

Memorandum

Date: November 22, 2019

To: CAUT Council

From: David Robinson, CAUT Executive Director

Re: **Background Documents (Resolution 15 e University of Saskatchewan Faculty Association)**

This memo is provided to Council delegates as additional background information to assist with consideration of Resolution 15 e. The motion raises a number of complicated matters and issues specifically related to the structure and operation of the CAUT Defence Fund, of which not all delegates may be fully aware.

History of the CAUT Defence Fund

The CAUT Defence Fund was founded by CAUT in 1978 to provide unionized member associations with a unified, national strike fund. At the time, a minority of academic staff associations in CAUT were certified trade unions with the right to strike. CAUT therefore established the Fund as an affiliated organization with voluntary membership. The By-law specified that, as an affiliate of CAUT, only members in good standing of CAUT were eligible to join and to maintain their membership in the Fund. Further, to be eligible for strike benefits, CAUT Defence Fund members were required to demonstrate that none of their bargaining demands were contrary to CAUT Policy Statements on academic freedom, non-discrimination, tenure, and collective bargaining.

Additionally, the By-laws were crafted to provide a structure to preserve the affiliation relationship and to ensure policy coherence between CAUT and the CAUT Defence Fund. The CAUT President, Treasurer, Executive Director, Chair of the Academic Freedom and Tenure Committee, and the Chair of the Collective Bargaining and Economic Benefits Committee were made members of the Fund. These representatives were given no entitlement to vote on any matter before the Fund with the exception of fundamental By-law changes that would alter the relationship between CAUT and the Fund. Such changes could only be made with the mutual agreement of the CAUT representatives and the members of the Fund. In all other matters (including all the normal business of the Fund), the CAUT members had no vote.

This basic structure of the CAUT Defence Fund has remained essentially unchanged since 1978, and was updated and approved by the Fund members in 2013. At that time, the By-laws had to be revised to comply with the new *Canada Not-for-profit Corporations Act*. To ensure that the same rights for CAUT representatives were retained while being consistent with the requirements of the new *Act*, an equivalent provision was adopted by providing that no fundamental changes to the affiliation could be made without the support of the CAUT representatives (the Class 60 members). That is, the Class 60 have no voting entitlements on any matters related to the normal business of the Fund. On matters related to changes to the affiliation between CAUT and the Fund, rather than requiring the agreement of the Class 60 members, they were instead given 200 votes on such matters only. This is clearly specified in the Articles of Continuance that form a part of the By-law.

Background to the Motion

As the movers of Resolution 15 e explain in their supporting documentation, their motion arises in response to events that occurred at the last CAUT Defence Fund meeting of October 5, 2019. At the meeting, the Trustees considered a request to provide strike pay for members of an Association not on strike but wanting to honour the picket line of another union. As I understand it, there was some debate about whether the allocation of strike benefits in this instance was consistent with the purposes of the Fund as spelled out in the By-law. The CAUT President (a class 60 member of the CAUT Defence Fund) voted on the matter as she believed at the time that the motion before the Fund was one that involved an interpretation of the By-law on which Class 60 members did have a right to vote. This was mistaken. Class 60 members of the CAUT Defence Fund have no vote except on fundamental By-law amendments. The motion was not a By-law amendment, let alone a fundamental amendment. The vote should have been ruled out of order.

I was unfortunately unable to attend the meeting, but understand that this situation caused a great deal of confusion. None of the CAUT Defence Fund officers or trustees in the room were able to answer the question about the eligibility of the CAUT members to vote on the matter. It is surprising that few members seemed to be aware of the Articles of Continuance as these are explicitly referred to in, and form an integral part of, the By-law.

Nevertheless, when I heard of these developments after the meeting concluded, I immediately informed the President of CAUT that, based upon my understanding of the By-laws and Articles of Continuance, she and other CAUT members did not have a right to vote on the matter in question. She recognized her error and notified the President and Chair of the CAUT Defence Fund. I spoke by telephone on October 7 with the Chair of the Defence Fund and conveyed my opinion that the Class 60 member vote should be ruled out of order. We also discussed the nature of and the rationale for the very limited voting entitlements that the Class 60 members have had since the Fund was created by CAUT. I suggested that he or the President of the Fund send a clarification to the members as soon as possible.

The CAUT Defence Fund President notified trustees by email on October 17 that the CAUT representative votes were not in order. The Chair of the Defence Fund subsequently issued the following note by email on October 31, 2019:

To: The Trustees of the CAUT Defence Fund

There has been some discussion as to why the "Class 60" members to the Defence Fund hold an effective veto over some of the Fund's decisions. This has been the case ever since the Fund was created in the 1970's.

Before the new By-Law was re-drafted in 2013 to make it in compliance with the "Not-for-profit Corporations Act (2009)", the By-Law specified that there would be five individuals from CAUT (President, Exec Director, Treasurer, and the Chairs of AFTC and CBEBC) on the Board of Trustees of the DF. Further, these five trustees would have to agree, by simple majority among them, to any proposed change to the By-Law in certain cases. These cases were:

- 1) A union must be a member of CAUT to be a member of the Defence Fund*
- 2) Chairs of AFTC and CBEBC are ex-officio members of the Board of Trustees, but have no vote on financial matters!!!!!!*
- 3) CAUT President, Treasurer and Exec Director can attend meetings, but have no vote and cannot move motions.*
- 4) Officers shall be elected from among the trustees from the unions. Officers can be removed by the Board, and term limits apply.*
- 5) Strike benefits are contingent on Good Financial Standing with the DF*

- 6) *Other benefits are also contingent on Good Financial Standing with the DF*
- 7) *Strike and Other benefits are also contingent on the union's bargaining positions being in compliance with CAUT Standing Policies on Academic Freedom, No Discrimination, Academic Appointments and Tenure, and Collective Bargaining.*
- 8) *The above seven rules cannot be changed without a majority approval of the five CAUT trustees.*
- 9) *The manner in which the above seven rules can be changed is spelled out.*

When the Planning and Policy Committee did the 2013 revision to the By-Law, the philosophy was to keep the spirit the rules in place at the time, but in a way that meet the requirements of the Act.

As such, the revisions provided that Class 60 members are not trustees, with the exception of the chairs of AF&T and CBEB who are made trustees at the annual meeting - trustees with 1 vote. The others are members but not trustees. The 200 votes apply only during member meetings and only on certain substantive changes to the by-laws. These changes were a way for them to keep the veto that they always had. Any attempt to change that would have resulted in a veto under the old rules.

Certainly there was confusion at the end of the meeting over the application of the new By-Law, and I accept my share of responsibility for that. But I want to make sure everyone knew that the rules as they currently stand is indeed a reflection of how the DF has historically operated.

*Larry Hale
Chair, CAUT Defence Fund*

Despite the attempts to clarify, it unfortunately remains the case that the matter has caused and continues to cause substantial confusion. The President of CAUT has admitted her error. The votes of the CAUT representatives were not in order. Nothing at all has changed in the way the CAUT Defence Fund operates and makes decisions. The CAUT representatives have no right to vote on any matter before the Defence Fund except fundamental By-law changes that could affect the relationship between CAUT and the Fund.

I recognize that this is a difficult and complicated matter for Council delegates to consider. Not all members of CAUT are members of the CAUT Defence Fund or are familiar with its structure. For those that are members of the Fund, not all who will be at Council attended the meeting in October at which the events in question occurred. Added to this is the fact that the CAUT Defence Fund By-laws are extraordinarily intricate and complex.

In an effort to assist delegates in understanding the issues under consideration in the resolution, I have attached an Appendix to this memo that contains excerpts of the relevant By-law provisions, Articles of Continuance, and governing legislation.

Legal Context

Some questions have been raised about whether the motion is in order and/or legally binding. The movers of the resolution also raise this issue, and have provided their opinion in their supporting documentation. To be certain about these legal questions, I have consulted our outside legal counsel who provided the following legal opinion which I have shared with the Speaker of Council:

"Unless there is some sort of agreement between the individuals holding the offices entitling them to be class 60 members of the Defence Fund and CAUT about how they will vote on matters that they are entitled to vote on at members' meetings of the Defence Fund, I don't see how a Council resolution is legally binding on those individuals in their capacity as class

60 members of the Defence Fund. Holding the office in CAUT (i.e., President, Treasurer, Executive Director, Chairperson of the Academic Freedom and Tenure Committee, and the Chairperson of the Collective Bargaining and Economic Benefits Committee of CAUT) is simply a condition for becoming, ex officio, members in the Defence Fund. As class 60 members, these individuals have all the rights and privileges, including voting as (and to the extent) permitted by the articles of the Defence Fund and the CNCA [Canada Not for Profit Corporations Act], as other members of the Defence Fund. As I say, unless there is an agreement between CAUT and these individuals in which they have agreed to vote as directed by the CAUT Council, they are not legally obligated to do so, and are free to exercise their voting rights in accordance with the Defence Fund articles, by-laws and the CNCA."

To the best of my knowledge, there is no agreement nor has there been any agreement between CAUT Council and the CAUT representatives to the Fund on how they will vote on matters to which they are entitled.

Appendix

1. CAUT Defence Fund – By-law Number 1

2.2 Membership Condition

(b) The following conditions of membership for Class 60, also known in this by-law as the CAUT Representative Class, shall apply:

- i. Class 60 shall be made up of the following members:
 1. The President of CAUT
 2. The Treasurer of CAUT
 3. The Executive Director of CAUT
 4. The Chairperson of the Academic Freedom and Tenure Committee of CAUT
 5. The Chairperson of the Collective Bargaining and Economic Benefits Committee of CAUT
- ii. Class 60 members are entitled to receive notice of and attend at all meetings of the members. Except in relation to bylaw amendments as delineated in the Articles, Class 60 members shall not be entitled to vote on any other matters before the members at a members' meeting.

2. Defence Fund Articles of Continuance

- (a) Class **60**. Class 60 members shall be entitled to receive notice of, and to attend at all meetings of the members of the Corporation. *Class 60 members shall have no vote, except in relation to by-law amendments related to the following:*
 - a. "fundamental changes", amendments as referenced under sections 197(d), (e), (f), (g), (h), (l), and (m) and 199 of the *Act*,
 - b. Strike or Other Benefits, as defined and referenced in the Corporation's by-laws; except Class 60 members shall not be entitled to vote on bylaw amendments related how the amount of strike benefits is determined; and
 - c. the maximum consecutive term of office for the president, treasurer and chair, as defined in the by-laws.

Where voting is permitted for Class 60 members, including where the *Act* permits Class 60 to vote separately as a class, each Class 60 member shall have the equivalent of 200 votes.

3. Canada Not-for-profit Corporations Act

Fundamental Changes

Marginal note: Amendment of articles or by-laws

- **197** (1) A special resolution of the members — or, if section 199 applies, of each applicable class or group of members — is required to make any amendment to the articles or the by-laws of a corporation to
 - (d) create a new class or group of members;
 - (e) change a condition required for being a member;
 - (f) change the designation of any class or group of members or add, change or remove any rights and conditions of any such class or group;
 - (g) divide any class or group of members into two or more classes or groups and fix the rights and conditions of each class or group;
 - (h) add, change or remove a provision respecting the transfer of a membership;
 - (l) change the manner of giving notice to members entitled to vote at a meeting of members;
 - (m) change the method of voting by members not in attendance at a meeting of members; or
- **199** (1) The members of a class or group of members are, unless the articles otherwise provide in the case of an amendment referred to in paragraphs (a) and (e), entitled to vote separately as a class or group on a proposal to make an amendment referred to in subsection 197(1) to
 - (a) effect an exchange, reclassification or cancellation of all or part of the memberships of the class or group;
 - (b) add, change or remove the rights or conditions attached to the memberships of the class or group, including
 - (i) to reduce or remove a liquidation preference, or
 - (ii) to add, remove or change prejudicially voting or transfer rights of the class or group;
 - (c) increase the rights of any other class or group of members having rights equal or superior to those of the class or group;
 - (d) increase the rights of a class or group of members having rights inferior to those of the class or group to make them equal or superior to those of the class or group;
 - (e) create a new class or group of members having rights equal or superior to those of the class or group; or
 - (f) effect an exchange or create a right of exchange of all or part of the memberships of another class or group into the memberships of the class or group.
- Marginal note: Right to vote
(2) Subsection (1) applies whether or not memberships of a class or group otherwise carry the right to vote.
- Marginal note: Separate resolutions
(3) A proposal to make an amendment referred to in subsection (1) is adopted when the members of each class or group entitled to vote separately on the amendment as a class or group have approved the amendment by a special resolution.