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M E M O R A N D U M

TO: Sarah Godwin, CAUT
Gavin Leeb, CUPE **PRIVILEGED AND CONFIDENTIAL**

FROM: Simon Archer and Erin Sobat (Ext. 6449)

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RE: **SUMMARY OF REPORT RECOMMENDATION AND ACTIONS –
SUMMARY OF FINANCIAL EXIGENCY TERMS**

OVERVIEW

You asked us for a shorter summary of the key findings and recommendations of our report to you on the problems of publicly funded universities being subject to commercial insolvency procedures.

In this memo we summarize the key findings and recommendations that are of interest to employee groups in Canadian universities, dividing them into recommendations and activities that should be undertaken prior to insolvency events and upon or during insolvency events, in that order.

We then outline in some more detail the principles and key elements in our main law reform proposal: the creation of a model financial exigency code that should be developed and promoted across the university sector in Canada. In connection with this summary, we provide a short chart identifying the key provincial statutory schemes governing university funding across Canada.

Finally, we provide a summary of model financial exigency language drawn from existing examples in collective bargaining agreements in Canada. Please note that, although based on existing exigency language in collective agreements, this model language requires careful amendment to adapt to individual circumstances, including applicable statutory frameworks.

SUMMARY OF KEY FINDINGS AND RECOMMENDATIONS

Prior to Insolvency Event

1. Employee groups and their federations should advocate for a sectoral law reform. Reforms should include the following:
 - development of a model financial exigency code to be promoted sector-wide by key stakeholders in the university system (employee and employer groups, and governments);
 - adoption or integration of the model financial exigency code into existing provincial legislation for funding and governing universities in Canada, including provision of temporary, repayable emergency funding for restructuring events; and
 - amendments to existing commercial insolvency laws (*Companies Creditors Amendment Act* (CCAA) and *Bankruptcy and Insolvency Act* (BIA)) excluding their application to publicly-funded universities.
2. Employee groups should monitor, seek disclosure, evaluate and improve transparency of university financial status and information, including through existing governance and communication channels. Financial information includes audited and unaudited financial statements of a university and its related entities. It may be necessary to engage professional advice in the analysis of financial statements.
3. Employee groups should seek to bargain improved financial exigency terms that enhance procedural protections and add early warning requirements from the

employer. Early warning or notice obligations should be tied to the duty of good faith that applies to both labour relations and insolvency (CCAA) proceedings.

Upon and During Insolvency Event

4. Where an insolvency proceeding is demonstrably justified, employee groups should retain advisors as quickly as possible to advise on key initial decisions. This includes engagement with the employer and government, evaluating the causes of liquidity problems and the need for restructuring, and assessing possible legal arguments opposing or influencing the proceeding.
5. Where an insolvency proceeding is immanent or occurring, 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.
6. In response to an insolvency 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).

ELEMENTS OF A MODEL RESTRUCTURING CODE FOR THE UNIVERSITY SECTOR

7. Recognizing that:
 - commercial insolvency law proceedings are both inappropriate to not-for-profit activities in principle and not designed or intended to facilitate restructuring of broader public sector organizations;

- commercial insolvency procedures are extremely costly options as compared to all other options;
- public funders (governments) play a critical role in protecting the academic mandate of universities individually, and in designing, coordinating, and protecting a public university system in each jurisdiction; and
- other models for restructuring sectors exist in Canada and around the world in comparable jurisdictions.

the CAUT, CUPE and other sectoral stakeholder organizations (including employer organizations) should develop a “model financial exigency code”. The Model Financial Exigency Code should be a widely accepted model procedure for restructuring universities in Canada.

8. Principles of any restructuring procedure applicable to publicly-funded universities (and that should be part of a Model Financial Exigency Code), should include the following:
 - the primacy of protecting the academic mandate, including upholding academic freedom and tenured employment;
 - full transparency in financial matters and any decisions relating to restructuring, including advance notice to all key university stakeholders;
 - the mandatory participation of public funders in any insolvency process;

- recognizing the independent university bicameral governance model developed in Canada, defined roles for each of the senate, board of governors, senior administration, and employee groups in the restructuring;
 - temporary, refundable emergency financing with conditions made available to universities who undertake a bona fide restructuring; and
 - an orderly method for identifying budget reductions and employee reductions consistent with otherwise applicable labour relations norms, including collective bargaining agreements.
9. A Model Financial Exigency Code should be used for a variety of advocacy activities. It may be used in reference at collective bargaining. It may be used as an example of a sectoral alternative supporting exclusion from commercial restructuring codes. It may be used in advocacy for provincial law reform to create alternative sectoral restructuring processes and resources to support them.
10. A key provincial and sectoral law reform that can be implemented in each provincial jurisdiction is to enact powers of the appropriate minister to:
- provide temporary, refundable emergency funding with conditions tied to a restructuring procedure, including a requirement to restructure and repay emergency funding over a reasonable timeline; and
 - facilitate a restructuring procedure consistent with the Model Financial Exigency Code.

Content of a Model Financial Exigency Code

11. In all provinces a minister has responsibility for funding agreements with universities. Their primary powers to influence universities are through funding mechanisms (as opposed to colleges, over which the Minister has more extensive powers of direction and administration).

12. In many cases, a Minister has a set of powers with respect to “awards and grants” that (arguably) include powers to make grants to universities on conditions a minister considers appropriate. The legislation governing funding universities (such as it is) should be amended to provide the minister with a clarified or enhanced set of powers that would be consistent with, and partially codify, the Model Financial Exigency Code. The following amendments should be considered:
 - a key stakeholder (a board of governors, senate, senior administration, or large employee group) may make an application to enter a supervised restructuring process;

 - notice and disclosure requirements to all key stakeholders arising in connection with the application to the Minister;

 - an application to enter a supervised restructuring process may include a request for emergency funding assistance based on need (i.e., evidence of a liquidity crisis and the need for restructuring);

 - temporary, refundable bridge financing may be provided by the minister in an amount that permits meaningful restructuring (for example, in amounts up to \$35 million);

- temporary bridge financing is repayable within a reasonable period of time, for example repayable over 10 years following the exit from restructuring processes;
- a requirement that all key financial and other stakeholders in the operations of the university participate in restructuring processes;
- a requirement that a restructuring plan be approved within a reasonable period of time following the application (for example, 12 months, with extensions by consent or based on demonstrated progress);
- a requirement that a restructuring plan be implemented within a reasonable period of time (for example 3 years, with extensions by consent or based on demonstrated progress);
- a set of principles in restructuring that must be considered in developing a restructuring plan, including those identified in the Model Financial Exigency Code; 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.

Legislation Governing Universities Across Canada

Province	Statute	Funding	Administration/Directives
BC	<i>University Act</i> , RSBC 1996, c 468, individual university corporations continued under this statute	No explicit statutory authorization for funding. Operating grants provided through annual budget letters from Ministry. Grants can be reduced or clawed back in strikes or lockouts. Reporting obligations.	Limited. Cabinet can remove Board members: s 22. Minister not to interfere in academics: s 48.

Province	Statute	Funding	Administration/Directives
		See also University Foundations Act .	
AB	Post-Secondary Learning Act , SA 2003, c P-19.5 and designation by Cabinet	No explicit statutory authorization for funding. Institutions must enter into investment management agreements with the minister and submit budgets and capital plans to the Minister: s 78.	Minister can appoint an investigator or administrator of a public university or dissolve a public university: ss 99–102 Institutions are divided into sectors with specific statutory mandates: Division 2.
SK	The Post-Secondary Education and Skills Training Act , SS 2000, c P-16.11	Minister may receive, allocate and distribute funds appropriated by the Legislature for the support of universities: s 18(c). Minister may review, authorize, or establish procedures for capital projects: s 18(f). Minister may require universities to provide info on funding, budget, implement accounting standards, provide reports, etc: s 18.	Minister has broad powers to take measures to provide post-secondary education, implement post-secondary policies, set standards, etc: s 15.
MB	The Advanced Education Administration Act , CCSM c A6.3	Minister allocates funds in accordance with directions and priorities they set for post-secondary: s 2(3)(a)–(b). Minister of Finance, on requisition of Minister, may make grants to a university or college: s 9.1(1) Minister may require budgets & financial information reports: ss 3(2), 9.2(1).	Following consultation with the institution, Minister may require a university or college to enter into a memorandum regarding accountability measures in respect of support provided to it, including performance measures: s 2(5). Enshrines autonomy of institutions: s 2(6).
ON	MTCUA and individual	Power to make “awards and grants”: s 5.	No express powers of direction or administration.

Province	Statute	Funding	Administration/Directives
	university statutes.	Provided through Strategic Mandate Agreements with Minister, primarily through negotiation within Ministry frameworks.	
QC	<u>Educational Institutions at University Level Act</u> , CQLR c E-14.1, and individual statutes	Primarily through negotiation within Ministry frameworks. See also <u>University Foundations Act</u> , <u>University Investments Act</u> .	Primarily reporting and transparency measures. No powers of direct administration.
NB	<u>Degree Granting Act</u> , RSNB 2011, c 140 and individual statutes	Primarily through negotiation within Ministry frameworks.	Primarily reporting and transparency measures. No powers of direct administration.
PEI	Individual university statute	Primarily through negotiation within Ministry frameworks.	N/A
NS	<u>Accountability and Sustainability of Universities Act</u> , SNS 2015, c 11 and individual university statutes	Power to make grants by the Minister: ss 3, 4. See also <u>University Foundations Act</u> .	Some powers of direct administration. Contains a “revitalization” procedure that is similar to a restructuring process but not fully consistent with Model Financial Exigency Code: ss 5-19. Contains powers to limit labour actions during revitalization process.
NFLD & LAB	<u>Degree Granting Act</u> RSNL 1990, c D-5, and individual university statute or designation by cabinet	Primarily through negotiation within Ministry frameworks.	No powers of direct administration. Reporting and transparency requirements.

Financial Exigency Language

The following are examples of bargained language modified to be non-specific to any institution or collective agreement. Proposals will require modifications to adapt to individual circumstances and applicable law.

PURPOSE AND INTERPRETATION

1. The University and the Association agree that, for the purpose of any restructuring procedure including the financial exigency procedure under this article, the primary and over-riding goals of the University and its stakeholders are to provide and protect the academic mandate of the University, including academic freedom, tenure, teaching, scholarship, and research.
2. The financial exigency procedure in this article may be invoked 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. Any reduction of employees that is negotiated and agreed as part of a financial exigency process shall occur only as a last option and after all other options have been considered.
4. In the event a party seeks creditor protection under the *Companies Creditors Arrangement Act*, any failure to assert financial exigency and employ the financial exigency procedures under this article shall be deemed to be acting in bad faith for the purpose of any other restructuring procedure including under the *Companies' Creditors Arrangement Act*.
5. Any time limits under this article may be extended by mutual agreement, in writing, between the parties. Such agreement may not be unreasonably withheld.

DEFINITION OF FINANCIAL EXIGENCY

6. 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, that will make the university unable to meet its obligations as they become due.
7. The expectation of short-term deficits is not financial exigency.
8. The closure, cessation, merger, or elimination, in full or in part, of an academic program, based on academic reasons, is not a financial exigency.

DECLARING A FINANCIAL EXIGENCY

9. Either party to the agreement may make a declaration of financial exigency.
10. In the event that a party desires to assert that a financial exigency exists, they shall immediately provide notice to the other.
11. At the date of such notice, the University shall freeze all hiring and no new positions shall be created until the exigency has been resolved.
12. Within 30 days of asserting a financial exigency, the party asserting financial exigency shall prepare a report specifying the precise nature of the financial exigency and any associated strategic analysis of the causes and major issues related to the financial exigency. Such report shall contain the measures taken to date to support the conclusion that financial exigency exists and any proposed measures to address financial exigency. The report shall also specify whether any program redundancies are being recommended as a solution to the problem.
13. A copy of this report shall be given to the other party and any other affected stakeholders.

FINANCIAL EXIGENCY COMMITTEE

14. The parties shall, within ten days of notice of an asserted financial exigency, establish a Financial Exigency Committee (the “**Committee**”) to review all documentation which it deems relevant, to consult with stakeholders, to decide whether or not a financial exigency exists, and oversee any consequent procedure.
15. The Committee 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 to be appointed from a list of candidates attached as Schedule “A”.
16. The Committee shall determine its own terms of reference and decision-making procedures which shall be consistent with generally recognized principles of natural justice, norms of collegial university governance and applicable collective agreements.
17. All reasonable expenses of the Committee shall be borne by the University.
18. The parties shall cooperate and provide the Committee with such information as it may request.
19. The onus shall be on the party asserting a financial exigency to establish to the satisfaction of the Committee that a financial exigency exists.
20. Parties are entitled to a copy of all information provided to the Committee.
21. The Committee may consult with any person or group it may deem necessary or convenient.

22. The Committee will also consult with, receive, and carefully consider any input which the Senate, employee groups, administration, or other stakeholders in the University may choose to provide in respect of the asserted financial exigency.

23. The Committee shall consider and shall respond to, each of the following factors in its deliberations, in addition to any other factors or criteria the Committee determines are relevant or necessary:
 - a. whether the party asserting a financial exigency has acted and is acting in good faith;

 - b. whether the University's overall financial position constitutes a bona fide financial exigency;

 - c. whether, in view of the primacy of academic goals in the university, the reduction of employee groups is a necessary, proportionate, reasonable and justifiable way to achieve cost savings;

 - d. whether all other reasonable means of achieving cost savings in all other areas of the University budget have been considered and attempted;

 - e. whether all reasonable means have been taken to achieve cost savings by means of voluntary early retirement, voluntary resignation, voluntary transfers to reduced workload status, and redeployment;

 - f. whether all reasonable means of improving the university's revenue position, including efforts to secure further assistance from the provincial Government have been considered and attempted;

- g. whether enrollment projections are consistent with the proposed reduction in the number of faculty.

- 24. The Committee shall make its report to the parties within sixty days of its establishment. The report shall analyze both the extent and nature of the financial problems identified by the party asserting financial exigency as well as the potential impact of any proposals to address the financial exigency on the academic programs and stakeholders in the University.

- 25. The report shall make a determination as to whether a financial exigency exists and provide reasons for this conclusion.

- 26. If the Committee finds that a state of financial exigency does not exist, the Committee is functus officio and no further proposals for restructuring or laying off or terminating employees shall be made for the duration of the collective agreement.

- 27. If the Committee finds that a state of financial exigency does exist, the Committee's report shall include recommendations as to the measures to be taken, including but not limited to employee position reductions in the budgetary allocation to faculty members' salaries and benefits. A report may specify the number of employee layoffs that are or may be required in order to address the financial exigency. If the number of layoffs specified by the Committee differs from the number proposed by the University, reasons for the difference will be provided.

IMPLEMENTATION

- 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

(whether as part of a financial exigency process, or otherwise), in particular through its decisions concerning the disposition of the University's resources, the parties 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 collective agreement. Further, in conformity with the collegial role in academic planning, the University shall inform employee groups and/or academic units as early as possible of any proposal that would affect them, and shall provide employees, their bargaining agents, and/or academic units with reasonable opportunity to participate in the planning process.

29. Notwithstanding any provisions to the contrary in the collective agreement, the parties shall make best efforts to renegotiate provisions of the collective agreement that are required or recommended by the report of the Committee.
30. If the parties do not reach agreement on measures to amend the provisions of the collective agreement implicated by the report of the Committee, the University may reduce the budgetary allocation for salaries and benefits for faculty members as recommended in the Committee report, but may not make any additional or further reductions to this budgetary allocation than those recommended in the Committee report pursuant to this clause.
31. Prior to implementing any layoffs permitted or recommended by the Committee report, the University shall exhaust all reasonable means to alleviate the financial exigency by using all reasonable means of improving its revenues and using existing methods for reducing any complement of employees in a manner which best maintains the academic viability of the University.
32. When a declaration of financial exigency has been declared by the Committee and no satisfactory provision can be made by the University for the continued employment of all employees under the collective agreement, a plan for reduction in the number of employees employed by the University shall be prepared by the administration in consultation with

the relevant department heads and the Association. The plan shall be structured so that the University may continue to operate as far as possible in accordance with its academic mission, and may propose vertical cuts (involving full or partial program redundancies), across the board cuts, or some combination of vertical and across the board cuts.

SA:lr