

Consultation on Post-Secondary Educational Institutions and Insolvency

Submission to the Government of Canada

June 2023

The Canadian Association of Universities Teachers (CAUT) welcomes the opportunity to participate in the consultation held by the Innovation, Science and Economic Development Canada's Market Framework Policy branch regarding public interest protection for public post-secondary education institutions (PSEIs).

Founded in 1951, CAUT is the national voice for academic staff representing 72,000 teachers, librarians, researchers, general staff, and other academic professionals at some 125 universities and colleges in all provinces across the country.

CAUT is an outspoken defender of academic freedom and works actively in the public interest to improve the quality and accessibility of post-secondary education in Canada.

A Dangerous Precedent

In February 2021, Laurentian University took the unprecedented step of becoming the first publicly funded post-secondary institution to file for court protection under the federal *Companies' Creditors Arrangement Act* (CCAA). As subsequently reported by the Auditor-General of Ontario, the instigation of CCAA restructuring was strategically planned by the administration, on the advice of external counsel, to bypass past practice and the collective agreement provisions with the faculty union regarding financial exigency. In other words, the CCAA allowed a mismanaged university to usurp the standard collegial processes that have been used for decades and sets a dangerous precedent for public post-secondary education in Canada.

The consequences to students, workers, and the entire community at Laurentian University were deep and far-reaching: the university saw close to two hundred jobs lost and 70 programs cut – many of which were French language programs – and caused turmoil to a community and Northern region that relies heavily on the institution. It was an unnecessary, inappropriate, costly, and destructive decision by the university's administration.

The CCAA is designed as a remedy for commercial companies, not for public and publicly funded institutions.

Universities and colleges serve the public interest by preserving, sharing, and advancing knowledge. These objectives are undermined by an insolvency law designed for private companies that puts the interests of big creditors ahead of the public mission of the institution. The CCAA is a process that is fundamentally and wholly inappropriate for PSEIs. Until the Laurentian CCAA, there was no suggestion that the legislation applied to publicly funded post-secondary institutions. The door opened by Laurentian must be closed.

In light of the harsh lessons learned from Laurentian University, CAUT urges the federal government to exclude public post-secondary education institutions from federal bankruptcy and insolvency laws without delay.

The Government of Canada must protect the mission of public post-secondary education by amending the *Companies' Creditors Arrangement Act* and the *Bankruptcy and Insolvency Act* to exclude public post-secondary education institutions.

This action is urgent because of this dangerous precedent created by Laurentian. Furthermore, it would be unnecessary to delay because:

- The academic mission of PSEIs is fundamentally undermined if collegial governance processes can be usurped and academic staff are left out of decision-making.
- The past practice and negotiated rules on financial exigency arise from the necessity of protecting academic freedom and principles of collegial governance during bona fide financial difficulties. This is reflected in Article IX B of the 1997 UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel, to which Canada is a signatory.
- The policy objectives of public PSEIs are inconsistent with the core rationale of insolvency law. The CCAA and BIA are commercial frameworks for for-profit businesses.

- While some provincial laws and institutional financial exigency language can be strengthened, the continued availability of the CCAA to public post-secondary administrators presents a perverse incentive to bypass collegial governance, accountability, and collective agreements. For example, many post-secondary academic staff associations report CCAA applications being threatened by administrations as a means of gaining leverage at the bargaining table.
- Bargained financial exigency language, once invoked, would require that a plan of arrangement be determined with all parties, including academic staff associations and the province. Commercial creditors are already part of debt restructuring negotiations outside of federal insolvency laws.

CAUT's Comments on the Government Scene-Setter Proposals

The Government of Canada's Market Framework Policy Branch has specifically invited stakeholders to provide comments and feedback on proposals for legislative action.

Special rules for PSEIs under federal insolvency laws would not resolve the issue at hand: the CCAA, like any federal insolvency law, is a fundamentally inappropriate solution because there are more differences than similarities between PSEIs and commercial businesses – such as in their mission, purpose, governance structures, funding structures, and stakeholder groups. Federal insolvency law was never considered prior to Laurentian for a public PSEIs and should never have been a possibility.

Following the crisis at Laurentian, CAUT commissioned Simon Archer of Goldblatt Partners and Dr. Virginia Torrie, then of the Faculty of Law at the University of Manitoba, to research and report on the application of the CCAA to publicly funded post-secondary institutions and to recommend changes to the Act and other initiatives to prevent a repeat of the Laurentian situation.¹

One of their findings is that the CCAA has been expanded beyond its original purpose and has increasingly been applied to organizations for which it was not originally intended, largely the result of court decisions since the 1980s.

Designed to address liquidity crises in large commercial corporations, “the CCAA is not an appropriate forum for restructuring publicly funded universities or organizations with public mandates and funding [...U]sing 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.”

As such, Archer and Torrie recommend amending existing commercial insolvency laws to exclude their application to publicly funded universities.

Commercial Risk-Taking Undermines the Public Nature of PSEIs

The CCAA is designed to deal with commercial for-profit organizations. Unlike private corporations, public post-secondary institutions are established by dedicated provincial legislation as not-for-profit corporations.

¹ *Restructuring Publicly-Funded Universities: A Report on the Laurentian University Insolvency Proceeding with Issues and Options for the University Sector*, by Simon Archer & Erin Sobat (Goldblatt Partners LLP) and

Virginia Torrie, Associate Professor & Associate Dean (J.D. Program) University of Manitoba Faculty of Law, December 2021.

This legislation sets out the governance structure of PSEIs, including the role of academic decision-making bodies such as Senates or Education Councils. Provincial governments play a role in the appointment of Boards, regulate tuition fees, and often establish particular mandates.

Both the federal and provincial governments also provide direct funding. Post-secondary institutions have commercial elements, but they are not governed by market interests alone, or even primarily.

They meet a variety of socio-economic considerations, such as linguistic and cultural diversity, and regional and equity development. Unless PSEI's are removed from the auspices of the CCAA, they are at risk of being defined solely by commercial interests – the antithesis of what a PSEI must be. As such, a public post-secondary institution does not need the same risk-taking incentives envisioned by the CCAA that a commercial entity requires because the risks are inherently different, and financial stability of institutions is in part the responsibility of provincial governments.

The Archer-Torrie report commissioned by CAUT concluded that “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.”²

In the case of the not-for-profit sector generally, the experience of Canadian Red Cross insolvency due to the tainted blood scandal, is illustrative. In that case, a political and social solution led by governments was needed, not something which could have been imposed by the Court in the context of a traditional commercial restructuring.³

The exclusion of PSEIs from the CCAA would mean that, where necessary, such institutions would rely on existing mechanisms resulting in solutions that uphold the public interest and the academic integrity of the institution.

The Role of Financial Exigency

Financial Exigency is the Model Process

Many academic staff association collective agreements already contain restructuring procedures, known as “financial exigency”.

Generally, financial exigency clauses:

- Define financial exigency as a situation where substantial and recurring financial deficits threaten the survival of the institution as a whole,
- Require the PSEI to be transparent in its finances and to provide early notice to the academic staff association of any circumstances that could lead to financial exigency.
- Specify that academic staff layoffs may be made only as a last resort in order to preserve academic freedom and the core educational mission.
- Require the institution to approach the government to seek additional funding before financial exigency may be declared.
- Ensure that the Board of Governors may declare financial exigency only after an open and transparent investigation by a fact-finding commission, jointly appointed by the Board and the academic staff association, has confirmed the existence of a bona fide financial exigency.
- Ensure that academic priorities must remain paramount, particularly regarding the quality of instruction and research, and preservation of academic freedom.

² *Restructuring Publicly-Funded Universities*, Archer & Torrie, 2021.

³ Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re, 1998 CanLII 14907 (ON SC)

- Ensure that academic staff appointments may be terminated only after every effort has been undertaken to alleviate the financial exigency by economies in all other segments of the budget, and after all means to improve the institution's revenues have been exhausted.
- Provide that any reduction of the budget for salaries and benefits of bargaining unit members may not exceed the amount of the reduction specified by the fact-finding commission. The board should make every effort to prevent layoffs through voluntary leaves of absence, retirement incentives and other cost reductions. The terms of such programs must be negotiated with the academic staff association.
- Specify the order of layoffs.

Financial Exigency and the Public Interest

Post-secondary institutions serve the public interest by preserving, sharing, and advancing knowledge. These ends cannot be achieved without shared collegial governance and academic freedom. Financial exigency rules, either in custom and practice or through negotiated collective agreements between institutions and academic staff unions, ensure that the values of collegial governance and academic freedom are not undermined during periods of bona fide financial emergencies.

As articulated in the 1997 UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel, “[s]ecurity of employment in the profession, including tenure or its functional equivalent, where applicable, should be safeguarded as it is essential to the interests of higher education.” Financial exigency processes exist to ensure that financial information is made available to the academic community, that all reasonable steps have been taken to avoid termination of employment, and that there is no bias in the termination procedure that would violate academic freedom. It is a process that ensures that decisions about academic restructuring and program closures are made with the active participation of the academic staff community – those who have the expertise on educational matters.

In this context, the CCAA insolvency process is inappropriate, unnecessary and runs counter to the fundamental values and principles of post-secondary education. The Ontario Auditor General confirmed that Laurentian did not need to file for CCAA protection, that it could have followed the financial exigency route that other institutions have deployed. Laurentian's decision was a strategic one made after the administration refused to transparently work with unions and the provincial government. In doing so, the university administration worked in a way that was contrary the values of academic freedom, collegial governance, and by extension the public interest.

Protecting Academic Freedom

As noted by the Supreme Court of Canada, academic freedom allows 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 is the procedural safeguard for academic freedom because it ensures the termination of academic staff therefore be only for just cause in law or bona fide financial reason as determined through an open and transparent process. Within the closed CCAA process, including during the confidential creditor negotiations, academic freedom is given little recognition.

The process of financial exigency is fundamentally more appropriate than the CCAA because it puts the public educational mandate at the forefront, not private interests. Financial restructuring of PSEIs, where necessary, must be shaped by public interest considerations rather than by private ones. In pursuing protection under the CCAA and casting aside the financial exigency process, an administration betrays the fundamental value of academic freedom. The door to the CCAA opened by Laurentian must be closed.

The Public Policy Actions Needed to Protect PSE

To fulfill their public mission, PSEIs require stable funding, institutional autonomy, and academic freedom. Governments have a positive obligation to ensure institutions can fulfill this mission. The Government of Canada should work constructively and collaboratively with the provinces to support existing regimes, rooted in the principles of public education.

Urgently Close Access to Federal Insolvency for PSEIs

It is not necessary for PSEIs to have access to federal insolvency laws. Structures and practices exist both at the provincial and institutional levels to handle bona fide financial difficulties when they arise.

There is a history of institutions remaining solvent by following existing financial exigency procedures and/or negotiating arrangements with the provinces. These processes have proven effective in the rare instances of financial distress of PSEIs.⁴

Given the precedent set by Laurentian, there is a need to move quickly to amend the CCAA to preclude its use, and its threatened use, by other public post-secondary institutions. Leaving the door open to the CCAA flies in the face of the lessons learned by the Laurentian fiasco. It would mean governments would be willing to set aside their obligations to respect academic freedom, allow the customary process of financial exigency to be ignored, permit creditors to determine which academic programs are cut, and put the future of countless students and staff at risk. In the case of Laurentian, the CCAA was used as a loophole to override collective agreements and avoid accountability. The administration deliberately triggered insolvency proceedings to slash and burn, creating irrevocable damage to its public mandate and academic mission. This cannot be allowed to happen again.

⁴ For example, North Bay-based Nipissing University followed broader public sector precedent by making comprehensive and clear efforts to seek financial assistance from the Ministry.

Ensure Stable Government Funding

Public spending on post-secondary education in Canada has not kept pace with inflation or enrolment over the past several decades. In most provinces, the share of operating revenues universities receive from governments has fallen below 50%.⁵ Declining public funding, in real terms, creates a negative ripple effect across the post-secondary education system, leading to higher student fees and debt, increased precarious employment, program cuts, and a reduction in Canada's ability to generate research and innovation. With more funds coming from private sources (such as international student fees), our once public education system is fast approaching a turning point.

Legislative Coordination with the Provinces

As constitutional issues arise where a provincial insolvency scheme seeks to displace the CCAA, there is a need for a coordinated set of amendments federally and provincially. However, the existing practices described here have made clear that this is no reason to delay federal legislative action to exclude PSEIs.

Provincial legislative actions could include:

- amendments to provincial labour legislation such that any collective agreement with a post-secondary employer must include a financial exigency clause;
- ensuring the appropriate Minister has the necessary powers consistent with the Model Financial Exigency Code to facilitate a restructuring procedure and 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.

⁵ Statistics Canada (2022). Revenue of universities by type of revenues and funds (in current Canadian dollars) (x 1,000) Table: 37-10-0026-01-01

To further bolster existing processes of financial exigency following the removal of PSEIs from federal insolvency, Archer and Torrie have recommended developing a *Model Financial Exigency Code* which would be a widely accepted model procedure for restructuring universities in Canada.⁶

⁶ This would include: 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.