

**What we could have lost:
Why Legislative Protection for Collegial Governance Rights is Important**

Summary

Collegial governance rights are an essential feature of universities, distinguishing them from most commercial enterprises and government agencies. In Canadian universities, such rights are protected through a combination of university acts of incorporation and collective agreements, the distribution of provisions between the two types of document varying from one institution to another. In September 2014 the UNB Board of Governors Act Review Steering Committee issued a draft revision of the *UNB Act* that would have substantially weakened collegial rights. Although the Board Committee chair, Roxanne Fairweather, has stated that the Committee plans to revise and moderate its proposal, it is still important to draw attention to the flaws in the rationale that led to the proposal, especially in light of Ms. Fairweather's comments to the *Brunswickan* to the effect that the original draft is still open for consideration by the Board.¹ Ms. Fairweather and the UNB president have publicly suggested the *UNB Act* is anomalous in the Canadian context, requiring radical revision of its collegial rights and other provisions. The present document explains collegial rights at UNB and how they currently are protected. It outlines the Committee's draft revision and the current status of the revision process. It situates the Committee's proposal in wider contexts. It illustrates through comparison with provisions in several other Canadian university acts that it is not the *UNB Act* which is anomalous, rather, the Committee's proposal is.

Collegial Rights at UNB

Collegial governance rights are the rights with corresponding responsibilities of academics to participate in the governance of the University. These include rights to be consulted, to deliberate, and to propose changes to programs, policies, practices, and initiatives through departmental meetings, faculty councils, and senates, as well as to have representation on the Board of Governors. Also included are rights to participation in matters of appointments, promotion and tenure. These rights are for the common good, serving to protect the public interest by setting and maintaining high academic standards for teaching and research, helping to ensure the accountability of senior administrators, and providing critical analysis generally.

Collegial rights are set out in and protected by the *UNB Act* and by the Collective Agreements between the Board and the AUNBT under the framework of the *Industrial Relations Act*. The *UNB Act* provides legislative protection for such matters as the existence, composition, and powers of the Fredericton and Saint John Senates and the faculty councils, elected faculty representation on the Board, and for committees with equal representation from Board and Senates to deal with important matters, such as the search for and review of presidents. The Act sets out powers and duties of the President. It also provides for student representation on the

¹ <http://thebruns.ca/unb-act-revisions-change-focus/>

Board and Senates and due process in student disciplinary matters. In addition, the Act provides protection for the public interest through requirements that the Lieutenant-Governor in Council approve a limited number of specified actions on non-academic matters.

The Collective Agreements set out such matters as the structure and criteria of the collegial assessment process, a definition of academic freedom, which includes the right to criticize administration and Board decisions, and a grievance and arbitration process. In addition, through Article 28, the Collective Agreement gives the Senates a significant role in program changes contemplated by the Board that could result in layoffs. The *UNB Act* and the Collective Agreements are explicitly linked by Article 5, “Collegial Rights” in the latter documents.² An important aspect of the linkage is that the Act defines tenure – the main protection for academic freedom – and the relevant Collective Agreement sets out criteria and procedures for the granting of tenure. In short, the two types of document together provide a substantial measure of academic democracy, and a weakening of rights through revision of the *UNB Act* would weaken rights under the collective agreement.

The Proposal by a Board Committee to Revise the *UNB Act*

Following a secretive process that commenced in early 2013, the Board’s UNB Act Review Steering Committee chaired by Roxanne Fairweather issued a draft revision of the *UNB Act* in September 2014. The draft was radical and extensive, and if enacted would have given the Board unprecedented powers. It would have enabled the Board unilaterally, without needing to seek legislative authority, to discontinue either or both Senates and to establish new Senates. It would have removed legislative protection for the existence and powers of Faculty Councils and for the mandates of joint committees of the Board and Senates. It would have eliminated the legislative oversight provisions in the *Act*. A great many individuals and groups within the UNB community, including the Senates and AUNBT, raised serious concerns about the draft and the revision process. AUNBT also put forward an alternative draft Act revision. Both the Board Committee and AUNBT held consultations on their respective drafts.

On April 1, 2015, Board Committee Chair Fairweather issued a public statement by email to the UNB community that the Committee would be substantially revising its September draft Act. She wrote

A revised proposal will focus *only* on two things; the sections of the UNB Act dealing with land transactions and changes which have already been approved by the Senates and the Board. ... There will be no wording changes or summaries other than to property

² Article 5.01 states “The University of New Brunswick recognizes the right, privilege, responsibility and desirability of Employees to participate in the collegial processes of the University, as set out in Senate regulations, guidelines, policies, and decisions, as approved by the Board of Governors and as set out in the University of New Brunswick Act except as specifically abridged or modified by this Collective Agreement. The Parties recognize the importance of these academic, personnel, and governance processes and will work together to promote collegiality. The Parties agree that openness and transparency are important for collegiality and accountability.”

matters and those administrative changes already approved by Senate and the Board.
(italics added)

Notwithstanding this statement, the UNB community must remain vigilant because on April 8, 2015 *The Brunswickan* reported Committee Chair Fairweather had said that the original draft would not be scrapped and that it will still be open for consideration on the recommendation of the board. She said

We've got all this work done. The draft Act we had posted is really based on current standards that are addressing governance documents today, that are being legislated for.

So that's sitting there. That's done, but right now. [sic] What we've decided to do is recommend the changes that the community has agreed to.³

Ms. Fairweather appears to make two points: that the proposed changes with respect to governance and rights are standard in Canadian universities and that such changes may still be considered by the Board of Governors. In fact suggestions that the *UNB Act* is anomalous in its collegial governance rights, or legislative oversight provisions are neither accurate nor an appropriate basis for weakening these provisions. The former are addressed in this document, the latter in a separate AUNBT document.⁴

The Wider Context

Regardless of the intent of the Board Committee, its draft Act revision issued in September would, if enacted, have represented a major erosion of collegial rights and adversely affect the public interest. Yet, according to the Committee Chair it remains "sitting there" and therefore could be revived at any time. Therefore it is important to understand the implications.

Collegial rights have been under concerted pressure internationally since the late 1980s when the Thatcher and Major governments abolished tenure in the UK. Since that time collegial rights have been eroded in various ways and at various rates also in the US, Canada, Europe, and elsewhere, although the erosion has been most severe in the UK to date.

This trend is the manifestation in the academy of the ascendancy of neoliberalism as the globally dominant form of political economy across the political spectrum, from left to right. The phenomenon has been abundantly documented in books and articles by experts. Its essence was summed up by economists Gérard Duménil and Dominique Lévy: "Neoliberalism is not about principles or ideologies but a social order aiming at [increasing] the power and income of the

³ <http://thebruns.ca/unb-act-revisions-change-focus/> . Very similar statements were made by UNB Board chair Kathryn McCain in a meeting with the Arts Faculty Council on April 9, 2015.

⁴ <https://aunbtweb.files.wordpress.com/2015/04/aunbt-task-force-statement-on-legislative-oversight.pdf>

upper classes.”⁵ The adverse effects on nation states include a weakening of collective bargaining rights, among the most effective counterweights to the political power of the wealthy, and of democracy itself. Legislative and regulatory changes have facilitated the exploitation of public resources for private profit, including the environment, universities, banking systems, and transportation systems – resulting in a vast increase in income disparity within and between nations.

The adverse trend for collegial rights in Canada has been a concern to The Canadian Association of University Teachers (CAUT) for some time. In 2001 its President wrote

Over the past two years events indicate that shared governance and collegial decision-making are gravely endangered. Increasingly, boards are departing from their important historical roles and overstepping into the recognized ambit of the senate, sometimes disregarding or ignoring the university's most senior academic body. ...

Senates employ, depend on, and embody shared governance and collegial decision-making. Where and when these principles are devalued senates are diminished, moving our universities ever closer to a corporate management model. ... Top-down governance structures also serve outside interests that would turn universities into academic enterprise providers for the private sector.⁶

In contrast during the intervening decade the Canadian Association of University Business Officers (CAUBO), the organization of non-academic university administrators, has become prominent in promoting commercial operating and performance criteria. Simultaneously the Association of Universities and Colleges of Canada (AUCC) – the presidents’ organization – has been promoting erosion of collegial rights in general and academic freedom in particular. For example, former AUCC Chair and University of Saskatchewan president Peter MacKinnon expresses the view that collegial governance involvement by faculty members has become excessive, an impediment to efficient, effective administration. He argues that “unit-level management must conform to the standards prescribed by the university as a whole,” asserting that “deans and presidents must exercise the statutory authority given to them by law.”⁷ MacKinnon regards faculty collective bargaining as an impediment to institutional autonomy and presidential authority.

In 2011 AUCC issued a new policy on academic freedom significantly weaker than its own 1988 policy and representing a narrow conception of this right of academics.⁸ Of the four components

⁵ Gérard Duménil and Dominique Lévy, *The Crisis of Neoliberalism* (Cambridge MA: Harvard University Press, 2011), p. 228.

⁶ Tom Booth, “The Evolution of University Governance,” CAUT Bulletin, February 2001 (https://www.cautbulletin.ca/en_article.asp?ArticleID=1659)

⁷ Peter MacKinnon, *University Leadership and Public Policy in the Twenty-first Century: A President’s Perspective* (Toronto: University of Toronto Press, 2014), p. 98.

⁸ The reactionary core of the policy takes the concept back a century, prior to the *1915 Declaration of Principles on Academic Freedom and Tenure* of the American Association of

of academic freedom widely accepted in Canada and the United States, freedom of research and publication, freedom of teaching, freedom of intramural expression, and freedom of extramural expression, the 2011 AUCC policy is silent on the third and fourth. In addition it conflates academic freedom and university autonomy.⁹ The elevation of institutional autonomy to the status of a central pillar of academic freedom could potentially serve multiple purposes. These could include bolstering arguments to free boards and senior administrators from the checks and balances of legislative oversight in financial and property matters, or from the checks and balances of arbitration in individual grievances or salary negotiations. They could also include bolstering arguments to operate more like a commercial enterprise while still receiving substantial annual operating grants from governments.

The new AUCC conception of academic freedom is very similar to that enunciated by Peter MacKinnon in an essay published in 2001, cited in his recent book.¹⁰ The new policy's emphasis on institutional autonomy is ironic because when AUCC issued it several member universities had signed agreements effectively ceding substantial autonomy to private sponsors of certain academic programs.¹¹ The policy was promptly and comprehensively criticized by the Canadian Association of University Teachers (CAUT).¹² For his part, MacKinnon is sharply critical of CAUT for its efforts to assist faculty associations and their members in defending university autonomy against inappropriate intrusions by private interests. MacKinnon suggests in effect that he or she who pays the piper calls the tune. MacKinnon concludes that CAUT "has its feet firmly planted in the past" owing to an antiquated notion of "academic integrity."¹³ Of special note is that only one president publicly distanced himself and his university from the new AUCC policy, David Naylor of the University of Toronto. Naylor promptly issued a public statement of support for his university's strong academic freedom policy that is consistent with the CAUT policy.¹⁴

University Professors and the influential 1916 dismissal and subsequent reinstatement of Bertrand Russell by Trinity College, Cambridge.

⁹ <http://www.aucc.ca/media-room/news-and-commentary/canadas-universities-adopt-new-statement-on-academic-freedom/>

¹⁰ MacKinnon suggests his 2001 essay had "influence" on the 2011 AUCC policy, op. cit., p. 62, fn. 30.

¹¹ See for example the case studies in the 2013 CAUT report *Open for Business: On What Terms*, available at <http://www.caut.ca/docs/default-source/academic-freedom/open-for-business-%28nov-2013%29.pdf>

¹² http://www.caut.ca/docs/default-document-library/caut_to_aucc_academic_freedom.pdf?sfvrsn=0

¹³ Op. cit., p. 89.

¹⁴ The mission statement of the University of Toronto includes the declaration, "Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research. And we affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself. It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the

Collegial Rights at Other Canadian Universities

Board Committee chair Fairweather's public assertion that "the draft Act we had posted [in September] is really based on current standards" can be examined through comparative review of other Canadian university acts. The results of such a review are as follows:

- There is wide variation among university acts on collegial governance rights, legislative oversight, size of the board of governors, and other important matters
- University acts for national comprehensive universities typically provide legislative protection for the existence, composition and powers of senates but there is wide variation in detail
- The *UNB Act* is one of the stronger on collegial rights in several respects, although not the strongest in all such respects
- The September draft of the Board Committee would, if enacted, be among the weakest university acts in Canada on collegial rights but would satisfy AUCC membership criteria
- The assertion by Board Committee chair Fairweather that the September draft is based on current standards is meaningless because there is no current standard for university acts of incorporation.¹⁵

The wide variation among university acts is in significant measure a reflection of historical origins, regional role and modern development.¹⁶ Some universities were public provincial institutions early in their histories and remained so, others were established by religious denominations, and still others were private. The following paragraphs serve to illustrate the points listed above through specific examples.

At many universities, there was modernization and institution of a bicameral university governance structure through act revisions after publication of the 1966 Duff-Berdahl report

liberated human spirit." (<http://www.utoronto.ca/about-uoft/mission-and-purpose>) The CAUT policy is located at <http://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom> .

¹⁵ AUCC membership criteria do not specify requirements for university or college acts of incorporation beyond proof of statutory (or similar legal) basis for corporate existence. For instance, the AUCC criteria explicitly include a requirement that there be a senate (or similar body) with jurisdiction over academic matters with elected academic staff among its members, but there is no explicit requirement that the existence, composition, or powers of the senate be legislatively protected through an act of incorporation. (<http://www.aucc.ca/about-us/member-universities/membership-eligibility/criteria-to-become-a-member/>)

¹⁶ MacKinnon states of AUCC, "the differences among its ninety-seven members are vast, and they challenge the potential for unified voice and collective action." Op. cit., p. 67.

commissioned jointly by AUCC and CAUT. Acts of incorporation with stronger collegial rights provisions were developed at universities where there was a strong faculty association and a well-developed faculty of law. UNB illustrates this: in 1968 when the *UNB Act* was modernized and its unicameral governance structure converted to bicameral, AUNBT had been in active existence for 15 years. The Act revision of 1968 was drafted by law professor George McAllister who in the same year was Vice-President of CAUT and a few years later was appointed Dean of his Faculty.

In contrast to the *UNB Act*, the much shorter acts at York University (1965) and Mount Allison University (1993) are weaker on collegial rights (for example, in regard to faculty councils or senate involvement in presidential searches). In 1965 York was in its early stage of development – it was founded in 1959 – and it did not have a Faculty of Law until the early 1970s when the Osgoode Hall Law School became affiliated. Mount Allison has never had a law faculty.

In British Columbia, the major universities including the University of British Columbia (UBC) are covered by the *University Act*, which has several collegial rights provisions similar to those in the *UNB Act*. For instance, both acts have sections setting out powers of faculty councils, Sections 40-42 in the BC case and Sections 46-49 in the UNB case. UBC is the original provincial university in its province, with origins somewhat parallel to those of UNB. Although it was established more recently than UNB, UBC has long had a strong faculty association and a well-developed law faculty. Of special note is that the BC *University Act* goes beyond the *UNB Act* and most other Canadian university acts in protecting collegial rights: it expressly prohibits interference by the Minister in academic matters, as set out in Subsection 48(1).

The Duff-Berdahl report emphasized the importance of Senates with powers to set and maintain academic standards. A specific recommendation was that “the majority of the Senate should be elected by the faculty from the faculty.”¹⁷ This was realized at some universities but not at others, and the variation can be illustrated by examples. At Dalhousie University, “the number of elected members from the Academic Units shall be at least three times the number of ex officio academic administrators who sit as Senators.”¹⁸ At UNB, on each Senate the total number of elected faculty members must be equal to the total number of all other members, excluding the President, under section 30 of the *UNB Act*.

The governance structure of the University of Toronto after the Duff-Berdahl report has been an exception, in that it was converted from bicameral into unicameral with a single Governing Council as the analogue of a combined board and senate, in charge of both financial and academic matters. Moreover, the number of elected faculty members on the Governing Council is a minority, 12 out of 50, under Subsection 2(2) of the *University of Toronto Act* (RSO, 1971 as amended 1978, c. 88).¹⁹

¹⁷ Sir James Duff and Robert O. Berdahl, *University Government in Canada* (Toronto: University of Toronto Press, 1966), p. 29.

¹⁸ Dalhousie University Senate Constitution, Subsection 2.1 (b).

¹⁹ The relatively small faculty representation on the Governing Council was the result of complex political manoeuvring among faculty, students, administrators, and the Ontario government in the years immediately following the Duff-Berdahl report. See David M. Cameron,

Another important collegial right is that of Senate involvement in the search for a president. Both the *UNB Act* and *An Act respecting the University of Western Ontario* (SO, 1988, c. Pr26 with subsequent amendments) have provisions that require the search be conducted by a joint parity committee of the Board and the Senate: three Senate members and three Board members in the UNB case (Subsection 19(3) of its *Act*), five members appointed by the Senate and five members of the Board in the Western case (Subsection 19(a) of its *Act*).

Conclusion

The *UNB Act* is not anomalous in the Canadian context. Its collegial governance rights provisions have parallels in acts governing a number of other Canadian universities, and they have always served the University community and the public interest well. We must defend these rights in order to ensure their continued legislative protection. In a context where neoliberal ideology is remaking the university in the corporate image, collegial rights are being undermined. However, as often in the past, coordinated and democratically organized resistance can be effective in defence of rights.