UPEIFA
UNIVERSITY OF PRINCE EDWARD ISLAND
FACULTY ASSOCIATION

8 September 2022

The Honourable Bloyce Thompson
Minister
Economic Growth, Tourism and Culture
Prince Edward Island

Re: UPEIFA Conciliation Concerns

Dear Minister Thompson,

We are writing to you to raise concerns surrounding the conciliation process that you initiated at our request on August 10.

Summary of Bargaining

After significant consultation with our members on their bargaining priorities, late last year UPEI Faculty Association (UPEIFA) members voted unanimously to adopt the bargaining mandate that forms the basis of our bargaining proposals. Early this year, we notified UPEI Administration of our interest in negotiating changes to our collective agreement which was due to expire on July 1. This summer, we spent close to 100 hours at the bargaining table in an effort to reach a reasonable agreement that addresses our members significant concerns. Unfortunately, those meetings made it clear that our employer was largely comfortable with the status quo and was not interested in participating in a meaningful process of collective bargaining to improve our members' working conditions and our students' learning conditions.

As such, on August 5 the UPEIFA indicated that the parties had reached an impasse and formally requested that you appoint a conciliator to endeavour to bring about agreement between the parties (s.25). On August 10, you indicated that you had appointed Ms. Patricia McPhail as the conciliator to handle this matter and that her appointment would commence two weeks later on August 24.

On August 24, Ms. McPhail scheduled a 30-minute meeting with the UPEIFA negotiations team to explain her understanding of how conciliation would take place. At that time, she identified a number of dates that would work in mid-September. While she did not speak to her availability in October, she did indicate that on account of her unavailability in November it would be necessary to discuss December dates sometime in the future. This led us to conclude that Ms. McPhail views her role in endeavouring to bring agreement about between the parties as taking not the several weeks outlined in the *Act* but potentially several months or more.

University of Prince Edward Island Faculty Association
550 University Avenue, Duffy Science Centre, Rm 415, Charlottetown, PE C1A 4P3
T 902-566-0438 | F 902-566-6043 | office@upeifa.ca | *www.upeifa.ca*

We further confirmed this understanding in a meeting with Ms. McPhail on August 31. In response to our request for clarification on a conciliation officer's legislated reporting responsibilities (s.26), Ms. McPhail indicated that:

- with respect to the conciliator's ten (10) day deadline for reporting to you on the advisability of appointing a conciliation board or mediator to endeavour to bring about an agreement (s.26), it was her understanding that the first day of the deadline would not begin until both parties attended a yet to be scheduled joint meeting (s. 25).[1]

- you would likely be exercising your discretion to extend the ten (10) day conciliation reporting timelines (s.26). Although this is typically done verbally, she indicated you may be amenable to formalizing it in writing should you decide to extend the deadline.

- in many cases, the Minister extends the timelines indefinity and allows the conciliation officer to exercise their discretion as to when they will fulfill their legislated reporting obligation (s. 26).

Taken together, this leads us to the conclusion that despite the fact that the *Act* envisions a conciliation process that takes weeks rather than months, the government will likely be exercising its discretion to extend this process significantly beyond the legislated timelines. If this is accurate, we find this concerning for a number of reasons.

Collective Bargaining and the *Charter*

As you are no doubt aware, the guarantees outlined in the *Canadian Charter of Rights and Freedoms* serve as the cornerstone of our society. They embody a range of values from human dignity and equality, to liberty and the respect for autonomy that animate our democracy and our shared sense of purpose. In the labour relations context, the *Charter's* guarantee of freedom of association (s. 2(d)) ensures that workers are able to join together to exert a measure of control over the terms and conditions of their employment and their working lives more generally.

Since 2007, the Supreme Court of Canada has recognized collective bargaining as a fundamental right protected by the *Charter's* guarantee of freedom of association:

> *We conclude that s. 2(d) of the Charter protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues … What is protected is simply the right of employees to associate in a process of collective action to achieve workplace goals. If the government substantially interferes with that right, it violates s. 2(d) of the Charter.*[2]

[1] *Labour Act*, RSPEI 1988, c L-1, https://canlii.ca/t/55fl7

[2] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 SCR 391, para 19. <https://canlii.ca/t/1rqmf>

In the process of providing constitutional protection to the right to a meaningful process of collective bargaining, the Supreme Court also provided an interpretive framework for making sense of this right if various labour contexts. Departing from previous rulings, the Supreme Court made it clear that the guarantee of freedom of association should be approached in a **purposive and generous** fashion. The broad outlines of this approach were captured in Chief Justice Dickson's dissent in the *Alberta Reference*:

> *Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict*[3]

A central feature of this purposive/generous approach to freedom of association is the recognition of the inherent power imbalances that exist between workers and employers. So while the purpose of the guarantee of freedom of association includes protecting an individual's right to join with others to form an association and to participate in collective activity in support of other constitutional rights, freedom of association is also vital for enabling workers to work collectively with one another to meet their employers on more equal footing:

> *The purposive approach thus recognizes that freedom of association is empowering, and that we value the guarantee enshrined in s. 2(d) because it empowers groups whose members' individual voices may be all too easily drowned out.*[4]

Within this interpretative framework, legislation or government actions that either fail to protect or actively undermines efforts to ameliorate these imbalances may violate the guarantee of freedom of association and workers' right to a meaningful collective bargaining process. As the Supreme Court noted in a recent ruling:

> *A process that substantially interferes with a meaningful process of collective bargaining by reducing employees' negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d).*[5]

In addition to drawing the connection between workplace justice and *Charter* values, recent Supreme Court cases have also made clear the extent to which maintaining a balance between workers and employers –

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[3] *Reference Re Public Service Employee Relations Act* (Alta.), 1987 CanLII 88 (SCC), [1987] 1 SCR 313, para 87. <https://canlii.ca/t/1ftnn>

[4] *Mounted Police Association of Ontario v. Canada* (Attorney General), 2015 SCC 1 (CanLII), [2015] 1 SCR 3, para 55. <https://canlii.ca/t/gfxx8>

[5] *Ibid*. para 71.

particularly in the context of collective bargaining – is absolutely vital for securing an enduring and meaningful labour peace. Negotiated agreements between unequal parties are more likely to lead to resentment which can have deleterious consequences for the working environment. When workers' ideas for shaping and improving the workplace are disregarded by their employers or when they feel that they have no alternative to accepting term and conditions set by their employers, the workplace as a whole is likely to suffer.

In contrast, negotiated agreements that are the result of equal partners working together to address workplace issues inevitably contribute to an environment where workers are more likely to be invested in the workplace and committed to its success. While this certainly applies to a wide range of sectors, such investment is particularly important for post-secondary institutions where our working conditions are our students' learning conditions.

In summary, the Supreme Court has made it clear that government measures that disrupt the balance between workers and employers may constitute substantial interference with meaningful collective bargaining and may be indefensible on constitutional grounds.[6] [7]

The Right to Strike

While the 2007 Supreme Court ruling established that collective bargaining is protected by the *Charter*, it remained unsettled whether the same protections extended to workers' collectively withholding their labour as part of the collective bargaining process. In other words, is the ability to strike an essential part of collective bargaining?

In 2015, the Supreme Court finally weighed in on this important matter voting to protect the right to strike under s. 2(d) of the *Charter*. In addition to reaffirming the Court's view that collective bargain is a right protected under the *Charter's* 2(d) guarantee of freedom of association, the Court ruled that when it comes to protecting the *Charter* values of "human dignity, equality, liberty, respect for the autonomy of persons and the enhancement of democracy,"[8]:

> *the right to strike is essential to realizing these values and objectives through a collective bargaining process because it permits workers to withdraw their labour in concert when collective bargaining reaches an impasse. Through a strike, workers come together to participate directly in the process of determining their wages, working conditions and the rules that will govern their working lives (Fudge and Tucker, at p. 334). The ability to strike thereby allows workers, through collective action, to refuse to work under imposed terms and conditions.*

[6] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 SCR 391, para 90. <https://canlii.ca/t/1rqmf>
[7] *Mounted Police Association of Ontario v. Canada* (Attorney General), 2015 SCC 1 (CanLII), [2015] 1 SCR 3, para 72. <https://canlii.ca/t/gfxx8>
[8] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 SCR 391, para 81. <https://canlii.ca/t/1rqmf>

> *This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives.* [9]

According to the Supreme Court, collective bargaining does not end when workers choose to collectively withhold their labour. On the contrary, workers' ability to strike is an integral part of collective bargaining. Indeed, in no uncertain terms the Supreme Court made it clear that:

> *The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction.* [10]

In addition, the Supreme Court ruling made it clear that the right to strike is integral to addressing the inherent power imbalances that exist between workers and employers. In this regard, the right to collectively withhold labour as part of the collective bargaining processes affirms not only our constitutional guarantee of freedom of association, it reinforces our societies commitment to equality:

> *The right to strike also promotes equality in the bargaining process. This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. While strike activity itself does not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all, it is the possibility of a strike which enables workers to negotiate their employment terms on a more equal footing*[11]

In summary, the Supreme Court recognizes that the ability to withhold labour is vital to a meaningful process of collective bargaining. Government intervention that unreasonably limits this right may as a consequence substantially interfere in collective bargaining.

PEI Labour Act

Similar to other Canadian jurisdictions, the conciliation process outlined in the *PEI Labour Act* (s. 41) introduces a statutory limitation on workers' collective right to withhold their labour as part of the collective bargaining process:

> ***41. Unlawful lockout, no employer etc. to call***

[9] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (CanLII), [2015] 1 SCR 245, para 54. <https://canlii.ca/t/gg40r>
[10] *Ibid*, para 3.
[11] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (CanLII), [2015] 1 SCR 245, para 57. <https://canlii.ca/t/gg40r>

(1) No employer, employers' organization or an agent or any other person acting on behalf of an employer or an employers' organization shall call, authorize, counsel, procure, support, encourage or engage in a lockout except as permitted by this section.

Unlawful strike, no employee etc. to call

(2) No employee, trade union or person acting on behalf of a trade union shall call, authorize, counsel, procure, support, encourage or engage in a strike except as permitted by this section.

Strike or lockout permitted when conciliation or mediation completed

(3) Where a trade union has been certified but no collective agreement has been entered into on behalf of the employees in the unit, or where the term of a collective agreement has expired or where negotiations pursuant to a reopener clause as mentioned in subsection 36(3) have failed, whether the bargaining agent named in such collective agreement is or is not certified, the employees in the said unit may strike and the employer may lock out such employees when the bargaining agent and the employer, or representatives authorized by them on their behalf, have bargained collectively and have failed to conclude a collective agreement, and either

(a) a conciliation officer appointed by the Minister has been unable to bring about an agreement between the parties, and fourteen days have elapsed from the date on which the report of the conciliation officer was filed with the Minister and a conciliation board or mediator has not been appointed under section 27 or section 34; or

(b) a conciliation board or mediator has been appointed and has been unable to bring about an agreement between the parties and seven days have elapsed from the date on which the report of the conciliation board or mediator was filed with the Minister.

To be in a position to exercise their constitutional right to strike, the union must first file for conciliation and work with a government appointed conciliation officer who will endeavor to bring about agreement between the parties. The parameters for the conciliation officer's report to you are outlined in s. 26 of the *Act*:

26. Report of conciliation officer

Where a conciliation officer has, under this Part, been instructed to confer with parties engaged in collective bargaining, he [sic] shall, within ten days of his [sic] first meeting with the parties after being so instructed or within such longer period as the Minister may allow, make a report to the Minister on

(a) the matters, if any, upon which the parties have agreed;

(b) the matters, if any, upon which the parties cannot agree; and

(c) the advisability of appointing a conciliation board or mediator to endeavour to bring about an agreement. R.S.P.E.I. 1974, Cap. L-1, s.25; 1975, c.17, s.1.

The statutory intent of our legislation is to provide a mechanism for a neutral third-party appointed by the province to work with the parties to see if an agreement can be reached within a reasonable timeframe. The timeframe outlined in the legislation includes ten (10) days for the conciliation officer to decide whether it is advisable to appoint a conciliation board or mediator. If you choose to appoint either a conciliation board or mediator, those processes included additional legislated timelines. In addition to these specific legislated timelines, you are empowered by statute to exercise considerable discretion over these legislated processes including:

- whether to extended the period for the conciliation officer to confer with the parties (s. 26)
- whether to appoint a conciliation board or mediator (s. 28, 34)
- whether to accept the recommendations of the conciliation board or mediator (s. 32)

In each of these cases, you are in a position through the exercise of your discretion to extended the limitation on our members' ability to exercise their constitutional right to strike. Depending on whether and to what degree you exercises this discretion, you are in a position to either facilitate or obstruct our members access to a meaningful process of collective bargaining.

In our view, the extension of the conciliation timeframe not only has the potential to fuel greater uncertainty at our institution, it will also disproportionately impact a significant number of our most vulnerable members. As a result of UPEI's increasing reliance on temporary contract academic teaching faculty who are hired on short-terms contracts, a substantial number of our members are only employed during the academic year (September – December / January – April). In most cases, these members have minimal supports and few if any benefits. Because a number of our bargaining positions aim to improve their working conditions in particular, it is absolutely vital that negotiations around their terms and conditions take place while they are in a position to participate in collective bargaining and if necessary exercise their constitutional right to strike. Any timeline extensions beyond the legislated conciliation framework will make it increasingly unlikely that these workers will be in a position to withhold their labour in the context of our current round of collective bargaining.

Discretionary Authority

In this context, we also feel it is important to point out that in 2012, the Supreme Court issued a ruling clarifying how administrators empowered by statute to exercise discretionary authority should do so when such authority limits rights protected by the *Charter*. According to the Supreme Court, when discretionary authority is likely to limit *Charter* protections, it is vital that such decisions interfere with a *Charter* guarantee "no more than is necessary given the statutory objectives".[12] This requires administrators to strike a reasonable between *Charter* values and statutory objectives. [13] The ruling made clear that discretionary decisions should show evidence of the balancing of *Charter* rights and values with statutory objectives – an exercise that will lead to a decision that "falls within a range of possible, acceptable outcomes."[14]

Clearly, the *Act* aims to facilitate a reasonable conciliation timeline[15] for government intervention in the collective bargaining process. Insofar as you are empowered to exercise some discretion over these timelines, we believe it is imperative that such discretion be exercised with due consideration of the intent of the *Act* as well as the implication of placing further limitations on our members' *Charter* rights and freedoms.

Conclusion

To be clear, our members have not decided whether they will withhold their labour to improve their working condition and their students' learning conditions. Under the *Act*, that decision can only be made at the completion of the conciliation/mediation process. While our members are certainly committed to participating in the conciliation process, government intervention that unnecessarily prolongs this process

[12] *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 SCR 395, para 7. <https://canlii.ca/t/fqn88>
[13] *Ibid*, para 55.
[14] *Ibid*, para 56.
[15] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 SCR 391, para 77. <https://canlii.ca/t/1rqmf>

is likely to lead to protracted labour unrest and a challenging environment at our university. This does not benefit our members, our students, or the Island community as a whole.

Island workers are the backbone of our economy. Throughout the pandemic, they have time and again sacrificed their own health and the health of their loved ones to support their patients, co-workers, students, and fellow citizens. In the case of our members, although the declaration of a pandemic coincided with the start of bargaining a new collective agreement, in 2020 our members voted at that time to forgo their principle avenue for improving their working conditions – collective bargaining - and instead provide a measure of labour stability by extend their current contract for two more years. Despite those sacrifices, UPEI Administration has repletely denied them basic supports even in these challenging times.

Returning to the bargaining table, we have encountered an employer that has made it clear that any improvements to our working conditions will have to be paid for by increasing student tuition. This is a context in which UPEI Administration has found it unnecessary to raise tuition to fund the silencing of victims of harassment, the hiring of multiple law firms to investigate our toxic working environment, or the relocation of Senior Management to various parts of campus. This is simply unacceptable.

Drawing on lessons learned over the last two years, our members have identified a set of priorities that will improve their working conditions and our students' learning conditions. From increasing accountability and transparency to providing greater benefits and more reasonable working conditions for our most precarious members, our proposals will help to reverse many of the serious structural issues that have already eroded the quality of the research and education UPEI is capable of providing, and make UPEI once again an excellent place to study, learn, and work. All they ask is for their government to refrain from exercising its discretionary authority in ways that tip the scales in favour of our employer and that lay the foundation for a protracted labour dispute.

Sincerely,

Dr. Michael Arfken
President
UPEI Faculty Association

cc:

The Honourable Dennis King, Premier, PEI
The Honourable Peter Bevan-Baker, Opposition Leader, PEI
The Honourable Trish Altass, Opposition Critic, PEI
Ms. Patricia MacPhail, Director, Labour and Industrial Relations
Ms. Erin McGrath-Gaudet, Deputy Minister, PEI
Mr. Pat Sinnott, Chair, Board of Governors, UPEI
Dr. Greg Keefe, Interim President, UPEI
Dr. Andrew Trivett, Chief Negotiator, UPEIFA
Mr. Brian Johnston, Chief Negotiator, UPEI