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Professional Development

Emerging Challenges in the University Sector in Tough Fiscal Times

April 23, 2014

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Elizabeth Brown
Michael Kennedy
John Brooks
Simon Mortimer
Frank Cesario
Dan Michaluk
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Bill 179 and It's Application to Deans and Provosts

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Moving Towards Sustainable Pension Plans in the University Sector

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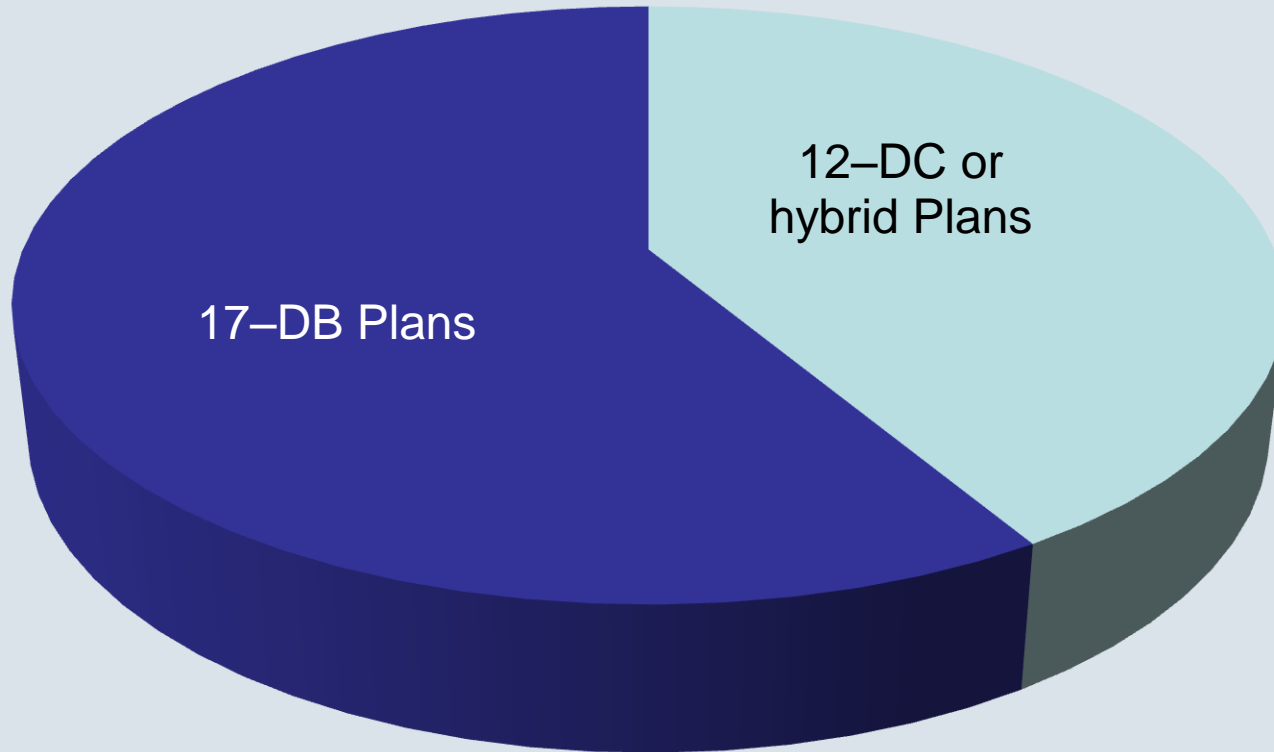
Today's Objectives

- Update on recent changes
- Be ready for future directions

Overview

- The Starting Point
- A First Step
- Future Directions

The Starting Point: Single Employer Pension Plans ("SEPPs")

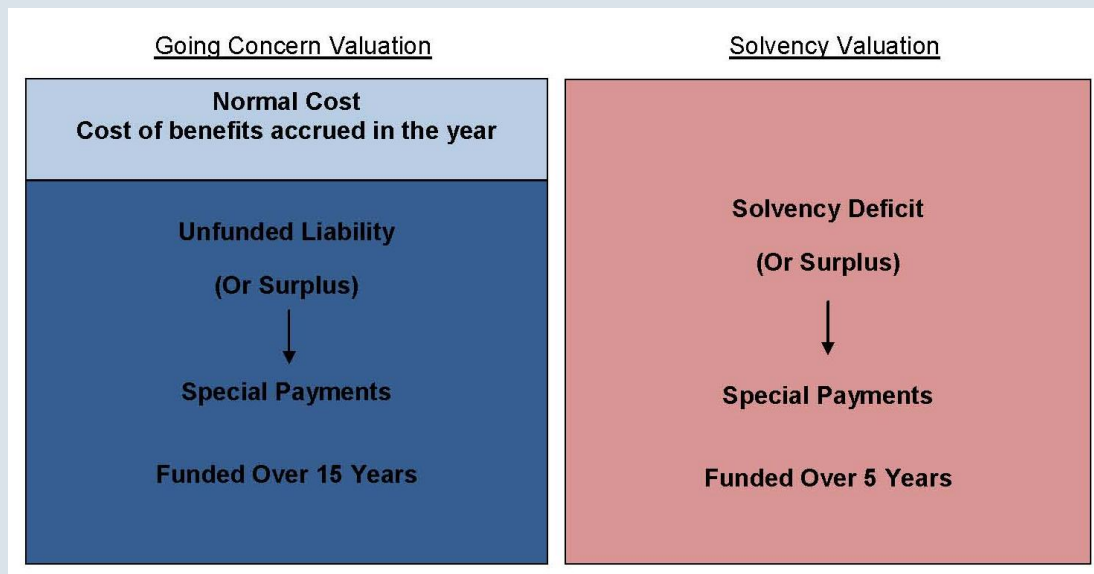


The Starting Point: Single Employer Pension Plans

- Employer is sponsor and Administrator
- Employer responsible for deficit funding
- Cannot reduce accrued benefits
- If wound up, employer responsible for terminal funding

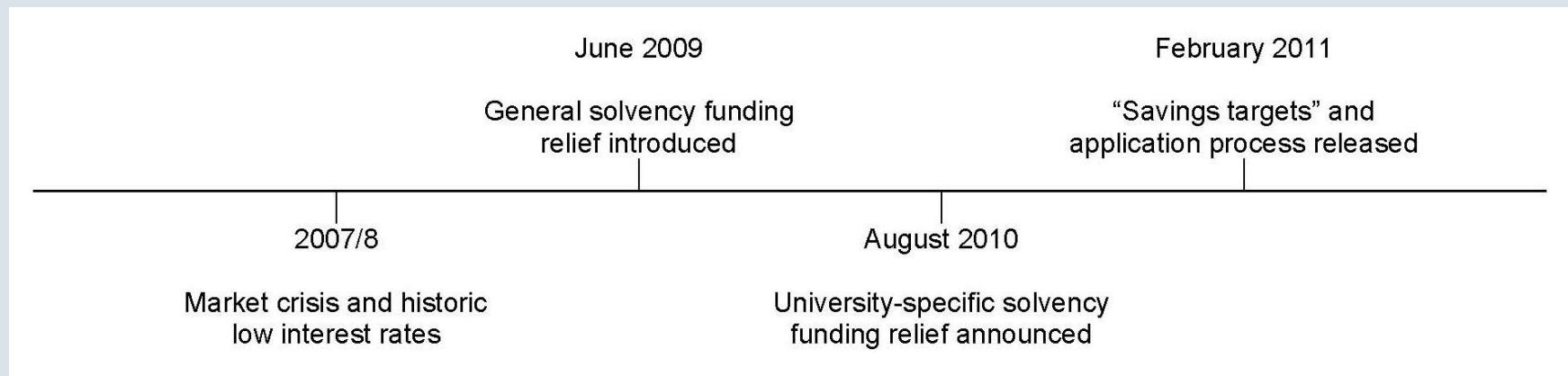
The Starting Point: Single Employer Pension Plans

- DB SEPPs are valued on two bases:



- Solvency special payments can be significant/unpredictable
- File valuation at least every three years

A First Step: University-Specific Solvency Funding Relief



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A First Step: University-Specific Solvency Funding Relief

- "Savings targets" to be met:
 - Stage 1
 - Three-year grace period to put plans on a sound footing
 - Negotiations with employee groups and unions to implement changes to contribution rates and benefit levels
 - Stage 2
 - Available if savings targets are satisfied as a result of Stage 1 negotiations/changes
 - Amortization of solvency deficiencies over a period of up to 10 years (normal rule is five years)

A First Step: University-Specific Solvency Funding Relief

Universities receiving Stage 1 relief:

| | |
|-------------------------------------|----------------------------|
| Carleton University | University of Ottawa |
| Trent University | University of Toronto |
| McMaster University | University of Waterloo |
| Lakehead University | University of Windsor |
| University of Guelph | Victoria University |
| Laurentian University | Wilfrid Laurier University |
| University of St. Michael's College | York University |
| Queen's University | |

Universities receiving Stage 2 relief (as of April 2014):

| | |
|-------------------------------------|----------------------------|
| Lakehead University | Wilfrid Laurier University |
| University of St. Michael's College | |

A First Step:

University-Specific Solvency Funding Relief

- In 2013 the Ontario government changed Stage 2 relief
- Plans eligible for Stage 2 may now choose to make interest-only payments for the first three years of the 10-year period

Future Directions



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Future Directions: 50/50 Cost Sharing



- 2012 Ontario Budget:

*"Many Ontario public-sector employees, **particularly in the university and electricity sectors**, are members of single-employer pension plans. Under these plans, the employer is solely responsible for funding shortfalls. Employers typically contribute more than plan members — in some cases, two or three times more. When these plans are in deficit, as many of them are today, the difference between employee and employer pension costs grows even wider."*

- Members of BPS SEPPs to share the "ongoing cost" of their pension benefits equally with the employer

Moving Forward: 50/50 Cost Sharing



- Expectation is that BPS SEPPs will move to 50/50 cost sharing formula for "ongoing contributions" within five years
- Employers continue to be responsible for existing and future plan deficits

Future Directions: JSPPs in the University Sector



- Under PBA, members **and** employers of jointly sponsored pension plans ("JSPPs") are required to contribute towards unfunded liabilities and solvency deficiencies
 - No special payments are made
 - Unfunded liabilities and deficiencies are addressed by increased contributions or reductions to future benefits
- Large public sector JSPPs exempt from funding solvency deficiencies

Future Directions: JSPPs in the University Sector



- Ontario government to consider extending exemption for other JSPPs
- Universities encouraged to explore JSPP conversion
- No university has yet converted

Future Directions: JSPPs in the University Sector



- Ontario government also encouraged exploration of pan-university JSPP...
- Or, a "multi-university" JSPP...
 - Some, rather than all, universities could be participating employers and co-sponsor a JSPP with affected employee groups or unions
- And, if universities cannot convert to a new JSPP, can they join an existing one?

Future Directions: JSPPs in the University Sector



- The CAAT Pension Plan is in discussions with interested universities regarding potential to join CAAT
 - CAAT Pension Plan exempt from funding solvency deficiencies
- University employees would contribute and build future retirement income within CAAT Pension Plan

Future Directions: JSPPs in the University Sector



- CAAT Pension Plan marketing this option:
 - university and college employees have a similar demographic profile; and
 - option will allow members easier portability within the broader post-secondary sector
- Joint sponsors of CAAT Pension Plan willing to share governance representation up to a maximum of 50%

Future Directions: JSPPs in the University Sector



- CAAT Pension Plan will not assume any university's pension deficit

Future Directions: JSPPs in the University Sector



- Significant hurdles affect ability to convert
- May require legislation to address:
 - Consent of retirees
 - Conversion of accrued benefits
 - Conversion of DB deficits
 - Transfer of existing assets or liabilities from SEPP to JSPP
 - PBGF coverage

Future Directions: Pooling of Investments



- Bill Morneau appointed special Pension Investment Advisor to lead investment pooling initiative

Future Directions: Pooling of Investments



- Morneau Report released November 16, 2012
- Chief advantages identified:
 - reduced investment management costs;
 - access to alternative investment classes;
 - enhanced risk management processes; and
 - possibly improved long-term investment returns

Future Directions: Pooling of Investments



- Report recommended:
 - creating a new arm's-length pooled asset manager, the Ontario Investment Management Corporation ("OIMC")
 - seven-year mandatory asset pooling for most public sector and BPS DB and hybrid pension plans with assets under \$40 billion
 - each plan to retain responsibility for asset allocation decisions from within OIMC'S pooled fund options

Takeaways

- Check-in regarding status of plans
- Determine pension agenda
- Align with collective bargaining
- Monitor developments post-Budget...

Moving Towards Sustainable Pension Plans in the University Sector

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Bargaining to a Deadline: Are You prepared?

Michael Kennedy

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Introduction

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Challenges This Round

- Fiscal squeeze
- Pension
- No money
- Workload
- Vigilant boards

Who Is Up for Bargaining This Year?

| Organization | Expiry of Collective Agreement |
|----------------------------|--------------------------------|
| Carleton University | April 30, 2014 |
| Brock University | June 30, 2014 |
| Guelph, University of | June 30, 2014 |
| Laurentian University | June 30, 2014 |
| Toronto, University of | June 30, 2014 |
| Western University | June 30, 2014 |
| Wilfrid Laurier University | June 30, 2014 |
| Windsor, University of | June 30, 2014 |
| Trent University | June 30, 2014 * |
| Nipissing University | April 30, 2015 |
| Queen's University | April 30, 2015 |
| York University | April 30, 2015 |
| Waterloo, University of | April 30, 2015 |
| Algoma University | June 30, 2015 |
| Ryerson University | June 30, 2015 |
| Lakehead University | August 31, 2015 |
| Ottawa, University of | April 30, 2016 |
| McMaster, University of | June 30, 2017 |

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Is There Ever A Good Time For Impasse?

June 30th

Pre-Labour Day

Fall



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What's Your Plan If No Deal After June 30th?

- Request Conciliation?
- Are you prepared to ask for a No Board?
- Request Mediation?
- Think about timing in advance?

Communication Strategy

- Before bargaining
- During bargaining
- In the event of an impasse

Strike Prep in the Event of Impasse

- It takes time
- Need to think through the operational and academic issues
- Need dedicated resources
- It's not an option

The End Game



- Have you done a realistic analysis of what's achievable?
- What do the comparators support?
- Do your Board and Executive Team understand what's really possible?

Bargaining to a Deadline: Are you prepared?

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Academic Restructuring

John Brooks

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Introduction

- Presentation will touch on the following:
 - Some of the challenges facing Ontario universities
 - The powers of the Board and Senate under university statutes
 - The courts and bicameralism
 - Consultation
 - Potential restructuring and university staff, faculty and librarians

Groundhog Day or Déjà Vu All Over Again

- "The actions of **[the President]** can best be understood in the context of recent history concerning **[the University's]** financial difficulties. Like many universities in Canada, the **[University]** has for a number of years suffered from chronic underfunding, and in the past decade, from projected deficits from one year to the next. It is generally agreed by the parties that each year the **[University]** has striven to balance its budget by making across-the-board or horizontal cuts, that is, by making equal percentage cuts to the budget of each faculty – spreading the pain evenly, as it were."

The Challenges

- Ontario universities educate more students with less operating revenue per student than universities anywhere in the country.

The Challenges

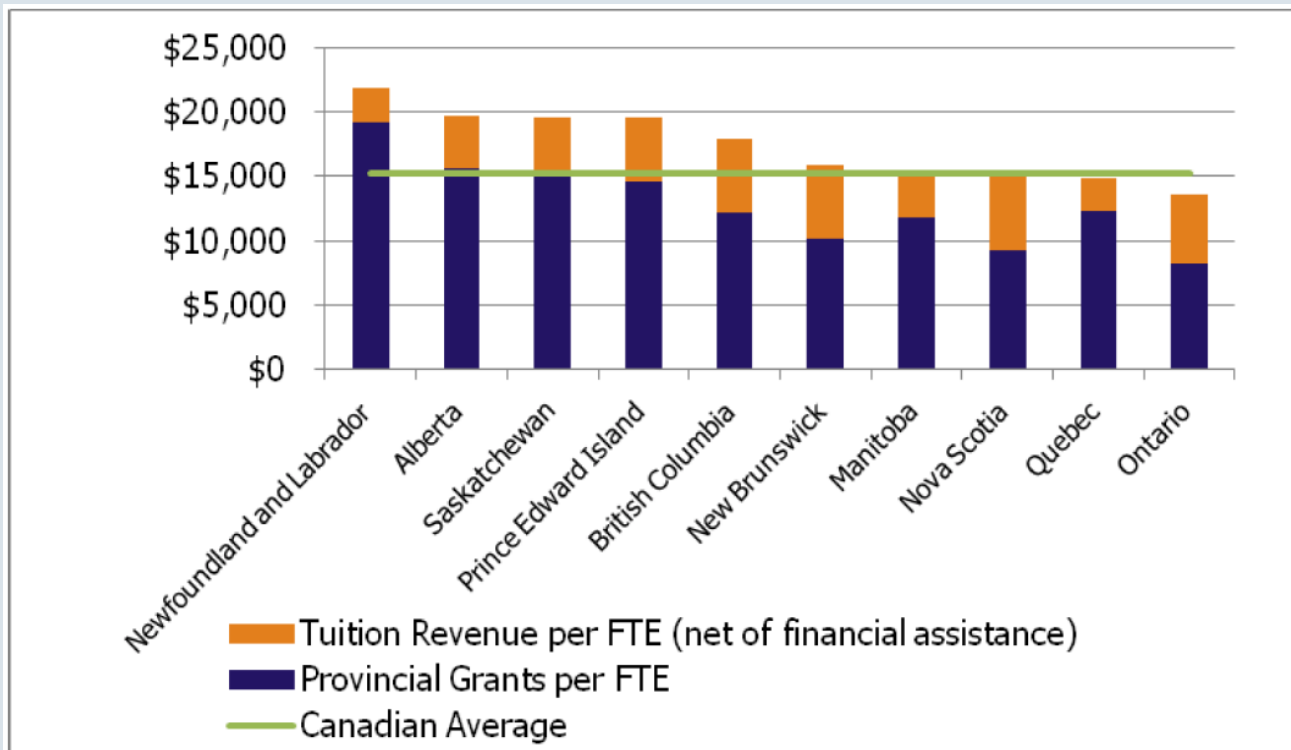


Figure 1: Interprovincial Revenue Comparison

(COU Universities' 2014 Provincial Pre-Budget Submission)

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The Challenges

- Ontario universities have accommodated growth of 146,000 students since 2002-03, an increase of 53%.
- Reductions in per-student funding in the government's operating grants.
- Reductions in revenue from the International Student Recovery Program.

The Challenges

- Lower tuition revenues because of caps on tuition.
- Changes in tuition administration that will add costs and further reduce revenue when the changes are implemented.
- Increased targeted investments by government that reduce the flexibility of universities to address student and local needs.

The Challenges

- A planned reduction of the BIU weight for teacher education that will begin in 2015-16.
(COU 2014 Provincial Pre-Budget Submission)
- Ontario's Differential Policy Framework for Post-Secondary Education and Strategic Management Agreements.

The Powers of the Board and the Senate

- Most Ontario universities are bicameral with a Board of Governors or similar body and a Senate.
- University statutes set out the powers of the Board and the Senate using various similar but not necessarily identical phrases.

Powers of the Board

- Except as to such matters specifically assigned by this Act to the Senate, the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs are vested in the Board.

Powers of the Senate

- Powers of the Senate include to control, regulate and determine the educational policy of the University and to determine the courses of study.
- Or "the system of education", or "academic policy".

The Courts and Bicameralism

- "One could only gain an accurate appreciation of how bicameralism actually works at a particular university by careful study of that institution's arrangements, practices and traditions."
- *Kulchyski v. Trent University*, 2001 Ontario Court of Appeal

***Kulchyski v. Trent University*, 2001 Ontario Court of Appeal, cont'd**

The Majority

- Supported the conclusion of the Divisional Court that the Board's specific and residuary powers grant it exclusive jurisdiction over the management and control of the University's property, revenues and expenditures including financial responsibility for provision of facilities.
- The Board is the keeper of the University purse and has no obligation to indefinitely provide financial support to any policy, educational or otherwise, that is draining the coffers of the University, even if that policy originally was agreed upon by both the Board and the Senate.

Kulchyski v. and Trent University, 2001

Ontario Court of Appeal, cont'd

The Dissent

- The powers of the Board and the Senate were both exclusive and overlapping. They were exclusive in the sense that where a matter is specifically assigned to one body the other body lacks authority over that matter (for example the Board has no authority to determine educational policy for the University and the Senate has no authority to manage or control the property, revenues and expenditures of the University).

Kulchyski v. and Trent University, 2001

Ontario Court of Appeal, cont'd

The Dissent

- Not all issues fall neatly into the categories of the matters assigned to the Board and the Senate respectively.
- Where a matter has both educational policy and financial implications the approval of both Senate and the Board is necessary.

***Kulchyski v. Trent University, 2001* Ontario Court of Appeal, cont'd**

The Dissent

- The Board could require the University to change and curtail its academic program for valid financial reasons, but the role of the Senate in identifying the activities or programs to be eliminated or curtailed would have to be respected.
- The power of the Board to determine the resources available for the University's program cannot be doubted, but neither should the Senate's power to define and shape the institution's educational policy with the resources that are available.

UBC v. UBC Faculty Association, British Columbia Court of Appeal, 2007 – the "Rucker" Decision

- The President of the University decided not to recommend a faculty member for promotion and the faculty association grieved.
- The collective agreement provided that if the arbitrator found the President's decision to be unreasonable the arbitrator "shall reverse the decision".
- Under the UBC Act the President has the power to recommend promotions of the teaching staff. The powers of the Board include the power to promote teaching staff, but that power is subject to a section of the Act which provides that a member of the teaching staff "must not be promoted or removed except on the recommendation of the President".

The *Rucker* Decision, cont'd

- The University argued that to accord with the UBC Act the word "reverse" in the collective agreement should be interpreted as "revoke" or "annul", thus permitting the matter of the faculty member's promotion to be remitted to the President for reconsideration.
- The arbitrator upheld the grievance and ordered that the faculty member be promoted.

The *Rucker* Decision, cont'd

- The majority of the Court of Appeal held that an arbitrator's decision could not create an inconsistency between the collective agreement and the powers granted to the President and the Board pursuant to the UBC Act.

Lakehead University v. Lakehead University Faculty Association, 2010 Arbitration Award of Jane Devlin

- Faculty association filed grievances concerning a Board-approved shut down of the University that took place in December for financial reasons to save money.
- The Act provided that except as to such matters by the Act specifically assigned to the Senate, the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs are vested in the Board.

Lakehead University v. Lakehead University Faculty Association, cont'd

- The University argued that the arbitrator did not have the jurisdiction to intervene in connection with the closure because in effecting the shut down the Board was exercising its exclusive jurisdiction to manage the University pursuant to the Act.
- A clause in the collective agreement provided that the faculty association recognized the rights, powers and responsibilities of the Board to operate and manage the University in accordance with the *Lakehead University Act* and that the Board would exercise those rights, powers and responsibilities which are pursuant to the collective agreement in a fair and reasonable manner.

Lakehead University v. Lakehead University Faculty Association, cont'd

- The arbitrator did not accept the University's submission that she had no jurisdiction to intervene and noted that while the Act involves a general grant of authority to the Board to govern and manage the University, the Board is also party to a collective agreement with the faculty association which contains certain rights and obligations.
- The arbitrator found that by instituting a shut down it was not open to the University in view of a variety of provisions of the collective agreement to calculate a daily rate of pay and unilaterally reduce the annual salary of faculty members by four days pay in connection with the shutdown.

Faculty Association of UBC v. UBC, BC Court of Appeal, April 2010

- The Senate promulgated and implemented a Policy on Student Evaluation on Teaching.
- The faculty association filed a grievance alleging that elements of that Policy were in breach of provisions of the collective agreement between UBC and the faculty association concerning teaching.
- The University argued that Senate policies were not arbitrable under the collective agreement

Faculty Association of UBC v. UBC, BC Court of Appeal, April 2010, cont'd

- The arbitrator held that Senate policies were not arbitrable and found that he lacked jurisdiction to hear the case. The arbitrator held that the University as employer had no power to bind the Senate to terms of the collective agreement conflicting with the terms of the Senate policies.
- The faculty association appealed this decision through the courts and the Court of Appeal ultimately dismissed the appeal.
- The Court of Appeal found that the purpose of the Senate policy was to improve teaching at the University, something that was within the statutory mandate of Senate under the UBC Act.

Consultation

- Education about the challenges facing the university
- A process for meaningful input from and consultation with all stakeholders – students, staff, faculty and librarians
- Consideration of alternatives in light of budgetary realities

Staff

- For non-unionized staff consider what the university could do if it had to in connection with a potential academic restructuring in the context of obligations under minimum standards legislation such as the *Employment Standards Act*, individual contracts of employment, and university policy.
- For unionized staff, review and consider all relevant provisions of collective agreements with a view to identifying what the university could do if it had to in connection with a potential academic restructuring in compliance with relevant provisions of the collective agreement (e.g. layoff provisions, severance pay provisions, etc.).
- Identify issues or provisions under collective agreements which the university might need to address and deal with in upcoming collective bargaining negotiations in the context of a potential academic restructuring.

Faculty and Librarians

- If non-unionized, review relevant agreements between the university and non-union faculty association and related university policies concerning what the university might be able to do if it had to in connection with an academic restructuring – e.g. obligations to reassign or relocate faculty or librarians in connection with an academic restructuring, etc.
- Potential options with respect to hiring freezes or attrition.
- Potential options with respect to contractually limited faculty, non-tenure faculty, etc.

Faculty and Librarians

- For unionized faculty carefully review the existing collective agreement including, in particular, financial exigency or "redundancy" provisions to identify what the university might be able to do if necessary and in compliance with the collective agreement in connection with a potential academic restructuring.
- Consider potential amendments or modifications the university may need to seek in upcoming collective bargaining negotiations in the context of potential academic restructuring.

In Summary

- What is the statutory jurisdiction of the Board and Senate in connection with any potential academic restructuring?
- What is Senate's role and what is Senate's area of exclusive authority in connection with any potential academic restructuring?
- Educate the community about what the challenges are.
- Consider early and upfront consultation processes concerning potential academic restructuring, including what the alternatives and options might include, and a process for meaningful input from and consultation with students, staff, and faculty and librarians.

In Summary

- What are the potentially applicable provisions of the university's collective agreements with both non-academic staff and academic staff relevant to any potential academic restructuring?
- What options or alternatives does the university have under existing collective agreements with respect to potential academic restructuring?
- What provisions of collective agreements might the university want to or need to address in upcoming collective bargaining negotiations in the context of potential academic restructuring?

Academic Restructuring

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Academic Freedom and Bill 168

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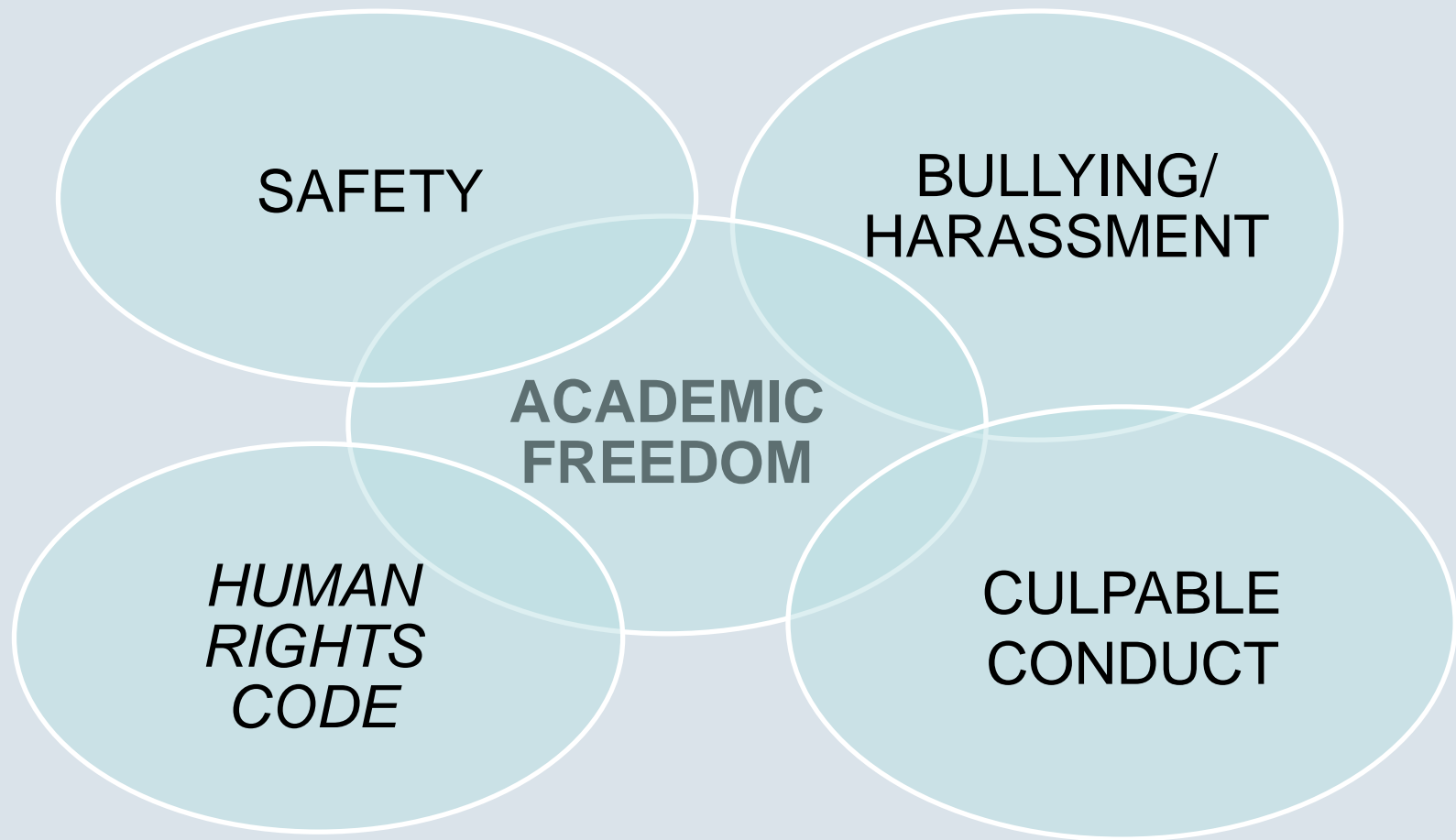
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The Scenario...

- New Senior Administrator with active management style – recipe for a clash with Faculty
- Two Camps:
 - Four Faculty square off against Senior Administrator and anyone who supports him
 - Claim: harassment & abuse of power to adversely affect their careers
 - Three other Faculty targeted by the other four Faculty
 - "victims" of manipulation of tenure process, threats, disparaging comments/emails
 - Claim: poisoned work environment because of harassment by other four Faculty and interference with Tenure decisions

What are we dealing with?



What are we dealing with?

"Every act by which a person causes some form of anxiety to another could be labelled as harassment. But if this is so, there can be no safe interaction between human beings. Sadly we are not perfect. All of us, on occasion, are stupid, heedless, thoughtless and insensitive. The question is then, when are we guilty of harassment?"

- Arbitrator Starkman, 2011
Ottawa (City) v. ATU, Local 279

Let's Break It Down...

- **Workplace Safety**
 - Bill 168
- **Bullying and Harassment**
 - Bill 168
- ***Human Rights Code* protections**
- **Culpable Conduct**
 - are there grounds to discipline?

Workplace Safety – Bill 168

"workplace violence" means,

- a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
- b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
- c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Threats

Kingston (City) and CUPE (Newman, 2011)

- Grievor uttered death threat against union president
 - no genuine intent to harm; intent to intimidate only
 - emotional impact of threat considered actual harm
 - no apology/remorse/acknowledgement
 - no evidence of rehabilitation
 - 28 years' seniority
 - history of anger and previous warnings
- Dismissal upheld

City of Kingston case

1. Bill 168 makes threats not just words, but violence.
2. Bill 168 has changed the manner in which the employer and a worker must react to an allegation of a threat. The parties must report. They must investigate. They must assess the existence of a real danger. Termination is not automatic.

City of Kingston case

3. The Bill 168 amendments impact the manner in which an arbitrator might assess the reasonableness of termination as an appropriate discipline. The weight given to the factor "seriousness of the incident" is affected. Threats are violence.
4. Workplace safety must be considered in assessing the reasonableness and proportionality of discipline.

Bullying and Harassment – Bill 168

"workplace harassment" means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome

Bullying and Harassment – Bill 168

- *not* a subjective test
- there must be an objective basis
- *properly* discharged supervisory responsibilities, including discipline, does not amount to harassment
- *a failure* to exercise supervisory responsibilities can create an unsafe and unhealthy workplace

Human Rights Code Harassment

- Are the disparaging comments or conduct based on a prohibited ground under the *Code*?
 - race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability
- "Harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome
- Can overlap with Bill 168 or not be engaged at all

When Bill 168 and Code Overlap

Metro Ontario and UFCW (2011, Williamson)

- Grievor uttered racial slurs and threw a meat slicer padlock against the wall at co-worker
- Grievor uttered a general threat that "someone/some people will pay" if she loses her job
 - no apology/lack of appreciation
- Dismissal upheld
- No reinstatement where no apology and lack of appreciation of severity of her misconduct

Academic Freedom – the Ultimate Defence?

- Starting point:
 - right to search for truth, knowledge and understanding and to express freely what one believes without fear of reprisal
 - right to study, teach, debate, research, criticize and even commend civil disobedience
- BUT does not grant immunity or alter responsibility to adhere to the law

Academic Freedom – There are Limits

McMaster 2013 decision

- Academic freedom, freedom of speech and freedom of association are at the core of academia and must be protected
- Context is the key when reviewing conduct
- Academic freedom is not absolute
- Competing rights need to be balanced

Academic Freedom – There are Limits

- Academic freedom does not include:
 - the right to slander, coerce, intimidate or use academic processes to adversely affect other faculty
- NOT a defence to Bill 168 or *Code* violations
- Academic freedom cannot be used as a shield for inappropriate, unprofessional and/or harassing behaviour by individuals or groups

Academic Freedom – There are Limits

- Must protect vigorous debate and close scrutiny in good faith in tenure process BUT:
 - academic freedom is not a defence where the conduct or comments are covert, biased and harassed others
- BUT:
 - as between faculty members, where NO power imbalance, academic freedom may be relied upon even if conduct vexatious

The Analytical Framework

Context:

1. Is there a power imbalance between faculty members?
2. Did the individual indicate the behaviour was unwelcome (unless it was unreasonable to do so)?
3. Were the comments or conduct made in the open or covert?

The Analytical Framework

The Lens:

4. Balance the principles of academic freedom and freedom of speech when identifying conduct that crosses the line.
5. Would the reasonable person objectively conclude that a vulnerable individual had been harassed, subjected to unwelcome hostile conduct?

Can We Discipline?

- YES – for engaging in harassment under either Bill 168 or the *Code*
- YES – for workplace threats or violence
- YES – for other culpable behaviour when he or she can't play nice in the sandbox
- YES – for making a complaint in bad faith

Other Issues to Contend With

- Where the root of the issue is mental health
- How to re-integrate the complainant into the workplace
- How to remedy a "poisoned" work environment

Academic Freedom and Bill 168

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Questions To Ask When Employees Are Disparaged

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Is this an insider or outsider?

- Employees and students are governed under respectful campus harassment and violence policies
 - Power to control exists but is "uncomfortable"
 - You may favour complaint-based engagement
 - Be wary of causing a "*Pridgen*" dispute
- Outsiders are governed by the law of defamation

Who is being disparaged?

- An employee's reputation is not the same thing as an employer's reputation
- An employer has no standing to sue for harm to its employee's reputation
- Defamation claims by institutions are looked at differently than defamation claims by individuals

Is there a legal duty to do a "takedown"?

- Public policy constrains the creation of contractual provisions to fund employee litigation
- GSB "Lee" case (2013, O'Neil)
 - Duty to provide a safe and harassment-free work environment may be engaged
 - But the discharge of that duty can be met in many ways short of funding a defamation action

Can we "help a little" without doing harm?

- Remember that you may do prejudice to a personal cause of action
 - Still an open question about whether online publication is a "broadcast"
 - Saying you'll do something and not doing it is prejudicial
 - You might do prejudice to the true strategy and approach

Is a funding arrangement lawful?

- *St Lewis v Rancourt*
 - Case by case analysis to determine legality
 - Funding likely okay if...
 - Rests on sense of duty to employee
 - Motivation to sue not initiated by institution

Warning. Drafting the agreement is difficult. The more you try to control the spend the more risk the agreement will be found to be unenforceable.

Questions to ask when employees are disparaged

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Lessons Learned From Penn State: What do University Counsel and Administrators Need to Know?

Frank Cesario

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Overview

- Cast of Characters
- Timeline
- Consequences
- Lessons Learned – Administrators
- Lessons Learned – Legal Counsel

Cast of Characters

- **Jerry Sandusky** – Defensive Co-ordinator
- **Joe Paterno** – Head Coach
- **Graham Spanier** – University President
- **Tim Curley** – Athletic Director
- **Gary Schultz** – Senior Vice-President
- **Cynthia Baldwin** – University's General Counsel

Timeline

May 1998

- University Police investigate allegations that Sandusky abused boy in Penn State shower
- Schultz is informed of investigation by University Police and informs Curley and Spanier
- Spanier does not report investigation to the University's Board of Trustees
- University Police close investigation without charges

Timeline

February 2001

- An assistant coach informs Paterno he witnessed Sandusky assaulting a boy in Penn State showers
- Paterno informs Curley and Schultz, who inform Spanier
- Sandusky is banned from bringing boys on campus
- Neither the police nor the Board of Trustees is informed of the incident

Timeline

2009-2011

- State Police begin investigation after an unrelated victim reports abuse by Sandusky to his high school
- Baldwin is hired as General Counsel
- University receives subpoena from Pennsylvania Attorney General for all Sandusky records

Timeline

April-May 2011

- Schultz, Paterno, Curley, Spanier testify before the Sandusky Grand Jury. All four men deny that they were specifically told about abuse
- Newspaper article on Sandusky investigation is published
- Baldwin and Spanier brief Board of Trustees about investigation, downplay its severity

Timeline

November 2011

- Sandusky is charged with sexually abusing minors
- Curley and Schultz are charged with perjury and failure to report child abuse
- Spanier releases a statement giving Curley and Schultz his "unconditional support"

Timeline

October 2012

- Baldwin testifies before a Grand Jury convened to lay charges against Spanier, Curley and Schultz
- She testifies that Spanier, Curley and Schultz deceived her and actively covered up their knowledge of past Sandusky abuse

Consequences

Penn State

- Spanier removed as President
- Curley and Schultz both resigned
- Paterno removed as Head Coach (deceased)
- As of October 2013, Penn State has reached settlements with 26 Sandusky victims in the amount of \$59.7 million

Consequences

Criminal Charges

- Spanier, Curley and Schultz have been charged with
 - perjury
 - obstruction of justice
 - conspiracy
 - child endangerment
 - failure to report child abuse
- These trials are ongoing

Lessons Learned – Administrators

Freeh Report

- Made sweeping recommendations
 - End insular culture of the "Penn State Way"
 - Strengthen and clearly define the role of General Counsel in the University
 - Improve channels of communication between administrators and Board of Trustees
 - Create a position of Chief Compliance Officer
 - Review University Police's policies and procedures

Lessons Learned – Legal Counsel

1. Role of General Counsel

- Baldwin's Grand Jury testimony is key evidence in the criminal case against the administrators
- Penn State waived privilege for all Sandusky related matters
- Admissibility of her testimony against the administrators is contested

Lesson Learned – Legal Counsel

Role of General Counsel

- In their testimony before the Sandusky Grand Jury Curley and Schultz specifically indentified Baldwin as their counsel
- Baldwin was in the room and did not refute this claim
- Spanier claims Baldwin was acting as his counsel during the course of the Sandusky investigation

Lesson Learned – Legal Counsel

Role of General Counsel

- Baldwin maintains that at all times the three administrators knew she was acting only on behalf of Penn State
- She denies that she heard either Curley or Schultz identify her as their counsel

Rules of Professional Conduct

Rules to Consider

- Who is your client?
 - Rule 2.02 (1.1) When Client an Organization
(1.1) Notwithstanding that the instructions may be received from an officer, employee, agent, or representative, **when a lawyer is employed or retained by an organization**, including a corporation, in exercising his or her duties and in providing professional services, **the lawyer shall act for the organization**

Who is the Client?

Boreta v. Primrose Drilling, 2010 ABQB 383

- Oppression action brought by creditor, officer and shareholder of defendant corporation
- Plaintiff sought production of documents that the defendant argued were covered by solicitor-client privilege
- Plaintiff claimed that counsel was retained by both the corporation and himself

Who is the Client?

- *Boreta v. Primrose Drilling*, 2010 ABQB 383
 - Court applied an objective test
 - Would a reasonable person in the plaintiff's position reasonably form the belief that counsel was acting on his behalf?
 - Court also examined the conduct of the parties to determine if a joint retainer could be inferred
 - Court found that there was a joint retainer and the plaintiff was entitled to the documents he sought

Rules of Professional Conduct

Rules to Consider (con't...)

- Professional obligations when aware of misconduct
 - Rule 2.02 (5) Dishonesty, Fraud etc. by Client or Others
 - Rule 2.02 (5.1) Dishonesty, Fraud, etc. when Client an Organization
- advise that the proposed conduct would be dishonest, fraudulent, criminal, or illegal
- go up the chain if necessary, all the way to the Board

Rules of Professional Conduct

Commentary:

- *"Lawyers acting for organizations are often in a position to advise the executive officers of the organization not only about the technicalities of the law but about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organizations' responsibilities to its constituents and to the public."*

Lessons Learned From Penn State: What do University Counsel and Administrators Need to Know?

Frank Cesario

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