Restructuring Publicly-Funded Universities:

A Report on the Laurentian University Insolvency Proceeding with Issues and Options for the University Sector

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Table of Contents

Executive Summary

Laurentian University is the first publicly funded university in Canadian history to seek creditor protection under a commercial restructuring statute, the *Companies' Creditors Arrangement Act* ("**CCAA**"). Prior to Laurentian's application, it was widely assumed that universities should not or could not seek creditor protection under commercial insolvency procedures.

The financial crisis at Laurentian was not entirely unforeseen, nor solely a short-term issue arising during the COVID-19 era. According to some sources, Laurentian University had been running operating deficits for some time—perhaps as long as 10 years prior to seeking creditor protection. Its auditors had reported these deficits to Laurentian's Board of Governors, and it appears that while some attempts were made to address deficits, they were not successful. It is also known that the Laurentian University Faculty Association ("**LUFA**") had attempted to trigger the restructuring process set out in its collective agreement in 2017 and again in 2020, but the administration did not agree to this procedure. Eventually, according to media reports, as late as December 2020 the administration sought assistance from the Ontario Government and was denied or offered insufficient relief. On February 1, 2021, the university applied for creditor protection under the CCAA.

Seeking creditor protection under the CCAA is an extraordinary step to take for any organization, and more so for publicly funded organizations. The effect is to "stay" any other proceedings—that is, to stop most or all other legal processes—and to force stakeholders (known as "creditors" in a CCAA process) to negotiate concessions to their contracts or claims under the threat of the organization dissolving. The whole procedure is overseen by a court, with the assistance of a "monitor", which reports to the court on the process and makes recommendations. Subject to court approval, the process of restructuring is significantly controlled by the debtor company in cooperation with the monitor.

During this process, for the purpose of negotiations aimed at obtaining concessions from creditors, they are divided into classes: the most fundamental division is between those who are secured creditors—who, in the event of a dissolution, would be paid in priority to others—and those who are unsecured creditors—who on a dissolution, would be paid last in priority. (There are much more limited classes of creditors who have a "super priority" imposed by statute, as well as some contested gaps in the hierarchy.)

Secured creditors have superior bargaining powers vis-à-vis unsecured creditors by virtue of their ability to negotiate—before insolvency—for security over some or all of the debtor's assets. These creditors can seize those assets as collateral for unpaid debts. This class of creditors tends to be banks and other lenders.

Labour costs are typically one of the key expenses that an organization will seek to reduce in a CCAA proceeding (or any restructuring proceeding). Employee groups have a variety of creditor claims, but the largest type of claim tend to be unsecured claims. Unlike secured creditors, employee groups typically cannot bargain for broad security against an employer. Instead, labour and employment laws provide a series of protections that assist in addressing the asymmetry of bargaining power between employees and employers. In universities, protections typically take the form of collective agreements under provincial labour relations legislation or voluntary recognition agreements.

Perhaps because commercial insolvency processes were not considered accessible or applicable, many faculty association collective agreements actually contain restructuring procedures, known generally as “financial exigency terms”. These terms contain a process that could allow universities to reduce budgets, amend or eliminate program offerings, and lay off faculty members in financial emergencies. However, entering a CCAA proceeding suspends and displaces these negotiated labour relations processes, along with related dispute resolution mechanisms such as grievance arbitration, effectively prohibiting their use altogether.

In short, CCAA norms and processes largely displace labour relations norms and processes for purposes of restructuring in an insolvency, and this is to the significant advantage of the debtor company and employer. It places extreme pressure on employee groups to negotiate concessions.

A CCAA process is also to the advantage of other creditors or stakeholders. In the case of the Laurentian proceeding, this includes the primary funder of universities, the Ontario Government. The Ministry of Colleges and Universities monitored the proceeding but did not take a formal position in court and did not participate in the restructuring. It was not required, for example, to state what funding it might make available to Laurentian beyond its existing commitments, or what its views were on the restructuring plan. While it may have made these views known privately to some stakeholders, it was not required to do so publicly or with notice to the employee groups who were most directly affected by the restructuring.

These are the basic dynamics of a CCAA proceeding, which is a flexible process designed to address liquidity crises in large commercial corporations. It is not designed to cope with organizations with a non-profit, public interest mandate that are funded by government.

We appear to be at the start of a new expansion of the application of the CCAA’s scope: to restructure public universities, and perhaps other organizations funded by governments. If true, the effect will be to displace existing contractual and other protections of employees and other stakeholders, except those with the power to protect themselves through standard commercial contracting practices. Many stakeholders in the public sector do not (yet) use those practices. This is a key moment to examine the role of the CCAA vis-à-vis publicly funded organizations, and the options for addressing the types of problems raised by the Laurentian filing.

Chapter 1 briefly summarizes how the CCAA operates, including eligibility criteria and the powers of a CCAA court to vary existing legal arrangements. Laurentian University was held to qualify to use the CCAA because it is an incorporated entity and faced a severe liquidity crisis, notwithstanding that it relies on public funding. Appendix "A" sets out a summary timeline of the Laurentian proceeding to date (it is still in process). Appendix "B" contains a summary of reporting and other commentary on the Laurentian proceeding.

Chapter 2 provides a brief historical background to the CCAA itself. Its original purpose was as a remedy for large commercial creditors. While it was reframed as a public interest debtor remedy over the 20th century, in practice it continues to serve private creditor interests first and foremost. Appendix "C" sets out a more technical summary of employee rights in an insolvency proceeding, as a more detailed reference for readers.

Chapter 3 summarizes the expansion of the CCAA beyond its original purpose, largely driven by court decisions from 1980 to today. It increasingly applies to new types of debtors, which has expanded the jurisdiction of federal insolvency law. This background assists in understanding how the CCAA has been found to apply to organizations that it was not originally intended to apply to, and to identify and evaluate the arguments used to expand the scope of application of the CCAA, and to oppose that expansion.

Chapter 4 expands these arguments and discusses how and why the CCAA is not an appropriate forum for restructuring publicly funded universities or organizations with public mandates and funding. The CCAA is designed to deal with commercial for profit organization and their markets and concerns. Using the CCAA to restructure universities or other broader public sector organizations displaces norms of public governance and oversight, collective bargaining, and institutional autonomy. This ultimately cedes democratic control over these organizations to corporate boards, commercial creditors, and federal insolvency law.

Chapter 5 sets out how stakeholders, and labour groups in particular, have sought to challenge the application of the CCAA in prior insolvencies, including the Laurentian proceeding. Employee groups have argued that the organization does not meet one of the basic threshold requirements under the statute, such as the test for insolvency; that it is acting in bad faith or for an improper purpose; or that the restructuring is more appropriately addressed in another—perhaps labour relations—forum. These challenges rely significantly on the specific evidence before the court, which is often controlled by the debtor company and the monitor. The implications of the expansive application of the CCAA are that, absent law reform, stakeholders will need a strong factual basis to challenge any CCAA proceeding. From a practical perspective, absent law reform, a critical lesson is that challenges are at best uncertain and that employee groups should seek to intervene in any CCAA process as early as possible and ensure that the arguments in favour of employee interests are part of the record before the courts.

Chapter 6 explores the existing and potential alternatives that universities may use instead of a commercial insolvency proceeding. These include the financial exigency terms in most faculty association collective agreements. These terms are examined and compared to a commercial insolvency process to identify principles that should guide any restructuring of a university, including: primacy of the academic mandate; transparency between the parties, with early warning and notice of financial conditions; exploring all other cost savings and revenue sources (including government); and clear roles in restructuring for the statutory governance bodies (senate and board of governors) as well as senior administrators and employee groups. Where the need for budget reductions is established, any layoffs should be identified through standard labour relations processes. These principles and procedures could be compiled into an updated CAUT "model financial exigency code" for use in policy development, legal argument, member education, and law reform. Appendix "D" sets out sample financial exigency terms from several collective agreements of CAUT members for reference to existing resources.

Chapter 6 also examines current funding agreements with, and statutory powers to intervene in, Ontario universities. These to not speak to financial emergencies or restructuring at all. However, there is the basis for providing an alternative system in existing statutory powers. A review of comparator jurisdictions indicates that in addition to commercial restructuring, there are other statutory powers and procedures (such as emergency and bridge financing) that could be adopted in Canada to facilitate orderly university restructurings.

Chapter 7 sets out and considers a series of potential reforms that would address the problems with using commercial restructuring procedures for universities and other publicly funded organizations. These include excluding publicly funded universities from using the CCAA or, alternately, amending the CCAA to require the government funder to participate in and approve final compromises or plans of arrangement. Other reforms could incorporate the principles that should govern university restructuring into existing CCAA norms, for example, by adding terms specific to publicly funded organizations to the model orders used by CCAA courts.

Viable alternatives also include establishing a restructuring procedure outside the CCAA. There is a spectrum of potential responses, from creating a process to apply for emergency loans and a supervised restructuring procedure under existing provincial legislation; to enacting explicit provincial powers to intervene in university administration in emergencies, such as currently applies to Ontario colleges; to establishing a sector-specific, stand-alone restructuring regime, as has been implemented from time to time in Canada in the past. One use of the "model financial exigency code" is to assist faculty associations in promoting these alternatives, particularly at the provincial level.

Chapter 8 begins with a summary of the lessons learned so far from the Laurentian insolvency process, which remains ongoing as of the date of this report. These lessons include limited information flow between the administration and employee associations; a failure to employ other existing restructuring processes; the (non)involvement of the Ontario Government; the use of the CCAA filing to isolate and extract concessions from employee groups (and affiliated universities) but not other creditors; and the lack of transparency in the CCAA proceeding itself, which was governed by commercial protocols and principles.

The Chapter then discusses steps employee groups can pursue to protect their interests in a potential future restructuring. They may seek to bargain improved financial exigency procedures or early warning obligations on the employer for any proposed restructuring, including the intent to file an application for creditor protection. These bargained terms can specifically reference good faith requirements under labour relations and CCAA norms. Employee groups can also prepare for potential insolvency proceedings by working with advisors to understand and develop positions on the causes of financial distress, the need for restructuring, and any legal arguments. Once an application is filed, challenges to the application, or to the content of the initial order may be appropriate. These measures will depend greatly on the factual context. Finally, we suggest that law reform efforts to limit application of the CCAA and to provide for alternative restructuring processes should be part of ongoing political action campaigns.

A final word on the subject of this report. We are discussing publicly funded universities and their particular context, especially in Ontario. However, some of the issues raised in the report may be applicable, with appropriate amendment, to publicly funded organization in the broader public sector. From time to time we make reference to publicly funded organizations, but a full discussion of any sector – such as hospitals or municipalities or social service organizations – would require a consideration of their specific actors, norms and processes.

I. Introduction

Summary

The CCAA allows insolvent corporations with over $5 million in debts to obtain protection from creditor claims while restructuring their operations. Laurentian University qualified because it is incorporated under a provincial statute (the Laurentian Act), had more than $5 million in debts, and faced a severe liquidity crisis, notwithstanding that it relies on public funding. CCAA courts have wide powers to vary existing legal arrangements as part of a restructuring process.

The *Companies' Creditors Arrangement Act* ("**CCAA**") provides a mechanism for struggling companies to obtain court protection from their creditors while they undertake a restructuring of operations, assets, and debts.[1] Under the CCAA, a court has the power to stay (i.e., pause) all existing and future legal proceedings against the debtor company so it can negotiate and implement a restructuring plan that is acceptable to both a majority of its creditors and the court. The court will also appoint a financial "monitor" to oversee the restructuring process and report on its progress.[2]

CCAA protection is available to a "debtor company" with over $5 million in liabilities.[3] A debtor company includes a corporation or income trust that is bankrupt or insolvent.[4] While the CCAA does not define the term "insolvent", many courts use the definition of an "insolvent person" under the *Bankruptcy and Insolvency Act* ("**BIA**"). This refers to a person who is unable to meet their financial obligations as they generally become due, who has ceased paying them in the ordinary course of business, or whose property would not be sufficient to cover them if sold.[5] However, some courts have been more flexible, holding that an insolvent corporation is

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[1] *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36 [*CCAA*].
[2] *Ibid*, ss 11.7, 23.
[3] *Ibid*, s 3(1).
[4] *Ibid*, s 2(1), "debtor company".
[5] *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s 2, "insolvent person" [*BIA*]. The person also must not be bankrupt, must reside or carry on business or have property in Canada, and must have liabilities amounting to at least $1,000.

one that would reasonably run out of liquidity before it could complete a restructuring without CCAA protection.[6]

Nothing in the CCAA explicitly excludes "public" organizations…from the definition of a debtor company.

Nothing in the CCAA explicitly excludes "public" organizations, including "broader public sector" ("**BPS**") entities such as government-funded universities and hospitals, from the definition of a debtor company.[7] Laurentian University was held to qualify for CCAA protection because it was incorporated under an act of the provincial legislature, it had over $5 million in debts, and it faced a "severe liquidity crisis" based on the financial statements and affidavit evidence before the court.[8] Laurentian's status as a non-profit did not impact its eligibility, in part because CCAA proceedings have previously been commenced regarding non-profit corporations.[9] The court did not discuss the wider policy implications of finding that a publicly funded university could access the CCAA.

Courts have a wide range of powers under the CCAA. They can set aside or assign contracts, approve the sale of assets, remove the debtor's directors, and create special priority charges against the debtor's assets to secure interim financing or professional fees.[10] They also have the general authority to make any order they consider appropriate in the circumstances.[11]

However, an initial stay order may not last longer than 10 days and relief during this period is limited to measures that are "reasonably necessary for the continued operations of the debtor in the ordinary course of business".[12] This restriction is intended to allow all

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[6] See e.g. *Stelco Inc.*, 2004 CanLII 24933 (ON SC) at para 26 [*Stelco*], leave to appeal refused, [2004] OJ No 1903 (Ont CA), [2004] SCCA No 336 (SCC).
[7] The "broader public sector" may be defined as organizations that receive funding from the government but are not part of the government itself, including hospitals, universities, colleges, and school boards: see e.g. Government of Ontario, "Broader public sector accountability" (last updated 12 August 2021), online: <www.ontario.ca/page/broader-public-sector-accountability>.
[8] *Laurentian University of Sudbury*, 2021 ONSC 659 at paras 25–34.
[9] *Ibid* at paras 28–29.
[10] *CCAA*, *supra* note 1, ss 11.2, 11.3, 11.5, 11.52, 32
[11] *Ibid*, s 11.
[12] *Ibid*, ss 11.001, 11.02(1).

interested parties to receive notice of an initial CCAA filing before a "comeback hearing" where the court can consider additional relief. Furthermore, when requesting a stay of proceedings, the applicant must satisfy the court that issuing an order is appropriate in the circumstances.[13] When seeking to extend a stay, the applicant must additionally show that it has been acting in good faith and with due diligence in the restructuring process.[14]

Notably, while courts can set aside individual employment contracts, they cannot set aside collective agreements except with the agreement of the parties.[15] However, if the parties do not reach a voluntary agreement as part of the restructuring process, the debtor company may apply, on five days' notice, for an order authorizing it to serve a notice to bargain on the union under the applicable collective bargaining legislation.[16] Any revision to the collective agreement gives rise to an unsecured claim by the bargaining agent equal to the concessions granted for the remainder of the original agreement's term.[17] In practice, some unions may have little choice but to accept concessions depending on the circumstances of the case. We discuss the basic employee protections under the CCAA and BIA in Appendix "C".

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Although the debtor company must continue paying for ongoing employee services while under CCAA protection, this is narrowly interpreted to apply only to post-filing services (and not, for example, severance pay).[18] A court may also temporarily stay other required payments under a collective agreement since this is considered a suspension rather than extinction of the employer's obligations.[19]

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[13] *Ibid*, s 11.02(3)(a)
[14] *Ibid*, s 11.02(3)(b).
[15] *Ibid*, ss 32(9)(b), 33(1). This restriction was added in 2009: see Nick E Milanovic, "Much Ado: Evaluating the Collective Agreement Amendments in the BIA and CCAA" (2015) 18 CLELJ 595.
[16] *Ibid*, ss 33(2)–(3).
[17] *Ibid*, s 33(5).
[18] See *Nortel Networks Corporation*, 2009 CanLII 31600 (ON SC) at para 67, affirmed, 2009 ONCA 833, leave to appeal refused, 2010 CanLII 14818 (SCC).
[19] *Ibid.*

CCAA courts often have regard to "public interest" considerations when determining whether a particular order is appropriate in the circumstances.[20] However, the notion of public interest in the CCAA context is nebulous and lacks a discrete definition.[21] It is not a legal term of art, and it is utterly flexible depending on the factual matrix of a given insolvency. It is a rather meaningless term in itself, yet carries tremendous importance in insolvency law because of how often it is referred to as part of the rationale for the exercise of a judge's discretion. When the CCAA was first enacted in the 1930s, this primarily referred to providing an orderly means for private commercial actors to continue participating in financial lending and for-profit markets by forcing restructuring on a debtor company. This purpose was expanded beginning in the 1980s, in part because the CCAA began to be used for company liquidations (i.e., to *exit* markets). Boiled down to its essence, the public interest in CCAA law means "doing what makes sense under the circumstances", and the methodology for determining what "makes sense" is the market-oriented lens of commercial law.

Takeaways

1. *The CCAA allows a "debtor company" that has over $5 million in debts to obtain a stay of other legal proceedings so it has time to restructure its operations, assets, and debts under court supervision.*
2. *CCAA courts have wide powers to set aside and assign contracts (other than collective agreements), approve sales of assets, remove directors, and create super-priority charges, such as for interim financing.*
3. *Laurentian University was found to qualify for CCAA protection because it is provincially incorporated and was facing a severe liquidity crisis.*
4. *The CCAA does not explicitly exclude universities or require courts to consider whether a prospective debtor company receives public funding.*
5. *The practical effect of filing for creditor protection is that employee groups (and other creditors) will be pressured to negotiate concessions.*

[20] See e.g. *Norcen Energy Resources Ltd. v Oakwood Petroleums Ltd.*, 1988 CanLII 3560 (AB QB) at paras 60–61.
[21] Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020) at 144.

II. Historical Overview of the CCAA

Summary

The CCAA was not intended to apply to public sector organizations. It originated in the 1930s as a remedy for secured creditors. After the Great Depression, it languished on the statute books for many years. In time, stalled bankruptcy reforms, an increasing use of judicial discretion, and the recessions of the 1980s and 1990s led to a new "narrative" about corporate restructuring. The contemporary narrative includes a more prominent role for the public interest and stakeholder concerns in CCAA restructurings. However, in practice, the CCAA continues to function as a creditor remedy, and is designed to address the issues and interests that arise in a commercial context.

The CCAA was enacted in 1933.[1] The general view has been that the statute was enacted in response to the Great Depression and the many business insolvencies that occurred during the 1930s.[2] This account of the CCAA's origins fits well with the current notion that the Act is intended to consider stakeholder concerns and play a role in advancing the broader public interest in functioning economic markets by facilitating the restructuring of debtor firms.[3] However, the first historical study of the CCAA—published in 2020—demonstrates that the general view is essentially unsupported by the historical record.[4]

…the CCAA was intended to be a remedy for large, secured creditors.

According to Professor Virginia Torrie in *Reinventing Bankruptcy Law*, the CCAA was intended to be a remedy for large, secured creditors.[5] The Act provided

[1] *Companies' Creditors Arrangement Act*, SC 1932–33, c 36.
[2] See e.g. Janis Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (Toronto: University of Toronto Press, 2003) at 12–13; Alfonso Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Restructuring Law in Canada" (2014) 56:1 Can Bus LJ 73 at 75–76; *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 16 [*Century Services*].
[3] See e.g. *Norcen Energy Resources Ltd. v Oakwood Petroleums Ltd.*, 1988 CanLII 3560 (AB QB) at paras 60–61 [*Norcen Energy*]; Sarra, *Creditor Rights*, *supra* note 2.
[4] Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020) at 46–47.
[5] *Ibid* at 48–49.

these creditors with a much-needed method of restructuring debtor companies, after the provisions which facilitated restructuring were removed from private lending agreements.[6]

The CCAA was a statutory version of a longstanding creditor practice of using a receiver to take over the operations of struggling debtors in an effort to restructure the business, where possible, or otherwise enforce the legal rights of creditors through the liquidation and winding-up of the company.[7]

The CCAA, or something similar, was necessary in 1933 because large institutional creditors were themselves in jeopardy of failing if they could not restructure their investments (read: debtor companies).[8] The original purpose of the CCAA was narrowly focused on helping creditors, with potential ancillary benefits for other parties and constituencies.

However, debtor firms often sought to restructure under the Act without creditor oversight and this practice was considered an abuse of the legislation.[9] In 1953, Parliament underscored the creditor-remedy purpose of the CCAA when it passed an amendment that prevented debtor companies from using the legislation in the absence of a receiver to represent creditors.[10]

How did the CCAA come to be viewed as intended to benefit debtors and address the concerns of stakeholder groups? Why is it regarded as advancing the public interest of functioning markets more broadly?

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[6] *Ibid* at 35–36.
[7] *Ibid* at 26–29. The federal CCAA was constitutionally controversial for this reason, since receivership and secured creditor remedies had been matters of exclusive provincial jurisdiction up until that point. See Virginia Torrie, "The *Companies' Creditors Arrangement Act* Reference Case, 1934" (2020) 64:1 Can Bus LJ 46 at 47. See further Thomas GW Telfer & Virginia Torrie, *Debt and Federalism: Landmark Cases in Canadian Bankruptcy and Insolvency Law, 1894–1937* (Vancouver: UBC Press, 2021).
[8] Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 37.
[9] *Ibid* at 71–72.
[10] *An Act to Amend the Companies' Creditors Arrangement Act, 1933*, SC 1952–53, c 3; *ibid* at 82.

A confluence of factors came together to produce the contemporary narrative about the CCAA that suggests an enhanced role for the concerns of all stakeholders in insolvency proceedings (instead of just secured creditors) and the idea that commercial restructuring, in itself, can advance the public interests of functioning markets.

One key element in the modern view of the CCAA is that Parliamentary neglect of insolvency reform through the mid-twentieth century meant that the CCAA was the only statutory regime capable of dealing with the totality of a company's debts and restructuring its affairs.[11] As a result, the raft of corporate insolvencies flowing from the 1980s and 1990s recessions funneled into the CCAA.

Additionally, changes in statutory interpretation in the 1980s placed a much greater emphasis on the purpose of the legislation being interpreted.[12] This led to a larger judicial role in interpreting and applying the CCAA. Confronted with a wave of CCAA applications, judges fleshed out the brief statute using their discretion to make decisions under the CCAA.[13] These exercises increasingly assumed precedential value and formed a body of practical law for the administration of CCAA insolvencies. This phenomenon was facilitated by the proliferation of online law reporting, which in turn was based on advancements in computers and the invention of the internet. As a result, the reasons offered for exercises of judicial discretion reverberated through the informational universe surrounding the CCAA—in case law precedents, in law reporters, and even in media reporting on significant insolvencies.[14]

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[11] Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 89–90, 93–94. The *Bankruptcy Act* of the time only provided for the restructuring of unsecured claims. It was therefore of little practical use, since the largest debts of an insolvent firm are generally secured.

[12] Elmer A Driedger, *The Construction of Statutes*, 1st ed (Toronto: Butterworths, 1974), cited in Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 110.

[13] See e.g. *Westar Mining Ltd.*, 1992 CanLII 1863 (BC SC) [*Westar Mining*], cited in Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 112.

[14] See e.g., Anne Fletcher, "Little Known Law Saves a Business", *Financial Post* (17 September 1990), section 4, page 36; Heather D. Whyte, "Canada's Chapter 11 Is Suddenly a Hit", *Financial Post* (20 May 1991), section 1, page 3.

By the 1980s and 1990s, American legal thought and jurisprudence had recharacterized the restructuring of insolvent firms as having potential benefits for different stakeholder groups and even the public at large.[15]

Judges reframed the CCAA as a debtor remedy…

Such ideas were far removed from those which led to the enactment of the CCAA in the 1930s. Even in the depths of the Great Depression, insolvency legislation in Canada was seen as an essentially private, creditor remedy.[16] By the end of the twentieth century, however, modern ideas made their way into Canadian courts. Judges reframed the CCAA as a debtor remedy, designed to promote the broader public interest by restructuring the insolvent firm, as opposed to liquidating it.[17] This (nebulous) idea was repeated often enough—in courts, the press, and scholarly literature—that it came to be regarded as the original purpose of the CCAA.[18] Yet while the narrative around the Act changed substantially, the provisions of the statute were largely ***unchanged*** from those enacted in 1933.[19] As summarized by Professor Anthony Duggan, "courts read the [CCAA] expansively to implement a policy that they themselves had invented."[20]

The fulcrum of the CCAA's narrative reinvention were the rights and interests of Canadian workers.

The fulcrum of the CCAA's reinvention were the rights and interests of Canadian workers. Ironically, this is a group whose interests the Act was never intended to address and which continues to struggle with systemic

[15] See e.g. Elizabeth Warren, "Bankruptcy Policy" (1987) 54:3 U Chicago L Rev 775, cited in Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 101. Canada's depression-era farm insolvency statute is a pseudo-exception, as it was motivated in part by a recognition of the dire political and economic consequences of allowing mass farm foreclosures in concentrated regions on the Canadian prairies. See Virginia Torrie, "Federalism and Farm Debt During the Great Depression: Political Impetuses for the Farmers' Creditors Arrangement Act, 1934" (2019) 82:2 Sask L Rev 203 at 205–207; "The *Farmers' Creditors Arrangement Act* Reference Case and Rehabilitating Debtors" in Telfer & Torrie, *Debt and Federalism*, *supra* note 7 at 103–106.
[16] Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 42.
[17] See e.g. *Norcen Energy* at paras 60–61. These ideas were advanced by legal academics, most notably Professor Janis Sarra: see Sarra, *Creditor Rights*, *supra* note 2.
[18] Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 117–19.
[19] *Ibid* at 89; *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36.
[20] Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at xii (Foreword by Anthony Duggan).

issues related to gaining access to proceedings and achieving satisfactory outcomes.[21] Labour's challenging relationship with the CCAA is emblematic of the contradictions immanent in this area of law. These contradictions stem from judicial efforts to re-purpose a creditor remedy into a framework that purportedly advances the wider public interest, without fundamentally changing the commercial basis on which the legislation is based.[22] The result is a disconnect between what the CCAA supposedly does and what tends to happen in practice.

Labour groups and issues were entirely absent from early discussion and practice of CCAA law.[23] The economic and social crises of the 1930s were the impetuses behind many public policy reforms that advanced worker interests, such as unemployment insurance and the development of a public policy to promote full employment.[24] It was not until the 1960s that Canada had a mainstream labour-based political party in the New Democratic Party, and this milestone significantly assisted in advancing labour interest in Canadian electoral politics.[25] Thus, it was the advancement of labour rights and political power ***generally*** that led to a role for labour interests in corporate insolvency proceedings.[26]

It was in the social and economic context of the late twentieth-century, that the narrative about restructuring as a means of promoting the broader public interest took hold. At that time an insolvency talking point emerged that it would be better from a public interest standpoint if all or some employees had the chance of keeping their job (through a

[21] See e.g. Jason A Waxman, "The *Stelco* Restructuring Paradox" (2009) 13 Just Labour 48 (discussing numerous unsuccessful union challenges to the Stelco CCAA filing); Tony Reyes & Jennifer Stam, "Employee-related Issues in the Nortel CCAA Proceedings" (2010) 26:1 BFLR 85 (discussing unsuccessful union efforts to obtain termination and severance payments in the Nortel CCAA filing); Ronald B Davis, "Security of Retirement Benefits in Canada: You Bet Your Life" (2013) 17 CLELJ 65 (discussing the vulnerability of pension benefits in an insolvency).
[22] Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 150.
[23] *Ibid* at 51–52, 77. While employees were mentioned in passing when the legislation was introduced, this was not the impetus for enacting the CCAA. Labour was not an organized interest group, as such, in the 1930s and was not one of the groups consulted on the bill.
[24] *Unemployment Insurance Act*, SC 1940, c 44, in Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 99.
[25] Gad Horowitz, *Canadian Labour in Politics* (Toronto: University of Toronto Press, 1968); "The New Party" in Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 99.
[26] *Ibid* at 99–100.

corporate restructuring) than if the firm were immediately liquidated and all workers lost their jobs.[27] This essentially justifies ***any*** insolvency based on worker interests.[28] It also obscures the fact that the CCAA did not substantively address the interests of workers.[29] Only in the last decade has the CCAA been amended to bar repudiating collective agreements[30] and, in 2019, to extend the limited wage priority protections from bankruptcy proceedings to CCAA liquidating sales.[31] Worker protections under both the CCAA and BIA remain quite limited overall. Nevertheless, the contemporary social and public policy concerns that have animated discussion of corporate insolvency in the twentieth century were sometimes—even often—erroneously attributed CCAA's original purpose and used to justify its application in creative ways and in novel contexts.[32]

The agnosticism of the Act toward labour interests… reinforces the power imbalances between different types of creditors.

The agnosticism of the Act toward labour interests and issues is not neutral to the outcomes labour groups have come to expect in CCAA insolvencies. It reinforces the power imbalances between different types of creditors. In practice, the statute is often used to override or diminish worker rights.[33] As commercial legislation, rooted in the creditor-

[27] *Ibid* at 98.
[28] *Ibid* at 99.
[29] The version of the CCAA in place during the 1980s did not address labour and employment issues at all: see *Companies' Creditors Arrangement Act*, RSC 1970, c 54.
[30] See *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, SC 2005, c 47, s 131; *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, SC 2007, c 36, ss 76, 112. These amendments came into force in 2009. For a discussion, see Nick E Milanovic, "Much Ado: Evaluating the Collective Agreement Amendments in the BIA and CCAA" (2015) 18 CLELJ 595.
[31] Following several high-profile insolvencies including that of Sears Canada, the federal Wage Earner Protection Program (which creates a super-priority claim for certain unpaid employee wages in a bankruptcy or receivership) has been extended to apply to CCAA insolvencies: Bill C-86, *Budget Implementation Act, 2018, No. 2*, 1st Sess, 42nd Parl, 2018, cl 629 (assented to 13 December 2018). These changes come into force on November 20, 2021: *Regulations Amending the Wage Earner Protection Program Regulations*, SOR/2021-196. For a discussion, see Jennifer Sokal, "Recent Developments in Canadian Bankruptcy and Insolvency Law" (2019) 34:2 BFLR 267 at 271–73.
[32] Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 155. See e.g. *Canadian Airlines Corp*, 2000 ABQB 442 at para 172; *Skeena Cellulose Inc. v Clear Creek Contracting Ltd.*, 2003 BCCA 344 at para 34; *Century Services*, *supra* note 2 at paras 16–18.
[33] See e.g. *Sproule v Nortel Networks Corporation*, 2009 ONCA 833, holding that because employee claims are unsecured, there is no statutory justification for giving employees priority over secured creditors; *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 [*Sun Indalex*], holding that interim lenders have

controlled practice of receivership, the CCAA is likewise mute on the particular issues that arise in the context of the insolvency of a publicly funded institution. As is standard practice in CCAA insolvencies, one can expect that judicial discretion will be used to fill these gaps.

The ad hoc nature of CCAA judging and the fact that the proceedings are court-driven raise a host of systemic issues for parties other than major commercial creditors. While major creditors deal with the insolvency system frequently, most other parties, such as workers, will only ever be involved with one insolvency proceeding.[34] The cost of meaningful participation is quite high, and this can be a barrier to individuals and groups.[35] Relatedly, judges may be left to rely on submissions by commercial creditors about what is or is not in the "public interest".[36] Even in instances where social stakeholders have been permitted to take part in proceedings, the restructuring plan must still be approved by a majority of creditors, demonstrating that the Act is ultimately driven by those parties holding formal legal rights as defined by the legislation.[37] In actuality the public interest narrative is no more than a public relations gloss on a creditor remedy which follows standard commercial law practices and norms.[38] The emphasis placed on the public interest aspects of CCAA proceedings confuses the fact that while there may be public interest elements in a commercial restructuring, these represent a mere sprinkling of public interests in a sea of private ones.

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priority for repayment over pensioners. See further the discussion regarding setting aside collective agreements and suspending pre-filing employment-related payments in Chapter 1, above.

[34] Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 124.

[35] One barrier is the cost of professional fees: see Stephanie Ben-Ishai & Virginia Torrie, "A 'Cost'-Benefit Analysis: Examining Professional Fees in CCAA Proceedings" (2009) 5 Annual Rev Insolvency Law 185 at 186.

[36] Sarra, *Creditor Rights*, *supra* note 2 at 50. In more recent cases where this has arisen, there is often also a government agency or union/employee group making submissions on public interest issues: see e.g. *Lemare Holdings Ltd.*, 2012 BCSC 1591 at paras 67–68, where British Columbia argued that a CCAA stay should be set aside because there was a public interest in permitting the Province to pursue a claim against the debtor, a logging company. Relatedly, one of the rationales given for allowing social stakeholders to participate in CCAA proceedings is to encourage courts to consider the broader social and economic consequences of a restructuring: see e.g. *Anvil Range Mining Corp*, 1998 CarswellOnt 5319 (Ont Gen Div) at para 2; Virginia Torrie & Vern DaRe, "The Participation of Social Stakeholders in CCAA Proceedings" (2020) 17 Annual Rev Insolvency Law 369 at 372, 379.

[37] Torrie & DaRe, "The Participation of Social Stakeholders", *supra* note 36 at 370.

[38] Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 125–26.

The new narrative that crystalized with the 1980s and 1990s recessions justified tremendous flexibility in the CCAA proceedings and caused the Act to become the restructuring vehicle of choice for large, complex insolvencies.[39] Legislative and case law developments in the decades that followed have affirmed and reaffirmed several important trends in this respect. The most significant of these is that virtually any situation that happens to intersect with corporate financial distress has its solution framed through the lens of commercial insolvency legislation. This developed in line with market-oriented neoliberal trends in public policy-making in the 1980s, 1990s, and beyond, which have tended to approach social issues from a principally economic perspective.[40] Nevertheless, matters such as job losses, wage issues, and underfunded pensions are not unique to the field of corporate insolvency.[41] Approaching these issues through the lens of insolvency law narrows the range of possible solutions to the (false) dichotomy of either corporate restructuring or liquidation. It tends to obscure solutions other than those which emanate from insolvency law. This is so despite the fact that history has shown it is precisely from fora ***other than*** insolvency courts that groups like labour have made their greatest public policy strides (e.g., electoral politics) which, in turn, have improved how such groups fare in CCAA proceedings.[42] Acceding to the commercial ground rules of corporate insolvency law, in itself, accordingly limits policy choices and shapes the "public interest" aspects of any solution along commercial lines.

…virtually any situation that happens to intersect with corporate financial distress has its solution framed through the lens of commercial insolvency legislation.

The paradigm of restructuring as a solution to insolvency is reinforced by Canadian federalism, where the insolvent condition of a debtor functions as a de facto dividing line

[39] *Ibid* at 170.
[40] See e.g. Adam Davidson-Harden, Larry Kuehn & Daniel Schugurensky, "Neoliberalism and Education in Canada", in Dave Hill (ed), *The Rich World and the Impoverishment of Education*, 1st ed (New York: Routledge: 2008). This trend is broader than the post-secondary education sector: see e.g. David Clark, "Neoliberalism and Public Service Reform: Canada in Comparative Perspective" (2002) 35:4 Can J Political Science 771; Mary Ellen Donnan, "Life After Neoliberalism in Canada: How Policy Creates Homelessness and How Citizenship Models Fail to Provide Solutions" (2014) 7:5 Intl J Arts & Sciences 585; Bryan M Evans & Carlo Fanelli (eds), *The Public Sector in an Age of Austerity: Perspectives from Canada's Provinces and Territories* (McGill-Queen's University Press, 2018).
[41] Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 100.
[42] *Ibid* at 100.

Federal insolvency Acts, and the CCAA in particular, have emerged as super-statutes…

between federal and provincial jurisdiction.[43] In recent decades, through several decisions of the Supreme Court of Canada, this fact has profoundly strengthened the federal insolvency law power.[44] The primacy of insolvency law over commercial relations has been augmented by, and even conflated with, the paramount nature of federal law over that of the provinces.[45] Federal insolvency Acts, and the CCAA in particular, have emerged as super-statutes, capable of superseding almost any conflicting legislation, particularly provincial legislation.[46] This is significant because education, healthcare, municipalities, natural resources, and property and civil rights (including most workplaces) fall under the provincial head of power.[47] The expanding ability to use the paramountcy of federal legislation to override conflicting provincial enactments significantly constrains policy-making and choices regarding financially-distressed businesses (and now universities), essentially limiting political solutions to those formed in Ottawa.[48]

It has not always been the case that the debtor's financial condition virtually ensured that the solution came through federal insolvency law, and it is not universally true even today. Historically, the legislature that created or regulated an institution maintained jurisdiction

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[43] *Ibid* at 69; Torrie, "The *Companies' Creditors Arrangement Act* Reference Case", *supra* note 7 at 48; Virginia Torrie, "Should Paramountcy Protect Secured Creditor Rights? *Saskatchewan v Lemare Lake Logging* in Historical Context" (2017) 22:3 Rev Const Studies 405 at 418; Telfer & Torrie, *Debt and Federalism*, *supra* note 7 at 74–75.

[44] See e.g. *Alberta (Attorney General) v Moloney*, 2015 SCC 51; *407 ETR Concession v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52; *Saskatchewan (AG) v Lemare Lake Logging Ltd*, 2015 SCC 53.

[45] See e.g. *Sun Indalex*, *supra* note 33 at para 60, per Deschamps J; Torrie, "Should Paramountcy Protect Secured Creditor Rights?", *supra* note 43 at 420–22.

[46] See e.g. *Canada v Canada North Group Inc.*, 2021 SCC 30 at para 31, per Côté J (holding that the purpose of the CCAA and orders made under it cannot be "neutralized" by other legislation, including provincial statutes). See also Sam Babe, "Recent Use of Statutory Discretion and Inherent Jurisdiction in Insolvency and Restructuring", (2020) 18 Annual Rev Insolvency Law 365, Part VII: Discretion and Paramountcy (noting that characterizing CCAA powers as an exercise of statutory discretion rather than inherent jurisdiction means that federal paramountcy now applies to these judicial interpretations); Roderick J Wood, "'Come a Little Bit Closer'": Convergence and its Limits in Canadian Restructuring Law" (2021) 10 J Insolv Inst Can 1 (contrasting the role of statutory discretion in CCAA and BIA restructurings).

[47] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 92–93, reprinted in RSC 1985, Appendix II, No 5.

[48] Torrie, "Should Paramountcy Protect Secured Creditor Rights?", *supra* note 43 at 424–25.

over it, including in situations when the institution experienced financial distress.[49] Additionally, there have been, and continue to be, various specific insolvency regimes tailored for particular types of entities, such as farm businesses, railroads, banks, and insurance companies.[50] This reflects the view that certain entities raise unique public interest considerations that make it more appropriate to resolve their financial distress through a mechanism other than ordinary commercial insolvency proceedings. This view is reinforced by the definition of "company" in the CCAA itself, which excludes banks, trust companies, and insurance companies.[51]

Takeaways

1. *The CCAA is a remedy for large commercial creditors.*
2. *It was outwardly refashioned by judges in the 1980s and 1990s as a vehicle for restructuring companies and this was seen as advancing the so-called public interest.*
3. *Workers have been central to the CCAA narrative, but their interests are not substantively addressed in the Act, nor are they advanced in most proceedings.*
4. *CCAA proceedings are concerned with the interests of private parties.*
5. *There is a tendency to automatically approach any issue that coincides with financial distress through the lens of insolvency law.*
6. *The CCAA has the aura of a super-statute, capable of superseding any conflicting legislation.*

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[49] See e.g. *L'Union St. Jacques de Montréal v Bélisle*, [1874] UKPC 53; Telfer & Torrie, *Debt and Federalism*, *supra* note 7 at 81.

[50] *Farm Debt Mediation Act*, SC 1997, c 21; *Winding-up and Restructuring Act*, RSC 1985, c W-11; *Canada Transportation Act*, SC 1996, c 10, Division V; *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, Part XII – Securities Firm Bankruptcies.

[51] *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s 2(1), "company"; Torrie, *Reinventing Bankruptcy Law*, *supra* note 4 at 46.

III. The Expanding Scope of the CCAA

Summary

Over time, case law has broadened the CCAA to apply to new kinds of debtors. This occurred for three inter-related reasons. First, stalled bankruptcy reforms in the twentieth century left judges to update antiquated laws. Parliament then belatedly amended the CCAA to reflect the case law. Second, judges tended to interpret away restrictions on accessing the CCAA, rendering these limitations meaningless. Third, the acceptance that restructuring advanced the public interest supported giving a wide scope to the CCAA to accomplish this objective. As a result, the jurisdiction of federal restructuring law has greatly expanded.

[The CCAA's] expanding scope tends to benefit large commercial creditors…

While the Laurentian University's CCAA application was publicly shocking,[1] it should not have been surprising to those who have been following recent trends in Canadian insolvency law. One of the clearest developments in CCAA cases is the judicial broadening of the Act's reach, including its applicability to different types of debtors.[2] There are three inter-related reasons for this phenomenon, which are described below. Throughout the discussion it is important to keep in mind that the CCAA is primarily a remedy for creditors and its expanding scope tends to benefit large commercial creditors relative to other stakeholders.[3] Additionally, the "public interest" in the CCAA context is a nebulous term which is frequently used to justify resolving the insolvency in a manner which advances creditor interests.

First, due to stalled bankruptcy reforms in the mid-twentieth century, a pattern developed of relying on judges to adapt antiquated bankruptcy laws to contemporary insolvencies.[4]

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[1] See e.g. "Laurentian University files for creditor protection", *CBC News* (1 February 2021), online: <www.cbc.ca/news/canada/sudbury/laurentian-university-creditor-protection-1.5896522>; Elaine Della-Mattia, "'Insolvent' Laurentian U files for protection from creditors; minister angry", *The Sudbury Star* (1 February 2021), online: <www.thesudburystar.com/news/local-news/insolvent-laurentian-u-files-for-protection-from-creditors-minister-angry>.

[2] Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020) at 136–37.

[3] *Ibid* at 7–9.

[4] *Ibid* at 4.

This occurred in an ad hoc manner, case by case, through the use of judicial discretion.[5] This pattern created a body of practical law that guided commercial insolvency proceedings. As consensus developed around specific points of practical law, Parliament passed piecemeal amendments to the CCAA to reflect that consensus.[6]

In terms of CCAA lawmaking, Parliament and the courts essentially switched roles.[7] As a consequence of locating legal changes in the courts, reforms are shaped more reactively and less deliberatively. They also receive significantly more input from private parties relative to the broader, more diverse spectrum of stakeholder groups that take part in legislative reform.[8] Relatedly, judicial adaptations in unusual insolvencies can become the law for virtually every CCAA insolvency.[9] Decisions from outlier cases may be used even in insolvencies where they are unnecessary or unwarranted.

…Parliament and the courts essentially switched roles.

Second, judicial adaptations of the letter of the law have gone hand in hand with a tendency to interpret restrictions in the CCAA in such a way that the restriction becomes meaningless. Following the pattern identified above, Parliament may then repeal the purported restriction, formally removing it from the Act altogether. One of the main ways this has occurred is through "tactical devices".[10] Tactical devices have been used to circumvent restrictions as to which debtors can access the CCAA; they are basically a means of avoiding provisions of the Act that are considered inconvenient. For instance, tactical devices

…[There is] a tendency to interpret restrictions in the CCAA in such a way that the restriction becomes meaningless.

[5] *Ibid* at 163.
[6] *Ibid* at 156, 160.
[7] *Ibid* at 146.
[8] *Ibid* at 174. For this reason, there is a growing trend of affected groups acting as intervenors in significant CCAA cases. See e.g *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6, in which the following groups intervened: Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals, and Canadian Bankers Association.
[9] See e.g. the development of the monitor role via judicial discretion in the 1980s, which eventually became a standard feature of initial orders and was institutionalized by Parliament in 1997: Torrie, *Reinventing Bankruptcy Law*, *supra* note 2 at 137–39.
[10] *Ibid* at 19, 147.

known as instant trust deeds were used to sidestep a 1953 amendment to the CCAA which prevented its use by debtor companies in the absence of a receiver to represent creditors.[11] After the use of instant trust deeds became common practice, Parliament repealed the restriction they were intended to overcome, belatedly bringing the text of the CCAA in line with practice.[12]

In other cases, restrictions in the CCAA have been rendered ineffective as a matter of statutory interpretation. For example, the CCAA technically requires that the debtor company be insolvent in order to make an application.[13] However, judges have interpreted this criterion broadly so as to include debtors that are still able to pay debts as they come due, but could on some measurements be "technically insolvent".[14] This could enable an debtor company to receive creditor protection even when it is not immanently insolvent: a powerful tool when facing negotiations with creditors.

…courts have found creative ways to get around the CCAA's express restrictions.

Another example is the CCAA's former prohibition on railway companies filing under the Act.[15] The court has allowed companies that operate railways to access the CCAA by interpreting the restriction on railway companies so narrowly that it does not function as a restriction.[16] Parliament subsequently removed

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[11] *Ibid* at 129–33. Similarly, in the third-party asset-backed commercial paper (ABCP) restructuring, the court again held to a strict and narrow interpretation of "company" in allowing ineligible debtors to be converted into eligible companies on the eve of application, for the express purpose of gaining access to the CCAA: *ibid* at 136.

[12] *Ibid* at 137.

[13] *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s 2(1), "debtor company". CCAA courts often cite the definition of "insolvent person" under bankruptcy legislation to determine if an applicant is a debtor company: *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 2. See e.g. *Les Oblats de Marie Immaculee du Manitoba*, 2004 MBQB 71, holding that the BIA definition was the only appropriate one to apply under the CCAA.

[14] See e.g. *Stelco Inc.*, 2004 CanLII 24933 (ON SC) at para 26, leave to appeal refused, [2004] OJ No 1903 (Ont CA), [2004] SCCA No 336 (SCC). In contrast, courts have held that a petitioner for bankruptcy must strictly prove one of the statutory acts of bankruptcy: see e.g. *Bombardier Credit Ltd. v Find*, 1998 CanLII 3000 (ON CA); *Avalanche Holdings Corp. v Ball*, 2004 BCCA 647 at para 5. See also *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABQB 2, explicitly rejecting the *Stelco* definition of insolvency in the BIA context.

[15] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 2(1) "company", as it appeared on 22 May 2018 [*CCAA* 2018].

[16] See *Montréal, Maine & Atlantique Canada Co. (Arrangement relatif à)*, 2013 QCCS 4039 at paras 8–26. See also Torrie, *Reinventing Bankruptcy Law*, *supra* note 2 at 136.

the prohibition on railway companies filing under the CCAA.[17] Even without resorting to a tactical device, courts have found creative ways to get around the CCAA's express restrictions.

Many commentators have praised the use of judicial discretion as an essential part of fleshing out a statute that was originally very brief.[18] However, filling gaps or creating new practices or norms is distinct from approaching restrictions in such a way that they are made meaningless. The former may be said to be "putting flesh on bones". The latter is more like removing bones from the skeleton. This trend suggests that any restriction in the CCAA can potentially be avoided through a tactical device or an interpretive approach that makes the restriction useless.

The third reason behind the expanding reach of the CCAA is the broad acceptance that commercial restructuring advances the "public interest" (however defined, although its original purpose was to provide lender creditors with a way to force restructuring on a borrower) and the resulting impulse to give the Act a wide scope to accomplish this objective. Allowing generous access to the CCAA has even been conflated with the purpose of the Act itself.[19] Broadening the CCAA's scope includes both overcoming statutory restrictions and "widening the lens" of the court to consider the interests of stakeholders other than creditors as part of insolvency proceedings—potentially even allowing social stakeholders to participate.[20]

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[17] *Transportation Modernization Act*, SC 2018, c 10, s 89, amending *CCAA* 2018, *supra* note 15, s 2(1) "company."

[18] See e.g. *Westar Mining* ("Proceedings under the CCAA are a prime example of the kind of situations where the court must draw upon such powers to 'flesh out' the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects."); Keith Yamauchi, "The Courts' Inherent Jurisdiction and the CCAA: A Beneficent or Bad Doctrine" (2004) 40 Can Bus LJ 250 at 277–79; Janis Sarra, "Judicial Exercise of Inherent Jurisdiction under the CCAA" (2004) 40 Can Bus LJ 280 at 280; Anthony J Duggan et al, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials*, 2nd ed (Toronto: Emond Montgomery, 2009) at 574; Julie Himo & Arad Mojtahedi, "The Evolving Role of the Eyes and Ears of the Court: Empowering the CCAA Monitor to Initiate Legal Proceedings Against Third Parties" (2020) 18 Annual Rev Insolvency Law 120 at 120.

[19] Torrie, *Reinventing Bankruptcy Law*, *supra* note 2 at 136, 164.

[20] *Canadian Airlines Corp*, 2000 ABQB 442 at para 95; *ibid* at 57–58; Torrie & DaRe, "The Participation of Social Stakeholders" at 376.

While the former broadens the applicability of the Act itself, the latter draws public policy-making into the courts as part of commercial insolvency proceedings. Both phenomena amplify the influence of judges and underscore the significance of the role reversal between Parliament and the courts in this area of law.[21] However, the fact that commercial insolvency proceedings may have public interest elements (although these are not well defined) does not mean that the CCAA should be the vehicle for making public policy.

This third reason for the increasing breadth of the CCAA fuels the two already described (relying on judges to adapt law to new circumstances and circumventing restrictions in the Act) by providing the impetus and justification for judges to act as they do. This has been the creative spark of commercial insolvency proceedings in Canada for the past 40 years. It has led to an insolvency law "exceptionalism" that justifies the pursuit of pragmatic commercial solutions despite statutory restrictions.[22]

[A]n insolvency law exceptionalism…justifies the pursuit of pragmatic commercial solutions despite statutory restrictions.

Taken together, these three inter-related reasons explain why a CCAA filing by a public institution such as Laurentian University was unprecedented, but not unlikely.

The corollary of the CCAA's expanding reach is that it draws a larger and larger boundary around this field of law, which results in jurisdictional expansion.[23] As described in Chapter 2, this is augmented by the dynamics of Canadian federalism, which provide that

[21] Torrie, *Reinventing Bankruptcy Law*, *supra* note 2 at 146.
[22] Roderick J Wood, "The Stories, Confabulations and Lies We Tell Ourselves in Bankruptcy and Insolvency Law" (2021) 64:2 Can Bus Law Journal 226; David Bish, "In Search of the Limits of Judicial Discretion" (2018) 7 J Insolv Inst Can 181 at 208.
[23] Virginia Torrie, "Should Paramountcy Protect Secured Creditor Rights? *Saskatchewan v Lemare Lake Logging* in Historical Context" (2017) 22:3 Rev Const Studies 405 at 420–22; Thomas GW Telfer & Virginia Torrie, *Debt and Federalism: Landmark Cases in Canadian Bankruptcy and Insolvency Law, 1894–1937* (Vancouver: UBC Press, 2021) at 99–100.

…the Laurentian University insolvency is a moment of reckoning.

a federal law such as the CCAA supersedes any conflicting provincial legislation.[24] Provincial influence over the substance of public policy-making in areas such as education is bound to be dampened if it becomes common practice to resolve the financial struggles of provincially funded institutions through federal insolvency law.[25] In light of the tendency of pathbreaking CCAA cases to establish new rules for "plain vanilla" insolvencies, the Laurentian University insolvency is a moment of reckoning. It brings long-simmering tensions within CCAA law into plain view and starkly raises the questions of whether, why and how the CCAA should apply to publicly funded institutions.

Takeaways

1. *There is a trend of broadening the CCAA to apply to different kinds of debtors.*
2. *Almost any restriction in the CCAA can potentially be avoided through a tactical device or an interpretive approach that makes the restriction useless.*
3. *The breadth of the CCAA and the increasing emphasis on public interest considerations transforms CCAA courts into policy-making bodies.*
4. *This results in an expanding jurisdiction of federal insolvency law.*

[24] See e.g. *Canada v Canada North Group Inc.*, 2021 SCC 30 at para 31, per Côté J (holding that the purpose of the CCAA and orders made under it cannot be "neutralized" by other legislation, including provincial statutes).
[25] Torrie, "Should Paramountcy Protect Secured Creditor Rights?", *supra* note 23 at 424–25.

IV. Application of the CCAA to Universities

Summary

The policy objectives of public institutions, such as universities, are inconsistent with the core rationale of insolvency law to promote commercial risk-taking. Universities rely on and are backstopped by government funding. Applying the CCAA to such institutions changes the ground rules on which they operate. This requires them to compete in a "marketplace", commodifies public purposes and goods, and undermines university governance, internal decision-making, and transparency. As a result, universities, governments, or other stakeholders can potentially use the CCAA process to sideline collegial governance, collective bargaining, and institutional autonomy. This cedes democratic control over universities to corporate boards, commercial creditors, and federal insolvency law.

The public policy objectives of Canadian universities include the advancement of learning, the dissemination of knowledge, and the betterment of society.[1] These goals are inconsistent with the commercial framework that ordinarily guides CCAA proceedings. One major theoretical justification for business insolvency law is to promote risk-taking by promising protection from liability—and a fairer distribution of losses—if a company encounters financial distress.[2] Corporate restructuring, more specifically, is often justified on the basis that it is more economically and socially beneficial to allow potentially viable firms to stay in business, and thereby continue contributing to local economies and societies.[3]

The public policy objectives of Canadian universities... are inconsistent with the commercial framework that ordinarily guides CCAA proceedings.

[1] See e.g. *An Act to incorporate Laurentian University of Sudbury*, SO 1960, c 151, s 3: "The objects and purposes of the University are, a) the advancement of learning and the dissemination of knowledge; and b) the intellectual, social, moral and physical development of its members and the betterment of society" [*Laurentian Act*]. Similar provisions are found in other university acts.

[2] See e.g. Elizabeth Warren, "Bankruptcy Policy" (1987) 54:3 U Chicago L Rev 775; Nathalie Martin, "American Bankruptcy Laws: Encouraging Risk-Taking and Entrepreneurship" (2006) 11:1 Economic Perspectives 13; Virginia Torrie, "Bankruptcy Theory" [unpublished draft article].

[3] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 18; Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed (Toronto: Carswell, 2013) at 14, quoted in *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10 at para 42 [*Bluberi*].

Within this paradigm, the use of the CCAA makes sense in the case of for-profit businesses. In contrast, universities are not subject to the market pressures to which for-profit enterprises are subject at all stages of their existence. A university does not need the same risk-taking incentives as a commercial entity because the risks in university administration are qualitatively and quantitatively different, and many key risks are borne or at least backstopped by a government.[4] Market-based contracting practices, finances, and fiscal responsibility are all important parts of administering a university—but they are a by-product of the decision to create one rather than the driving motivation. Indeed, money is just one of a much wider range of socio-economic considerations.

A university does not need the same risk-taking incentives as a commercial entity…

For example, Laurentian University had specific mandates to address linguistic and cultural diversity as well as regional equity and development.[5] To fulfill its unique mandate, a university requires stable funding and institutional autonomy, not market pressure. Even modern funding frameworks for universities—like the performance-based measurements that are employed in some jurisdictions including Ontario—are in theory not intended to create profit motivations for universities, but to better coordinate available resources and to tie some aspects of university programming to labour market needs.[6]

On this understanding, the formation, continued existence, and even winding up or amalgamation of a public university is shaped primarily by political choices rather than by private action. This is clear from the applicable legal structure: unlike private corporations,

[4] We will discuss the quality of the backstop in Chapter 6.
[5] See e.g. Laurentian University, "Our Tricultural Mandate", online: <laurentian.ca/faculty/arts/our-tricultural-mandate>; Laurentian University, *Professional Year Practicum Handbook 2017–2018* (Sudbury: Laurentian University, 2017) at 3.
[6] See Matt Clare, *Exploring Ontario Universities' Strategic Mandate Agreements' New Performance-Based Model in Relation to SMA's Original Differentiation Goals* (M Ed Thesis, Brock University, 2021). We will discuss the role of performance-based funding rules in Chapter 6.

[T]he government has a monopoly over the formation of universities…because they raise novel public interest considerations…

which can be created by right after filing the relevant documents,[7] both public and private universities are established by dedicated provincial legislation (and, in many provinces, dedicated acts for each institution).[8] The government has a monopoly over the formation of universities and other quasi-public bodies exactly because they raise novel public interest considerations, represent publicly funded policy choices, and require public oversight.

Certainly, the decline in public funding has required universities to rely more heavily on alternate revenue streams such as tuition to operationalize their public purpose. However, both the federal and provincial governments remain primary and essential funders of post-secondary education and exert substantial control over tuition costs.[9] There are regional differences, with tuition fees—especially de-regulated international student tuition—making up a greater proportion of university revenues in Ontario than in other provinces.[10] The COVID-19 pandemic has led to lower international student enrolment across the country, creating a funding shortage for many precariously-funded educational institutions that were reliant on this revenue stream.[11]

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[7] See e.g. the mandatory language in the *Canada Business Corporations Act*, RSC, 1985, c C-44, ss 5(1), 7, 8(1).

[8] See e.g. *Laurentian Act*, *supra* note 1; *Post-secondary Learning Act*, SA 2003, c P-19.5; *Memorial University Act*, RSNL 1990, c M-7.

[9] See e.g. Ontario's 10% reduction of tuition fees in 2019 and subsequent freeze on tuition increases: Ontario Ministry of Colleges and Universities, "Ontario Extends Freeze on College and University Tuitions", News Release (30 April 2021), online: <news.ontario.ca/en/release/1000048/ontario-extends-freeze-on-college-and-university-tuitions>.

[10] See Statistics Canada, "Revenues of universities and degree-granting colleges (x 1,000)" (Table 37-10-0026-01, 29 July 2021), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3710002601>. The Province of Ontario provided 43% of Laurentian University's operating funds.

[11] See Christopher Matias, Andrija Popovic & André Lebel, "Projected Financial Impact of the COVID-19 Pandemic on Canadian Universities for the 2020/21 Academic Year" (Statistics Canada, Education, learning and training: Research Paper Series, 18 August 2021), Chart 4, online: <www150.statcan.gc.ca/n1/pub/81-595-m/81-595-m2021002-eng.htm>. A recent review of Ontario's public colleges has suggested that this tuition model poses a financial risk to the entire system: Office of the Auditor General of Ontario, *Value-for-Money Audit: Public Colleges Oversight* (December 2021), online (pdf): <www.auditor.on.ca/en/content/annualreports/arreports/en21/AR_PublicColleges_en21.pdf>.

Over time, then, the public mission of universities to educate domestic students has become reliant on the partial commodification of operations due to inadequate public funding. Some have argued that this commodification has begun to change the nature of universities, as visible in the recent push towards "micro-credentials" as a means to commodify and gear more post-secondary education to market needs.[12]

However, these shifts in funding models are also the result of policy choices by government, and government remains the primary funder and controls the primary method by which universities obtain funding (tuition) as matters of public policy. And if reductions in public funding have caused some areas of a university to be defined primarily by their revenue-generating potential, then the internalized tensions this creates are exacerbated by a CCAA process that is designed to separate revenue generation from all other functions. This is a form of privatization-by-stealth that will erode the public mandate of universities.

This is a form of privatization-by-stealth that will erode the public mandate of universities.

In addition, this trend still does not transform universities into private entities from an organizational or insolvency law perspective. For one, the very structure of a university—including endowment lands with restricted purposes and other highly-specialized, non-liquid assets such as lecture halls—make standard commercial lending-security relationships difficult. Instead, it is likely the relative stability of public funding and the implicit government backstopping that has given creditors the confidence to lend to universities in the past.[13] The narrow exception may be those institutions that do not receive any government funding and are wholly dependent on tuition revenues and private donors.

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[12] See e.g. Jackie Pichette et al, *Making Sense of Microcredentials* (Higher Education Quality Council of Ontario, 5 May 2021), online: <heqco.ca/pub/making-sense-of-microcredentials/>. The 2020 Ontario budget committed nearly $60 million towards a micro-credential strategy for employment-related upskilling.
[13] Alex Usher, "Laurentian Blues (7) – The Process", *Higher Education Strategy Associates*, (13 April 2021), online: <higheredstrategy.com/laurentian-blues-7-the-process/>.

For example, the private, not-for-profit Quest University in British Columbia was established following a sizeable land bequest from a private foundation and for many years relied on developing its real estate portfolio and other business ventures to finance university operations and various loans.[14] This business model proved untenable and Quest filed for CCAA protection in January 2020, eventually entering into a restructuring plan that required it to sell off all its lands to finance continued university operations.[15]

…publicly funded universities operate on much different ground rules than ordinary commercial businesses.

In general, then, publicly funded universities operate on much different ground rules than ordinary commercial businesses. Subjecting a public institution to commercial insolvency law is a way of "privatizing" it through the use of market protocols and forces in the restructuring process.[16] This assumes that financial considerations are the primary if not sole organizing principle of a university—instead of the means to an end—and looks at all aspects of the university in terms of revenues or profitability, which diminishes the role of its broader public purpose and obscures the reality that government funding remains a significant source of revenues. It changes the norms for the institution's governance and operations and departs from the public policy that gave rise to the university in the first place. (We do not argue that financial considerations are unimportant in university governance—they most certainly are, as we will discuss in the next chapter—but only make the point that a commercial insolvency process is not well-equipped to accommodate the genuine public interest and academic policy elements of a university as they bear on financial considerations.)

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[14] *Quest University Canada*, 2020 BCSC 318 at paras 7–15.

[15] *Quest University Canada,* 2020 BCSC 1883, leave to appeal refused, *Southern Star Developments Ltd. v Quest University Canada*, 2020 BCCA 364; "In order to settle its debts, Quest University sells off campus" *The Squamish Chief* (29 October 2020), online: <www.squamishchief.com/local-news/in-order-to-settle-its-debts-quest-university-sells-off-campus-3351994>.

[16] For example, Laurentian University applied for, and was granted, CCAA protection in part because its faculty compensation package was deemed to be "above market": *Laurentian University of Sudbury*, 2021 ONSC 659 at para 22 [*Laurentian CCAA Filing Decision*]. Legitimate questions could also be raised about certain doctrines associated with market-based analyses, quite apart from whether they are appropriate to apply to a publicly funded institution. These are beyond the scope of this report.

Public institutions do not (and should not) require the insolvency law "carrot" of insulation from liability to fulfill their objectives. However, because the CCAA is silent on its application to universities (or any publicly funded institution), there is no mandate for the court to consider the source of an institution's revenues beyond the balance book that is before the court—including, for example, whether the government is a necessary party to the proceedings.[17]

…the CCAA effectively require[s] CCAA courts to apply a commercial lens to all the issues in dispute.

Instead, the commercial constraints of the CCAA effectively require courts to apply a commercial lens to all the issues in dispute. For example, in the Laurentian case the court rejected arguments that the university could not use the CCAA to disclaim its longstanding federation agreements with other schools, even though this federated structure was far from a typical commercial relationship.[18] The disclaimer was justified because Laurentian determined it could teach the same federated university students internally at a lower cost, thereby allowing it to retain millions of dollars in grant revenues.

The court accepted that "right-sizing" the university meant it could not continue programs and courses that were "revenue negative" and that long-term sustainability required "generat[ing] positive cash flow from operations on an annual basis".[19] Yet this narrow view of "sustainability" ignores that the major source of a university's "cash flow" is the province. The disclaimer also represented a corresponding loss of revenue for the other universities, placing them in direct competition with each other in a way that previously was not the case. Decisions about university funding are not a zero-sum game. However, the court assumed that Laurentian was already viably operating under a commercial framework, which was arguably never the case, nor intended to be the case.

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[17] See e.g. *Laurentian CCAA Filing Decision*, *supra* note 16 at paras 27–29, where the court easily accepted that Laurentian qualified as a "debtor company" under the CCAA, and *Laurentian University of Sudbury*, 2021 ONSC 1098 at para 45 [*Laurentian CCAA Comeback Decision*], where the court noted that whether the Ministry of Colleges and Universities was participating in the proceedings was not relevant to determining Laurentian's request for relief.

[18] *Laurentian University of Sudbury*, 2021 ONSC 3272 at para 69, leave to appeal refused, 2021 ONCA 448.

[19] *Ibid* at paras 52–54.

The CCAA process also undermines the historic governance structure of Canadian universities…

The CCAA process also undermines the historic governance structure of Canadian universities, which is based on institutional autonomy, collegial self-governance, and freedom from partisan political control.[20] Self-governance often takes the form of a bicameral structure with an academic senate and administrative board of governors.[21] While the quick pace of the CCAA process makes sense in a commercial context where the goal is to resolve financial distress quickly and put the debtor firm back on a financial footing that will enable them to turn a profit, it is at odds with the deliberative and consultative nature of university governance.[22]

One practical consequence is that in the Laurentian case, under threat of shutdown, the senate had little choice but to accept massive cuts to academic programs and staff, which it otherwise may have desired to re-design more deliberately.[23] The duress of a restructuring diminishes the role of the academic senate in favour of the board of

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[20] See "Institutional autonomy: principles" online: Universities Canada <www.univcan.ca/about-us/membership-and-governance/institutional-autonomy-principles/>; *McKinney v University of Guelph*, [1990] 3 SCR 229 at paras 40–41; Julia Eastman et al, "Provincial Oversight and University Autonomy in Canada: Findings of a Comparative Study of Canadian University Governance" (2018) 48:3 Can J Higher Education 65 at 67.

[21] Glen A Jones, "Introduction" in Glen A Jones (ed), *Higher Education in Canada: Different Systems, Different Perspectives* (New York: Routledge, 2009) at 2; Brent Davis, "Governance and administration of postsecondary institutions in Canada", in Teresa Shanahan, Michelle Nilson & Li-Jeen Broshko (eds), *Handbook of Canadian Higher Education Law* (Kingston: McGill-Queen's University Press, 2015) at 74–75. While much of the real decision-making power may lie in executive committees of the Board and offices such as the President, for our purposes these bodies report to the Board and so we refer to it as the primary administrative governance body.

[22] In the Laurentian case, it has been suggested that the academic program cuts made through this condensed process were "too deep", subsequently requiring the university to recall laid-off workers: see Erik White, "'The best word to describe it is strange': financial crisis looms over Laurentian University this fall", *CBC News* (6 December 2021), online: <www.cbc.ca/news/canada/sudbury/laurentian-university-campus-atmosphere-insolvency-financial-crisis-1.6267660>. See also Usher, "Laurentian Blues (7) – The Process", *supra* note 13.

[23] Ontario Confederation of University Faculty Associations, "CCAA process continues to fail public institutions as Laurentian Senate is forced to vote on restructuring package", Press Release (6 April 2021), online: <ocufa.on.ca/press-releases/ccaa-process-continues-to-fail-public-institutions-as-laurentian-senate-is-forced-to-vote-on-restructuring-package/>. As part of the CCAA process, Laurentian has retained Nous Group management consultants to conduct an operational and governance review: Laurentian University, "Operational and Governance Review" (26 October 2021), online: <www.laurentianu.info/operational-and-governance-review/>.

governors and the external monitor, the latter of which primarily exists to look out for creditor interests. Across Canada, university boards have been criticized for increasingly acting like corporate boards of directors made up of major donors and financial figures.[24] However, the CCAA process further empowers them to act unilaterally and to have these business decisions sanctioned by a court.

These concerns are exacerbated by the lack of transparency regarding certain aspects of a restructuring. While the CCAA process is court-supervised and theoretically open, the quick pace of proceedings means that most stakeholders are playing catch-up, at least at the outset.[25] There may also be an informational imbalance. To address this concern, the CCAA empowers a court to require any person to disclose any aspect of their economic interest in a debtor company.[26] But while the definition of "economic interest" is commercially broad, it does not appear to extend to require government disclosure. In the Laurentian case, the court also granted a sealing order over certain communications between the province and the university immediately before it filed for creditor protection, because disclosing them might compromise the restructuring process.[27] The court held that the "commercial interest" in the documents transcended the direct interests of Laurentian to involve the entire community, including faculty, students, employees, suppliers, the City of Sudbury, and the surrounding area.[28] Yet rather than support disclosure, this

[T]he court also granted a sealing order over certain communications between the province and the university…because disclosing them might compromise the restructuring process.

[24] See e.g. Moira MacDonald, "University boards in the spotlight", *University Affairs* (3 January 2018), online: <www.universityaffairs.ca/features/feature-article/university-boards-spotlight/>.
[25] For example, few parties were aware of the Laurentian filing before it happened. While typical, the only parties present at the initial hearing were the university, the proposed monitor, the bank creditors, and the DIP lender: *Laurentian CCAA Filing Decision*, *supra* note 16. Representatives of the campus unions, the student association, the affiliated universities, and the provincial government attended the "comeback hearing": *Laurentian CCAA Comeback Decision*, *supra* note 17.
[26] *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s 11.9.
[27] *Laurentian CCAA Filing Decision*, *supra* note 16 at paras 60–64; *Laurentian University of Sudbury*, 2021 ONSC 1453 [*Laurentian CCAA Sealing Order Decision*], leave to appeal refused, 2021 ONCA 199. The court also granted a stay of freedom of information requests to the institution, reasoning that relevant information could be accessed via the monitor instead: *Laurentian CCAA Comeback Decision*, *supra* note 17 at paras 23–25, 60–61
[28] *Laurentian CCAA Sealing Order Decision*, *supra* note 26 at para 20.

justified the sealing order to avoid undermining the restructuring process, which was "of paramount importance" to all stakeholders.[29] While both concerns were framed in terms of the public interest, this malleable concept was interpreted to require approving the sealing order (thereby protecting commercial interests in practice).

In this way, CCAA decisions are often justified with reference to the needs of the restructuring process itself, creating a feedback loop. The University of Sudbury's challenge to Laurentian's disclaimer of its federation agreement was dismissed on a similar basis: arguments about legal obligations to fund French-language education were cast aside because if Laurentian had to enter bankruptcy, this would mean no educational offerings for the francophone community at all.[30] This parallels the (false) choice of restructuring and saving jobs versus not restructuring and losing jobs, as described in Chapter 2. The Laurentian experience reflects a trend of the CCAA process forcing complex issues into narrow dichotomies.

…CCAA decisions are often justified with reference to the needs of the restructuring process itself, creating a feedback loop.

These decisions demonstrate both the deficiencies of using a commercial process to deal with issues outside the "commercial box" and the tautological reasoning underpinning much of CCAA law. Because going-concern restructuring is seen as the ultimate goal, the demands of the CCAA process to achieve it take priority over other considerations.[31] Relatedly, appellate courts apply a more deferential standard to applications for leave to appeal from CCAA decisions, which is justified in part by the need to avoid delaying the proceedings or compromising an eventual plan of arrangement.[32] This is particularly concerning in the university context, where the urgency justifying restructuring and cuts

[29] *Ibid* at para 21.
[30] *Laurentian University v Sudbury University*, 2021 ONSC 3392 at paras 58–60.
[31] The CCAA is also used to facilitate liquidations and this function has been sanctioned by the Supreme Court, underscoring the creditor-centric nature of the CCAA remedy: *Bluberi*, *supra* note 3. See further Torrie, *Reinventing Bankruptcy Law* at 175; Virginia Torrie, "Implications of the *Bluberi* decision: An Affirmation of Broad Judicial Discretion in CCAAs and a 'Green Light' for Litigation Funding in Canada" (2021) 36:2 BFLR 277.
[32] *Bluberi*, *supra* note 3 at paras 53–54; *Edgewater Casino Inc.*, 2009 BCCA 40 at para 20; *Nortel Networks Corp.*, 2016 ONCA 332 at para 34.

may actually be created by the government itself. University bureaucracies may move more slowly than private businesses in part due to the need for public accountability, consultative decision-making, and unique considerations such as academic freedom—all of which are absent or muted in the CCAA process. This result seems all the more absurd when the biggest funding partner—which could single-handedly decide whether a university remains solvent—is not even required to come to the table.

There is also a (neoliberal) tendency to view any situation that intersects with financial distress through the lens of insolvency law. Yet it is a myth that the CCAA and restructuring itself promotes the public interest (as that term is understood outside of commercial law) and that all restructuring is good. This narrows possible solutions to insolvency law solutions, even if that is not the optimal means of resolving the problem. The expanded scope of the CCAA goes hand-in-hand with a kind of learned helplessness in terms of exploring alternative policy approaches, notwithstanding the range of options open to government. Despite the public interest rhetoric of CCAA courts, this also ignores the long-term impacts of cuts to an institution that is at the centre of a local community—for example, on the regional economy,[33] the healthcare system,[34] relationships between researchers and Indigenous communities,[35] or even increased lending costs for other institutions.[36] None of this is truly relevant under the CCAA unless the debtor can first formulate a plan of arrangement that will be accepted by its creditors.

There is also a (neoliberal) tendency to view any situation that intersects with financial distress through the lens of insolvency law.

[33] Ben Leeson, "Laurentian cuts could take more than $100 million out of Sudbury's economy", *The Sudbury Star* (14 April 2021), online: <www.thesudburystar.com/news/local-news/laurentian-cuts-could-take-more-than-100-million-out-of-sudburys-economy>.
[34] "'Destructive' closure of Laurentian University's midwifery program vexes students, educator", *CBC News* (16 April 2021), online: <www.cbc.ca/news/canada/sudbury/laurentian-university-midwifery-school-cut-reaction-1.5989455>.
[35] Maureen Gustafson, Sebastien Lefebvre, and Robyn Rowe, "Insolvency, Indigenous Research & the Uncertain Future of Laurentian University" (Yellowhead Institute Policy Brief Issue 96, 19 April 2021), online (pdf): <yellowheadinstitute.org/wp-content/uploads/2021/04/laurentian-university-and-indigenous-research-yi-brief-4.2021.pdf>.
[36] Usher, "Laurentian Blues (7) – The Process", *supra* note 13.

Whether and when this all occurs is ad hoc, possibly driven by political calculations to reduce the government's financial obligations while deflecting responsibility for its decision. This aligns with a neoliberal agenda that sees universities, despite their long histories, as (poorly-run) businesses. Academically, some of the first casualties could be programs that critique corporations and governments or otherwise do not align with a business-oriented ideology.[37]

Why should a government be permitted to do indirectly…what it cannot do directly, simply by using insolvency law as the vehicle?

It is also true that there is a degree of government influence on universities through funding metrics and government-nominated members on governing boards.[38] However, this is meant to be arms-length and does not give the government free reign to dictate university decision-making.[39] Why should a government be permitted to do indirectly—setting aside collective agreements, cutting full academic programs, and sidelining collegial governance—what it cannot do directly, simply by using insolvency law as the vehicle?[40] Similarly, why should a university that does not begin its life having to compete in an open marketplace with a profit motive have to end its life this way? The logical extension is a world where a university (or any publicly funded organization) is deliberately underfunded by government and then pushed into bankruptcy proceedings in order to slash and burn. This is budgeting for crisis to avoid accountability. Or, it is a world of increasingly privatized universities that are dependent on bank financing and must sell off their campuses to survive, like Quest University.

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[37] Tasha Beeds, "Sparking Change from the Colonial Crisis of the Laurentian Insolvency Debacle: Let Them Burn their Own Houses Down…A Call for An Inter-Indigenous Nation to Nation University" (22 April 2021) kâ-pimotêt aski-iskwêw (Walking Earth Woman), online: <askikwew.blog/2021/04/22/sparking-change-from-the-colonial-crisis-of-the-laurentian-insolvency-debacle-let-them-burn-their-own-houses-down-a-call-for-an-inter-indigenous-nation-to-nation-university/>.

[38] We discuss funding arrangements in Chapter 6.

[39] Eastman et al, "Provincial Oversight and University Autonomy in Canada", *supra* note 20 at 67. See also *Canadian Federation of Students v Ontario (Colleges and Universities)*, 2021 ONCA 553 at paras 62–64, where the court found the Provincial Crown is bound by Ontario's university acts and cannot use its spending power to dictate internal university decision-making without legislation to this effect.

[40] This parallels the use of "strategic bankruptcy" by large American corporations to avoid debt obligations and pursue other political and organizational objectives, which has increasingly transformed US bankruptcy courts into fora for resolving social issues: see Kevin J Delaney, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage* (Berkeley & Los Angeles: University of California Press, 1999).

All institutions can potentially fail and there should be some process available for universities if they encounter financial difficulty. There is also a valid concern that an alternate mechanism could come with strict government-imposed conditions or closer management of the institution, which might similarly undermine the arm's-length position of the university.

…there should be some process available for universities if they encounter financial difficulty.

But the CCAA yields de facto control to creditors without any requirements for democratic involvement. As discussed above, it also relinquishes provincial jurisdiction over universities to federal jurisdiction over bankruptcy and insolvency law. This is despite the fact that the insolvency of a university is ultimately a political problem, rather than a financial one. Nor are courts the best forum to work out solutions to complex political issues. If we accept that universities are and should be "public", then important decisions about how to restructure public education should not be placed in the hands of private parties in this manner. Democratic organizations should not be extracted from public oversight during a crisis when democratic accountability is likely most important.

Democratic organizations should not be extracted from public oversight during a crisis…

Takeaways

1. *The commercial framework of the CCAA is inconsistent with the public mandate of Canadian universities.*
2. *Publicly funded universities should not require insolvency protection as an incentive to take risks, because they are already backstopped by the state.*
3. *The CCAA requires courts to apply a commercial lens to university decision-making, undermining their governance, transparency, and accountability.*
4. *CCAA decision-making is often justified with reference to the needs of the restructuring process itself, creating a feedback loop that ignores other potential policy solutions.*
5. *Applying the CCAA to universities allows administrators, governments, or other stakeholders to override collegial governance, collective bargaining, and institutional autonomy to save money.*
6. *Allowing universities to file for CCAA protection is consistent with a neoliberal view of universities as businesses and cedes control to corporatized boards, creditors, and federal jurisdiction over insolvency law.*

V. Limits of Challenging the CCAA Today

Summary

A stakeholder may challenge the application of the CCAA to universities in several ways. These include arguing that the organization does not meet one of the basic threshold requirements under the statute, such as the test for insolvency; that it is acting in bad faith or for an improper purpose; or that the restructuring is more appropriately addressed in a labour relations forum. These challenges are unlikely to be successful given broad judicial discretion and limited statutory restrictions on whether the CCAA applies, the high evidentiary threshold required to prove allegations of bad faith, and the supremacy of the CCAA over labour relations legislation. This allows the CCAA process to be used in place of existing collective bargaining procedures and protections. While there is not yet clear precedent addressing these arguments in a university (or public sector) restructuring, in our view these challenges to the application of the CCAA would not succeed absent extraordinary facts supporting the arguments.

Most stakeholders were surprised when Laurentian University filed for creditor protection under the CCAA. Although there was no independent legal challenge of the issue, many questioned the ability of a publicly funded university to even qualify as "insolvent".[1] In this chapter we review the ways in which stakeholders can challenge the application of the CCAA and assess the viability of bringing such challenges if or when a university (or perhaps any publicly funded institution) seeks creditor protection. We conclude that in the absence of some unusual evidence about solvency or very clear proof of bad faith conduct by the debtor, these efforts are not likely to succeed.

A stakeholder (like a faculty association or trade union) may seek to challenge an initial CCAA filing, or any step of a CCAA proceeding, on the basis that the debtor does not meet one of the requirements for CCAA protection. As we have noted in prior chapters, judicial interpretations of these requirements have expanded the scope of the CCAA over time. Broadly speaking, and depending on the factual matrix surrounding the filing, there

[1] See e.g. *Laurentian University of Sudbury*, 2021 ONSC 1098 [*Laurentian CCAA Comeback Decision*].

may be three primary grounds upon which to challenge the application of the CCAA within the CCAA process itself:

1. the university does not meet the test for “insolvent”, in part due to the publicly funded nature of the institution;

2. the university seeking creditor protection is acting in bad faith or abusing the CCAA process; or

3. some or all of the objectives of the restructuring are more properly addressed in another forum (for example, before a labour relations board or arbitrator).

The fact that there are very few statutory limits on the application of the CCAA to debtor corporations, the flexible approach to the definition of insolvency, and the likely high evidentiary threshold required to establish bad faith or abuse of process mean that it will be very difficult to challenge a university’s application for creditor protection. In addition, unions have generally not been successful in arguing that restructuring-related issues are better dealt with through labour relations fora (or alternatively, in circumventing a CCAA stay on this basis). The remainder of this chapter will particularize this summary with more detailed reference to prior case law challenging the use of the CCAA, highlighting the relatively limited precedents available.

A. Challenging CCAA Eligibility

As we have suggested in preceding chapters, we do not believe that a general challenge to the application of the CCAA to a publicly funded organization will be successful, so long as that organization is incorporated, has liabilities of at least $5 million, can demonstrate some basis for a current or impending inability to pay its liabilities as they come due, and otherwise does not fall into any of the exceptions to the CCAA (for example, banks or insurance companies).

…CCAA court[s] will likely find any incorporated organization…to be a "debtor company".

The definition of "debtor company" has been expanded over time through amendment and judicial interpretation. Several CCAA applications have previously been commenced in respect of not-for-profit corporations.[2] Unless there is a specific exemption in the CCAA (and perhaps even if there is one, as explained in Chapter 3), we are of the view that a CCAA court will likely find any incorporated organization—whether a registered business corporation or a corporate body created under a special statute—to be a "debtor company". The public nature of a special act of incorporation, the public purpose or assets of the institution, or the critical role of government funding have been insufficient reasons to exclude entities that meet the formal qualifications for the evolved understanding of debtor company.[3] This suggests that other broader public sector entities, such as hospitals, could also be found to qualify for CCAA protection.

Another specific way in which parties—including bargaining agents—have sought to challenge the application of the CCAA is to argue that the debtor company is not in fact insolvent and should not be able to avail itself of the protection of a stay of proceedings. As we have noted in prior chapters, the CCAA itself is a very flexible statute and CCAA courts have considerable discretion to make orders to facilitate its purposes.[4] Courts have relied on this power to find, among other things, that they can grant CCAA access to a company that is ***near to*** insolvency.

In *Stelco Inc.*, the bargaining agents argued the assessment of the debtor company's solvency should recognize that certain long-term liabilities (including pension liabilities) were not immediately payable and due, and as such, the threshold of insolvency was not

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[2] See e.g. *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ON SC) [*Red Cross*], leave to appeal refused, 1998 CanLII 17737 (ON CA); *TLC The Land Conservancy of British Columbia*, 2014 BCSC 97; *Quest University Canada*, 2020 BCSC 318 [*Quest CCAA Filing Decision*].

[3] Some universities were originally founded through pre-Confederation royal charters. There may be a technical argument for these institutions not available to universities incorporated under provincial statutes. However, to the extent that a university charter creates a body corporate or similar governance structure, we suggest that judges would find the CCAA applies to chartered universities.

[4] The Supreme Court of Canada has confirmed that the CCAA confers broad discretionary authority which must be exercised in furtherance of its remedial objectives: *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 at para 59.

met. The court disagreed and held that it would defeat the CCAA's purpose to limit filings until a company's financial difficulties are so dire that it would not have sufficient resources to carry through a restructuring bid.[5] Under this test, an insolvent corporation is one that is not yet unable to meet its obligations but would reasonably run out of liquidity before it could complete a restructuring without CCAA protection. This less onerous "reasonable foreseeability/proximity" test has been widely adopted in Ontario, although it is not universally accepted by courts either in that province or elsewhere in Canada.[6]

A challenge to the alleged insolvency of an applicant will depend heavily on the facts of each case. However, existing case law strongly suggests that as long as there is some credible evidence of a liquidity crisis, a court will likely find that an applicant is insolvent, even if the immediate causes of insolvency are temporary or public bridge financing is or could be made available.

[A]s long as there is some credible evidence of a liquidity crisis, a court will likely find that an applicant is insolvent…

Can a Specially Incorporated Organization Qualify Under the CCAA?

Prior to Laurentian, the first example of a university CCAA filing was the 2020 application by Quest University. Quest is a small privately funded, not-for-profit university that was established in 2004 following a significant donation of property in Squamish, British Columbia. It was provincially incorporated under a dedicated university statute and managed by a board of governors. Among Quest's legislated purposes were "to maintain the highest standards of teaching and learning excellence in the university's academic programs" and "to encourage and facilitate contributions to the advancement of knowledge."[7] Besides tuition from approximately 500 students, most revenues came from donations, proceeds from selling off surplus lands, and other business ventures. The

[5] See e.g. *Stelco Inc.*, 2004 CanLII 24933 (ON SC) at para 26 [*Stelco*], leave to appeal refused, [2004] OJ No 1903 (Ont CA), leave to appeal refused, [2004] SCCA No 336 (SCC).
[6] Certain courts have held that the solvency test should be limited to obligations currently payable or properly chargeable in a given accounting period: see e.g. *Enterprise Capital Management Inc. v Semi-Tech Corp.*, 1999 CanLII 15003 (Ont SCJ); *Oblats de Marie Immaculee du Manitoba*, 2004 MBQB 71; *Royal Bank of Canada v Oxford Medical Imaging Inc.*, 2019 ONSC 1020.
[7] *Sea to Sky University Act*, SBC 2002, c 54, s 3.

university received many loans over the years and never generated sufficient revenue to fund its expenses, leading to consistent yearly deficits.

Quest's financial difficulties came a head in late 2019 when several loans came due. It filed for creditor protection under the CCAA in January 2020 and exited the restructuring process in December of that year. The court held that Quest was insolvent under the test from *Stelco* because it was unable to satisfy imminent payroll and lease payments without further financing.[8] It appears there was no real debate that the CCAA applied, though the court acknowledged that Quest was unique, highlighting that its "business" was as "a not-for-profit operation with aspirations not to make money, but to provide a valuable and unique learning experience for young adults."[9] The court also highlighted the special nature of the university's assets such as campus buildings. However, this uniqueness did not appear to change the nature of the proceedings in any notable way. Quest "successfully" exited the CCAA process on December 8, 2020 after the court approved a sale of the university's lands to a private education provider, from which Quest must now lease its own campus.[10] While the B.C. Ministry of Advanced Education Skills and Training ***was*** represented at the hearings, it does not appear that any government involvement or approval was required, nor was public funding part of any proposals.

While we may rightly question the Quest model and the outcomes of its restructuring, as a private institution it is distinguishable from publicly funded universities such as Laurentian. However, it is an example of the courts' willingness to expand the CCAA to new entities that meet the formal requirements of the statute, even where specially incorporated as a post-secondary institution by a provincial legislature.

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[8] *Quest CCAA Filing Decision*, *supra* note 2 at paras 26–27.
[9] *Ibid* at para 89.
[10] *Quest University Canada*, 2020 BCSC 1883, leave to appeal refused, 2020 BCCA 364; Quest University Canada, "Quest University Successfully Emerges from CCAA", Press Release (8 December 2020), online (pdf): <questu.ca/wp-content/uploads/2020/12/Quest-Final-CCAA-Emergence-Press-Release-December-8-2020.pdf>. See also The Squamish Chief, "In order to settle its debts, Quest University sells off campus" (29 October 2020), online: <www.squamishchief.com/local-news/in-order-to-settle-its-debts-quest-university-sells-off-campus-3351994>.

Can a Publicly Funded University Meet the Definition of Insolvency?

On the initial application by Laurentian, the court briefly determined that the CCAA applied.[11] Because Laurentian was incorporated under the *Laurentian Act* and was also a not-for-profit corporation, it was a "company" for CCAA purposes. The university argued that it met the insolvency test because it had experienced recurring operational deficits in the millions of dollars each year for several years, leading to an accumulated operating deficit of approximately $20 million at the end of the 2019–20 fiscal year, with a further deficit of $5.6 million projected for 2020–21.[12] The court accepted this evidence, finding that Laurentian was "plainly insolvent" and faced "a severe liquidity crisis."[13] There was no suggestion that a restructuring was not reasonably possible. As a result, it met the requirements of a debtor company and was granted creditor protection.

In the comeback hearing, bargaining agents for employees questioned whether Laurentian had actually met the definition of insolvency and why the Ministry of Colleges and Universities was not participating.[14] The court reiterated that the evidence at the initial hearing was sufficient to find that Laurentian was insolvent and there had been no new evidence provided that would alter this finding. Regarding the Ministry's role, the presiding justice simply noted that, "Although this issue is of interest to LUFA and the Associations and perhaps other stakeholders, it does not, in my view, impact the issues that have to be determined on this comeback motion".[15]

[P]olitical arguments regarding the proper role of the public funder…are unlikely to be persuasive to a CCAA court.

As this case suggests, political arguments regarding the proper role of the public funder—government—have been and are unlikely to be persuasive to a CCAA court. The Laurentian proceeding is certainly the most recent

[11] *Laurentian University of Sudbury*, 2021 ONSC 659 at paras 27–29.
[12] *Ibid* at paras 20–21. The university went so far as to claim that absent CCAA protection, it would run out of funds to meet payroll expenses that same month.
[13] *Ibid* at para 33.
[14] *Laurentian CCAA Comeback Decision*, *supra* note 1 at paras 39–55.
[15] *Ibid* at para 45.

example, but in general courts will be hesitant to intervene in government funding decisions that involve complex policy considerations.

In another example, in 1998 the Canadian Red Cross Society filed for CCAA protection because it was facing approximately $8 billion in tainted blood supply lawsuits.[16] It entered into an agreement with the Government of Canada to sell most of its assets to the new Canadian Blood Service and Héma-Québec, with the sale proceeds to provide the pool of settlement funds in its various class proceedings. These new independent entities were created on the recommendation of the Krever Commission of Inquiry. The court approved this "quick sale" before any restructuring plan was ever put to creditors, including the class action claimants.[17] The court framed the plan as a negotiated "resolution to all of these political, social and personal problems" that served the public interest by preserving Canada's blood supply infrastructure and ensuring the continued viability of the Red Cross as a humanitarian organization.[18]

The court rejected an alternate proposal for a no-fault compensation plan put forward by some of the class action claimants. This was premised on the Red Cross maintaining temporary control over the blood supply system and charging hospitals directly on a full cost recovery basis for its services, with the goal of raising sufficient funds to cover the legal claims without any public funding. The court suggested that this proposal was not even a valid plan of arrangement under the CCAA because it depended on political action rather than agreement between the corporation and its creditors:[19]

> I have come to the conclusion that the Lavigne Proposal—whatever commendation it my [sic] deserve in other contexts—does not offer a workable or practical alternative solution in the context of these CCAA proceedings. I question whether it can even be said to constitute a "Plan of Compromise and Arrangement" within the meaning of the CCAA, because it is not something which either the debtor (the Red Cross) or the creditors (the Transfusion Claimants amongst them) have control over to make happen. It is, in reality, a political and social solution which must be effected by Governments. It is not something which can be imposed by the Court in the context of a restructuring. Without deciding that issue, however, I am satisfied that the Proposal is not one which

[16] Janis Sarra, "Competing Public Interest Considerations: Canadian Red Cross Society" in *Creditor Rights and the Public Interest* (University of Toronto Press, 2003) 195.
[17] *Red Cross*, *supra* note 2.
[18] *Ibid* at para 7.
[19] *Ibid* at para 31.

> in the circumstances warrants the Court in exercising its discretion under sections 4 and 5 of the CCAA to call a meeting of creditors to vote on it. [emphasis added]

The court's conclusion was based in part on the fact that the government had not accepted the Krever Commission's recommendation for a no-fault compensation scheme, but ***had*** accepted that the Red Cross should not continue to manage the blood supply system. In other words, the court was not prepared to consider a speculative CCAA proposal that would take it into the policy-making role. The only viable proposal—to bail out an essentially-public asset—was the one actually agreed to by the government beforehand. However, this position was only reached following a lengthy public inquiry and extensive negotiations between the parties, which was not present at all in the Laurentian case.

Is There a Reasonable Possibility of Restructuring?

A debtor company must also show that there is a reasonable possibility of restructuring to qualify for CCAA protection. However, this is not an onerous burden.[20] An application will only be refused in the absence of such a possibility, for example where it is obvious that the required majorities of creditors would never support a plan of arrangement or that CCAA protection would prejudice a majority of creditors.[21] (A plan of arrangement must be approved by a majority of creditors in each class, together representing at least two-thirds of the total claims in each class.[22]) This situation is highly unlikely to apply in the case of a university where—given the specialized nature of university assets—creditors may have even agreed to loans on the explicit or implicit understanding of a government backstop.[23]

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[20] See e.g. *Alberta Treasury Branches v Tallgrass Energy Corp*., 2013 ABQB 432; *Industrial Properties Regina Ltd. v Copper Sands Land Corp.*, 2018 SKCA 36.
[21] *Hunters Trailer & Marine Ltd.*, 2000 ABQB 952.
[22] *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s 6(1) [*CCAA*].
[23] For a discussion, see Alex Usher, "Laurentian Blues (7) – The Process", *Higher Education Strategy Associates* (13 April 2021), online: <higheredstrategy.com/laurentian-blues-7-the-process/>.

In addition, employees are primarily unsecured creditors outside of a $2,000 super-priority statutory claim for unpaid wage amounts.[24] They are generally disadvantaged in any plan of arrangement (and in the "reasonable possibility" criterion) because restructuring priorities can be driven by large secured creditors. Furthermore, there is no requirement for the government, which is usually the largest single funder in the case of a publicly funded university, to participate in the proceedings or agree to a final plan. This can be contrasted with the requirement for the Crown or certain regulatory bodies to approve plans that do not include payment of outstanding employee source deductions or pension amounts.[25] Put another way, the CCAA deals with certain debts to the Crown, and binds the Crown under the statute, but does not require specific participation of government or indeed any intervention at all where they are the largest creditor of a publicly funded university.

[T]here is no requirement for the government…to participate in the proceedings or agree to a final plan.

B. Bad Faith or Abuse of Process

Is an Application Made in Good Faith and for Proper Purposes?

Since November 1, 2019, section 18.6 of the CCAA includes an explicit duty of good faith that applies to all parties in the restructuring proceedings (and not only the monitor). While good faith is not defined, courts have held that debtors must act with honesty, commercial fairness, and good intentions toward all stakeholders in the insolvency process.[26]

[D]ebtors must act with honesty, commercial fairness, and good intentions toward all stakehoders…

Where an interested person fails to act in good faith, the court has broad remedial discretion to address this conduct. Some commentators have criticized this new "free-standing" duty as providing little guidance or

[24] *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, ss 81.3–81.4 [*BIA*]. See Appendix "C" for a summary of employee rights in restructuring proceedings.
[25] *CCAA*, *supra* note 22, s 6(3),(6).
[26] See e.g. *San Francisco Gifts Ltd (Companies' Creditors Arrangement Act)*, 2005 ABQB 91 at paras 13–27 [*San Francisco Gifts*]; *Muscletech Research & Development Inc*, [2006] OJ No 462 (Ont SCJ) at para 4; *Worldspan Marine Inc*, 2011 BCSC 1758 at para 23.

substance in CCAA proceedings.[27] However, the Supreme Court has endorsed the CCAA judge's contextual role in determining whether a party is acting for an "improper purpose" that would frustrate, undermine, or run counter to the statutory objectives.[28]

In addition to the statutory and common law requirements of good faith, a CCAA court retains its inherent jurisdiction to prevent an abuse of its own process. The Supreme Court has described this doctrine as a means of controlling proceedings that are oppressive, vexatious, or bring the administration of justice into disrepute.[29]

While this captures circumstances where the court is used for an improper purpose, most CCAA abuse of process cases deal with attempts to circumvent the stay of proceedings or relitigate matters already dealt with in a restructuring, rather than the CCAA filing itself. Courts have also treated bad faith and improper purpose arguments as interchangeable or at least closely linked. For example, in *Elan Corp. v. Comiskey* (a case addressing instant trust deeds), Justice Doherty, dissenting in part, commented:[30]

> A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the court has the means available to it…to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors.

Acting with an improper purpose requires more than merely opposing an arrangement or promoting an interest that differs from other stakeholders, meaning that the motivations of a particular party would only rise to this threshold in extreme cases.[31] The focus is

[27] See e.g. Jassmine Girgis, "A Generalized Duty of Good Faith in Insolvency Proceedings: Effective or Meaningless?" (2020–2021) 64 Can Bus LJ 98.
[28] *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10 at paras 70, 75–76.
[29] *Behn v Moulton Contracting Ltd.,* 2013 SCC 26 at para 39.
[30] *Elan Corp. v Comiskey*, 1990 CanLII 6979 (ON CA) at 313.
[31] See e.g. *12178711 Canada Inc v Wilks Brothers, LLC*, 2020 ABCA 430 at para 76, an appeal from an approval of a plan under the *Canada Business Corporations Act*, RSC, 1985, c C-44.

whether the debtor is abusing the CCAA to the detriment of creditors or other stakeholders.[32]

In theory, an abuse of process could also rise to the level of fraud or an argument that a party did not come to the court with clean hands. In the Woodward's CCAA filing, a group of suppliers argued that the timing of the filing was chosen based on when the company's unpaid inventory debts would be at their highest, thereby giving the company an unfair advantage.[33] The court found there was insufficient evidence that the timing of the filing was fraudulent or abusive.[34] However, it suggested that had there been sufficient evidence to bar an application on this basis, the likely remedy would be to refuse CCAA protection. We have not found any cases where this occurred. In contrast, improper purpose arguments are much more common in bankruptcy filings.[35]

In the Laurentian proceeding, stakeholders Thorneloe University and the University of Sudbury both unsuccessfully challenged Laurentian's notice of disclaimer of its federated university agreements on the grounds it was acting in bad faith.[36] Laurentian argued that this disclaimer was necessary to achieve cost savings (because it had determined it could teach the federated university students internally at a lower cost) and that its interim lender had made it a condition of further financing.

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[32] *San Francisco Gifts*, *supra* note 26 at paras 14–27.
[33] *Woodward's Ltd. Estate*, 1993 CanLII 881 (BC SC) at 13.
[34] The practice of "juicing the trades" in this way led to amendments creating super-priorities over goods purchased shortly before a bankruptcy or receivership: *BIA*, *supra* note 24, ss 81.1, 81.2. While this does not apply in CCAA cases, it demonstrates how a problematic case can lead to law reform to address the "abuse" complained of.
[35] See e.g. *First City Trust Co v Omni-Stone Corp*, 1991 CanLII 7092 (ON SC) (holding that it is not an abuse of process or an improper purpose for a creditor to petition for bankruptcy simply because it may have an alternate contractual remedy); *Christiansen v Paramount Developments Corp.*, 1998 ABQB 1005 at paras 34–35 (holding there was insufficient evidence to find that an application for a receiving order by a former employee was made for an improper purpose); *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42 at paras 50–56 (describing when creditor votes in bankruptcy will be disallowed based on tortious motives such as abuse of process or fraud).
[36] *Laurentian University of Sudbury*, 2021 ONSC 3272 [*Thorneloe University*], leave to appeal refused, 2021 ONCA 448; *Laurentian University v Sudbury University*, 2021 ONSC 3392 [*Sudbury University*]. See also Jassmine Girgis, "A Generalized Duty of Good Faith Applied to Disclaimer Under the CCAA", Case Comment on Laurentian University v Sudbury University, *ABlawg* (1 June 2021), online: <ablawg.ca/2021/06/01/a-generalized-duty-of-good-faith-applied-to-disclaimer-under-the-ccaa/>.

Thorneloe argued that Laurentian had consistently wanted to terminate the federation relationship and was improperly using the CCAA process to do so. The court disagreed, noting, “Restructurings are not easy and often result in treatment that a party can consider to be extremely harsh. However, that does not necessarily mean that the other party has not been acting in good faith.”[37] It could also be inferred that the Monitor, by recommending the disclaimer, agreed that Laurentian had acted in good faith.

Sudbury argued more explicitly that the disclaimer was an abuse of process and in bad faith because Laurentian sought to use the CCAA process for the collateral and improper purpose of effectively destroying a competitor.[38] The court again rejected this point, holding that, “This is not a matter of putting a competitor out of business, it is simply a matter of putting an end to an unsustainable financial model within the context of difficult and urgent circumstances.”[39] In the court’s view, Laurentian’s duty to its creditors took priority and this is what had led it to attempt negotiations with Sudbury:[40]

> I do not find that LU has a legal duty to act in the interests of the Federation. LU’s most significant duty at this time is to its creditors. As mentioned above, LU engaged in two months of intensive mediation with all of its stakeholders. It achieved positive results with Huntington and its unions. I agree with counsel for LU that failing to achieve a resolution with Thornloe and SU does not mean that LU was not making good faith attempts at resolution.

We have only found one case where a bad faith argument was successfully raised by a union party, although this pre-dated the codified section 18.6. Dura Canada obtained CCAA protection in 2009 due to pension plan debts of approximately $9 million, benefit plan debts of approximately $8.2 million, and total unsecured liabilities of over $90 million ($72 million of which was owed to related entities). The fundamental issue was whether the Canadian entity bore sole liability to make payments to its Canadian pension and benefit plans or whether this obligation also extended to its related entities, including Dura US. The company subsequently sought an extension of the CCAA stay and the creation

[37] *Thorneloe University*, *supra* note 36 at para 72.
[38] *Sudbury University*, *supra* note 36 at para 22.
[39] *Ibid* at para 29.
[40] *Ibid* at para 30.

of a claims process as part of a plan that involved a complete release of all claims against its related companies.[41]

The two unions and the pension plan administrator opposed the motion and sought an order terminating the proceedings, declaring that the commencement of the application was an abuse of process, declaring that the company was estopped from arguing it had sole liability for pension payments, and a bankruptcy order against the company (which was no longer operating). The Superintendent of Financial Services likewise opposed the relief sought, arguing there was no basis on which to conclude a viable plan could be put forward. Even the monitor did not support the stay extension as it was "not convinced that the Applicant is acting in good faith and due diligence".[42]

The unions and the pension plan administrator had consistently opposed the company's CCAA filing. The company had attempted negotiations with these parties to develop a viable plan of arrangement up until the morning of the scheduled motion. When it recognized at the eleventh hour that negotiations on the pension liability issue would not be successful, it changed its tactics to seek an order that its plan be presented to the retirees for a vote. As part of this motion, it raised a new argument that the unions in fact did not have authority to represent the retirees. The court found Dura had acted in bad faith in the negotiations (though not in its initial filing) because it previously negotiated with the existing representative groups without objection. Furthermore, the failure of negotiations meant that no viable plan could be put forward. The court dismissed the company's motion and ended the stay to allow a bankruptcy application to be filed, although the CCAA proceeding itself was not terminated.

We note that this single example of successfully halting a CCAA process on the grounds of bad faith did not occur at the initial filing stage. Unusually, the affected unions, regulators, and even the monitor all opposed the extension, preferring bankruptcy to restructuring. The CCAA process had been ongoing and it became clear that it would ultimately be unsuccessful, not least because the debtor was clearly negotiating in bad

[41] *Dura Automatic Systems (Canada) Ltd.*, 2010 ONSC 1102.
[42] *Ibid* at para 9.

faith. This unique fact scenario suggests the case may not be a helpful precedent for the university sector.

In general, then, judges accept that it is acceptable for CCAA applicants to act in self-interest within the commercial lens of insolvency law. They will often defer to the monitor to assess whether the debtor company is acting in good faith. The cases suggest that it is unlikely, absent some clear evidence of improper behaviour on the part of the applicant, that a CCAA court will find bad faith or an abuse of process where an otherwise eligible debtor company seeks CCAA protection.

[J]udges accept that it is acceptable for CCAA applicants to act in self-interest…

However, one set of authors has suggested that when considering the CCAA duty of good faith in light of legislative labour relations obligations (such as the duty to bargain in good faith), it requires employers to notify unions in advance of impending CCAA or bankruptcy applications, including discussions with secured creditors regarding interim financing.[43] This is because of the vulnerability of employees compared to secured creditors, which is not adequately addressed by a comeback hearing when many of the key decisions have already been made. They argue that the required timing of the notice will likely depend on when the decision is sufficiently concrete. For example, in *Sun Indalex Finance v. United Steelworkers*, the Supreme Court found that the company breached its fiduciary duty as pension plan administrator by not giving notice to pension plan members of its application for interim financing, which granted priority to the lender over plan members.[44] The authors summarize the benefits of advance notice as follows:

> Practically, advance notice serves at least three purposes. First, it promotes positive labour relations. Informing the union as early as possible of impending CCAA proceedings may go some distance to ensuring the union and the employer maintain a cooperative and candid relationship throughout the CCAA proceedings and in any collective bargaining that is engaged in during the proceedings.
>
> Second, it permits the union to seek counsel, get advice, and prepare itself in a manner that permits it to best carry out its statutory duties to its members. Unions are often knowledgeable about the

[43] Tracey Henry, Danielle Stampley & Alex St John, "CCAA Duty of Good Faith: Notice Obligations to Union Stakeholders" (2019) 19 Annual Rev Insolvency Law.
[44] *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at paras 72–73, 212–19, 275–76.

> industry in which they represent workers and may be able to assist the company in determining the best path forward.
>
> Third, where a debtor fails to give a union adequate notice and has breached its duty of good faith, the union would be entitled to seek relief from the court that issued the initial order. For example, the union could request an order requiring certain notice going forward or for a partial lift of the stay to deal with grievances or other issues that were prejudiced by the lack of notice.

While advance notice is reasonable, we are not aware of any cases where this argument has succeeded outside of the fiduciary duty (pension) context. At the same time, the statutory duty of good faith is a recent codification and it is difficult to predict how it will be interpreted and applied in future cases. Although it seems unlikely that it will evolve into any kind of sweeping duty in favour of labour interests, it may provide support for a discrete challenge to the CCAA in the right fact scenario.

C. Exclusive Jurisdiction of Arbitration

Is the CCAA the Preferable Procedure?

Finally, in prior cases, bargaining agents have (unsuccessfully) challenged the applicability of the CCAA procedure on the grounds that labour arbitrators have exclusive or preferred jurisdiction to resolve labour relations matters arising under a collective agreement. CCAA courts have not accepted this argument for two reasons: first, some (perhaps necessary) stakeholders are not subject to labour relations jurisdiction, and second, in any event the federal CCAA process is paramount over provincial labour law.[45]

The Supreme Court has repeatedly affirmed that labour arbitrators generally have exclusive jurisdiction over disputes arising expressly or inferentially from a collective agreement.[46] Outside of the CCAA context, this means that unions can only pursue employment-related claims through grievance arbitration, unless another statute grants

[45] The CCAA can also supersede other federal laws, which would include federal labour laws: see e.g. *Hongkong Bank of Canada v Chef Ready Foods*, 1990 CanLII 529 (BC CA) (holding that a CCAA stay bars the realization of security under the federal *Bank Act*).
[46] See e.g. *Weber v Ontario Hydro*, 1995 CanLII 108 (SCC); *Parry Sound (District) Social Services Administration Board v O.P.S.E.U., Local 324*, 2003 SCC 42; *Bisaillon v Concordia University*, 2006 SCC 19; *Northern Regional Health Authority v Horrocks*, 2021 SCC 42.

exclusive or concurrent jurisdiction to another tribunal. This may include alleged violations of employment-related statutes (e.g., human rights legislation), the common law (e.g., tort claims), and even the *Canadian Charter of Rights and Freedoms*.

[C]ourts and practitioners are likely to think of CCAA procedures as paramount…

From the CCAA perspective, courts and practitioners are likely to think of CCAA procedures as paramount over any others, and of the stay as effective against any other proceedings. In many respects, they have been vindicated by judicial decision-making. There are some ongoing questions as to whether a stay of proceedings is effective against certain labour board proceedings, but as a rough guide, to the extent that an alternative proceeding has an economic impact on the stakeholders of a CCAA proceeding, it will be stayed.[47]

In the *Stelco* case, the union opposed an extension to the stay on the basis that the parties should negotiate under the *Labour Relations Act* ("**LRA**") rather than the CCAA, and that otherwise "labour law is being replaced by insolvency law".[48] The court disagreed, suggesting that because of the high degree of interrelationship between labour and other financial matters in a corporation, the broader multilateral negotiations through a CCAA process—which also included non-labour creditors—were preferable to dealing with the union alone:[49]

> …It would be preferable if we could take a more distant overall view of matters and appreciate that there is a (high) degree of interrelationship and therefore what happens in one part of the relationship impacts both internally and externally on that relationship and external relationships. I would therefore observe that multilateral discussions have the benefit of allowing all interested parties to have direct contact with the others and likely will result in better communication, promote meaningful dialogue and avoid missteps and miscommunication. I do acknowledge that technically it is possible for a union to deal exclusively with an applicant and then have the applicant deal with the other interested parties/stakeholders and in doing so act as the conduit for the views of the

[47] See e.g. *Sears Canada Inc. v International Brotherhood of Electrical Workers, Local 213*, 2017 CanLII 69395 (BC LRB) (where the B.C. Labour Relations Board found that its proceedings fell into the exception to a stay for "investigations, actions, suits or proceedings by a regulatory body" under s 11.1 of the CCAA); *Romspen Investment Corp. v Courtice Auto Wreckers Ltd.*, 2017 ONCA 301, leave to appeal refused, 2018 CanLII 11140 (SCC) (where the court allowed a certification application to proceed against an insolvent business that was subject to a stay of proceedings under a receivership order).
[48] *Stelco*, *supra* note 5 at para 3.
[49] *Ibid*.

> union. I must, however, say that I do not think that such an arrangement generally is very effective or efficient.

[Courts] might view an internal restructuring process as too narrow…

This suggests that a court might view an internal restructuring process as too narrow to address major, complex financial issues, especially once creditor discussions are involved and the company has gotten to the point of a CCAA filing.

More explicitly, in the 2016 Essar Steel Algoma restructuring, the company applied for approval of an expedited arbitration procedure to deal with a backlog of over 3,000 grievances.[50] The union argued that the exclusive jurisdiction of arbitrators over grievance arbitration under the LRA applied to insolvency cases under the CCAA.[51] The court rejected this position on the basis that the CCAA was paramount over the LRA and that an expedited arbitration process was necessary to the restructuring. It also rejected an argument that staying grievances under a collective agreement violated freedom of association rights under section 2(d) of the *Charter* because the proposal did not represent substantial interference in collective bargaining.[52]

In contrast, after a CCAA proceeding has concluded, unions may again be restricted to addressing employment-related issues (such as future wage and pension benefits) through the grievance and arbitration process.[53]

[W]hile there is still no direct precedent…an argument that the alternative procedure is the proper forum [likely] would not succeed.

While the jurisdictional argument has been made in the context of a commercial restructuring, the parallel argument has not been judicially considered in the context of a university CCAA proceeding where an alternative restructuring process (for example, financial exigency terms in a collective agreement, discussed further in Chapter 6) is available. In our view, while there is still no direct precedent in the context of a publicly funded

[50] *Essar Steel Algoma Inc.*, 2016 ONSC 1802 at paras 31–35, leave to appeal refused, 2016 ONCA 274.
[51] *Ibid* at paras 31–35.
[52] *Ibid* at paras 22–29.
[53] See e.g. *Air Canada Pilots Association v Air Canada Ace Aviation Holdings Inc.*, 2007 CanLII 337 (ON SC) at para 84.

university, the decisions cited above suggest an argument that the alternative procedure is the proper forum would not succeed.

There are other aspects of the CCAA process that bear reviewing insofar as they may inform the arguments just canvassed. Laurentian featured a number of these aspects.

In an "ideal insolvency process", all parties participate in the negotiation process and the resulting compromises are considered acceptable to all (or at least a large majority) given the alternatives. However, labour groups have always viewed the CCAA process with suspicion because of the asymmetries in power and information, including the outsized influence of secured creditors, and the targeting of employee interests for compromises not applied to other creditors. In the Laurentian case, these fears were realized insofar as it appears to have been a pressure- and time-driven exercise in layoffs based primarily on the metric of student enrolment.

In its filing, Laurentian claimed that several "structural issues" were causing its financial challenges and needed "to be resolved to ensure long-term stability".[54] This included that the LUFA collective agreement terms were "above market", which was exacerbated by the tenuous labour relationship between the parties. It also included the need to restructure academic programming and the federated universities model. In other words, the justifications for CCAA filing were largely labour relations or academic matters, along with identifying opportunities for future revenue generation and addressing current and long-term indebtedness. The court appointed a mediator to oversee negotiations between the university and labour unions for a new collective agreement. In May 2021, the court approved the term sheets that would form the basis of new agreements (projected to generate an annual savings of $30.3 to $33.5 million for the university), with the unresolved issues to be determined by binding

[T]he CCAA process is used in place of provincially regulated collective bargaining…

[54] *Laurentian University of Sudbury*, 2021 ONSC 659 at paras 22–24.

arbitration.[55] To-date, then, the brunt of cuts has been borne by labour rather than other creditors. It has also been suggested that these cuts were even more than what was necessary to address Laurentian's deficits, particularly as many of the administrative staff who were laid off have since been recalled.[56] The result is that the CCAA process is used in place of provincially regulated collective bargaining procedures and in the place of an orderly de-federation of the related universities, which may now face financial crises of their own.

D. Conclusion

To date, none of the above challenges to a CCAA application have been successful. In our view, it is unlikely that they will succeed in future, even if there are sound public policy rationales for excluding publicly funded institutions from the CCAA. More specifically, courts have found that public funding and public interest mandates of debtor companies are not sufficiently compelling reasons to reject a CCAA application. They have also taken a very broad view of what constitutes insolvency that does not consider the role of potential public funding (or the solvency of the government itself). The accepted role of self-interest in a commercial process means that challenges based on bad faith or improper purpose must meet a high evidentiary standard. Nor are the availability of alternative fora sufficient to displace the CCAA as the preferred venue for restructuring, which, in any case, is constitutionally paramount when the alternate forum is under provincial jurisdiction.

At the same time, we have few actual examples dealing with thorough arguments based on the role of government and the public mandate of the debtor company, as distinct from

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[55] *Laurentian University of Sudbury*, 2021 ONSC 3545. For the June 2021 arbitration award resolving the remaining terms in the new LUFA collective agreement, see *Laurentian University v Laurentian University Faculty Association*, 2021 CanLII 53318 (Arbitrator: Kaplan).

[56] See Alex Usher, "Laurentian Blues (7) – The Process", *Higher Education Strategy Associates* (13 April 2021), online: <higheredstrategy.com/laurentian-blues-7-the-process/>; Ernst & Young, "Third Report of the Monitor" (26 April 2021) at 21, online (pdf): <documentcentre.ey.com/api/Document/download?docId=33498&language=EN>; Erik White, "'The best word to describe it is strange': financial crisis looms over Laurentian University this fall", *CBC News* (6 December 2021), online: <www.cbc.ca/news/canada/sudbury/laurentian-university-campus-atmosphere-insolvency-financial-crisis-1.6267660>.

a typical commercial insolvency. These arguments should still be attempted where the facts are supportive of such challenges, which can only be determined on a case-by-case basis. Raising these issues in litigation can assist in both educating the court about the issues of importance and creating leverage for the purpose of influencing the CCAA process and negotiations.

One perhaps unintended consequence of this pattern is the use of the CCAA to achieve labour force restructuring objectives in isolation from restructuring other creditor claims. Although difficult to challenge on the CCAA's own terms—in part due to the manner in which CCAA participation is tiered by type of creditor—this technique suggests that the CCAA can be used to target and force a restructuring of labour relations matters while not necessarily requiring concessions from other major (secured) creditors.

[T]he CCAA can be used to target and force a restructuring of labour relations matters…

A second difficulty with the CCAA process is in characterizing the nature of public funding to a debtor company. As discussed in the next chapter, this funding is provided to Ontario universities under Strategic Mandate Agreements. However, it is unlike debt financing or other debts in insolvency (such as amounts owed to employees for services rendered). In theory, it could be characterized as an unsecured debt for services not rendered or contingent future revenues from a large consumer of university services (i.e., the public, as represented by the state). The status of the government as a stakeholder is relevant not only to the definition of insolvency and the initial application of the CCAA, but to the subsequent approval of any plan of arrangement and exit from the CCAA process. The serious limits to challenging the CCAA suggest there is a need for insolvency law reform to address the unique features of publicly funded entities such as universities. The next chapter discusses some of the unique features that are currently considered under existing or potential university restructuring avenues, which we argue should inform future law reform proposals.

Takeaways

1. *Courts have allowed CCAA applications to proceed for not-for-profit corporations, privately funded universities, and publicly funded universities.*
2. *Policy arguments regarding the proper role of government funders are unlikely to persuade CCAA courts.*
3. *It is difficult to prove that a debtor company has acted in bad faith or abused the CCAA process without very clear evidence of improper behaviour.*
4. *The CCAA supersedes federal and provincial labour relations legislation.*
5. *The practical result is that a CCAA application can be used to restructure labour costs outside of existing labour relations regimes.*

VI. Restructuring Publicly Funded Universities in Ontario

Summary

Many faculty associations already have financial exigency terms in their collective agreements that could and should serve the purpose of restructuring a university. Laurentian avoided the use of this process. Financial exigency terms contain principles that should underlie any university restructuring process, including the primacy of the academic mandate; early warning and transparency; exploring all other cost savings and revenue sources; clear roles for the senate, board of governors, senior administration, and employee groups; and an orderly process for identifying voluntary and involuntary employee reductions. The CAUT or other bodies should develop an updated, model financial exigency code that can be used as a tool for policy development and advocacy based on these principles. Current funding agreements do not speak to financial emergencies and there are few explicit statutory powers to intervene in Ontario universities. A review of comparator jurisdictions indicates that in addition to commercial restructuring, there are other statutory powers and procedures including emergency and bridge financing that could be adopted in Canada to facilitate orderly university restructurings.

[T]he CCAA is silent on its applicability to public institutions…

The public interest value of the university sits uncomfortably within the for-profit commercial framework that ordinarily guides CCAA proceedings. As discussed in prior chapters, the CCAA is silent on its applicability to publicly funded organizations; it excludes (or previously excluded) from its scope organizations with significant public interest in their orderly restructuring (however defined), such as railway companies and telegraph companies.[1] Instead, government tendency during prior eras (such as the Great Depression) was to intervene directly in, restructure, subsidize, or bail out institutions and companies with a significant public

[1] *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s 2(1), "company" [*CCAA*]; Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020) at 136.

interest, including municipalities, the Canadian National Railroad, and Algoma Steel Company.[2]

As Professor Torrie argues, the public interest in these institutions was too great to let their fate be decided by the financial calculations of creditors in commercial insolvency proceedings.[3]

However, the CCAA's silence on the matter of public institutions is not neutral. The lack of a prohibition against a publicly funded university, or any public sector organization, filing under the CCAA means that it can be used to restructure such an entity. It also means that the restructuring will proceed along the lines of commercial insolvency generally, instead of a modified process that takes account of the unique nature of a university as a public institution.

The Laurentian University insolvency…brings critical tensions…to the forefront.

The Laurentian University insolvency—the first insolvency of a public university in Canada—brings critical tensions between publicly funded organizations and commercial insolvency law to the forefront. These tensions have become particularly acute due to experiences in the COVID-19 era and may become even more relevant in future.[4]

We must make a preliminary observation about the causes of liquidity crises at Laurentian and in the university sector. While the reasons for university financial issues vary by each institution within Canada and internationally, it seems clear that there are generalized and

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[2] Torrie, *Reinventing Bankruptcy Law*, *supra* note 1 at 57–58. See e.g. *Ladore v Bennett*, [1939] AC 468 (PC), dealing with the amalgamation of four Ontario municipalities due to budgetary issues. See also Mandy Belford, "The Forgotten History of Provincial Insolvencies in Canada" (2020) 35 BFLR 523.

[3] *Ibid*.

[4] See e.g. the budgetary challenges facing many Canadian municipalities throughout the pandemic: Carter McCormack, *Economic impacts of COVID-19 in the provinces and territories* (A Presentation Series from Statistics Canada About the Economy, Environment and Society, no 2, 2021), online: <www150.statcan.gc.ca/n1/pub/11-631-x/11-631-x2021002-eng.htm>; Alex Kotsopoulos, "How the pandemic has hurt the finances of municipalities" (16 April 2021), online: *RSM Canada* <rsmcanada.com/our-insights/the-real-economy/the-real-economy-canada-volume-9/how-the-pandemic-has-hurt-the-finances-of-municipalities.html>.

increasing long-term funding pressures that have been exacerbated by the pandemic. These pressures include limited or declining public funding, increased reliance on private tuition fees—which in Canada primarily refers to deregulated professional programs and international student tuition fees—and a growing emphasis on "entrepreneurial", market-based programs such as micro-credentials. There are no doubt other pressures and considerations for university sector funding. It is beyond the scope of this report to fully assess these short- and long-term funding trends and drivers of liquidity crises; however, any serious law reform effort of the kind we discuss in this chapter and the next should take these trends into consideration.

This chapter examines the existing or traditional modalities that are available to restructure Ontario universities. A review of the "pre-Laurentian" methods for addressing financial distress in this sector reveals substantially different procedures than a CCAA process. Legitimate questions were raised in the Laurentian process as to why these existing modalities were not employed instead of a CCAA filing. These questions were not answered clearly or to the satisfaction of many creditors.

[T]hese processes…guide restructuring in a manner consistent with the unique nature of a publicly funded academic institution…

Section A addresses the primary pre-existing method for academic restructuring, a declaration of "financial exigency". This refers to a process established through collective bargaining that allows a university to pursue budget reductions, program changes, and lay-offs of (tenured and sessional) faculty members in situations where it can demonstrate bona fide and persistent financial distress.[5] Although these processes have rarely been used, and they were deliberately avoided by the administration in the Laurentian case, they establish important principles that are intended to guide restructuring in a manner consistent with the unique nature of a publicly funded academic institution.

[5] While not all faculty associations are certified trade unions with collective agreements, we assume for purposes of this report that all are bargaining agents under voluntary recognition agreements, provincial certification, or an equivalent structure.

These principles include the preservation of the academic mission, consultation with faculty members and government funders, justification and transparency in decision making, and respect for the statutory authority of the university senate. Interestingly, in the Laurentian proceedings supervised by the court, many of the principles that were the stated objectives of the restructuring also appear in exigency processes. The difference was they were implemented in a CCAA process that lacked most of the checks and balances that financial exigency provides.

[A] statutory amendment would be necessary and desirable to provide authority for certain forms of government action…

Section B considers other standard and ad hoc methods that may theoretically be available to the province to pursue university restructuring, including the terms of Strategic Mandate Agreements and the powers of the Minister of Colleges and Universities ("**the Minister**") under the *Ministry of Training, Colleges and Universities Act*. The former agreements do not speak to consequences of financial emergency directly (or at all), and there is currently a surprisingly thin set of statutory powers related to financial distress of universities compared to, for example, colleges or school boards. This suggests that a statutory amendment would be necessary and desirable to provide authority for certain forms of government action, including a formalized process for making bridge financing available, taking a role in supervising a restructuring, or even direct intervention.

Finally, Section C surveys the experience of university insolvencies in three other common law jurisdictions: the United States, the United Kingdom, and Australia. Similar questions about the appropriate restructuring modalities for universities are being asked in each country, and in respect of organizations in the broader public sector. While the American post-secondary sector operates under considerably different conditions, the United Kingdom and Australia have developed (or are developing) more systematic university restructuring regimes that are currently absent in the Canadian context.

A. Financial Exigency Procedures

Many faculty association collective agreements contain negotiated provisions that contemplate restructuring all or part of a university. These clauses are typically referred to as "financial exigency terms".[6] Prior to the Laurentian University CCAA proceeding, they were the primary sources of contractual and negotiated procedures that a university administration (i.e., board of governors) could trigger to restructure academic programs.[7]

In this section, we primarily discuss examples of financial exigency procedures from Ontario universities. Appendix "D" contains sample provisions from several collective agreements. In our review of terms maintained by the CAUT and others, we believe that these examples are broadly consistent with those found across Canada.[8]

The most directly relevant example is that of the Laurentian University Faculty Association ("**LUFA**"). Like others, Article 10.15 the LUFA collective agreement creates a definition of insolvency or financial exigency that must be met to trigger the restructuring process; a body or committee to oversee restructuring decisions; a consultation and decision-making protocol for that body; a set of criteria or considerations to be followed in making decisions; and a dispute resolution procedure (Figure 1).

[Financial exigency] describes an internal university restructuring procedure that…is comparable to…any insolvency or restructuring process.

In short, "financial exigency" describes an internal university restructuring procedure that at a general level is comparable to a CCAA proceeding or any insolvency or restructuring process. In fact, in the Laurentian case the court found that a CCAA order permitting the university to terminate or temporarily lay off employees, as it deemed appropriate, paralleled the exigency terms

[6] Some agreements may use alternate or additional language such as financial "necessity", "stringency", or "emergency". See also discussion of the distinction between financial exigency and program redundancy below.
[7] Universities may be able to restructure ancillary services that do not impact directly on academic programming without recourse to such procedures.
[8] Agreements at smaller institutions may contain less robust procedural protections: see e.g. the Athabasca University Faculty Association Collective Agreement (July 1, 2018 – June 30, 2020), Article 12.1.

of the LUFA agreement as they apply to tenured faculty members and the board's authority to make such a declaration due to financial distress.[9]

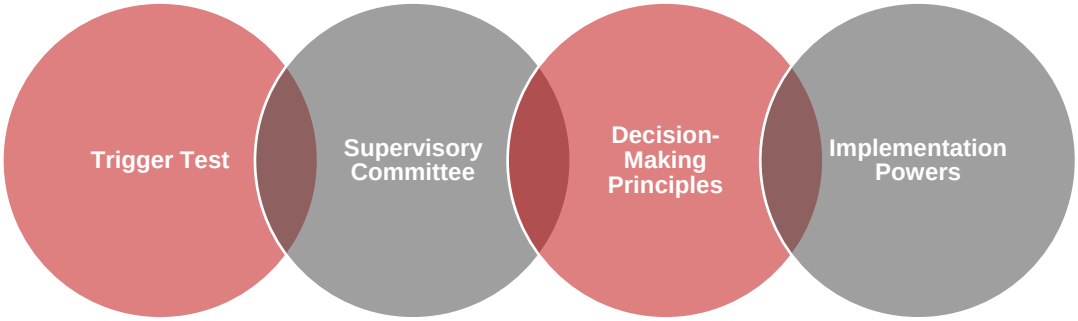

Figure 1: Components of a Financial Exigency Procedure

However, the definition, process, and criteria for consideration differ from a commercial insolvency proceeding in some important ways. For example, Article 10.15.1 acknowledges the paramount importance of the academic priorities of the institution, including quality of instruction, research, and academic freedom. Under Article 10.15.3, reductions in academic staff are only to occur in extraordinary circumstances after efforts have been undertaken to find economies in other budget areas and "all reasonable means of improving the University's revenues have been exhausted."

Financial exigency should also be distinguished from program redundancy. The latter normally involves a different test such as the termination, reduction, or restructuring of an academic program due to changes in academic priorities or enrolment patterns (rather than overall financial condition of the university). While such decisions may necessarily be influenced by the availability of resources, the relevant question is whether financial necessity or academic priorities is the primary motivation for the change.[10] Under Article

[9] *Laurentian University of Sudbury*, 2021 ONSC 1098 at paras 62–65 [*Laurentian CCAA Comeback Decision*].
[10] See e.g. *Dalhousie University v Dalhousie Faculty Assn.*, 1994 CanLII 17842 (Arbitrator: Soberman); *Brandon University Faculty Association v Brandon University (BUNTEP Program Grievance)*, [2009] MGAD No 19 (Arbitrator: Gibson) at paras 146–47. But see *Governors of the University of Alberta v Association of*

10.10 of the LUFA agreement, redundancy can be triggered by a resolution of the Senate or the Board of Governors, while exigency is triggered by the Board of Governors.

The subsections below discuss each of the four components of financial exigency.

Trigger Test

The first key component of the restructuring process involves the definition of "financial exigency": that is, what set of conditions need to be established to trigger the process?

[F]inancial exigency is defined as "substantial and recurring deficits which threaten the long-term solvency of the University as a whole.

In the case of the LUFA collective agreement, financial exigency is defined in Article 10.15.2 as "substantial and recurring deficits, which threaten the long-term solvency of the University as a whole". When comparing exigency and CCAA processes, this is the functional equivalent to the test for solvency under the CCAA. This is a fact-specific analysis, although some collective agreements may speak to a minimum period of deficits occurring (two or three years in many cases).

A declaration of exigency is made by the Board of Governors with notice to the Association under Article 10.15.5, which triggers an automatic hiring freeze and an obligation to disclose relevant financial documentation. In Laurentian's case, it may be obvious to say that the test is or would have been met, notwithstanding that the Board of Governors decided not to trigger financial exigency.

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the Academic Staff of the University of Alberta, 1988 CanLII 8837 (Arbitrator: Wakeling) at para 4 [*University of Alberta*], where the arbitrator deferred to the university's determination that it was not experiencing financial exigency but rather had eliminated a position due to redundancy.

There has been speculation about the administration's refusal to use financial exigency procedures despite two prior attempts to trigger them by LUFA.[11] One suggestion is that the procedures take too long.[12] This may have been a valid concern by February 1, 2021, but it is not a strong argument when employee groups attempted to trigger the process twice in the preceding four years, and deficits appear to have been running for 10 years prior to filing. A second concern is that the negotiated procedures would not result in sufficient reductions to expenditures or would not address the specific employees and programs the administration thought necessary to reduce (such as the most senior faculty members).[13] This is hypothetical insofar as changes were never even attempted or proposed within existing financial exigency procedures; however, it also indicates that the administration sought to avoid negotiated restructuring procedures in favour of a process in which it had greater power to compel compliance with its objectives. In this light it is odd to see the administration and the court then rely on the content of those negotiated terms to justify the CCAA process.[14]

…the administration sought to avoid negotiated restructuring procedures in favour of a process in which it had greater power to compel compliance with its objectives.

In any event, by filing a CCAA application, the Board clearly believed that the long-term solvency of the institution was at risk. According to its filing documents, Laurentian had experienced recurring operational deficits in the millions of dollars each year for several years, leading to an accumulated operating deficit of approximately $20 million at the end of the 2019–20 fiscal year, with a further deficit of $5.6 million projected for the 2020–21

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[11] *Laurentian University of Sudbury*, Affidavit of Fabrice Colin (sworn 25 March, 2021) at para 90, online: <documentcentre.ey.com/api/Document/download?docId=33203&language=EN>: "In response to claims by the University of financial difficulty, LUFA took the unusual step of filing two separate grievances (in 2017 and 2020) seeking to have the University trigger the Financial Exigency provisions in the Collective Agreement. The University rejected those grievances and thus denied that a situation of financial exigency existed. These were among the outstanding grievances as of February 1, 2021."

[12] Alex Usher, "Laurentian Blues (7) – The Process", *Higher Education Strategy Associates* (13 April 2021), online: <higheredstrategy.com/laurentian-blues-7-the-process/>.

[13] *Ibid*; Douglas Goldsack, "Decades of questionable decisions led Laurentian University into this mess", *Sudbury.com* (26 November 2021), online: <www.sudbury.com/columns/guest-columns/opinion-decades-of-questionable-decisions-led-laurentian-university-into-this-mess-4802498>.

[14] *Laurentian CCAA Comeback Decision*, *supra* note 9 at paras 62–65.

fiscal year.[15] It went so far as to claim that absent CCAA protection, it would run out of funds to meet payroll expenses that same month. The court accepted this evidence, finding that Laurentian was "plainly insolvent and faces a severe liquidity crisis."[16] (We address the incentives to delay revealing significant financial problems and implementing restructuring processes below and in Chapters 7 and 8.)

The fact that financial exigency procedures were not triggered by the administration raises the question of whether "substantial and recurring deficits" that threaten long-term solvency is a higher standard than the test for insolvency under the CCAA. The basic conclusion of previous chapters on the CCAA test is that it is not easily predicted and has some flexibility in its application. In practice there are not many examples of how tests for financial exigency have been interpreted or applied, and the exact terminology used varies across agreements. For example, in *Governors of the University of Alberta v. Association of the Academic Staff of the University of Alberta*, Arbitrator Wakeling observed the difficulty in defining a trigger test that referred to "financial exigencies which appear to be long term":[17]

[T]he test for "insolvency" is…not easily predicted and has some flexibility in its application.

> The bench-marks of such a condition are not readily apparent. Does such a state exist only if the university will have to cease operating if it cannot reduce its staff? Or does it mean that the university has reduced all non-staff budget items as much as is consistent with the maintenance of the most important university functions, such as teaching, and research[?]

In a more recent case dealing with similar language, Arbitrator Beattie acknowledged that, "There is no definitive legal authority on where the line is to be drawn to reach [the

[15] *Laurentian University of Sudbury*, 2021 ONSC 659 at paras 20–21 [*Laurentian CCAA Filing Decision*]. The President's affidavit supporting the filing stated that Laurentian had made its liquidity crisis known to the Minister for at least a year prior to filing, while media reports suggest the university had requested a $100 million loan in December 2020 and warned the Minister of its intent to file for creditor protection: see Shawn Jeffords, "Laurentian ran deficits dating back to 2014, government adviser says in report", *CBC News* (16 February 16 2021), online: <www.cbc.ca/news/canada/sudbury/laurentian-university-deficits-report-1.5915327>.
[16] *Laurentian CCAA Filing Decision*, *supra* note 13 at para 33.
[17] *University of Alberta*, *supra* note 10 at para 6.

financial exigency] threshold".[18] On its face, however, the LUFA collective agreement appears to set a higher (or at least more stringent) standard for exigency than the Alberta agreements referenced above. The reference to substantial "recurring" deficits and "long-term" solvency may also suggest that something more than a short-term liquidity crisis is required, possibly in contrast to the CCAA.

In hindsight it seems clear that the test would have been met and the procedures could have been employed.

However, LUFA had filed grievances in 2017 and 2020 seeking to require the administration to use the exigency process. At least for the purposes of this report, the test for financial exigency found in the Laurentian example should be viewed as a highly context-driven determination that may apply with some flexibility. In hindsight it seems clear that the test would have been met and the procedures could have been employed.

We conclude this section with some speculations about the use of financial exigency terms in faculty association collective agreements. In many cases examining financial exigency terms and claims, there appears to be either a disbelief on the part of employee groups as to the severity of a financial crisis (although in Laurentian's case, LUFA did attempt to trigger restructuring as early as 2017), or a belief on behalf of administrators that even persistent deficits will be overcome absent an exigency process. There may also be an administrative aversion to employing exigency processes because they involve extensive procedural protections and meaningful participation of employee groups in that process. Unsurprisingly, universities are made up of many different constituencies with competing or even conflicting interests that may limit cooperation in this regard. The recorded cases dealing with exigency terms sometimes revolve around unilateral actions of administrators or claimed redundancies that—it is argued—should have been implemented through an exigency process itself.

[18] *Athabasca University Faculty Association v Athabasca University Board of Governors*, 2015 CanLII 154110 (Arbitrator: Beattie) at para 143.

In order to be maximally effective, it is desirable to have access to the true financial position of a university on an ongoing basis, and to have clear lines of communication through deans and other administrators regarding short- and long-term trends based on these data. However, such information is often presented positionally in collective bargaining or vis-à-vis outside funders and stakeholders. There may be incentives to diminish the appearance of solvency problems, or to assume they are not serious enough to warrant exigency language. The Laurentian insolvency proceeding will perhaps contribute to changing those perceptions in the future.

[I]t is desirable to have access to the true financial position of the university on an ongoing basis…

Supervisory Committee

The next key component of the restructuring process involves designating a group that will oversee the exigency (restructuring) procedures, including an assessment of whether the insolvency trigger has been met. For the purpose of this report, we call these bodies "supervisory committees," although they may have different names in different agreements (see Appendix "D"). The composition of this supervisory committee may vary. The collective agreement may provide for representation from the faculty association, a board of governors, and/or other stakeholders. Alternatively, it may use an arbitration panel model, subject to arbitration dispute resolution procedures that are otherwise known to the parties. This is the case of the Laurentian model, which calls the supervisory committee a "Financial Commission" and constitutes it as an arbitration board under the collective agreement. We note for interest that none of the members of the Laurentian Financial Commission may be a representative of the Ontario government. This is consistent with both the tradition of university autonomy and the nature of exigency processes as an extension of collegial governance and labour relations norms from within the institution, rather than a government (or creditor) imposed restructuring from without.

Terms also typically set out the notices and timelines associated with the operation of the supervisory committee, and the required disclosure to the parties and supervisory committee. For example, under Article 10.15.7 the Laurentian Financial Commission must be established within 15 days of notice of the exigency declaration. The committee will solicit written and/or oral submissions from affected parties, including the faculty association and staff unions, the university administration, and the student association (Article 10.15.10). Within 60 days of its first meeting, it must issue a report confirming or rejecting the declaration of exigency, and if accepted, specifying the budgetary reduction needed to address it and any conditions (Article 10.15.11). The Board can then make cuts up to this amount (Article 10.15.12), following which the Financial Commission is tasked with apportioning the reduction among faculties, subject to further rules and procedural requirements.

[D]ecision-makers…in a financial exigency process are more likely to be familiar with…the causes and consequences of a university restructuring process.

There are some loose parallels between a supervisory committee and the role of the court and monitor in a CCAA proceeding. In a CCAA proceeding, the ultimate supervisor of the process is the CCAA judge, assisted in significant part by the monitor working closely with the debtor company. The main difference to note in the composition of the supervisory bodies are twofold: familiarity with the statutory, funding, and policy environment that a university operates in, and familiarity with labour relations matters specific to a university. Being primarily commercial insolvency experts, a CCAA court and monitor are likely to be less familiar with the post-secondary sector, including administration and governance, funding, and labour relations. In the financial exigency scheme there is either a selected supervisory committee with faculty representation, or a third-party arbitration scheme, members of which will be experts in these topics. In short, the decision-makers set out in a financial exigency process are more likely to be familiar with and sensitive to the unique causes and consequences of a university restructuring process. Indeed, in the Laurentian proceeding, some of

Being primarily commercial insolvency experts, a CCAA court and monitor are likely to be less familiar with the post-secondary sector…

these groups were consulted to a limited degree, such as through a sub-committee of the Senate.

Decision-Making Principles

Financial exigency language uses a financial test to trigger the process—akin to a CCAA proceeding—but frequently includes additional, key principles or factors that must be considered in decision-making, or are even paramount considerations in any decisions made by the supervisory committee and the parties working with it. These considerations and conditions will be familiar to anyone involved in university sector labour relations and are one of the ways in which a financial exigency process differs markedly from the commercial dictates of a CCAA procedure.

The overarching principle is that the academic mission and programming of the university are paramount considerations…

The overarching principle is that the academic mission and programming of the university are paramount considerations in a restructuring. From this flow three more crucial decision-making principles: that all other budgetary measures must be pursued before terminating academic employees, including additional government financing; that enrollment projections must be consistent with any plan; and that employee reductions must be achieved through an orderly waterfall of voluntary exits and workload re-allocation to the extent possible (Figure 2).

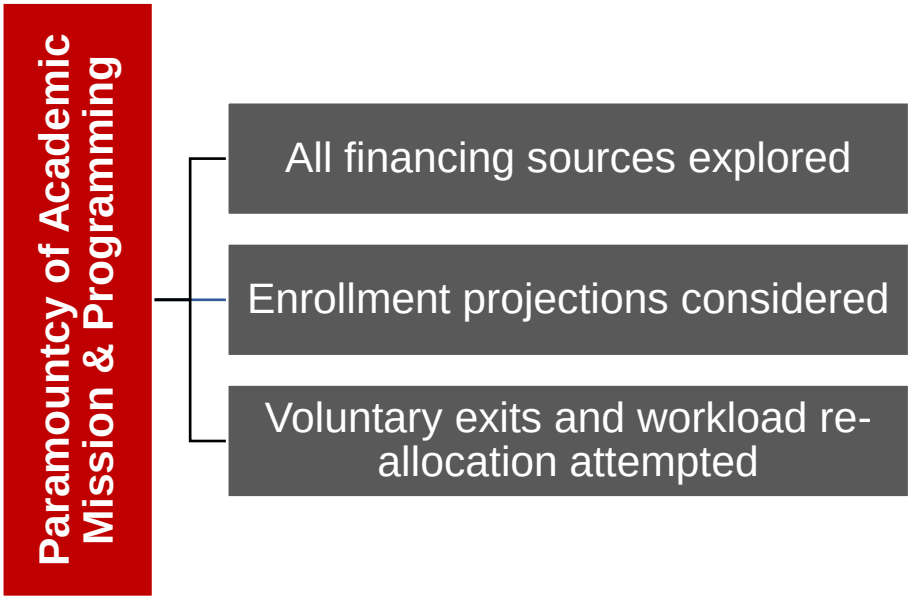

Figure 2: Decision-Making Principles in Financial Exigency

The LUFA collective agreement articulates these principles in several ways throughout the section on financial exigency:

- The first duty of the University is to ensure academic priorities remain paramount (Article 10.15.1).
- Reductions in employees are a last option, following a review of all other budget items, and only once all other reasonable means of improving revenues have been exhausted (Articles 10.15.3, 10.15.10).
- Efforts to secure financial resources from the Ontario Government must be considered as part of the procedure for making a declaration, and as part of recommendations for any restructuring (Article 10.15.10(e)).
- Enrollment projections must be considered and compared to proposed reductions in employees (in this case, academic staff) (Article 10.15.10(f)).

- All means of reducing employees must be exhausted before terminations, such as voluntary early retirement, resignation, reduced workload, redeployment, and leaves (Article 10.15.10(g)).

Where a declaration of exigency is confirmed, there are further principles guiding budget reductions and lay-offs. For example, the Laurentian terms state that wherever possible, budget reductions must be divided proportionately among academic units unless there is a clear and substantial reason for doing otherwise. (While "clear and substantial reason" is not defined, this would presumably be guided by the findings of the supervisory committee's report.)

[T]he Laurentian terms state that wherever possible, budget reductions must be divided proportionately among academic units…

Criteria are also articulated for determining the order of involuntary terminations, including tenure and seniority, qualification, performance record, contribution to university or community, and possibility of relocation within the university (most of which is consistent with general norms for layoffs and internal restructuring in unionized workplaces). This can be contrasted with the approach to Laurentian's restructuring under the CCAA process, which targeted specific "historically low enrolment" programs rather than distributing cuts across the university—although an ad hoc committee of the Senate was formed to have some limited input on restructuring decisions.[19]

As we have briefly mentioned above, these criteria for decision-making are sometimes criticized as hindrances to a fast and profound restructuring. This criticism reflects a market-based view of the process. Again, in our view, it speaks primarily to the desirability of both early warning of financial concerns (such as persistent deficits, which according to some accounts were present for as long as 10 years prior to Laurentian's filing) and

[19] Ernst & Young, "Third Report of the Monitor" (26 April 2021) at 14, online (pdf): <documentcentre.ey.com/api/Document/download?docId=33498&language=EN>.

quicker intervention. Both of these steps would have the very considerable benefit of engaging employee groups in the process and minimizing the harms of a liquidity crisis through a negotiated process and orderly restructuring.

[I]n our view, it speaks primarily to the desirability of both early warning of financial concerns…and quicker intervention.

The above are not the only set of criteria in a financial exigency process. For example, under Article 24.02 of the York University Faculty Association ("**YUFA**") collective agreement (see Appendix "D"), a bright line threshold is used as a condition for layoffs. In that example, no layoffs can be proposed based on financial necessity so long as the bargaining unit salaries and fringe benefits do not exceed 39.46% of the university's expenditures. This is similar to, but more specific than, the Laurentian requirement for the supervisory committee to consider the total university budget (and not just the academic or salary components) when assessing whether exigency has been established (Article 15.10(a)).

YUFA also has other interesting terms in its collective agreement that in effect require early warning of financial difficulty. Article 18.28 requires the university to provide advance notice to academic units "of any proposal that would affect them" and a reasonable opportunity to participate in the planning process as part of collegial governance (as well as respect for the role of the senate). Article 18.29 further requires that any "proposals for significant academic restructuring of Faculties, units, programs, and the use of redeployments" shall first be referred to a joint subcommittee prior to implementation."

A different system for addressing reductions is used at the University of Western Ontario. Under Article 9.2 of the University of Western Ontario Faculty Association ("**UWOFA**") collective agreement (see Appendix "D"), any layoffs are actioned across the whole unit rather than specific positions. A formula is used to calculate the number of layoff "days" (i.e., a salary cut) that each faculty member will receive in order to preserve total jobs.

Again, in comparison to the CCAA process and norms outlined in previous chapters, there is a difference between the way in which CCAA processes generally operate (although

there is great flexibility) and the way in which a financial exigency procedure as outlined above would operate.

Although a lack of financial resources triggers this procedure, the determination of reductions is made with a different priority.

One of the key differences is that decisions prioritize a non-commercial or non-financial objective; that is, the academic mission of the university and the preservation, to the extent possible, of the integrity of academic programming. Although a lack of financial resources triggers this procedure, the determination of reductions is made with a different priority. In a CCAA process, a key objective is profitability and maintaining going-concern value of the corporation (as measured in primarily financial terms).[20]

A second key difference is that all efforts must be made to obtain further financial resources from both internal and external sources, including expressly from the public funder, the Ontario Government. These efforts can be made conditions of any program and employee reductions proposed.

Although they may be part of restructuring efforts by the parties, these criteria are not required to enter or exit a CCAA process. In the Laurentian example, communications with the Ontario Government prior to filing were sealed and not shared with the parties that had to negotiate program and employee reductions. This is clearly contrary to the notice, disclosure, and consultation principles of the exigency procedure described above (which the administration also refused to trigger). On the other hand, we now know that the Province did in fact offer Laurentian short-term bridge financing in late 2020, but that the administration rejected this offer.[21] Without more information, it is difficult to

It is unclear whether every effort was made to obtain financial resources…from the Ontario Government…

[20] See e.g. *Diemaster Tool Inc. v Skvortsoff (Trustee of)*, [1991] OJ No 3465 (Ont Ct J) at para 40.
[21] Shawn Jeffords, "Laurentian ran deficits dating back to 2014, government adviser says in report", *CBC News* (16 February 16 2021), online: <www.cbc.ca/news/canada/sudbury/laurentian-university-deficits-report-1.5915327>.

conclude whether every effort was made to obtain financial resources from the Ontario Government, which ultimately chose not to participate in the CCAA proceedings except as an observer.

This lack of early or clear information about the sources of financing and steps taken prior to CCAA filing is at odds with the transparency normally expected in public sector institutions, including universities. It prevents labour groups from assessing the causes and necessity of a proposed restructuring, developing a strategy to respond, and holding administrators accountable for financial decision-making. It also leads to distracting speculation about the actual practices of management (and government) immediately pre-filing, which is ultimately corrosive of the relationship between the stakeholders at a critical time and may result in avoidable long-term problems.[22]

Implementation Powers

Finally, as already suggested, exigency terms may govern the implementation of any decisions of the supervisory committee. These could include terms empowering the committee to make recommendations or decisions on the programming and employees to be restructured; on conditions to those changes (for example, obtaining further financial resources or funding commitments); and on resolving disputes that arise in the implementation process.

[E]xigency terms may govern the implementation of any decisions of the supervisory committee.

In the Laurentian example, the Financial Commission's report identifies the maximum global budgetary reduction that may be implemented by the Board of Governors. While the Board is then empowered to make this reduction (Article 10.15.12), it is the Commission that actually apportions the global cut across academic units (Article 10.15.13). From there, each Faculty Council apportions its share of cuts among its departments and schools (which again, should occur proportionately unless there is a

[22] See e.g. the theory that the administration deliberately manipulated loan funding to trigger a financial crisis and enable a CCAA filing: Alex Usher, "Laurentian Blues (8) – Causes, Fault and Lessons", *Higher Education Strategy Associates* (15 April 2021), online: <higheredstrategy.com/laurentian-blues-8-causes-fault-and-lessons/>.

clear and substantial reason to do otherwise) and determines which faculty members will be laid off (Article 10.15.14). If the relevant Council cannot decide on layoffs, the decision falls to the Dean, or failing that, the Financial Commission (Article 10.15.18). Even where layoffs occur, the employer must make reasonable efforts to find alternate positions elsewhere in the university for employees facing lay off (Article 10.15.20) and laid-off employees retain the right to grieve their selection on procedural grounds (Article 10.15.21) as well as recall rights for future positions (Article 10.15.22(b)).

Jurisdiction of Senate and Board of Governors

The overarching principle in exigency procedures identified above is preserving the academic mission and programming of the university. This may be achieved through strictly distributed budgetary reductions, as in the UWOFA collective agreement, or by more flexible reductions across faculties and departments.

In both cases, a key aspect of financial exigency procedures is the role of the senate in academic affairs. Some collective agreements are explicit in reserving authority to the senate where decisions are not reached through the exigency procedure.[23] Strategic faculty association involvement in this governing body can help contest Board of Governors or other budgetary and restructuring decisions even outside of a formal exigency or redundancy process.

[M]ost university legislation establishes a bicameral system of governance…

In the Ontario university system, most university legislation establishes a bicameral system of governance split between a board of governors (broadly dealing with financial/operational matters) and a senate (broadly dealing with academic matters) (Figure 3). However, each enabling statute varies slightly in terms of areas of exclusive or concurrent jurisdiction assigned to each governance body. Some

[23] See e.g. the Carleton University Academic Staff Association Collective Agreement (May 1, 2017 – April 30, 2021), Article 17.

statutes will confer residual authority on the board, subject to whatever powers are specifically conferred on the senate.

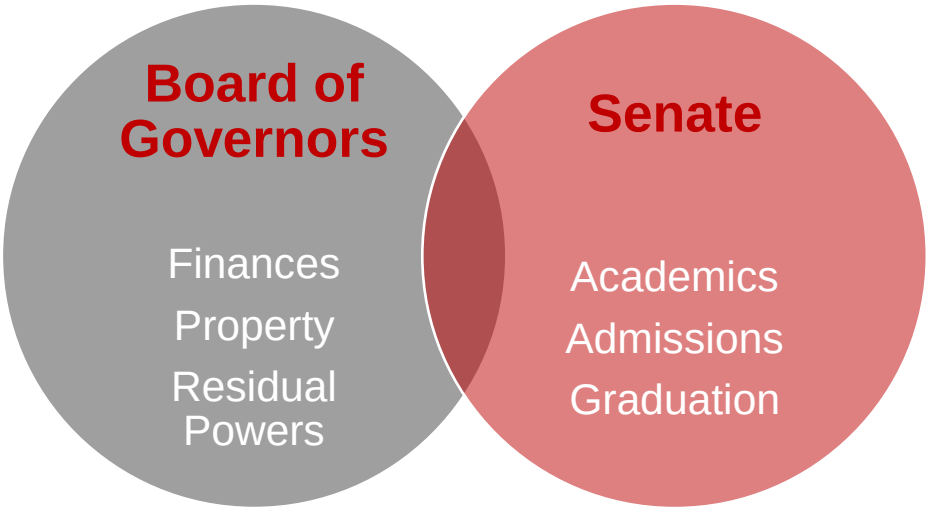

Figure 3: Jurisdiction of Board of Governors & Senate

For example, the *Laurentian University Act* provides the board with authority to manage property, revenues, and expenditures, as well as all matters not specifically assigned to the President, the Senate, and the federated universities.[24] In contrast, the Senate is responsible for educational policies, with its decisions subject to the approval of the Board "in so far as the expenditure of funds and establishment of facilities are concerned".[25] Specifically, the Senate may create faculties, academic programs, councils, committees, and regulations regarding topics such as admissions, exams, graduation, degrees, and awards, and its own procedures.[26]

Importantly, a senate is not a subordinate body to a board. Although these issues may sometimes be contested where a senate acts in its exclusive jurisdiction, a board has no

[A] senate is not a subordinate body to a board.

[24] *An Act to incorporate Laurentian University of Sudbury*, SO 1960, c 151, s 18.
[25] *Ibid*, s 21.
[26] *Ibid*, ss 21–22.

authority to override or interfere with its decisions and board approval is not required unless it is an area of shared or overlapping authority.[27]

Of course, the exact role of the senate will depend on the specific language of the statute. Like Laurentian, section 12 of the *Trent University Act* contains a restriction making the senate's general responsibility for educational policy subject to "the approval of the Board in so far as the expenditure of funds and the establishment of faculties is concerned."[28] This led to the result in *Kulchyski et al. v. Trent University*.[29] In that case, the board approved the closure of two of the university's residential colleges, while the senate resolved that the colleges should not be closed. Three faculty members applied for judicial review of the board's decision, asserting in part that it engaged educational policy and was at least a matter of overlapping jurisdiction requiring the senate's approval.

In upholding the Divisional Court's decision to dismiss the application, the majority of the Court of Appeal found, based on the specific language of the statute, that even if the closure of the residential colleges were a matter of educational policy (which the majority doubted) the board had the power to override the senate's decision.[30] In other words, a university board may have an overriding power over a senate's decisions regarding educational policy insofar as this is an area of shared or overlapping jurisdiction and/or involves the expenditure of funds.[31]

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[27] This was addressed by the British Columbia Court of Appeal in *Faculty Association of the University of British Columbia v. University of British Columbia*. The appellant faculty association asserted that a senate policy concerning teaching evaluations was in violation of the faculty association's collective agreement. The Court of Appeal upheld the arbitrator's award dismissing the grievance, reasoning that under the terms of British Columbia's University Act, which establishes a bicameral governance model, the Board could not restrict Senate's exclusive powers, even by negotiating a collective agreement. **[Remove note in distributed report]**

[28] *An Act to incorporate Trent University*, SC 1962–63, c 192, s 12.

[29] *Kulchyski et al. v Trent University*, 2001 CanLII 11691 (ON CA), leave to appeal refused, [2001] SCCA No 516.

[30] *Ibid* at paras 32–33.

[31] See also Ontario Confederation of University Faculty Associations, "OCUFA Submission warns of threat to shared governance in regulations proposed in Northern Ontario School of Medicine University Act" (29 November 2021), online: <ocufa.on.ca/blog-posts/ocufa-submission-warns-of-threat-to-shared-governance-in-regulations-proposed-in-northern-ontario-school-of-medicine-university-act/>.

Within a CCAA process…the board of governors functionally becomes the sole decision-maker…

Within a CCAA process (bearing in mind that Laurentian is the only example of a bicameral university insolvency in this country), the board of governors functionally becomes the sole decision-maker, and the role of the senate is marginalized or eliminated completely.[32] This may make sense for a procedure designed to deal with financial aspects of restructuring in a corporate context. For universities, however, finances are so interconnected to the academic mission that most major restructuring decisions will necessarily affect them. In the Laurentian case, the Senate was asked to vote on the lay-offs plan, but this was felt to be a "gun-to-the-head" decision without real choice.[33] The Senate did not, as an independent body, play a critical role in shaping the arrangement put to it. Insofar as the senate is a second vehicle for expressing the "voice" of faculty as well as the statutory body charged with academic matters, it cannot perform the functions assigned to it by law and public policy.

This is in stark contrast to a financial exigency procedure, which is designed to preserve consultative decision-making and collegial governance even when difficult and complex restructuring decisions are necessary. In fact, in August 2020, Laurentian unilaterally suspended 17 low-enrolment programs and LUFA challenged this decision on the basis that it violated the authority of the Senate.[34] Once again, the slower pace of university decision-making demonstrates the importance of using existing governance and decision-making procedures at an earlier stage rather than waiting until the situation is too dire.

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[32] In the case of Quest University, the governing statute creates an academic council for consultation purposes that is subordinate to the board: *Sea to Sky University Act*, SBC 2002, c 54, s 9.

[33] See e.g. Ontario Confederation of University Faculty Associations, "CCAA process continues to fail public institutions as Laurentian Senate is forced to vote on restructuring package" (6 April 2021), online: <ocufa.on.ca/press-releases/ccaa-process-continues-to-fail-public-institutions-as-laurentian-senate-is-forced-to-vote-on-restructuring-package/>.

[34] "Laurentian programs still suspended, deans to report back on low enrolment, quality control", *CBC News* (23 September 2020), online: <www.cbc.ca/news/canada/sudbury/laurentian-programs-still-suspended-1.5735471>; Canadian Association of University Teachers, "Collective Bargaining Report" (November 2020), online (pdf): <council.caut.ca/sites/default/files/14._a_collective_bargaining_report_2020-11council_2020-11.pdf>.

On balance, in a CCAA/restructuring context, insisting on the statutory jurisdiction of a senate over academic policy is more helpful than hurtful, and provides a justification for involving a senate in any restructuring process (CCAA or otherwise). The senate can act as a counterweight to ensure that the academic mission of the university remains the overarching goal. The presence and role of the senate in universities is also an opportunity for faculty groups to take an active role in collegial governance not only during a CCAA proceeding, but well before one as a means of heading off future issues.

The senate can act as a counterweight to ensure that the academic mission of the university remains the overarching goal.

President and Executive

We have discussed the statutory role and duties of the senate and board of governors. A separate but related consideration is the unique role of executive bodies including university presidents. It is relatively common in universities to have an executive committee and president's office (or equivalent) supervising the day-to-day operations of the university and reporting to the board. Some of these offices are established by the university act, while others are created by university bylaws, policies, or simply employment contracts. These are the individuals who likely have the most knowledge of the (operational) affairs of the university.

Structurally, a president typically owes duties to both the board of governors and the senate. The executive may similarly report to either or both. These individuals are the locus of all major administrative decision-making and may have distinct "voices" vis-a-vis university governance. In some respects, their interests and capacities will also differ from the board—which is composed mainly of volunteers and can have a more distant supervisory role—and the senate—which is often more connected to ongoing teaching and research activities. In considering the roles and voice of administration within any restructuring process, it may be useful to separate out executive committees and presidents from the board and senate to the extent that their views and roles may differ.

Employee Groups

We have considered financial exigency terms in faculty association collective agreements. These are, of course, only one employee group within a university. There may be other bargaining units represented by different unions or associations, such as administrative staff, facilities operators, food service workers, sessional instructors (when not covered by a permanent faculty bargaining unit), student employees (including teaching and research assistants), and non-unionized employees. Retiree groups may also be stakeholders to the extent they have financial or other interests in the university.

In the Laurentian example, sessional instructors were largely—though not exclusively—represented by LUFA, and the staff union, LUSU, was also part of the negotiations that resulted in the reductions.

The financial exigency language we have examined does not address potential effects of restructuring on other employee groups. In developing a revised model financial exigency code, it will be necessary and desirable to make provision for any employee group who will be affected by financial exigency to have a voice in that process.

A Model Financial Exigency Code

One reason for this discussion of the principles and procedures that can be derived from existing bargained financial exigency language is that these principles form the basis for a fair, negotiated restructuring process, wherever that may take place. Chapters 7 and 8 outline options for law reform by governments (inside and outside the CCAA, including in provincial legislation governing universities), by courts and through litigation (in insolvency proceedings), and by stakeholders themselves (in bargaining, university administration, and seeking to change current insolvency law practices). A useful tool in each of these areas will be a revised model code containing financial exigency definitions and procedures. The CAUT or similar body is in

The CAUT…is in a position to develop a model financial exigency code…based on the best practices derived from existing collective agreements and examples of restructuring.

a position to develop a model financial exigency code for these purposes, based on the best practices derived from existing collective agreements and examples of restructuring.

The CAUT has long had a Policy Statement setting out the basic financial exigency terms that should be included in a faculty association collective agreement.[35] However, this should be updated in light of the Laurentian experience. The principles, processes and actors that should be addressed in a model financial exigency code include:

- Primacy of the academic mandate in all decision-making.
- Transparency in flow of information to all affected stakeholders.
- Early warning and timeliness in notice and provision of information.
- Terms establishing an exigency procedure including trigger test, supervisory committee, and implementation powers.
- Requirements to seek all reasonable sources of financing and cost-savings as part of the decision-making process.
- Required role of the public funder.
- Roles for the senate, board of governors, executive and president, and affected bargaining agents.
- Processes for determining budgetary reductions and, where layoffs are required, orderly allocation and implementation of layoffs based on labour relations norms.

[35] Canadian Association of University Teachers, "Financial Exigency and Lay-offs" (last revised 2009), online: <www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-financial-exigency-and-lay-offs>.

B. Other Sources of Authority to Restructure Universities

Strategic Mandate Agreements

Strategic mandate agreements ("**SMAs**") are the primary funding framework between the Ontario public funder (the Ontario Government) and a university, and as such are one potential source for disclosure, supervision, and intervention vis-à-vis a university where circumstances might support it.[36]

…SMAs are the primary tool governments have used to guide university decision-making…

Much has been written about SMAs by stakeholders in the Ontario university sector and we will not repeat that analysis in detail here. It seems clear that SMAs are the primary tool governments have used to guide university decision-making toward government and public policy objectives outside of any direct restructuring or intervention. In examining trends in Ontario and British Columbia, one set of authors notes that the intent of Ontario's SMAs was "to align programming with the economy and labour market either by restricting operating grant allocations for specific high-demand programming or by making decisions on the types of programs and credentials offered."[37]

SMAs have come under criticism from the university sector…

SMAs have come under criticism from the university sector for this reason. One commentator argues that in terms of academic research, the model "effectively displaces research that 'matters' with research that 'counts' and puts a premium on doing simply what counts as fast as possible", as measured through narrow performance indicators such as citation metrics, evaluation framework scores, or funds raised.[38]

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[36] Ontario Ministry of Colleges & Universities, "College and University Strategic Mandate Agreements, 2020-2025" (last updated 14 October 2021), online: <www.ontario.ca/page/college-and-university-strategic-mandate-agreements-2020-2025>.

[37] Lane D Trotter & Amy Mitchell, "Academic Drift in Canadian Institutions of Higher Education: Research Mandates, Strategy, and Culture" (2018) 48:2 Can J Higher Education 92 at 94.

[38] Marc Spooner, "Ontario university strategic mandate agreements: a train wreck waiting to happen", *University Affairs* (23 January 2018), online: <www.universityaffairs.ca/opinion/in-my-opinion/ontario-university-strategic-mandate-agreements-train-wreck-waiting-happen/>.

The most recent phase (Phase 3) of the SMAs are in effect from 2020 to 2025. This phase began with the 2019 Ontario budget which made a fundamental change to the SMAs. Instead of accountability-based performance measures, it tied funding to performance outcomes (as defined in an SMA.) In addition to common metrics such as graduation rate and research funding, the performance-based funding ("**PBF**") criteria now include new, less common metrics such as graduate employment rates and graduate earnings.[39] Novel metrics, not found in other PBF models, include community/local impact, graduate earnings, and institution-specific economic impact metrics.[40]

The terms of the 2017–2020 SMA for Laurentian University that address financial conditions and commitments are as follows:[41]

> **Financial sustainability**
>
> The Ministry and the University recognize that financial sustainability and accountability are critical to achieving institutional mandates and realizing Ontario's vision for the postsecondary education system. To this end, it is agreed that:
>
> It is the responsibility of the governing board and senior administrators of the University to identify, track, and address financial pressures and sustainability issues. At the same time, the Ministry has a financial stewardship role. The Ministry and the University agree to work collaboratively to achieve the common goal of financial sustainability and to ensure that Ontarians have access to a full range of affordable, high-quality postsecondary education options, now and in the future.
>
> The University remains accountable to the Ministry with respect to effective and efficient use of provincial government resources and student resources covered by policy directives of the Ministry, or decisions impacting upon these, to maximize the value and impact of investments made in the postsecondary education system.
>
> […]
>
> **Ministry/Government Commitments**

[39] Ontario Ministry of Training, Colleges & Universities, "College and University Strategic Mandate Agreements, 2020-2025".
[40] *Ibid*. At the same time, the Ontario Government imposed a 10% cut in regulated tuition as well as a $600 million cut to grants under the Ontario Student Assistance Program and a modification to the needs assessment formula.
[41] Government of Ontario, "Archived - 2017-20 Strategic Mandate Agreement: Laurentian University" (Published 16 March 2018), online: <www.ontario.ca/page/2017-20-strategic-mandate-agreement-laurentian-university>.

> The SMA2 process has focused on implementing the first stages of the new funding model and demonstrating the ongoing commitment by all colleges and universities to student success. Future growth will only be funded through negotiated changes to an institution's funded enrolment corridor. Through the SMA2 cycle, the ministry will continue to work closely with institutions to ensure all dimensions of the funding model are implemented.

The document also committed the Ministry to engage in consultations on performance-based metrics and other issues such as francophone education, tuition policy, graduate program needs, and the Northern Grant.

The SMA for Laurentian University for 2020–2025 that address financial conditions and commitments are as follows, based on 2019–20 operating grant totals:[42]

> For the SMA3 cycle, Laurentian University's annual allocation of performance-based funding has been calculated by the ministry in accordance with the university funding model and Ontario's Performance-based Funding Technical Manual. Laurentian University's notional allocations will not be impacted by previous year performance, and will follow a graduated activation plan as follows:

Year	2020–21	2021–22	2022–23	2023–24	2024–25
Differentiation Envelope	$16,213,262	$21,733,046	$27,252,994	$32,772,942	$35,532,916
Performance-based Grant	$16,213,262	$21,733,046	$27,252,994	$32,772,942	$35,532,916

The document adds that PBF funding will not be in place for 2020–21 and 2021–22, with following years determined through the SMA3 Annual Evaluation process and caps based on system-wide averages. Then follows a further set of tables on metric weightings tied to institutional features which are not reported here but show the funding variation possible where each of the metrics are either met, not met, or exceeded. One commentator has estimated that the "worst case scenario" under this PBF scheme is "much ado about nothing", or, unlikely to result in significant downward variance.[43]

[42] Government of Ontario, "2020-2025 Strategic Mandate Agreement: Laurentian University" (Published 14 October 2021), online: <www.ontario.ca/page/2020-2025-strategic-mandate-agreement-laurentian-university>.
[43] Alex Usher, "Ontario's PBF System: Much Ado About Nothing", *Higher Education Strategy Associates* (2 December 2020), online: <higheredstrategy.com/ontarios-pbf-system-much-ado-about-nothing/>.

There are three main comments to make in connection with SMAs and Laurentian University specifically. First, the current SMAs contain a funding allocation and a series of metrics that may cause that allocation to vary over the life of the agreement—although how much variance will occur is contested and not yet possible to estimate. SMAs do not contain any other terms that set out conditions on funding or consequences for significantly adverse events, such as temporary or persistent deficits, nor do they set out any statements, even of a general nature, about procedures to be followed in the event of financial distress.

[T]he Ontario Government opted to decline to provide any one-time or special emergency funding…

Second, by comparing the 2017–2020 and 2020–2025 SMAs for Laurentian University, we can see a shift in the phrasing and terms of financial commitments by the Minister to the university, but the legal effects of these broad statements are not immediately clear. According to the 2017–2020 SMA, the university has "responsibility…to identify, track, and address financial pressures and sustainability issues", but "at the same time, the Ministry has a financial stewardship role" and "the Ministry and the University agree to work collaboratively to achieve the common goal of financial sustainability…" This language is absent from the 2020–2025 SMA, where metrics become tied to funding, although as mentioned the consequences of failing to meet metrics may not be severe. In short, there are no clear terms that establish a "backstop" (as was perhaps assumed by many creditors) and the contractual obligations to fund Laurentian University under the 2020–2025 SMA are, in this respect, similar to prior SMAs. (They of course differ in the funding metrics driving the total amounts.) In the event, the Ontario Government opted to decline to provide any one-time or special emergency funding to Laurentian.

Third, one of the stated purposes of the SMA system is to eliminate duplication and to coordinate the university sector's funding and program offerings in Ontario (commentators have suggested that these objectives were a guise for reducing overall funding of the sector). The system was developed at least in part in response to the

recommendations of a review of the university sector within broader public spending more generally.[44]

A commercial insolvency process is not well-equipped to take those considerations into account...

This suggests that if any one of the 21 universities participating in the SMA system becomes so financially distressed as to require significant restructuring of its academic programming, there will be implications for the sector as a whole in a variety of ways. We can already see the secondary impacts of the Laurentian cuts on the funding, course offerings, and future direction of other Greater Sudbury universities, including francophone, Indigenous, and healthcare education, as mentioned in Chapter 4.[45] A commercial insolvency process is not well-equipped to take those considerations into account, particularly where the Minister takes no active role in the proceeding.

The Ministry of Training, Colleges and Universities Act

A third possible source of authority with respect to restructuring of Ontario universities is the references to the authority of the Minister over some limited financial matters in the *Ministry of Training, Colleges and Universities Act* ("**MTCUA**").[46] The MTCUA refers to a minister's powers in respect of "awards and grants" as follows:

> **5** (1) The Minister may make grants and awards to,
>
> (a) students of universities, colleges of applied arts and technology or other post-secondary institutions;
>
> […]
>
> (2) A grant or award may be made on such terms as may be prescribed by regulation and on such other terms as the Minister considers proper.
>
> […]

[44] For a summary of the background to SMAs, see Pierre G Piché & Glen A Jones, "Institutional diversity in Ontario's university sector: A policy debate analysis" (2016) 46:3 Can J Higher Education 1.
[45] See e.g. the closure of Laurentian's School of Midwifery—the only bilingual midwife program in Canada and the only program in Ontario outside the Greater Toronto and Hamilton area, which specialized in serving northern, Indigenous, and rural populations.
[46] *Ministry of Training, Colleges and Universities Act*, RSO 1990, c M.19 [*MTCUA*].

> **6** The Lieutenant Governor in Council may make regulations providing for the apportionment and distribution of money appropriated by the Legislature for the maintenance, development and promotion of historical institutions, and providing for the conditions governing the payment thereof.
>
> […]
>
> **10** (1) The Minister, in connection with the administration of student loans, medical resident loans, awards and grants, may appoint inspectors for the purposes of determining compliance with this Act, the regulations and any agreements entered into by the Minister.
>
> (2) For the purposes of determining whether this Act has been complied with and is being complied with, an inspector may, without a warrant, enter and inspect business premises of any person and post-secondary institutions.
>
> […]
>
> **11** On receipt of a report from an inspector under section 10, the Minister may make any order that he or she considers appropriate for the purposes of the proper administration of student loans, medical resident loans, awards and grants under this Act and the regulations.

Section 13 of the MTCUA provides that the Minister may make regulations governing the following matters:

> (d) providing for the apportionment and distribution of money appropriated or raised by the Legislature for university, college and other post-secondary educational purposes;
>
> (e) prescribing the conditions governing the payment of legislative grants;
>
> (f) defining "enrolment" and "student" for the purpose of legislative grants to post-secondary educational institutions recognized by the Minister for the purpose of such grants, and requiring that "enrolment" be subject to the approval of the Minister;

These powers are phrased more broadly than those in section 5. Read together, they may expand the meaning of "grants" in section 5 to include transfers to universities that are not limited to student loans, and made "for university, college and other post-secondary educational purposes". Further, the Minister has a general power to prescribe conditions "for the payment of such legislative grants".

While it is clear from these provisions that the Minister has certain powers with respect to student loan and grant programs, including the appointment of financial inspectors, it could and should be clarified that this power extends to providing emergency funding and

any associated conditions.[47] At the least, this is an example of an existing statutory power to provide resources to a university in Ontario. The Minister may also have a non-statutory, general spending power which could be employed to provide emergency loans to a university, presumably on terms and conditions the Minister thought appropriate so long as this does not otherwise interfere with institutional autonomy under the university acts.[48]

[T]his is an example of an existing statutory power to provide resources to a university in Ontario.

We point out these powers because they could be supplemented to permit a more comprehensive authority to provide emergency funding tied to restructuring, for example on application by a university, as we will discuss in more detail in the next chapter.

In addition, the Minister has the power to appoint advisory committees or other consulting bodies.[49] The "Special Advisor on the Long-Term Financial Sustainability of Laurentian University" was appointed pursuant to this power to provide advice to the Minister relating to the financial state of the university and its path to return to financial sustainability.[50] No report from the Special Advisor has been released publicly to-date.[51]

[T]he province is generally obligated to respect the institutional autonomy conferred by the various university acts.

The limited legislative authorization for government intervention in universities means that the province is generally obligated to respect the institutional autonomy conferred by the various university acts. In 2018–19, the Minister revised the guidelines governing

[47] If not clarified, the exercise of government powers to intervene in universities could potentially invite legal disputes. See, for example, Laurentian's (ongoing) challenge to the Auditor General of Ontario's statutory authority to compel production of privileged documents: Ernst & Young Inc, "Auditor General of Ontario Application" (Restructuring Document Centre – Laurentian University of Sudbury), online: <documentcentre.ey.com/#/detail-engmt?eid=459>.
[48] See *Canadian Federation of Students v Ontario (Colleges and Universities),* 2021 ONCA 553 at paras 22–30 [*CFS ONCA*].
[49] *MTCUA*, *supra* note 45, s 4.
[50] OIC 88/2021 (*Ministry of Training, Colleges and Universities Act*), online: <www.ontario.ca/orders-in-council/oc-882021>. See also Ontario Ministry of Training, Colleges & Universities, "Ontario Names Special Advisor to Support Laurentian University", Press Release (1 February 2021), online: <news.ontario.ca/en/statement/60200/ontario-names-special-advisor-to-support-laurentian-university>.
[51] An initial January 29, 2021 letter to the Minister was reviewed by The Canadian Press: Jeffords, *supra* note 13.

tuition and ancillary fees to require that universities make certain categories of student fees optional (the "Student Choice Initiative").[52] The guidelines did not refer to any statutory authority for this change. On an application for judicial review brought by impacted student associations, both the Divisional Court and Court of Appeal found that the Student Choice Initiative contravened the autonomy of universities to establish ancillary fee agreements with student associations, and this interference could not be justified based on the Crown's prerogative power or spending power alone.[53]

In short, apart from the individual university statutes, there is no clear and cogent set of statutory powers or authority for the Ontario Government to make emergency financing available or intervene directly in university operations—or, more precisely, to supervise a restructuring process on its own initiative or on the initiative of a university stakeholder.

[T]here is no clear and cogent set of statutory powers…for the Ontario Government…to supervise a restructuring process on its own initiative…

This can be contrasted with the situation of colleges, which are all established as agents of the Crown under a single statute, the *Ontario Colleges of Applied Arts and Technology Act*, *2002*.[54] The Minister has much more extensive powers over colleges, including the ability to intervene directly in their affairs:

> **4** (1) The Minister may issue policy directives in relation to the manner in which colleges carry out their objects or conduct their affairs.
>
> […]
>
> **5** (1) The Minister may intervene into the affairs of a college or a subsidiary of a college in such manner and under such conditions as may be prescribed, if the Minister is of the opinion that,
>
> […]

[52] Ontario Ministry of Training, Colleges & Universities, *Tuition Fee Framework and Ancillary Fee Guidelines: Publicly-Assisted Universities* (2019–20 and 2020–21), Section 6: Ancillary Fee Policy, online (pdf): <www.tcu.gov.on.ca/pepg/mtcu-university-tuition-framework-guidelines-mar2019-en.pdf>.
[53] *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 (Div Ct) at para 117; *CFS ONCA*, *supra* note 47 at paras 61–64. Note that the distinction between prerogative powers and spending powers was relevant in this case; it need not be for the purposes of this report.
[54] See *Ontario Colleges of Applied Arts and Technology Act*, 2002, SO 2002, c 8, Sched F, s 2(4).

(c) it is in the public interest to do so.

(2) In determining whether an intervention is in the public interest, the Minister may take into consideration, among other things,

(a) the quality of the management and administration of the college;

(b) the college's utilization of its financial resources for the management and delivery of core education and training services;

[…]

Additional financial obligations are prescribed by regulation, including the requirement that colleges obtain ministerial approval before running a deficit in any given year.[55] The same regulation provides the Minister with broad discretion to appoint investigators and administrators, issue policy directives to college boards, and remove board members:[56]

15. (1) Where the Minister is of the opinion that an intervention into the affairs of a college under section 5 of the Act is necessary, the Minister may,

(a) appoint a person to investigate the activities of the college and to advise the Minister whether, in his or her opinion, the appointment of an administrator is in the public interest and is needed to ensure that the college continues to provide service in accordance with applicable Acts and the regulations made under them and policy directives;

[…]

(c) remove some or all board members appointed under subsection 4 (2) temporarily or permanently; and

(d) appoint a person to temporarily administer the business and affairs of the college, subject to such conditions and restrictions as the Minister may impose upon the administrator.

This regulation also outlines the authority of investigators to access and inspect records and of administrators to exercise all the powers of the board of governors, in place of the board, subject to directions and reporting to the Minister.[57] It appears that at minimum a statutory amendment would be required to provide for a comparable process in the

[55] O Reg 34/03 (General), s 9.
[56] *Ibid*, s 15(1).
[57] *Ibid*, s 15(2)–(7).

Ontario university sector. Alternatively, dedicated, single-purpose legislation could be enacted to provide this authority.[58]

The Nova Scotia Revitalization Scheme

In 2015, the Nova Scotia government passed the *Universities Accountability and Sustainability Act*.[59] Like other provinces, this statute contains provisions that enable the responsible minister to provide funding to universities and to require certain reporting and transparency measures from universities.

It also contains a procedure to facilitiate a "revilatization process". This procedure contains some of the elements of a financial exigency procedure. A university may "participate" in a "revilatization planning process" on application to the Minister (s. 5). To apply, the university must detemrine, and the Minister accept, that a "significant operating deficiency" has arisen.. Notice and comment from employee groups is required. The Minister has powers to seek further financial information or have it verified independently.

During the period of this process, certain labour relations rights are suspended, such as trikes and lockouts, but collective bargaining continues; however, no collective agrement may be negotiated and concluded during the process.
The Minister establishes a committee and facilitator to oversee the revitalization process and to facilitate stakeholder participation in developing a "revitalization plan". The revitalization plan must include certains terms that relate to the long-term position of the university in the provincewide system, among other things, which largely reflects economic priorities, but also including impacts on students and employees and the impact on academic freedom. The plan must be developed wihtin six months, reviewed by the committee, and returned within 10 months. The Minister may then decide to make grants,

[58] The Ontario Government has proven willing to enact legislation to protect some former Laurentian-affiliated institutions following its CCAA application: see *Northern Ontario School of Medicine University Act, 2021*, SO 2021, c 25, Sched 16; *Université de Hearst Act, 2021*, SO 2021, c 25, Sched 28.
[59] SNS 2015, c 11.

with or without conditions, tied to the revilatization plan. The revitalization plan may then be turned into one or more “outcomes agreements” with the university.

Elements of this procedure are useful reference in developing a more robust model financial exigency code. We note, however, the following shortcomings of the Nova Scoita revitalization scheme:

- the suspension of labour relations remedies (including strike / lock out) and prohibition of executing collective agreements during a revitalization plan is, or may be, an undesirable or extraordinary limitation on freedom of association;

- there is a lack of defined mandates for some key stakeholders, such as the senate, separation of board of governors and senior administration, and employee groups; and

- although some consideration is made for adacemic mandate and the post-secondary system as a whole, and impacts on employee groups and academic freedom, there is not a priority in protecting academic mandate and associated public interest values over economic and commercial considerations.

C. International Comparisons

We reviewed common law jurisdictions to identify any other uses of insolvency proceedings by publicly funded universities, or alternative modalities of restructuring publicly funded universities. Below we summarize developments in the United States, United Kingdom, and Australia.

United States

The American post-secondary sector is heavily privatized and generally quite distinct from the Canadian model. For-profit university and college closures are common, and even publicly funded institutions have suffered budgetary crises due to greater exposure to market competition, historic inequities (for example, in the case of historically Black colleges and universities), and politically driven budget reductions.

The American post-secondary sector is…quite distinct from the Canadian model.

Since the early 1990s, Chapter 11 bankruptcy (restructuring) has not been a viable option for U.S. institutions that receive federal student financial aid funding from the Department of Education ("**DOE**").[60] Universities and colleges qualify as debtors under the *Bankruptcy Code*.[61] However, an institution that files for bankruptcy is no longer eligible to receive post-secondary student financial aid under Title IV of the *Higher Education Act*.[62] It appears this change was adopted to prevent insolvent institutions from obtaining bankruptcy protection and continuing to accept students despite being unable to make loan refund payments.[63] An alternate rationale is that "any institution needing to declare bankruptcy is too risky to bet taxpayer dollars on it, and too risky to allow students to enroll in."[64]

For this reason, most U.S. educational institutions that experience severe financial distress liquidate under Chapter 7 of the *Bankruptcy Code*.[65] Some ***have*** used Chapter 11 if it was viewed as a more

[M]ost U.S. educational institutions that experience severe financial distress liquidate under Chapter 7…

[60] Scott F Norberg, "Bankruptcy and Higher Education Institutions" (2015) 23 American Bankruptcy Institute Law Review 385.
[61] *Bankruptcy Code*, § 109, "Who may be a debtor", excludes other specialized institutions such as railroads and banks.
[62] The definition of "institution of higher education" excludes an "institution...that has filed for bankruptcy": 20 USC § 1002 (a)(4)(A).
[63] Norberg, *supra* note 57 at 390–92. Norberg dismisses this justification in arguing to repeal the restriction.
[64] *Ibid* at 392.
[65] See e.g. Mark Reilly, "McNally Smith College Files for Bankruptcy", *Minneapolis/St. Paul Business Journal* (9 February 2018), online: <www.bizjournals.com/twincities/news/2018/02/09/mcnally-smith-college-files-for-bankruptcy.html>.

effective means to dispose of assets[66] or if they are prepared to forego Title IV funding.[67] Professor Matthew Bruckner has also suggested that universities could qualify as "municipalities" under Chapter 9 bankruptcy (the process used by Detroit), which provides creditor protection through a plan of arrangement.[68] Municipalities include a wide variety of governmental entities such as cities, counties, townships, municipal utilities, taxing districts, and school districts.[69] However, there is no existing example on this process being applied to universities. Furthermore, only 12 states authorize the use of Chapter 9. This means that most U.S. colleges and universities do not have functional access to a bankruptcy restructuring process outside of liquidation.

Several commentators have argued that U.S. law should be amended to allow higher education institutions access to Chapter 11.[70] This argument is generally made on one or more of the following bases: the original policy rationale for the ban was flawed; expanded DOE oversight of institutions addresses the original policy concerns that led to the ban; the loan repayment issue could be addressed through a super-priority charge in favour of the DOE; or simply, "universities are businesses too". Professor Scott Norberg summarizes:[71]

> Like any other overleveraged business that generates income in excess of operating expenses, and going concern value exceeds liquidation value, there are strong incentives for creditors to consensually restructure the debt. However, collective action problems or dysfunction in debtor-creditor negotiations may derail a consensual restructuring. Bankruptcy would provide an opportunity for the school to restructure its debt, preserve going concern value for the benefit of creditors, maintain employment of faculty and staff, continue relationships with suppliers, and help to preserve the local tax base. The threat of bankruptcy provides added incentive for creditors, the mortgagee in particular, to restructure the school's debt.

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[66] See e.g. the Chapter 7 bankruptcy of private Dowling College in New York: Rick Seltzer, "Closing out a College", *Inside Higher Ed* (5 January 2017), online: <www.insidehighered.com/news/2017/01/05/virginia-intermonts-campus-sale-begs-questions-how-colleges-close-accounts>.

[67] See e.g. the Chapter 11 restructuring of Morris Brown College: "How an Atlanta HBCU Fell into Bankruptcy", *The Atlanta Journal-Constitution* (31 January 2018), online: <www.ajc.com/news/local/morris-brown-college-timeline/I8aag6h6giHpHW84ExIAfM/>.

[68] Matthew Adam Bruckner, "Special Purpose Municipal Entities and Bankruptcy: The Case of Public Colleges" (2020) 36:2 Emory Bankruptcy Developments Journal 341 at 367–68.

[69] Under the *Bankruptcy Code*, "municipality" is defined as a "political subdivision or public agency or instrumentality of a State": 11 USC § 101(40) (2019).

[70] See e.g. Norberg, *supra* note 57 at 399; Matthew Adam Bruckner, "Bankrupting Higher Education" (2017) 91 American Bankruptcy Law Journal 697 at 698 (2017); Matthew Adam Bruckner, "Higher Ed 'Do Not Resuscitate' Orders" (2018) 106 Kentucky Law Journal 223 at 228.

[71] Norberg, *supra* note 57 at 398.

He goes on to suggests that the bankruptcy prohibition "may give undue leverage to creditors other than the DOE", who can "demand changes in the school's operating plan that may be inconsistent with program quality standards."[72] In contrast, he frames the bankruptcy court as a "neutral tribunal" that can "impartially consider a debtor higher education institution's business plan in light of the competing interests of creditors, on the one hand, and the debtor's interest in maintaining educational program quality, on the other hand."[73]

[The U.S.] education market has significantly greater privatization and post-secondary institutions are typically more dependent on private funding sources, student tuition, and debt financing.

These observations should be put in context. In the U.S., the education market has significantly greater privatization and post-secondary institutions are typically more dependent on private funding sources, student tuition, and debt financing. While tuition regulation varies by state, few states cap or freeze tuition rates, particularly for private institutions which are largely unregulated.[74] Professor Norberg's hypothetical insolvent law school receives 90% of its funding through student tuition, most of which comes from student loans, compared to Ontario's approximately 40%.[75] Private U.S. colleges and universities frequently file for bankruptcy, with 160 institutions closing between 2000 and 2016.[76] The main federal requirements for closing institutions involve developing "teach-out" programs to ensure students can complete their degrees at other institutions. The DOE itself has previously appointed monitors to oversee the winding up of for-profit institutions.[77]

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[72] *Ibid* at 398–99.
[73] *Ibid* at 399.
[74] Kyle Zinth & Matthew Smith, *Tuition-Setting Authority for Public Colleges and Universities* (Education Commission of the States, October 2012); Robert Kelchen, "An Analysis of Student Fees: The Roles of States and Institutions" (2016) 39:4 Rev Higher Education 597; Robert Kelchen & Sarah Pingel, *Postsecondary Tuition Capping and Freezing* (Education Commission of the States, November 2018).
[75] Statistics Canada, "Revenues of universities and degree-granting colleges" (29 July 2021), online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3710002601&pickMembers%5B0%5D=1.7&pickMembers%5B1%5D=2.1&pickMembers%5B2%5D=4.1&cubeTimeFrame.startYear=2014+%2F+2015&cubeTimeFrame.endYear=2019+%2F+2020&referencePeriods=20140101%2C20190101>.
[76] Michael B Goldstein & Jay Indyke, "Bankruptcy Benefits", *Trusteeship* 24:5 (September/October 2016).
[77] See e.g. the case of Corinthian College: Richard Perez-Pena, "College Group Run for Profit Looks to Close or Sell Schools", *The New York Times* (4 July 2014), online: <www.nytimes.com/2014/07/05/education/corinthian-colleges-to-largely-shut-down.html>.

Closures have accelerated during the COVID-19 pandemic, although many schools were likely saved due to general federal stimulus funding.[78]

In addition, 24 public institutions closed between 2012–13 and 2016–17 alone.[79]. We have not identified any reported bankruptcies of state universities or colleges.[80] Instead, the most common mechanisms for addressing financial difficulties appear to be: an emergency loan from the state, with hopes of financial recovery through increased enrolments, fundraising, and/or efficiencies; a merger with another public college or university; or outright closure of the institution, depending on the government involved and whether the financial crisis was precipitated by intentional state funding cuts.

For example, Georgia combined 14 institutions into seven between 2011 and 2018 after significantly cutting university funding, and the University of Wisconsin merged its 13 two-year campuses with seven of its four-year colleges.[81] Private campuses have at times been bought by public universities.[82] Public community colleges have also been placed under state trusteeship, similar to the power of the Ontario Minister to place colleges under administration.[83]

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[78] Doug Lederman, "The Number of Colleges Continues to Shrink", *Inside Higher Ed* (2 August 2021), online: <www.insidehighered.com/news/2021/08/02/number-colleges-shrinks-again-including-publics-and-private-nonprofits>.

[79] Doug Lederman, "The Culling of Higher Ed Begins", *Inside Higher Ed* (July 19, 2017), online: <www.insidehighered.com/news/2017/07/19/number-colleges-and-universities-drops-sharply-amid-economic-turmoil>.

[80] In one case in 2017, the charitable foundation of the public University of Wisconsin, Oshkosh filed for bankruptcy under Chapter 11 following various revelations of financial impropriety: Nick Roll, "U Wisconsin-Oshkosh Foundation Declares Bankruptcy", *Inside Higher Ed* (28 August 2017), online: <www.insidehighered.com/quicktakes/2017/08/28/u-wisconsin-oshkosh-foundation-declares-bankruptcy>.

[81] Kelly Meyerhofer, "UW System Merger Approved. Here's When the Official Transfer Takes Place", *Wisconsin State Journal* (30 June 30 2018), online: <madison.com/wsj/news/local/education/university/uw-system-merger-approved-here-s-when-the-officialtransfer/article_aa4d164b-4983-5306-ab53-b1e766bd465c.html>.

[82] For example, Delaware State University purchased Wesley College, a private liberal arts school in Delaware, with the help of a $1 million foundation grant: Mark Eichmann, "Delaware State University completes acquisition of Wesley College", *Philadelphia Business Journal* (2 July 2021), online: <www.bizjournals.com/philadelphia/news/2021/07/02/delaware-state-university-completes-acquisition-we.html>.

[83] Compton College, a public community college in California, was placed under state trusteeship in 2005 following allegations of corruption and financial insolvency: Ashley A Smith, "Comeback in Compton", *Inside Higher Ed* (7 June 2018), online: <www.insidehighered.com/news/2018/06/07/compton-college-comes-back-losing-accreditation>. It agreed to operate under another accredited college, which it did for over a

Many insolvent public universities have been institutions with a focus on Black student enrollment. For example, the public Chicago State University ("**CSU**") approached bankruptcy in 2016 due to the 2015–17 Illinois budget crisis.[84] Ultimately, around 400 employees were laid off as part of extensive cuts to academic programs and services. It appears subsequent changes in government led to more funding as CSU remains open.

Many insolvent [U.S.] public universities have been institutions with a focus on Black student enrollment.

Pennsylvania's Cheyney University, the country's first historically black university, ran out of money in 2017 and survived on $31 million in emergency state loans while a review was conducted of the entire state university system.[85] It appears Cheyney was able to overcome its deficits through cutbacks, state forgiveness of $40 million in debt, and increased fundraising.[86]

Finally, several public universities have declared financial exigency over the years, which allows them to lay off tenured faculty members under American Association of University Professors ("**AAUP**") guidelines. Much like in Canada, under most collective agreements this requires prior notice to and involvement from faculty members in decision-making. For example, South Carolina State University declared exigency in 2015 to deal with $20 million in debt, which some commentators referred to as the "academic equivalent of bankruptcy".[87] The state also gave it a 5-year extension to repay a $6 million loan. In

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decade before regaining accreditation in 2017: Nanette Asimov, "City College near bankruptcy, audit says", *SFGate* (18 September 2012), online: <www.sfgate.com/bayarea/article/CCSF-close-to-bankruptcy-state-report-says-3875651.php>.

[84] Julie Bosman, "Chicago State, a Lifeline for Poor Blacks, Is Under Threat Itself", *The New York Times* (9 April 2016), online: <www.nytimes.com/2016/04/10/us/chicago-state-a-lifeline-for-poor-blacks-is-under-threat-itself.html>.

[85] Bill Schackner, "Who thrives and who doesn't as Pa.'s state university system nears the edge", *Pittsburgh Post-Gazette* (11 June 2017), online: <www.post-gazette.com/news/education/2017/06/11/State-System-of-Higher-Education-college-APSCUF-Pennsylvania-Brogan-governor-legislature-cheyney-HBCU/stories/201706110089>.

[86] "A boost for Cheyney University: The school will keep its accreditation", *Pittsburgh Post-Gazette* (26 November 2019), online: <www.post-gazette.com/news/education/2019/11/26/Cheyney-University-accreditation-debt-Pennsylvania-Tom-Wolf-pledge-education/stories/201911260123>.

[87] Scott Jaschik, "South Carolina State U Declares Financial Exigency", *Inside Higher Ed* (18 June 2015), online: <www.insidehighered.com/quicktakes/2015/06/18/south-carolina-state-u-declares-financial-exigency>; Peter Jacobs & Abby Jackson, "A 119-year-old college in South Carolina declared the

2019, Alaska threatened to slash its higher education budget by $135 million, leading the University of Alaska system to declare exigency. Similar announcements have increased during the COVID-19 pandemic.[88]

United Kingdom

We did not identify any U.K.-based university that has used commercial insolvency proceedings. However, there has long been speculation about university bankruptcies since major changes in the late 2000s removed student enrolment and tuition caps, leading to increased competition among schools.[89] This particularly disadvantaged smaller and regional universities. Until 2018, the Higher Education Funding Council had the power to step in with loans or to force mergers between vulnerable institutions, which led to various amalgamations.[90] At that time, the Council was replaced with a new regulator, the Office for Students. In November 2018, the chair of the Office for Students told universities that they are not too big to fail and that they would not be bailed out.[91]

The U.K. government has also introduced a new insolvency regime for colleges…normal commercial insolvency law will apply…

equivalent of bankruptcy, and it's part of a bigger problem", *Business Insider* (19 June 2015), online: <www.businessinsider.com/south-carolina-state-college-declared-the-equivalent-of-bankruptcy-2015-6>.

[88] Rick Seltzer, "Exigency Outlook Uncertain", *Inside Higher Ed* (19 May 2020), online: <www.insidehighered.com/news/2020/05/19/college-leaders-consider-exigency-summer-nears-drawbacks-may-outweigh-benefits-many>. Examples include Missouri Western State University, Lincoln University (also in Missouri), and Central Washington University.

[89] "What would happen if a UK university went bust?", *The Guardian* (7 February 2017), online: <www.theguardian.com/education/2017/feb/07/what-if-uk-university-goes-bust-ucas-students>; "How to deal with insolvency in higher education", *Pinsent Masons* (6 March 2018), online: <www.pinsentmasons.com/out-law/analysis/insolvency-in-higher-education>.
"Britain may soon have a bankrupt university", *The Economist* (10 November 2018), online: <www.economist.com/britain/2018/11/08/britain-may-soon-have-a-bankrupt-university>.

[90] Higher Education Funding Council for England, *Collaborations, alliances and mergers in higher education* (March 2012); Mike Ratcliffe, "The Many Mergers of English Higher Education", *More Means Better* (18 April 2017), online: <moremeansbetter.wordpress.com/2017/04/18/the-many-mergers-of-english-higher-education/>. There have also been a significant number of mergers between colleges since the 1990s, and four university-college mergers since 2015: Association of Colleges, "College Mergers" (2021), online: <www.aoc.co.uk/about-colleges/college-mergers>.

[91] Office for Students, "We will not bail out universities in financial difficulty, regulator chair says" (6 November 2018), online: <www.officeforstudents.org.uk/news-blog-and-events/press-and-media/we-will-not-bail-out-universities-in-financial-difficulty-regulator-chair-says/>.

The U.K. government also introduced a new insolvency regime for colleges ("further education" institutions) in 2017,[92] which came into force in 2019.[93] Previously, there was a college-specific restructuring regime in the form of area reviews leading to an in-house restructuring unit at the Department for Education. Under the new model, normal commercial insolvency law will apply to colleges, including Company Voluntary Arrangements, administration, winding up, and receivership.[94] However, the law includes a special education administration process to ensure the institution continues in operation, similar to existing special administration regimes in the social housing, postal services, and energy sectors.[95]

The U.K. Secretary of State can commence an education administration through court application. The court may make an education administration order only if it is satisfied that the college is unable to pay its debts or is likely to become unable to pay its debts. The education administrator (an insolvency professional appointed for this purpose) may achieve the special objective through:

- rescuing the further education body as a going concern;
- transferring some or all of its undertaking to another body;
- keeping it going until existing students have completed their studies; or,
- arranging for existing students to complete their studies at another institution.

The government has stated that it intends to use a non-statutory route in the first instance, such as commissioning an independent business review.[96] As part of these changes, it

[92] *Technical and Further Education Act 2017* (UK), c 19.
[93] *The Further Education Bodies (Insolvency) Regulations 2019* (UK), SI 2019/138; Association of Colleges, "The new college insolvency regime" (24 January 2019), online: <www.aoc.co.uk/news/the-new-college-insolvency-regime>.
[94] Department of Education, *Further education bodies: insolvency guidance* (January 2020) at 19–20, online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/858896/Further_Education_Bodies_Insolvency_Guidance.pdf>.
[95] *Ibid* at 20.
[96] *Ibid* at 16–17.

also ceased providing "exceptional financial support" (emergency funding) to colleges as of April 2019.

A comparable process does not exist for U.K. universities ("higher education" institutions). However, the government has developed a "restructuring regime" for institutions that are at risk of insolvency due to the COVID-19 pandemic.[97] This followed a report on the financial impacts of COVID-19 on universities, which concluded that many would be at risk of insolvency without a bailout:[98]

> The government response will be critical in determining the future of these institutions. It could set a precedent by letting institutions become insolvent, enabling debt restructuring, mergers with other institutions or wind-downs. Alternatively, it could try to avert this outcome with a bailout, either through a general increase in research or teaching grants or via targeted help for struggling institutions. Most ambitiously, it could help struggling institutions by pushing through general reforms – for instance, by increasing funding for courses below degree level as recommended by the Augar Review. Whichever response the government chooses, the COVID-19 pandemic is likely to have a lasting impact on the higher education landscape.

The new [U.K.] program will allow universities to apply for restructuring support through repayable conditions loans…

The new program will allow universities to apply for restructuring support through repayable conditional loans, though once again it "is not a guarantee that no organisation will fail".[99] Applications are submitted through the Higher Education Restructuring Unit, which is staffed by "restructuring professionals" who will confidentially case manage individual applications.[100] There is a triage stage and independent business review before a

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[97] Department for Education, *Establishment of a Higher Education Restructuring Regime in Response to COVID-19* (July 2020), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902608/HERR_announcement_July_2020.pdf>.

[98] Elaine Drayton & Ben Waltmann, *Will universities need a bailout to survive the COVID-19 crisis?* (Institute for Fiscal Studies, IFS Briefing Note BN300, July 2020) at 27, online (pdf): <ifs.org.uk/uploads/BN300-Will-universities-need-bailout-survive-COVID-19-crisis.pdf>.

[99] *Ibid* at 3.

[100] Department of Education, *Higher Education Restructuring Regime: Guidance for Applicants* (December 2020), online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/944590/Guidance_for_applicants_to_HERR_December_2020.pdf>.

restructuring plan is developed to submit to the Education Secretary for potential approval. The Education Secretary will only approve an application if:[101]

- There is a clear economic and value for money case for intervention: not all Higher Education Providers ("HEPs") will be prevented from exiting the market. Any intervention should be a last resort measure after all other finance options have been exhausted, including the Government-backed business support schemes related to COVID-19;
- The problems are related to COVID-19 and there is a clear and sustainable model for future provision as a result of restructuring, meaning that the HEP should not need further assistance; and,
- The failure of the HEP would cause significant harm to the national or local economy or society (for example, this could be the loss of high-quality research or teaching provision, a disruption to COVID-19 research or healthcare provision or overall disruption to policy objectives including a significant impact on outcomes for students).

The stated policy objectives are to protect the welfare of current students; to support the role institutions play in regional and local economies through the provision of high-quality courses aligned with economic and societal need; and to preserve the sector's internationally outstanding science base. Any funding will likely be tied to performance-based outcomes such as graduation rates and future employment (with an emphasis on STEM programming) as well as reducing administrative costs and/or closing non-viable campuses.[102] Beyond this new regime, a formal bankruptcy process is uncharted territory for U.K. universities.[103]

Australia

We did not identify any publicly funded universities that have entered commercial insolvency proceedings in Australia. However, as in the U.K., there has been speculation about university insolvencies, including prior to the COVID-19 pandemic.[104]

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[101] *Ibid* at 4.
[102] *Establishment of a Higher Education Restructuring Regime in Response to COVID-19* at 3–4.
[103] David Kernohan, "Understanding insolvency in higher education", *Wonkhe* (5 October 2020), online: <wonkhe.com/blogs/understanding-insolvency-in-higher-education/>.
[104] See e.g. "Number of Australian universities in deficit doubles", *The World University Rankings* (1 November 2018), online: <www.timeshighereducation.com/news/number-australian-universities-deficit-

Australia has legislation to address a university liquidity crisis by providing the institution with an emergency loan…

Australia has legislation to address a university liquidity crisis by providing the institution with an emergency loan and clawing it back through a reduced operating grant over the next three years. Section 33-40 of the *Higher Education Support Act 2003* ("**HESA**") enables the minister to make cash advances for "such purposes as the minister determines".[105] The *Commonwealth Grant Scheme Guidelines* identify those possible purposes as:[106]

> a) to assist providers with the cash-flow implications of restructuring;
> b) to implement adjustments arising from the specific effects of Commonwealth policy change on the payment of grants;
> c) to rationalise staffing levels, courses and infrastructure both within and between providers;
> d) to help secure genuine productivity improvements in the area of workplace reform;
> e) to implement explicit decisions to restructure the educational profile of a provider; and
> f) such other purposes as the Minister may determine.

Total advances are capped by regulation at $25 million.[107] The loan must be paid back by lower subsequent grants over a period of up to three years. A similar model has been proposed as an alternative in connection with the Laurentian case.[108] One commentator notes that this section envisages longer-term restructuring rather than temporary revenue drops, which may explain why it has not been used during COVID-19.[109] While not

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doubles>; "Without international students, Australia's universities will downsize – and some might collapse altogether", *The Conversation* (8 April 2020), online: <theconversation.com/without-international-students-australias-universities-will-downsize-and-some-might-collapse-altogether-132869>.

[105] *Higher Education Support Act 2003*, 2003/149, s 33-40(1), online: <www.legislation.gov.au/Details/C2020C00078> [*HESA*].

[106] *Commonwealth Grant Scheme Guidelines 2020 (No 3)* (30 July 2021), s 16, online: <www.legislation.gov.au/Details/F2021C00851>. The Commonwealth Grant Scheme is the biggest single source of government funding for Australian universities, allocated on the basis of the number of full-time equivalent domestic students in Commonwealth Supported Places.

[107] *Higher Education (Maximum Amount for Special Purpose Advances) Specification 2012*, s 3, online: <www.legislation.gov.au/Details/F2012L02476>.

[108] See Alex Usher, "Laurentian Blues (8) – Causes, Fault and Lessons", *supra* note 21.

[109] Andrew Norton, "What happens if a university needs bailing out?", Blog post (11 March 2020), online: <andrewnorton.net.au/2020/03/11/what-happens-if-a-university-needs-bailing-out/>.

intended as an emergency measure, there is also a provision under section 41-10 of the HESA to make grants "to support structural adjustment".[110]

D. Conclusion

Financial exigency terms in collective agreements create a restructuring process that is better geared to the public interest aspects of the university system, including academic programming, public funding arrangements, collegial governance, and academic labour relations. Any restructuring process should include a central role for the academic senate as well as other affected stakeholders. The CAUT should develop an updated "model financial exigency code" that embodies these principles, processes, and roles for use in a variety of advocacy contexts.

The Ontario Government controls the major sources of funding for Ontario universities (tuition and operational grants). It has sought to exert greater control and coordination over the post-secondary sector as a whole and to limit public funding as a matter of policy. To this end, strategic mandate agreements are intended to guide program offerings at Ontario universities but do not address restructuring principles or procedures. Despite the problematic nature of performance-based funding metrics generally, it is not clear that there is risk of significant funding losses in the short term.

In contrast to the Ontario college system, however, the statutory frameworks that apply to Ontario universities do not contain a clear set of powers for the Minister or other government actors to intervene in university affairs or supervise a restructuring process.

Similar tensions and issues have been expressed about the university systems in other common law jurisdictions. In some cases, there are pressures to make commercial insolvency procedures available to universities, which do not easily apply to publicly funded organizations. One new approach is to amend or supplement commercial insolvency procedures with special powers and processes that consider the unique mandate and features of universities, as in the United Kingdom. Another is to avoid

[110] *HESA*, *supra* note 102, s 41-10(1), Item 9B.

commercial insolvency processes and instead use government powers to provide emergency financial resources with conditions for restructuring, as in Australia.

Takeaways

1. *Principles underlying a university restructuring should include the primacy of the academic mandate; transparency and early notice of financial conditions; exploring all available cost savings and revenue sources (including government); preserving a substantive role for the senate and employee groups; and an orderly procedure for determining budget reductions and layoffs consistent with labour relations norms.*
2. *The CAUT should develop an updated model financial exigency code that can be used to support bargaining, law reform, and legal argument in restructuring processes.*
3. *While strategic mandate agreements are the key framework for university funding, the position of the Ontario Government under these SMAs in an insolvency situation is not clear.*
4. *There are few existing statutory powers explicitly authorizing either bridge financing or Ministry interventions into universities in financial distress.*
5. *Examples from other jurisdictions suggest that these are alternatives to commercial restructuring processes that could be adopted in Canada.*

VII. Options for Insolvency Law Reform for Universities

Summary

One immediate response to the Laurentian University CCAA filing were calls to prohibit the use of CCAA proceedings by publicly funded organizations. Other reforms to the CCAA are possible, with a view to codifying the principles identified in the previous chapter as a framework for any university restructuring. Reforms could include requiring the active participation of public funders in the CCAA process and in approval of any final compromise or plan or arrangement. It is also possible to establish restructuring processes outside the CCAA. Three main models are used in some degree in Canada and other jurisdictions. The first is the provision of emergency financing with conditions, in a process overseen by the Minister. The second is placing universities under temporary administration. The third is the creation of a sector-specific, stand-alone restructuring statute, as was adopted for Canadian farm debts or certain financial institutions.

The previous chapter identified a set of principles that should be applied in any restructuring of a university in Ontario, which are in part based on the public nature of the university and the unique governance model that Ontario universities have developed and used since the 1905 Flavelle Commission.[1]

These principles are: the primacy of the academic mandate; transparency and timely flow of financial and other information; participation of the public funder in the proceeding, particularly with respect to providing funding and coordinating impacts on the sector as whole; participation of the board of governors and senate pursuant to their statutory mandates; and participation of the senior administration and affected employee groups. To these might also be added the principles derived from labour relations norms: all sources of financing and efficiencies must be considered prior to staff reductions; layoffs or redundancies should be subject to voluntary programs and re-assignment where possible; and any layoffs should be actioned in accordance with length of service (with

[1] Glen A Jones, Theresa Shanahan & Paul Goyan, “University governance in Canadian higher education” (2001) 7:2 *Tertiary Education & Management* 135.

possible modifications to address the potential systemic discrimination created by a strict application of reverse order seniority in a tenured environment).[2]

[T]here is no clear statutory requirement for a public funder of a debtor company to participate meaningfully in a CCAA proceeding…

Despite broad powers and a flexible process under the CCAA, previous chapters have identified certain gaps that come with such flexibility. First, there is no clear statutory requirement for a public funder of a debtor company to participate meaningfully in a CCAA proceeding, despite its key financial role. The government's (likely intentional) reluctance to intervene encouraged this privatization process without taking any responsibility for it.

Second, it is possible to structure a CCAA proceeding such that some creditors in the same class are not required to compromise their claims, with the focus of any compromises on one sub-group of creditors (in the case of Laurentian, primarily the employee groups to-date).

These gaps result in circumstances that contracting parties have sought to avoid (by bargaining express financial exigency language) and that CCAA courts have, from time to time, also sought to avoid; that is, the use of restructuring to (inappropriately) target one specific stakeholder to make concessions.

This chapter outlines possible reforms to address these issues, both within and outside the CCAA. The former category includes statutory amendments to prohibit the use of CCAA proceedings by publicly funded organizations; to require active participation of the public funder in the proceedings and in approving a final compromise or plan of arrangement; and to direct the court to consider more appropriate principles in university restructuring.

[2] See Canadian Association of University Teachers, "Financial Exigency and Lay-offs" (last revised 2009), note 2, online: <www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-financial-exigency-and-lay-offs>.

In addition to or in advance of statutory amendments, efforts could be made to include specific default terms in model orders of the CCAA court which deal with the same matters. Reforms outside of the CCAA process involve the creation or expansion of a Minister's powers under provincial statutes applicable to universities, to enable applications for conditional emergency financing or empower the Minister to place universities under temporary administration. A sector-specific restructuring statute could also be enacted. We discuss each option in more detail below.

A. Reforms to the CCAA

Excluding Publicly Funded Institutions from CCAA Application

One of the first proposed legislative responses to the Laurentian CCAA proceeding was a private member's bill introduced in Parliament, Bill C-288, that would have amended the CCAA definition of "company" as follows:[3]

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include
>
> (a) postsecondary educational institutions that receive from a government or a municipality funds that are paid for the purpose of assisting them in the ongoing provision of educational services to the general public,
>
> (b) banks and authorized foreign banks within the meaning of section 2 of the Bank Act,
>
> (c) telegraph companies,
>
> (d) insurance companies, and
>
> (e) companies to which the Trust and Loan Companies Act applies;

[3] Bill C-288, *An Act to amend the Companies' Creditors Arrangement Act*, 1st Sess, 43rd Parl, 2021 (first reading 21 April 2021), online: <www.parl.ca/DocumentViewer/en/43-2/bill/C-288/first-reading>.

This amendment would have the effect of excluding most Canadian publicly funded universities from making an application under the CCAA.

This amendment would have the effect of excluding most publicly funded universities from making an application under the CCAA. Its ambit is likely broader than that: it could exclude colleges and other post-secondary "educational institutions" that receive funds from a province or municipality for the purpose of the ongoing provision of educational services to the public. This definition may capture, for example, private post-secondary institutions that receive funding from granting agencies.

There are at least two considerations that should arise in connection with this type of exclusion. First is the scope of the exclusion itself. In the example of Bill C-288, there may be liminal issues associated with the scope of publicly funded post-secondary institution like the ones just described, but the purpose behind the exclusion is clear: exclude universities from using the CCAA.

[S]hould [universities]… hospitals and social service agencies…be exempt from the CCAA?

Similar issues of scope arise when applying the same principle to other organizations in the broader public sector.[4] For example, should hospitals and social service agencies, most of which receive significant public funds to provide services to the public, also be exempt from the CCAA? This may be a desirable policy choice but drawing the line between public and private will depend in significant part on the governance and funding relationships of those organizations and the types of services they provide.

The second related issue is: if the CCAA is not made available as a forum and process for restructuring, how should those institutions then undertake restructuring if in financial distress or otherwise? As our review of trends in other jurisdictions in Chapter 6 indicates,

[4] The "broader public sector" may be defined as organizations that receive funding from the government but are not part of the government itself, including hospitals, universities, colleges, and school boards: see e.g. Government of Ontario, "Broader public sector accountability" (last updated 12 August 2021), online: <www.ontario.ca/page/broader-public-sector-accountability>.

these questions are being raised internationally with respect to university systems as well as the broader public sector.

Historically, it seems that restructuring public and broader public sector organizations has happened on an ad hoc basis, or in a manner coordinated by a set of reforms overseen by the relevant government authorities. Each sector or subsector of publicly funded organizations may require different considerations. And as described in Chapter 3, the CCAA has been expanded over time in part by judges interpreting away existing, explicit restrictions. While an amendment may deter universities from making CCAA applications and judges from accepting them, without some clearer alternative it runs the risk of inviting similar intervention in a future case.

Role of the Public Funder

A second reform of the CCAA could address a different problem identified above, the role of the public funder.

One of the most consistent criticisms of the Laurentian insolvency process was that the Ontario Government did not actively participate in any meaningful way. This was clearly intentional and appeared to be coordinated with the university's senior management (but we do not know the exact timing or extent, because key communications were sealed).

It is not reasonable or good policy for [the government] to avoid participating in the restructuring process.

It is not reasonable or good policy for the stakeholder that has both direct control over the largest source of funding, and indirect control over governance, to avoid participating in the restructuring process. Most critically, without an accurate and forward-looking sense of the quantum of public funding (including whether this may be increased, frozen, or even clawed back), it is not possible to fully assess the viability of the university.

Amendments to the CCAA could address the role of government funders of universities when they apply for creditor protection under the CCAA. For example, the CCAA could be amended to provide the court with an express power under section 11 to compel a public funder of an organization to participate in the proceedings on terms it considers "appropriate in the circumstances". We also note that section 40 binds the Crown to orders of the court. Amendments to section 11 could expressly require the participation of the public funder in disclosure and negotiations of the debtor company, including taking positions on bridge financing and projected funding.

[T]he CCAA could be amended to provide the court with [the power] to compel a public funder…to participate in the proceedings…

Additionally, court approval of a compromise or arrangement under section 6 of the CCAA could be subject to a government funder's participation and approval. Currently, this section contains various conditions on court approval of a compromise or arrangement, including the repayment of certain employee claims and debts owed to the Crown.[5] Amendments to section 6 might add further conditions regarding the role and financial contributions of the public funder. These conditions of "exit" would incentivize the active participation of government in the restructuring process and make clear that they have a key role in the future of the institution.

Directing Court on Considerations for Publicly Funded Institutions

A third option is to amend the CCAA to include factors the court must consider when making an order in respect of a publicly funded university (including on an initial application or in the approval of any plan or compromise). Similar obligations could be placed on the monitor. These factors should reflect the principles identified in Chapter 6. For example, when deciding whether to make an order, the court should consider (among other relevant factors):

[5] See Appendix "C": Employee Protections in Restructuring Proceedings.

- whether the applicant receives a material level of public funding to provide services to the public;
- the public interest mandate of the applicant, as well as the groups and constituencies it is meant to service;
- whether a debtor-in-possession restructuring mechanism is appropriate in light of the administration's handling of the institution's finances leading up to its financial distress, or whether an alternative procedure is appropriate (for example, more focused bilateral negotiations or a governance review);
- the stakeholders affected by the applicant's insolvency, and their respective interests, especially if these are non-financial in nature;
- the primary objectives of the restructuring, recognizing that these may be non-financial in nature;
- the role and position of the major public funder(s) of the applicant;
- the role and position of the governance arrangement(s) of the applicant;
- whether the applicant has the confidence of its major creditors as well as its employees; and
- whether and how any creditor or stakeholder (including employees) would be materially prejudiced as a result of the order.

These are suggestions based on what we see in the CCAA and its case law. The actual considerations that ought to guide decision-making may be more specific to a particular case or even sector of publicly funded institution. They may also differ from those existing under the CCAA and case law at the present time, as these reflect the commercial, for-profit paradigm.[6]

[6] As a point of comparison, business corporations contain certain (limited) protections of employee rights by placing legal duties on directors. These obligations interact with the CCAA process and court orders

We provide some observations about the utility of amendments to the CCAA. The first is that amendments require the cooperation of governments and law reform processes can be lengthy and complicated. As a result, where possible we have identified actions that may be taken by stakeholders acting within and using existing CCAA provisions, such as amending model orders or making arguments before the courts.

The case-driven nature of CCAA law means that, even absent a legislative amendment, these considerations can be proposed to a court in response to a given CCAA filing. In essence, labour groups can have their arguments on hand and be ready to respond, or intervene, in the next CCAA filing where these issues arise. As explained in Chapter 3, the locus of change in modern CCAA case law is the court, rather than Parliament.[7] Furthermore, there is a common practice of interest groups intervening in important CCAA decisions, albeit usually at the appellate court level.[8] As such, there are some opportunities and points of entry to seek to influence how a CCAA proceeding may operate. There is some scope to modestly sway proceedings in a way that results in greater participatory rights for stakeholders, hopefully reducing some of the information asymmetries and making space for public interest arguments to be put to the court by a broader range of affected parties (instead of only by large creditors).

[T]here is some scope to modestly sway proceedings in a way that results in greater participatory rights for stakeholders…

(including initial orders). However, they do not exist in university statutes in the same way, and may need to be explicitly articulated as considerations. The duties of university governors may in fact be governed by charity law: see Brent Davis, "Governance and administration of postsecondary institutions in Canada", in Teresa Shanahan, Michelle Nilson & Li-Jeen Broshko (eds), *Handbook of Canadian Higher Education Law* (Kingston: McGill-Queen's University Press, 2015) at 74–75.

[7] Virginia Torrie, *Reinventing Bankruptcy Law: A History of the Companies' Creditors Arrangement Act* (Toronto: University of Toronto Press, 2020) at 146.

[8] *Ibid* at 174. For this reason, there is a growing trend of affected groups acting as intervenors in significant CCAA cases. See e.g. *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6, in which the following groups intervened: Insolvency Institute of Canada, Canadian Labour Congress, Canadian Federation of Pensioners, Canadian Association of Insolvency and Restructuring Professionals, and Canadian Bankers Association.

For instance, recent CCAA decisions regarding the insolvency of several major tobacco companies have created an opening for the recognition of non-commercial "social stakeholders" in commercial restructuring by granting these groups some participatory rights.[9] Building on these developments in the case law, it is possible that non-financial university stakeholders—such as the CAUT, CUPE, and Canadian Labour Congress—could be recognized and granted similar status.

However, and ultimately, we caution that such developments are very unlikely to fundamentally change the course of the jurisprudence, and by their nature involve participating in a process which is ill-suited to the purpose of restructuring a publicly funded organization.

Amending Model Orders

To supplement the court's existing powers under the CCAA, or in coordination with amendments just suggested, stakeholders could advocate for amendments to key procedural tools in CCAA proceedings to reflect the above principles.

One key tool are the CCAA "default orders". These are standard text of orders the court will issue in a proceeding. For example, existing model initial orders address requirements such as the appointment of a monitor or approval of debtor-in-possession financing.[10] These are intended to reflect the requirements of the statute, the consensus of the applicable case law, and the recommendations of judges, practitioners, and other stakeholders.

So, for example, the principles and processes in the model financial exigency code discussed in Chapter 6 could be used as a basis for establishing new default terms of an

[9] Virginia Torrie & Vern DaRe, "The Participation of Social Stakeholders in CCAA Proceedings" (2020) 17 Annual Rev Insolvency Law 369.
[10] See e.g. the model orders for the Commercial List of the Superior Court of Justice in Ontario, including a model Initial Order in a CCAA proceeding, online: <www.ontariocourts.ca/scj/practice/practice-directions/toronto/#Commercial_List_Forms_including_Model_Orders>.

initial order used by CCAA courts. Initial orders typically also include terms dealing with employee interests, as mentioned in Appendix “C”.

Model orders reflect in some degree the status of existing law and requirements of the CCAA, but there may be room to develop new default rules, particularly where existing case law is so thin – as with publicly funded universities. These terms are of course always subject to amendment in each particular proceeding, but they could provide a set of default conditions (and expectations) that require an explanation if they are amended. Model CCAA court orders are generally developed with the input of stakeholders in each provincial jurisdiction.

A parallel and similarly-motivated reform would be the issuance of “guidance” for university insolvencies stakeholders (and in particular monitors) by an appropriate supervisory body, such as the Superintendent of Bankruptcy. Stakeholders could seek to engage the Superintendent in a dialogue about appropriate guidance that incorporates some of the aspects of the model financial exigency code.

All of the preceding options seek to amend or attenuate the existing CCAA requirements and processes: these reforms will not yet be well understood by the existing CCAA stakeholders. This suite of law reforms will face challenges given the history, culture and orientation of the commercial insolvency bar. They are, however, one way to articulate the norms and processes that are better suited to restructuring publicly funded organizations.

B. Reforms Outside the CCAA

In the case of excluded organizations, there are usually alternative restructuring regimes…

For much of its history, the CCAA was a skeletal statute with more limited application. Today, it continues to exclude certain types of organizations, such as financial institutions. As we have discussed in prior chapters, part of the rationale for the exclusion of organizations is the public interests engaged by their

activities—banking and insurance, for example. In the case of excluded organizations, there are usually alternative restructuring regimes available.

If universities are excluded from the CCAA, and even if they are not, having an alternative restructuring procedure available would meet the objectives of providing a forum to address financial difficulties that incorporates the principles identified at the beginning of this chapter.

[T]here are three main types [of alternative restructuring process].

A review of alternative restructuring processes and associated legal frameworks both within Canada and in other common law jurisdictions suggests that there are three main types. These are: (a) empowering a government body to provide emergency funding tied to restructuring conditions, often with repayment of the bridge financing over a pre-determined period of time; (b) more extensive powers of temporary administration of a university, akin to the powers of Ontario's Minister with respect to colleges; or (c) a separate, standalone insolvency scheme, as has been enacted from time to time in Canada for specialized sectors. We elaborate on each of these options below.

Emergency Financing and Associated Powers of Minister

The Australian *Higher Education Support Act 2003* ("***HESA***") contains a set of rules that permit the Minister to make cash payments for purposes that the Minister determines.[11] Those purposes are described in the *Commonwealth Grant Scheme Guidelines* (the primary student loan funding guidelines) and they include restructuring mandates:[12]

- to assist universities with the cash-flow implications of restructuring;

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[11] *Higher Education Support Act 2003*, 2003/149, s 33-40(1), online: <www.legislation.gov.au/Details/C2020C00078>.

[12] *Commonwealth Grant Scheme Guidelines 2020 (No 3)* (30 July 2021), s 16, online: <www.legislation.gov.au/Details/F2021C00851>.

- to rationalize staffing levels, courses and infrastructure both within and between universities; and

- to implement explicit decisions to restructure the educational profile of a university.

The Australian Minister may advance up to $25 million and the loan must be repaid over a period three years. This amount is equal to the initial debtor-in-possession financing provided to Laurentian during the CCAA proceeding (though this was subsequently increased by an additional $10 million).[13] It is also more than the $12 million in emergency funding that Ontario reportedly offered to the university in December 2020, but much less than the $100 million initially requested from the government.[14]

As discussed in Chapter 6, the Ontario Minister currently has a set of powers under the *Ministry of Training, Colleges and Universities Act* with respect to "awards and grants" that (arguably) include powers to make grants to universities on conditions the Minister considers appropriate. The MTCUA could be amended to provide the Minister with a clarified or enhanced set of powers comparable to those under Australian legislation. For example, amendments could follow the principles of a model financial exigency code to provide for the following:

- an application for emergency funding assistance may be made by a key stakeholder, which would require evidence of a liquidity crisis (a version of the trigger test) and the need for restructuring;

- notice and disclosure requirements to key stakeholders;

[13] *Laurentian University of Sudbury*, 2021 ONSC 1098 at para 9; *Laurentian University of Sudbury*, 2021 ONSC 3271 at para 1. Ontario's Auditor General has recently projected that Laurentian will spend $19.84 million on restructuring costs through February 2022: Office of the Auditor General of Ontario, *Update on the Special Audit of Laurentian University* (December 2021) at 1, online (pdf): <www.auditor.on.ca/en/content/annualreports/arreports/en21/AR_Laurentian_en21.pdf>.
[14] Jeffords, *supra* note 13.

- funding to be provided in an amount that permits meaningful restructuring and is repayable within a reasonable period of time, for example up to $35 million repayable over 5 to 10 years;
- a requirement that a restructuring plan be approved within a reasonable period of time (for example, 12 months);
- a requirement that a restructuring plan be implemented within a reasonable period of time (for example 3 years, with possible extensions based on progress);
- a set of principles that must be considered in developing a restructuring plan, including those identified above; and,
- a supervisory role for the Minister, with dispute resolution procedures and a neutral, third-party decision-maker appointed by the parties, or the Minister if no agreement can be made.

There are advantages to this approach. First, it is overseen by the Ministry charged with administering post-secondary institutions in Ontario, which is the government body best suited to coordinating policy across the sector, including the knock-on effects of a particular restructuring.

Second, it requires the participation of the public funder, potentially by providing bridge financing, which was one of the key problems with the Laurentian insolvency.

Third, the bridge financing could come with further conditions reflecting the public policy elements of importance to a university. Insofar as the Ontario Government already attempts to achieve its policy objectives through Strategic Mandate Agreements,

[T]he bridge financing could come with further conditions reflecting the public policy elements of importance to a university.

similar priorities will likely be reflected in any conditions on restructuring.[15] However, this concern may be tempered by codifying the restructuring principles identified at the start of this chapter. Requiring any restructuring plan to be consistent with the considerations animating financial exigency procedures can help ensure that emergency funding is not simply an opportunity to redesign universities around micro-credentials (for example), as some have suggested will be the result of the Laurentian proceeding.[16]

Fourth, the cost of bridge financing should be less than commercial debtor-in-possession lenders (i.e., in terms of interest rate, term, and other repayment conditions).

Fifth, if the Minister refuses to provide funding, this decision could be challenged through judicial review or perhaps political channels. While an emergency funding application may need to remain confidential at the time (as is the case in the U.K. model), an earlier refusal to provide funding may provide important context in the case of a later CCAA proceeding.

Conditions on Student Aid Funding

In Chapter 6 we identified one of the reasons that U.S. universities do not use the commercial restructuring process under Chapter 11 of the *Bankruptcy Code*: the institution would then be prohibited from receiving student financial aid funding. In that case, the definition of an institution that may receive student financial aid payments excludes a university that has filed bankruptcy proceedings.[17] This does not prohibit a university from liquidating, and some have used commercial restructuring procedures to do so, but it has resulted in an aversion to using this process among most institutions that intend to continue as a going concern.

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[15] This is one concern with the new U.K. restructuring regime, which appears geared towards promoting STEM training and market-based outcomes: Department for Education, *Establishment of a Higher Education Restructuring Regime in Response to COVID-19* (July 2020) at 3–4, online (pdf): <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902608/HERR_announcement_July_2020.pdf>.

[16] See e.g. Nathan M Greenfield, "Laurentian – Insolvency, mass firings and the erosion of multiculturalism", *University World News* (5 June 2021), online: <www.universityworldnews.com/post.php?story=20210604121808388>.

[17] 20 USC § 1002 (a)(4)(A).

A similar condition on the provision of public student aid funding could be introduced for Ontario universities, which would provide a disincentive to enter a commercial restructuring in favour of other options.[18]

While this may have the effect of stopping universities from using a CCAA or another insolvency proceeding, we do not favour this option for two reasons. First, it does not address the need to restructure where one legitimately exists (as is shown by the U.S. experience). Second, it may create further incentives to avoid necessary restructuring negotiations earlier, which we believe are typically of benefit to all stakeholders.

Temporary Administration Powers

A second type of restructuring process that currently exists in the Ontario post-secondary sector is the ability for the Minister to directly intervene in the administration of a college. Under the *Ontario Colleges of Applied Arts and Technology Act*, *2002*, the Minister has a very general power to issue policy directives to colleges on how they are to carry out their affairs.[19] A college is likewise required to comply with these directives.

The Minister has a very general power to issue policy directives to colleges…

Further, the Minister may "intervene into the affairs of a college" where the Minister forms an opinion that it is necessary to do.[20] Reasons for intervention include proper provision of educational services, compliance with policies, problems with administration or use of financial resources, and quality of education, among others. The Laurentian proceeding raised several concerns along these lines: the lack of sophisticated financial controls leading to co-mingling of operating and research funding resources; a long pattern of deficits and public concerns over lack of transparency; and rejection of prior attempts to trigger existing restructuring procedures. Regulations further provide the Minister with a power to appoint a temporary administrator of a college to investigate and conduct the

[18] See e.g. O Reg 70/17 (Ontario Student Grants and Ontario Student Loans).
[19] *Ontario Colleges of Applied Arts and Technology Act*, 2002, SO 2002, c 8, Sched F, s 4.
[20] *Ibid*, s 5.

business and affairs of the college, subject to any conditions the Minister imposes.[21] There are also powers to remove a board of governors and other administrators.

This is a much more robust form of intervention than a discretionary power to make bridge financing tied to a largely voluntary restructuring process that is conducted by the university itself. Instead, the Minister has both ongoing authority to issue policy directives to colleges and the ability to place a college under administration for a period of time, as well as to replace the board and/or administrative staff. Such a scheme could be replicated in the MTCUA or a regulation to it. In addition, the principles informing university restructuring noted at the beginning of this chapter could be codified, as they may be under the discretionary loan power just discussed.

Establishing these forms of interventionist powers of the Minister is a greater departure from the history and context of the university governance model in Ontario and Canada. That model—as described previously—saw universities develop as autonomous self-governing institutions from the early 20th century onwards. The Minister has not had or exercised powers to intervene directly in university affairs in such a manner, and indeed has been rebuffed for attempts to do so indirectly.[22] Arguably, there has not been a need to address this issue prior to the Laurentian proceeding. The presence of exigency and redundancy terms in most collective agreements is an indicator that restructuring was expected to take place outside insolvency proceedings.

The Minister has not had or exercised powers to intervene directly in university affairs in such a manner…

It is relevant to note, however, that the Minister already plays an ongoing role in university governance. As an obvious example, the Minister appoints some members of the Board of Governors of Laurentian University (and other institutions). The Minister also enters into Strategic Mandate Agreements with each university that are intended to influence its

[21] O Reg 34/03 (General), s 9.
[22] See e.g. *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 (Div Ct), affirmed 2021 ONCA 553.

normal course by directing recipients toward market-based outcomes. To the extent that the CCAA continues to be available as a forum for Ontario universities, a Ministry-directed restructuring may be a preferable procedure for all the reasons identified in this report.

Standalone Provincial Restructuring Statute

A third option would be to create a standalone statute dedicated to facilitating university restructuring.[23] There is some limited precedent in Canada for adopting sector-specific insolvency or restructuring schemes: for example, the *Farmers' Creditors Arrangement Act*, which was enacted in response to a wave of insolvencies during the 1930s, and its successor statute, the *Farm Debt Mediation Act*; Part XII of the *Bankruptcy and Insolvency Act*, which deals with securities firm bankruptcies; or the *Winding-Up and Restructuring Act*, which is applicable to certain financial institutions.[24] There are analogous sector-specific insolvency procedures in other jurisdictions: one important example is the different procedures available under the U.S. *Bankruptcy Code*.

There is some limited precedent in Canada for adopting sector-specific insolvency or restructuring regimes…

It is beyond the scope of this report to set out even the broad terms of such a statute. These could build on the principles identified in this chapter, depending on how a series of key questions are answered. These questions include:

- To which institutions is the legislation intended to apply?
- Is the proceeding to be court-based or an administrative procedure facilitated or supervised by a government agency, board, or commission?

[23] See Laura N Coordes, "Bespoke Bankruptcy" (2021) 73 Fla L Rev 359.
[24] See *Farm Debt Mediation Act*, SC 1997, c 21; Stephanie Ben-Ishai & Virginia Torrie, "Farm Insolvency in Canada" (2013) 2 Journal of the Insolvency Institute of Canada 33; Virginia Torrie, "Federalism and Farm Debt During the Great Depression: Political Impetuses for the Farmers' Creditors Arrangement Act, 1934" (2019) 82.2 Sask L Rev 203; *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3; *Winding-up and Restructuring Act*, RSC, 1985, c W-11; Bruce L Welling & Thomas GW Telfer, "The Winding-Up and Restructuring Act: Realigning Insolvency's Orphan to the Modern Law Reform Process" (2008) 24 BFLR 233.

- Who will be the decision-maker?
- Who has power to initiate a proceeding, and who has standing in the proceeding?
- What powers are required for the decision-maker?
- What principles or factors must be considered in the decision-making process?
- What rights of appeal are there?
- Which parties can be bound to the stay of proceedings and the restructuring plan?
- How will constitutional issues be addressed (including competence and paramountcy)?

There are many other questions that would need to be answered to develop such a statutory scheme. In our view, this would be a significant undertaking that would be made redundant or unnecessary were other law reforms implemented to permit the orderly and accountable restructuring of Ontario universities. It would also likely raise federalism issues given that the existing bespoke insolvency regimes referred to above are all created under federal legislation.

These standalone regimes are exceptions to the normal processes for reforming insolvency law in Canada—which have been piecemeal and at times reactive to immediate problems or conditions. Usually, they were lobbied for by the debtors themselves or were created when there were no other alternatives. The insolvency of a publicly funded university is (and ought to be) an extremely rare event, and the effort it would take to create a standalone restructuring regime might be better spent developing less formal alternatives. For these reasons we are skeptical of the need or benefits of establishing a sector-specific insolvency regime for Canadian universities.

Takeaways

1. *Principles of any restructuring procedure applicable to universities should include the primacy of the academic mandate; transparency and advance notice; participation of public funders; role for each of the senate, board of governors, senior administration, and employee groups; and an orderly method for identifying budget reductions and employee reductions.*
2. *Reforms to the CCAA already proposed involve excluding universities from the definition of debtor company. Reforms could also introduce requirements for public funders to participate in restructurings involving universities and/or to approve any final compromise or plan of arrangement.*
3. *Some reforms can be implemented without statutory amendment. Changes to the "model orders" used by CCAA courts could add default terms applicable to proceedings involving publicly funded organizations.*
4. *The CAUT or other organizations have a role to play by developing an updated "model financial exigency code" that can be used in a variety of advocacy contexts.*
5. *Restructuring may also take place outside the CCAA (and the presence of alternatives supports limiting access to the CCAA).*
6. *A relatively straightforward reform that can be implemented in any jurisdiction is codifying the powers of a Minister to provide emergency funding with conditions, including a requirement to restructure and repay emergency funding over a reasonable timeline.*
7. *A second reform would be to create powers for the Minister to directly, and on their own initiative, intervene in or assume administration of universities. This would be inconsistent with the historical autonomy of universities.*
8. *A third reform is creating a standalone sectoral restructuring statute, akin to those for the farm sector or certain financial institutions. This is a major involving more complex legal and policy issues.*

VIII. Next Steps for Employee Groups

Summary

Before any financial crisis emerges, employee groups should take an active role in existing university governance channels to stay informed of financial issues. They can also seek to bargain improved financial exigency procedures and advance notice obligations on the employer of any proposed restructuring, including the intent to file an application for creditor protection. Early warning provides some opportunity to influence the framing of a potential filing, particularly with respect to labour relations, and may provide grounds for seeking further orders from a CCAA court. Employee groups can prepare for potential insolvency proceedings by working with advisors to understand and develop positions on the causes of financial distress, the need for restructuring, and any legal arguments. Once an application is filed, challenges to the application, or to the content of an order, may be appropriate. These measures will depend greatly on the factual context. Law reform efforts to limit application of the CCAA and provide for alternative restructuring processes should be part of ongoing political action campaigns.

When it was assumed, rightly or wrongly, that a university would never file for CCAA protection, it was not necessary for including employee groups to consider their position in an insolvency process. That has now changed. Employee groups—and all creditors—must now consider what steps they can and should take to protect their interests against a possible filing for creditor protection.

Employee groups…must now consider what steps they can and should take to protect their interests against a possible filing for creditor protection…

The Laurentian proceeding provides us with an opportunity for a "post-mortem" evaluation that can guide future responses to similar situations. One dimension is understanding how Laurentian got to the point of filing for creditor protection, and another is addressing the limitations of the CCAA process.

As mentioned, a persistent criticism of the Laurentian case is that we still do not understand exactly how the university reached the point of insolvency. The administration

has not been forthcoming with key information, even in the special audit ordered by the Legislature's Standing Committee on Public Accounts.[1] Without knowing everything that went wrong financially, it is difficult to provide a full assessment of the issues. However, several contributing themes seem clear on the basis of existing reports:

- Lack of transparent or accurate financial information, which may have delayed seriously confronting and reckoning with financial realities over many years and at least three bargaining cycles.

- Administrative irregularities, which should not have been present and which should have been clearly flagged by auditors and others, such as the intermingling of research and operational funds.

- With the benefit of hindsight, poor financial decisions by successive boards and administrators, including over-investment in capital developments such as new buildings.[2]

- An administration unwilling to engage in existing financial exigency procedures.

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[1] Laurentian has so far refused to release certain privileged documents to the Auditor General of Ontario, including various Board of Governors meeting materials, senior administration emails, and human resources files. It has also challenged the statutory authority of the Auditor General to access these documents in court: see Office of the Auditor General of Ontario, *Update on the Special Audit of Laurentian University* (December 2021) at 6–8, online (pdf): <www.auditor.on.ca/en/content/annualreports/arreports/en21/AR_Laurentian_en21.pdf>; Ernst & Young Inc, "Auditor General of Ontario Application" (Restructuring Document Centre – Laurentian University of Sudbury), online: <documentcentre.ey.com/#/detail-engmt?eid=459>; "Ontario's auditor general says Laurentian lacks transparency", *CBC News* (1 December 2021), online: <www.cbc.ca/news/canada/sudbury/laurentian-university-auditor-general-1.6270203>; "Laurentian University, Ontario auditor general argue right to privileged documents in value-for-money audit", *CBC News* (6 December 2021), online: <www.cbc.ca/news/canada/sudbury/privilege-court-documents-laurentian-auditor-general-emails-lawyers-1.6275291>; Erik White, "Ontario legislature to vote on issuing warrant for Laurentian University documents", *CBC News* (8 December 2021), online: <www.cbc.ca/news/canada/sudbury/laurentian-university-documents-audit-ontario-government-1.6277992>.

[2] The Auditor General has recently suggested that large capital projects undertaken between 2014 and 2019 seriously strained the university's cash flow: see Office of the Auditor General of Ontario, *Update on the Special Audit of Laurentian University*, *supra* note 1 at 5–6. See also Dieter K Buse, "Unmaking a university: Laurentian's insolvency", *The Sudbury Star* (26 June 2021), online: <www.thesudburystar.com/opinion/columnists/unmaking-a-university-laurentians-insolvency>; Douglas Goldsack, "Decades of questionable decisions led Laurentian University into this mess", *Sudbury.com* (26 November 2021), online: <www.sudbury.com/columns/guest-columns/opinion-decades-of-questionable-decisions-led-laurentian-university-into-this-mess-4802498 >.

- A tuition cap and resulting over-reliance on international student enrolment, which dropped during COVID-19.

- Closing or repudiating the university's line of credit.

- A provincial government that was uninterested in adequate temporary financial assistance, increasing system-wide university funding, or providing a sufficient backstop or guarantee of commercial lending facilities.

- Somewhat higher program and salary costs associated with a bilingual, tricultural, regional university.

- The administration's refusal of (admittedly limited) emergency funding from the province in favour of the CCAA process.

To this list of potential causes of the Laurentian financial crisis, we add one more lesson learned from private sector CCAA restructurings. If past experience is any guide, while wages may be the major aspect of compensation that a university seeks to restructure, pension and benefit plans—which comprise perhaps 25% of total compensation—have been particular targets in past restructurings.[3]

With respect to the Laurentian CCAA proceeding itself, as the preceding chapters have shown, commercial insolvency procedures do not easily apply to universities or publicly funded organizations. Although they may encompass limited protection of a collective agreement and require negotiation of compromises, the CCAA process gives considerable power to the debtor company, monitor, and secured creditors. This power would otherwise be mitigated by standard labour relations checks and balances. As a result, employee groups can effectively become the primary or only group making material concessions in a restructuring process.

[3] See e.g. Ronald B Davis, "Security of Retirement Benefits in Canada: You Bet Your Life" (2013) 17 CLELJ 65 (discussing the vulnerability of pension benefits in an insolvency).

[I]t is difficult for employee groups to fully protect themselves through bargained terms…

For similar reasons, it is difficult for employees to fully protect themselves through bargained terms against the risks of a CCAA proceeding. Employees are termed in insolvency law as "non-adjusting creditors".[4] A non-adjusting creditor is one that cannot easily bargain terms and conditions on the provision of their services to the debtor company to protect itself. This contrasts with other creditors, such as large financial lenders, who have much more leverage to negotiate protections in the event of an insolvency, such as a priority in payment upon liquidation or a requirement that property be held in trust as security. Appendix "C" provides a summary of the statutory protections for employees in a CCAA or BIA restructuring that are intended to (partially) address this imbalance.

Key Lessons from Laurentian

We suggest the following as a non-exhaustive list of "lessons learned" from the Laurentian insolvency:

- Persistent deficits and growth in long-term liabilities appear not to have been addressed early or consistently enough.
- The administration refused to use existing tools (financial exigency) to restructure.
- The Ontario Government systematically reduced university funding in favour of tuition revenues and private financing, but did not intervene on an ad hoc basis prior to insolvency filing or during the insolvency filing.
- Normal labour relations procedures were suspended in favour of a pressurized negotiation process under CCAA norms and timelines.
- Lack of transparency, particularly with respect to communications between the Ontario Government and the university administration.

[4] Lucian A Bebchuk & Jesse M Fried, "The Uneasy Case for the Priority of Secured Claims in Bankruptcy" (1996) 105 Yale LJ 857 at 864.

- Lack of advance notice of the CCAA filing to stakeholder groups other than financial lenders.

- Principles that would normally guide exigency procedures were disregarded in favour of a dollars-and-cents focus on “low enrolment” programs.

- Cuts to-date have primarily targeted labour and academic costs rather than secured creditors, and these appear to have been more aggressive than “necessary” (even from a narrow, balance-book perspective).

In response to these lessons learned, this chapter summarizes some of the recommendations identified in previous chapters and discusses how employee groups can take steps to mitigate the risks of insolvency insofar as possible.

One consistent insight behind these recommendations is the difficulty of challenging a CCAA filing in court (at least on existing law), and the corresponding importance of early identification of financial crises, early intervention through bargained rights, and exploration of alternative restructuring avenues with support from the Minister.

[Delay] exacerbates the time pressures and severity of an eventual restructuring process…

At the same time, we recognize that university administrators (and management of most debtor companies) often have significant incentives to deny or diminish the severity of financial stresses and to delay taking steps. This exacerbates the time pressures and severity of an eventual restructuring process. For the same reasons, university administrators will be reluctant to bargain terms that might fetter their ability to make financial decisions (including when and how to restructure), particularly now that Laurentian has provided a precedent for exploiting CCAA procedures.

We divide these steps into those that can be taken prior to an insolvency filing and those that can be taken as rapidly as possible in response to one. We emphasize that while systemic law reform is central to our recommendations, a key objective is to ensure that

existing, viable restructuring procedures such as financial exigency are actually used when they are clearly necessary. In addition, the case-driven nature of CCAA law means there is room for actors such as individual faculty associations and the CAUT to generate new norms that should guide any response to future university financial crises, whether or not a CCAA application is made.

A. Steps Prior to Insolvency

Model Financial Exigency Code

As discussed in Chapters 6 and 7, the CAUT should expand its Policy Statement on Financial Exigency and Lay-offs or develop a model financial exigency code that can be used in a variety of advocacy contexts.[5] The principles and procedures for such a code are set out in Chapter 6. This document could be promoted with groups such as the Council of Ontario Universities (and equivalent bodies in other provinces) to secure administrative buy-in, or at least understanding, at an early stage.

Engagement in University Governance & Financial Reporting

As a general point, employee groups should actively and strategically engage with existing university governance and communication channels to keep informed of relevant financial developments. The Laurentian proceeding now provides a new reason to discuss financial issues and more specifically, the steps that will be to address them. It is also certain that other financial stakeholders impacted by the Laurentian proceeding will be seeking to ensure their interests are similarly protected. For example, research funders will (or should) require that funds be held in trust in separate accounts; commercial lenders will require security for their loans where they previously did not; trade creditors may adjust pricing to reflect new insolvency risks, and so-forth.

[5] Canadian Association of University Teachers, "Financial Exigency and Lay-offs" (last revised 2009), online: <www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-financial-exigency-and-lay-offs>.

Employee groups can use their position within the university to seek early warning and other procedures that can protect their interests and the university as a whole. These include participating in the senate and its committees; coordinating with representatives on the board of governors, where applicable; pursuing regular meetings with administrators such as deans; and creating or enhancing joint bodies required under collective agreements. It should also be axiomatic that proper financial controls be employed for all funds and that there be accountabilities for funds administered.

The Laurentian experience indicates that universities ought to provide clearer and more extensive public financial reporting on an ongoing basis, perhaps by holding regular joint senate-board meetings to discuss financial updates and outlook. It is not reasonable for administrators to insist on maintaining the board and senate as watertight compartments with an executive go-between that controls the flow of financial information.

[U]niversities ought to provide clearer and more extensive public financial reporting on an ongoing basis…

Where employee groups suspect financial distress or impropriety, pointed questions should be asked through existing channels—including at the bargaining table if appropriate—to obtain more information. These practices can be implemented outside any formal law reform or collective bargaining process.

Financial Exigency Terms

Employee groups may seek to bargain improved financial exigency language in their collective agreements, including procedural protections, consultation obligations, and principles that must be considered in any restructuring. This is particularly important for institutions where only limited exigency procedures are currently in place. However, even well-defined terms could be reviewed to ensure they adequately respond to the kinds of issues that arose at Laurentian (for example, by providing for early notice of internal restructuring proposals, additional opportunities for sharing of financial information, or expedited resolution where the administration refuses to trigger exigency at the request of the faculty association).

We have set out in Appendix “D” a series of financial exigency terms for reference. We include the full set of terms from the LUFA collective agreement to compare to the actual CCAA proceeding. We include a second set found in the Ryerson University Faculty Association collective agreement that contain a comprehensive process defining financial exigency, establishing an oversight committee, articulating criteria for decision-making, and creating powers and procedures for implementation.

We also include selected examples from the York University Faculty Association collective agreement, particularly with respect to rights to information and “early warning” terms, as well as a fixed level of total compensation (as a percentage of total budget) under which layoffs are prohibited. Finally, Appendix “D” includes some language from the University of Western Ontario Faculty Association collective agreement, which pre-defines how budgetary cuts are to be implemented by calculating the number of days without pay that are to be implemented for each faculty member once an overall budget target is determined.

Other Collective Agreement Terms

In addition to these terms enhancing exigency processes, an employee group may seek to bargain other language that enhances their ability to anticipate and respond to a potential CCAA filing by an employer.

[A]n employee group may seek to bargain other language that enhances their ability to anticipate and to respond to a potential CCAA filing…

One of the features of a CCAA restructuring is that it can occur very quickly—so-called “real time” litigation and decision-making. This is also one of the key problems from the perspective of a more considered and deliberate reform of academic programs—or public interest mandates more generally—as well as from a labour relations perspective, which might require some time to implement voluntary employee reductions. As a result, early warning of any proceeding (or potential proceeding) can assist bargaining agents in understanding the issues, assessing options,

seeking to influence the content of the initial order as it deals with labour relations, and (where practical) opposing the use of the CCAA through legal or political means.

One new provision of the CCAA may assist in this regard. As discussed in Chapter 5, the CCAA now requires any "interested person" to act in good faith in respect of the proceedings and permits an interested person to seek orders from the court for any alleged bad faith conduct.[6] The concept of good faith is well-known in the labour relations community, particularly at the bargaining table. It arguably already existed in some form under the CCAA, but has now been confirmed (if not necessarily clarified) by recent amendments.[7] Some commentators have argued that the statutory duty of good faith now requires labour groups to be provided with notice of an intent to file under the CCAA.[8] They argue that the duty is enhanced while the parties are engaged in collective bargaining and there is a corresponding labour relations duty to disclose relevant management decisions.

[O]ne term an employee group may seek to bargain…is an obligation to provide notice of any potential CCAA or BIA filing.

Against this backdrop, one term an employee group may seek to bargain into a collective agreement is an obligation to provide notice of any potential CCAA or BIA filing. Such a term could cite the good faith provisions of these statutes specifically. This should include at least the same kind of information that must be disclosed regarding employer plans and business changes in response to specific inquiries at the bargaining table. It could also include a requirement to explain why financial exigency under the collective agreement did not work or was not triggered, as the case may be.

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[6] *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s 18.6 [*CCAA*]. The BIA contains a similar duty: *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 4.2.

[7] See e.g. Jassmine Girgis, "A Generalized Duty of Good Faith in Insolvency Proceedings: Effective or Meaningless?" (2020–2021) 64 Can Bus LJ 98; Ari Y Sorek & Charlotte Dion, "Good Faith in Insolvency and Restructuring: At the Intersection of Civilian and Common Law Paradigms, at a Fork in the Road or in a Merging Lane?" (2020) Annual Rev Insolvency Law 34; Virginia Torrie, "Implications of the *Bluberi* Decision: An Affirmation of Broad Judicial Discretion in CCAAs and a 'Green Light' for Litigation Funding in Canada" (2021) 36.2 BLFR 277.

[8] Tracey Henry, Danielle Stampley & Alex St John, "CCAA Duty of Good Faith: Notice Obligations to Union Stakeholders" (2019) Annual Rev Insolvency Law.

The timing of the required notice should provide adequate opportunity, in the circumstances, for the group to defend their interests. This is particularly so for vulnerable employees who are likely to be significantly affected by the proceedings and are otherwise unable to protect their interests through contractual protections like taking security. Arguably, advance notice should be provided as soon as, or very soon after, a plan to file for CCAA protection has crystallized.

The advantages of such a term are suggested above. It would give an employee group time to challenge or influence the initial order of the court and any contemplated labour negotiations, as well as to assess any other response it wished to pursue (such as government lobbying and political campaigns). Additionally, if the employer breached the term, it would be strong evidence that the employer acted in bad faith contrary to the CCAA. This could support a remedial order such as damages or partial lifting of the stay to deal with grievances or other issues.

Finally, trade unions and other employee organizations typically maintain one or more discretionary funds to be used for specific labour relations purposes. These include strike funds or emergency funds. Bargaining agents may wish to establish an emergency fund to be used in the event of a restructuring (e.g., for political action or litigation), and seek to bargain regular contributions to such a fund.

Special Issues: Pension and Benefits

[P]ension and benefit plans have often been a target in private sector restructurings.

As we noted above, pension and benefit plans have often been a target in private sector restructurings. As the Supreme Court of Canada has noted: “Insolvency can trigger catastrophic consequences. Often, large claims of ordinary creditors are left unpaid. In insolvency situations, the promise of defined benefits made to employees during their employment is put at risk.”[9] We believe it is necessary to outline some of the special issues raised by pensions and benefits.

[9] *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at para 1 (per Deschamps & Moldaver JJ).

The costs associated with health and related benefits for current employees, pension plans, and post-employment health care benefits are often grouped together, but they are treated very differently at law.

Pension benefit plan designs come in three broad types: defined benefits (where a defined level of benefits paid in retirement is promised), target benefits (where a defined level is projected, but only as a target that may be reduced under some circumstances), and defined contributions (where only a contribution is defined, and the exact benefit level depends on market conditions in retirement). In the Ontario university sector, there exist defined benefit plans, some (but not many) defined contribution plans, and several unique arrangements called hybrid plans that combine elements of both. Very generally, pensions are closely regulated in Canada, and must be pre-funded by setting aside benefits accrued by current employees. This is intended to protect these benefits in the event the employer later becomes unable to pay.

That does not mean that pensions are fully protected. Employers can owe contributions to pension funds that can become very significant liabilities, so they are often a target for restructuring and cost reductions. Put simply, these contributions come in two types: current amounts owed to a pension fund to pay for benefits, called “current service costs,” and amounts owed to a pension plan to pay for any unexpected deficit in the plan, called “special payments.” Current service costs are protected in a restructuring by a statutory priority over other creditor claims, but special payments are not. Special payments can be very large amounts—much larger than current service costs—and in some cases, are the largest unsecured claims on a bankrupt business.

[C]ontributions to pension funds…are often a target for restructuring and cost reductions.

Health and welfare benefits are also common to all universities (and most large employers in Canada). They typically include health, dental, vision, long-term and short-term disability income, life insurance, and other “fringe” benefits. Unlike pension plans, health

and welfare benefits are not as closely regulated and do not need to be pre-funded. As a result, they are less well protected in a financial crisis, and are a target for cost reductions.

The interaction of pension and insolvency law is a complicated field and not amenable to quick summary. We note for the purpose of this section that there are still several unsettled matters of law regarding the treatment of pensions in restructurings and these are often the subject of law reform proposals. Similarly, health and welfare benefits are often a major item for negotiation in any restructuring.

Policy and Law Reform

In the previous chapter we outlined possible law reforms including amendments to the CCAA that would either exclude publicly funded universities or require participation of the public funder in the restructuring process and final compromise or plan. These are reforms that require action from the federal government to amend the CCAA (and may result in corresponding amendments to the BIA).

In our view, appropriate law reform objectives require a combination of amendments to federal and provincial legislation. The CCAA should be amended to either exclude publicly funded universities or add new powers of the CCAA court to compel public funder participation, as well as further conditions on approving any compromise or plan of arrangement.

[A]ppropriate law reform objectives require a combination of amendments to federal and provincial legislation.

At the same time—and recognizing that emergency funding may be required to complete any university restructuring—amendments to the MTCUA should be enacted to provide a cogent set of powers to the Minister to provide emergency funding on a temporary basis, which may be clawed back or repaid over a reasonable period (e.g., five to ten years). Any key stakeholders should be able to make an application and trigger the procedure. The provision of the funding may be conditional upon a restructuring of the university guided by principles identified in standard financial exigency terms, and to be conducted within a reasonable period (e.g., 12 months with the possibility of extension).

Other law reforms would have the effect of creating an alternative restructuring process with a more direct role—in greater or lesser degree—for the Minister. These changes are clearly within the jurisdiction of the province in which a university is based.

We conclude by acknowledging that there are constitutional issues raised by some of these law reform options, particularly where a provincial insolvency scheme seeks to displace the CCAA without a coordinated set of amendments to the CCAA. Faculty associations and other stakeholders such as the CAUT and OCUFA can play a key role in advocating for coordinated law reforms at both the federal and provincial levels.

B. Responses to an Application

Apart from the bargaining and law reform options already discussed, there are some basic responses to a potential CCAA filing or notice of filing (whether early or after-the-fact).

In Chapter 5 we outlined some of the main legal avenues to challenge the CCAA and identified some of the arguments and precedents that would apply. We cautioned that such challenges are difficult to win; however, there is limited precedent and they are significantly driven by the factual basis before the court. To the extent that an employee group can influence the process leading to the initial application, or rapidly respond to it with credible supporting evidence, this may enhance the voice of employees in the CCAA process.

[If] an employee group can influence the process…or rapidly respond to it…this may enhance the voice of employees…

An employee group should consider the following actions in response to a potential filing:

- Retain advisors as soon as possible to assist in assessing the legal and practical opportunities to influence a possible filing.

- Develop an understanding of and position on the causes of the liquidity crisis and the necessary elements of any restructuring.

- Seek to influence the framing of the CCAA proceeding, particularly with respect to labour relations. Issues that could be emphasized include the necessary role of the public funder, the principles to be considered in any labour relations negotiations and compromises, and the necessary role of other creditors (in the same class or in other classes).

- Develop a strategy to build negotiating power. While this influence is in part driven by the recognized role of employees as stakeholders and their voting rights in any plan of arrangement, they can also bring motions before the CCAA court to seek specific orders protecting employee interests or engage in political mobilization outside of court.

- Evaluate possible challenges to the application that may be brought at the initial hearing or in a comeback hearing. These may include a challenge to the insolvent status of the university or the good faith use of the CCAA proceeding. They may also relate to ensuring a more active voice for employee groups in the proceedings and restructuring decisions or being provided information in a timely manner, among other considerations.

- Evaluate ancillary legal claims, for example against insurers, auditors, or other institutional advisors, including the possibility of obtaining litigation funding.[10]

- Evaluate the options for other extra-legal activities, such as public campaigns and direct political appeals.

[10] See e.g. Kate Rutherford, "Laurentian University Faculty Association files claim against board of governors, senior administrators", *CBC News* (20 September 2021), online: <www.cbc.ca/news/canada/sudbury/laurentian-faculty-association-directors-officers-claims-1.6179985>; Jaren Kerr, "Britain-based litigation firm to finance lawsuit against Canadian advisers of failed payday lender", *The Globe and Mail* (28 November 2021), online: <www.theglobeandmail.com/business/article-britain-based-litigation-firm-to-finance-lawsuit-against-canadian/>.

The particular strategy and tactics involved in contesting a CCAA filing will necessarily depend on the facts of that proceeding and what the true objectives of the university are in seeking creditor protection. However, the Laurentian University experience and the themes highlighted in this report provide something of a guide for employee groups that may be confronted by a future university financial crisis.

Takeaways

1. *Employee groups should push for increased transparency and disclosure of university financial information, including through existing governance and communication channels.*
2. *Employee groups can attempt to bargain improved financial exigency terms that enhance procedural protections and add early warning requirements. Notice obligations could be tied to the duty of good faith that applies to all CCAA parties, which should be informed by labour relations principles.*
3. *Where a CCAA filing is anticipated, employee groups should retain advisors as quickly as possible to advise on key initial decisions. This includes engagement with the employer, evaluating the causes of liquidity problems and the need for restructuring, and assessing possible legal arguments.*
4. *Where a CCAA filing is anticipated, employee groups can seek to influence the proceeding through input into the initial order and the factors that must be considered in any restructuring decisions, including the role of the public funder and other creditors. This includes resisting the false separation of labour relations compromises from compromises of other creditors.*
5. *In response to a filing (or at the initial hearing), employee groups should evaluate the factual and legal basis for challenging the application (or the content of the initial order) where appropriate.*
6. *Employee groups and their federations should advocate for law reform, including changes to the CCAA to exclude universities or require government participation and to provincial legislation to facilitate restructuring where it becomes necessary.*

Appendix A: Timeline of Laurentian University Insolvency Proceedings[1]

January 21, 2021

- Ontario named Dr. Alan Harrison as a Special Advisor on the Long-Term Financial Sustainability of Laurentian University.

January 21, 2021

- Correspondence was exchanged between the Ministry of Colleges and Universities ("**the Ministry**") and Laurentian University ("**LU**").

February 1, 2021

- LU brought an application under the *Companies' Creditors Arrangement Act* ("**CCAA**") to allow it to restructure.

- Chief Justice Geoffrey Morawetz of the Ontario Superior Court of Justice ("the **Court**") granted an initial 10-day stay of proceedings, appointed Ernst & Young as the Monitor, and issued a sealing order in respect of the January 21–25 communications between LU and the Ministry.

February 5, 2021

- The Court appointed Justice Sean Dunphy as a mediator to oversee confidential negotiations between LU and a sub-committee of the Senate, each of the Federated Universities, the Laurentian University Faculty Association ("**LUFA**"), and the Laurentian University Staff Union ("**LUSU**").

February 10, 2021

- At a comeback hearing, the Court approved debtor-in-possession ("**DIP**") financing for LU and extended the stay of proceedings to April 30.

February 26, 2021

- In response to several challenges to the sealing order of communications between LU and the Ministry, the Court upheld the initial order.

March 31, 2021

[1] For a summary of pre-CCAA filing events, see "Laurentian University: From Surplus to Insolvency, 2001-2021" (Timeline), Ontario College of Art and Design Faculty Association, online: <cdn.knightlab.com/libs/timeline3/latest/embed/index.html?source=1i7P57g7wMuCoxtUKUDnmhh2i4cYQe8v8G0AaRxeJaRA&font=Default&lang=en&initial_zoom=2>. For the most up-to-date information on the CCAA process, see Ernst & Young Inc, "Restructuring Document Centre – Laurentian University of Sudbury", online: <documentcentre.ey.com/#/detail-engmt?eid=459>.

- The Ontario Court of Appeal refused leave to appeal the sealing order.

April 1, 2021

- Following several weeks of unsuccessful negotiations, LU provided notice to the three Federated Universities disclaiming their Federation Agreement, effective May 1, 2021.

April 5, 2021

- LU and Huntington University entered into a transition agreement.

- LU and LUSU entered into a new agreement including the termination of 42 members.

April 6, 2021

- The LU Senate approved a plan to close 38 English-language and 27 French-language undergraduate programs as well as 7 English-language and 4 French-language graduate programs.

April 7, 2021

- LU and LUFA signed a term sheet setting out the key terms of a new collective agreement, including declaring 116 full-time faculty positions to be redundant and salary decreases of 5% effective May 1, 2021. This also made provision for a governance review to assess the LU Board and Senate efficiency and internal operations. Certain terms not agreed on by the parties were to be decided by binding arbitration.

April 12, 2021

- LU provided notice to the faculty members identified for termination.

April 13, 2021

- LUSA members ratified the new term sheet.

April 29, 2021

- The Court briefly extended the stay of proceedings until May 2, 2021 to consider certain motions.

May 2, 2021

- The Court approved an increase in the DIP financing, the term sheet negotiations with LUSU and LUFA, and extended the stay until August 31, 2021.

- The Court dismissed motions brought by Thorneloe University and the University of Sudbury opposing LU's disclaimer of the Federated University agreement.

May 31, 2021

- The Court approved a process to call for and determine claims of creditors, with a deadline to file claims of July 30, 2021.

June 21, 2021

- An arbitration award resolving the remaining terms of the new LUFA collective agreement was issued by Arbitrator Kaplan.

June 23, 2021

- The Ontario Court of Appeal refused leave to appeal from the dismissal of Thorneloe University's challenge to LU's disclaimer of the Federation Agreement.

July 5, 2021

- The Court appointed Cushman & Wakefield as real estate advisor to assist LU in developing a plan to monetize its real estate portfolio.

July 28, 2021

- The Court extended the deadline for creditors to file claims to August 20, 2021.

August 5, 2021

- LU released a request for proposals for the governance review, with a deadline of August 31, 2021.

August 27, 2021

- The Court granted LU an extension of the stay until January 31, 2022 in order to determine creditor claims, negotiate a plan, and implement the internal review recommendations.

October 26, 2021

- LU retains Nous Group management consultancy to conduct its operational and governance review.

Appendix B: Selected Commentary on the Laurentian University Insolvency[1]

A. Press Releases

Ontario Confederation of University Faculty Associations & Laurentian University Faculty Association, "Erosion of governance and public funding cause of Laurentian University financial crisis: Minister must provide long-term funding" (2 February 2021)

Canadian Association of University Teachers, "CAUT Statement on Laurentian" (3 February 2021)

Ontario Confederation of University Faculty Associations, "As Laurentian's funding crisis continues, Ministry of Colleges and Universities refuses to take action" (23 February 2021)

Ontario Confederation of University Faculty Associations, "Laurentian University President is wrong: There's no respect for stakeholders in CCAA process" (9 March 2021)

Ontario Confederation of University Faculty Associations, "CCAA process continues to fail public institutions as Laurentian Senate is forced to vote on restructuring package" (6 April 2021)

Ontario Confederation of University Faculty Associations, "OCUFA calls for resignation of Ross Romano amid devastating cuts to jobs and programs at Laurentian University" (12 April 2021)

Ontario Confederation of University Faculty Associations & Laurentian University Faculty Association, "Laurentian's senior leadership and Minister of Colleges and Universities should step down in wake of financial crisis" (14 April 2021)

Ontario Confederation of University Faculty Associations, "CCAA at Laurentian University threatens Indigenous studies and the Truth and Reconciliation Commission's calls to action" (30 April 2021)

[1] For existing summaries of news and opinion articles, see University of Toronto Faculty Association, "Articles: The Laurentian crisis and the fight for funding" (2021), online: <www.utfa.org/content/articles-laurentian-crisis-and-fight-funding>; Canadian Association of University Teachers, "Laurentian University – Issues" (2021), online: <www.caut.ca/content/laurentian-university-issues>; Wikipedia, "2021 Laurentian University financial crisis" (last edited 30 November 2021), online: <en.wikipedia.org/wiki/2021_Laurentian_University_financial_crisis>.

B. Selected News Articles

Shawn Jeffords, “Laurentian ran deficits dating back to 2014, government adviser says in report”, *CBC News* (16 February 16 2021)

“Don't blame CCAA process for Laurentian University's financial troubles, insolvency expert says”, *CBC News* (19 April 2021)

Colleen Flaherty, “A University in Tatters”, *Inside Higher Ed* (29 April 2021)

“Politicians point fingers over Laurentian University insolvency”, *CBC News* (3 June 2021)

Nathan M Greenfield, “Laurentian – Insolvency, mass firings and the erosion of multiculturalism”, University World News (5 June 2021)

“Laurentian University president addresses insolvency and return to classes”, *CBC News* (8 September 2021)

“Committee issues declaration on restoring university education in Sudbury”, *CBC News* (9 September 2021)

Lyndsay Aelick, “Sudbury group aims for educational equity for French and Indigenous post-secondary students”, *CTV News* (10 September 2021)

Kate Rutherford, “Laurentian University Faculty Association files claim against board of governors, senior administrators”, *CBC News* (20 September 2021)

“University of Sudbury transfers Indigenous studies online courses to Kenjgewin Teg”, *CBC News* (7 October 2021)

“Province in no hurry to get involved in Laurentian situation”, *The Sudbury Star* (19 October 2021)

Darren MacDonald, “Court documents detail standoff between Laurentian, auditor general, over insolvency audit”, *CTV News* (20 October 2021)

Darren MacDonald, “Laurentian University picks firm to conduct operational review”, *CTV News* (28 October 2021)

Heidi Ulrichsen, “Union leader says it’s ‘disappointing’ Laurentian University restructuring could last until end of 2022”, *Northern Ontario Business* (2 November 2021)

"Enrolment at Laurentian University in Sudbury, Ont., down 14% this fall amid restructuring", *CBC News* (4 November 2021)

Heidi Ulrichsen, "Full report on Laurentian's real estate holdings likely won't be made public, president says", *Sudbury.com* (9 November 2021)

"Ontario's auditor general says Laurentian lacks transparency", *CBC News* (1 December 2021)

Darren McDonald, "Laurentian was treading water financially until it started construction projects, auditor general says", *CTV News* (1 December 2021)

Erik White, "'The best word to describe it is strange': financial crisis looms over Laurentian University this fall", *CBC News* (6 December 2021)

"Laurentian University, Ontario auditor general argue right to privileged documents in value-for-money audit", *CBC News* (6 December 2021)

Erik White, "Ontario legislature to vote on issuing warrant for Laurentian University documents", *CBC News* (8 December 2021)

C. Opinion Pieces

Dave McKee, "Laurentian Bankruptcy: Neoliberal Policies Get the Failing Grade", *People's Voice* (3 February 2021)

John Peters, "Shock Therapy: Public Funding and the Crisis at Laurentian University", *The Bullet* (20 February 2021)

Mary Ann Corbiere & Darrel Manitowabi, "Is Indigenous education in jeopardy at Laurentian University?", *Anishinabek News* (13 March 2021)

Stéphanie Chouinard, "French-language postsecondary education in Ontario: crisis or opportunity?" *Northern Ontario Business* (29 March 2021)

Donald Dennie, "A university 'by and for' francophones", *Northern Ontario Business* (31 March 2021)

Ken Coates, "The bigger picture: comparing Laurentian University and Université de l'Ontario français to the national post-secondary landscape", *Northern Ontario Business* (1 April 2021)

Konrad Yakabuski, “Laurentian cuts serve as a warning for other Canadian universities”, *The Globe and Mail* (16 April 2021)

Adam DK King, “Laurentian University Is A Casualty Of The Neoliberal Assault On Higher Education”, *Passage* (21 April 2021)

Min Sook Lee, “Laurentian University crisis a story of political interference and defunding of education”, *Rabble* (22 April 2021)

Reuben Roth, “Subjects of the New Corporate University: The Sabotage of Laurentian University”, *The Bullet* (5 May 2021)

Dieter K Buse, “Unmaking a university: Laurentian’s insolvency”, *The Sudbury Star* (26 June 2021)

David Leadbeater, “Laurentian University Insolvency Reflects a Structural Crisis in Ontario’s Neoliberal University System”, *The Bullet* (2 July 2021)

Tricultural Committee for University Education at Sudbury, “LU mandate must change: Tricultural group”, *The Sudbury Star* (17 October 2021)

Denis Constantineau, “Three universities would best serve Sudbury”, *The Sudbury Star* (2 November 2021)

Douglas Goldsack, “Decades of questionable decisions led Laurentian University into this mess”, *Sudbury.com* (26 November 2021)

D. Blog Posts

Alex Usher, “Laurentian Blues (4) – Who Is Next?”, *Higher Education Strategy Associates* (9 February 2021)

Alex Usher, “Laurentian Blues (6) – The Model”, *Higher Education Strategy Associates* (8 March 2021)

Alex Usher, “Laurentian Blues (7) – The Process”, *Higher Education Strategy Associates* (13 April 2021)

Alex Usher, “Laurentian Blues (8) – Causes, Fault and Lessons”, *Higher Education Strategy Associates* (15 April 2021)

Tasha Beeds, “Sparking Change from the Colonial Crisis of the Laurentian Insolvency Debacle: Let Them Burn their Own Houses Down….A Call for An Inter-Indigenous Nation to Nation University”, *kâ-pimotêt aski-iskwêw (Walking Earth Woman)* (22 April 2021)

E. Policy Briefs

Maureen Gustafson, Sebastien Lefebvre & Robyn Rowe, “Insolvency, Indigenous Research & the Uncertain Future of Laurentian University” (Yellowhead Institute Policy Brief Issue 96, 19 April 2021)

Australian Centre for Philanthropy and Non-Profit Studies, “Laurentian University of Sudbury, 2021 ONSC 659” (Legal Case Reports Series, July 2021)

F. Selected Legal Commentary

Jassmine Girgis, “A Generalized Duty of Good Faith Applied to Disclaimer Under the *CCAA*”, Case Comment on *Laurentian University v. Sudbury University*, *ABlawg* (1 June 2021)

“Reviewing CCAA Disclaimers Requires Balancing of Interests”, Case Comment on *Laurentian University of Sudbury*, Thornton Grout Finnegan LLP (29 June 2021)

“Top 5 Key Takeaways from ‘A Panel Discussion about the CCAA’”, McCarthy Tétrault LLP (19 July 2021)

Virginia Torrie, “Laurentian University of Sudbury: A Consideration of Restructuring, Public Institutions and the Public Interest” (2022) 65 Canadian Business Law Journal [forthcoming].

Appendix C: Employee Protections in Restructuring Proceedings

This Appendix provides a brief summary of the protections afforded to employees and unions in restructurings under the *Companies' Creditors Protection Act* ("**CCAA**")[1] and *Bankruptcy and Insolvency Act* ("**BIA**").[2] This is intended to supplement the discussion in this report with some more technical detail of the rules that apply to employee groups and claims in a commercial insolvency process.

Note that proceedings to restructure a business can also be commenced under other legislation, though this most often occurs under the CCAA or BIA.[3] Further, there are various provincial employment-related regimes which may apply to and intersect with insolvency proceedings, such as laws governing pension plans and corporate laws that create directors' liability for unpaid wages.[4]

This appendix sets out:

- an overview of the two legislative schemes;
- a discussion of who has rights to participate in an insolvency process;
- the status of collective agreements and employment contracts in an insolvency process;
- the operation of the federal Wage Earner Protection Plan to protect certain employee interests;

[1] *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36 [*CCAA*].
[2] *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 [*BIA*].
[3] See e.g. *Winding-up and Restructuring Act*, RSC, 1985, c W-11, Part III; *Canada Business Corporations Act*, RSC, 1985, c C-44, s 192; *Canada Transportation Act*, SC 1996, c 10, Part III, Div V.
[4] See e.g. *Employment Standards Act, 2000*, SO 2000, c 41, Part XX. These provincial regimes are generally outside the scope of this report, along with Crown claims related to employee source deductions (e.g., income tax, Employment Insurance, Canada Pension Plan) and other statutory or deemed trusts; the law on successor employers or the transfer/sale of an insolvent business; and the liability of monitors, receivers, and trustees to employees.

- the status of pension claims in an insolvency proceeding; and
- requirements to exit restructuring processes, called plans of arrangement or proposals.

A. Overview

As discussed in Chapter 1 of this report, a CCAA restructuring is generally available to a debtor company with over $5 million in liabilities.[5] As a result, CCAA restructurings are more common among larger, more complex companies. In contrast, a BIA restructuring is technically available to a debtor with at least $1,000 in liabilities.[6]

A corporation that files for protection under the CCAA (a "debtor company") is seeking to restructure and reduce its costs. The ultimate objective of a restructuring proceeding is to file a "plan of compromise or arrangement" with the court, including any proposed compromises of pre-filing debts. Under the BIA, a debtor company makes a similar "proposal" to creditors. This is in effect the whole purpose of the process.

In order to negotiate the plan of arrangement, companies normally seek the protection of a stay of proceedings before entering discussions with creditors.[7] We discuss the effect of the stay of proceedings in Chapters 1–3. The procedure is flexible and, apart from the initial steps in the process, has no strict timelines associated with it.

For comparison, under the BIA, this process is commonly initiated by filing a Notice of Intention ("**NOI**"), which gives the debtor 30 days to file a proposal with the official receiver.[8] The debtor may request extensions of this timeline of up to 45 days at a time by application to the court, but the total length of all extensions cannot exceed six months

[5] *CCAA*, *supra* note 1, s 2(1), "debtor company".
[6] *BIA*, *supra* note 2, s 2, "insolvent person". The BIA differentiates between "General Proposals" and "Consumer Proposals" for debtors with $250,000 or less in liabilities: s 66.11, "consumer debtor". Consumer Proposals are governed by Part III, Division II while General Proposals are governed by Part III, Division I.
[7] *CCAA*, *supra* note 1, s 11.02; *BIA*, *supra* note 2, ss 69(1), 69.1.
[8] *BIA*, *supra* note 2, s 50.4.

(including the initial 30-day period under the NOI).[9] If a debtor fails to file a proposal within the required time period, it is deemed to have made an assignment in bankruptcy.[10]

In both the CCAA and BIA there are analogous provisions regarding the treatment of collective agreements and employment contracts. Both also require a plan of arrangement or proposal to include the minimum payments that employees would receive in a distribution of assets in bankruptcy.

A key protection for employees is the availability of the federal WEPP in the event of a bankruptcy, receivership, BIA proposal filing, or CCAA filing in a liquidating restructuring. That is, if the business is going to fail and its assets liquidated (sold) through any of these processes, the WEPP program is available to address some employee claims, discussed below. It is not available, however, where there is simply a restructuring that does not end up liquidating the business.

In practice, most larger employers use the CCAA process to attempt to restructure, and if it fails, to eventually liquidate.

B. Standing – Who Can Initiate and Participate?

CCAA

A CCAA application may be made in respect of a debtor company by "any person interested in the matter", which could include a union or employee, although an initial application must include financial documentation that may only be available to the debtor company.[11] In almost all cases, the initial procedure is triggered by the employer/debtor.

[9] *Ibid*, s 50.4(9)
[10] *Ibid*, ss 50.4(8)–(9). Like in the CCAA context, to obtain an extension the applicant must show that the debtor is acting in good faith and with due diligence, it would likely be able to make a viable proposal if the extension were granted, and no creditor would be materially prejudiced by the extension.
[11] *CCAA*, *supra* note 1, ss 10(2), 11.

Employees and/or bargaining agents are creditors for the purpose of an insolvency proceeding and will typically receive notice once the employer/debtor company has filed for protection.

In some circumstances, courts may also grant standing to a wider class of social stakeholders where deemed appropriate.[12]

An application for permission to submit a plan of compromise or arrangement to creditors can be made by the debtor company, a creditor, or a trustee-in-bankruptcy or liquidator.[13]

It is sometimes asked whether employee groups or individuals can challenge or oppose a CCAA process outright. An employee or union can challenge a CCAA filing or the extension of a stay.[14] We discuss the various ways this has been attempted in Chapter 5. To date, such challenges have met with limited success.

BIA

Most restructurings take place using the CCAA. Just for comparison, under the BIA, any creditor with a provable claim may apply for a bankruptcy order in respect of an eligible business.[15] This could include a current or former employee since provable claims include all present or future debts and liabilities of the company on the date of bankruptcy.

However, a BIA proposal can only be made by an insolvent person, a bankrupt, a receiver, a liquidator, or a trustee.[16] Therefore, it is not possible for an employee or bargaining agent to initiate a BIA proposal in respect of an insolvent employer.[17]

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[12] See e.g. *Anvil Range Mining Corp*, 1998 CarswellOnt 5319 (Ont Gen Div) at para 2; Virginia Torrie & Vern DaRe, "The Participation of Social Stakeholders in CCAA Proceedings" (2020) 17 Annual Rev Insolvency Law 369.
[13] *CCAA*, *supra* note 1, ss 4–5.
[14] See e.g. *Dura Automatic Systems (Canada) Ltd.*, 2010 ONSC 1102.
[15] *BIA*, *supra* note 2, s 43(1).
[16] *BIA*, *supra* note 2, s 50.
[17] However, there are other types of insolvency proceedings they could bring, such as an involuntary petition for bankruptcy: see e.g. *Christiansen v Paramount Developments Corp.*, 1998 ABQB 1005 (where a former minority shareholder successfully applied for a receiving order against the company after his employment and directorship were terminated).

C. Collective Agreements

CCAA

Another question that arises is whether a collective agreement remains in force during a restructuring, or whether it is suspended or amended.

CCAA courts are now barred from setting aside or assigning collective agreements.[18] These remain in force and may not be altered or repudiated except under limited circumstances.[19] This requires the parties to negotiate any changes as part of the restructuring plan.

However, if the parties cannot reach a voluntary agreement, the debtor company may apply, on five days' notice, for an order authorizing it to serve a "notice to bargain" under the applicable collective bargaining legislation.[20] (This results in the same effect as if the contract had expired, and associated procedures under labour relations legislation applied, but is now thought to be ultimately supervised by the CCAA court, which may approve of other dispute resolution methods such as binding arbitration). However, as a practical matter, employee groups are under extreme pressure to renegotiate terms of the collective agreement and often do so.

As a matter of process, the court may only issue an order authorizing a notice to bargain if it is satisfied that (a) a viable compromise or arrangement could not be made in respect of the company, taking into account the terms of the collective agreement; (b) the company has made good faith efforts to renegotiate the provisions of the collective agreement; and (c) a failure to issue the order is likely to result in irreparable damage to the company.[21]

[18] *CCAA*, *supra* note 1, ss 11.3(2)(c), 32(9)(b).
[19] *Ibid*, s 33(1).
[20] *Ibid*, s 33(2).
[21] *Ibid*, s 33(3).

Any revision or compromise to the collective agreement gives rise to an unsecured claim by the bargaining agent equal to the concessions granted for the remainder of the original agreement's term.[22] However, pre-filing claims can still be compromised.[23] A creditor vote on a compromise or arrangement may not be delayed solely because the time period governing collective bargaining in the applicable jurisdiction is still running.[24]

Even where the existing agreement remains in force, because the grievance process is stayed and the CCAA has paramountcy over provincial collective bargaining legislation, the debtor company may impose an alternate procedure to arbitrate grievances (for example, on an expedited basis) with court approval.[25]

More generally a CCAA stay is to be broadly interpreted and includes any actions taken in respect of a collective agreement.[26]

Courts have also held that even if it is ultimately determined that employees are not creditors of a debtor company, a union's application for certification as bargaining agent is a "proceeding" that may be stayed.[27] However, in *Sears Canada Inc. v. International Brotherhood of Electrical Workers, Local 213*, the B.C. Labour Relations Board held that its proceedings fell into the exception to a stay for "investigations, actions, suits or proceedings by a regulatory body" under s 11.1 of the CCAA (whereas labour arbitration did not).[28] While the Board could proceed with hearing grievances under its jurisdiction, any monetary award would be barred by s 11.1(2). In that case, it declined to depart from its general policy of deferral to the arbitration process except in one wrongful termination grievance brought by the union, given the importance of the claim and the union's recognition of the limits on enforcing any back pay remedy before the stay was lifted. In other words, while grievance arbitrations and monetary remedies are clearly stayed

[22] *Ibid*, s 33(5).
[23] See e.g. *TQS Inc.*, [2008] JQ no 7151 (Que CA); *AbitibiBowater Inc.*, [2009] JQ no 7160 (Que SC).
[24] *Ibid*, s 33(4).
[25] See e.g. *Essar Steel Algoma Inc.*, 2016 ONSC 1802.
[26] See e.g. *A.R. Clarke Ltd.* (2000), 89 LAC (4th) 190 (Arbitrator: Liang) (court-ordered stay of proceedings against employer operating pursuant to *CCAA*; arbitration hearing adjourned).
[27] *Hawkair Aviation Services Ltd.*, [2006] BCJ No 938 at para 27 (BCSC).
[28] *Sears Canada Inc. v International Brotherhood of Electrical Workers, Local 213*, 2017 CanLII 69395 (BC LRB).

during a CCAA process, there is some uncertainty as to whether other labour board proceedings may fall into the exception from a stay in a given case.

BIA

The manner in which a proceeding is triggered under the BIA—by filing a Notice of Intention or a Proposal, as they are called—triggers a comprehensive stay of proceedings that applies to all claims against the debtor company in respect of pre-filing services.[29] This is the same effect as the stay under a CCAA proceeding.

A court in a BIA proposal context is similarly prevented from setting aside or assigning collective agreements.[30] An insolvent person can apply for authorization to issue a notice to bargain on analogous terms to the CCAA.[31] Any concessions likewise become unsecured claims.[32]

In *Romspen Investment Corp. v. Courtice Auto Wreckers Ltd.,* the union sought to lift a stay imposed by a receivership order so it could pursue a certification application and unfair labour practice complaints against the insolvent business.[33] A majority of the Ontario Court of Appeal overturned the decision of the motion judge and allowed the certification efforts to proceed, since there was no guarantee that a successful certification would give the employees an advantage over other creditors. The dissenting judge emphasized that the federal bankruptcy regime was paramount and reasoned that lifting the stay would prejudice other creditors, suggesting that the majority decision would cause issues in insolvency law more broadly (including under the CCAA).

Disclosure

Under both the CCAA and BIA, where a notice to bargain is issued the bargaining agent may apply for an order requiring disclosure as it relates to the insolvent person's business

[29] *BIA*, *supra* note 2, ss 69–69.1.
[30] *Ibid*, ss 65.11(10)(c), 84.1(3)(c).
[31] *Ibid*, s 65.12(1)–(2).
[32] *Ibid*, s 65.12(4).
[33] *Romspen Investment Corp. v Courtice Auto Wreckers Ltd.*, 2017 ONCA 301, leave to appeal refused, 2018 CanLII 11140 (SCC).

or financial affairs and that is relevant to collective bargaining between the parties.[34] The court may limit the information that must be provided or impose conditions on its release.

The CCAA now contains an additional mechanism whereby an interested party can apply for court-ordered disclosure of another party's economic interest in the debtor company on any terms that the court considers appropriate.[35] The court must consider whether the monitor approved the proposed disclosure, whether the disclosed information would enhance the prospects of a viable compromise or arrangement, and whether any interested person would be materially prejudiced as a result of the disclosure.[36] "Economic interest" includes a claim, an eligible financial contract,[37] an option or a mortgage, hypothec, pledge, charge, lien or any other security interest and the consideration paid for any right or interest, and any other prescribed right or interest. This provision is meant to address informational asymmetries among the parties, and particularly to make CCAA proceedings more accessible for pensioners and workers.[38] To-date, however, it appears it has only been relied on by a monitor to require disclosure of a shareholder list.[39]

D. Individual Employment Contracts

CCAA

Employment relationships continue through CCAA proceedings. However, individual employee contracts may be "resiliated" or "disclaimed" (i.e., annulled) with no obligation to pay termination or severance pay (which normally become unsecured claims, as

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[34] *CCAA*, *supra* note 1, s 33(6); *BIA*, *supra* note 2, s 65.12(5).
[35] *CCAA*, *supra* note 1, s 11.9(1).
[36] *Ibid*, s 11.9(2).
[37] An "eligible financial contract" includes various kinds of derivatives agreements, securities agreements, and share agreements, including related loans, indemnities, and security interests in collateral, as prescribed by *Eligible Financial Contract Regulations (Companies' Creditors Arrangement Act)*, SOR/2007-257.
[38] Innovation, Science and Economic Development Canada, "Enhancing Retirement Security for Canadians (Consultation Document)" (22 November 2018), online: <www.ic.gc.ca/eic/site/116.nsf/eng/00001.html>; Senate, Standing Senate Committee on Banking, Trade and Commerce, Evidence, 42-1, No 56 (8 May 2019) (Mark Schaan), online: <sencanada.ca/en/Content/Sen/Committee/421/BANC/56ev-54778-e>.
[39] See *Accel Canada Holdings Limited*, 2020 ABQB 116.

addressed below).[40] The court will consider whether the monitor approved the proposed disclaimer or resiliation, whether it would enhance the prospects of a viable compromise or arrangement being made, and whether it would likely cause significant financial hardship to a party to the agreement.[41] The Ontario Superior Court of Justice (Commercial List) Model Initial CCAA Order, which is used as a default template by judges in most CCAA cases, states that the applicant is permitted to terminate or temporarily lay off such employees as it deems appropriate.[42]

As part of a restructuring, a debtor may seek court approval of a "Key Employee Retention Plan", including a charge on the debtor's assets to secure employee payments, to avoid departure of certain personnel deemed important to a successful restructuring process.[43]

BIA

In a BIA proposal, employment contracts may similarly be disclaimed or resiliated under conditions analogous to the CCAA.[44] Employees will have a super-priority charge for wage arrears from the last six months (see next section).

E. Wages

CCAA

The debtor must continue making payments for the ongoing provision of services by employees, since no stay order may prohibit a person from requiring immediate payment for services provided.[45] However, this is narrowly interpreted to apply only to post-filing services, rather than obligations arising post-filing that are in substance related to pre-

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[40] *CCAA*, *supra* note 1, s 32(1).
[41] *Ibid*, s 32(4).
[42] Model Initial CCAA Order, s 11(b), online: Superior Court of Justice <www.ontariocourts.ca/scj/practice/practice-directions/toronto/#Commercial_List_Forms_including_Model_Orders>. Model orders are developed and approved by the Commercial List Users' Committee.
[43] See e.g. *Target Canada Co.,* 2015 ONSC 303 at para 57; Michael Nowina & Gillian Maharaj, "Key Employee Retention Plans in Canadian Restructuring Proceedings", Case Comment on *Aralez Pharmaceuticals Inc.* (2019) 34 BFLR 491.
[44] *BIA*, *supra* note 2, s 65.11(1), (5).
[45] *CCAA*, *supra* note 1, s 11.01(a).

filing services (such as severance pay, which are unsecured claims stayed during a CCAA proceeding). The key consideration is whether the employee performed services after the date of the initial order to which the payment relates.[46] A court may temporarily stay other required payments under a collective agreement, since this is considered a suspension rather than extinction of the employer's obligation.[47]

The federal WEPP, which creates a super-priority claim for certain unpaid employee wages in a bankruptcy or receivership, has now been extended to apply to CCAA liquidating restructurings.[48] It now applies to wage arrears in the six-month period before the date of initial CCAA filing (or filing of a BIA NOI), rather than the six months before filing a plan or proposal. Interestingly, this could create a discrepancy where employees who are laid off as part of a successful plan or proposal receive less than those terminated in a liquidation.[49]

BIA

The BIA provides employees with a super-priority charge for wages in arrears for the last six months before the appointment of a receiver or initial bankruptcy event, excluding termination and severance pay, up to $2,000 each.[50]

The *WEPPA* establishes a federal program through which employees entitled to claim a priority for unpaid wages are compensated directly by Service Canada.[51] The government is "subrogated" to the rights of the unpaid employee for amounts paid under this program, meaning they receive a priority claim against the current assets of the debtor company in

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[46] *Nortel Networks Corp.*, [2009] OJ No 2558, (Ont SCJ) [*Nortel*]; *AbitibiBowater Inc.*, 2009 QCCS 2028; *Windsor Machine & Stamping Ltd.*, [2009] OJ No 3196 (Ont SCJ).
[47] *Nortel*, *ibid*. See also *Fraser Papers Inc.*, [2009] OJ No 3188 (Ont SCJ).
[48] *Budget Implementation Act, 2018, No. 2*, SC 2018, c 27, Division 16. These changes come into force on November 20, 2021: see Canada Gazette, Part I, Volume 154, Number 48: Regulations Amending the Wage Earner Protection Program Regulations, online: <canadagazette.gc.ca/rp-pr/p1/2020/2020-11-28/html/reg1-eng.html>.
[49] See Allan Nackan, "Changes to the Wage Earners Protection Program Act" (12 March 2019), online: <farbergroup.com/articles/weppa-changes/>.
[50] *BIA*, *supra* note 2, ss 81.3–81.4.
[51] *Wage Earner Protection Program Act*, SC 2005, c 47 [*WEPPA*].

the amount of the compensation actually paid out, to a maximum of $2,000 per employee. Any balance over $2,000 does not have priority over secured creditors.

While termination and severance pay are expressly excluded from the super-priority claim under the BIA, it may be claimed by employees under the federal WEPP up to the maximum amount payable under that program.[52] In addition, WEPP payments can now be calculated from the date a NOI is filed, rather than only a final proposal. "Wages" has been interpreted broadly to include payments made by an employer on behalf of employees to a third party for the benefit of the employees which formed part of their remuneration, at least where these payments are covered under an employment contract or collective agreement.[53] This would include contributions to long-term disability plans and union dues.

The maximum WEPP payment amount to an employee who has a valid claim was recently increased to approximately $7,000. The WEPP measures the amount payable in relation to the amount of insurable earnings under the Employment Insurance scheme.[54] (The maximum super-priority charge has remained capped at $2,000.)

In general, all other employee claims for unpaid wages, including termination and severance pay or common law notice, are unsecured claims to be paid on a *pro rata* basis only once priority claims and secured creditors are paid in full.[55] This means that employees will receive a portion of the remaining assets (if any) equivalent to the percentage value of their claim among all remaining unsecured debts.

F. Pensions & Benefits

Pension claims against a debtor company come in two types: current amounts owed to a pension fund to pay for benefits, called "current service costs," and amounts owed to a

[52] *Ibid*, s. 2(1), "eligible wages".
[53] *Ted Leroy Trucking Ltd. v Century Services Inc.*, 2010 BCCA 223, leave to appeal refused, [2010] SCCA No 259.
[54] *WEPPA*, *supra* note 51, s 7(1).
[55] *BIA*, *supra* note 2, s 136(3).

fund to pay for any unexpected deficit in the plan, called “special payments.” As a practical matter, special payments can be very large amounts—much larger than current service costs—and in some cases, are the largest unsecured claims of a company.

CCAA

In a CCAA filing, ongoing special payments and arrears are typically suspended and a company is only required to continue making regular (i.e., current service cost) payments. Like with wages, post-filing service and normal cost contributions are distinguished from past service and special contributions that relate to pre-filing services. For example, in the Laurentian University case the court granted a stay of both pre- and post-filing special payments to the defined benefit pension plan.[56] In addition, the continued application of collective agreements has been held to apply only to employees who continue to work, rather than retirees.[57] The Supreme Court of Canada has also held that interim lenders have priority for repayment over pensioners.[58]

BIA

The BIA creates a super-priority charge in bankruptcy for pension amounts deducted and not remitted and for unpaid regular (i.e., current service cost) payments.[59] This does not extend to special payments or the underfunded liability itself.

G. Plans of Arrangement & Proposals

CCAA

The claims of both secured and unsecured creditors may be compromised in a plan. However, a court may not sanction a plan of arrangement or compromise unless it requires the immediate payment of all amounts that employees or former employees would have been entitled to had the company become bankrupt under the BIA, as well

[56] *Laurentian University of Sudbury*, 2021 ONSC 1098 at para 21.
[57] *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 2590.
[58] *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6.
[59] *BIA*, *supra* note 2, ss 81.5–81.6.

as wages, salaries, commissions, or compensation for services rendered after CCAA proceedings commenced and before the court sanctioned the compromise or arrangement.[60]

Similarly, the plan must require payment of the following pension amounts outstanding as of the sanction hearing date: [61]

- contributions deducted from employees' remuneration but not remitted to the pension fund;
- contributions owed by an employer for the normal cost of benefits offered under the pension plan, excluding amounts payable to reduce an unfunded pension liability;
- contributions owed by an employer to the fund under a defined contribution plan; and
- contributions owed by an employer to the administrator of a pooled registered pension plan.

Alternatively, a court may approve a plan that does not include all these amounts if the parties and the relevant pension regulator have entered into an agreement for payment of the amounts.[62]

The CCAA requires Crown approval of any plan that does not provide for the payment, within six months, of all amounts owed to the Crown in respect of employee source deductions (e.g. income tax deductions, Canada Pension Plan and Employment Insurance premiums).[63]

[60] *CCAA*, *supra* note 1, s 6(5).
[61] *Ibid*, s 6(6).
[62] *Ibid*, s 6(7).
[63] *Ibid*, s 6(3).

BIA

Following court approval of a proposal, the debtor must pay out an amount equal to what employees would receive under the BIA if the employer had become bankrupt on the date of filing the NOI or proposal, plus wages, salaries, commissions, or compensation for services rendered after that date and before court approval.[64] There is an analogous requirement to the CCAA for Crown approval of proposals that do not include repayment of outstanding deduction amounts within six months of approval.[65] Super-priority charges for unpaid wages and pension amounts, as well as other unsecured employee claims, are addressed above.

H. Conclusion

Since every restructuring is fact-specific, it is difficult to conclude that either the CCAA or the BIA is more preferable for employees than the other. CCAA applications are necessarily brought by larger, more complex companies with greater liabilities, which require (or prefer) more time to restructure operations. These longer timeframes may create more uncertainty for employees. However, they may also offer more flexibility and negotiating room for workers with greater bargaining power (including unionized employees and “key personnel”) compared to the stricter timelines for a BIA proposal.

Both regimes provide similar stays of proceedings; treatment of collective agreements, employment contracts, wages, and pensions; and minimum requirements for employee payments as part a successful plan or arrangement or proposal. Under either process, an unsuccessful restructuring will likely lead to the employer entering bankruptcy and employee claims will rank behind most creditors except for the super-priority WEPP claim.

[64] *BIA*, *supra* note 2, ss 60(1.3)(a), 136(1)(d).
[65] *Ibid*, s 60(1.1).

Appendix D: Collective Agreement Financial Exigency Language

A. Exigency & Redundancy Language

This section excerpts the financial exigency and program redundancy terms from the Ryerson Faculty Association ("**RFA**") and Laurentian University Faculty Association ("**LUFA**") collective agreements. Both examples provide for relatively standard exigency and redundancy procedures, which we believe are consistent with other collective agreements across Canada, with slight variations. The RFA example is highlighted in part because it is more concise for the general reader. Financial exigency procedures are described in more detail in Chapter 6 of this report, "Restructuring Publicly Funded Universities in Ontario".

Ryerson University Faculty Association (RFA) (July 1, 2018 – June 30, 2020)

The most recent RFA collective agreement sets out a relatively standard process for declaring financial exigency or addressing program redundancy. In addition, there is a specific process for the School of Midwifery because of its different funding structure.[1]

ARTICLE 22 FINANCIAL EXIGENCY

A. PREAMBLE

1. The University and the Association agree that the primary goals of the University are teaching, scholarship and research, and that the first duty of the University is to ensure that its academic priorities remain paramount, particularly with regard to the quality of instruction and research and the preservation of academic freedom. Any reduction of faculty members for budgetary reasons shall occur only as a last resort during a state of financial exigency.

B. DEFINITION

[1] For another example of a differentiated approach to exigency for "self-funded" programs, see the Carleton University Academic Staff Association Collective Agreement (May 1, 2017 – April 30, 2021), Article 17.11, online (pdf): <carleton.ca/hr/wp-content/uploads/WEB-CUASA-2017-2021-CA.pdf>.

1. The term financial exigency is defined as substantial and recurring financial deficits in the total University operating budget which have occurred and are reasonably projected to continue, thereby placing the solvency of the University, as a whole, in serious jeopardy.

2. This Article is invoked only in the event of a declaration of financial exigency in which the layoff of faculty members is proposed as part of the resolution to the situation.

3. The expectation of short term deficits is not financial exigency.

4. The closure, cessation, merger or elimination, in full or in part, of an academic program, based on academic reasons, is not a financial exigency.

C. DECLARING A FINANCIAL EXIGENCY

1. In the event that the President decides that a financial exigency exists within the meaning of B.1. above, he/she shall forthwith give notice to the Association of such decision. At the date of such notice, a University wide hiring freeze shall be imposed and no new positions shall be created until the exigency has been resolved.

2. The President shall prepare a report specifying the precise nature of the problem facing the University. Such report shall contain the economies taken to date to support his/her conclusion, set out the reasons supporting the layoff of faculty members and disclose the number of faculty layoffs that are deemed necessary. The report shall also specify whether any program redundancies are being recommended as a solution to the problem.

3. A copy of this report shall be given, inter alia, to the Association.

4. The President shall, within ten days of giving notice to the Association, establish a Financial Exigency Committee to review all documentation which it deems relevant and decide whether or not a financial exigency exists.

D. THE FEC

1. The FEC shall be composed of five members who are independent of and external to the University. Two members shall be appointed by the University and two members shall be appointed by the Association. Together they shall attempt to agree on an independent Chair. If the other four members are unable to reach a majority decision on a Chair, the Chief Justice of Ontario shall be asked to make the appointment.

2. In the event program redundancies are proposed as part of the resolution of the financial exigency, there will be no separate Redundancy Committee created as contemplated in Article 23 as the FEC will undertake the review of the need for layoff of faculty members generated by such program redundancies.

3. The FEC shall determine its own terms of reference and decision making procedures which shall be consistent with generally recognized principles of natural justice.

4. All reasonable expenses of the FEC established under this Article shall be borne by the University.

5. The University shall cooperate with the FEC in its deliberations. The onus shall be on the University to establish to the satisfaction of the FEC that a financial exigency exists within the meaning of B.1. It shall provide all information that is related to the claimed financial exigency and/or is deemed relevant by the FEC. The Association is entitled to receive a copy of the material provided to the FEC by the University.

6. The FEC may consult with any person or groups it chooses and may consider oral and/or written submissions on the University's financial condition. It will also consult with, receive and carefully consider any input which the Senate may choose to provide regarding the proposed program redundancies.

7. The FEC shall consider, inter alia, and shall respond to each of the following:

    a) Whether the University's financial position (as evidenced from the total operating budget and not just from the academic or salary components thereof) constitutes a bona fide budgetary crisis as contemplated in B.1;

    b) Whether, in view of the primacy of academic goals in the university, the reduction of faculty members is a reasonable and justifiable way to effect a cost saving;

    c) Whether all reasonable means of achieving cost savings in all other areas of the university budget have been explored;

    d) Whether all reasonable means have been taken to reduce costs by reducing the number of faculty members by voluntary early retirement, voluntary resignation, voluntary transfers to reduced workload status and redeployment;

    e) Whether all reasonable means of improving the university's revenue position, including efforts to secure further assistance from the provincial Government have been explored and taken into account;

f) Whether enrollment projections are consistent with the proposed reduction in the number of faculty.

8. The FEC shall make its report within forty (40) days of its establishment. The report shall analyze both the extent and nature of the financial problems identified by the President, as well as the potential impact of the President's plan on the academic programs of the University. The Report shall also state whether the FEC finds that a state of financial exigency does or does not exist.

9. If the FEC finds that a state of financial exigency does not exist, no reductions of academic staff members for budgetary reasons may take place.

10. If the FEC finds that a state of financial exigency does exist, the FEC report shall recommend the amount of reduction required, if any, in the budgetary allocation to faculty members' salaries and benefits.

11. The FEC Report shall also specify the number of faculty member layoffs that may be required in order to address the financial exigency. If the number of layoffs specified by the FEC differs from the number proposed by the President, reasons for the difference will be provided.

E. BOARD OF GOVERNORS

1. The Board of Governors, through the President, has the responsibility for implementing Actions arising out of the FEC report.

2. It shall be open to both parties, notwithstanding any provisions to the contrary in the Agreement, to renegotiate provisions of this Agreement bearing directly on salaries and benefits or to reach other mutually acceptable emergency methods of reducing expenditures that could avert layoffs or decrease the number of layoffs.

3. If the parties do not reach agreement on measures to reduce salaries and benefits within seven (7) days of the FEC Report, the University may reduce the budgetary allocation for salaries and benefits for faculty members as permitted in the FEC Report. In no case shall this amount exceed the amount the FEC stipulated in D.10. above.

4. Layoff is an exceptional action which shall be taken only after the University has exhausted all reasonable means to alleviate the financial exigency by applying rigorous economies in all areas of the University's present and projected expenditures, by using all reasonable means of improving its income and by using all other means of making the necessary reductions in the employee groups in a manner which best maintains the academic viability of the University.

5. When a declaration of financial exigency has been confirmed, and no satisfactory provision can be made by the University for the continued employment of all faculty

members, a plan for reduction in the number of faculty members employed by the University shall be prepared by the President, the Provost and Vice-President, Academic and the ViceProvost, Faculty Affairs, in consultation with the Faculty Deans and Association President. The plan shall be structured so that the University may continue to operate as far as possible in accordance with its mission, and may propose vertical cuts (involving full or partial program redundancies as defined in Article 23), across the board cuts, or some combination of vertical and across the board cuts.

6. Any layoffs under this Article shall occur only to the extent necessary to alleviate the financial exigency and shall not exceed the number which may be specified by the FEC.

F. TIME LIMITS

1. Any time limits under this Article may be extended by agreement, in writing, between the parties. Such agreement may not be unreasonably withheld.

ARTICLE 23 REDUNDANCY

A. PREAMBLE

1. The University and the Association recognize the importance of sound academic planning in establishing or changing academic priorities.

2. No faculty member shall be laid off or subject to an involuntary transfer requiring retraining except in accordance with this Article or Article 22 (Financial Exigency).

B. DEFINITION

1. Program Redundancy refers only to the direct termination of an academic program by Senate that either leads to the layoff of faculty members or to the transfer of faculty members into academic units such that training will be required. It also refers to the reduction or restructuring of an academic program by Senate that leads to layoff of faculty members.

2. An academic program for these purposes consists of a group of courses offered by the University which may lead to a diploma, certificate or degree, a designated sub-discipline within a Department or Faculty or any combination of the above.

C. INVOKING PROGRAM REDUNDANCY

1. An academic program may be declared redundant by the University upon a recommendation from Senate to the Board of Governors, solely for bona fide academic reasons as outlined in C.2.

2. Bona fide academic reasons arise from concerns about academic quality within the program or within the University in the context of an exigency, academic relevance or enrolment. Senate may strike a subcommittee to determine whether bona fide academic reasons exist for the declaration of a program redundancy.

3. Upon such declaration, the University shall impose a halt to the hiring of new faculty members in the Department/School involved.

4. Following the declaration of a program redundancy, the University shall strike a Redundancy Committee (RC) as set out below.

D. THE REDUNDANCY COMMITTEE (RC)

1. The Redundancy Committee shall consist of three representatives appointed by the University, three members appointed by the Association and a Chair jointly selected by a majority of the appointees. If the appointees cannot agree on a Chair, he/she shall be chosen by lot from the nominees of each side.

2. All members of the RC shall be tenured faculty members at Ryerson. No senior academic administrator at the level of Dean or above, no person who belongs to the academic unit affected by the proposed redundancy and no person who participated in the preparation of the University's declaration of program redundancy may be nominated to or participate on the RC.

3. The RC shall meet within ten (10) days of being appointed and shall establish its own procedures.

4. The reasonable cost of the RC shall be borne by the University.

5. The University shall cooperate with the RC in its deliberations including providing full disclosure of available information that is pertinent to any proposed layoff or transfer of members.

6. The RC shall consult with all faculty members of the academic unit declared redundant who wish to be heard, either individually, in groups or through the Association. Generally, the RC may consult as broadly as it deems necessary in order to arrive at its recommendations to the University.

E. MANDATE OF THE RC

1. Within forty-five (45) days of being struck, the RC shall prepare a report which shall:

a) Assess the extent and nature of the impact that the program closure(s) will have upon the other academic programs at the University;

b) Recommend how to implement the program redundancy, including transfers or layoffs in the least disruptive manner;

c) Recommend specific implementation strategy in respect of each faculty member affected either by a transfer to another academic unit, or layoff of a faculty member.

2. The report shall be submitted to the President, Provost and Vice-President, Academic, Vice-Provost, Faculty Affairs and the Association President.

F. IMPLEMENTATION

1. If the Report of the RC specifies that layoff of faculty members is necessary as a result of Program Redundancy, the University shall, within thirty (30) working days prepare a detailed plan that it proposes to take. The Plan shall be in accordance with the collective agreement, shall affect faculty members' terms and conditions of employment only to the extent necessary to alleviate the academic problem identified hereunder and shall be based on sound academic reasons. The plan shall include:

   a) a list of faculty members affected by the redundancy;

   b) a list of the faculty members who are to be laid off and timelines for the layoffs;

   c) a list of academic and administrative positions to which each member could be transferred, either without training or following a training period of not more than two (2) years, considering his/her academic and professional qualifications and his/her work experience;

   d) a list of all options other than layoff, including but not limited to accelerated or partial sabbatical leaves, voluntary early retirement, voluntary resignation, voluntary transfer to Reduced Workload status and redeployment.

2. In the event the University chooses not to accept one or more of the recommendations contained in the RC Report because it believes other steps could be taken with less impact on the faculty members, reasons for not accepting the recommendations must be presented in writing to the RC and to the Association President.

3. A copy of the University's Plan shall be presented to the Association which shall have twenty-one (21) working days to make written comments thereon.

4. Within a further ten (10) working days following receipt of the comments from the Association, the University shall prepare a final plan of action and provide a copy to the Association. If the University position rejects advice given in the comments from the Association, written reasons for rejecting that advice shall be included in

the final detailed plan. If the University Plan proposes an implementation decision which is different from that of the RC or the Association's advice, then that decision may be the subject of a grievance by any affected faculty member to determine whether or not it meets the requirements of sub Article H.1. below.

G. TIME LIMITS

1. Any time limits under this Article may be extended by agreement of the parties in writing. Such agreement may not be unreasonably denied.

H. GENERAL

1. Given the academic nature of the University, the RC, the Senate and the President shall act to protect the primacy of the academic work of the University. Thus, prior to effecting any layoffs, the University shall make every effort to offer each faculty member in the redundant program a transfer to another department or school to an unfilled complement position for which the faculty member is academically qualified or could become qualified with a maximum of two (2) years of retraining.

2. A faculty member who is offered a transfer under H.1. shall have fifteen (15) working days to accept or reject that offer. If the faculty member accepts a transfer to another academic unit, he/she shall retain rank, base salary, benefits and seniority. If a faculty member chooses not to accept the transfer, or if the University cannot offer such a position, then the faculty member will be laid off in accordance with the Layoff Article.
[…]

ARTICLE 17 MIDWIFERY FACULTY

17.8 REDUNDANCY AND LAY-OFF

A. Redundancy and Lay-Off

1. The provisions of Article 22 (Financial Exigency), Article 23 (Redundancy), and Article 24 (Layoffs), shall apply to Midwifery faculty except in the event that the government funding is withdrawn, in whole or in part, from Ryerson University as it relates to the funding of the Midwifery Program. In such an event, the Midwifery Program shall be closed or reduced at the sole discretion of the University.

2. Further to paragraph 1 above, in cases where the government funding is withdrawn, in whole or in part, from Ryerson as it relates to the funding of the Midwifery Program, and the University decides to close or reduce the Midwifery Program, and such action results in layoffs of affected Midwifery Faculty it is understood that such layoffs are not as a result of a confirmed financial exigency or a Program Redundancy. Therefore, in such cases, the provisions of Article 22 (Financial Exigency), and Article 23 (Redundancy) of the Collective Agreement do

not apply. In such cases, only the notice, severance, recall rights and benefits during recall' provisions found in Article 24 (Layoffs), shall apply to affected Midwifery Faculty.
[…]

Article 24 Layoffs

[…]

C. SEVERANCE

1. In addition to any paid notice period or pay in lieu of notice, a faculty member who is laid off under a confirmed financial exigency or a program redundancy shall be entitled to the following:

   a) one (1) month's pay for each year or partial year of service at the time of layoff for pre-tenure faculty members;

   b) one (1) month's pay for each year or partial year of service at the time of layoff, with a minimum total amount of nine (9) months' salary and a maximum total amount of twenty-four (24) months' salary, for tenured faculty members.

Laurentian University Faculty Association (LUFA) (July 1, 2017 – June 30, 2020)

The previous LUFA collective agreement also set out a relatively standard process for declaring financial exigency or addressing program redundancy.

REDUNDANCY AND FINANCIAL EXIGENCY

ARTICLE 10.10 – REDUNDANCY

10.10.1 For the purposes of this Article, the declaration of a state of redundancy by the Employer shall mean that the number of Members employed in a particular Department/School(s) must be reduced. The Employer agrees that no procedures other than those specified in this Article will be used to deal with redundancies as defined in Article 10.10.3 below. It is understood that the term redundancy does not apply to limited term appointments that carry no implication of renewal or continuation beyond the stated term in accordance with Article 5.20 – Appointment and Renewal.

10.10.2 The Employer shall declare a state of redundancy by sending a written notice to the Union and to the Vice-President, Academic and Provost that it has approved a resolution for one of the reasons outlined in Article 10.10.3 below. With this notice, the Employer shall submit a detailed report specifying the reasons why the redundancy is justified and the exact magnitude of the reduction believed to be necessary.

10.10.3 A declaration of redundancy by the Employer may be initiated in one of two (2) ways:

(a) Senate may resolve to terminate a Faculty, Department/School or program for reasons other than Financial Exigency. For the purpose of this Article, a program is defined as a course of study previously approved by the Senate and leading to a degree or a diploma. Should the program involve more than one Faculty or Department/School, the plural should be understood in the following Articles. If the Employer resolves to approve Senate's decision, then a program redundancy shall be declared.

(b) The Vice-President, Academic and Provost may make a submission to the Employer that a particular Department(s)/School(s) has (have) a larger number of Members than necessary to fulfil its (their) program and service teaching requirements in the light of student demand. Such a redundancy shall be known as a workload redundancy. The Employer agrees that it will not declare a workload redundancy if such an action will result in insufficient academic personnel for that Department(s)/School(s) to continue to offer a viable program(s). The onus shall be on the Employer to show that the proposed reductions are consistent with normal workloads as defined in Article 5.40 – Academic Workload and that the proposed reductions will not create an inequitable workload for the Department(s)/School(s) affected by the redundancies.

10.10.4 Redundancies may be justified only for bona fide academic reasons and/or on the grounds of insufficient student demand. When insufficient student demand is used as a justification, such lack of demand must be demonstrable over a period of at least three (3) years and projections into the future must not indicate any appreciable increase in this student demand.

10.10.5 As a result of the Employer's declaration, a Redundancy Committee shall be formed. This Committee shall hold its first meeting within fifteen (15) days of receipt by the Union of the Employer's notice as specified in Article 10.10.2 hereof. Within ten (10) days of receipt of that notice, the Union shall forward to the Vice-President, Academic and Provost the names of three (3) Members who shall serve on the Redundancy Committee.

10.10.6 The Redundancy Committee shall include the following:

(a) Three (3) Members chosen by the Union,

(b) Three (3) individuals named by the Employer,

(c) The Vice-President, Academic and Provost as non-voting Chair.

10.10.7 Within sixty (60) days of its first meeting, the Redundancy Committee shall make its final report to the Employer (with a copy to the Union). The Employer shall make no

new academic or administrative appointments nor shall the Employer order the reduction or redistribution of the actual number of full-time Members of the Bargaining Unit, until the Redundancy Committee has made its final report or until the time limit of sixty (60) days stated in this Article has expired, whichever comes first.

10.10.8 It shall be the responsibility of the Redundancy Committee in consultation with the Vice-President, Academic and Provost, the Dean/University Librarian and the Faculty/Library Personnel Committee to recommend who, among the Members of the Department(s)/School(s) under consideration, shall be affected by redundancy.

10.10.9 Keeping in mind that the continuing academic function assigned to the Department/School is of the highest priority, the Redundancy Committee shall consider the following steps in the following order:

(a) Non-renewal of limited term appointments within the Department/School.

(b) Non-renewal of two (2) year probationary contracts within the Department/School.

(c) Non-renewal of contracts of Members within the Department/School on three (3) year probationary contracts.

(d) Removal of a tenured Member from the Department/School.

10.10.10 If the Redundancy Committee decides that Members with tenure, or on a three (3) year probationary contract will be affected by Redundancy pursuant to Article 10.10.9 hereof, it shall include, in its final recommendation to the Employer, a list of administrative and academic areas to which the Members could be transferred, with or without a year's retraining, considering their academic and professional qualifications.

10.10.11 If the Employer approves a resolution to act on the Redundancy Committee's recommendation that a Member be declared redundant, then the Employer shall send the Member a written notice of its resolution. This notice shall also contain an offer to the tenured Member of the following options:

(a) Voluntary early retirement if the Member is age fifty-five (55) or more.

(b) Transfer in whole or in part to another Department/School for which the Member is academically qualified or could become qualified with a year's retraining if the transfer can be effected by one (1) of the following means:

(i) Filling a vacancy

(ii) Non-renewal of a limited term contract

(iii) Non-renewal of a two (2) year probationary contract

(iv) Non-renewal of contract of Members on three (3) year probationary contract in the Department/School to which the tenured Member is to be transferred.

(c) Transfer to an appropriate administrative vacancy in the University.

(d) Termination of employment with severance pay. (e) Any other alternative that may be implemented in the future with the mutual consent of the two Parties.

Any of the above options shall be implemented in accordance with the terms of this Article. All proposed transfers to another Department/School must have the approval of the Vice-President, Academic and Provost. If the offer is to transfer one (1) component of the Member's workload (this component restricted to either teaching or research) to another academic area, such offer shall include a statement of the duties of that Member and a method of weighing the Member's evaluation for merit based on these special arrangements. If the Employer cannot offer at least one (1) of paragraphs 10.10.11 (b) or (c) above, it shall offer to keep the Members in their present position until such time as it can offer them one (1) of paragraphs 10.10.11 (b) or (c) above unless Article 10.10.16 below applies.

10.10.12 Notwithstanding Article 5.20 – Appointment and Renewal, Members with a two (2) year, initial probationary appointment can be refused the second probationary appointment for reasons of redundancy in accordance with Articles 10.10.9 or 10.10.11 above. In such instances, the Members shall receive notice by December 15 of the academic year in which their contract comes up for renewal. A written notice of non-renewal shall be sent to the Members in which redundancy shall be clearly stated as the reason for non-renewal.

10.10.13 Notwithstanding Article 5.20 – Appointment and Renewal and Article 5.60 – Tenure Evaluation Procedures, Members who are on a three (3) year probationary appointment can be refused a renewal of their appointment and/or tenure for reasons of redundancy in accordance with Articles 10.10.9 or 10.10.11 above. In such instances, the Members shall receive notice by December 15 of the academic year in which their contract comes up for renewal. A written notice shall be sent to the Members in which redundancy shall be clearly stated as the reason for non-renewal and/or refusal to grant tenure. They shall be given severance pay in accordance with Article 10.10.18 hereof as well as recall rights in accordance with Article 10.10.18 below.

10.10.14 Tenured Members who accept a transfer to another academic area in whole or in part, shall retain their rank as well as all preexisting employment rights. If such a transfer requires retraining, the Members shall be granted leave to a maximum of one (1) year at one hundred percent (100%) salary plus benefits. Any tuition fees connected with the retraining shall be paid by the University.

10.10.15 Tenured Members who accept a transfer to an administrative position in accordance with Article10.10.11 (c) hereof cease to be Members of the Bargaining Unit on the date that the transfer becomes effective. Members transferred to an administrative

position shall not be dismissed for a period of five (5) years for reasons other than just cause and shall retain for this period the full rights of Members of this Union, to grieve dismissal for cause. Such Members shall not have their pay decreased as a result of the transfer but they shall receive only the basic percentage increase to salary scale and no increments until the normal salary level for their administrative position has reached their own. For a period of five (5) years from the date of their appointment to the administrative position, the Members shall have first right of refusal of any academic vacancy within Laurentian for which they are judged by the Vice-President, Academic and Provost to be academically competent.

10.10.16 Where a redundancy results from the termination of a program as per Article10.10.3 (a) above and when all transfer provisions have been exhausted, the Employer may layoff a tenured Member provided that those Members who are at least forty-five (45) years of age, have tenure and in respect of whom the sum of years of seniority from the effective date of tenure plus age equals fifty-five (55) shall be exempt from lay-off.

Costs associated with any arbitration arising out of lay-off shall be distributed in accordance with Article 11.15 – Arbitration Procedure. The usual burden of proof shall apply.

10.10.17 Groups and/or individuals who are selected for redundancy may grieve their selection (under Article 11.10 – Grievance Procedure) on the grounds of bias or procedural error, as well as on the grounds that the criteria for selection have been applied in a manner which is discriminatory or is in bad faith. This right to grieve includes the right to challenge the validity of the redundancy but not the right to challenge the Employer's authority to initiate Redundancy procedures.

Tenured Members who wish to remain in the employ of the University and who have been offered transfer but do not wish to accept the offer must grieve this transfer within thirty (30) days of receipt of the offer. If the Arbitration Board concludes that the Members' refusal is well founded, the Members retain their original positions. If the Arbitration Board concludes that the Members' refusal are not well founded or that another suitable transfer is available, then the Members must accept the transfer within thirty (30) days of receiving a copy of the decision or else the Members' employment shall be terminated. The effective date of notice shall be the date that the arbitrator's report is received by the Members. The Members shall retain recall and notice of termination rights but shall lose their rights to all severance payments and benefits.

10.10.18 All Members who are on tenured or three (3) year probationary appointments, and whose appointments are terminated pursuant to this Article shall have rights as set out hereafter:

(a) (i) Twelve (12) months' notice in writing or any equivalent combination of notice plus salary followed by

(ii) Six (6) months' salary plus one (1) month's salary for each year as a full-time employee provided that no Member on a three (3) year probationary appointment receives less than nine (9) months' salary and no tenured Member receives less than eighteen (18) months' salary.

All payments under this Article shall be based on the Members' total regular salary including the University's contribution to pension and other benefit plans for their final full academic year of service at the University. In no case shall the number of months' salary paid under this Article exceed the time remaining until the normal retirement age of the Member.

(b) First right of refusal of all academic vacancies within Laurentian University, for which they have academic competence as judged by the VicePresident, Academic and Provost in consultation with the Department/School to which the individual is to be appointed for a period of three (3) years for a Member on a three (3) year probationary appointment and five (5) years for a tenured Member from the effective date of termination. Individuals who accept such positions shall return to the University at the rank they held when their appointments were terminated, with full recognition for years of service at Laurentian. Disputes arising out of these recall procedures are referable to the grievance and arbitration process set out in this Collective Agreement.

Individuals who are recalled pursuant to this Article shall have up to thirty (30) days to accept such recall offer, and shall terminate their alternative employment and take up the offered post, as soon as they are contractually able to do so but in no instance later than six (6) months after accepting the recall offer.

(c) Reasonable efforts by the Employer to assist a laid-off Member in obtaining suitable alternative employment including the use of professional assistance as well as access to University resources.

(d) Reasonable access to library, laboratory and computer facilities subject to the agreement of the Dean/University Librarian concerned until suitable alternative employment is secured or for three (3) years in the case of a Member on a three (3) year probationary appointment or for five (5) years in the case of a tenured Member if suitable alternative employment has not been secured.

(e) Eligibility for themselves and their dependants for exemption from tuition and Physical Education fees until suitable alternative employment is secured or for three (3) years in the case of a Member on a three (3) year probationary appointment or for five (5) years in the case of a tenured Member if suitable alternative employment has not been secured.

10.10.19 Nothing in this Article shall limit the total amount of severance benefits that a tenured Member might privately negotiate with the Employer.

10.10.20 All grievances submitted under the terms of this Article shall go directly to arbitration in accordance with Article 11.15 – Arbitration Procedure. Unless stated otherwise in this Article, within fifteen (15) days of receipt of the written notice containing the decision which the Members wish to grieve, the Members must give notice in writing to the Employer of their intention to submit that decision to Arbitration.

Note: Master Lecturers with permanency will be treated in the same category as tenured faculty and Master Lecturers without permanency shall be treated in the same category as probationary faculty.

ARTICLE 10.15 – FINANCIAL EXIGENCY

10.15.1 The Board of Governors and the Union agree that the first duty of the University is to ensure that its academic priorities remain paramount, particularly with regard to the quality of instruction, library service and research, and the preservation of academic freedom.

10.15.2 For the purposes of this Article, Financial Exigency shall be defined as substantial and recurring deficits, which threaten the long-term solvency of the University as a whole.

10.15.3 Reductions in academic staff for reasons of financial exigency shall occur only in extraordinary circumstances, and only then after efforts to alleviate the financial crisis by economies in all other segments of the budget have been undertaken and after all reasonable means of improving the University's revenues have been exhausted.

10.15.4 Members may be laid off in accordance with this Article only in the event that a state of financial exigency has been both declared and confirmed pursuant to the procedures contained in this Article.

10.15.5 In the event that the Employer considers that a financial exigency exists, within the meaning of Article 10.15.2 above, it may give notice of such a belief. As of the date of such notice the procedures specified in this Article shall apply, and no new appointments may be made to either the academic or administrative staff complement.

10.15.6 Within two (2) days of giving notice of its belief that a financial exigency exists, the Board of Governors shall forward to the Union all financial documentation relevant to the alleged state of financial exigency

10.15.7 Within fifteen (15) days of the notice specified in Article 10.15.5 above, the Parties shall establish a Financial Commission which will consider the alleged financial exigency and either (a) confirm it (under whatever conditions it chooses to impose) or (b) reject it.

10.15.8 The Financial Commission shall be chosen as is an Arbitration Board per Article 11.15 – Arbitration Procedure. It is agreed that in this instance no Member of the Financial Commission shall be a government official, and the Minister of Labour, if requested to appoint a Chair, shall choose a person who is not in the employ of a government.

Decisions of the Financial Commission under this Article shall be final and binding on all Parties. In this regard the Financial Commission shall be deemed to be an Arbitration Board.

10.15.9 The onus of proof shall be on the Employer to establish to the satisfaction of the Financial Commission that a state of financial exigency exists within the meaning of this Article.

10.15.10 Within seven (7) days of the choice of a Chair, the Financial Commission shall meet and invite and consider submissions on the University's financial condition. Inter alia it shall consider:

(a) Whether the University's financial position (as evidenced from the total budget and not just the academic or salary components thereof) constitutes a bona fide budgetary crisis such that deficits projected by generally accepted accounting principles are expected to continue for more than two (2) fiscal years;

(b) Whether in view of the primacy of academic goals at the University the reduction of academic staff is a reasonable type of cost saving;

(c) Whether all reasonable means of achieving cost-saving in other areas of the University budget have been explored and exhausted;

(d) Whether all reasonable means of improving the University's revenue position have been explored and exhausted;

(e) Whether every effort has been made to secure further assistance from the provincial government;

(f) Whether enrolment projections are consistent with a proposed reduction in the academic staff complement;

(g) Whether all means of reducing the academic staff complement including voluntary early retirement, voluntary resignation, voluntary reduced workload, voluntary redeployment and leaves, etc. have been exhausted, and

(h) Whatever other matters it considers relevant.

10.15.11 The Financial Commission will normally be expected to hand down its Report and deliver a copy to the Employer and to the Union within sixty (60) days of its first meeting. If the Commission finds that a state of financial exigency does not exist, no reductions of academic staff for reasons of financial exigency may take place. If the Commission finds that a financial exigency does exist, its Report shall specify the amount of reduction required, if any, in the budgetary allocation to salary and benefits for Members of the Bargaining Unit. Any reduction in the budgetary allocation for academic salaries and benefits may be made conditional upon the further exploration of alternative

cost saving measures by the University, and the Commission shall remain seized of its jurisdiction in this matter pending the satisfactory exhaustion of all such specified alternatives. Within five (5) days of receipt of the Report of the Financial Commission, the Parties shall meet and confer with respect to its implications.

10.15.12 Pursuant to the ruling of the Financial Commission, the Board of Governors may reduce the budgetary allocation for salaries and benefits of Members of the Bargaining Unit but such reduction shall not exceed the amount of the reduction specified by the Commission. The decision of the Board of Governors shall be taken and written notice thereof sent to the Financial Commission within two (2) weeks of receipt of the notice mentioned in Article 10.15.11 above.

10.15.13 Within twenty (20) days the Financial Commission shall apportion among the Faculties, Library and similar units, the reduction in the budgetary allocation for salaries and benefits of the Members of the Bargaining Unit. Whenever possible, such reductions will be divided in a proportionate amount among the Faculties and Library within the University unless there is a clear and substantial reason for doing otherwise.

10.15.14 Within thirty (30) days, the Faculties/Library through their respective Faculty/Library Councils shall apportion the budgetary reduction among the Departments/Schools within the Faculty/Library and determine which among its Members are to be laid off. Whenever possible such reductions will be divided among the units within a Faculty/Library in a proportionate amount unless there is a clear and substantial reason for doing otherwise.

10.15.15 The principal criteria in the termination/lay-off of Members within a Department, School or similar unit shall be:

(a) The possession of qualifications suitable for the continuing function of the Faculty, School, Department or Library.

(b) Quality of performance in teaching and research or scholarly activity where applicable.

(c) The possession of qualifications suitable for transfer with or without retraining to another academic or administrative position within the University.

(d) Contributions to the wider community.

10.15.16 Within a Department/School, a tenured Member shall not be terminated in preference to a non-tenured Member. For tenured Members, the more senior Member, in terms of service determined from the date at which tenure at the University became effective shall be retained unless, after applying the above criteria, there is a clear and substantial reason for doing otherwise.

10.15.17 Those Members who are at least forty (40) years of age, have tenure and in respect of whom the sum of years of seniority from the effective date of tenure plus age equals at least fifty-five (55) shall be exempt from lay-off until all other academic staff within the Faculty/Library and not included in this category have been laid off.

10.15.18 Should the Faculty/Library Council fail to determine within thirty (30) days who among its Members is to be laid off, it shall be the responsibility of the Deans/University Librarian to apportion the budgetary reduction within their Faculty/Library. Should the Deans/University Librarian fail to make such a decision within seven (7) days, the Financial Commission shall make the apportionment of the budgetary reduction.

10.15.19 Members who are selected for lay-off under this Article shall be provided with written notice of the reasons for their selection. Layoffs under this Article shall not be treated or recorded as dismissals for cause.

10.15.20 After the selection of the Members who are to be laid off, but prior to the implementation of such lay-offs, the Employer shall make every reasonable effort to secure positions elsewhere in the University, including administrative positions, for those Members who are to be laid-off. Members who accept alternative academic employment retain all pre-existing employment rights, including credit for sabbaticals, salaries and pensions. Members who accept alternative employment shall be given the opportunity to retrain for a period of up to one (1) year for their new duties. The Employer shall pay any related tuition fees and full salary to the Member during this retraining period.

10.15.21 Groups and/or individuals who are selected for lay-off by a Faculty/Library Council or Dean/University Librarian, may grieve their selection under Article 11.10 – Grievance Procedure and Article 11.15 – Arbitration Procedure on the ground of bias or procedural error, as well as on the grounds that the criteria for lay-off have been applied in a manner that is discriminatory or is in bad faith. The right to grieve does not include the right to challenge the validity of the financial exigency.

10.15.22 All tenured and probationary Members whose appointments are terminated pursuant to this Article shall have rights as set out hereafter:

(a) (i) The University shall be obliged to offer twelve (12) months’ notice or twelve (12) months' salary in lieu of notice followed by;

(ii) One (1) month's salary for each year as a full-time employee provided that no tenured Member shall receive less than twelve (12) month's salary.

All payments under this Article shall be based on the Members' total salary including the University's contribution to pension and other benefit plans for their final full academic year of service at the University. In no case shall the number of months' salary paid under this Article exceed the time remaining until the normal retirement age of the Member.

(b) First right of refusal of all academic vacancies within Laurentian University, for which they have academic competence as judged by the Vice President, Academic and Provost in consultation with the Department/School to which the individual is to be appointed for a period of three (3) years from the effective date of termination.

Individuals who accept such positions shall return to the University at the rank they held when they were laid off, with full recognition for years of service at Laurentian. Disputes arising out of these recall procedures are referable to the Grievance and Arbitration process set out in this Collective Agreement. Individuals who are recalled pursuant to this Article shall have up to thirty (30) days to accept such recall offer, and shall terminate their alternative employment and take up the offered post, as soon as they are contractually able to do so but in no instance later than six (6) months after accepting the recall offer.

(c) Reasonable efforts by the Employer to assist a laid-off Member in obtaining alternative employment including the use of professional assistance as well as access to University resources.

(d) Reasonable access to Library, laboratory and computer facilities subject to the agreement of the Dean/University Librarian concerned until suitable alternative employment is secured or for three (3) years whichever is less.

(e) Eligibility for themselves and their dependants for exemption from tuition and Physical Education fees until suitable alternative employment is secured or for three (3) years, whichever is less.

10.15.23 Notice of academic vacancies shall be deemed to be good and sufficient if they are sent by the Board of Governors to the Member's last known address with a copy to the Union. Any Member who fails to reply within thirty (30) days or who refuses a permanent position offered under this Article shall lose all rights of recall.

10.15.24 A Member accepting a permanent position at Laurentian University will no longer receive severance pay.

10.15.25 Any vacancy that occurs and that cannot be filled through the recall procedures in this Article will be filled in accordance with the normal hiring practices.

10.15.26 Tenured Members, whose appointments are terminated while they are on leave as in Article 3.2, shall have the same rights as other tenured Members in accordance with the terms of this Article.

10.15.27 Laid off Members who are recalled shall repay any portion of the allowance specified in Article 10.15.22 above which exceeds their entitlement had they continued to occupy their normal position.

10.15.28 The cost of the Financial Commission established under this Article shall be borne by the Employer.

B. Other Restructuring-Related Language

This section excerpts additional exigency and redundancy-related terms from the York University Faculty Association ("**YUFA**") and University of Western Ontario Faculty Association ("**UWOFA**") collective agreements. Such language may be helpful for ensuring advance notice of restructuring plans (YUFA), further limiting when exigency can apply (YUFA), or protecting jobs in a confirmed exigency situation (UWOFA).

York University Faculty Association (YUFA) (May 1, 2018 – April 30, 2021)

The YUFA collective agreement, Article 18 (Terms and Conditions of Employment) contains additional notice requirements that the university must meet in advance of undertaking any academic planning or restructuring decisions (emphasis added).

> **Restructuring and Redeployment**
>
> 18.28. The parties recognize the importance of effective academic planning in maintaining the well-being of the University. In exercising its role in the academic planning process, in particular through its decisions concerning the disposition of the University's resources, the Employer shall respect the role of Senate in academic matters and shall also make reasonable efforts to ensure that all planning proposals are in conformity with the provisions of this Agreement. Further, in conformity with the collegial role in academic planning, the Employer shall inform academic units as early as possible of any proposal that would affect them, and shall provide academic units with reasonable opportunity to participate in the planning process.
>
> 18.29 Before implementation, proposals for significant academic restructuring of Faculties, units, programs, and the use of redeployments shall be referred to the Joint Subcommittee on Long Range Planning.

Article 24 (Layoff for Reasons of Financial Necessity) contains a similar financial exigency process to the RFA and LUFA collective agreements. However, it sets a specific threshold

for bargaining unit salaries and expenditures as a percentage of the university budget, below which no lay-offs will be proposed (emphasis added).

> **Article 24 – Lay-off for Reason of Financial Necessity**
>
> 24.01 The parties acknowledge their joint responsibilities to work together in maintaining the University in a financially sound position. The Employer recognizes that full-time faculty members and professional librarians and archivists constitute the University's major academic strength, and that it has a responsibility to take all reasonable measures to forestall and prevent financial circumstances that would require the lay-off of employees. Employees, in turn, have a responsibility to show reasonable flexibility in assisting the Employer to meet the changing needs of the University and its changing financial circumstances.
>
> 24.02 The Employer undertakes that lay-off of employees will occur only in the event of, and only to the extent required by, a bona fide case of financial necessity which, by its gravity and the likelihood of its long-term continuation, threatens the fulfilment of the University's academic purpose, and which can be alleviated only by lay-offs. Specifically, it is agreed by the parties that lay-offs for reason of financial necessity will not be proposed if the bargaining unit salaries and fringe benefits budget, as defined in Appendix B, does not exceed 39.46% of the University's expenditures listed in Appendix B. A declaration of financial necessity and such lay-offs as may follow shall be subject to the procedures specified below in clauses 24.03 to 24.24 inclusive.

Western University Faculty Association (UWOFA) (July 1, 2018 – June 30, 2020)

While UWOFA's collective agreement contains a similar financial exigency process to other institutions, any layoffs are actioned across the whole unit rather than specific positions. A formula is used to calculate the number of lay-off "days" (i.e., a salary cut) that each faculty member will receive in order to preserve jobs.

> **FINANCIAL EMERGENCY**
> […]
>
> 8.5 If the Financial Commission determines that a Financial Emergency exists, its report shall specify the amount of annual reduction required in the budgetary allocation to salaries and benefits of Members over the period of Financial Emergency. The Employer may reduce the budgetary allocation for salaries and benefits of Members by laying off Members, but such reduction shall not exceed the amount of the reduction specified by the Financial Commission.

Implementation

9. The implementation of layoffs shall be supervised by a three-person subcommittee of the Joint Committee on Implementation: one chosen by the Employer, one chosen by the Association and a Chair chosen by the other two subcommittee members. The subcommittee shall verify that layoffs are consistent with the principles set out in this Clause before they are implemented.

9.1 Subject to Clause 9.2, Members shall be laid off across the Bargaining Unit regardless of discipline, rank, tenure status, Appointment status, length of service or performance.

9.2 The number of days of layoff shall be determined as follows:

a) a Nominal Annual Salary (NAS) shall be determined for each Member. For Members holding a Full-Time Appointment, the NAS shall be the regular annual salary on the date the Financial Emergency was verified. For other Members, the NAS shall be three times the salary payable in the term in which the date the Financial Emergency was verified falls;

b) a Standard Number of Days (SND) of layoff shall be determined. The actual number of days of layoff required of each Member shall be as follows:

   (i) Members whose NAS does not exceed two-thirds of the Floor Salary for Assistant Professors shall not be laid-off;

   (ii) Members whose NAS equals or exceeds four-thirds of the Floor Salary for Assistant Professors shall be required to take the Standard Number of Days of layoff, rounded down to the nearest half day;

   (iii) Members whose NAS is between two-thirds and four-thirds of the Floor Salary for Assistant Professors shall be required to take the number of days of layoff given by the following formula

$$\frac{\text{NAS} - (.67 \times \text{Asst.Floor})}{.67 \times \text{Asst. Floor}} \times \text{SND}$$

   rounded down to the nearest half day (Asst. Floor is the Floor Salary for Assistant Professors);

c) Regardless of when the days of layoff are taken by Members, each Member's salary shall be temporarily reduced by an amount equal to 0.4167 percent for each day of layoff required, and such reduction shall remain in effect during the term of the verified Financial Emergency;

d) During a period when Members' salaries are reduced by virtue of the imposition of layoff, all benefit plans which are salary-related, including but not limited to pensions and life insurance coverage, shall continue to be based on Members' unreduced salaries, and all applicable Employer and Member contributions to such plans shall continue to be made on the basis of unreduced salaries;

e) The Standard Number of Days of layoff shall be that number required to achieve the reduction in the budgetary allocation to salaries and benefits for Members specified by the Financial Commission.

9.3 Members shall be notified of the number of their layoff days within thirty days of the date on which the subcommittee is established under Clause 9.

9.4 Members shall schedule layoff days so as to avoid interference with scheduled academic activities. 9.5 In accord with Clauses 4 and 5 of this Article, when a second or further assertion of Financial Emergency is not made, the Employer shall, at the conclusion of the period of Financial Emergency, restore all salaries to their pre-layoff level, including negotiated salary and benefit increases suspended under Clause 7.