

CONFERENCE OF FACULTY ASSOCIATION STAFF (COFAS)
MAY 29 - JUNE 1, 1997

MINUTES

May 30, 1997

LEGAL MATTERS

Mr. Denis Power, Senior Counsel and Ms. Pascale Roy, Staff Lawyer of the Law Offices of Nelligan/Power in Ottawa, provided the members of COFAS with an informative session on the importance of confidentiality and in particular how it would pertain to a Faculty Association office.

Mr. Power said that there is very little actual law which can be looked at regarding cases surrounding confidentiality. He said that in Canada there is not absolute right to privacy and that privacy rights are in the common law context. He said that each association should formulate policies to safeguard the confidentiality of its members/clients. Some examples of these policies are:

- (a) Who should have access to private and confidential files.
- (b) What use should be made of the information in these files.
- (c) How should these files be stored and what safeguards should be put in place to keep them confidential.
- (d) What is the liability of the association in case of abuse of a member's confidential information.

If a member/client feels that the confidentiality of their case has been breached they could go forward with any of the following:

- (a) File an unfair labour provision to the Labour Board.
- (b) They could sue for declaration relief.
- (c) They could sue for slander.
- (d) They could sue under the Charter.
- (e) They could sue for breach of impediment.
- (f) They could commence a suite for the tort of breach of confidence.

Mr. Power said that an association or union must meet statutory rules and must act in the best interest of not just one member but in the interests of all of the members. He said that "privacy" is the right of the individual to determine for themselves as to how and when to release information on him/herself. There is a recognized legal right to privacy. He said that since a member places their trust in the association and those people who represent the association, these people are trustees of the association and therefore have a high duty of care and a statutory duty to represent all members to the best of their ability.

Mr. Power recommends that an association's constitution be carefully reviewed to ensure that guidelines concerning confidentiality are built into the document.

Mr. Power said that some of the more contentious complaints that the Labour Board deal with are member vs member complaints. Each association should have rules concerning member vs member complaints and avail itself of outside counsel, if necessary to avoid a conflict of interest charge to the Labour Board.

Mr. Power said that often a question arises whether an association has the legal right to represent a person if they wish to go forward with a grievance but the association does not think that they have a case. He provided an example of two member who were involved in a promotion review. When one member received the promotion and the other did not, the second person grieved. As both people involved were members of the association the association looked at the case and it was clear that the person who

received the promotion was much more qualified and had a more meritorious case than the second person, therefore the association refused to go forward with the grievance because the right person received the promotion. If the association cannot decide who should receive the promotion then the association may have to support both cases and seek independent counsel for one member. Mr. Power said that this comes under the rule of representing all members fairly. He said that it was important that at that at the first meeting of any grievor that the association representative disclose to the grievor that all information provided to them will also have to be provided to the other side and that in a case like this that they are not guaranteed to absolute privacy.

Mr. Power also discussed how long an association should keep information from a grievance on file. His recommendation was "a very long time." There is no set rule, however, he has found that information needs to be looked at again many years after the grievance is settled.

Director's and Officer's Liability Insurance

Ms. Leta Pedersen, Marketing Manager of Rhodes and Williams Ltd. Gave a talk and led a discussion regarding who needs Director's and Officer's Liability insurance and Errors and Omissions insurance.

She said that if there is a possibility of a person being sued then they need these types of insurance. She also said that it is necessary if a personal liability comes into play, i.e. tort law, contract law, statutory law.

Failure to act with good faith, in the best interest of the members and with care and diligence are some of the major factors why an organization should have Director's and Officer's Liability insurance. Without this type of coverage, not only could the association be sued but an individual could be held personally liable for their actions while acting on behalf of the association.

Errors and Omission insurance is not a substitute for Director's and Officer's liability insurance as it is meant to protect the association. Most lawyers, doctors and engineers carry this type of insurance and it is meant to protect the association in case there is failure of the professional employee to perform his or her duties.

Ms. Pedersen said that the duties of the directors and officers should be set out in the association's constitution. For instance, a director is usually a person or a group of people with a lot of influence, for instance, a Board or Council, and the officers would be the President, Vice-President and Treasurer.

To obtain Director's and Officer's (D&O) Liability insurance the association should not be in debt. This is not to say that an association would not be able to get D&O insurance, but it would make it much more difficult and would be very expensive.

Ms. Pedersen said that unions have a much more difficult time to get D&O insurance. Grievance issues and arbitration elements tend to scare insurance companies. If a policy is sold, it usually has exclusions in it regarding grievance and arbitration issues.

The University of Calgary noted that there are no protections for staff and volunteers against being sued and were not covered under the D&O or Errors and Omissions insurance and asked if there was any type of insurance available to cover these people. Ms. Pedersen said that there was not and that an association must be sure that these people are non-voting members of boards. She said that there may be some insurance available but only through companies in the United States.

Ms. Pedersen said that her company was looking into a national program for insurance for faculty associations across Canada. She said that an association should not just look at the cost of the policy but should ensure that they are covered for everything they need.

ROLE OF ASSOCIATION STAFF

Mr. Gord Unger, senior staff member at the University of Alberta Faculty Association provided a synopsis of the report on Staffing Practices that he presented to COFAS in 1994.

He said that the bottom line of his report is that the staff do the work of the association that needs to be done. The delineation of duties and how these duties are distributed, along with the varying titles, vary widely across Canada.

He sums up the positions in the office as:

The support person(s) -- have no responsibility

The Executive Assistant (or equivalent) -- has some responsibility behind the scene.

The Executive Director (or equivalent) -- responsibility as the strategist.

Mr. Unger said that the roles of the staff cannot be separated from the mission of the association. He said that it is the duty of an association to understand the processes a person needs to do their job and to provide professional development when required and also to ensure that the resources and time are available to take the professional development.

Mr. Unger said that every person of an association, from the President to the volunteers and staff, must understand that the only mission of the association is that it exists to represent the interest of their members. He said the one thing an association needs to meet its objective is to have excellent lines of communication and that the success or failure of an association can sometimes depend on this. He said that since younger members of the university community have different views than older members, the need to communicate better with younger members should be looked at carefully. The organization/association should ask the members what their interests are and what they want the association to focus on. Mr. Unger also said that the association should make sure that the members understand the context of the association negotiating on their behalf.

Mr. Unger said that an association should partake in an exercise on a continuing basis of strategic planning. The need for assessment, setting direction, developing strategy and how to implement the strategy should be ongoing. He said that an organization should build on the differences among the members instead of trying to bring the differences down to a common denominator, for example instead of only adhering to the old ideas that a person has to shrink to fit into the mould that is already there, an organization should allow different ideas to develop and help shape an organization that the members want and need.

SUPREME COURT OF CANADA'S DECISION OF WEBER AND BEYOND

Ms. Cynthia Westaway, a staff lawyer at CAUT, presented information on "Who own the grievance?" or, what are the rights of a member under the collective agreement or special plan and when can that member take an action to Court? Ms. Westaway said that the resolution of this issue within the context of each case is very important to facilitate the smooth operation of the grievance handling and at the same time the Association's duty to fairly represent its members figures squarely into the decision making equation.

Ms. Westaway said that in Canada, the courts have generally adopted the view that any question involving the interpretation of a collective agreement supercedes the jurisdiction of the court in favour of the arbitrator. In addition, she said that it has been held that the individual's member's rights over terms and conditions of employment are supplanted by the collective agreement. Ms. Westaway said that since the above is not easy for a member to understand, that this explanation should be provided to a grievor in writing.

Ms. Westaway provided the members of COFAS with information surrounding the decision of *Weber v. Ontario Hydro (1995)* and the implications it has when dealing with members who have similar grievances.

As the information is complex, I will outline the case below using Ms. Westaway's notes:

The Supreme Court of Canada in the decision of *Weber v. Ontario Hydro (1995)* has brought in the model of exclusive jurisdiction for the arbitrator to hear disputes arising out of the collective agreement. While this concept in itself does not at first glance seem to be a serious departure from the historically held principles as seen in *Ste. Ann Nackawick*, those decisions which have followed *Weber* have continued to narrow the scope of the courts jurisdiction and, in turn, to broaden the scope of the arbitrator's jurisdiction.

This of course effects the day-to-day operation of member associations.

To summarize the facts in *Weber*:

Mr. Weber, an employee of Ontario Hydro, was on extended leave as a result of a work-related back injury. Pursuant to his collective agreement he was on paid sick leave. Suspecting Mr. Weber of malingering, the employer hired a private investigator who ultimately gained entry into Weber's home under false pretenses. As a result of the information obtained by the investigator. The employer decided to suspend Mr. Weber for abuse of sick-leave.

A grievance was filed which sought, among other things, an undertaking that the employer would no longer use private security firms to monitor absences plus an award of damages for Mr. Weber and his family to compensate for mental anguish and suffering as a result of the invasive surveillance. The grievance was eventually settled but Mr. Weber had also commenced a civil action for trespass, nuisance, deceit and invasion of privacy. In addition, Weber claimed compensation for violations to his Charter rights - specifically his right to security of person (s.7) and his freedom from unreasonable search and seizure (s.8). This action was eventually appealed to the Supreme Court of Canada.

The Court held unanimously that the Ontario Labour Relations Act conferred exclusive jurisdiction on labour tribunals to deal with all disputes arising either expressly or inferentially out of collective agreements.

The applicable test became "whether the dispute, in its essential character arose from the interpretation, application, administration or violation of the collective agreement." We are, left to determine the meaning of essential character in the practical context.

The Court was divided on whether the jurisdiction of the arbitrator ought to extend to Charter claims. The majority extended the rules established under such cases as *Cuddy Chicks* and *Douglas College* to find that an arbitrator is a court of competent jurisdiction under s.24 of the Charter.

The dissenting judges held that arbitrators were not courts of competent jurisdiction and that they are not possessed of independent power to grant Charter remedies.

What Weber means is that an associations must look at all potential grievances which arise expressly or inferentially out of their agreement. What did not use to be grievable because it was not grounded in the collective agreement is now grievable because it is inferentially linked to some right which is protected by the collective agreement. Arguably it is unacceptable for an Association to ignore those grievances that are inferentially related to the collective agreement. While an association may decide not to support a grievance, financially or otherwise, Weber seems to require a broad investigation of those issues which are raised by a member. In conjunction with the statutory duty of fair representation and the general principles of fair procedure, I suggest that the work of the Association has expanded in that you are now required to review the broadest grounds for a potential grievance in order to form a well-reasoned decision for the support or the denial of support of a specific case.

And as ever cautious legal counsel, I would advise Associations to render their reasons in writing. I suspect that there will be an increasing need for you to consult outside legal counsel or to encourage your members to consult independent legal counsel to determine the full claim in such areas as defamation, denial of benefits, nuisance, interference with economic relations and a whole hose of other areas of law which have traditionally been heard before the courts and may now be found under the jurisdiction of the arbitrator. These are not the traditional areas of expertise of grievance officers, collective bargaining officers or labour lawyers. It is quite likely that if Associations are required to make such decisions, they will seek the advice of experts until the requisite knowledge can be amassed.

Ms. Westaway also provided several case summaries that have been impacted by the Weber case. Many of these summaries were originally published by the law firm of Cavalluzzo Hayes Shilton McIntyre and Cornish.

I would like to thank Ms. Westaway for the use of her notes.

PROFESSIONAL DEVELOPMENT OPPORTUNITIES

Rosanne Hood and Rae Ryan from the UBC Faculty Association led the members in a discussion of what they have found were worthwhile and interesting professional development opportunities and where to find further information.

It was agreed that over the years the COFAS conference has been a major provider of professional development for faculty association staff members. Because the member of COFAS do the same type of work, the agenda items over the years have been geared specifically toward these people and have been more beneficial than if a more diversified group was involved. The information provided at COFAS is the information required by faculty association staff to keep on top of the job.

The members who receive a professional development allowance said that they can use it to benefit them more than to benefit their association.

One association ensures that there are funds available for the staff to have professional development opportunities by budgeting 2% of gross revenue for this purpose. This amount covers conferences that staff may attend, courses or seminars.

It was agreed that although most associations believe that professional development was important for them, that they did not think that staff should be provided with professional development.

May 31, 1997

INTEREST-BASED BARGAINING

Mr. Dan Butler who is a negotiator with the Professional Institute of the Public Service of Canada (PIPS) gave a presentation and led a discussion on the pros and cons of "interest based" bargaining as an alternative to classic "positional bargaining" and discussed some of the problems and potential benefits of an "interest-based" approach.

Positional Bargaining

Mr. Butler said that traditional positional bargaining starts with a solution -- parties propose solutions to one another and make offers and counter-offers until a solution is found acceptable to both. In other words, the whole process is driven by positions. The parties involved spend a great deal of time debating, exchanging and changing positions but no time talking about the underlying problems. He said that in position bargaining both sides spend a lot of time weighing concessions and usually the bargaining is antagonistic.

He said that the costs or outcome of this type of bargaining is that not only is it time consuming but approximately 85% of the time spent bargaining is spent in caucus and only 15% of the time talking to the other side. He said that positional bargaining promotes rigid adherence to positions and bargaining teams become bogged down in their positions and become inflexible to other ideas.

Mr. Butler said that the benefits form positional bargaining is that it can work in that it does produce compromises and settlements.

Interest-Based Bargaining

Mr. Butler's definition of interest-based bargain is:

A process which focuses on identification of underlying interests and joint search for solutions which address those interests.

He said that this type of bargaining moves away from positional and confrontational bargaining and instead both sides focus on identifying the underlying problems and look to solve these positions. Both sides do not go to the table with demands but go to the table with an agenda. The idea is to shift the focus and to try to educate each side about what bothers them and spend time brainstorming to try to come up with possible solutions.

The mind set needed to enter this type of bargaining is the recognition that all interests must be addressed for an agreement to be reached and that both sides must focus on interests, no positions. Both sides should be willing to admit that there may be more than one way something may be changed and/or improved.

Mr. Butler did say that this type of bargaining is a radical change from positional bargaining and involves considerable trust on both sides. It also requires a disclosure of information and interests and may uncover truly divergent interests. He also said that in interest-based bargaining that everybody on the team participates. Each member must speak up and the discussion not be carried by a designated speaker. The main rule that must be adhered to is that everyone can pursue a possible idea without being wedded to a certain position. I.e. you can explore a solution in whatever direction you want to take it but at the end of the day each team can pull back from the position.

A major benefit from interest-based bargaining is that both sides are looking for a win-win solution. If an idea attracts support from both sides then it will probably have a better chance of being implemented. Other benefits are that it also promotes trust, involves participants and can save time. Mr. Butler said that at the end of the day interest-based bargaining should produce tangible benefits. He said that this type of bargaining is often used, if not for the whole of negotiations, then for a few issues on the table that both sides have a stake in resolving.

RETIRED/ASSOCIATE MEMBERS

Western Ontario

Marion Clarke from the University of Western Ontario reported that her university retired faculty members have a retired association run by the University and is governed by a Constitution for UWO Retired Academic Group (attached). They meet monthly and participate in a number of social activities throughout the year. Her association presently has 680 members, which is down from the high of 950 member in the 1980's. Ms. Clarke reported that the UWOFA presently has approximately 165 retired members. She said that her association has put together a retirees booklet listing the benefits that they are entitled to through the association, CAUT and the university. Other benefits are Parking, Recreation Services, Library Privileges, Library Carrels, and Senior Citizen's Bursaries. The benefits they receive from the faculty association are that they receive a copy of the association's newsletter and can apply for the Faculty Dependents' Tuition Scholarship Plan.

Carleton University Faculty Association

Pat Finn provided a brochure that is given to the retired members of the Carleton Faculty Association. CUASA has one member on their steering committee and one of their two members on the Pension Committee is a retired member. The CUASA constitution provides for non-voting association membership for all retired academic staff.

The benefits CUASA members received through negotiations are: (1) Extended Health Care and Dental Plans with the premiums wholly paid for by the employer; (2) access to the University Library, the athletic facilities and health services; (3) preference for available sessional lecturer teaching of up to two full credit courses per calendar year at not less than \$8,770 (full credit) or \$4,810 (half credit); and, (4) continue to enjoy the benefit of free tuition.

Other benefits retired members receive at Carleton are: (1) may apply for adjunct professorship which shall not be unreasonably be withheld; (2) have access to suitable office space (depending upon availability) and support services as consistent with their scholarly/professional activities at Carleton, such as email, computer access; (3) shall have the "occasional use" membership fee of the Faculty Club paid by the employer; (4) shall have the accommodation and meal expense of Spring Conference paid by the employer; and (5) shall have issues of This Week sent to them.

There are no fees charged to retired members to become retired members of CUASA.

Windsor

Nan Sennema reported that the retired members at WUFA are called honorary members. There are three retirees on the pension and benefit committee and have voting rights. These members are also involved on the contract committee. They receive the WUFA newsletter and through the university they receive a part of the dental plan and have access to the services of the library as well as having access to e-mail through the university. Retired members can teach up to 6 courses per year and pay dues to the faculty association at the rate of \$8.85 per thousand earned (on the same basis as part-time people) to belong to the

association. Retired members are covered under the collective agreement and if they are working as a sessional they can belong to the Faculty Club. The association used to hold a dinner/dance for retiring members but they has now been scaled down to a lunch.

Toronto

Chris Penn reported that at the University of Toronto retired faculty and librarians can join the faculty association for a fee of \$50.00 for a three year membership. This entitles them to the association Newsletter and allows them to take advantage of special discounts that have been arranged with an insurance company, travel agency, banks etc. From the retired membership two members are elected for a three year period to sit as voting members on the UTFA Council. Retired members are allowed to vote at special and Annual General meetings on issues regarding the association.

A retired member can continue on with the health plan at the University with the exception of vision care. They have access to library privileges and when possible have some access to office or desk space in the department. The university holds a party each year for members who are retiring. They also have access to the Faculty Club and health facilities with a special membership fee.

CAUT

Bob Moore reported that retired members can join CAUT for a fee of \$10.00. CAUT is presently undergoing a review concerning retired faculty members. The general idea is to organize retired academic staff nationally as a group within CAUT separate from Associate members. He said that currently there are approximately 300 CAUT retirees who are Associate Members. Mr. Moore said that CAUT estimates that there are approximately 1,000 retired academic staff who are not part of the CAUT membership. He said that because local relations between associations and retired members vary so widely, as do benefits and other services for retirees, the formation of a strong CAUT retiree's group to review national concerns and issues is long overdue.

Mr. Moore said that statistics show that at least half of the present complement of academic staff at Canada's universities will retire at or before normal retirement age over the next fifteen years. Possibilities exist to offer retirement planning services and other activities to all members as academe ages and CAUT moves into the 21st century. This undertaking marks a new beginning for CAUT at the outset of the next millennium. It will offer CAUT retirees the opportunity to participate actively in these and related pursuits.

COFAS BUSINESS MEETING

Saturday, May 31, 1997

COFAS: WHERE DO WE GO FROM HERE?

Desmond Morley, from FNBFA led the members in a discussion of the future of COFAS. The decisions made at the meeting are as follows:

1. Direct Value

All members agree that COFAS was valuable to them and their Associations in that the sessions organized were tailored specifically to what staff at faculty associations had in common. All agreed that employers would hold COFAS in higher regard if they were to attend the conference.

A discussion was held as to how the members of COFAS could get the message across to the faculty association employers how important and educational the conference was. It was discussed that if the employers were properly educated, that perhaps staff members who have a hard time being allowed to attend and those who have never been allowed to attend, would have better success in arguing their case to attend this conference.

A recommendation was brought forward that a factual article could be placed in the CAUT Bulletin to promote COFAS as a legitimate and beneficial conference that their staff should attend to help keep abreast of their jobs. It was agreed that permission be sought and an article be written for the CAUT Bulletin.

Statement of Purpose

A Statement of Purpose was drafted and after much discussion was agreed to in principle. The following interim statement is provided for comments. The final version will be approved at the 1998 COFAS conference.

COFAS INTERIM STATEMENT OF PURPOSE

The Conference of Faculty Association Staff (COFAS) is an informal liaison of staff employed by faculty associations at local, provincial and federal level across Canada which provides a forum in which

- to develop a shared community of interests;
- to foster a network of communication;
- to share ideas and information, and especially;
- to provide opportunities for the professional development of staff at all levels

by sponsoring an annual conference on issues and concepts related both to what staff are employed to do and to knowledge, skills and resources staff need in order to be effective encompassing the full range of activities expected of staff in single person offices as well as the varied functions of multiple staff offices; and

by providing vehicles of communication through print and electronic media.

The COFAS Conference will be rotated among the regions in Canada in order to equalize costs over several years.

COFAS will select site, coordinators, program coordinators and officers as necessary.

Approved in principle, at the COFAS Conference held in Ottawa, May 30 - June 1, 1997.

Other projects:

1. Committee to work on an Article about for the CAUT Bulletin.

Desmond Morley (FNBFA); Rae Ryan (UBC); Pat Finn (CUASA) with assistance from Robert Leger and Cynthia Wesaway (CAUT).

2. Timing of COFAS

Don Kozak (Calgary) agreed to undertake another survey on the timing issue as the September CAUT Council meeting and the late May OCUFA Teaching Awards no longer happen at those times.

3. History of COFAS

Gordon Unger (Edmonton) with some assistance from Pat Finn.

4. Reports on COFAS97 via mail

Chris Penn (UTFA) and Renata Green (APUO)

Site Coordinator's Handbook

Leah Shaw (APUO), Lori Morinville (CAFA), Arlene Grant (Dalhousie) and Nancy Gordon (CAUT)

Brigitte Schotch (Dalhousie) provided the members with the 1997 salary survey. The members thanked her for her work. She agreed to do the salary survey for the 1998 COFAS meeting.

COFAS 1998: To be held in Fredericton, New Brunswick and the hotel would be the Sheraton.

Joseph Varga (McGill) and Valerie Barry (Concordia) agreed to be the agenda coordinators.

COFAS 1999: To be held in Victoria, British Columbia. Bruce Curtis (BCIT Faculty and Staff Association) and Carol Rivera agreed to be site coordinators and agenda coordinators.

It was decided that Rosanne Hood would be the Chair of COFAS for a 2 year period. Pat Finn would take on the role of Secretary and Anne Feilden would be Treasurer each for a 2 year period.

The role of the Chair would be as a back-up person in order that there be somebody who has some history of COFAS to fall back on and one source that agenda and site coordinators can turn to for help

Report of the Treasurer

Ann Feilden reported that both Carleton University Faculty Association and CAUT provided extra money for the reception. The financial statement showed a balance of \$1,345.85 as of December 31, 1996.

Other Business

Leah Shaw (APUO) said that she would send thank you letters to each of the guest speakers and to everyone who was on the agenda. Joseph Varga thanked the members for their suggestions. It was also decided that there would not be any concurrent sessions.

The members expressed their appreciation to the agenda and site coordinators of the conference, Leah Shaw (APUO), Nancy Gordon (CAUT) and Ann Fortin (APUO) and their helpers for an outstanding job, by giving them a standing ovation.

Special thanks was given to the organizers of the surprise "retirement of the Dean of COFAS" party.

Chris Penn
UTFA