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AUNBT STATEMENT ON POSSIBLE REMOVAL OF LEGISLATIVE OVERSIGHT FROM *THE UNB ACT*, WITH PARTICULAR REFERENCE TO LAND TRANSACTIONS

Introduction

On 1 April 2015, Roxanne Fairweather, chair of the Board of Governors' *UNB Act* Review Steering Committee, announced that the Committee was revising its September 2014 draft and that it intends to proceed with a proposal for a much more limited set of revisions. We are pleased that the Committee has set aside their most problematic proposals. However, we believe the UNB community must be vigilant in reviewing their forthcoming proposal, which, the Committee says, will focus on removing legislative oversight on land transactions. Publicly Ms. Fairweather may have understated the widespread opposition to the initial proposal (*Daily Gleaner*, 04 April 2015) but it is no secret that the broader UNB Community was deeply troubled by the proposal and that those concerns were articulated unambiguously by the Senates, individuals, groups, and AUNBT, which submitted a comprehensive alternative draft of the *Act*. This powerful response made it all the more disheartening to read, in the same article, that the Board might still consider the Committee's now-abandoned original draft, a draft Ms. Fairweather is quoted as characterizing as "really based on current standards that are addressing governance documents today, that are being legislated for".¹ For the moment, we will leave aside the unwelcome notion that the Committee is still committed to, and the Board may still be considering, elements of the original proposal. One of the points AUNBT and others explicitly made in response to that draft was that the revisions clearly were *not* based on "current standards" in Canada. Accordingly, we are disappointed that the Board Committee continues to try to promote this view to the UNB community.

Indeed, we note that UNB President H. E. A. Campbell, Ms. Fairweather, and the Committee's legal counsel have remarked on several occasions that they consider the *UNB Act* to be

¹ <http://thebruns.ca/unb-act-revisions-released-public-week/> (accessed March 30, 2015)

anachronistic and an anomaly in the broader Canadian context. Given Counsel's claims to have compiled five binders full of other acts, we are at a loss to explain these assertions. Suggestions that the *UNB Act* is anachronistic and anomalous represent a serious misunderstanding and mischaracterization that underpins some of the remaining proposed changes. It is critically important that the UNB community and the public of New Brunswick understand the *UNB Act's* provisions on legislative oversight in their historical and national contexts.

In the paragraphs below we provide detailed information about incorporation acts of provincial universities across the country that shows clearly that the relevant provisions of the *UNB Act* are neither anachronistic nor anomalous. We encourage readers to ask why the Committee wants such provisions removed from our Act and whether it is in the best interests of the UNB community and the public to lose this important means of accountability over the lands UNB received from and holds in trust for the people of New Brunswick.²

Statements by the President and the Board Committee

The Brunswickan quoted President Campbell on October 1, 2014 as having said:

We appear to have elements of our Act that date back to 1785 when we were first created. I think that really some of the things [the committee] discovered at a very close examination of the Act did take them a bit aback.³

The 1785 reference was reinforced by Section 4 of the Board committee's proposed *Act* revision issued in September, which stated that, "The University of New Brunswick, first incorporated by Royal Charter as an academy of liberal arts and sciences in 1785 ...".⁴

Dr. Campbell responded in writing to questions submitted by Senator Adam McAvoy on February 26, 2015 about the revised *UNB Act* proposed by the Board committee and to the consultation process on the proposal. In his reply, the President stated:

² The UNB Board Charter declares Board members "hold the university in trust for the people of the province." http://www.unb.ca/secretariat/_resources/pdf/governors-structure-and-terms-of-reference/unb_board_charter.pdf (accessed 12 April 2015)

³ <http://thebruns.ca/unb-act-revisions-released-public-week/> (accessed March 30, 2015)

⁴ http://www.unb.ca/secretariat/_resources/pdf/unb-act-review/discussdocunbactdrftsep141.pdf (accessed April 1, 2015)

I have been told that the proposed *UNB Act* is similar to many other university acts in the rest of the country as well as in New Brunswick. For example, I am told that the legislative oversight provided for in the current Act is unusual and/or rare.

By his own account Dr. Campbell holds these views either because he himself read the relevant documents or because other persons who read them told him their views on the contents or the wider context and he accepted them. Because Dr. Campbell is the President of UNB and, as such, a person of potential influence on Board committees in accordance with published Board Guiding Principles,⁵ it is relevant to review the statements quoted above in context.

Relevant Aspects of UNB History

It is AUNBT's position that the *UNB Act* should reflect UNB's historical status as a provincial university, and that the province's role in its governance should be maintained. According to UNB's own website the actual early history is that in 1785 there was only an aspiration expressed through a petition by prominent citizens to the colonial governor ". . . to grant a charter of incorporation for an 'academy or school of liberal arts and sciences,' which they maintained would result in many 'public advantages and conveniences.'"⁶ A Provincial Charter for the College of New Brunswick was not granted until 1800, along with a large tract of land. It was not until 1827 that the College was granted a Royal Charter as King's College, at Fredericton, continuing it as a sectarian institution strongly affiliated with The Church of England and with the Crown land grant.

In 1859, not 1785, King's College was transformed and incorporated by the Legislative Assembly through *An Act to establish the University of New Brunswick*, as a non-sectarian public institution, to provide "a comprehensive system of University Education" for "the great body of the inhabitants of New Brunswick." UNB was thus established as the provincial university of New Brunswick. This status was emphasized in the Act by Section 19 requiring that a specified number of students from each county of New Brunswick and from the cities of Saint John and Fredericton be admitted "free of all charges of fees for education." Section 3 provided for all lands and other property, as well as all rights and immunities of King's College to be vested in UNB. With passage of this first *UNB Act*, the institution began more fully to realize the objectives of the 1785 petitioners. The mandate was also expanded to include applications of the sciences and arts, such as in engineering or commerce.

⁵ "The first officer of any committee is the President ... The management of the committee is in effect a partnership between the President, the Chair of the Committee and the appropriate Senior Manager, who will act as the subject matter expert to the Committee." (<http://www.unb.ca/secretariat/governors/board-committees.html> accessed March 29, 2015)

⁶ <http://www.unb.ca/aboutunb/history/historicalskech.html> (accessed March 29, 2015)

The *Act* has been amended or revised many times since 1859, but it has always included provisions requiring approval by the Lieutenant-Governor in Council for a number of things including certain land transactions and that the Lieutenant-Governor in Council appoint the President.⁷ The major revision enacted in 1968 created bicameral governance through a Board and Senate each with specified powers and strengthened collegial rights for academic staff.⁸ A 1986 amendment created two Senates: Fredericton and Saint John. (We note that UBC, one of Canada's largest universities, also has two, in Vancouver and Okanagan.) It is unclear from the President's statement to *The Brunswickan* which provisions of the current Act caused the Board committee to be "taken aback," but the Board committee's September proposal did considerably weaken collegial governance rights and it removed all of the legislative oversight provisions.⁹ Although the Board committee has retreated from most of its September provisions, it appears to be proceeding with at least one substantial part of its challenge to UNB's status as a provincial university.

Legislative Oversight of Universities

The Association of Universities and Colleges of Canada (AUCC) represents 97 public and private not-for-profit universities and university-degree level colleges in Canada. These institutions have diverse histories, populations, and capacities. Their acts of incorporation are also diverse as to details, lengths, extent of legislative protection for collegial rights, and whether or not they contain provisions for legislative oversight on specified matters beyond the publishing of annual audited financial statements.

Many universities have indirect legislative oversight in the form of requirements in their incorporation acts that their Board of Governors (or corresponding body) must include a specified number of members appointed by the provincial government. The universities with acts requiring more direct legislative oversight on specified matters constitute a minority but a significant minority, nevertheless. The specified matters are not academic but pertain instead to property transactions, borrowing, investments, or the appointment of a president.

⁷ See Sections 14 and 19, respectively, of the current *UNB Act*.

⁸ These included parity rights on joint Board-Senate committees. The 1968 *Act* also made provision for student representation on both the Board and Senate. The modernization followed the main lines of recommendations in the 1966 Duff-Berdahl Report jointly commissioned by the AUCC and the CAUT, Sir James Duff and Robert O. Berdahl, *University Government in Canada* (Toronto: University of Toronto Press, 1966)

⁹ Collegial rights are discussed in a separate AUNBT document.

The following list of universities and of provincial university systems with direct legislative oversight, and our discussion of them, is for illustrative purposes. It is not intended to be exhaustive either as to institutions or oversight provisions. The British Columbia and Alberta systems include the universities established historically as the provincial university, the University of British Columbia and the University of Alberta, and these remain the largest and most prominent in research, range of degrees offered, and knowledge transfer in their respective provinces. The Université de Québec system was founded as provincial system. The Universities of Saskatchewan, Manitoba, New Brunswick, and Prince Edward Island, as well as Memorial University of Newfoundland, were all incorporated as provincial universities. As such, the development of each was facilitated by the aid of Crown resources (funding, land, or both) that were very substantial for the size of the provincial population.

British Columbia Four public universities are governed by a single *University Act* (RSBC, 1996, c. 468, revised and consolidated to 2014): UBC, University of Victoria, Simon Fraser University, and University of Northern British Columbia. Section 58 (1) requires ministerial approval for borrowing money, and Subsection 29 (1.1) requires ministerial approval for estimates of increased liability or over-expenditure in a fiscal year. Establishing a new degree program also requires ministerial approval under Subsection 48(2). Subsection 50(2) says “Subject to the approval of the Minister and to the terms of any grant, conveyance, gift or devise of land, a university may (a) mortgage, sell, transfer, lease for not more than 99 years, or otherwise dispose of its land, and (b) lease for any term any of its land to a college affiliated with the university.” A special provision of the *Act* applies only to UBC, i.e. subsections 50(4), (a) and (c) of the *Act*, which require approval of the Lieutenant-Governor in Council for leasing portions of land described in a 1924 provincial grant to any affiliated theological college. Subsection 3(4) of the *Act* gives ministerial control over which parts of the Business Corporations Act apply. (The stated default is none.) Subsection 32(1) requires that the Board of Governors submit an annual report of its transactions to the Minister, and subsection 49(1) requires that universities provide any reports that the Minister may request. Under Subsections 19(1) and 19(2) the Lieutenant-Governor in Council appoints eight members to the Board of each university other than UBC and eleven members to the Board of UBC and the chair of each Board must be chosen from among those appointed members. Under Section 22, the Lieutenant-Governor in Council has the power to remove any appointed Board member and to remove an elected member for cause. Thompson Rivers University is incorporated under a separate act but Section 4 of the *Thompson Rivers University Act* TRU states that specified sections of the *University Act* apply to TRU, including Sections 29, 48, 50 and 58 cited above.¹⁰

¹⁰ It is of particular note that Section 50 of the BC *University Act* is similar in its wording to Section 14 of the *UNB Act*.

Alberta The public universities, colleges, technical institutes, and the Banff Centre are governed by a single *Post-secondary Learning Act* (SA, 2003, current to 2013). Among institutions governed by the Act are the Universities of Alberta, Calgary, and Lethbridge, Athabasca University and MacEwan University. Subsection 59(2) specifies that the Lieutenant-Governor in Council may by regulation limit or prohibit any right, power, or privilege of a university board of governors. Section 67 requires approval of the Lieutenant-Governor in Council for land transactions, and Sections 73 and 74 require approval of the Lieutenant-Governor in Council for specified types of financial transactions. All institutions governed by the Act are subject to the Land Use Regulation (Alberta Regulation 54/2004), requiring each university to submit long-range plans for land use for review and approval by the Minister (a similar requirement is stated also in Section 121(2) of the *Act*). Nine members of the public are appointed to each Senate by the Minister (11(3)(b)(viii)), nine members of the university community are appointed to each Board by the Minister (16(3)(d)), and up to nine members of the public are appointed to each Board by the Lieutenant-Governor in Council (16(3)(e)). The Lieutenant-Governor in Council appoints the chair of every Board (16(3)(a)). Sections 78, 79 and 80 impose on every Board a range of specified annual financial and other reporting requirements for “accountability” purposes. Sections 100 and 101 empower the Lieutenant-Governor in Council “to appoint an administrator for a public post-secondary institution” when it is in the public interest to do so. Appointment of an administrator has significant consequences, including termination of the terms of office of all Board members. Subsection 102(1) gives Lieutenant-Governor in Council the power to disestablish an institution and dissolve its Board.

Saskatchewan *The University of Saskatchewan Act* (SS, 1995, c. U-6.1, with amendments to 2014) imposes a number of legislative oversight requirements on the Board of Governors through specific annual financial and other reports to the Minister or to the Lieutenant-Governor in Council as set out in Sections 87, 88, 89, 90, and 91. In addition, approval of the Minister or of the Lieutenant-Governor in Council is required for certain real property transactions, for incurring financial liabilities that could “impair the financial status of the university,” for borrowing money for certain purposes, and for issuing certain securities as set out in Sections 92, 93, and 95. Subsection 7(1)(d) limits leases to 99 years, and requires ministerial approval for those exceeding 21 years. All land sales over \$100,000 dollars require ministerial approval (92(a)), and those over \$500,000 require the approval of the Lieutenant-Governor in Council. The Minister and Deputy Minister both sit on the Senate (24(1)(a)). Subsection 49(1)(c) requires ministerial approval for all building construction on university property. The Lieutenant-Governor in Council appoints five members to the eleven-member Board of Governors (42(b)). Section 102 empowers the Lieutenant-Governor in Council to create any regulation necessary to fulfill the purposes of the Act. *The University of Regina Act* (RSS, 1978, c. U-5, with amendments to 2014) imposes a number of legislative oversight requirements on the Board of Governors similar to those in *The University of Saskatchewan Act*.

Manitoba *The University of Manitoba Act* (CCSM, 2013, c. U60, current to 2015) requires approval of the Lieutenant-Governor in Council to borrow money for purposes other than annual operating expenditures, and to enter into arrangements to provide academic assistance to colleges or universities outside Canada, as set out in Subsections 4 (g) and (j). Section 21 requires annual accounts to be audited by the Auditor General who must submit a written report to the Lieutenant-Governor in Council, as well as to the Board of Governors. Subsection 22(1) requires that the Board of Governors submit to the Minister an annual report on the operation of the university. The Lieutenant-Governor in Council appoints twelve members to the Board of Governors (8(a)), and five members of the public to the University and Community Council (37(k)). Subsection 24 gives the Lieutenant-Governor in Council the right to remove any appointed member of the board for cause, and any elected member on the recommendation of the Board. The list of Board members includes the Deputy Minister, or his or her designate (Subsection 26(1)(q)).

Québec *An Act Respecting the Université du Québec* (1968, c. U-1, subsequently amended at various times) governs the provincial system of ten constituent universities, including UQAM, UQAC, UQTR, UQAR, UQAT and UQO. These six, and UQ itself, are members of AUCC. The *Act* specifies that the President of the Université du Québec and the Principal of each constituent university are all appointed by the Government and have their salaries fixed by the Government under Sections 13 and 38, respectively. The President and principals are members of the Board of Governors, and the Government appoints all other members of the Board—up to 14 people—from various representative groups (Section 7). Section 14 allows the Board of Governors to appoint 3 particular vice presidents but requires the approval of the minister for the appointment of any other vice presidents and the assignment of their titles and functions. Sections 23, 24, and 25 require the annual submission of the investment and operating budget, a report on the university’s financial position, and interim financial statements to the Minister and a report of the university’s activities, which is also presented to the National Assembly. Sections 27-29 and 47-49 contain provisions for allowing the government to constitute a constituent university and to revoke the charter of a constituent university. Separate legislation, *An Act Respecting Educational Institutions at the University Level* (chapter E-14.1, updated to 2015) applies to every university in the province (not only UQ). It requires reporting to the Minister, for tabling in the National Assembly, details of the compensation package of each senior administrator, including basic salary and other specified components of compensation, as well as any severance granted.

New Brunswick *The University of New Brunswick Act* (SNB, 1984, c. 40, including amendments up to 2003) requires approval of the Lieutenant-Governor in Council to guarantee securities or issue debentures for specified purposes and for real property transactions as set out in Sections 11 and 14. The Lieutenant-Governor in Council appoints the Chancellor and the President as set out in Sections 18 and 19. Approval of the Lieutenant-Governor in Council is required for the terms and conditions of any affiliation of UNB with another college or university

in the Province, as set out in Sections 72 and 73. Bringing of an action against a member of the Board of Governors requires the written consent of the Attorney General, under Section 88.

Prince Edward Island The *University Act* (RSPEI, 1974, c. U-4, with subsequent amendments) requires the approval of the Lieutenant-Governor in Council for real property transactions, under Subsection 14(1) (i). Approval of the Lieutenant-Governor in Council is required for incurring liabilities or expenditures beyond available money and for borrowing money, as set out in Section 17. In addition to the requirement that annual financial statements must be reported to the Legislative Assembly under Section 19, Section 20 requires a prompt response to any request from the Clerk of the Executive Council for financial information. Section 26 specifies that “the Lieutenant-Governor is the Visitor of the University with authority to do all those acts which pertain to Visitors.”

Newfoundland and Labrador *An Act Respecting Memorial University of Newfoundland* (RSNL 1990 c. M-7, consolidated to March 2015) requires approval of the Lieutenant-Governor in Council for real and personal property transactions and for expenditures on buildings and their grounds as set out in section 4. Also, approval of the Lieutenant-Governor in Council is required for incurring liability for purchase of land or erecting buildings under Section 37 and for borrowing money for current or capital expenditures under Section 40 and Subsection 41(1). The Lieutenant-Governor is “the Visitor to the university, with authority to do all those acts which pertain to visitors that the Lieutenant-Governor shall consider appropriate” under Section 9. The Chancellor is appointed by the Lieutenant-Governor in Council under Section 48. The President is appointed by the Board with the approval of the Lieutenant-Governor in Council Section 51).

The total number of universities in the list above with various forms of legislative oversight set out in their acts of incorporation is 23, nearly one-quarter of the 97 members of AUCC. The AUCC total membership includes many institutions smaller than UPEI, the smallest provincial university. If only universities of size comparable to or larger than UPEI are considered, the group of universities with various forms of public oversight is proportionately larger. It is clear that in the proper Canadian context the kinds of legislative oversight provisions found in the *UNB Act* are neither anachronistic nor anomalous, nor in any way exceptional. Indeed as the foregoing summaries show, some universities are subject to more legislative oversight and public accountability than UNB under its act of incorporation.

Ontario and Nova Scotia In Ontario, in Nova Scotia, in Québec outside the U de Q system, and in New Brunswick other than UNB, the historical development of universities has been varied. Before the mid-twentieth century the financial resources and real property of most of them derived primarily from sectarian or private sources and tuition, even though at times some of them also had substantial public support. From 1956 onward the federal government transferred increasing amounts of funding for post-secondary education operating and capital expenditures to provincial governments. The provinces made the federal transfers available to universities, and almost all of the Canadian universities with private or religious origins assumed

a substantially public aspect to their operations. However, the presence or absence of legislative oversight in university acts of incorporation did not significantly change with the transfers of federal funds to universities through the provinces. That being said, it remains the case that almost all Canadian universities established as provincial institutions have a variety of significant forms of public oversight.

The University of Toronto can be considered an exception in many respects. Among Canadian universities, it has perhaps the most complex institutional history, for various reasons. Like UNB, it began as a Church of England college and was incorporated into a public non-sectarian university by the Canada West Legislature in 1849. After Confederation it was in effect the provincial university of Ontario. Beginning in the 1850s, it became affiliated in various ways with a number of colleges, sectarian and non-sectarian, in the process of evolving into its modern form. Also, it chose in 1971 to convert its bicameral governance structure into unicameral form with a Governing Council as the analogue of a combined board and senate. Aside from provincial operating grants, which all Ontario universities receive, the province is still involved in the U of T by way of the appointment by the Lieutenant-Governor in Council of 16 of the 50 members of its Governing Council. In contrast, four members of the 30 member Board of the University of Western Ontario are appointed by the Lieutenant-Governor in Council, while the Board of Queen's University, which became private in the nineteenth century, has no members appointed by the Lieutenant-Governor in Council.

In Québec, Laval was a Roman Catholic university, and McGill was private and relatively non-sectarian, although they both, along with other Québec universities, have been substantially supported by the provincial government in more recent decades. In Nova Scotia, Dalhousie became private and non-sectarian in the nineteenth century, while other universities had sectarian origins.

In New Brunswick the historical developments of Mount Allison, St. Thomas, and the Université de Moncton included longer and stronger sectarian affiliations than UNB had. The establishment of the Université de Moncton in the 1960s on a new campus as a public comprehensive university involved in part the fusion of several sectarian colleges located in different parts of the province.

In summary, the provisions in the current *UNB Act* for legislative oversight are not excessive impositions; rather they are a reasonable way to protect the public interest and they are similar to corresponding provisions in the incorporation acts of other Canadian institutions with similar histories and roles. Contrary to the assertions of President Campbell, the chair of the Board's UNB Act Review Committee, and others, the *UNB Act* is neither anachronistic nor anomalous in its provisions for legislative oversight.