

1975 CarswellOnt 692
Ontario Labour Relations Board

C.U.A.S.A. v. Carleton University

1975 CarswellOnt 692, [1975] O.L.R.B. Rep. 500

**Carleton University Academic Staff Association (Applicant) v.
Carleton University (Respondent) v. Employees (Objectors)**

T.E. Armstrong, Q.C., Chairman, and Board Members P.J. O'Keeffe and J.E.C. Robinson, Q.C.

Judgment: June 18, 1975

Docket: Doc. 7435-74-R

Counsel: *J. Sack, Dr. D. Savage, Dr. J. Vickers* and *Dr. S. Healing* for the applicant.

C. Riggs, Dr. D. Brown, G.R. Love and *J. Downey* for the respondent.

No one for the objectors.

Decision of T.E. Armstrong, Q.C., Chairman, and Board Member P.J. O'Keeffe:

1 In its decision of April 4, 1975, the Board set out the partial agreement of the parties as to the description of the appropriate bargaining unit: see paragraph 8. At the commencement of the reconvened hearing on May 6, 1975, counsel advised the Board that agreement had been reached between them on all outstanding bargaining unit description problems, save as to the status of Chairmen of Departments. Accordingly, the sole issue remaining to be determined is whether the persons holding the rank of "Departmental Chairman" are properly included within the bargaining unit. In seeking their exclusion, the respondent relies upon the provisions of section 1(3)(b) of *The Labour Relations Act*, which reads:

1.-(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

2 This is the first time that the Board has been called upon to define unit appropriateness in an application for the full-time faculty of an institution of higher education. For that reason, it is necessary to review the evidence in detail and to analyze the unique aspects of decision-making within a University. As will appear, counsel for the applicant contends that the traditional tests for determining managerial status in an industrial setting are not appropriate in making the same determination at a university. Counsel for the respondent, on the other hand, while conceding that there are material differences between decision-making in an industrial enterprise and decision-making at a university, contends that there remain compelling reasons for excluding departmental chairmen, related, in the main, to their managerial link with other administrative officials, principally Deans, a category excluded by agreement of the parties.

3 The parties agreed that evidence of Dr. Peter King, Chairman of the History Department, would govern the Board's decision as to the status of all Departmental Chairmen. Before turning to an examination of Dr. King's evidence, it will be helpful to describe the basic organizational structure of Carleton University. Carleton University is a bi-cameral institution, with a Senate, concerned mainly with academic matters (sections 21 and 22 of *The Carleton University Act*, S.O. 1952, c. 117, as amended) and a Board of Governors (section 15) responsible, generally, for the government, conduct and management of the University, including the appointment of the President, Deans of Faculties and members of the University teaching staff. The chief executive officer of the University is the President. For the purpose of academic instruction, the University is divided into a number of

Faculties and Schools, i.e., Faculties of Arts, Science, Engineering and Graduate Studies, Schools of Commerce, Journalism and Public Administration, etc.

4 Each faculty is headed by a Dean and contains a number of departments. The department of History, chaired by Dr. King, is one of fifteen departments within Division I of the Faculty of Arts (the Humanities Division). Within the History Department there are approximately thirty full-time tenured faculty members, four part-time or sessional lecturers, sixteen of seventeen graduate teaching assistants and several summer lecturers. It is common ground that the basic organizational unit of the University is the department. The department is comprised of all members of the faculty involved in teaching one or more subjects in a particular discipline. Each department has its own chairman.

5 We shall be examining the intra-departmental decision-making process in detail; however, it is generally true to say that, unlike an industrial enterprise, decision-making at this particular University tends to flow upwards from the department through the Dean to the President, with whatever approval or confirmation is required by various faculty or advisory committees. Moreover, decisions tend to be made collectively, at least at the departmental level. There was repeated reference in the evidence and in the submissions to the "collegial" nature of decision-making at a university. A less arcane and more comprehensible explanation is that at the faculty level, decision-making is shared by the entire faculty and operates through a committee system.

6 In the History Department there are eight standing committees, comprised of faculty and student representatives as follows: the Committee of Fields of Appointments; the Selection Committee; the Promotion and Tenure Committee; the Curriculum Committee; the Graduate Programme Committee; and three Degrees Committees: one for Pass B.A., one for Honours B.A. and one for M.A. Membership on the committees is determined by the entire faculty on the recommendation of the Chairman of the Selection Committee. The Departmental Chairman is required to chair the Committee on Promotions and Tenure, although he may set on and chair other committees. The work of the committees is indicated by their titles. For example, the Committee of Fields of Appointments determines what areas of a particular discipline are to be taught in order that the appropriate faculty appointments may be sought; the Curriculum Committee decides on course content, including curriculum changes, new courses, etc. Generally, committees report to the department, meeting in plenary session. Decisions at all meetings, whether full department meetings or committee meetings, are arrived at either by informal consensus or by majority vote. The membership on committees is subject to annual change.

7 Any full-time member of the department, regardless of his rank and whether or not he holds tenure, is eligible for election as Department Chairman. Nominations may be made by anyone within the department. If more than one candidate is nominated, the selection is by ballot amongst all of the members in the department. Dr. King was chosen by acclamation in July 1973 and has served as Department Chairman continuously since that time. The term of office is three years and the incumbent is eligible to succeed himself once. Certain elected student representatives are considered to be members of the department for the purpose of selecting the chairman as well as serving on the various committees. If the Department Chairman's term is not renewed, he can, and usually does, revert to his position as a faculty member. The formal appointment of the Chairman is confirmed by the President, after consultation with the Dean.

8 The duties of the Chairman of a Department or the Director of a School or Institute are summarized in Exhibit 22, a document issued by the respondent's Senate office on November 1, 1974, entitled "Academic Organization Carleton University", which reads, in part, as follows:

1. to call and preside over meetings of the department;
2. to represent the department in administrative matters;
3. to bring to the attention of the department for discussion and action matters pertaining to the work and efficiency of the department;
4. to oversee the internal administrative business of the department in consultation with other members, and to delegate administrative activities as he sees fit;

5. to bring forward on behalf of the department, after consultation with other members, proposals requiring the approval of the appropriate Faculty Board, or of the Senate;

6. to designate, in consultation with other members of the department, the members who will take charge of or participate in courses or programs of the department. (In case of disagreement, the matter shall be referred to the appropriate Dean).

7. (Previously the Department Chairman prepared the department's library estimate but since April, 1969, library purchasing is done on an overall basis by the Librarian and the President. Departments may of course recommend specific books for acquisition.)

8. to submit to the appropriate Dean in writing, after consultation with other members, an estimate of the department's other budgeting needs for the ensuing year;

9. to perform such other duties in connection with the work and administration of the department as the President, or the appropriate Dean, may assign him.

9 Certain of the Department Chairman's duties, i.e., those relating to budget, tenure, hiring, promotion, etc. are of particular relevance to the shared or collegial decision-making process and they are examined in detail below. However, certain miscellaneous duties may be noted at this point. For example, as the above list indicates, the Department Chairman prepares the teaching schedule, subject to ratification by the full department. In preparing course assignments, he may be required to deal with particular requests and preferences expressed by faculty members. If a particular faculty member's preference cannot be accommodated to his satisfaction, he may carry the matter forward to the Dean, although, in Dr. King's experience, there have been no disagreements which he has been unable to resolve amicably through direct discussions with the faculty members involved.

10 The Chairman does not supervise his colleagues in their classroom work or in any other respect. Included in the Faculty Handbook (Exhibit 11) is an item entitled "Teacher Evaluation", which reference is made to assessments of faculty members by "senior colleagues" and to "student ratings" of faculty members. Nowhere in the evidence was it suggested that the Chairman plays a role in regular evaluations, except in committee presentations dealing with promotion and tenure, the details of which are examined later. The Chairman does not normally have occasion to deal with student complaints concerning instructors. Dr. King testified that a student with a complaint or problem would, instead, approach one of the faculty advisors appointed for the purpose of student consultation by the full departmental meeting.

11 A Chairman normally performs some teaching duties. Dr. King teaches one and a half courses, and in the next academic year will teach two courses. He sits on several non-departmental committees (for example, the Senate Executive Committee), not by virtue of his office as Chairman but in his capacity as a faculty member. The Chairman plays no role in the establishment of the salaries of his departmental colleagues. He does not take part in the faculty grievance procedure. He receives the normal salary of an Associate Professor, together with a stipend or honorarium of \$1000 (plus expenses) in consideration of extra duties performed as Chairman. When a member of the faculty wishes special time off, he makes application to the President, having first discussed the matter with the Chairman to determine whether the request can be conveniently granted. It is normal for the President to ask the Chairman for his recommendation with respect to special leave applications and the Chairman's recommendation is usually followed.

12 As a matter of routine, the Chairman signs applications by individual faculty members for research grants, not, however, as signification of approval and support, but merely as acknowledgment that the application is being made. Faculty members requiring graduate teaching assistants or markers normally make their own arrangements, subject to confirmation by the Chairman that funds are available within the current budget. Generally, it is clear that the Chairman is the single person within the department who communicates with the Dean in all matters of departmental administration. Dr. King stated that the Dean's confidence and support is essential in order that the Chairman may carry out his administrative duties effectively. Equally, he requires the support and cooperation of his colleagues.

13 Dr. King spends less than one-half of his working time on administrative duties and responsibilities as Chairman. As a rank-and-file faculty member, he spends approximately thirty hours per week either teaching or preparing for teaching, doing administrative work related to teaching, or in committee work unconnected with his work as Chairman. Approximately twenty hours per week are spent in administrative work as Chairman, either in committee meetings or other miscellaneous tasks: e.g., preparing for meetings, reviewing teaching schedules, reading or preparing memoranda, conferring with colleagues, reviewing the curriculum, working on the budget, etc. He agreed that, in general, it is true to say that as Chairman he co-ordinates the work of his departmental colleagues.

14 The more important functions of the Chairman - many of which illustrate the collegial nature of departmental decision-making - deserve more detailed examination.

(a) The Departmental Budget

The Chairman, following consultation with his departmental colleagues, prepares a preliminary budget (on the basis of funds allotted for the preceding year, together with an inflation allowance) for submission to the Dean. It is comprised of two major items: salaries for non-academic staff and office supplies and equipment. Faculty salaries are not included; in fact, the Chairman does not know the salaries of his colleagues, nor does he participate in the procedures followed at higher levels in approving or amending the preliminary budget. Excerpts from the departmental minutes (Exhibit 20) disclose that budget cuts, made by the Dean, are simply reported as a *fait accompli* by the Chairman to the departmental meeting. Such reductions in the preliminary budget can and do affect the number of available academic support staff (i.e., sessional lecturers, graduate teaching assistants).

(b) Sabbatical Leave

There is a standing, University-wide policy on sabbatical leave for full-time faculty, contained in the Faculty Handbook (Exhibit 12) and approved by the Board of Governors. While the Chairman, together with the Dean, administers the leave policy (see, for example, the memorandum of November 14, 1972 from the President, requiring the Dean and the Chairman *jointly* to arrange the scheduling of sabbatical leave) there is no evidence that the Chairman plays any role in formulating that policy. Any disagreement between the Chairman and Faculty members concerning entitlement to, or timing of, sabbatical leave is resolved by the Dean. If sabbatical leave has to be postponed, notification of postponement is given by the Dean, rather than by the Chairman. Similarly, if a faculty member wishes to withdraw his notice of intention to take sabbatical leave within the six-month period proceeding commencement of leave, the agreement of the Dean and the President (not the Chairman) is required: see Policy on Sabbatical Leave, Exhibit 12.

(c) Hiring

(i) Full-time Faculty

Before recruitment can occur, the Department's Committee on Field of Appointments must determine what area within a particular subject requires staffing. The Committee's decision is then reported to, and ratified by, the full departmental meeting, and only then is the Chairman authorized to solicit applicants. The Selection Committee reviews all applications and determines which applicants should be interviewed, although the Chairman may screen and reject applicants who are obviously unqualified. Interviews are conducted by the entire Selection Committee, whose decision may be reported back to the full departmental meeting. The proposed appointment is then discussed with the Dean ("with the involvement of the appropriate departmental committees") who authorizes the Chairman to make an informal offer to the applicant, on terms as to salary and rank prescribed by the Dean. Although the Chairman may be given limited mandate to negotiate salary, the permissible range of negotiations is stipulated by the Dean, and it is clear that the Chairman has no authority to commit the University to a final position. Dr. King agreed that he was a conduit in these matters and that final approval, including the formal offer of employment, came from the President. Matters of administrative detail - e.g., office and secretarial facilities, teaching assistants, etc. - may be discussed between the Chairman and the applicant, although standard departmental arrangements cover these relatively minor matters.

(ii) Sessional Lecturers

The Chairman has a more significant role in the recruitment and hiring of sessional lecturers who, it is to be noted, are excluded from the bargaining unit. The Chairman discusses particular needs, as well as potential candidates, with his colleagues, both to determine availability and to assess suitability of prospective appointees. Dr. King testified that sessional lecturers "would not be hired if [his] colleagues did not approve". According to the Faculty Handbook, appointments are "handled by the Chairman and the Dean, although the President gets a copy of the appointment. The formal appointment is offered by means of an agreement signed by the Dean". Summer lecturers are engaged in much the same manner, with little or no involvement by the departmental committees.

(d) Tenure

No matter is more rigidly structured than the procedure for granting of tenure to full-time faculty members. Each department is required to establish a committee on tenure, consisting of the Chairman of the department and at least four other faculty members, as representative as possible of the ranks and fields of interest in the department. In the Department of History, the Chairman is required to chair the Promotions and Tenure Committee but the University-wide regulations (approved by the Board of Governors) permit departments to specify their own procedure for selecting the Chairman of the tenure committee. Intra-departmental determinations on tenure are given exclusively to the tenure committee. The departmental Chairman is required to present to the committee a detailed statements concerning the candidate, based upon all relevant sources: e.g., *curriculum vitae*, published works, etc., together with an appraisal and recommendation. Following its deliberations, the committee must prepare written recommendations, including any areas of disagreement, signed by *all* committee members.

A complex, review procedure is also prescribed. The committee's recommendation is forwarded to the Dean (with copies to the candidate and to the President); the matter is considered by a Faculty (or Divisional) Committee on Tenure, chaired by the Dean and comprising all Chairmen of the Faculty (or Division), together with one member from each departmental committee on tenure. Following deliberations, the Faculty or Divisional Committee makes its recommendations to the President, through the Dean, accompanied by a written statement prepared jointly by the Dean and the appropriate Departmental Chairman, setting out the reasons for the recommendation. The President then makes his decision and communicates it to the candidate and to the Faculty and Departmental Committees concerned. For the unsuccessful candidate, there is a final appeal to the Tenure Appeal Committee, a standing committee of the Senate. Departmental Chairmen are *not* eligible for membership on the Tenure Appeal Committee. Dr. King stated that he did not participate in tenure procedures except as described above, and in particular that he made no informal recommendations, written or oral, to the Dean or any other persons concerning applications for tenure.

(e) Promotions

Like tenure, promotions are governed by a University-wide policy, adopted by the President's Advisory Committee on Promotions (Exhibit 10). Each department is required to establish a promotions committee. In the Department of History, the departmental Chairman chairs the Promotion and Tenure Committee, which prepares a list of all persons eligible for consideration for promotion, together with an evaluation of each, based upon scholarship, teaching performance and general contribution to the University. The Chairman then submits the departmental recommendation - prepared and signed by *all* committee members - to the Dean, together with supporting documentation. The Dean may add names to the list of recommended promotions. The departmental Chairman then presents the Committee's recommendations to the Divisional Committee on Promotions. Dr. King pointed out that if the departmental Chairman dissents from the Committee's recommendation on promotion, someone else from the Department is asked to make the presentation. According to the uniform procedures as set out in the Faculty Handbook, the Dean requests confidential letters of recommendation from Faculty "referees" concerning the professional status of each candidate. The Dean then forwards the recommendations to the President for submission to the President's Advisory Committee on Promotions. The formal promotion is made by the President, as contemplated by section 15(3) of the *Carleton University Act*.

(f) Dismissals

Dr. King testified that he has no authority to discharge or discipline his colleagues. The University-wide procedures on tenure and dismissals (Exhibit 11), approved by the respondent's Board of Governors, contains no suggestion to the contrary. The document reads, in part, as follows:

There is no formalized body of rules concerning the conduct of the Faculty, nor is there a laid-down procedure for determining the fact of undesirable conduct, and the penalty therefor is presumably denial of tenure or promotion. Suspension or termination of employment are penalties available in response to undesirable conduct. These matters affect the contract of employment between the Faculty members and the University. As such, they are ultimately under the jurisdiction of the Board of Governors, *although this authority is exercised only on the recommendation of the President, usually on the advice of the Dean.* (underlining added).

There is an established procedure for dismissal which reinforces the fact that dismissal is within the President's prerogative: namely, a Presidential investigation, including a committee of inquiry. The only stipulated involvement of the departmental Chairman is at the "informal proceedings" stage, where the Faculty member may be invited by the President to meet with the President, the Dean and the Departmental Chairman. If this invitation is declined and the dismissal is contested, a formal appellate procedure comes into play, in which the Chairman has no apparent role.

(g) Relationship with Administrative Staff

The Department of History has one administrative assistant and three secretaries. Potential candidates are sent to the Department by the respondent's Personnel Department. The administrative assistant, who works for the Chairman, is interviewed and presumably accepted for employment by the Chairman, although the formal act of hiring is apparently done by Personnel. The administrative assistant advises the Chairman on the suitability of applicants for the secretarial positions. In addition to dealing with the Chairman's correspondence, the administrative assistant deals with routine administrative matters, such as student records, budget expenditures, requisitioning of office supplies, etc. It is clear that the ultimate supervisory responsibility over the department's administrative staff lies with the Departmental Chairman (although a small proportion of his time is spent in supervising the clerical support staff who are not, of course, included in the bargaining unit). Dr. King testified that, if required, he would recommend dismissal of a secretary, although he hasn't had occasion to do so. This is consistent with the policy statement contained in the Faculty Handbook which provides: "The Bursar of the officer who terminates the employment of the support staff, on the basis of the recommendation of the department head".

(h) Merit Pay Increases

Much evidence was tendered concerning the role of the Chairman in authorizing discretionary merit increases for full-time faculty. The President, in a memorandum to all Faculty members, set out procedures to be followed in granting discretionary increases for the academic year 1974-75. The substance of the memorandum was that increases were to be recommended by the Chairman following an assessment of the performance of individual members of the department, such recommendations to be subject to review by the Dean. In fact, however, in the Department of History the matter was dealt with by the entire department at a departmental meeting. Following the unanimous decision of the Faculty, the Chairman recommended that the same average discretionary increase be granted to each member of the department - a recommendation which was accepted and carried out by the administration. Acquiescence by the respondent in this departure from the President's memorandum is significant. In our view, evidence of the practical application of policies is of greater probative value than the formal policy itself.

(i) Confidential Files

Dr. King testified that he had access to all files in the History Department, including the personal files of his colleagues not available to others in the department. However, he pointed out that most of the material on those personal files dealing with assessments and evaluations would be made available to the Promotion and Tenure Committee. Documents relating to new appointments, including references and evaluations from former employers, would be seen by the Selection Committee. Although the files would contain any recommendations from the Chairman for merit or special salary increases, it is obvious that the Chairman would have knowledge of these matters independently of their inclusion on the files. The files do not contain

information concerning wages. It was not established that the Chairman made use of the material in these files in any confidential function relating to labour relations other than those functions performed by the departmental committees, as outlined above.

15 In the light of the facts described above, we must determine whether the Departmental Chairmen should be excluded from the bargaining unit by virtue of section 1(3)(b) of the Act. This statement of the problem is deceptively simple; the underlying questions are complex and, in some senses, unique: is the managerial test capable of abstract formulation or must it depend upon the particular context in which it arises? If the test varies with the context (as we believe it must), what are the characteristics of the university governance which are controlling; in an institution where decision-making is shared by a peer group, is there a discoverable demarcation line between the administration (the management) and those subject to the edicts of the administration (the faculty)? If so, on which side of the line do departmental chairmen fall?

16 The first of the underlying questions is the easiest to answer. It is now well established that in particular institutions (notably hospitals) and amongst particular groupings of employees (highly trained technicians, paramedical employees, paraprofessionals, etc.) skill, training and the assumption of responsibility are not necessarily equivalent to the performance of management functions within the meaning of section 1(3)(b) of the Act. Thus we have held that a skilled white collar worker performing complex and important duties and having a measure of independent decision-making power may not exercise managerial functions. The two general tests most frequently propounded are first, whether the particular employee participates in the formulation of policy in a meaningful and significant way; and secondly, whether in the performance of assigned duties he has the capacity to affect the employment status of persons working under him: see *Falconbridge Nickel Mines Limited*, OLRB M.R. Sept. 1966, p. 379; *The Hydro Electric Power Commission of Ontario*, OLRB M.R. Aug. 1969, p. 669; *McIntyre Porcupine Mines Ltd.*, Board file No. 4373-73-R (April, 1975).

17 It will be seen immediately that these tests are premised on the industrial model of hierarchic authority, where ultimate power resides above - typically, with the plant manager - and filters down through a management chain to the primary level of supervision - the unit supervisor, or foreman. Even in the hospital cases this is so, the difference being that the line between management and non-management is blurred by the importance, complexity and responsible nature of some of the functions performed by non-managerial employees. However, the same basic bureaucratic decision-making structure is present in the hospital as in an industrial enterprise: see *Toronto East General and Orthopaedic Hospital Inc.*, [1974] OLRB Rep. 672; *Ottawa General Hospital*, [1974] OLRB Rep. 714; *Peterborough Civic Hospital*, [1973] OLRB Rep. 154.

18 The university model is significantly different. While the Board of Governors is, in a general overall sense, responsible for the business operations of the institution, and the Senate for its academic policies, the power of detailed decision-making is diffuse and extends into the institution's basic organizational unit, the department. Moreover, management-type decisions are made not only by the Board of Governors, the Senate, the President, the senior administrative staff, the Deans, but by faculty members as well, and in more recent times, students, as members of various committees or boards. Counsel for the applicant argued that decision-making was reversed in the university, and that all critical management determinations flow from the departmental level to the higher administrative levels. This seems to us to be an over-simplification. Important determinations of general application are made at the higher levels and in this sense, a parallel with the industrial model remains. What is novel is that many important decisions, narrower in scope and having to do with the academic and personnel matters applicable to limited groupings, do originate at the departmental level, subject only to endorsement at the higher levels.

19 It is clear to us from the evidence that the effective initial decisions on hiring, promotion and tenure, curriculum, etc. are made by the faculty as a group. This, no doubt, reflects the fact that the university is seen, historically, as a community of scholars where common educational interests and goals - at least ideally - transcend the traditional management/non-management distinctions. In *Hamburger v. Cornell University*, 240 N.Y. 328, Mr. Justice Cardoza wrote:

A governing body of a University makes no attempt to control its professors and instructors as if they were servants. *By practice and tradition the members of the faculty are masters and not servants... They have the independence appropriate to a company of scholars.* (underlining added).

20 This view of the status of faculty members led some universities in early faculty applications before the National Labour Relations Board to contend that no faculty members are eligible for collective bargaining, since all exercise supervisory authority within the meaning of section 2(11) of the *National Labour Relations Act*. The N.L.R.B., however, rejected that argument, holding, in effect, that while an individual decision may be supervisory in character, if it applies to others, the same type of decision made collectively, by those to whom the decision applies, loses its supervisory character. Superficially, the result appears paradoxical. However, what we take the N.L.R.B. to be saying is that self-government, by group decision-making, is not the kind of externally imposed supervisory edict to which section 2(11) of the *National Labour Relations Act* is intended to refer. In our view, the same reasoning applies with equal force to section 1(3)(b) of *The Labour Relations Act*. This is not to say that there is no employer-employee distinction in the University. While the collegial relationship is unique, and while many important employment-related decisions are made communally, the faculty as a whole is still economically dependent on the decisions of the supreme governing body, the Board of Governors. Accordingly, there does exist, in our view, a sufficient distinction between the administration and the faculty to enable us to say that faculty members may bargain collectively under *The Labour Relations Act*.

21 What, however, of the status of Departmental Chairmen? Mr. Sack, on the one hand, contends that the exclusion of Departmental Chairmen would destroy the principle of the collegial decision-making. Mr. Riggs, as well, argues for the preservation of collegiality, but on different grounds, contending that the inclusion of the Departmental Chairman would preclude him from continuing to play his dual role as even-handed representative of both the faculty and the administration at the departmental level. In the absence of that necessary management link, according to Mr. Riggs, the parties will be driven into polarized positions and shared decision-making will be destroyed. Yet, if, as we have concluded below, the Chairman is indistinguishable in any significant respect from his colleagues, all of whom share more or less equally in the decision-making process, the threat of collegiality consists precisely in the respondent's tacit recognition that the traditional collective bargaining regime is appropriate for faculty members.

22 In short, the potential for polarization to which Mr. Riggs refers already exists, whatever our decision may be as to the status of Departmental Chairmen. Put another way, we are of the view that the survival of the collegial process does not turn on the question of inclusion or exclusion of Departmental Chairmen. A much more fundamental problem faces the parties - and that is whether they can adapt in their relationship to the strains of collective bargaining. Legally, we have concluded that the faculty have the right to organize under *The Labour Relations Act*; the suitability of the traditional bargaining relationship and the capacity of the negotiating parties to fashion a *modus operandi* which will preserve the existing collegial structures remains to be tested.

23 Within the existing structures, as described in the evidence, we cannot conclude that Departmental Chairmen perform functions sufficiently different from those of their departmental colleagues to warrant their exclusion from the bargaining unit. In the *Duff-Berdhal Report*,¹ Departmental Chairman is defined as:

The administrative head of a department; i.e., a single field of policy. Some Universities use 'head' instead of 'chairman'. The latter perhaps conveys better the sense that he is *primus inter pares*.

There is no doubt, on the evidence, that the Departmental Chairman has an administrative role. As the *Duff-Berdhal Report* states:

He always will and should have certain areas of administrative discretion, but the department's basic policies should be approved collectively.

The real question is whether the Chairman at Carleton have sufficient individual discretion to justify their exclusion from the unit. We think not. In those areas of greatest importance - hiring, tenure, promotion and dismissal - the dominant role is played by the department collectively. It is true that the Chairman assembles data, makes presentations, gives evaluation reports at higher committee levels, etc., but he does so as a representative of the department, scrupulously expressing the will of his colleagues rather than his personal views, as the particular recommendation proceeds through the review process. In the more routine areas,

while some potential for the exercise of independent discretion exists, it is for the most part narrowly circumscribed. Moreover, in a substantive sense, the decisions in these areas are of limited importance. It is true, for example, that the Departmental Chairman has some independent discretion in the employment of the administrative staff and, possibly, summer lecturers. These persons, however, are not in the bargaining unit and we see no reason for excluding the Chairman on that ground. In our view, the infrequent exercise of authority over the office staff poses no danger of conflict of interest within the unit. It is important to emphasize that the overwhelming proportion of the Chairman's duties have nothing whatever to do with the supervision or control of the department's small clerical staff. In this connection, we agree with the observation of the National Labour Relations Board in *Adelphi University*, 195 NLRB No. 107 at page 19; [1972] CCH NLRB ¶23,950:

An employee whose principal duties are of the same character as that of other bargaining unit employees should not be isolated from them solely because of a sporadic exercise of supervisory authority over non-unit personnel.

24 We have read with interest all of the National Labour Relations Board's cases cited to us by counsel. While it is true that the *U.S. National Labour Relations Act* is not identical to *The Labour Relations Act* in dealing with managerial exclusions, the relevant sections of the U.S. legislation are, in effect, a compendium of the major tests which this Board has developed in its assessment of the managerial function. The *National Labour Relations Act* does not speak of managerial functions, per se, but excludes from the definition of employee in section 2(3) "any individual employed as a supervisor". In section 2(11), *supervisor* is defined as -

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Accordingly, the U.S. decisions are, presumptively, of some assistance. However, even on the most careful reading, it is difficult to reconcile what appear to be two contradictory lines of authority. In the first two cases, *C.W. Post Center of Long Island University*, [1971] CCH NLRB ¶22,961, and *Long Island University (Brooklyn Center)*, [1971] 189 NLRB 110, the Board excluded Departmental Chairmen as supervisors. In the next two cases - *Fordham University*, [1971] CCH NLRB ¶23,473, and the *University of Detroit*, [1971] 78 LRRM 1273, the Board included Departmental Chairmen in the bargaining unit, ostensibly on the ground that the Chairmen in the latter two cases did not have the power to make effective recommendations as to the hiring and change of status of other faculty members.

25 As the NLRB's jurisprudence has grown, decisions have continued to go both ways. Frankly, it is difficult to derive a consistent rationale based upon clear evidentiary distinctions. The fact that the NLRB is, itself, aware of its own ambivalence on the issue is reflected in the following passage from *New York University case*, [1973] 83 LRRM 1549:

In virtually every case since we asserted jurisdiction over universities the status of department chairman, or heads, has been in issue. That is true here as well. Attempting to identify and resolve the complex threads, and even the nuances of the relationship among the faculty, administration, and department chairmen is not an easy task, nor one usually susceptible to a completely satisfactory conclusion.

26 The recent trend before the NLRB, however, appears to favour the inclusion of Departmental Chairmen performing duties similar to the Chairmen at Carleton. As was stated in the *New York University case*:

Though chairmen have a certain formal responsibility with respect to decisions on the appointment, salary, promotion, and tenure of full-time faculty, it appears that they act primarily as instruments of the faculty in these matters. The chairmen, in these respects, therefore, stand on the same footing as the faculty, whence their authority flows.

27 There is very little Canadian jurisprudence to guide us in this difficult determination. Faculty members in two Community Colleges have been certified in British Columbia: Capilano College (Nov. 1973) and Vancouver City College (May 1974). In both, Division Chairmen were included. In *Vancouver City College*, [1974] 1 Canadian LRRB 298, the Board observes at page 302:

That function [i.e., the administrative function of the Division Chairman] does not appear to be *management* - the exercise of authority over a group of people. Instead, it appears to be *co-ordination* of the instructional efforts of the many people in the division. The key indicia of managerial authority - the power to hire and fire, to evaluate and promote - are not features of this position. I do not mean to say that the Division Chairmen have no part to play in these decisions because they are made somewhere higher up. As a practical matter (subject to formal approval by the Principal), these are group decisions. The Division Chairman participates in the group and has substantial influence. However, so do ordinary faculty members who, as individuals, are clearly "employees" under the Code. Division Chairmen have no authority to impose discipline, except perhaps by way of verbal reprimands. They do prepare budget recommendations, but that task appears to be largely one of compiling figures with the real judgments about where to cut or where to expand being made elsewhere, again by a group.

Most, if not all, of these observations apply to the facts before us.

28 The two British Columbia decisions, as we have pointed out, involve Community Colleges. Other Canadian decisions which involve university faculty are of little assistance since, except in one case, no reasons were given. It is of interest to note, however, that in the several situations where faculty units have been certified, all have included Department Chairmen: see *University du Quebec à Montreal* (a decision of a Commission of Inquiry dated January 25, 1971, confirmed by the Quebec Labour Court); *Notre Dame University of Nelson, B.C.* (March 27, 1973); *University of Manitoba* (November 15, 1974); *St. Mary's University Halifax* (April 25, 1974).

29 For all of the above reasons, we find that Departmental Chairmen are properly included in the bargaining unit.

30 In our decision of April 4, we determined the appropriate bargaining unit as follows:

All full time academic staff and professional librarians employed by the Respondent in the City of Ottawa in the Regional Municipality of Ottawa-Carleton save and except President, members of the Board of Governors elected by the Senate, Assistant to the President, Vice President Academic, Assistant to the Vice President Academic, Deans, Assistant Deans, Directors of Schools, University Librarian, Assistant to the University Librarian & Section Heads for Bibliographic Processing, Central Library Services & Systems.

Note 1: The unit does not include persons engaged in non-academic administrative positions such as faculty registrars, the University registrar, his associate registrars, development officers, information officers & secretary to the Board of Governors, & persons currently employed in departments such as physical plant, finance, administrative services, student services, computer centre, planning, analysis & statistics, continuing education.

Note 2: The unit includes teaching associates but does not include sessional lecturers (part time), technical aides, research officers, laboratory directors or supervisors, program consultant, graduate teaching assistants and persons engaged primarily in research at the University under a grant appointment nor does it include demonstrators, technical officers or field instructors other than those primarily engaged in teaching.

31 On the taking of the representation vote directed by the Board more than fifty per cent of the ballots cast were in favour of the applicant.

32 A certificate will issue to the applicant.

33 The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

Decision of Board Member J.E.C. Robinson, Q.C.:

I have had an opportunity of reading the decision of the majority as it refers to Department Chairmen and concede that there is considerable merit in such decision and much of the reasoning therefor.

Inasmuch as this is the initial application before this Board asking it to define an appropriate unit for the full-time faculty of a university, counsel for the applicant has stressed in his argument that we consider the jurisprudential authority found in certain decisions of the National Labor Relations Board.

With the dearth of authority in Canada, one would think that such an appraisal of the jurisprudence in the United States would be of great assistance to this Board in determining the difficult question before us, notwithstanding that such decisions were fashioned within the confines of a different Act, with different social, economic and other considerations prevailing.

A perusal of the decisions of the N.L.R.B. dealing with Department Chairmen indicates that the Department Chairmen in the various institutions of higher education in the United States had relatively similar duties and responsibilities and also that such duties and responsibilities were similar to those shared by Department Chairmen at Carleton University. Notwithstanding this striking similarity, in slightly less than one-half of the determinations concerning Department Chairmen, they were excluded from the bargaining unit. (See: *Long Island University (Brooklyn Center)*, 189 N.L.R.B. 909; *Adelphi University*, 195 N.L.R.B. 640; *Syracuse University*, 204 N.L.R.B. No. 85; *Farleigh Dickenson University*, 205 N.L.R.B. No. 101; *Point Park College*, 209 N.L.R.B. No. 152.)

While the N.L.R.B. initially would seem to have excluded Department Chairmen from the bargaining unit, that pattern has not prevailed through to the present time. One may surmise that such change was made after the N.L.R.B. was able to see how the pattern of bargaining developed.

Since no pattern of bargaining has developed in this jurisdiction, one is not able to make such surmise.

Both counsel for the applicant and the respondent argued that in these unique circumstances there should be a preservation of the collegial aspect of decision-making; but argued in support thereof that different results should follow.

There is little argument that in many decisions, the Department Chairman seeks the approval and consent of other members of the faculty in his department.

The fact remains, however, that, in the traditional sense, collective bargaining tends to produce a differentiation between the supervisor and the supervised which to some extent undermines the collegiality which heretofore obtained. Thus, while there may be a sharing of authority between faculty and Department Chairmen in a horizontal way, there is also a vertical sharing of authority between the Department Chairmen, the Dean and the Senate in a vertical way. Thus it is apparent that managerial authority is shared in the university in many ways.

In my opinion, and I would so find, this Board should do everything in its power to maintain the *status quo* of collegial decision-making and should exclude Department Chairmen from the bargaining unit. To do otherwise, it would seem, would be to end the horizontal managerial decision-making authority presently resident in the faculty and to vest it in a very few hands such as the Dean and the Senate.

To include the Department Chairmen in the bargaining unit would be to remove from the department the only person who is able to speak on behalf of management and the only person who has the intimate knowledge of the department and the professional concerns of the faculty in that department.

It is not my intention to examine in detail the traditional indicia of the Board in determining who should be excluded as being managerial within the meaning of section 1(3)(b) of *The Labour Relations Act*.

It will suffice to say that I place different nuances upon the evidence than do my colleagues; and even adopting the traditional tests, I would find that Department Chairmen exercise managerial functions within the provisions of *The Labour Relations Act*.

It may well be that in this embryonic phase of determining the status of Department Chairmen at universities in general, and at Carleton University in particular, the Board must resolve it as a policy matter. If this be so, I would content myself in finding that in the preservation of the existing non-adversary structures, Department Chairmen should be excluded from the bargaining unit.

In the future, of course, it may well be that the evidence concerning Department Chairmen at another university will constrain me to find that they should be included in the bargaining unit. However that may be, I would find that at this period of time, based upon the evidence obtaining in this particular university, Department Chairmen should be excluded from the bargaining unit.

Footnotes

- 1 *"University Government in Canada"*, Report of a Commission sponsored by The Canadian Association of University Teachers and The Association of Universities and Colleges of Canada, U. of T. Press, 1966.