

Square Pegs in Round Holes: Public Post-Secondary Institutions and Federal Insolvency Laws

**Submission to the Standing Senate
Committee on Banking, Trade and
Commerce**

October 2022

On behalf of the 72,000 academic staff members of the Canadian Association of University Teachers (CAUT), we are writing to urge the Committee to recommend S-215 *An Act respecting measures in relation to the financial stability of post-secondary institutions*.

The Bill has two important yet discrete components:

1. the development of a proposal for federal initiatives designed to ensure the financial stability of post-secondary institutions; and,
2. the amendment of the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA) to exclude public post-secondary educational institutions from the definitions of corporation and company under those Acts.

This submission speaks to the urgency of both proposals and will begin with the case for excluding public post-secondary institutions from federal insolvency laws.¹

Public post-secondary institutions are not private corporations

On February 1, 2021, Laurentian University became the first public post-secondary institution in Canada, to seek to restructure its operations using a legal process designed for private sector corporations.

Post-secondary institutions are dedicated to the preservation, sharing, and advancement of human knowledge. The fundamental role post-secondary institutions play in a democratic society and the customs and operations that have evolved to maintain this role must be given central consideration in any financial restructuring process.

¹ This submission draws substantially from a [CAUT-commissioned report](#) on the Laurentian University Insolvency, prepared by Simon Archer and Erin Sobat of Goldblatt Partners

The CCAA process however drowns these values and the public interest in a sea of private interests. For example, the commercial lens applied by the CCAA led to the elimination of the only Indigenous bilingual midwifery program serving Northern Ontario, and classes taught in French due to their smaller enrolments regardless of their social and educational value. In total, 36% of Laurentian's programs were cut, impacting almost 1000 students. The value of the University as tri-cultural and bilingual was greatly diminished through the CCAA proceedings. The CCAA (and the BIA) is designed to address the issues and interests that arise in a commercial, not a public, context. This assumes that financial considerations are the primary if not sole organizing principle of a university or college —instead of the means to an end.

Unlike private corporations, almost all post-secondary institutions are established by dedicated provincial legislation (and, in many provinces, dedicated acts for each institution). The government has a monopoly over the formation of universities and colleges exactly because they raise novel public interest considerations, represent publicly funded policy choices, and require public oversight.

Yet the provincial government is not formally at the table during insolvency proceedings, where commercial creditors take up the seats. In the case of Laurentian, the Ontario Ministry of Colleges and Universities monitored the proceedings but 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.

LLP and Virginia Torrie, of the Faculty of Law at the University of Manitoba, December 2021.

In treating public post-secondary institutions as private corporations, the CCAA displaces existing contractual language on financial exigency that provides for a collegial process to manage financial crises.

The CCAA is unnecessary for public post-secondary institutions

If the CCAA excluded public universities and colleges, institutions facing financial difficulties would have to work with their public funders and within their existing legal contracts, such as collective agreements with employees, to negotiate a sustainable path forward.

Financial exigency provisions in collective agreements exist for when financial emergencies require a restructuring of administrative and academic priorities within a post-secondary institution. Such provisions are the norm in the sector. These clauses serve to protect tenure, collegial academic decision-making, and academic freedom, unique and essential characteristics of universities, within a dire financial circumstance.

Financial exigency contract language requires a university or college administration, when it believes it is in a situation of financial exigency, to immediately inform the academic staff association. This then triggers the establishment of a transparent investigation by a fact-finding commission, jointly appointed by the board and the academic staff association. If a bona fide financial exigency has been confirmed, the academic staff association is included in determining whether redundancies in tenured staff are required, and if so, which staff will be made redundant. It is this process, not the CCAA, that was used successfully at Nipissing University in 2015.

Historically, financial exigency clauses arose in collective agreements to protect the principles of collegial academic decision-making and academic freedom. Financial exigency processes ensure that decisions about academic

restructuring and program closures are made not by administrative or creditor diktat, but with the active participation of the academic community – those who have the expertise on educational matters.

Financial exigency language also protects the foundational value of universities– academic freedom. Academic freedom, as the Supreme Court of Canada in *McKinney v. University of Guelph* (1990) noted, is necessary to allow a “free and fearless search for knowledge and the propagation of ideas” that is “essential to our continuance as a lively democracy.” Academic freedom grants academic staff the right to teach, research, and express views without institutional censorship or reprisal. Tenure, awarded only after a lengthy probationary period, is the procedural safeguard for academic freedom – it ensures that academic staff can be dismissed only for just cause or bona fide financial reasons.

Financial exigency processes are important as they provide the academic staff association with oversight to ensure that administrations do not use a financial crisis as a cover to violate the principles of tenure and academic freedom, such as by targeting academics they find controversial, difficult, or unpopular.

The values and goals of post-secondary institutions are therefore inconsistent with the commercial framework that ordinarily guides CCAA proceedings. Financial exigency provisions ensure that academic priorities remain paramount, particularly in regard to the quality of instruction and of research, and the preservation of academic freedom.

As noted by the Auditor-General of Ontario in her [preliminary report](#)² on Laurentian,

We believe Laurentian did not have to file for CCAA protection... The university did not follow the normal broader public sector precedent by making

² Office of the Auditor General of Ontario. *Preliminary Perspective on Laurentian University*. 2022: [Preliminary Perspective on Laurentian University \(auditor.on.ca\)](#).

comprehensive and clear efforts to seek financial assistance from the Ministry... The university's contract with the Laurentian University Faculty Association (LUFA) contains a financial exigency clause, designed to deal with dire financial circumstances. Triggering this clause—which is in most university faculty labour contracts in Canada—would have required senior administration to work in partnership with LUFA to address Laurentian's financial situation.”

The CCAA is extremely costly

The fact that CCAA 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. The cost of meaningful participation is quite high, and this can be a barrier to individuals and groups. Relatedly, judges may be left to rely on submissions by commercial creditors about what is or is not in the “public interest.” Even in instances where social stakeholders are able and have been permitted to take part in proceedings, the restructuring plan must still be approved by most creditors, demonstrating that the CCAA (and the BIA) is ultimately driven by the most well-resourced private parties.

At Laurentian University, social stakeholders, namely workers and students, paid a high price in the restructuring but had the least voice. Close to 200 staff lost their jobs, and 69 programs were closed, negatively impacting almost a thousand students. The ramifications of these losses will be felt on those impacted, their families and the community for years to come.

The financial costs of the CCAA process for Laurentian were significant, on top of the social and economic costs to the University and broader community. As of April 2022, according to the Ontario Auditor General, legal and financial consultant fees associated with insolvency were \$24 million. Bank charges because of the CCAA

decision were an additional \$24.7 million.

Employee restructuring and termination costs: \$44 million. Meanwhile, Laurentian's 2020-21 deficit was \$65.9 million and its total debt as of 2020-2021 was \$141 million.

Public post-secondary institutions must be exempted from federal bankruptcy and insolvency laws

It has not always been the case that a debtor's financial condition virtually ensured that the solution came through federal insolvency law, and it is not universally true even today. There have been, and continue to be, various specific insolvency regimes tailored for particular types of entities.

The exclusion of public post-secondary institutions from federal bankruptcy and insolvency laws would be consistent with the existence of specific insolvency regimes for this type of public entity.

The federal role in financial stability of public post-secondary institutions

Considering the Laurentian debacle, and following calls from CAUT and others, the federal government increased funding for post-secondary minority-language education in its 2021 budget. Although welcome, this funding: (a) is used at the discretion of the province; (b) is inadequate to ensure the financial stability of Canada's post-secondary system, and (c) is unavailable for students, workers and communities impacted by an institution's insolvency or bankruptcy.

Although the circumstances resulting in the financial crisis at Laurentian are unique, Canada's public post-secondary education system is facing ongoing fiscal challenges. Public funding for universities in Canada has fallen below 50 % of total operating revenues.

Government funding³ of institutions has not increased in real terms in nearly fifteen years. Canada is 30th out of 36 OECD⁴ countries in public support for post-secondary education. To make up for the lack of public funding, universities are increasingly reliant on tuition fees, and particularly the much higher fees paid by international students, an ethically questionable, unpredictable, and unsustainable source. Canadians are also shouldering increased tuition⁵ adding to household indebtedness for one out of two students and acting as a barrier for some to further education.

Both the provincial and federal governments have a role to play in ensuring the fiscal stability of post-secondary institutions. As noted in a report prepared by the Library of Parliament, “the very nature of post-secondary education makes it national in scope. [...] the federal government has a role in ensuring that the country has adequate supplies of highly qualified personnel, that there is some equality of opportunities for young Canadians regardless of where they live, and that there is development of the knowledge required for economic growth, prosperity, and international competitiveness.”⁶

This role for the federal government is also highlighted in the report from the Standing Senate Committee on Social Affairs, Science and Technology, *Opening the Door: Reducing Barriers to Post-Secondary Education in Canada*⁷ which recommended in 2011 that “the federal government work with the Council of Ministers of Education, Canada, to develop and implement a national strategy for post-secondary education ...to ensure that there is dedicated funding for postsecondary education and training...”.

³ Statistics Canada. *Financial information of universities and colleges, 2019/2020: The Daily — Financial information of universities and colleges, 2019/2020* (statcan.gc.ca).

⁴ OECD (Organisation for Economic Co-operation and Development). *Education at a Glance 2022: OECD Indicators*. 2022: [Education at a Glance - OECD](https://www.oecd.org/education/education-at-a-glance/)

⁵ Statistics Canada. *Tuition fees for degree programs, 2021/2022*. 2021: [The Daily — Tuition fees for degree programs, 2021/2022](http://www150.statcan.gc.ca/n1/pub/95-009-x/2021001/article/00001-eng.htm) (statcan.gc.ca)

The development of a proposal on how the federal government can ensure the financial stability of post-secondary education is long overdue.

Conclusion

Seeking creditor protection under the CCAA is an extraordinary step for any entity to take. For publicly funded post-secondary institutions it is an unnecessary, inappropriate, and a needlessly costly option. Using the CCAA to restructure universities and colleges displaces public governance and oversight, cedes democratic control over these organizations to corporate boards and commercial creditors, and throws their public vision, mission, and mandates to the side, as well as employees and pensions.

The Auditor General of Ontario summarized the concerns of the use of the CCAA in the case of Laurentian well. “[It is] a process that diverted more money to external advisors through professional fees, was less transparent, and likely has had, and will continue to have, a greater impact on students, faculty, the community of Sudbury and the university’s reputation.”

The proposed legislation will ensure that public post-secondary institutions use existing mechanisms to address financial crises; mechanisms that will be less costly, more transparent, and better protect the public interest mandate of the institutions. It will also assist in identifying ways the federal government can better sustain the sector, while respecting provincial jurisdiction.

S-215 deserves your full support.

⁶ Library of Parliament. *Post-Secondary Education: An imperative for Canada’s future*. 1992.

⁷ Standing Senate Committee on Social Affairs, Science and Technology. *Opening the Door: Reducing Barriers to Post-Secondary Education in Canada*. 2011: [rep06dec11-e.pdf](https://www.sencanada.ca/rep06dec11-e.pdf) (sencanada.ca)