jlt

James L. Turk
303-1941 Queen Street East
Toronto, Ontario M4L 1H7
jim@jameslturk.com

October 27, 2016

Dr. Carolyn Sale
President
Association of Academic Staff University of Alberta
1901 College Plaza
8215-112 Street
Edmonton, Alberta T6G 2C8

Dear Carolyn:

I have reviewed the October 21, 2016, submission of the presidents of the University of Alberta, the University of Calgary and the University of Lethbridge to the Minister of Advanced Education for the Post-secondary Education Labour Relations Model Review. Their position is disturbing. It is harmful to the interests of academic staff, and, if adopted, would entrench the disadvantageous position of academic staff in Alberta for another decade at least.

Academic staff in Alberta have fewer rights and protections than their colleagues in every other province in Canada. This is because they and their academic staff associations operate under legislation that is a universities act to which an incomplete, anti-democratic, and biased labour relations regime has been grafted. The labour relations aspects of the *Post-Secondary Learning Act* (*PSLA*) are sufficiently flawed that one part has made the legislation unconstitutional – which is the reason the Government of Alberta is undertaking the current consultation on the future of labour relations in the post-secondary sector.

This is an opportunity for academic staff in Alberta to gain the rights and protections available to all other academic staff in Canada. The remedy is simple as the model is in place in all nine other provinces. But the submission of the three university presidents advocates entrenching the worst aspects of the *PSLA* and, if anything, diminishing further the rights and protections of academic staff in Alberta.

First, I will point out some of the problems with the *PSLA* and then address the presidents' submission.

The *PSLA*

The problems with the *PSLA* are several:

- Unlike labour relations acts in the rest of Canada and the *Labour Relations Code* in Alberta, the *PSLA* denies each academic staff association the right and autonomy to structure their organization in a democratic manner that suits their circumstance. Should you wish, I would be happy to provide a more detailed discussion of how the *PSLA* denies academic staff associations democratic rights.

- The *PSLA* gives the employer the unilateral power to determine whether an employee is allowed to be a member of the academic staff association. This provision is without parallel anywhere else in the post-secondary sector in Canada.

- While the *PSLA* provides for resolution of disputes concerning the interpretation and application of a collective agreement, arbitrators under the *PSLA* do not have statutory powers to do necessary things such as compel the attendance of witnesses and order them to produce relevant documents.

- The *PSLA* fails to provide a statutory duty to bargain in good faith, no compulsory freeze of terms and conditions of employment during contract negotiations, and no protection for association officers or for members whose activities on behalf of their association may be disliked by the institution`s administration.

- The *PSLA* also fails to protect individual academic staff by imposing a statutory duty of fair representation on their academic staff associations. As a result, an association member who feels their concerns have been dealt with in an arbitrary or discriminatory manner only has an option to launch an expensive court action which affords limited remedies, not including reinstatement.

- Then there is the deficiency in the *PSLA* which has made it unconstitutional – denying to academic staff of the right to strike.

As an ersatz labour relations act, the *PSLA* falls short in many other ways. This is not surprising. Provincial labour relations acts, including the Alberta *Labour Relations Code,* are designed to deal with the complexities of labour relations *irrespective* of sector – setting out a framework to balance the powers of the parties, ensure fairness and the efficient resolution of differences while respecting the uniqueness of different sectors. Through many decades of practice, provincial labour relations acts have been modified and amended to better achieve these ends. Sticking a few labour relations

provisions onto a universities act, as has happened with the *PSLA*, can never be an adequate alternative for ensuring a comprehensive, fair and efficient labour relations regime within the post-secondary sector.

The Presidents' Submission

The submission of the three university presidents on behalf of their institutions recommend continuation of the status quo insofar as possible, some changes that will further weaken academic staff 's and their associations' rights, as well as a minimal number of positive changes to help ensure constitutionality.

In their submission, the presidents reach back forty years to the bogus arguments university administrations used when academic staff associations first began seeking their rights to be covered by provincial labour relations legislation.

For example, the presidents assert, "A successful labour relations model for Universities must embrace a collegial governance system while recognizing that the Board of Governors and administration at the Universities oversee the overarching strategic direction and operation of the Universities...Universities operate through a collegial governance model that distinguishes each of their academic workplaces from those industrial sectors regulated by the *LRC*." This is followed by a disquisition on collegial governance, an argument they make repeatedly throughout their submission, suggesting collegial governance is somehow inconsistent with labour relations law. It is not, as is empirically shown by the fact that almost every university in every other province operates under their province's labour relations act while maintaining as vibrant collegial governance as exists in Alberta universities. The claim that collegial governance and labour relations acts are antithetical is disingenuous.

The presidents dredge up another canard: that were post-secondary labour relations to be governed by proper labour relations law there would be increased conflict. Again, we have forty-six years of evidence showing this simply has not been the case. The degree of conflict between academic staff associations and administrations has had no relationship to the governing labour relations regime. It has more to do with the policies and practices of the administration than anything else, as is acknowledged by the old management cliché, "An employer gets the union it deserves."

In their efforts to entrench current archaic practices, the presidents' submission argues strongly that boards of governors should retain the right to determine which of their employees are entitled to be members of the academic staff association and that that right "should be maintained without the addition of an appeal process." That the university determines who is *hired* is without question and universal. But that the board should then determine whether each employee can be a member of the academic staff association ("designation") is without parallel. It is not the employer's business to have control, much less sole control, of each employee's representation rights – nor are post-secondary employers given that right in any other jurisdiction in Canada. The presidents' meandering justification for denying their staff's basic democratic rights (see Section 5 of their submission) is based on demonstrably false claims that to do otherwise would infringe on institutional autonomy, would add unnecessary confusion and complexity and could jeopardize pension eligibility.

Equally falsely, they claim that excluding administrators at the level of dean and above from the bargaining unit is "inconsistent with collegial governance." They simply ignore the fact that managerial exclusion from the bargaining unit is universal practice in universities outside Alberta as well as some in Alberta and has had no negative effect on collegial governance.

Curiously, on matters for which the presidents take a good position, the *Labour Relations Code*: protects what they propose:

- "There are no subjects involving the terms and conditions of employment that should be excluded from collective bargaining and placed under a specialized process. Comprehensive bargaining of all issues involving the terms and conditions of employment promotes meaningful collective bargaining."
- Fixed term collective agreements
- Mechanism providing notice to begin bargaining
- Mandatory mediation and a cooling off period during bargaining
- A mechanism to make unfair labour practices complaints
- Access to the Labour Relations Board to deal with duty of fair representation complaints

One of the most dangerous parts of the presidents' submission is their position on essential services legislation (See Part 2 and Part 13). The effect of "essential services" designation is to deny to those so designated various rights including the right to strike. In the Supreme Court case [*Saskatchewan Federation of Labour v Saskatchewan*] that triggered the current review of Alberta post-secondary labour relations, the Court found that Saskatchewan's *Public Sector Essential Services Act*, with the broad leeway it gave the province to designate employees as "essential", was an unwarranted and unconstitutional interference with the right to strike and the right to collective bargaining.

The presidents in their submission are ignoring how this matter is handled in universities across the rest of Canada and implicitly, if not explicitly, seeking a regime where it would be possible to designate a large number of academic staff as "essential", thereby denying them their labour relations rights.

The presidents' argument begins by saying that the legal definition of essential services ["the interruption of which would endanger the life, personal safety or health of the public, or that are necessary to the maintenance and administration of the rule of law or public safety"] is too narrow to apply in the university. The conclusion from the next several pages of their submission is that a very substantial number of academic staff must be deemed essential and lose their rights. The presidents go so far as to imply, because a strike could be damaging to students, that potentially all faculty should be deemed essential. Were their position to be legislated, it is almost certain it would be found to be unconstitutional.

Although, given the number of rounds of collective bargaining in Canadian universities, strikes are rare, there have been a number, and all of the concerns laid out by the presidents have been successfully handled without the need for essential services provisions. In every case in Canadian

post-secondary labour relations history, protection for research that needs continuous maintenance has been assured through strike protocols that allow researchers to protect their ongoing research. The same protocols have allowed for the maintenance of any university systems that require attention during the strike or lockout. Provisions have been universally made to ensure that grant and reporting deadlines are not missed.

With respect to academic staff in medicine, dentistry and nursing, their clinical obligations are dealt with under essential services legislation in relation to the health care facility where they practice and through the strike protocol insofar as their research or clinical duties require necessary activities at the university during a strike or lockout.

No student in a Canadian university has ever lost their term or their year because of an academic staff strike.

Conclusion

The presidents' submission is a self-serving, misleading, and often factually incorrect document that, if accepted by the Government of Alberta, would further disadvantage academic staff. I encourage AASUA to make this known to the Government so it is not misled by the three biggest universities' presidents. A universities act is important, but nowhere has it ever been a suitable vehicle for governing labour relations in the post-secondary sector. However much it is amended, unless the *Labour Relations Code* is appended to it, it cannot offer the full range of provisions necessary for a fair and efficient labour relations context.

There is only one problem, and it is a serious one, with the *Labour Relations Code* were post-secondary labour relations to be brought under it, and the presidents failed to mention it. This is the *LRC*'s exclusion of any member of the medical, dental, architectural, engineering or legal profession "employed in the person's professional capacity." If academic staff associations are to be brought under the *Labour Relations Code*, the Government will have to amend it, ending the archaic exclusion for professionals teaching in universities and colleges, if not eliminating the exclusion altogether.

Other than this, there are only advantages for academic staff were post-secondary labour relations brought under the *Labour Relations Code.* If the presidents' erroneous statements are unchallenged, academic staff in Alberta will lose this unique opportunity to gain the rights that their colleagues in the rest of Canada have enjoyed for years.

Sincerely,

James L. Turk