely directory statutory provision does not affect the validity of the delegate's action. [Footnotes omitted, emphasis added.]

No party to this appeal disputes the fact that consultation is a mandatory requirement under s. 10(2) of the Act.

81 It follows that a failure to adequately consult is an error made by the Board in meeting that requirement and goes to jurisdiction. That so, the test by which that decision is measured is the correctness test: *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Canada (A.G.) v. P.S.A.C.* (1991), 80 D.L.R. (4th) 520 (S.C.C.) (the Econosult case). The Legislature could not have intended that the Board be incorrect about the decision. Furthermore, the courts, if asked, must review the decision and apply the correctness test. As Justice Beetz said in *Syndicat*, *supra* at 441:

Once a question is classified as one of jurisdiction, and has been the subject of a decision by an administrative tribunal, the superior court exercising the superintending and reforming power over that tribunal cannot, without itself refusing to exercise its own jurisdiction, refrain from ruling on the correctness of that decision, or rule on it by means of an approximate criterion.

82 Did the Board fall into error in making the decision as to the status of Ms. Kaai? I find it did. The purported consultation was so inadequate that it cannot be characterized as a consultation as required by the Act. Given the purpose, intention and scheme of the Colleges Act, the legislature could not have intended such an inscrutable exercise of authority by the Board. To repeat my earlier conclusions: the failure of the Board to consider the collective agreement and the impact of the redesignation on Ms. Kaai's collective bargaining rights; the failure of the Board to provide any reason for the exercise of its power under s. 10(2); the failure to provide any information for the basis for the redesignation; and the narrowness of the criteria apparently used to determine Ms. Kaai's status all lead to the conclusion that the Board did not meet the standard required for a proper consultation under s. 10(2) of the Colleges Act.

83 Since s. 10(2) is clear that a consultation is required before the decision is made to designate or redesignate, the failure to adequately do so results in the Board having no jurisdiction to make the decision it did to redesignate Ms. Kaai: *Syndicat*, supra at 420 - 421.

84 The above would be an adequate basis upon which to dispose of this case, however the actions of the Board raise another basis for jurisdictional error.

85 The void left by the Board's actions leaves open to review the exercise, by the Board, of its discretion. As Jones and de Villars, supra state at pp. 146-147:

An abuse of discretion is an error which is jurisdictional in nature, even though the statutory delegate is properly constituted, has complied with all mandatory requirements, is dealing with the subject matter granted to him or her by the legislation, and undoubtedly has the right to exercise the discretionary power in question.

86 The authors raise various possible bases for such an abuse of process. Those which might apply to the exercise of the discretion by the Board include: acting for an ulterior purpose, and ignoring relevant considerations. Furthermore, courts are entitled to look at the result or effect of an exercise of discretion to determine whether an abuse has occurred.

87 The result of the Board redesignating Ms. Kaai in the way it did was to eliminate any librarians at Lakeland College from having academic status. The implications for hiring and the budget are obvious. It certainly seemed obvious to the representative of the Faculty Association who expressly asked the Chairman of the committee whether the decision was taken for financial reasons. In the face of the total failure of the Board to give any explanation for its decision, the negative reply to the question leaves the motives of the Board a mystery. Fiscal planning is a responsibility of the Board, but the Faculty Association, Ms. Kaai and the public should not have been left to speculate if that was the motivation for the decision. Left as it was, the ulterior purpose of the Board could be construed to be a reduction in the number of academic positions without the rigours of working through the collective bargaining process.

88 A further serious consequence of the procedure and decision of the Board was its failure to consider the very relevant, indeed critical, impact of the collective agreement on its own designation power under s. 10(2). Specifically, it failed to consider the rights and protections afforded to Ms. Kaai. But as a Board it had institutional responsibilities under this Act granting it such unusual power. There is no indication, whatsoever, that the Board understood or appreciated the collective agreement. The Board exercised its discretion under s. 10(2) in a vacuum. It provided no reason for using s. 10(2). Given the nature of the power, its potential effect on the collective agreement and bargaining process and its infrequent use, action taken under it cried out for openness and communication.

89 In the result, by ignoring relevant considerations, along with the absence of explanation for its

actions, the Board abused its discretion thereby making an error which is jurisdictional.

90 However, I do not need this additional finding of jurisdictional error to come to my conclusion. I find that the Board did not enter into an adequate consultation with the academic staff, as represented by the Faculty Association prior to redesignating Ms. Kaai from academic to nonacademic status pursuant to s. 10(2) of the Colleges Act. Since a consultation is a requirement, and a prerequisite to the Board having the authority to redesignate, the Board acted without jurisdiction.

B. Decision of the Chamber's Judge

91 The chambers justice reviewed the Board decision and specifically whether the requirement of a consultation had been met and found that it had and the Board had made no error of any kind. While stating that he was not "unmindful" of the effect of the redesignation on Ms. Kaai, he apparently did not attach any specific consequence to the failure of the Board to consider the collective agreement.

92 The statutory construction of the meaning of consultation in the Colleges Act is a question of law over which this Court may exercise its appellate function: see *Jones & de Villars*, supra at 378-379. The chambers justice did not specifically enunciate the requirements of such a consultation except to say that it had to be "substantial" and "more than a form of lip service". Although the Board put forward no evidence of what took place at the critical committee meeting, and the examination of Ms. Kaai on her affidavit was to the opposite effect, the chambers justice held that there was evidence of a full and meaningful discussion. He found that all that was required was that Ms. Kaai know the goal of the Board, have the opportunity to present her point of view, and know that the Board would consider her case and reach a decision. He also felt that the Board's actions should exhibit good faith.

93 With respect, the chambers judge fell into error in construing the requirements of a consultation. The standard described by him is too low given the scheme of the Colleges Act, and the rights being affected by the decision.

94 The conclusion by the chambers justice that the Board "made no error of law, nor has it made a patently unreasonable error of law in interpreting its powers pursuant to s. 10(2)" indicates that he was reviewing the actions of the Board with respect both to its interpretation of its authority and its performance of duties delegated to it. Given the error of law made by the Board which went to jurisdiction, it is unnecessary to go further.

95 The consequence of the chambers judge's failure to deal with the Board's jurisdictional error is an error of law.

XII. THE CHARTER ISSUE

96 All parties to this appeal have argued the Charter issue. However, it is only the interveners, the Faculty Associations of Grant MacEwan and NAIT, who ask that s. 10(2) of the Colleges Act be declared ultra vires.

97 No one has argued that the Charter does not apply to the actions of the Board. Instead, it is s. 2(d) of the Charter the right to freedom of association which is argued. This section of the Charter raises two questions:

- (1) Did the decision of the Board to redesignate Ms. Kaai breach her right to freedom of association?
- (2) Is s. 10(2) of the Colleges Act constitutionally invalid?

98 The Supreme Court of Canada has considered s. 2(d) of the Charter in a number of cases, and has held that the right to bargain collectively and the right to select a bargaining agent are not protected: *P.I.P.S. v. Northwest Territories (Commissioner)*, [1990] 5 W.W.R. 385 (S.C.C.); *P.S.A.C. v. Canada* (1987), 38 D.L.R. (4th) 249 (S.C.C.). However, the right to freedom of association is protected albeit with some constraints: *Lavigne v. O.P.S.E.U.* (1991), 81 D.L.R. (4th) 545 (S.C.C.).

99 It is impossible to embark on a Charter analysis in this case for two reasons. First, the Board's failure to carry out its statutory duty of consultation makes determining the scope of Ms. Kaai's associational rights problematic. Case law from the Supreme Court states that in order to decide whether a person possesses a freedom of association right, there must be an analysis of that person's individual actions performed in the collective pursuit of common goals: *Lavigne*, supra at 573, 623. In this regard, s. 10(2)'s requirement that there be a consultation before redesignation sets up a mechanism that would provide a means for ascertaining the scope of the protected Charter right. On the instant facts, the absence of an adequate consultation affected the: presentation of Ms. Kaai's individual goals and associative actions; exploration of the relationship between Ms. Kaai's individual goals, associative actions and the group goals of academic staff members; and the articulation of Ms. Kaai's purported associational right.

100 Second, even assuming that the consultation process would not have added anything to the Charter inquiry, there remains very sparse evidence from which this Court could engage in an appraisal of Ms. Kaai's associational right or the basis for denying such a right. Little evidence is before this Court on the critical issue of the deleterious personal, social, economic and political effects flowing from differing Charter interpretations of s. 10(2) of the Colleges Act. Such evidence is essential because it prevents courts from improperly deciding Charter issues in a factual vacuum: *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361.

101 The Charter issue might, for example, properly arise where the Board redesignated Ms. Kaai as a nonacademic, but in spite of that she proved she had an individual interest in associating with the Faculty Association. (Of course the Board could also be in error in their conclusion under s. 10(2), but for the purposes of this analysis I assume their decision to redesignate is supportable. If

they were found to be in error under s. 10(2) this may be relevant to the Charter challenge.)

102 In such circumstances, that is if Ms. Kaai was found to have a Charter-protected right to associate with the Faculty Association, does the legislation preclude the exercise of that right?

103 The scope of s. 21.1(2) of the Colleges Act is critical to the answer. The complexity of interpreting this section is evidenced by the varied submissions of counsel on appeal. Section 21.1(2) states that the academic staff association "consists of the academic staff members of the college". The interveners, Grant MacEwan and NAIT, argued that a nonacademic is thereby precluded from membership, whereas the Government of Alberta says this is not the case and says further that the Faculty Association at Lakeland College has the authority to pass bylaws to include nonacademics as has been done by the University of Alberta Faculty Association operating under similar legislation. The chambers judge resolved the Charter issue on the basis of his interpretation of s. 21.1(2); namely, that this section did not preclude a nonacademic person from being a member of the Faculty Association for purposes other than collective bargaining.

104 Any finding of Charter rights and their possible breach goes to the validity of the legislation and requires an ordered and logical analysis on a factual base. Accepting that the Charter binds the Board, the onus would rest with Ms. Kaai to prove that she has a right to freedom of association with the Faculty Association of which she has been deprived by a decision of the Board. A proper consultation would provide evidence relevant to the Charter analysis.

105 In summary, there is an insufficient foundation upon which to proceed to Charter analysis or a determination of whether any rights of Ms. Kaai have been breached. It is inappropriate to deal with the constitutional validity of s. 10(2) of the Colleges Act in a factual vacuum.

106 Moreover, the potential, if not actual, overlap of information relevant to the two decisions one under the Colleges Act, the other under the Charter strengthens the need for the Board to properly exercise its statutory authority.

107 I find it is not possible nor appropriate to deal with the Charter issue.

XIII. RESOLUTION

108 The failures of the Board and the chambers judge to apply a proper standard of consultation is a reviewable error of law. The decision of the Board of Governors of Lakeland College is void.

109 For these reasons the appeal is allowed and the decision of the respondent Board of Governors of Lakeland College to alter the designation of the position occupied by the appellant Ms. Kaai is quashed.

PICARD J.A.

RUSSELL J.A.:-- I concur.

PICARD J.A.:-- I concur.

cp/d/drk/DRS/qlsxs

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