

Post-Secondary Institutions and Insolvency – Background Presentation

By: Cheryl A. Foy LLB
President

Strategic Governance Consulting Services Ltd.

www.universitygovernance.ca

April 27, 2022



What happened?

February 1, 2021 - Laurentian University of Sudbury (“LU”) commenced court-supervised restructuring proceedings under the Companies’ Creditors Arrangement Act (“CCAA”), in order to, obtain a stay of proceedings against it, and to provide an opportunity to financially and operationally restructure.

Ernst & Young Inc. was appointed as monitor of LU pursuant to an Order of the Ontario Superior Court of Justice (Commercial List).

In the tenth order of the proceedings on January 27, 2022 – creditor protection was extended to May 31, 2022.



Why is it of interest?

- Unprecedented - First time in Canadian history a university sought protection under the CCAA.
- The university (like all universities) has a complex set of relationships with other educational and community institutions. The ripple effect is wide.
- Decision has had a devastating effect on the university itself, its employees, students, affiliate and partner institutions, Sudbury, other northern communities, other Canadian universities and the higher education sector in general. i.e. 69 programs discontinued, 100 jobs lost (83 faculty members plus 27 vacant positions eliminated, extremely limited severance payouts). Some cuts to programs were very controversial e.g. midwifery. Particular concerns across the country about the implications for French language higher education. Ripple effects across the sector and across the country.
- Decision to use the CCAA has been widely criticized and questioned. Key questions around the appropriateness of the CCAA for a not for profit broader public sector organization. Complex stakeholder environment – only creditors may vote on the final plan of arrangement.
- Size of the proceedings - Over 20 counsel involved (3 for Laurentian, 3 for the monitor, 2 for RBC, 2 for TD, 1 For BoM, 1 for LU Board, 2 for Huntington, 2 for Thorneloe, 2 for NOSM, 1 for LU student association, 1 for Canada Foundation for Innovation, 1 for University of Sudbury, 1 for faculty association and ...
- Cost to Laurentian for lawyers and consultants is greater than \$24M



Auditor General of Ontario Preliminary Report Key Findings (April 2022)

- ❑ casts the decision to use the CCAA as a discretionary “strategic” decision that allowed Laurentian to act without transparency and subvert collective agreements
- ❑ decision taken on the advice of experts some of whom have since benefited – greater than “\$24 million [paid] to external lawyers and other consultants, including those who recommended and guiding the CCAA restructuring process” (AGO, p. 6).
- ❑ insufficient efforts made to work with provincial government prior to deciding to use the CCAA process – failed to provide complete financial information to government or to the university’s stakeholders (no disclosure to own auditors).
- ❑ advocates for greater provincial government oversight of university finances as an alternative to allowing universities to file under CCAA
- ❑ cites many governance deficiencies and poor decision-making leading up to the financial crisis – notes that the provincial government has been actively involved in overseeing university finances since 2015 – had the information available but did not act. AGO’s view is that the Ontario government needs more tools
- ❑ my view is the Province has all the tools it needs to have acted (see: <https://universitygovernance.ca/responding-to-the-ontario-auditor-generals-oag-preliminary-perspective-on-laurentian/>)



What do the non-creditor stakeholders say?

“Humanities and social sciences will get gutted in this process. It’s basically doing what, I think, the government wanted to do in the first place, which is get rid of the soft programs and just focus on the sciences.” – [Christopher Duncanson-Hales](#), sessional philosophy prof, Laurentian U

Not surprisingly, the City of Greater Sudbury city council has voted unanimously to write the Premier and MCU to urge funding “to stabilize Laurentian University’s operations.” [CBC](#)

“Asking the senate to consider and vote on an omnibus programming package, without input on the academic criteria and in the span of a single day during an in-camera session is a clear violation of collegial governance, senate’s mandate and the responsibility of a public institution to the community it serves.” – [Rahul Sapra](#), president, OCUFA

“The federated universities... are deeply embedded in Laurentian’s culture. This action will tear a hole in the fabric of the university’s mission, one that may prove impossible to repair.” – [Christopher Duncanson-Hales](#), prof, uSudbury

“We’ve opened up the floodgates for other universities and colleges to be treated similarly, as though we were a private -sector corporation.” – [Jen Johnson](#), gender and sexuality studies prof, Thorneloe U

“We will oppose this attempt by Laurentian to shut down Thorneloe as a scapegoat for Laurentian’s self-inflicted financial problems.” [John Gibaut](#), president, Thorneloe U



What do the non-creditor stakeholders say?

“Let’s make no mistake. Management by the board and senior administration at Laurentian was outrageously bad.” – [Brenda Austin-Smith](#), president of CAUT

“Faculty knew that the board of governors was notoriously resistant to reporting financial details. But without giving any notice to anyone, and in a shocking display of contempt for collective agreements bargained in good faith to protect the workplace rights of staff, the Laurentian board decided to downplay its status as a public institution.” – [Brenda Austin-Smith](#), president of CAUT

110 Faculty, 41 Staff and 36 Administrators lost their jobs on Monday. The LUFA membership was voting on a new collective agreement yesterday, reached through a process “construed as a mediation, but it’s not really.” [Sudbury.com](#)

Laurentian’s School of the Environment has been eliminated, along with the Ecology and Restoration Biology programs. “The entire legacy of the re-greening of Sudbury has been wiped out.” (Symbolically, Sudbury has been decimated by another man-made disaster this year.) [CBC](#)

“I’ve got friends and colleagues whose lives are destroyed. It’s brutal... I have to go back to work, and how am I going to handle working for an administration that implemented this grossly inhumane and cruel plan?” – [Albrecht Schulte-Hostedde](#), Biology prof, CRC Chair, Laurentian U

“Universities are much more complicated than pulp mills in terms of their programs and what they do in communities.” – [Livio Di Matteo](#), economist, Lakehead U



What do the non-creditor stakeholders say?

“To take an institution like Laurentian and sell it off like you’re at a yard sale, or treat it like a bankrupt company, has national importance.” – [Charlie Angus](#), MP for Timmins-James Bay

“In one e-mail sent at 10:01 pm, the university had undone decades of education for the humanities including fields of communications, Indigenous studies, gerontology, and gender and sexuality.” – [Jackson Pind](#), Laurentian alumnus

OCUFA is calling for the resignation of minister of colleges and universities Ross Romano, and for the province to provide immediate financial support to LU. [CBC](#)

“Without the provincial government at the table, we were in an impossible position. It now appears clear that this was the outcome that both Laurentian’s senior administration and Minister Romano were working toward.” – [Fabrice Colin](#), Laurentian U Faculty Association president

Among the 69 programs cut on Monday for “low enrolment” was Canada’s only bilingual Midwifery program – and *unlike* the others, it was extremely popular with students and cost LU nothing. The program attracted 300 applications last year, for just 30 available seats – a cap imposed by the province. Since the program is grant funded by MCU and the Ministry of Health, “Laurentian does not pay for this program at all.” (Supporters of the program are circulating a [petition in English](#) and [en français](#), with a deadline of today.) [The Lambda](#)

Sometime last summer, one of LU’s major bank lenders, Desjardins, somehow got paid out in full, while RBC and TD were left holding \$90M in debt as the university slipped into creditor protection. Alex Usher asks if the bank called its line of credit, what tipped them off? Or worse, did LU “actually *choose* to renounce the line of credit in order to provoke a crisis? (The careful wording of Haché’s affidavit is ambiguous on this point.)” As I’ve suggested before, Alex also points out that “Laurentian’s problems could have been solved with much less fuss” if MCU had simply loaned them ~\$35M for repayment over 5-7 years. (I think one or both parties – MCU and LU’s administration or board – must not have *wanted* to avoid the university’s implosion. If so, I think they seriously underestimate the long-term damage this will do to the university.) [HESA](#)



Governing complexity

Universities are not simple organizations. In fact, given the breadth of their goals and missions, the tremendous expertise and specialization that characterize their basic functions, and the huge diversity of their activities, universities have evolved to become one of the most complex organization forms that the human species have ever created. They employ hundreds, and in some cases thousands, of highly specialized experts who share their knowledge through teaching and pursue what are frequently unique programs of research. The university's physical plant includes classrooms and laboratories, but it may also include medical centers, restaurants, rental housing, museums, art galleries, spaces for worship, and a plethora of specialized research facilities, ranging from agriculture research lands, to supercomputing facilities to nuclear reactors.

Peter McKinnon, *p. 90*.



About universities:

- All Ontario universities are independent corporate entities with their own boards.
- While they are designated as part of the broader public sector because they receive a significant amount of revenue from government, they are NOT part of government.
- Shared governance - University governance is unique. They are not top-down organizations. While the board is accountable like other boards, it is expected in the university environment that there will be collegial decision-making – that faculty have a say in running the university particularly in academic matters (approval of courses, programs, admissions standards, academic quality, academic conduct etc.). This is called shared governance.
- There is no room for shared governance in a CCAA proceeding. University stakeholders are relegated.



Unique aspects of university governance

- Created by individual legislation or charters (older universities)
- Shared governance:
 - Board size and composition - "representatives" on boards
 - Academic Governing body – size, composition
 - More complex, unique relationship and jurisdictional challenges between the governing bodies
 - Board role in hiring
 - Different models of shared governance (unicameral, bicameral, tricameral)
- Different culture
 - Autonomy inside universities – federated organizations
 - Faculty as members
 - Academic Freedom
 - Collegial decision-making and collegial processes:
 - What it takes to hire a president
- Complexity and scope of activity / many stakeholders
 - Research, Teaching and Service
 - Partnerships and affiliations
- Risk and compliance
- High degree of regulation



The importance of universities to democracy

- Universities are essential to democracy
- Fallis describes universities that provide “liberal education, graduate education and professional education” as “multiversities” (p.3) .
- G. Fallis p. 351:

Multiversities serve democracy, but paradoxically the authority of elected governments over the multiversity must be highly attenuated. The multiversity’s democratic purposes are best served with institutional autonomy and academic freedom. The new idea of a university is well suited to existing principles of governance.



Most of these stakeholders have little say in the final outcome of the Laurentian CCAA filing:

- Students
- Faculty
- Staff
- Provincial government
- Federal government
- Municipal government
- Partners – hospitals, other universities, public and private corporate entities
- Donors
- Parents
- Community
- Unions, Groups and Associations
- And



Dr. V. Torrie – University of Manitoba

Although there have been CCAA proceedings for other not-for-profit corporations, a CCAA proceeding for a publicly funded not-for-profit corporation, such as a public university, is unprecedented. However, this point was not raised during any of the court proceedings. This is unsurprising, as there is no exception in the CCAA for public universities. (p.9)

As can be seen, there is a disconnect between the purposes of a public university and the CCAA which largely stems from two different conceptions of the public interest. The CCAA can serve the public interest by protecting creditors, employees, third-party businesses, and other stakeholders from the potentially dramatic effects of corporate liquidation, but these benefits primarily result from the financial health of the institution. A university, on the other hand, is subject to public policy considerations that extend beyond its mere financial stability. A financially solvent university that fails to achieve its other policy goals is not an effective institution. Therefore, although the CCAA can further the public interest, it cannot give effect to all of the public interest considerations that are embodied in the principles of academic excellence and accessibility. This is underscored by the fact that a university's solvency actually depends on the ongoing provision of public funds (p.17)



Is it contradictory to say universities are independent but shouldn't be able to access the CCAA?

- No – it's simply a recognition that universities are unique corporate entities who receive large amounts of public funding, who are highly-regulated by government, in which a large number of stakeholders have an interest – they primarily serve a social purpose and that, as we now have seen, the use of the CCAA in the university context is devastating.
- universities can retain independence but still be accountable – governments have many mechanisms for holding universities accountable and for ensuring financial sustainability– due diligence and conditions in granting agreements:
 - Universities in Ontario receive about 40% of their funding from the provincial government
 - Research funding comes from the federal government primarily through the Tri-agencies.



Additional Resources:

All publicly-available documents pertaining to the Laurentian CCAA filing are filed on an E&Y site at: <https://documentcentre.ey.com/#/detail-engmt?eid=459>

Simple explanation of the CCAA: <https://www.pwc.com/ca/en/services/insolvency-assignments/what-is-ccaa.html>

Stakeholder quotations taken from Ken Steele's webpage (Higher Education Futurist) at: <http://eduvation.ca/2021/04/laurentian-in-limbo/>

G. Fallis, *Multiversities, Ideas, and Democracy* (University of Toronto Press, 2007) Cheryl Foy, *An Introduction to University Governance* (Irwin Law, 2021)

Peter McKinnon, *University Commons Divided: Exploring Debate and Dissent on Campus* (Toronto: University of Toronto Press, 2018)

T. Shanahan et al, *Handbook of Canadian Higher Education Law* (McGill-Queen's University Press, 2015)

V. Torrie, *Laurentian University of Sudbury: A Consideration of Restructuring, Public Institutions and the Public Interest* *Canadian Business Law Journal*: (2022) 65 *Can. Bus. L.J.*

Alex Usher (Higher Education Strategy Associates) at: <https://higherstrategy.com/tag/laurentian-university/> and in particular: <https://higherstrategy.com/the-auditor-general-on-laurentian/>

