

Labour law in Canadian higher education

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ABSTRACT

The legislative framework for academic and nonacademic unionization and collective bargaining in Canadian public colleges, universities and technical institutes is set out and compared with mainstream labour law. Significant deviations affecting academic staff in the province of Alberta are explored to understand their effect and the factors which maintain this deviation.

INTRODUCTION

Research on labour relations in Canadian higher education focuses on collective bargaining and agreements as well as tenure and academic freedom (Ponak, Thompson and Zerbe, 1992; Leckie and Brett, 1995; Rajagopal and Farr, 1993; Horn, 1999; Hum 1998; Tudiver 1999). Gender issues and the use of part-time and temporary faculty are also topical (Lundy and Warme, 1990; Looker, 1993; Author, 2001; Mysys, 2001). Broadly similar patterns exist in the US literature.

Largely unexamined in both Canadian and American literature (but see Saltzman, 1998, 2000, 2001; Bodah, 2000) is the legal framework within which unionization and collective bargaining occurs. Labour statutes are a key structural feature of union-management relations, influencing individual and organizational behaviour. It determines who can belong to a union, how individuals hold their representatives to account, and how employers and unions advance their interests in (and out of) bargaining. More broadly, these labour laws represent a societal compromise, codifying the rules through which the inherent conflicts between the interests of labour and capital are managed (Glassbeek, 1982; Fudge & Tucker, 2001).

Labour law in Canadian higher education

This article addresses this gap by examining the rules around unionization and collective bargaining for academic and nonacademic staff in Canada's public colleges, universities and technical institutes. This framework is then compared to mainstream labour statutes on seven criteria. Finally, the legislative scheme affecting academic staff in the province of Alberta is analyzed to explain its continuing and significant deviation from the mainstream.

BACKGROUND

Higher Education in Canada

Canadian higher education is administered and funded on a provincial basis. The majority of students are educated in secular, publicly funded institutions. Historically, universities have been the only degree-granting institutions (excepting theology degrees) with colleges and technical institutes focusing on one- and two-year programs, university transfer and apprenticeships in the trades. This changed in the 1990s and provinces created various mechanisms through which colleges could grant degrees at the undergraduate level (Jones, 1997).

Governance in universities is normally bicameral. Colleges and technical institutes have a broadly similar structure but academic governance tends to be less autonomous than in universities (Dennison and Gallagher, 1986).

A small number of religious institutions (some affiliated with public universities) operate. Similarly, there are also private, for-profit institutions. These frequently offer vocational training (e.g., information technology and business programs). Recently, for-profit American universities (e.g., DeVry Institute of Technology, the University of Phoenix and

Labour law in Canadian higher education

Nova Southeastern) have also begun operating in Canada. Overall, however, their current impact on higher education is minimal.

Labour Relations Legislation

Under Canada's constitution, authority to regulate collective bargaining is primarily vested in Canada's 10 provinces and 3 territories rather than the federal government. Despite provincial variations, private-sector Canadian labour law is premised upon three pluralist assumptions established in 1944 federal legislation:

1. Employees and employers have conflicting interests.
2. Unions are a legitimate way for employees to counter employers' power.
3. Collective bargaining can reduce and manage labour conflict (Barbash, 1984).

This framework drew heavily on the 1935 American *National Labour Relations Act* (the Wagner Act). Canadian labour laws differ from American by including greater state involvement in the bargaining process. For example, state-sponsored mediation is normally required before a strike or lockout commences. Further, mid-term strikes (over the content or interpretation of a collective agreement) are statutorily barred—a negotiable issue in the United States (Jackson, 2001).

That said, the American and Canadian systems are very similar. Legislation is administered by a labour relations board. Once a union is certified by a labour board to represent employees, the union and employer negotiate. The resulting collective agreement sets out the terms and conditions of employment for one or more years. If agreement isn't possible, the parties may exert economic pressure or engage in third-party arbitration (Carter, 1995).

Labour law in Canadian higher education

Canada's private-sector labour laws have seven significant characteristics:

1. **Choice:** Employees normally have the right to choose (as a group) whether to unionize and which union will represent them. Unionized employees may periodically revisit this choice and choose a different or no union. Legislative provisions for certification and revocation reflect unions' legitimacy is based on members' continued support.
2. **Duty of fair representation:** To balance unions' exclusive right to advance grievances, legislation and common law impose a duty of fair representation on unions. Unions must exercise their discretion in good faith, objectively and honestly. Decisions about grievances must not be arbitrary, capricious, discriminatory or wrongful (*Merchant Service Guild v. Gagnon*, 1984).
3. **Independent unions:** Unions must represent employees' interests. Unions unduly influenced by management are illegitimate and do not normally bring about industrial peace because employee concerns are unaddressed. Labour statutes recognize this by prohibiting the certification of employer-dominated unions and voiding collective agreements negotiated by them.
4. **Unfair labour practices:** Union or employer action is statutorily regulated to preclude behaviour such as employers negotiating directly with employees, bargaining in bad faith, and illegal work stoppages/slow downs. These provisions ensure statutory rights and obligations are honored.
5. **Strikes & lockouts:** Collective bargaining impasse has historically been resolved via economic sanctions. Alternatives (e.g., interest arbitration) exist but strikes and lockouts remain the norm, in part because they rapidly clarify the true settlement point and vent frustration—functions not served by other methods.

Labour law in Canadian higher education

6. **Labour boards:** Independent, quasi-judicial tribunals, comprising both employer and labour representatives administer and interpret labour laws. This structure reflects historical dissatisfaction with the ways courts have handled labour disputes. These tribunals provide a neutral adjudicative body with the power to fashion remedies that make labour relations sense (Adams, 1993).
7. **Web of Rules:** Labour laws operate within a complex web of other employment rules (Dunlop, 1958). For example, Alberta's *Labour Relations Code* and the *Public Service Employee Relations Act* govern union-management relations. Collective agreements negotiated pursuant to the Code or Act are subject to the statutory minimums set out in the *Employment Standards Code* (e.g., minimum wage and holiday entitlements). The *Human Rights, Multiculturalism and Citizenship Act*, *Occupational Health and Safety Code*, *Workers' Compensation Act*, common law and (in some cases) the *Charter of Rights and Freedoms* also apply. All of these acts limit the employer's right to manage.

Private-sector unionization was rapid in the 1950s and '60s (Morton, 1995). Collective bargaining came to the majority of public-sector employees between 1963 and 1975 and, by 1998, the public-sector unionization rate was approximately double the national average of 32.5% (Ponak and Thompson, 2001). Public sector labour laws differ from private sector ones in that, in the former,:

1. Legislation may grant unions bargaining rights and determine bargaining units, although this tends to be less true the further one gets from government proper.
2. The scope of bargaining may be restricted by excluding, for example, pensions, classification, promotion and reorganization from negotiations.

Labour law in Canadian higher education

3. Compulsory interest arbitration often replaces strikes and lockouts. For example, approximately half of public servants and most teachers can strike while police officers generally cannot (Ponak and Thompson, 2001; HRDC, 2003).

These differences exist because the employer is the government (or a government agency). Bargaining outcomes can therefore be pursued in the legislature as well as at the negotiating table (Panitch and Swartz, 1993). Despite these differences, public-sector labour law generally conforms to the post-war framework. Consequently, it is reasonable to (and common) to compare the public sector rules on unionization and collective bargaining to the private-sector norm.

METHOD

Research initially adopted Dunlop's (1958) systems approach, focusing on rules and their content. These rules delineate socially acceptable uses of power. Labour legislation governing academic and nonacademic union-management relations in publicly funded Canadian colleges, universities and technical institutes was identified via a literature search, an examination of collections of statutes, and conversations with key informants. Fourteen pieces of legislation from nine jurisdictions were analyzed. Legislation governing private (e.g., religious or for-profit) and Quebec institutions was excluded because of significant legal differences.

Legislation was coded as "academic" or "nonacademic" and "university" or "college/technical institute" depending upon which employees and institutions it applied to. This reflects the traditional divisions in Canadian higher education. Some legislation spanned categories (e.g., Alberta's *Public Sector Employee Relations Act* covers nonacademic staff in both universities and colleges/technical institutes). Once coded,

Labour law in Canadian higher education

each piece of legislation was then examined to determine if it contained provisions addressing each of the seven key features of mainstream labour relations.

Of the nine jurisdictions examined, Alberta's laws affecting academic staff were the only one that deviated significantly from mainstream labour law. The obvious (and most interesting) question is: why? Attempts to directly determine "why?" are hampered by the unavailability of key decisions makers from the 1960s and by a closed political culture. But some light can be shed upon why this arrangement continues by examining the implications of Alberta's legislation on power, authority, control and cooperation. This approach requires a shift from descriptive work in Dunlop's (1958) tradition to the political economy framework outlined by Godard (1994).

Consequently, the legal framework of unionization and collective bargaining in Alberta's higher education was subjected to further scrutiny on the seven criteria outlined above. The likely structural impact of Alberta's legislation on labour relations from the perspective of the government, institutions (i.e., employers), academic staff associations and individual faculty members was determined. Four potential explanations were explored, one of which was found clearly superior.

FINDINGS

The results of the cross-jurisdictional analysis are summarized in Tables 1 (academic) and 2 (nonacademic) below. Little difference in labour law affecting universities and college/technical institutes was found. Any salient differences are discussed in the written summaries that follow.

Labour law in Canadian higher education

Table 1. Labour laws affecting academic staff by province

Province	Choice	Duty of Fair Representation	Independent Unions	Unfair Labour Practices	Strike & Lockout	Labour Board	Web of Rules
Newfoundland	Y	N*	Y	Y	Y	Y	Y
Nova Scotia	Y	N*	Y	Y	Y	Y	Y
Pr. Edward Island	Y	N*	Y	Y	Y	Y	Y
New Brunswick	Y	N*	Y	Y	Y	Y	Y
Ontario	Y	Y	Y	Y	Y	Y	Y
Manitoba	Y	Y	Y	Y	Y	Y	Y
Saskatchewan	Y	Y	Y	Y	Y	Y	Y
Alberta	N	N*	N	N	N	N	N
British Columbia	Y	Y	Y	Y	Y	Y	Y

* Duty of fair representation exists at common law and is enforceable through the courts

Table 2. Labour laws affecting non-academic staff at post-secondary institutions by province

Province	Choice	Duty of Fair Representation	Independent Unions	Unfair Labour Practices	Strike & Lockout	Labour Board	Web of Rules
Newfoundland	Y	N*	Y	Y	Y	Y	Y
Nova Scotia	Y	N*	Y	Y	Y	Y	Y
Pr. Edward Island	Y	N*	Y	Y	Y	Y	Y
New Brunswick	Y	N*	Y	Y	Y	Y	Y
Ontario	Y	Y	Y	Y	Y	Y	Y
Manitoba	Y	Y	Y	Y	Y	Y	Y
Saskatchewan	Y	Y	Y	Y	Y	Y	Y
Alberta	Y	N*	Y	Y	N	Y	Y
British Columbia	Y	Y	Y	Y	Y	Y	Y

* Duty of fair representation exists at common law and is enforceable through the courts

Labour law in Canadian higher education

Atlantic Provinces

Legislation in all four Atlantic provinces is similar, with academic and nonacademic staff at colleges, universities and technical institutes being covered by the primary labour statute, except academic and nonacademic staff at colleges in Newfoundland and New Brunswick who fall under the public sector legislation. The key deviation from the Canadian norm is the absence of a statutory duty of fair representation throughout the region, reflecting employees' statutory right to advance their own grievances. The New Brunswick *Public Service Labour Relations Act* also excludes some casual, temporary and part-time faculty from bargaining units—an issue that also arises in Ontario.

Central Provinces

With a single exception, labour relations in Ontario, Manitoba and Saskatchewan public colleges, universities and technical institutes are governed by each province's primary labour relations statute. Academic and nonacademic staff in Ontario's colleges of applied arts and technology unionize and bargain under the *Colleges Collective Bargaining Act*. This legislation is mostly administered by the Ontario Labour Relations Board and contains provisions broadly similar to those in Ontario's *Labour Relations Act*. A key difference is that bargaining for academic and nonacademic staff occurs on a province-wide basis. A second difference is the exclusion of part-time academic staff from membership in the staff association. This growing group of employees has no ability to unionize under Ontario's *Labour Relations Act*, thereby being essentially barred from union representation (Peter Mckeracher, personal communication, 15 January 2004).

Labour law in Canadian higher education

Western Provinces

The legal frameworks for labour relations in Alberta and British Columbia differ somewhat from those of other provinces: British Columbia has a more complex history and Alberta is significantly less comprehensive.

University faculty in British Columbia are subject to the *Labour Relations Code*. Prior to 1991, the relationship between a university and faculty members was not, however, an employment relationship according to the *Universities Act*. Consequently, faculty developed an alternative bargaining regime to contractually regulate the “non-employment” relationship. Since 1991, only the University of British Columbia has entered into a voluntary recognition agreement and created a collective agreement under the *Code*. The status of the agreements at the other three universities is unclear but it appears likely that they are not collective agreements under the *Code* (Rob Clift, personal communication, 15 January 2004). That said, faculty could choose to unionize (with their faculty association or another bargaining agent). In doing so, they would then have all of the protections and restrictions of the *Code* available to them.

Unionization and collective bargaining for academic and non-academic staff at BC colleges and institutes are governed by the *Labour Relations Code* but there are also provisions in the *Colleges and Institutes Act* that apply. Although academic and non-academic staff at each institution are organized as separate bargaining units, academic bargaining is multi-employer and results in a province-wide master agreement. Local issues are addressed through subsidiary, local agreements (CIEA 2003a, 2003b, PSEA 2003). The recent *Public Education Flexibility and Choice Act* allows the employer to unilaterally establish workload, despite collective agreement language.

Labour law in Canadian higher education

In Alberta, the *Public Service Employee Relations Act* (PSERA) governs labour relations for non-academic staff in colleges, universities and technical institutes. PSERA applies to most public-sector employees, contains provisions broadly similar to the *Labour Relations Code* (except strikes and lockouts are prohibited and there is no duty of fair representation) and is administered by the Alberta Labour Relations Board.

The recent *Post-Secondary Learning Act* (PSLA) sets the labour relations framework for academic staff. PSLA excludes academic staff from the ambit of the *Employment Standards Code* and the *Labour Relations Code*. Collective bargaining occurs on a unit-by-unit basis. The PSLA directs institutions' Boards of Governors to determine which employees are members of the academic staff association (s. 61(2)). All other employees are considered non-academic staff. Academic staff associations are established by statute at all institutions and employees have no opportunity to choose their bargaining agent or to choose another or no union. Section 87 and the Model Provisions Regulation establish the minimum content of collective agreements. There are no references to unfair labour practices or bad faith bargaining and no method to resolve those issues.

Bargaining impasse is resolved via compulsory arbitration (s. 88). The powers of arbitrators are not specified. Arbitrators have ruled themselves unable to compel witnesses or production of documents, award damages or file orders with the courts. This means the dispute resolution procedures legislatively deemed to be included in collective agreements (if the agreement is without one) is of questionable effectiveness (CAFA, 2002).

Labour law in Canadian higher education

Summary

Overall, the framework for labour relations in higher education is remarkably consistent with that of mainstream labour relations. Both academic and nonacademic staff generally have the opportunity to choose if they wish to be represented by a union and which union. The power of the union over members is checked by a duty to fairly represent them and the labour relations board can hear complaints about employer-dominated unions. Unfair labour practices and dispute resolution via strikes and lockouts are also regulated by the labour relations board. In addition to the relevant labour relations statute(s), academic and nonacademic staff also find themselves protected by a web of other employment laws. The single, stark exception is academic staff in Alberta. The *Post-Secondary Learning Act* (a 2004 amalgamation of the *Colleges Act*, *Universities Act* and *Technical Institutes Act*) contains none of the fundamental features of Canadian labour relations. This deviation warrants further scrutiny.

ACADEMIC STAFF IN ALBERTA

One of 10 provinces, Alberta had a population of 2.9 million in 2001, 80% living in urban areas (Government of Alberta, 2003). Two major cities (the greater Edmonton and Calgary areas) each house approximately 1 million people. Alberta's public post-secondary system includes 4 universities, 14 colleges and 2 technical institutes. Approximately 10,000 academic staff are employed to teach approximately 130,000 full-time equivalent students. Governance is generally bicameral and government transfers to institutions in 2003 totaled \$1107 million (roughly half of total institutional revenues) (Ministry of Learning, 2003).

Labour law in Canadian higher education

As noted above, the *Post-Secondary Learning Act* (PSLA) excludes academic staff from coverage under the *Labour Relations Code*. In place of this statute, the PSLA sets out a labour relations framework for academic staff. Alberta's framework is examined below in light of the seven key features of mainstream labour law to determine what structural differences exist and what the implications are.

Choice

Academic staff are represented by legislatively created academic staff (or faculty) associations (s. 85). Faculty cannot choose a different (or no) union. This approach significantly differs from mainstream labour relations in two ways:

1. The legitimacy of unions (specifically their exclusive representational rights) is premised on continuing employee support. This is not the case in Alberta: a specific bargaining agent is mandated.
2. The possibility of a union being replaced by another (or no) union places a type of competitive pressure on unions: they must satisfy their members or risk having their bargaining rights revoked. This is not the case of academic staff associations.

Consequently, faculty associations face less structural pressure to advance their members' interests vigorously than do mainstream unions.

Duty of Fair Representation

The PSLA contains no duty of fair representation (DFR) obligation for faculty associations. An obligation does exist at common law. Individuals pursue this through the court system, but this entails greater expense and a longer process than registering

Labour law in Canadian higher education

a complaint with the Alberta Labour Relations Board. No academic staff have pursued this route to date. The absence of a statutory DFR reduces the pressure on faculty associations to handle grievances in a careful and measured way because the review process is difficult for faculty to access.

Independent Unions

The PSLA does not preclude employer involvement in a faculty association. Further, s.1(c) allows institutions' Boards of Governors (i.e., the employer) to determine which employees or categories of employees are included in the academic bargaining unit. Department heads are routinely members of faculty associations despite making (particularly in colleges and technical institutes) effective recommendations about hiring, firing, discipline and evaluation—typical indicators an individual performs managerial functions and should be excluded from a bargaining unit under the *Labour Relations Code*. The ability of employers to compromise (intentionally or otherwise) the independence of unions has the potential to make unions less effective at advancing members' interests.

Unfair Labour Practices

The PSLA does not address unfair labour practices (UFLPs) or require either party to bargain in good faith. Section 87(1) requires the parties to enter into negotiations for the purpose of concluding or renewing an agreement and s.87(3) requires an agreement to contain procedures respecting negotiation of future agreements, but the remedies arbitrators may impose are limited to those set out in the collective agreement. Further, arbitrators have a financial interest in not alienating either party therefore impartial resolution of UFLPs may be difficult. The result is that actions, such as bargaining directly with faculty members, refusing to hire or promote unionists, and layoffs with anti-

Labour law in Canadian higher education

union animus, remain effectively irremediable. This fundamentally departs from the principles of free collective bargaining enshrined in the *Wagner Act* and subsequent Canadian legislation, under which both employers and trade unions must act in good faith.

Strikes and Lockouts

Section 88(1) of the PSLA requires college and technical institutes to submit disputes to binding arbitration when bargaining reaches impasse.¹ University faculty are not covered by this prohibition on strikes and lockouts.² Any strike or lockout in the university sector would not be regulated under the *Labour Relations Code*, but rather by the courts. Legislation preceding the PSLA was silent on this matter and only a single collective agreement allowed for strikes and lockouts. The Minister of Learning's rationale for instituting binding arbitration was:

...last year, Mount Royal College was within about four hours of a strike and/or lockout which would have lost approximately 3000 students their one semester or their one year (Hansard, 2003, p. 1877).

Precluding strikes limits the ability of a faculty association to pursue contract demands by generating political pressure on institutions and government. Similarly, an institution loses its ability to pressure faculty to accept an offer. The result is that the true settlement point may not surface in negotiations as each side expects an arbitrator to split the difference.

Labour Boards

Labour law in Canadian higher education

The PSLA specifically excludes faculty from the ambit of the *Labour Relations Code* ergo the Labour Relations Board has no authority to hear complaints to applications. This is not the case for nonacademic staff, who may access the labour board via the *Public Sector Employees Relations Act*. Academic staff, faculty associations and institutions must pursue regulation of their relationship through the court system or arbitration. Time-consuming adjudication results in delay. It is axiomatic in labour relations that delay benefits one party, normally the employer, given the “work now-grieve later” rule of thumb. Some power is also simply given to the employer (particularly that of determining the bargaining unit boundaries).

Web of Rules

Faculty are subject to human rights and occupational health and safety legislation. Faculty are excluded, however, from the *Employment Standards Code* (although the maternity and parental leave provisions continue to operate) The *Employment Standards Code* sets the floor of employment rights (e.g., minimum wages, holidays). All collective agreements provide better terms. One notable loss, though, is provincial guidelines regarding hours of work and overtime.

Analysis

Having summarized the major implications of Alberta’s PSLA, we now turn to its effect on faculty associations, institutions, the government and individual faculty members.

1. **Academic staff associations** face less structural pressure than other unions to advance their members’ interests: their bargaining rights are secure and most faculty cannot enforce the common law duty of fair representation. This is not to discount the effect of political pressure internal to faculty associations. But,

Labour law in Canadian higher education

beyond electing a new executive, there is no effective way for faculty to hold associations to account. There is, however, no evidence of poor performance; this is simply a structural observation. At the same time, associations have fewer avenues to advance members' interests than do other unions. The employer controls which employees are in the bargaining unit and can thereby influence unit cohesion and strength in ways no other employers can. Faculty associations also have no effective recourse when an employer commits an unfair labour practice or bargains in bad faith except costly and slow court proceedings or, perhaps, a weak arbitration process. Unions are also unable to withdraw their services to create student and parental pressure on institutions or government to settle contracts. Despite this, examining available data on university faculty salaries (CAUT, 2004) indicates no significant difference between Alberta and other jurisdictions. This may reflect the operation of a national or international labour market for university academics.

2. **Institutions** have more legal latitude than other employers to influence the collective bargaining process. They determine the composition of the bargaining unit and have more leeway to commit unfair labour practices. That said, institutions are legislatively compelled to have unionized faculty, an obligation not placed on other employers. The impact of this is unclear. While unions may reduce managerial discretion, the incorporation thesis suggests unions aid employers in ensuring employees comply with their contractual obligations, thereby helping the employer control the workforce.

Institutions are also able to avoid the political difficulties that may come with a strike or lockout via legislated interest arbitration. This may, however, be a

Labour law in Canadian higher education

double-edged sword. Institutions' inability to lock out employees significantly reduces institutions' ability to moderate employees' demands in bargaining. Like many public-sector employers, institutions actually save money during a strike or lockout, thereby eliminating economic pressure to accept a faculty association's last offer. At the same time the specialized nature of faculty members' employment and the structure of the academic job market (i.e., long hiring process, few openings) reduce the ability of faculty to find other employment during a strike. This would increase the economic pressure on faculty to accept an institution's last offer in the event of a strike or lockout.

3. **Government** is less likely to experience political consequences of labour relations in higher education when faculty are excluded from the ambit of mainstream labour law. Unions have less incentive and ability to oppose employer initiatives. When they do, the main outlet is the private world of interest and rights arbitration. The notion that government legislates to avoid public conflict is supported by the changes to dispute resolution set out in the PSLA. The threat of a single strike of questionable viability (i.e., union had no strike fund or plans to operate when it lost access to its offices; employer faced no economic pressure) resulted in significant legislative change. And respectfully, despite the then-Minister's assertion, a strike doesn't automatically cost students a semester or year of academic work.
4. **Individual faculty members** do not appear advantaged. Their most basic labour right—to choose whether to unionize and which union shall represent them—is abridged. It is not unreasonable to ask, then, from where do academic staff associations derive their legitimacy? This is a particularly salient question given

Labour law in Canadian higher education

that faculty associations operate effectively without the check and balance of the duty of fair representation (although no evidence of such abuse exists). Faculty also have little protection from employer actions tinged with anti-union animus (although tenured faculty are less impacted by this).

These observations suggest four possible explanations why Alberta's legislation remains so different from that of other jurisdictions:

1. **Confluence of interests:** Alberta's framework significantly advantages both government and institutions. At the most basic level, government legislatively reduces the motivation and ability of faculty to resist employer initiatives and action. In turn, institutions accept mandatory unionization and loss of lockout power. This reduces the overt conflict in the system and resulting political fallout. This is not to say institutions and government have identical interests. Yet, institutions' Boards of Governors comprise government appointees (including former members of the legislative assembly) and direct government transfers account for 50% of institutional revenue, thus there may well be some confluence of interests. To be fair, faculty associations receive protection from raids by other unions and revocation drives as well as effective insulation from the duty of fair representation. The result is a stable system where the only potentially disadvantaged group (individual faculty members) has little ability to influence the system because its representatives are partly co-opted by the system and largely powerless.
2. **Quality:** This arrangement may contribute to educational quality or academic freedom. The quality argument might justify compulsory interest arbitration—

Labour law in Canadian higher education

protracted strikes and lockouts could harm, for example, both learning and research. But what relationship exists between educational quality or academic freedom and choosing a bargaining agent, the duty of fair representation, protection from unfair labour practices, independent unions or access to expedited, third-party adjudication by a labour relations board? Nonacademic staff have these rights (excepting the DFR) under the *Public Service Employee Relations Act* to no apparent harm. The key labour relations difference between academic and nonacademic employment (at the university level, at least) is tenure. Tenure is essentially exceptional job protection meant to ensure (tenured) faculty have a significant amount of academic freedom (Horn, 1999). It does not exempt faculty from legitimate discipline or management. Consequently, there does not appear to be a relationship between the exceptional labour relations framework faculty are subjected to and educational quality or academic freedom.

3. **Association not unions:** Some (including some faculty members) may argue faculty associations are not actually trade unions. Rather, they are some sort of professional association. If so, comparing the legal framework with mainstream labour relations may be specious. Trade unions are authoritatively defined as:

...organization(s) of employees formed to protect their common interests and to engage in collective bargaining and other matters pertaining to employer-employee relations... that include the regulation of relations between employers and employees (Sack and Poskanzer, 1984, p. 150).

Faculty associations are specifically created to (and do) negotiate and enforce collective agreements. Although they may also engage in other activity (e.g.,

Labour law in Canadian higher education

professional development), the majority of their financial and staff resources are deployed to manage the employment relationship. By any conventional standard, then, faculty associations are trade unions and consequently comparisons to other trade unions are reasonable.

4. **Faculty not employees:** The US Supreme Court's *Yeshiva* decision asserts that faculty members' administrative and governance responsibilities at private institutions may take them out of the role of employee and make them managers (Saltzman, 1998). Canadian labour law generally excludes workers who perform managerial functions from the definition of employee (Adams, 1993) and this may explain Alberta's legislation.

"Managerial functions" are not normally defined in statute but case law suggests managers exercise effective control over those they supervise, including the power to hire, fire, discipline, and evaluate or make effective recommendations to those who do so (*Okanogan Telephone Co.*, 1977). Workers without supervisory power can also be managers if they are involved in matters of policy or the running of the organization where they exercise independent decision-making responsibilities that impact the employment relationship (*AHA et al. v. UNA 151 et al.*, 1986).

This argument has mixed support. Faculty in universities, colleges and technical institutes often sit on hiring committees. University faculty also normally make tenure decisions and performance evaluations. Neither group, however, normally handles discipline or termination. Faculty representatives also participate in academic governance (particularly at universities) yet the impact this has on the

Labour law in Canadian higher education

terms and conditions of employment of an individual faculty member is constrained by the terms set out in the collective agreement. Further, individual responsibility and discretion is minimized (via the committee process) and often subject to approval by senior administrators and/or the Board of Governors.

The labour relations purpose of excluding from the bargaining unit employees who exercise managerial responsibilities is that employers legitimately require some staff who are free from union pressure or conflict of interest to negotiate and enforce a collective agreement. Labour Boards across Canada implicitly reject the *Yeshiva* reasoning in that they include faculty in bargaining units. In Alberta, institutions can designate membership in the bargaining unit, thereby undermining this argument. Consequently, *Yeshiva*-based explanations aren't particularly persuasive.

A further variation on this argument may be that the exclusion is required for the operation of collegial governance. That collective bargaining and collegial governance exist side-by-side through the rest of Canada's higher education system suggests this is not the case.

The most compelling explanation for why Alberta's unique arrangement continues is clearly that Alberta's laws reflect the confluence of interests between government and institutions. Similar relationships between governments and quasi-public agencies exist throughout the public sector and result in bargaining outcomes being achieved through legislation. For example, Alberta altered health-care bargaining with a 2003 amendment to the *Labour Relations Code* requested by its regional health authorities (*Labour Relations (Regional Health Authorities Restructuring) Amendment Act, 2003*). By

Labour law in Canadian higher education

reducing 480 bargaining units (and consequently contracts) to 36, well-established and expensive contract terms wound up back at the bargaining table. Similarly, during a politically difficult teachers' strike in 2002, the government legislated striking teachers back to work and mandated compulsory arbitration (*Education Services Settlement Act, 2002*). This confluence of interests between government and employers is also broadly mirrored in mainstream Alberta labour laws (Thompson, Rose & Smith, 2003). What is unique about the higher education case is that the legislative arrangements are without parallel. No other group is so systemically disadvantaged by labour law.

CONCLUSION

The labour relations framework for Canadian higher education broadly conforms to mainstream labour law as assessed on seven criteria. There are no significant differences between academic and nonacademic staff or among universities, colleges and technical institutes. The major variation appears to be the existence of province-wide collective bargaining as a result of specific legislation, action by parties or by virtue of a single (sometimes multi-campus) institution. This was more common in colleges.

The single exception to the norm is Alberta. Nonacademic staff are covered by legislation broadly consistent with mainstream labour law except there is no DFR and strikes/lockouts are prohibited. Academic staff are subject to a unique regime which significantly deviates from mainstream labour law. The reason for this continued deviation is unclear. The most compelling explanation is that this framework sees the needs of government (no overt conflict) and institutions (minimally effective unions) met. Academic staff associations potentially receive some small benefits from this scheme but individual faculty members may be substantially disadvantaged and the legitimacy of their bargaining agents is questionable.

Labour law in Canadian higher education

Having set out the basic rules for unionization and collective bargaining in higher education, several new questions come to light. For example, how does the culture of collegial governance and statutory provisions affecting academic decision making affect labour relations? For example, does it create a countervailing pressure within the employer's decision-making processes akin to the intra-organizational negotiation that often occurs within unions during negotiations? And what, if any, impact does this have on collective bargaining for non-academic staff? Similarly, how does the jurisprudence stemming from interest and rights arbitrations as well as court challenges of matters such as mandatory retirement age and discrimination on the basis of sexual orientation further contour the operation of collective bargaining relationships in higher education? While beyond the basic structural analysis intended by this article, they are reasonable next steps in developing a greater understanding of the labour relations framework as it affects academic and non-academic staff in Canadian higher education

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¹ Theoretically, an agreement could contain a strike/lockout provision that kicks in for a defined period of time before a binding interest arbitration process is invoked. If, however, the purpose of a strike or lockout is to put economic pressure on the other party to accept and this pressure has a specified end date, the effectiveness of the strike or lockout would be significantly impaired. This suggests that the right to strike or lockout may exist in principle but is devoid of practical significance.

² The exclusion of university faculty accommodates the existing practice at the Universities of Alberta and Lethbridge and Athabasca University of having two separate documents comprise the collective agreement. A document containing terms and conditions of employment can only be opened by mutual agreement. A document containing compensation clauses opens automatically on the expiry date of the agreement. In either case, the agreement(s) stipulate binding interest arbitration as the method of dispute resolution.