

August 7, 2014

Changes to the *UNB Act*

In 2013 the Board of Governors established a committee on revision of the *UNB Act* (referred to here as the Act Revision Committee, ARC). The committee is chaired by the Past Chair of the Board and includes two faculty members: one from UNBSJ and one from UNBF, both Senators. As with acts of incorporation generally, revisions are made from time to time. The UNB Act has evolved over the past century and a half, with the 1968 revisions being among the most momentous as they placed the processes of collegial governance on a firm legal footing. Article 5 of the Collective Agreement, Collegial Rights, provides AUNBT members with the right to participate in collegial processes as they are set out in Senate and Board documents and the *UNB Act*. Revisions to the *Act* that weaken collegial processes would weaken collegial rights set out in the Collective Agreement. This concern is one of the important reasons AUNBT and its members must take seriously the proposed changes to the *Act*; it and others are discussed in the present document.

The Revision Process to Date

The process has been characterized by a substantial lack of transparency, with members of the Act Revision Committee stating that they are under an administrative directive not to disclose anything substantive about their work without authorization. Initially, only a timeline was disclosed when on December 14, 2013 an ARC member informed an AUNBT member that the objective was to have the entire process concluded by legislative enactment of the revisions during the session of the Legislative Assembly expected to end in June 2014. Two days after the open joint meeting of Senates held on April 17, 2014, three AUNBT members expressed concerns about lack of consultation to a member of the Executive Committee of the Board and asked about the status of ARC work. The Board member replied that the process of drafting revisions was well advanced, so that legislative enactment in June was still feasible. The Board member added that consultations on the revisions would occur in due course.

The limited information provided by these two informed sources was sufficient to raise serious concerns and AUNBT began to maintain a watching brief. The President of AUNBT twice wrote to the President of UNB inquiring about the status of the revision process but received no substantive information in reply. In parallel two faculty members from the Academic Council and the Research Council met with government officials to express concerns about lack of transparency and lack of consultation. Subsequently, representatives of AUNBT and FNBFA also met with senior government officials to express similar concerns. Both groups were assured that the government was insisting on substantive consultations. Subsequently, an outline of draft revisions was provided in reports to open Senate meetings held on May 26, 2014. A transcript of one of these Senate reports is appended hereto.

The May 26 reports indicated consultation on the draft amendments would begin in mid-August. No explanation has yet been provided as to why there was no consultation on amendments – especially with the members of the UNB community who enjoy collegial rights or with their bargaining agent – before the ARC commenced the task of drafting amendments. Curious aspects of the transcript are that the two faculty members on the ARC have “not [been] involved in generating the documents,” and that AUNBT is not mentioned among entities to be consulted. It is not clear from the transcript whether the consultation to begin in August will be substantive with an opportunity to propose changes or additions to the draft *Act* revisions, or will be *pro forma* however elaborate the consultation process may appear to be.

Collegial Rights

In the late 1950s intensive discussion began across Canada on democratizing university governance and establishing tenure and promotion procedures. In 1961 UBC President N.A.M. MacKenzie (a former president of UNB) published an influential article in the *CAUT Bulletin*, “emphasizing academic involvement in decision-making and downplaying the influence of board members.”¹ Subsequently CAUT and AUCC jointly commissioned a study on governance by Sir James Duff, a British university administrator, and Robert Berdahl, an American political scientist. The commissioners found that “defective structure[s] of university government” were widespread and “a new and growing class of administrators [wa]s assuming control,” with the result that “a gulf of misunderstanding and misapprehension [wa]s widening between the academic staff and the administrative personnel.”² Recommendations by Duff and Berdahl in their 1966 report for addressing these concerns were adopted in various forms and to varying degrees across Canada.

At UNB the essence of many of the Duff-Berdahl recommendations were implemented through extensive revisions to the *UNB Act* that came into effect on July 1, 1968 – including new Senate and Board structures. The revised *Act* was drafted by Professor George McAllister of the Faculty of Law, who in the same year was elected as the Vice-President of CAUT and as a faculty member on the UNB Board of Governors. Historian Peter Kent, who witnessed events as Assistant to President Colin B. McKay, recalled that the revised *Act* brought “a radical change ... in the governance of the university” making “more democratic” a system that had been “a presidential autocracy.” The 1968 *Act* inaugurated “a new era of collegial governance” including “power vested in the teaching faculty and modelled on the ideal of the community of scholars.”³

Circumstances or people can change and by the late 1970s – notwithstanding widespread adoption of recommendations in the Duff-Berdahl report – managerialism again became widespread in universities while advances in collegial governance were being eroded. The response by faculty across Canada was unionization, at UNB in 1979. This brought stronger procedures, more accountability and transparency, as

¹ Michiel Horn, *Academic Freedom in Canada: A History* (Toronto: University of Toronto Press, 1999), p. 257.

² Sir James Duff and Robert O. Berdahl, *University Government in Canada* (Toronto: University of Toronto Press, 1966), p. 3-4.

³ Peter C. Kent, *Inventing Academic Freedom: The 1968 Strax Affair at the University of New Brunswick* (Halifax: Formac, 2012), p. 195.

well as effective means to enforce substantial elements of collegial rights and procedural fairness. The result at UNB was a mature, stable relationship between faculty and administration lasting three decades.

Changes since 1968

Significant changes during the past 45 years included adding provisions to create the UNBSJ Senate and deleting sections pertaining to “The Visitor on Behalf of Her Majesty.” The latter provided a right to appeal to The Visitor in the event of disputes between individuals and the administration or Board, with the Visitor then appointing a qualified person to investigate and make recommendations. The rationale for removing these sections was that students could appeal to the Human Rights Commission and faculty had union protection. Bills to implement such changes were treated in the manner of private legislative acts.

AUNBT learned from government officials on May 14, 2014 that the government had advised the UNB Board in autumn 2013 the bill to implement revisions under confidential development by the ARC would be treated in the manner of a public act, requiring legislative hearings. Reasons for the different approach are not known to AUNBT at present but it is possible some of the proposals (notably, excising from the *UNB Act* requirements for approval by the Lieutenant Governor in Council for certain types of action) – may be a factor. In any case, significant public oversight is to be welcomed in present UNB circumstances.

Proposed revisions

The transcript of the May 26 Senate report opens with “underlying principles” that might have been reassuring several years ago. However, in recent months most UNB faculties have passed non-confidence motions in the current senior administration because of its management policies and practices – while as recently as June 27 the Board declared its full confidence in the senior administration. The non-confidence motions arose when examination of the administration’s own financial and other records led many faculty members to conclude the senior administration – regardless of its intent – has been causing “damage” to UNB’s teaching and research programs, its core mission as a university, apparently with the encouragement and approval of the Board.⁴ In such circumstances the meaning of the stated principles is unclear. Lack of detail makes it difficult to assess some of the proposed changes, but others are sufficiently explicit as to invite discussion.

Potentially Uncontroversial Items

The transcript says the amendments will “create a smaller Board” and “de-mingle legislation and by-laws.” At first glance these seem innocuous because UNB has a large Board and the *Act* is complex and detailed. For example, Board members include the mayors of Fredericton and Saint John and a member elected by the NBTA, positions that may reasonably be considered anachronistic as they were included for political considerations less significant now than several decades ago. However, comparison of recent

⁴ In a letter of reply to UNB Board Chair Kathryn McCain by Professor Cliff Shaw and 20 other members of the Academic Council, published by the *Telegraph-Journal* on July 19, 2014, Dr. Shaw and his colleagues wrote, “We hold the senior administration responsible for the damage to our academic programs.”

experiences at UNB and the University of Saskatchewan (which has an eleven-member Board – about 1/3 the size of UNB’s Board) raises questions about the extent to which size matters.

It is common for acts of incorporation of private, for-profit organizations to be compact, with more elaborate by-laws to guide ongoing operations so that changes can be made expeditiously through by-law revision. However, UNB is a public university. The *Act* is complex in order to specify and protect collegial rights from easy removal, such as the powers of faculty councils and senates, as well as circumscribing the powers of administrators and the Board. These are not anachronisms. It took more than a century of struggles to limit autocracy and later managerialism in order to firmly establish such rights in Canadian universities, and they are integral to the modern mission. Much depends on the text of the still-undisclosed revisions.

Radical Items

The transcript says that the amendments will excise from the Act the sections requiring UNB to obtain the approval by the Lieutenant Governor in Council for: 1) “changes” regarding “administrative and academic matters” including “adjustment [to] the membership/composition of Senate” and “creat[ion]” of “new positions and titles”; 2) “appointment of President and Chancellor”; and 3) “leasing University lands.”

With respect to excision of sections requiring government approvals for actions, it must be acknowledged that arbitrary or politically motivated interference by governments in universities can be harmful, but strictly limited government oversight in matters of public interest can be helpful to restrain or correct abuses of institutional power. History records instances in which an administration and board together determined to set a university on a misguided course paying no effective heed to faculty, student, or public concern.

Events at the University of Saskatchewan provide a recent object lesson. That university was set on a managerialist course so radical that a senior and distinguished tenured professor was summarily dismissed for expressing concern. In the early aftermath of the professor’s dismissal, the resignation of the Provost and the dismissal of the President followed quickly upon public interventions by the Saskatchewan government. The Chair of the Board of Governors and the Associate VP (HR) subsequently announced their own departures. In summary, clearly circumscribed restraints on the conduct of administrators or boards of governors by an elected government can be an important and necessary corrective in special circumstances.⁵

⁵ Large-scale government interventions have in some instances been helpful, in other instances harmful, but for the latter there is the option of mounting a public campaign which an elected government may heed in its own political interests. In New Brunswick the report of the Deutsch Royal Commission of the early 1960s appointed by the Robichaud Liberal government led to expansion of the provincial system (including creation of UNBSJ) and provides an example of the former type; the PSE commission established by the Graham Liberal government several years ago provides an example of the latter type, but in that instance the worst excesses in the commission’s report were not implemented due to organized public resistance on and off campuses.

If enacted, the proposed changes would constitute a radical departure from the past – UNB would no longer be *the* provincial university in New Brunswick except possibly in a vestigial sense. With enactment of the proposed amendments, the administration and Board could in future more readily make changes adversely affecting not only collegial rights, but also AUNBT’s viability as a certified bargaining agent. For example, it could then more readily be possible to change Senate composition by adding as voting members persons who are subject to administrative direction, thereby diluting the voting power of members elected from the academic staff.⁶ Such amendments also could facilitate redefining the roles of department chairs in advance of an attempt to have them excluded from the bargaining unit (at Memorial University where ‘chairs’ are termed ‘heads’ they were excluded, and a much more sweeping exclusion occurred at Yeshiva University as a result of an interpretation of definitions by a labour board). Concerns could also arise in regard to future management of UNB lands, which include a large, ecologically and environmentally significant forest tract in the Fredericton region.

It will be important for AUNBT members to take an active interest in these matters. In an era when long established collective bargaining rights are being eroded across the Western world, and even the administrative frameworks of labour relations are being degraded,⁷ collegial rights and public restraints against arbitrary administration are assuming greater importance in universities.

Appendix

Transcript of Report to Senate in a Meeting Held on May 26, 2014

(The text below appears exactly in the form provided to AUNBT)

I Underlying principles:

- Revitalize the Act
- An act that will be resilient and has sufficient flexibility for the future
- Preserve institutional integrity
- Improve ability to fulfill university mission

II How to accomplish:

- Create a smaller Board
 - More effective and efficient, deeper individual engagement
- De-mingle legislation and bylaws
 - Allow the university to make changes—without approval from L-G in counsel—with regards to administrative and academic matters. For example, allow the university to adjust the membership/composition of Senate or to create new positions and titles (eg. VP Advancement last time there was a holdup due to restrictions of existing Act)

⁶ The Duff-Berdahl report “recommend[ed] that the majority of the Senate should be elected by the faculty from the faculty.” (p. 29)

⁷ Alain Supiot, *The Spirit of Philadelphia: Social Justice vs. The Total Market* (New York: Verso, 2012)

- No longer need LGiC approval for appointment of President and Chancellor
- No longer need LGiC approval for leasing University lands
 - More flexibility for using lands as an alternate source of revenue

III Focus on the process:

- We have met 9 times since Feb 2013 – some of these meetings have stretched over more than one day and include evening and weekend meetings
- Where we are:
 - Have engaged in an in depth review of current act and compared it to the proposed Act
 - Have met several times with the University Solicitor’s Office – Fred McElman is assisting us. He is a leading authority on drafting legislation in Canada.
 - We recently found out that the UNB Act is a public Act; the Committee has been learning what this means in terms of process and documentation (eg. other legislation where UNB referred to must be amended to reflect new/changed act)
 - Now working to create documents that are appropriate to share with the community, including a table of concordance that sets out where things have moved to in the legislation or into bylaws
 - Next step: will production of accompanying bylaws (Bof G, Senate, Board of Deans). This is envisioned as somewhat exploratory as the bodies concerned will presumably play a role in creating their bylaws.
 - Just like to point out that this committee (at least the faculty on it) are not involved in generating the documents. These have come from the Secretary’s office in collaboration with legal counsel. We are tasked with offering comments/criticisms and sometimes suggesting where clarity is needed.

IV Why so long:

- The committee is working toward a set of documents that are clear and of high quality to share with the community

V Where is this going:

- The goal is to have documents that are ready to share with the community in August
- The thinking is that the committee will share them with the University community around mid-August and allow time for people to read and review and consider the work that the Committee has done
- Mid-September and into the fall meetings will be scheduled to hear
- once consultation takes place and is duly considered, the revised Act will be prepared for formal consideration—by the Senates for consideration and the Board.
- Following this, the revised Act must wend its way through the legislative process—which has its own protocols and procedures