

Minister's Roundtable on Post-Secondary Institutions and CCAA

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Summary of key points made during discussion
by Cheryl A. Foy, BAH, LLB



Cheryl Foy - Credentials

- ❑ Thought leader and expert in university governance
- ❑ Lawyer (non-practicing) (called to the Ontario Bar in 1995)
- ❑ 20+ years of governance experience in public company, private company, and higher education (General Counsel and University Secretary to 2 universities (Carleton and Ontario Tech)).
- ❑ Author: *Introduction to University Governance*, 2021
- ❑ Co-Reviewer/Author with Julia Eastman – Dalhousie University Governance Review (2022)
- ❑ To date - worked with about 20 universities on different aspects of their governance.
- ❑ Founder and teacher of the only Canadian micro-credential on university governance – University Governance in Canada, through the Centre for Higher Education Research and Development, University of Manitoba.



Recommended Resources

1. <https://universitygovernance.ca/lessons-learned-from-the-special-report-on-laurentian-university-part-2-of-several/>
2. <https://higheredstrategy.com/wp-content/uploads/2015/11/HESA-Intelligence-Brief-11-Exigency.pdf>
3. <https://www.youtube.com/watch?v=-nIDShJM6K0>
4. <https://ontariosuniversities.ca/resources/committed-to-strong-university-financial-transparency-and-accountability>
5. <https://ontariosuniversities.ca/wp-content/uploads/2022/11/Leading-Practices-in-University-Board-Governance-COU.pdf>



Response to opening question

- ❑ Universities should continue to have access to the CCAA
- ❑ Support exploring the development and application of a "public interest" framework for application to all "public interest corporations", not just for universities. "Public interest corporations" could include charities and not for profits.



6 points

- ❑ Any solution has to foster the role of universities in democracy – respecting institutional autonomy and academic freedom means choosing solutions that respect the autonomy of universities and enable them to protect academic freedom for the benefit of society.
- ❑ CCAA is a blunt instrument but the underlying reasons that Laurentian University (LU) ended up filing under the CCAA weren't caused by the CCAA and the focus should be on those underlying causes (most of which are governance-related).
- ❑ There have been many positive changes as a result of the Laurentian crisis – particularly in university governance. The focus needs to be on accountability through effective governance, and not on control of universities.
- ❑ There is promise in the development of a public interest framework as a part of court approval of restructuring plans for a subset of public interest corporations including but not limited to universities.
- ❑ Eliminating the CCAA leaves universities who face financial troubles in an impossible position given the existence of unworkable and overreaching financial exigency clauses in most university collective agreements.
- ❑ Provincial and federal governments have extensive contractual relationships with universities – they have opportunities through due diligence (pre-contract) and through the inclusion of contractual provisions in these contracts to foster financial health of universities while respecting their autonomy.



Point 1 - Democracy and universities - protectors of ideas and free thought

The university [not only continues] the process of building democratic character [in its students] – [democratic character being “the ability to think carefully and critically about problems, to articulate one’s views and defend them before people with whom one disagrees”] but the fundamental democratic purpose of a university is protection against the tyranny of ideas. Control of the creation of ideas ... subverts democracy. As institutional sanctuaries for free scholarly inquiry, universities can help prevent such subversion. Fallis goes on to call universities “sanctuaries of non-repression”.

George Fallis



Point 1 - Institutional Autonomy

- ❑ Institutional autonomy allows universities to play the role they've played as pillars of democracy for hundreds of years
- ❑ There are many definitions of academic freedom – unions focus on academic freedom as a rights-based concept but the focus is properly on academic freedom and its role in ensuring two things: 1) those with expertise teach and evaluate students who seek to acquire it, and; 2) those with expertise bring that expert lens to the world's problems and their potential solutions well before governments or others have even identified the problem.
- ❑ Why do we need to protect academic freedom?
 - ❑ mRNA vaccines were being researched for six decades before COVID.
 - ❑ Research into the effects of CO₂ on the air and water was begun in the 1800's. A US professor developed tools to measure CO₂ in the air and water in the 1950's and at the same time identified the source of CO₂ in the air and water as fossil fuels.



Point 2 – CCAA did not cause the crisis

- ❑ The Laurentian situation was many years in the making
- ❑ Successive LU leadership and boards failed to fulfil their governance obligations
- ❑ Leadership and unions contributed to a poor labour relations environment
- ❑ Financial exigency clause in LU's collective agreement would have prevented meaningful restructuring
- ❑ Provincial government was aware of LU's financial situation at least five years before the CCAA filing but took no steps
- ❑ CCAA allowed restructuring through a painful process but at the end of the day LU emerged and is rebuilding



Point 3 – Positive Change

Focus needs to be on accountability and not control. The LU crisis has led to increased focus on accountability:

- ☐ Council of Ontario Universities:

- ☐ Financial transparency initiatives
- ☐ Leading governance practices statement

- ☐ Auditor General Value for Money Audits in 2022 – are identifying gaps and focusing on improved governance but not finding another LU even though the early focus was on institutions with high debt

- ☐ Universities are increasing focus and engaging in governance education:

- ☐ First Micro-credential in University Governance in Canada offered by University of Manitoba in 2023 – first program offered in the Spring fully subscribed within one week and waiting list for Fall program
- ☐ Canadian Association of University Business Officers is offering governance training for senior administrators and those who work for them (since 2022 - 3 courses for senior leaders, one at an annual conference (100 attendees)).
- ☐ Canadian University Boards Association – continued focus on governance training for board members

- ☐ Banks have changed their practices and are doing more diligence before lending to universities

- ☐ University commitment to the use of rating agencies



Point 4 – Public Interest Framework

- ❑ A public interest framework within the CCAA would ensure that for public interest corporations, the courts would consider how well the public interest has been addressed in the proposed restructuring.
- ❑ Unless provincial legislation provides otherwise, universities would have the choice to file under the CCAA – their autonomy as institutions would be preserved by this solution.
- ❑ At the same time, presumably a public interest framework could accommodate the shared governance environment of a university and provide a voice or mechanism for the engagement of the many stakeholders affected by universities.



Point 5 – Financial Exigency Clauses

Unworkable

- ❑ Low likelihood of use but does that mean you take away the oxygen masks or the life vests?
- ❑ Ontario AG takes the position that LU should have consulted faculty unions and resorted to financial exigency measures - the financial exigency measures are unworkable and create a barrier to real restructuring measures in the unlikely event of a financial emergency
- ❑ Please see Resources to understand how the LU financial exigency clause would have worked and how in all likelihood it was the unworkable nature of this clause that pushed LU toward the CCAA
- ❑ Cutting off access to the CCAA will hamstring any university that finds itself in financial difficulty, given the existence of financial exigency clauses in many university collective agreements. While leaving the CCAA in place may encourage more labour relations balance and more collaboration between unions and universities to avoid a CCAA outcome.



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