Faculty and Graduate Students Labour Relations Model Review

DISCUSSION GUIDE

2016

ACIFA Copy

After extensive consultation, the positions taken in this document reflect the overwhelming majority of ACIFA members' opinions. Please see our responses following in red under each question.

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Table of Contents

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Introduction and invitation to submit feedback

This discussion guide seeks stakeholder feedback on labour relations in Alberta for faculty and graduate students. The guide contains five topic areas with questions in each one on which we need your input. We look forward to your responses on these topics and any additional feedback you may have. For your reference, there is a glossary of terms at the end of this document.

Advanced Education welcomes all feedback in response to this document. Your input is valuable and will be considered as part of the process of developing recommendations to Cabinet. The **deadline for written submissions is October 17, 2016**. Please direct your submissions via email to the address below.

If you have any questions about the consultation or this discussion guide please contact:

Post-secondary Labour Relations Consultation
Alberta Advanced Education
780-422-0512
PSLALabourConsultation@gov.ab.ca

Ways to get involved

The Government of Alberta is collecting feedback multiple ways:

Online

Impacted stakeholders are invited to take a survey which is available on the consultation website. For more information, please visit: http://PSLALabourRelations.alberta.ca/.

In-person

Details about scheduled in-person meetings with stakeholders can be found on the consultation website.

In addition, if you wish to meet with department staff to discuss issues in more detail, please contact the Post-secondary Labour Relations Consultation, Advanced Education at 780-422-0512 or PSLALabourConsultation@gov.ab.ca to arrange a mutually convenient time.

FOIP NOTICE

Advanced Education is collecting personal information in this survey under the authority of section 33(c) of the *Freedom of Information and Protection of Privacy Act* (FOIP), for the purposes of informing changes to the post-secondary labour relations model in Alberta. The use and disclosure of your personal information is managed in accordance with FOIP. If you have any questions about the collection or use of this information, please contact the Manager, FOIP Coordination, 5th Floor, Phipps-McKinnon Building, 10020 – 101A Avenue, Edmonton, Alberta, T5J 3G2 or by telephone at 780-422-1029.

Objective

This consultation seeks stakeholder feedback to inform options for potential legislative amendments for collective bargaining in the post-secondary sector. This includes parameters on the right to strike and the implementation of this right in the post-secondary sector. Consultation with affected institutions and employees is important to ensure implementation in a way that respects the distinctive character of post-secondary education. This further round of consultation will also allow individual faculty members and graduate students to provide their own feedback, separate from their associations, which was not obtained during the fall 2015 essential services consultation.

Desired outcomes

- Aligning the post-secondary labour relations model with the decision of the Supreme Court of Canada (see below for the decision).
- Ensuring the protection of the public interest by mitigating potential impacts of strikes and lockouts.
- Developing a well-functioning labour relations model that contributes to the provision of quality, accessible and affordable post-secondary education.
- Ensuring all stakeholder perspectives are considered during the development of this new model.
- Ensuring a smooth transition to and implementation of a new labour relations model.

Background

Charter-protected right to strike

In January 2015, the Supreme Court of Canada released its decision in *Saskatchewan Federation of Labour v. Saskatchewan* (SFL decision). In this decision, the court found that the right to strike is fundamental to the collective bargaining process and is constitutionally protected under section 2(d) (Freedom of Association) of the *Canadian Charter of Rights and Freedoms*.

The Supreme Court found that employees' right to withdraw labour when collective bargaining negotiations break down is critical to a meaningful process of collective bargaining; however, the Court also said that many employees in the public sector provide essential services. The maintenance of these essential services during a work stoppage is a proper concern for governments and public sector employers. The right to strike may be restricted to ensure essential services are provided, so long as the right to strike is restricted no more than is necessary to achieve that goal.

Previous consultation with post-secondary stakeholders

In the fall of 2015, following the SFL decision, Advanced Education consulted with academic staff associations, graduate student associations and public post-secondary institutions about how to implement the right to strike given the unique nature of the post-secondary sector.

A discussion guide with proposed options and questions was distributed on behalf of the Minister of Advanced Education to the boards of governors of public post-secondary institutions and to faculty and graduate students associations.

Department staff met and discussed the proposed options with a number of stakeholders. Stakeholders were also asked to provide feedback on essential services legislation.

Undergraduate students' associations were also asked to provide feedback on the potential impact of strikes and lockouts on students at public post-secondary institutions. An online public comment form was available on the essential services consultation website during the month of October 2015.

Fall 2015 consultation outcomes

The general consensus among consulted stakeholders was that if the government decided to amend the PSLA by March 31, 2016, it should take a minimalist approach and only amend the Act to ensure it aligns with the SFL ruling. Stakeholders were amenable to broader amendments on a longer timeline should further consultation take place.

Topics that arose during the discussions included:

- **Collegial governance**: institutions as well as faculty and graduate students associations expressed a strong commitment to collegial governance. Advanced Education heard making changes to the labour relations model could adversely impact collegial governance within the sector.
- **Academic freedom**: academic staff associations strongly emphasized the need to protect academic freedom. They argue that academic freedom is currently protected through collective agreements and it is important to ensure that such protections are not diminished by changes to legislation.
- **Management exclusions**: there is a lack of solid distinction between managers and employees among academic staff members.
- **Designation of academic staff members**: designation by the board of governors impacts who is or is not a member of the faculty association.
- **Statutory designation of academic staff associations**: statutory designation of faculty associations as the sole bargaining agent for all academic staff members does not allow academic staff members to choose representation by a different association or by a trade union (although they can vote on the members of the association's executive).
- **Academically employed graduate students**: graduate students are increasingly performing teaching functions within universities and expressed concerns about their ability to negotiate the terms and conditions of employment. The graduate student experience is more transient than that of other employees. They are employed to do work but they are also students with academic responsibilities and their academic program may be disrupted by a work stoppage.
- **Smooth transition**: ensuring a smooth transition to a labour relations model that includes the right to strike or lockout.

Upon completion of the fall 2015 consultation, Advanced Education worked with the Ministry of Labour and Mr. Andrew Sims, Q.C., who is a labour relations expert, to determine how to move forward. The Government of Alberta decided not to include amendments to the PSLA in the spring 2016 legislative session and instead to consult further with the post-secondary sector. For further information on the

2015 consultation, you can go to: https://work.alberta.ca/documents/essential-services-psla-what-we-heard.pdf.

The current labour relations framework

The PSLA requires academic staff associations and graduate students' associations to negotiate collective agreements with the board of governors of their respective institutions. These agreements govern the terms and conditions of employment for all the association's members. Agreements must contain provision for the negotiation of future agreements and provisions for the settlement of disputes (rights arbitration) during the lifetime of the agreement.

In most cases, the PSLA requires that binding interest arbitration be used to settle collective bargaining disputes at public post-secondary institutions (the exception are academic staff members at Alberta's four comprehensive academic and research institutions (CARIs): University of Alberta, University of Calgary, University of Lethbridge and Athabasca University). Binding interest arbitration means strikes and lockouts are prohibited. Instead, a neutral third party arbitrator resolves the dispute after hearing arguments from both sides.

All academic staff members and graduate students employed as instructional staff by public post-secondary institutions are exempted from the *Labour Relations Code*, which governs labour relations in the private sector, including at Alberta's independent academic institutions. They are also exempted from the *Public Service Employee Relations Act*, which governs labour relations in much of the public sector, including the non-academic staff members at Alberta's public post-secondary institutions. Postdoctoral fellows are not explicitly addressed in any current legislative framework.

Post-secondary labour relations in other jurisdictions

In other Canadian provinces, academic staff members are usually governed by the equivalent of Alberta's Labour Relations Code, through voluntary recognition or formal certification. Academic staff members normally have a right to strike and post-secondary institutions have a right to lockout their academic staff. Being governed by a labour code also gives employee associations and employers access to a labour relations board to settle a variety of disputes, such as bargaining in bad faith and other unfair labour practices. In Alberta, academic staff members at the five independent academic institutions (e.g. Concordia University of Edmonton) are already governed by the Labour Relations Code.

Unique aspects of post-secondary labour relations

Labour relations in the post-secondary setting has some unique aspects. In Alberta, the PSLA provides what can be described as an open labour relations model providing much discretion to boards and faculty/graduate student associations to negotiate and develop a collective agreement. For example, the parties have significant discretion over what to include in bargaining. There are also a range of employment agreements that exist within faculty associations of institutions such as with sessional and full time instructors, contractors and temporary staff. This will be considered further when discussing bargaining agent status later in the Discussion Guide. The PSLA does not provide some of the elements common in other legislative frameworks, such as set timelines for collective bargaining or protections

for employee/management rights. As a result, collective agreements at Alberta's public post-secondary institutions have developed over time to address some of these items.

Academic staff members and graduate students are employees but they also play a significant role in the governance of their respective institutions. They share some of this governance role with the board of governors and the administration. Traditionally, faculty make decisions about issues such as research and instruction through their involvement in academic decision-making bodies like general faculties councils or academic councils. The administration has authority over other areas, including finances and student affairs.

Post-secondary institutions, and the education they offer, depend for their success on their reputation for quality within Alberta but also across the world. They are influenced by accreditation and recognition issues that transcend Alberta but which nonetheless sometimes influence both managerial and collective bargaining priorities.

These unique considerations have led to the historical evolution of collective agreements in the post-secondary sector. They require further consultation to determine the impact of, and any adjustments necessary for the introduction of, the right to strike model in this sector.

2016 Labour Consultation

The Government of Alberta is conducting an additional round of consultation to determine the most effective post-secondary labour relations model. Below are the topic areas that require feedback:

TOPIC 1: Alberta's collective bargaining model

The Labour Relations Code, which regulates collective bargaining where strikes and lockouts are allowed, will provide useful context for any potential changes to the labour relations mode in the public post-secondary sector. Alberta's labour relations model, as outlined in the *Labour Relations Code*, has much in common with those used elsewhere in Canada including, in many cases, for academic bargaining units. A request for input on this model is set out at the end of this section.

Collective bargaining is the process by which trade unions or employee associations and employers negotiate a collective agreement governing the terms and conditions of employment for all persons within the bargaining unit. The term "association" is used in this paper since all bargaining agents in this sector are presently faculty associations or graduate students' associations.

Most collective bargaining models contain procedures for settling who is to act as bargaining agent, the process for negotiating new or revised collective agreement, and procedures for settling disputes that may arise during the term of an agreement (rights arbitration). Almost all such models also establish rules that govern labour relations generally and provide for a supervisory labour relations board equipped to resolve complaints about unfair labour practices and other process issues.

Based on the Supreme Court of Canada's SFL decision and the consultation that took place in fall 2015, the Government of Alberta is considering implementing a similar process for negotiating collective agreements for faculty and graduate students in the public post-secondary sector.

Strike/lockout process

A typical bargaining process using the strike/lockout model has a number of features including:

1. Fixed-term collective agreements
2. Notice to begin bargaining
3. Mediation and cooling-off period
4. Strike/lockout vote
5. Essential service agreements
6. Notice of strike or lockout

The objective of post-secondary collective bargaining is to establish a collective agreement between the association and the employer. This agreement must remain in effect for a fixed period or "term". It specifies the wages, benefits and other terms and conditions of employment for the employees it covers. This fixed-term collective agreement provides a period of labour peace. Strikes and lockouts are allowed only when a collective agreement has expired and then only after good faith bargaining using the following process has taken place.

Notice to begin bargaining

Collective bargaining usually starts when one party serves the other with a written notice to bargain. Under the *Labour Relations Code* model, if a collective agreement is in force, the notice to bargain must be served between 60 and 120 days before the existing collective agreement expires, unless the collective agreement specifies a longer period. The notice must include a list of the names and addresses of the bargaining committee of the side issuing the notice. The other party must respond with a similar list.

The association and the employer must meet and begin to bargain in good faith within 30 days after the notice is given. Bargaining may involve the negotiation of an initial collective agreement or, more often, the revision an existing agreement. The parties must exchange bargaining proposals within 15 days of this first meeting unless they agree on a longer period. Either party can require the other to tell them what ratification procedures are necessary for a binding agreement.

If bargaining remains ongoing after any existing agreements expire, the *Labour Relations Code* automatically extends the terms of that contract. This is called "bridging" which means that the terms and conditions of the existing agreement continue to apply so long as bargaining continues. Bridging ends when a legal strike or lockout takes place, the association's bargaining rights are terminated, or a new collective agreement is achieved.

Mediation and cooling-off period

After bargaining begins, several things must happen before a strike or lockout can occur. The parties must meet, exchange proposals, and discuss their mutual concerns in detail. If they cannot reach a settlement on their own, they must enter a period of bargaining with the help of a mediator. Once a mediator has assessed the situation and decided whether to issue a report, the parties to the bargaining must wait a 14-day "cooling-off period" before they can strike or lockout action.

Strike/lockout vote

Before a strike can take place, the bargaining agent must get the approval of the employees affected through a strike vote. An association must apply to the Labour Relations Board to have them supervise any strike vote. Similarly, an employer wishing to lock out its employees must apply to the Labour Relations Board for an employer poll.

Strike votes democratically determine whether a majority of the employees are prepared to strike. Under the *Labour Relations Code,* a strike vote remains valid for only 120 days so that strikes do not take place too long after the employees have had a chance to express their views. When an application to supervise a strike or lockout vote is received, the Labour Relations Board appoints a supervising officer who reviews the applicants' proposed voting procedures, and may attend during the vote and be present at the counting of the ballots. The Labour Relations Board's role is supervisory. The vote is actually conducted by the party requesting the vote.

Essential Services Agreements

As described below, the Government of Alberta recently adopted a strike and lockout model for bargaining units previously subject to a mandatory arbitration model. This new model requires negotiation of an agreement that will ensure that during a work stoppage essential services will be maintained.

Strike/lockout notice

The final step before a strike or lockout can take place is giving notice of the time, date and initial location of the intended action. To be effective, the notice must be properly served on the other party at least 72 hours in advance of the proposed strike or lockout. The notice must also be served on the mediator. The purpose of the notice is to give the other side advance warning of the strike or lockout action so it can prepare. It also gives a last minute opportunity to try to find a settlement before strike or lockout action begins.

Other Labour Relations Code features

Unfair labour practices

Typically, labour legislation gives employers, associations and employees the ability to make a complaint regarding unfair labour practices to the Labour Relations Board, which has the power to order a person to do or refrain from doing something and to assess penalties. Examples of unfair labour practices include failure to make every reasonable effort to enter into a collective agreement or punishing an individual for exercising a right under the legislation.

Duty of fair representation

Another common feature of labour legislation is the ability for a member of an association to complain to the Labour Relations Board alleging that the association has failed to provide fair representation in matters arising out of the collective agreement.

Currently, the PSLA does not provide faculty or graduate students with any similar opportunity. A faculty member wishing to make a complaint about unfair representation can only do so through the Courts; a more expensive and time consuming process than a complaint to the Labour Relations Board.

Voluntary binding arbitration

Under the Labour Relations Code, when both parties agree in writing, a dispute can be submitted to voluntary binding arbitration. One side cannot submit a dispute to arbitration without the consent of the other. Often, in a difficult dispute, one side will resist such a step. The Minister of Labour can be asked to make the necessary appointments if the parties cannot agree on an arbitrator. The parties can choose one or three-person arbitration. The arbitration board will hold a hearing into the dispute, listen

to submissions then decide on terms and conditions for a collective agreement that will bind both parties.

QUESTION ABOUT ALBERTA'S COLLECTIVE BARGAINING MODEL

1. ***In your opinion, is there anything problematic or do additional factors need to be considered in implementing the labour relations model described above in the public post-secondary sector?***

In general, the model described above is appropriate for the post-secondary environment. It should be noted that many aspects of this model – except the procedures for strike/lockout – are already covered in the collective agreements of ACIFA members.

The nature and uniqueness of post-secondary education is such that it should have its own labour relations arrangements - preferably within the PSLA or as a separate section in the labour code. What makes the post-secondary learning (PSL) sector unique is firstly the dual nature of the task of workers, i.e. in our sector faculty members wear more than one hat. They are employees (Professors/Instructors) but also have academic governance responsibilities (such as program chairs or members who serve on governance councils). This dual nature characteristic is present in a few other public sector occupations too, such as police and teachers. The second unique side to our sector is that it has collegial governance at its core. These distinctive characteristics (dual nature of employment and collegial governance) of the PSL sector justify a unique approach to labour relations within the PSLA or within a separate section of the labour code.

In addition, while the model described above is appropriate for the post-secondary environment, **the implementation** of this model will have to account for the fact that employees in this sector have not had the ability to strike since 2003. ACIFA members' collective agreements currently have arbitration provisions in addition to the arbitration provisions in the existing PSLA. Therefore, a transitional process that provides for an orderly and stable transition from a no-strike regime to one in which strikes are allowed will be critical. The process that must be followed before a strike or lockout may be called have to be set out clearly. Order and stability will mostly derive from the clarity of the legislation and by allowing an **appropriate amount of time for the transition**.

The Labour Relations Code can be extended to post-secondary institutions by extending the application of the Code itself. Alternatively, specific provisions in the Labour Relations Code can be imported into a new PSLA. Administratively, it might be easier to extend the application of the Code to the post-secondary environment with modifications to reflect the unique features of the post-secondary environment, including the dual role of instructors (teachers and "managers"), the collegial governance model and the importance of academic freedom. **However, importing the appropriate labour code provisions into the PSLA will likely be less disruptive.**

The PSLA addressed both labour issues as well as governance

In a properly functioning bicameral system, academic councils have the majority of the say in academic matters, while the board of governors (BOG) has the majority of the say in administrative matters.

The PSLA currently states that academic councils "…shall make recommendations to the board with respect to any matter that the board refers to the academic council**" (p. 36 PSLA). In other words, academic councils currently have no more than an advisory role on matters which the boards refer to them.**

ACIFA recommends strengthening the authority of academic councils by incorporating similar language to what BC has in their College & Institutes Act. The BC act requires that boards **must consult** the academic council on the development of educational policy for the following matters:

> (a) the mission statement and the educational goals, objectives, strategies and priorities of the institution;
>
> (b) proposals about implementation of courses or programs leading to certificates, diplomas or degrees, including the length of or hours for courses or programs;
>
> (c) reports after implementation by the institution without prior review by the education council of
>
> (i) new non-credit programs, or
>
> (ii) programs offered under service contract;
>
> (d) priorities for implementation of new programs and courses leading to certificates, diplomas or degrees;
>
> (e) cancellation of programs or courses offered by the institution or changes in the length of or hours for courses or programs offered by the institution;
>
> (f) evaluation of programs and educational services;
>
> (g) policies concerning library and resource centers;
>
> (h) setting of the academic schedule;
>
> (i) policies on faculty member qualifications;
>
> (j) adjudication procedure for appealable matters of student discipline;
>
> (k) terms for affiliation with other post-secondary bodies;

(l) consultation with community and program advisory groups concerning the institution's educational programs;

(m) qualifications for admission policies;

(n) criteria for awarding certificates, diplomas and degrees;

(o) other matters specified by the board.

The board must consult academic councils on any of the matters mentioned above at least 10 working days before the board will deal with the matter.

Powers/responsibilities of the academic council

The composition and election of the academic council must be clearly defined. Academic council members must be elected by the faculty from their own ranks. Term limits must be set on how long academic council members may serve.

Academic council has the power and duty to do all of the following:

(a) set policies concerning examinations and evaluation of student performance;

(b) set policies concerning student withdrawal from courses, programs and the institution;

(c) set criteria for academic standing, academic standards and the grading system;

(d) set criteria for awards recognizing academic excellence;

(e) set policies and procedures for appeals by students on academic matters and establish a final appeal tribunal for these appeals;

(f) set curriculum content for courses leading to certificates, diplomas or degrees.

Joint responsibilities of boards of governors and academic councils

To be implemented, decisions concerning the following matters must have joint approval:

(a) Curriculum evaluation for determining whether

(i) courses or programs, or course credit, from another institution, university or other body are equivalent to courses or programs, or course credit, at the institution, or

(ii) courses or programs, or course credit, from one part of the institution are equivalent to courses or programs, or course credit, in another part of the institution;

(b) other responsibilities of the board that it and the academic council agree are subject to joint approval.

An agreement under subsection (b) may be terminated by

(i) the board giving written notice of termination to the chair of the academic council, or

(ii) the academic council giving written notice of termination to the chair of the board.

If joint approval on a matter described in subsection (a) is not attained within 60 days of the board or academic council requesting the other to consider its proposal, the board or academic council may refer the matter to the minister. **(1996, Part 4)**

Composition of the board of governors (BOG)

ACIFA recommends that the composition of the board of governors (BOG) be revisited.

Under the current legislation the composition of the board of governors (BOG) for colleges and technical institutes is stipulated under part 2 sections 44(1) and (2) of the act on pages 34-35. **ACIFA strongly recommends that new legislation allows for more diversity in board composition and specify that a skill matrix for BOG members' appointment needs to be agreed to by FAs as well as academic councils of each institution.** The composition of the Board of Governors is very significant as its decisions powerfully influences the academic process. Members on that board need to be sufficiently exposed to or informed about the characteristics of and issues pertaining to academic life.

TOPIC 2: Essential Services Legislation

The Legislative Assembly of Alberta recently passed essential services legislation for specific public sector employees, which came into force in May 2016. It represents a fundamental change in public sector labour legislation for Alberta since it removes the prohibition on strikes and lockouts for most public sector bargaining units. This legislation defines essential services as those whose interruption would endanger the life, personal safety or health of the public, or those necessary for the maintenance and administration of the rule of law or public security. This essential services legislation thus allows strikes and lockouts by public sector workers, while still requiring 'essential' public services to be available during labour disruptions.

Determining what services are essential and which employees are required to provide those essential services is something that must be negotiated in advance by the employer and union as part of their essential services agreement. In cases where the parties are struggling to reach an agreement, they can bring in "umpires" to adjudicate the dispute. The newly appointed essential services commissioner may grant an exemption from the requirement to negotiate an essential services agreement, but only if there are no or few employees in the bargaining unit performing essential services.

2. ***Should faculty members and graduate students be subject to the essential services legislation? Why or why not? Is there anything further that needs to be considered on this issue?***

"Essential" in this context refers to the possibility of real damage, not to mere hardship. Given that definition, it is difficult to foresee all of PSE being declared part "of "essential services". It might be that certain sub-sections of academics, such as the people responsible for animals in a research study or delicate equipment that requires regular oversight (e.g. a nuclear reactor) would be essential. Should it happen that PSE in its entirety be declared as essential services, then the institutions and the bargaining agents would simply have to file with the Commissioner for exemptions from the legislation.

TOPIC 3: Bargaining Agent Status

What organization can be the bargaining agent and can that change?
The PSLA establishes one faculty association at each institution and one graduate students' association at each Comprehensive Academic and Research Institution. These associations are currently given the exclusive right to represent their members (the people in their bargaining unit) for the purposes of collective bargaining. Graduate students' associations represent all graduate students, including those who are not employed by the board of governors. Members are able to vote for the association's executive, for constitutional changes and on bargaining issues, but they cannot choose a different entity (such as a trade union or another association) to represent them in collective bargaining.

A similar approach is used for police officers under the *Police Officers Collective Bargaining Act* and for teachers under the *Teaching Professions Act*. Both groups have employees whose professional obligations set them apart from traditional employees. When the *Public Service Employee Relations Act* was passed, the legislation "deemed" the Alberta Union of Provincial Employees to be a certified bargaining agent for the public service.

This may be contrasted with the model for faculty members in some other Canadian jurisdictions, where employees have the right to vote for a different representative for collective bargaining. There may also be more than one association representing different groups of faculty members if the Labour Relations Board considers it appropriate. For example, sessional faculty are sometimes represented by a different association than tenured faculty. There may also be a vote to "decertify" if the members feel the association is inadequately representing their interests.

Statutory designation for faculty and graduate students' associations

Two options for determining the bargaining agent for faculty members and graduate students include:

(a) Status quo: current associations continue to be established as exclusive bargaining agents by legislation
(b) Deemed certification of current associations as bargaining agents, but subject to change based on member choice

3. ***What are your thoughts on which approach is best for determining the bargaining agent for faculty and graduate students? What rationale is used to support your choice?***

An overwhelming majority of ACIFA's members prefer option (a), the status quo, because it allows academic staff associations (FAs) to exist as an integral partner of the governance and operation of post-secondary institutions (PSI). FAs are mandated in current legislation, and are not a mere afterthought. Legislation thus recognizes the important role academic staff play in student lives, the affairs of our institutions and in the betterment of Alberta. Removing statutory rights for FAs will profoundly change the culture of PSE institutions.

Statutory recognition has enabled the evolution of a collective bargaining framework that has served the post-secondary sector well. This evolution has been predicated on the statutory recognition of FAs. To change these established practices will be unnecessarily disruptive to staff, students and the institutions.

The statutory rights of faculty associations (FAs) have tempered a potentially adversarial relationship between management and faculty – one that can easily develop during a certification process. There are many examples in other provinces of the long-term damage done during the certification drive to the relationships between faculty and management. The process of certification (or decertification) can also interfere with the academic agenda of PSE institutions and lead to tremendous animosity amongst faculty members who have different opinions on whether unionization is a good idea or not.

Under the status quo, faculty members who are unhappy with the representation they are receiving from existing FA leadership have the democratic right to put forward an alternative election platform and be elected by faculty members to better represent them. What disgruntled faculty members cannot do is to organize a decertification drive that will dismantle the existing bargaining unit. Therefore, the status quo limits the amount of damage disgruntled FA members can do to the academic agenda of institutions.

Many civil servants in Alberta belong to associations that have statutory rights – the teachers' association (ATA) for example. If we lose our statutory rights we go out of sync with our civil servant colleagues in other areas.

Although not "essential" in the legislative sense, post-secondary institutions are important public bodies. It is in the interest of students, the institutions and the general public that stability and continuity be encouraged in publicly funded post-secondary institutions. The importance of stability and continuity extends to labour relations. While the Supreme Court's decision in the SFL case has clarified the rights of all non-essential employees to engage in strike action, stability and continuity can and should still be pursued in post-secondary labour relations. **As such, any new labour relations regime must recognize the established associations as the exclusive bargaining agents for their members.**

As with other publicly funded areas of employment with statutorily prescribed bargaining agents (police, firefighters, teachers, etc.), employee choice and employee associational rights in PSE are recognized and maintained through adherence to the internal democratic systems and rules contained in an association's bylaws and/or constitution. Members choose their leadership on a regular basis, provide input and direction to their leadership through general meetings and have a voice in the ratification of

collective agreements. There is no reason to suggest that existing post-secondary associations in Alberta are undemocratic and thus no compelling policy or other reason has arisen to alter their current status.

In addition to the continuation of the exclusive bargaining agent status of existing FAs referred to in (a), it may be argued that a new post-secondary labour relations regime has to include mechanisms to change bargaining agents, based on member choice. While employee choice is very important and employees should definitely have a say in how they are represented, this is best achieved through the internal democratic processes inherent in all post-secondary associations.

There is nothing inherently undemocratic about maintaining the current statutorily created bargaining agents. Although employees did not vote to support these associations when they were created, they are and have been composed of elected representatives from within the bargaining unit. Newly hired faculty members at post-secondary institutions also did not vote to have their association represent them, but that association has the exclusive right to represent such members.

Moreover, designated post-secondary bargaining associations are really just legislative expressions of the boundaries of bargaining units, limited to academic faculty at one institution. They are not expressions of preference for one association over another association. The association is simply the vessel to give effect to employee representation in a particular institution. Post-secondary institutions have no parent unions to whom they answer. Nor do they have to accommodate the interests of other bargaining units within their parent union in the development of policy, rules or in the representation of members. They simply give effect to the democratically expressed will of their members. The size of such bargaining units and their geographical dispersion would likely make a raid or revocation unattainable in practice.

4. Are there other approaches that should be considered?

Considering all the factors discussed in item 3 above, **the interests of students, institutions, members of associations and the public are best served by the stability and continuity that would be provided by a continuation of the current statutorily designated bargaining agents**. With respect to providing a mechanism to change or remove a particular association as bargaining agent, it is not at all clear that this will be either necessary or effective.

Scope of the bargaining unit

Who does the bargaining agent bargain for – the designation of academic staff and the exclusion of managers

Currently, the membership of an Association's bargaining unit is determined unilaterally by the institution's board of governors, which designates employees as academic faculty members and thus members of the association. Introduction of a new collective bargaining model might introduce a further factor based on the managerial status of persons within the bargaining unit. These two approaches are interrelated.

Under the PSLA, the membership of a faculty association is defined as "the academic staff members of the post-secondary institution". The PSLA gives the board of governors at each institution the power, after consulting with the faculty association, to designate individual employees or categories of employees as academic staff members, making them members of the faculty association. The PSLA does not provide for any right of appeal from a board's decision to designate or not designate an employee as an academic staff member.

In other jurisdictions there is a mix between board designation of faculty members (e.g. University of Toronto), General Faculties Council designation of faculty members (e.g. Universities in British Columbia) or collective agreement designation of faculty members (e.g. British Columbia's Colleges and Institutes). Under a *Labour Relations Code* model, it is generally up to the labour relations board to approve a high level description of the bargaining unit (e.g. "all faculty members") and then collective bargaining would be used to establish a more precise definition of who is covered and may include very specific inclusions or exclusions from the bargaining unit.

One option is to keep the current designation process but allow for designations to be appealed to a neutral third party.

5. **What are your thoughts on maintaining the board designation of academic staff members but providing for an appeal process?**

Subject to the important consideration below and in response to question 6, it might make sense to maintain the board designation of academic staff, but provide for an appeal process. This option would be the least disruptive. However, to make it fair, the appeal process should be referred to a neutral third party, agreed to by both FAs and management.

Currently the PSLA reads that "…after consultation with the FA, a designation may be changed…" {p. 34 par 42(2)(c)}. What constitutes "consultation" is not currently defined, but it should be defined in new legislation.

In the Alberta Court of Queen's Bench case of Lakeland College Faculty Association v. Lakeland College; 1995-11-03**, what the term "consultation" means** has been described in various sections as follows:
"…In this reference, I am of the view that the section is clear and unambiguous and that the word 'consultation' must be used in its common, everyday context which includes conferring about, deliberating upon, debating, discussing, and considering [33]. In other words, consultation must amount to considerably more than a form of lip service [34]. ….consultation will not require the full concept of natural justice which, in most cases, includes full disclosure, representation, a formal hearing, examinations under oath, cross-examination, and a final determination including written reasons for the decision [35]."
"…the minimum standard of consultation should not be less than a valid demonstration of good faith. [37]"

At the moment, the only part of the designation process that can be grieved by a FA is if "insufficient consultation" was done with the FA before the designation decision was made by the BOG**. Under the new legislation, FAs must have the right to appeal the designation decision itself - not only whether BOGs engaged in sufficient consultation or not.**

It is, furthermore, important that the law clearly states that the designation process must be an open and transparent one.

6. **Do you think the General Faculties Council should have a role in designation of academic staff members? Why or why not?**

In the interest of collegial governance, designation should be negotiated between the BOGs and faculty associations (FAs).

The BOGs may consult or seek advice from the academic council or GFC on designation. **However, academic councils or** GFCs cannot be a formal partner **to the designation decision because students form part of academic council and designation decisions lie outside their ambit. Designation is also an HR issue while academic councils or GFCs have authority over academic matters.**

7. **Is there some other body or mechanism other than the Labour Relations Board or General Faculties Council that is more appropriate to hear appeals from decisions to designate?**

Ideally, the board of governors and an FA should jointly be responsible for the designation decision, with the right to appeal the designation decision to an independent third party. **Who the independent third party is should be determined. Options are an independent arbitrator or the labour board or a tribunal consisting of representatives of post-secondary employers and employees. ACIFA has a slight preference for the arbitrator option because our sector had been served well by independent, well-informed, and highly regarded arbitrators in the past.**

ACIFA's position is for the Board of Governors and FA to be jointly responsible for the designation decision. However, if it is decided that the labour board has the final say on the designation issue, it is important that the board or appropriately delegated arbitrator be familiar with the post-secondary sector and call academics (people who understand the PSE sector and the academic process) as witnesses in a disputed designation. We accept that the labour board takes trouble to understand the idiosyncrasies of different areas of work and how each unique work environment affects the application of labour relations legislation. However, given that the post-secondary education sector has not resided under the labour board, calling on knowledgeable arbitrators and witnesses will be helpful - especially during the transition period.

8. **Please provide any other comments on this topic.**

Managerial Exclusions

Most labour legislation excludes employees who exercise managerial functions from inclusion within a bargaining unit. The application of this rule in the post-secondary environment is complicated because many faculty members are involved in the governance and management of their institution.

A general rule has emerged in other jurisdictions whereby faculty members at the level of Dean or higher are excluded from faculty associations, whereas department heads and lower are included. For faculty in other provinces, usually the collective agreement defines the line between management and employee.

Under the PSLA, there is no management exclusion and practice has varied widely amongst institutions. In some cases, even senior executives of the institution have been designated as members of the bargaining unit and the faculty association.

The Government of Alberta is considering giving the Labour Relations Board the capacity to hear cases where parties cannot agree on whether the degree of managerial functions exercised by a person is substantial enough to warrant exclusion from the association bargaining unit.

9. **Please provide your comments on the exclusion of managerial personnel from bargaining units.**

The only managerial personnel who might be excluded from the bargaining unit are those with ultimate hiring, firing and disciplinary authority (Deans and up). Faculty members, who move into front line supervisory positions should stay within the scope of the collective agreement (CA) because after serving in a supervisory position for a defined period they may return to the teaching group. That way, front line supervisors remain academics first, as opposed to managers. The academic missions of PSE institutes are better served that way. Academic leaders ask very different questions than managers such as "how can we optimize the development of intellectual capacity" as opposed to managers who ask "how can we minimize cost."

It should be noted that the dual nature of the tasks in our sector (described in the answer to question 1) also applies to Deans. It is not unheard of for a Dean to move back to the teaching group (and thus back into the bargaining unit) after serving as dean for a period of time.

At least one post-secondary institution has sub divided the faculty bargaining unit into a number of separate collective agreements, but each represented by the same Association.

10. **Should legislation specifically authorize the division of a bargaining unit into smaller units (e.g. librarians, teaching staff), and if so, in what circumstances and subject to what constraints, if any?**

ACIFA does not perceive any need for the legislation to specifically authorize the division of academic bargaining units into smaller units.

TOPIC 4: Scope of collective bargaining

What can the parties bargain over – if matters are excluded from bargaining, how are they to be resolved

Some current collective agreements have sought to ensure that certain terms covering academics not change under the pressures of collective bargaining, including protections for promotion, tenure and academic freedom. The current legislation does not explicitly set out topics that cannot be bargained. Moving to a right to strike requires consideration of whether there are topics that should be excluded from the collective bargaining process.

For example, California's *Higher Education Employer-Employee Relations Act* removes from the scope of collective bargaining a number of academic subjects such as admission requirements; conditions for the award of certificates and degrees; the content of courses, curricula, and research programs; and policies for appointment, promotion, and tenure.

11. **Are there any subjects (e.g. tenure, academic freedom, pensions) that would not be appropriate for collective bargaining?**

12. **If so, what are they? Please explain**

Although academic freedom and tenure are of bigger concern to universities, there are aspects of academic freedom that are important to the faculty at our colleges and polytechnics. **Therefore, it is important that legislation commits to academic freedom in a principled high-level statement. The particulars of what academic freedom means in the context of each institution should be determined through collective bargaining.**

At the moment ACIFA members belong to the LAPP or PSPP (which has never been part of collective bargaining) and these plans have served our members well. We recommend that this arrangement be kept in place. However, there are issues related to pensions that should be addressed. For instance, at the moment there is a 35-year contribution limit to the LAPP and PSPP pension plans. Due to changing demographics, long serving members (longer than 35 years) who might like to continue contributing to the pension plans are not allowed to do so due to the 35-year limit. In the interest of fairness to all members, this contribution limit should be addressed. As this and other similar issues are created by legislation itself, legislative change would be required to address them.

Even under the *Labour Relations Code* model, parties have successfully directed certain issues towards alternative methods of dispute resolution. One example involves deferring to companywide human rights or anti-harassment plans. The jurisdictional disputes process common in construction industry agreements is another example. A jurisdictional dispute is a disagreement over whether certain work falls within the scope of one trade or another. The construction industry has long had multi-union agreement to divert all such issues to special jurisdictional dispute plans. This is given legislative support by Section 202 of the *Labour Relations Code*.

13. **Would you like to see specific enabling legislation that allows certain topics like tenure, promotions, and statutory rights within the governance process or academic freedom to be subject to some alternative negotiation model, outside of the normal processes of collective bargaining?**
14. **If so, how should the scope of any special protections be defined?**
15. **If so, should it be required, or enabled with mutual consent?**
16. **How should any disputes about the scope of special protections be resolved so as not to impede free collective bargaining?**

These questions require further discussion and are dependent on what specific issues are removed from the scope of ordinary collective bargaining.

TOPIC 5: Phasing in of changes during a transition process

Currently, none of the collective agreements in the post-secondary sector obviously allow for a right to strike or lockout. Moving to a collective bargaining model with a strike/lockout process calls for an orderly transition. The transition may be easier for some aspects of a change than for others. For example, bargaining for newly included employees if the scope of a unit changes, or over new matters should the scope of bargaining change, may be difficult.

Options to transition might include:

1. Statutory reset option: setting a specific date on which all current compulsory binding arbitration provisions in collective agreements are reset and any collective bargaining that begins after that date would take place under the new strike/lockout process. Collective bargaining already in progress would still be subject to the old model, so there would no changes to the dispute resolution process in the middle of collective bargaining.
2. Allow the parties to agree upon an effective date or schedule for the transition, subject to some legislated maximum period.
3. Allow either party to apply to the Labour Relations Board or the Minister for approval of a transition plan, subject to receiving submissions from each party.
4. Some variation of Options 1 or 2 to allow additional time, subject to some maximum limit before changes to the scope of bargaining or changes to the scope of the unit take effect. This might be, for example, the term of the first collective agreement negotiated after the legislation becomes law.

17. **Please provide your comments on the transition process.**

Currently, all ACIFA members have binding arbitration written into their collective agreements. In the interest of a less disruptive transition, the new legislation should read as follows:

"If one of the parties prefers to relinquish binding arbitration as a conflict resolution mechanism and move to strike/lockout instead, a notice period must be given to the other party. The duration of this notice period should be one full negotiation cycle, or **five years**, whichever is longest." In other words, should a collective agreement (CA) with binding arbitration as conflict resolution expire today, the CA taking effect tomorrow cannot have strike/lockout as conflict resolution mechanism. There must be

sufficient notice given of the intent to change before it takes effect in order for both parties to have sufficient time to prepare and adjust to the new reality.

New legislation must allow for (and explicitly state) that existing collective agreements remain in effect until their expiry date. In addition existing FAs must be grandfathered.

Therefore ACIFA prefers option 4 from the list above.

Further Considerations

18. Is there anything else that should be considered as part of changes to the post-secondary labour relations model?

Next Steps

Collect stakeholders' feedback

Feedback will be collected from a variety of stakeholders including post-secondary institutions, faculty members, graduate students and other students. Written submissions to this document and online responses will be collected in response to this Discussion Guide over the late summer and fall of 2016.

Discussions

Stakeholder information sessions for a broader group of impacted stakeholders will be scheduled in Edmonton and Calgary. In addition, roundtable discussions will be hosted in the fall by Mr. Andrew C.L. Sims, Q.C. These discussions with a smaller group of stakeholders will be focused on developing recommendations for a new labour relations model and addressing outstanding stakeholder concerns.

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2016 Timelines

August - October

- Consultation begins
- Stakeholder Discussion Sessions held
- Written and online submissions accepted until October 17, 2016
- Analysis and preparation of feedback

October - November

- Round Table Discussions facilitated by Labour Expert Mr. Andrew Sims, Q.C. to validate and further discuss feedback received on Discussion Guide

November - December

- Feedback from Stakeholder and Round Table Discussions reviewed and analyzed
- Mr. Sims will deliver a report to the Government of Alberta in December containing advice and recommendations for a new labour relations model
- Decisions on legislative amendments made in 2017

Further details will be available at http://PSLALabourRelations.alberta.ca

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Appendix A – Glossary of Terms

Bargaining agent

A union or employee association that possesses the sole authority to act on behalf of all the employees in a particular bargaining unit. Under the PSLA, each faculty association and each graduate students association is a bargaining agent.

Bargaining unit

A group of employees appropriate for collective bargaining and represented by a single bargaining agent in collective bargaining with their employer.

Certification

Official recognition by the Labour Relations Board that a trade union is the exclusive bargaining representative for employees in a particular unit.

Collective agreement

An agreement in writing between an employer and a bargaining agent containing terms or conditions of employment.

Collective bargaining

Negotiation with a view to the conclusion of a collective agreement or the revision or renewal of a collective agreement.

Interest Arbitration

The process for having an independent third party resolve disputes about the content of a new or revised collective agreement. The results of interest arbitration are binding on both parties. Legislation may, and often in the past did, make interest arbitration mandatory. Now, more frequently interest arbitration will have to be voluntary, subject to the agreement of both parties.

Lockout

Includes the closing of a place of employment by an employer, the suspension of work by an employer, or a refusal by an employer to continue to employ employees, for the purpose of compelling the employer's employees to accept terms or conditions of employment.

Rights Arbitration

The process for having an independent third party resolve disputes about the meaning or application of an existing collective agreement. All collective agreements must have such a process and its results are binding on both parties

Strike

Includes a cessation of work, a refusal to work, or a refusal to continue to work, by two or more employees acting in combination or in concert or in accordance with a common understanding for the purpose of compelling their employer to agree to terms or conditions of employment.

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