

## THE CIGI-YORK INITIATIVE

### FINAL REPORT OF THE “PANEL OF REPRESENTATIVES”<sup>1</sup> TO OSGOODE FACULTY COUNCIL CONCERNING THE PROTOCOL TO PROMOTE AND PROTECT ACADEMIC FREEDOM

FEBRUARY 2, 2012

The purpose of this report is to conclude the role of the panel by providing an update on recent developments regarding the initiative, by outlining what the panel sees as the outstanding issues regarding the protocol, and by collecting a timeline and the record of Faculty Council’s consideration of the initiative and the protocol.

The key points of this final report can be summarized as follows:

- In response to the panel’s request for the final positions of CIGI and York, Dean Sossin informed the panel on January 31, 2012 that Faculty Council’s conditional approval for the initiative had lapsed; that the Dean had explored other ways to bridge the gap regarding the protocol but concluded that it was not possible; that planning on the initiative will now be suspended; that the Dean has conveyed to CIGI and York that Osgoode can no longer provide leadership for the proposed centre/ program (CILGE); and that the Dean will provide an update when he learns more about how CIGI and York will pursue their collaboration.
- The panel agrees that Faculty Council’s conditional approval for the initiative has lapsed and that the Faculty Council process by which approval has been sought since September 2011, based ultimately on finalization of the protocol, will conclude (with reports from the Dean and from the panel to Faculty Council) on February 6, 2012.
- In light of outstanding issues under the protocol – focused on, but not limited to, enforcement/ dispute resolution – the panel is of the view that CIGI and York are either not able or not prepared to commit to a protocol that provides the required floor of protections for academic freedom, academic integrity, and institutional autonomy, and that ensures the integrity of other commitments made to the Osgoode community.
- In the absence of a binding and enforceable protocol/ side letter, various provisions in the Agreement of August 2011 between CIGI and York (the August Agreement) re-emerged as serious concerns for the panel. These include, for example, the non-endowment structure of the initiative and the provisions in the August Agreement that allow the private funder (CIGI) to play a direct role in the “development of research areas” for faculty, in establishing “research plans and research support” for faculty, in making recommendations on the

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<sup>1</sup> The panel members are Thomas Wilson and Professors Carys Craig, Giuseppina D’Agostino, Francois Tanguay-Renaud, Gus Van Harten, and Stepan Wood.

“appointment, renewal, and termination” of faculty, and in approving the budget of the academic centre/ program.

The panel has prepared this report, and otherwise carried out its role, as part of its mandate from Faculty Council (pursuant to Faculty Council’s motion of November 28, 2011) to (a) work in collaboration with the Dean to communicate with the parties to the Agreement of August 2011, on request, to clarify/ explain the choice of language in the protocol, (b) respond to any concerns those parties might have with the language and consider any alternative language that the parties might propose, and (c) report to Faculty Council on these matters, subject in all cases to final approval by Faculty Council of any changes to the protocol and, in turn, of the initiative.

The rationale for this motion stated, notably, that the motion was intended to provide an opportunity for Faculty Council to approve the proposed collaboration, subject to (a) robust safeguards of academic freedom and academic integrity and of institutional autonomy and (b) assurances of the integrity of the reforms previously announced regarding the graduate program, the library, contingent liability, and other matters outlined in documentation tabled by Dean Sossin at meetings of Faculty Council. The rationale stated also that it was anticipated by Faculty Council that minor or technical changes to the language of the protocol might be requested, following further communications with other parties, and that the panel was established to work with the Dean in order to facilitate such communications.

### **Recent developments**

Following the panel’s report of January 18, 2012 to Faculty Council, the panel requested that the Dean clarify the last sentence of his memorandum of January 19 to Faculty Council, which stated: “... if by the time of the next Faculty Council meeting on February 6, 2012 we are unable to reach sufficient common ground to attract the broad support that this initiative requires, then I believe it is time for York to pursue this collaboration at the University level.”

In response, on January 23, the panel received this communication from the Dean:

In the last sentence of my memo to Faculty Council, I simply intended to clarify that, in the event that Osgoode elects not to proceed with this initiative at the faculty level, I anticipate that the university will wish to proceed with the collaboration with CIGI at the institutional level. Of course Osgoode faculty members who are interested in participating would be free to do so, if they wished, but it would be as part of a pan-University initiative rather than a Faculty specific one.

Along with this communication, the Dean proposed to the panel an addition to the proposed side letter between York and the Osgoode Hall Faculty Association (OHFA). After conferring, the panel agreed that the revision did not address any of the concerns laid out in the panel’s report of January 18, including notably York’s unwillingness to make its commitments in the side letter binding. Also, the panel agreed that the proposal did not address other outstanding issues. This

was communicated to the Dean on January 25, at which time the panel requested to hear the final positions of CIGI and York on (a) the concerns identified in the panel's report of January 18 and (b) option 3 for enforcement/ dispute settlement, as outlined in the panel's report of January 6.

On January 31, Dean Sossin provided a detailed communication to the panel which did not include any final position of CIGI or York. In the communication, he conveyed, first, that Faculty Council had voted on January 9 to extend the deadline for finalizing the Protocol until January 23 and that, in the absence of finalization of the protocol, Faculty Council's conditional approval of the initiative had lapsed.

Second, he conveyed that he had explored other ways in which to bridge the gap, with a view to bringing a fresh motion to Faculty Council on February 6. However, he concluded reluctantly that the impasse with respect to (as the Dean characterized it) the role of OHFA in relation to dispute resolution under the Agreement remained a barrier to moving forward. He also acknowledged that there were other outstanding issues with respect to the protocol.

Third, the Dean indicated that, on this basis, rather than introduce a motion to renew Faculty Council approval, he would provide an update to Faculty Council and suspend planning for the initiative.

Fourth, the Dean indicated that he had informed CIGI and York of the outcome of the Faculty Council process and that Osgoode can no longer provide the leadership for CILGE. He indicated that he would provide further updates when he learned more about how CIGI and York will pursue their collaboration.

Finally, the Dean expressed his gratitude for the considerable efforts of those who worked on the protocol and, in turn, the panel expressed and wishes to reiterate its appreciation for the Dean's extraordinary efforts.

Based on these communications with the Dean, the panel concluded that further approval of the initiative would not be sought at Faculty Council and that the panel's role would be complete as of the Faculty Council meeting on February 6. The panel does not see itself as having any mandate to address questions about next steps.

### **Outstanding issues**

The panel is not in a position to provide an exhaustive or pinpoint summary on outstanding issues related to the protocol. This is because the panel did not receive a final position from CIGI and was informed on January 15 that a further change to the protocol was expected from CIGI, regarding "how to recognize the Steering Committee's important role in non-academic aspects of the collaboration". There were also other issues that, in the panel's understanding, had been resolved as of January 6, but were put back on the table by CIGI and York on January

15. The panel did not have an opportunity to research or discuss fully other issues raised by this last development.

However, as an approximation based on York's understood final position and CIGI's proposals, as of January 31, the following issues, at least, were outstanding. They are listed roughly in order of importance for the panel (\*\*\*) denotes matters which the panel understood were resolved as of January 6, until January 15):

- \*\*\* York was unwilling to agree to make its commitments in the proposed York-OHFA side letter binding and enforceable, based on a mechanism for neutral enforcement of York's commitment to a YUFA-model arbitration mechanism between York and OHFA;
- York and/ or CIGI were unwilling to make clear in the protocol that it was enforceable, as between York and CIGI, in the courts;
- \*\*\* CIGI did not accept a proposal from the panel to clarify that CIGI would not have veto power over the centre/ program's budget, non-approval of which bars funding of the centre/ program under the August Agreement;
- \*\*\* York was unwilling to adopt clear remedial language in a side letter to make it responsible for any withdrawal by CIGI of funds in breach of the protocol.
- York and/ or CIGI, having rejected the panel's preferred option to make OHFA a direct party to the protocol, were unwilling to extend limited participatory rights to OHFA in relation to dispute resolution, including: (a) a proposed commitment by York not to agree to the appointment of an arbitrator under the August Agreement without OHFA's consent, where OHFA felt that the dispute related to the protocol, (b) a proposed right of OHFA to seek judicial review of an arbitration award, especially on whether a commercial arbitrator's decision had gone beyond the arbitrator's jurisdiction and encroached on the protocol; (c) a proposed direction to the judge who would have power to appoint an arbitrator, in the absence of agreement between CIGI and York, to appoint a person with experience in academic freedom who was perceived as neutral by the affected parties including OHFA, after receiving input from the affected parties including OHFA; and (d) a proposed commitment by CIGI and York not to object to OHFA being afforded party status in an arbitration or court proceeding at the discretion of the arbitrator or judge.
- York had not agreed on the particular form of a non-binding commitment by York not to raise tuition rates due to financial difficulties that might arise from the initiative, such as a cut-off of funding by CIGI.

Most, though not necessarily all, of these issues were fundamental concerns for the panel. However, the discussion of alternatives – whether reflected in the protocol or in a side letter – was approached as a whole, and it became apparent after January 15 that CIGI and York were

not prepared to accept core elements of an overall proposal that the panel had understood to provide a potential way forward.

On enforcement/ dispute settlement, in particular, the panel concluded that CIGI and/ or York were unwilling to commit to making the protocol, and the proposed York-OHFA side letter, binding and enforceable. There are several elements to this concern. First, York's proposal would have made its commitments on enforcement in the side letter non-binding. Second, in light of this first element, enforcement of the protocol would depend on CIGI and York alone. Third, York and/ or CIGI were unprepared to make very clear in the protocol itself that CIGI and York could themselves enforce the protocol. Further information on these and other outstanding issues is provided in the panel's reports of January 6 and January 18.

In this respect, the panel wishes to emphasize that a range of options for enforcement/ dispute resolution were put by the panel to CIGI and York. These included:

(a) the dispute resolution mechanism in the original protocol, with supporting language in the protocol, as discussed in the panel's report of January 6, 2012.

(b) an alternative enforcement mechanism, put to Dean Sossin on December 16, 2011, based on a labour relations model of arbitration to resolve disputes under the protocol, as follows:

"This protocol incorporates the provisions of clauses 28, 29, 32, 33, 34, and 35 of the Agreement, as modified by the following provisions and as otherwise subject to the other terms of this protocol.

- i. The jurisdiction of any arbitrator appointed pursuant to the Agreement or the protocol, and pursuant to the provisions of the *Ontario Arbitration Act*, shall be limited to disputes relating to commercial matters arising from the Agreement. The arbitrator shall have no jurisdiction whatever to make a decision that would affect in any way, directly or indirectly, academic policy or programming, academic freedom or academic integrity, or the institutional autonomy of the academic partners. Faculty Council and faculty are recognized as having rights or interests related to the initiative that are protected by this protocol and the Agreement and, to this end, Faculty Council and OHFA are recognized as parties with standing to seek judicial review of any decision of an arbitrator pursuant to the dispute resolution process laid out in clause 34 of the Agreement.
- ii. Where Osgoode Hall Law School or OHFA is of the view that this protocol, as it relates to academic freedom, academic integrity, or institutional autonomy, has been breached by a party to the Agreement, then either of these actors may initiate the dispute resolution process that is laid out in clause 34 of the Agreement in order to resolve the dispute. The actor that initiates the dispute resolution process shall be a party to the arbitration and

the agreement of that actor shall be required for the appointment of the arbitrator that is agreed on by the parties pursuant to clause 34 of the Agreement. Where the actor that initiated the dispute resolution process is OHFA, then the arbitrator appointed pursuant to clause 34 of the Agreement shall be appointed pursuant to the provisions of the *Ontario Labour Relations Act*, rather than the *Ontario Arbitration Act, 1991*, from the roster of arbitrators maintained by the Ontario Ministry of Labour (Arbitration Services) and shall have experience in labour relations in the university sector. If the parties are unable to agree on a single arbitrator within the ten-day period specified in clause 34 of the Agreement, then the arbitrator shall be selected upon application by OHFA to a judge of the Superior Court of Ontario sitting at Toronto, Ontario.

- iii. An arbitrator appointed pursuant to the Agreement or this protocol shall not make any decision that will in any way have the effect of changing, altering, or amending the Agreement or this protocol.”

(c) an alternative mechanism that added OHFA as a party to the protocol and envisioned enforcement either in the courts or through arbitration, as reproduced in the panel report of January 6, 2012.

(d) an alternative mechanism recognizing OHFA as an affected third party that could seek enforcement of the protocol either in the courts or through arbitration, as reproduced in the panel report of January 6, 2012, and

(e) a potential mechanism, although not preferred by the panel, based on a model of indirect enforcement whereby the protocol would be enforceable as between CIGI and York, but OHFA could seek enforcement of the protocol indirectly against York based on a binding side letter between York and OHFA, and have limited participatory rights in relation to CIGI-York dispute resolution mechanisms, as reproduced in the panel’s report of January 6, 2012. Within this proposal, the panel had put to Dean Sossin the following language for the proposed York-OHFA side letter:<sup>2</sup>

“York University commits to adhere to the principles laid out in the memorandum of 19 September 2011 from Osgoode Dean Sossin to York University President Shoukri.

In the unlikely event that there is any adverse impact on the budget of Osgoode Hall Law School arising from the initiative involving CIGI and York University, whether directly or indirectly, York University agrees that no OHFA member shall be laid off as a result of this adverse impact and to add this commitment, subject to OHFA’s agreement to do so, as a provision in the collective agreement between York University and OHFA.

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<sup>2</sup> To be clear, the panel understood this language to have been agreed in full as of its report of January 6, until January 15 when the Dean provided the panel with further changes from York and CIGI.

In the event of any dispute pursuant to the Agreement of August 2011 or the Protocol to promote and protect academic freedom and academic integrity in the collaboration between the CIGI and Osgoode Hall Law School of York University (“the protocol”), York University/ Osgoode Hall Law School shall provide notice of the dispute, without delay, to OHFA. Where OHFA expresses the view that the dispute relates to academic freedom, academic integrity, or the institutional autonomy of the academic partners, York University/ Osgoode Hall Law School shall not agree to the appointment of an arbitrator in any dispute pursuant to the Agreement or the protocol without OHFA’s consent to the appointment of the arbitrator.

In light of the potentially significant changes to the employment position of OHFA members due to the initiative, York University agrees to enter into negotiations in good faith with OHFA, upon request by OHFA, to strengthen the provisions on academic freedom in the existing collective agreement between York University and OHFA in order to ensure that Osgoode faculty have equivalent substantive and procedural protections of academic freedom to those enjoyed by other York University faculty. If OHFA requests to enter into such negotiations and York University and OHFA do not, by June 30, 2012, reach a mutual agreement on the appropriate terms of the substantive and procedural protections, then OHFA may refer the matter to a third party selected by the Chief Justice of Ontario, or if he or she is unavailable by the Associate Chief Justice of Ontario, who shall decide upon an appropriate procedure to add to the York-OHFA collective agreement (based on the model of the arbitration provisions contained in the collective agreement between York University and the York University Faculty Association (YUFA), but incorporating a single-arbitrator rather than a three-arbitrator panel) as appropriate to the circumstances of OHFA.

Pursuant to this procedure, an OHFA member or OHFA itself may bring forth a complaint alleging, among other things, that York University has breached the protocol or has failed to respond appropriately to an alleged breach of the protocol by CIGI. If the complaint is found to have merit – including in, but not limited to, circumstances where funding for the initiative was withdrawn or withheld by CIGI in any way that related to or affected academic freedom or academic integrity, then York University may be ordered by the arbitrator to provide an appropriate remedy to Osgoode Hall Law School, OHFA, and/ or any affected Osgoode faculty member(s), staff member(s), or student(s) including, where funding was withdrawn or withheld, the provision of an amount of funds to Osgoode Hall Law School that is equivalent to the funds that were withdrawn or withheld.”

Among these five mechanisms for enforcement/ dispute resolution, the last three were put by the panel to CIGI and York on December 29 and discussed in the panel’s report of January 6. The panel understands that all of these options have now been rejected, in whole or in substantial part, by CIGI and/ or York and that this appears to have been the immediate, although not the only, cause of the impasse over the protocol.

The panel did not consider this development to be minor or technical. Rather, it pervades the protocol and the initiative as a whole. It appears to demonstrate that CIGI and York are not prepared, as a condition of the initiative, to commit to a binding and enforceable protocol to safeguard academic freedom and academic integrity, to ensure institutional autonomy, and to affirm the various commitments made to the Osgoode community since discussions of the initiative began at Faculty Council.

Despite this disappointing outcome, the panel is grateful to Dean Sossin for his extraordinary efforts on this file.

### Timeline

The following is a non-exhaustive outline of the steps related to the Faculty Council process on the proposed CIGI-York initiative.

<b>August 2011</b>	Original agreement signed between CIGI and York (see appendix one).
<b>September 28, 2011</b>	Motion to approve CIGI initiative, based on the August Agreement and accompanying documentation, was brought by Dean Sossin before Faculty Council.
<b>October 3, 2011</b>	First meeting of Faculty Council on the CIGI initiative. Dean Sossin announced at the meeting that, in response to a request from the OHFA Executive, the motion to approve the initiative would be tabled only, pending further consultations. Extensive discussion ensued.
<b>October 11, 2011</b>	Report on the initiative by an <i>ad hoc</i> committee of the Osgoode Hall Faculty Association (OHFA), <sup>3</sup> outlining various concerns of Osgoode faculty about the initiative, was provided to members of Faculty Council (see appendix two).
<b>October 27, 2011</b>	Motion to approve CIGI initiative, based on the August Agreement and accompanied by further documentation with various commitments to the Osgoode community, brought by Dean Sossin before Faculty Council.
<b>October 28, 2011</b>	Second report on the initiative by an <i>ad hoc</i> committee of OHFA <sup>4</sup> was provided to members of Faculty Council (see appendix three).
<b>October 31, 2011</b>	Second meeting of Faculty Council on the initiative. York President Shoukri addressed Faculty Council to discuss the initiative. Limited time for discussion.

<sup>3</sup> It was stated in the report that the members of the sub-committee served in a personal capacity and did not represent any position of OHFA, which intended to seek a mandate from its members after the terms of the initiative were finalized.

<sup>4</sup> Ibid.

<b>November 7, 2011</b>	Third report on the initiative by an <i>ad hoc</i> committee of OHFA was provided to members of Faculty Council (see appendix four). <sup>5</sup>
<b>November 16, 2011</b>	Dean Sossin informed Osgoode faculty of his intent to seek approval of the initiative by Faculty Council based on an agreement in principle to proceed, subject to further discussions with CIGI and York in order to address concerns about academic freedom, academic integrity, and institutional autonomy.
<b>November 19-23, 2011</b>	“Protocol to safeguard academic freedom and integrity and to clarify other terms of the collaboration between CIGI and Osgoode Hall Law School of York University” (the original protocol) was drafted and revised among a group of about 12 Osgoode faculty who work in research areas affected by the CIGI initiative.
<b>November 25, 2011</b>	Motion to approve CIGI initiative, conditional on the original protocol, was brought by Dean Sossin before Faculty Council.
<b>November 28, 2011</b>	Third meeting of Faculty Council on the initiative. Extensive discussion ensued. The motion to approve the initiative, conditional on the protocol being agreed by January 16, 2012, passed following amendments, with strong support (see appendix five). The motion also established the Faculty Council panel for facilitation of discussions with CIGI and York about the protocol.
<b>November 29, 2011- January 5, 2012</b>	Extensive review and research on proposed revisions to the protocol in discussions amongst panel members, and between the panel and the Dean, based on the Dean’s reports of communications with CIGI and/ or York. Note: no meetings took place between the panel and any representative of CIGI or York other than Dean Sossin and, in one instance, Associate Dean Puri.
<b>January 6, 2012</b>	Motion to approve the initiative, conditional on a revised protocol, was brought by Dean Sossin before Faculty Council. First report of the panel was provided to Faculty Council, outlining the revisions to the protocol and highlighting outstanding issues (see appendix six).
<b>January 9, 2012</b>	Fourth meeting of Faculty Council on the initiative. Due to time limitations, the Dean and the panel agreed not to seek approval of the motion as a whole with the attached revised protocol. Instead, the motion was amended and passed for the sole purpose of extending the deadline for finalization of the protocol until January 23, 2012.
<b>January 15, 2012</b>	Receipt by the panel of York’s “final position” on enforcement/ dispute resolution as well as additional proposed changes by CIGI.

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<sup>5</sup> Ibid.

<b>January 20, 2012</b>	Second report of the panel dated January 18, outlining new outstanding issues, and the memorandum of January 20 from Dean Sossin, was distributed to Faculty Council (see appendices seven and eight).
<b>January 31, 2012</b>	Receipt by the panel of communication from Dean Sossin indicating that Faculty Council's conditional approval had lapsed and that the process to approve the initiative would be concluded.

### APPENDICES

- Appendix One      Agreement of August 2011 between CIGI and York
- Appendix Two      Report by *ad hoc* committee of the Osgoode Hall Faculty Association (OHFA), dated October 11, 2011.
- Appendix Three    Second report by *ad hoc* committee of OHFA, dated October 28, 2011.
- Appendix Four     Third report by *ad hoc* committee of OHFA, dated November 7, 2011.
- Appendix Five     Motion to approve conditionally the initiative, as approved by Faculty Council on November 28, 2011.
- Appendix Six      First report of the panel, dated January 6, 2011 [sic].
- Appendix Seven    Second report of the panel, dated January 18, 2012.
- Appendix Eight    Memorandum of Dean Sossin to Faculty Council, dated January 20, 2012.

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CONCERNING THE PROTOCOL TO PROMOTE AND PROTECT ACADEMIC FREEDOM**

**FEBRUARY 2, 2012**

**APPENDICES**

**Appendix One**

**Agreement of August 2011 between CIGI and York**

THIS AGREEMENT made this            day of August, 2011

AMONG:

**THE CENTRE FOR INTERNATIONAL GOVERNANCE  
INNOVATION,**

(a non-share capital corporation incorporated under the laws of Canada  
and hereinafter called "CIGI")

-and-

**YORK UNIVERSITY,**

(a university incorporated under the laws of Ontario and hereinafter called  
the "University")

WHEREAS CIGI and the University have agreed to collaborate with respect to the  
undertaking of a world-class international law program as more particularly described in  
Schedule "A" attached (hereinafter called the "Program"); and

WHEREAS the parties have agreed to establish ten (10) chairs at the University  
(including a Chair granted to the Executive Director as hereinafter described) the holders of  
which will form part of the Program faculty (each such chair hereinafter called a "Chair" or  
collectively the "Chairs"); and

WHEREAS CIGI has agreed, subject to the terms and conditions of this Agreement, to  
make advances to the University, as more particularly described herein in support of the Chairs  
(hereinafter collectively called the "CIGI Advances");

NOW WITNESSETH that the parties hereby agree as follows:

**The Program**

1. The parties agree to collaborate with respect to the construction and operation of the  
Program in accordance with the terms of this Agreement. The parties agree that in their  
decision making they will be guided by the objectives for the Program as set out in  
Schedule "A" (hereinafter called the "Program Objectives").
2. The parties acknowledge that the Program shall be operated from two physical locations  
namely: (i) the new CIGI Campus building recently constructed by CIGI at its premises  
in Waterloo, Ontario ("CIGI Campus"); and (ii) at the premises of York University's  
Osgoode Hall Law School in Toronto, Ontario. The parties agree that they shall  
endeavour to ensure that at least 2/3 of the Chairs, any other faculty funded through the  
Program and students will be situated in Waterloo and that the balance will be situated in  
Toronto.
3. The parties agree to establish the following committees in connection with the  
establishment of the Chairs:

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- (a) A "Steering Committee". The primary responsibility of the Steering Committee will be as follows:
- (i) The development of research areas for each Chair;
  - (ii) Establishing the specific financial terms and expectations for each of the Chairs, including their research plans and research support;
  - (iii) Making recommendations to the University regarding the appointment, renewal and termination of Chair candidates;
  - (iv) Approval of an annual budget for the Program (including all associated operational expenses) prepared by the Executive Director; and
  - (v) Subject to paragraph 6 and 14 hereof, all other aspects of the structure and operation of the Program from time to time other than matters related to academic programming.
- (b) An "Advisory Committee". The Advisory Committee will act as an external expert advisory committee that will provide expert advice and recommendations to the Steering Committee and the parties hereto with respect to all matters related to the Chairs and the Program generally.

4. The "Steering Committee" shall consist of five members selected as follows:

- (a) The Executive Director of the Program as a nonvoting member of the committee;
- (b) Two members appointed by the University. The University initially appoints its Dean of Law and the Chair of the Osgoode Faculty Recruitment Committee as its appointees to the Steering Committee; and
- (c) Two members appointed by CIGI. CIGI initially appoints its Executive Director and its Vice-President Programs.

Decisions of the Steering Committee shall require the unanimous approval of the members described in subparagraphs (b) and (c) above.

5. The "Advisory Committee" The Advisory Committee will be composed of internationally recognized scholars and experts in the international law areas identified in Schedule A. The structure and initial membership of the Advisory Committee shall be as determined by the Steering Committee. In the event that a member of the Advisory Committee is unable to act in such capacity for whatever reason or if it becomes desirable to increase the size of the Advisory Committee, then the Steering Committee shall select a replacement for such member or additions to the Committee, as the case may be, in consultation with the remaining members of the Advisory Committee.
6. The parties acknowledge that, subject to the terms of this provision and this Agreement, generally, the University will have the final authority with respect to decisions regarding the appointment or renewal of Chairs and with respect to all matters related to academic

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programming for the Program. Notwithstanding the foregoing, the University acknowledges and agrees that:

- (a) It will only appoint or renew a Chair from amongst candidates that have been recommended to it by the Steering Committee, guided by the Program Objectives, and recognizing that the University's normal collegial processes for the appointment of tenure stream faculty will apply in respect of the appointment of Chairs associated with the Program;
  - (b) It is a condition of this agreement and of the funding to be provided by the Government of the Province of Ontario and CIGI that the Chairs be new appointments who will bring added strength and depth to the existing Osgoode faculty complement; and
  - (c) On matters other than the appointment or renewal of Chairs, it will:
    - (i) Consider the recommendations of the Steering Committee and the Advisory Committee before arriving at its decision with respect to the above-noted matters; and
    - (ii) Endeavour to be guided by the Objectives in arriving at its decisions with respect to the above-noted matters.
7. The parties agree to recruit and appoint an Executive Director, consistent with the Objectives, to lead the Program and to undertake an annual assessment of his/her performance. The parties acknowledge and agree that the Executive Director's employment arrangement, including their remuneration and tenure entitlement, will be structured as one of the Chairs and that, therefore, the Executive Director's appointment must be approved by the University in accordance with the normal collegial processes governing the appointment of tenure stream faculty.
8. Subject to the terms and conditions of this Agreement and subject to the guidelines and policies established by the Steering Committee or the parties, from time to time, the Executive Director shall manage the Program generally. The Executive Director shall report to the Steering Committee with respect to the Program. The Executive Director shall also be obliged to prepare and provide to the Steering Committee quarterly financial reports that detail spending against the pre-approved annual budget consistent with the terms of this Agreement and the direction of the Steering Committee from time to time.

#### The CIGI Advances

9. CIGI shall advance to the University, on each calendar quarter during the term of this Agreement an amount equal to one quarter of the budgeted cash requirement of the Program for the particular year (as set out in the Program annual budget approved by the Steering Committee for the particular year) less any balance in the Segregated Account and less any amounts designated by the parties as available for use in connection with the Program costs including the contributions of the University as set out in this Agreement. (for the purposes of this Agreement each such advance shall hereinafter be called a "CIGI Advance" or collectively the "CIGI Advances").

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10. The University shall use the CIGI Advances exclusively in the manner set out in this Agreement.
11. The University shall account for the unused portion of the CIGI Advances (and attribute all income earned thereon from time to time) separate and apart from its other property until it disburses same in accordance with the provisions of this Agreement (hereinafter called the "Segregated Account"). To the extent that it is reasonable to do so (having regard to the quantum in the account and the anticipated timing for the use of same), the University shall invest and thereafter reinvest all of the funds in the Segregated Account prudently and wisely. In making its investment decisions, the University shall not be required to comply with the provisions of the Trustee Act (Ontario) applicable to the investment decisions of trustees. The University agrees to provide CIGI with a periodic detailed accounting of all activity in the Segregated Account no less than once per calendar quarter.
12. The University covenants and agrees that no portion of the CIGI Advances or any amount earned thereon will be subject to any overhead charge, administrative fees or other charges by the University or any other person or entity.

#### The Chairs

13. Each Chair shall be for a term of 10 years subject to renewal upon mutual agreement by the parties (the "Chair Term"). The remuneration package and the term of employment for a Chair shall be as agreed to by the parties based on the recommendation of the Steering Committee.
14. The University acknowledges that each of the Chairs will be considered for tenure at the University in accordance with the University's tenure policy as it exists from time to time and that Chairholders will enjoy the customary rights and privileges associated with such an academic appointment.
15. While the holder of a Chair is situated at Waterloo, Ontario, CIGI shall make available to such Chair holder, at CIGI Campus, reasonably furnished and equipped office as well as secretarial and other administrative support that are reasonably appropriate having regard to the nature of the Chair and the seniority of the Chair holder. While the holder of a Chair is situated at Toronto, Ontario, the University shall make available to such Chair holder, at the University's premises, reasonably furnished and equipped office at its premises as well as secretarial and other administrative support that are reasonably appropriate having regard to the nature of the Chair and the seniority of the Chair holder. The cost to each of the parties for the foregoing will be considered as part of the Program operating cost.

**Funding for the Chairs and the Program**

16. The funding for each of the Chairs and the Program shall be derived from the following sources (and in the order set out below):

- (a) The University shall contribute the following amounts to the Chairs:
- (i) the base faculty salary and related benefits costs associated with the tenure position for one of the Chairs as designated by the parties.
  - (ii) An amount equal to \$1,000,000, in the aggregate, plus such greater amounts as the University is able to raise in respect of a second Chair as designated by the parties. In this regard, the University agrees to make reasonable best efforts to raise an additional \$2,000,000 toward the funding of said Chair.
  - (iii) All tuition received by the University from students enrolled in the Program from time to time.
  - (iv) Any amounts received by the University from the Province of Ontario's Basic Operating Grant Program in respect of the Program.
  - (v) Reasonable contribution to operating costs and overhead of the Program, as contemplated by Paragraphs 15 and 18 or as otherwise agreed by the parties.

To the extent that the amounts described in paragraphs (iii) and (iv) that are received by the University exceed eligible costs of the Chairs for a particular period, then such excess shall be deposited into the Segregated Account and treated in the same manner as all other funds in such account.





- (b) The balance of the funding for the Chairs and the Program shall be satisfied by funds in the Segregated Account. In the event that there is a shortfall, then CIGI agrees to make additional advances to the University to fund such shortfall as soon as reasonably possible after notice of a shortfall has been provided to CIGI (for the purpose of this Agreement any such advances will be treated as CIGI Advances).
17. For greater certainty, the University shall be solely responsible for all costs associated with the tenure position granted to a holder of a Chair upon the conclusion of the Chair Term. The parties acknowledge that the University may require reasonable provisions as part of Chair terms that are intended to mitigate such tenure obligations for the University without materially impairing the attractiveness of such Chairs to prospective holders of same.
18. The parties acknowledge that in order to attract outstanding students to the Program that, particularly in the early stages of the Program, it will likely be necessary or desirable to provide scholarships to students. The detailed strategy for such scholarships shall be as determined by the parties from time to time and the costs associated with such scholarships will be considered as part of the operating costs of the Program.

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



19. It is acknowledged that CIGI is seeking funding from the Government of the Province of Ontario in connection with the Chairs and the Program generally (for the purposes of this Agreement such funding including any renewal of such funding or replacement or similar funding provided by the Government of the Province of Ontario or the Government of Canada hereinafter called the "Government Funding"). The University acknowledges that the undertaking of this Agreement by CIGI is conditional upon CIGI receiving an agreement from the Province of Ontario for Government Funding in the aggregate amount of approximately \$30 million and on terms acceptable to CIGI and upon agreement of a matching grant of \$30 million to CIGI by Mr. Jim Balsillie.
20. The parties acknowledge and agree that, subject to the terms of the Government Funding arrangement, the following principles shall govern their relationship in respect of such funding:
- (a) The Government Funding shall be used in priority to the other sources of funding, as contemplated by this Agreement, to cover the costs of the Chairs and the Program generally;
  - (b) To the extent that the Government Funding has been exhausted, then the funding arrangements contemplated by this Agreement, and particularly paragraph 16 shall apply to the funding of the Chairs and the Program.

#### Miscellaneous

21. The parties acknowledge that in undertaking the Program, it will be necessary or desirable to establish a number of policies, guidelines, procedures, committees related to various aspects of the Program and the relationship of the parties and other constituents involved in the Program. The parties agree to work together to establish the foregoing in a manner that is consistent with the terms of this Agreement, the Program Objectives, and the underlying theme of consensus that is the basis for the within relationship.
22. Subject to the University's naming policies, the parties agree that the name for the Program, the Chairs and any scholarships created as part of the Program shall be as agreed to by the parties from time to time. The parties acknowledge that it may be desirable to refer to the Program as a "Centre" and agree in principle to such a reference provided that (i) such reference does not in any way alter the arrangements contemplated by this Agreement including, but not limited to the arrangements related to the structure, control and operation of the Chairs and the Program and (ii) any University policies regarding the use of the term "Centre" are complied with. It is further contemplated that the Chairs and the Program will collaborate and partner with existing Centres and Programs at Osgoode in areas of mutual interest.
23. The graduate program and degrees offered by the law school in conjunction with the Program will not be new programs. They will be Osgoode's existing graduate program leading to the University's LL.M., and Ph.D., in law.
24. For greater certainty, in the event that any aspect of the operation of the Program requires approval by governing bodies within the University, the University undertakes to make best efforts to secure such approvals.

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25. Each of the parties agrees to consult with and report to the other party, on regular basis (which for greater certainty shall be no less than quarterly) on all aspects of the Chairs, including potential hires, curriculum and other programming issues, scholarships, financial matters including fundraising, matters related to facilities or technology and all other matters related to the Program. The parties may, upon mutual agreement, agree to undertake such consultation and reporting through the Steering Committee.
26. The terms of this Agreement shall commence on the date hereof and shall terminate on the 10<sup>th</sup> anniversary of this Agreement. The parties may renew this Agreement by mutual agreement. In order to allow sufficient time for appropriate planning to take place, the parties agree to make best efforts to determine by no later than the 8<sup>th</sup> anniversary of the date hereof whether they wish to extend the term of this agreement. Subject to the dispute resolution provisions of paragraph 34, this Agreement may be terminated by CIGI or the University upon the material breach of any representation or obligation under this Agreement on the part of the other of CIGI or the University which such party has failed to remedy within ninety days after delivery of written notice requiring the breach to be remedied. Upon the termination of the Agreement, all of the funds advanced by CIGI to the University pursuant to the terms of this Agreement that have not been used at the date of such termination shall be returned to CIGI. Each of the parties agrees to notify the other party of any facts that may reasonably give rise to a material breach of this Agreement by the party or may in the fullness of time reasonably give rise to such a material breach forthwith upon becoming aware of such facts.
27. Notwithstanding any provision contained herein, the parties acknowledge that any party shall be entitled to seek such injunctive or other non-monetary equitable relief as may be appropriate with respect to a breach of any covenant contained herein.
28. In the event that any provision of this Agreement is invalid, unenforceable, or illegal, then such provision shall be severed from this Agreement and the Agreement shall be read as if the provision were not part of the Agreement.
29. This Agreement shall be construed and enforced in accordance with the laws of the Province of Ontario.
30. Except as otherwise required by law, the terms of all press releases or other public announcements or disclosure regarding the terms of this Agreement and the matters contemplated herein, including without limitation, all matters related to the operation of the Program, the Chairs or any scholarships created as part of the Program will be as agreed to by the parties from time to time acting reasonably.
31. Each party to this Agreement undertakes to act with reasonable diligence to carry out the transactions contemplated in this Agreement and will provide such further documents as may be reasonably necessary to effect the purpose of this Agreement and to carry out its provisions.
32. This Agreement shall enure to the benefit and shall be binding upon the parties hereto and their respective heirs, executors, administrators and successors.

INITIALS: CIGI   YORK   Page 7 of 10

33. All notices, consents, requests, demands and other communications hereunder are to be in writing, and are deemed to have been duly given or made:

- (i) when delivered in person;
- (ii) three days after deposit in the Canada mail, first class postage prepaid certified mail, return receipt requested;
- (iii) overnight courier services, upon delivery by the overnight courier service with payment provided for; or
- (iv) in the case of telex, telecopy, fax or email, when sent, verification received; in each case addressed as follows:

To the University:





**Lorne Sossin, Dean  
Osgoode Hall Law School,  
York University,  
4700 Keele Street,  
Toronto, Ontario M3J1P3**

To CIGI:

**Thomas A. Bernes, Executive Director  
The Centre for International Governance Innovation  
57 Erb Street West,  
Waterloo, Ontario N2L 6C2**

A party may change its address for service from time to time by providing a notice in accordance with the foregoing. Any subsequent notice must be sent to the party at its changed address.

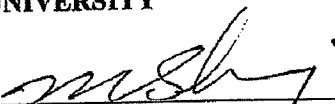
34. If a dispute arises relating to the performance of any part of this Agreement, the parties shall attempt to resolve any dispute first through direct negotiation. If the dispute cannot be resolved within twenty days of commencing such negotiation, the dispute will be resolved by arbitration conducted at the City of Toronto, Ontario by a single arbitrator, who shall be appointed pursuant to the provisions of the *Ontario Arbitrations Act*, 1991. The arbitrator shall be agreed upon by the parties within ten days of one party notifying the other parties that arbitration is desired. If the parties are unable to agree on a single arbitrator within this ten-day period, then the arbitrator will be selected upon application of any party to a judge of the Superior Court of Ontario sitting at Toronto, Ontario. The decision of the arbitrator shall be final and binding and not subject to appeal. The arbitrator shall be empowered to determine all questions of law and fact and may grant injunctive relief. Each party will pay its own costs.

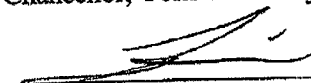
INITIALS: CIGI   YORK   Page 8 of 10

35. Each of the parties hereby agrees to execute all such further documents and agreements as may be reasonably necessary or desirable to the terms of this Agreement and every part hereof.

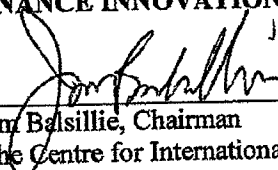
IN WITNESS WHEREOF the parties hereto have executed the within Agreement on the date first mentioned above.


**YORK UNIVERSITY**

Per:   
Mamdouh Shoukri, President and Vice  
Chancellor, York University

Per:   
Lorne Sossin, Dean, Osgoode Hall Law  
School of York University

**THE CENTRE FOR INTERNATIONAL  
GOVERNANCE INNOVATION**

Per:   
Jim Balsillie, Chairman  
The Centre for International Governance  
Innovation

Per:   
Thomas A. Bernes, Executive Director  
The Centre for International Governance  
Innovation

## SCHEDULE "A"

The Program will specialize in three areas of international law: international economic law (including trade, investment and finance); international intellectual property law; and international environmental law. By providing an opportunity for talented scholars, researchers and innovators to advance their knowledge and understanding through new partnerships and multi-disciplinary teaching a high level of scholarly excellence will be cultivated. Furthermore, this cooperation between CIGI and York University/Osgoode Hall Law School will advance Ontario's capacity to deal with complex innovation and trade rights related to commercialization, investments, and regulations, as well as the impact of environmental law on trade and commerce.

The objective of the program is to build capacity in international law in Ontario, assisting government and business leaders in shaping the discussion regarding global issues and helping to establish a Canadian perspective on such issues. The program will contribute to scholarly work, policy development, and advanced research in the outlined disciplines, beyond the practice of law itself – to commerce and to public policy in a multilateral context.

To tackle the complexity of trade barriers, global competitiveness and the exchange of innovation across borders, the program will be developed towards graduate-level legal, as well as business-minded leaders and experts. The program will have the flexibility to study and teach current international issues like global and economic security, bilateral trade disputes and other areas of interest such as global environmental laws, bio-ethics, intellectual property, digital technology, and information technology laws.

The academic Executive Director position and nine Chairs will be modelled loosely on the Tier 1 CRC model.

It is expected that there will be considerable cross-fertilization among the professors based in Waterloo and those based in Toronto, including existing professors in law and related other disciplines at the University, as well as BSIA located on the CIGI Campus. Regular visits, satellite course and lecture delivery, and terms in residence will be encouraged to ensure an integrated interdisciplinary program that flourishes in both locations.

**Appendix Two**

**Report by *ad hoc* committee of the Osgoode Hall Faculty Association (OHFA),**

**dated October 11, 2011.**

## **CIGI-YORK INITIATIVE/ PROGRAM**

### **REPORT OF CONCERNS RAISED BY OSGOODE FACULTY**

**11 OCTOBER 2011**

A significant number of Osgoode Hall Law School faculty have raised concerns about a major CIGI-York Initiative that was disclosed to Osgoode faculty in late August 2011 and put before Osgoode Faculty Council at meetings in early September and early October 2011. This report provides a summary of these concerns and description of relevant information derived from the following documents, all of which were distributed to Faculty Council on 28 September 2011:

- the Agreement of 8 August 2011 among the Centre for International Governance Innovation (CIGI) and York University ("the Agreement"). This Agreement was signed, for York, by York President Mamdouh Shoukri and Osgoode Dean Lorne Sossin and, for CIGI, by CIGI Chairman Jim Balsillie and CIGI Executive Director Thomas A. Bernes.
- Memorandum of 28 September 2011 from Osgoode Dean Sossin to Osgoode Faculty Council;
- Memorandum of 19 September 2011 from Osgoode Dean Sossin to York President Shoukri (cc York VP Academic & Provost Patrick Monahan); and
- Email of 28 September 2011 from York President Shoukri to Dean Sossin (cc York VP Academic & Provost Patrick Monahan).

Regarding this documentation, it is stated in the above Memorandum of 28 September 2011 from Osgoode Dean Sossin: "This proposal remains for internal Faculty Council circulation only and should be treated as confidential". Dean Sossin subsequently clarified to Faculty Council that the documentation could be shared with other actors, internal to York, so long as they were aware of the confidentiality of the Initiative. It is understood based on recent communications with Dean Sossin that some or all of the Agreement and documentation underlying the Initiative may be subject to renegotiation or revision.

#### **Summary of the CIGI-York Initiative/ Program**

- Contribution of \$30 million by the Ontario government, subject to a matching contribution by Mr. Jim Balsillie, to York University for a collaboration between CIGI (Centre for International Governance and Innovation) and York University to establish "a world-class international law program".
- All funds to be provided, not via a typical private endowment (or public funding) arrangement, but rather as a stream of quarterly advances from CIGI to York University for operating expenses incurred by York under the Agreement.
- 10 new CIGI-York Chairs to be appointed, including an Executive Director of the new program, who will be tenure-stream or tenured York (and presumably Osgoode) faculty.
- New program to be based at a CIGI facility in Waterloo; new Chairs to be located at least 2/3 in Waterloo and at most 1/3 at York.

- Primary decision-maker under the Agreement is a Steering Committee of five representatives: two from CIGI, two from York, and the Executive Director of the new program. Decisions of the Steering Committee require unanimous approval of the four CIGI and York appointees.
- An Advisory Committee of external experts is established to provide advice and recommendations to the Steering Committee. The structure and membership of the Advisory Committee is decided by the Steering Committee.

#### **Summary of concerns raised by Osgoode faculty**

The following is a non-exhaustive descriptive summary of concerns raised by Osgoode faculty. It focuses on issue arising directly from the terms of the Agreement and other documents identified above.

- **Role of external funders in determining academic priorities.** As a condition of funding for the Initiative, York has agreed to provide external donors with a significant role in determining the research and teaching priorities of Osgoode (provision 3(a)(i) and (ii) of the Agreement).
- **Role of external donors in influencing academic appointments.** As a condition of funding, York has agreed to provide external donors with a significant role in the appointment of tenure-stream faculty and the designation of its academic priorities (provision 3(a)(iii) of the Agreement).

New Chairs will presumably be members of the Osgoode Hall Faculty Association or (potentially) the York University Faculty Association. Salary and other terms of employment will be decided by CIGI and York based on the recommendation of the Steering Committee (provision 13 of the Agreement) and not governed by the terms of employment that apply otherwise to OHFA/ YUFA members.

- **Limitations to the Agreement's safeguards for University authority.** The Agreement includes a carve-out for the University's "final authority" over appointments and academic programming (provision 6 of the Agreement). However, the Agreement makes this carve-out "subject to the terms of... this Agreement" and thus appears to prioritize specific rights of CIGI under the Agreement over the University's final authority over appointments and academic programming.
- **CIGI right to participate in York/ Osgoode academic policy and programming.** The Agreement appears to put on York/ Osgoode an obligation to notify and receive recommendations from the Steering Committee and the Advisory Committee before reaching decisions on academic policy and programming (provision 6(c)(i) of the Agreement). Failure of the University to do so may constitute a material breach of the Agreement (see below).
- **Contingent liability to York/ Osgoode.** The salary and benefit costs of the CIGI-York Chairs will be covered primarily by external funding for a period of ten years, subject to any dispute with CIGI that led to withdrawal of funding under the Agreement. After the ten-year period, unless the Agreement is renewed, these costs will shift to York for the remainder of the Chairs' employment as tenured faculty (provision 17 of the Agreement). Thus, the Agreement creates contingent liabilities for the

University for the salary and benefits costs of the new Chairs, all or most of which appear to fall upon Osgoode (Memo of 19 September 2011; Email of 28 September 2011).

- **Potential implications for academic autonomy and freedom.** There is an acknowledged tension within the Agreement between the mitigation of this contingent liability to the University and the offer of tenure-stream or tenured positions as a means to recruit candidates for Chairs (provision 17 of the Agreement). The resolution of the tension is unclear in the Agreement, making it possible that the tenure status of a Chair could be limited to mitigate the University's liabilities. There is no mention of academic autonomy or academic freedom in the Agreement.

It is also unclear how funds allocated for research activities, including Visiting Fellowships for non-CIGI Osgoode faculty, will be allocated and in particular whether such decision-making will be taken by established processes for collegial governance or by central administrators at CIGI, York, and/ or Osgoode.

- **Limited contribution of CIGI Chairs to the core Osgoode JD program.** New Chairs will receive course release. They will make "contributions" to the JD program (Memo of 28 September 2011, p. 5) but it seems doubtful that this will include significant teaching in high-enrolment JD courses or extensive service responsibilities. Finally, the Agreement also does not provide for any minimum number of faculty to be located at York; thus, at a complement of 10 Chairs, between 7 and 10 would be located in Waterloo.
- **Disbursement of funds to Osgoode.** Much of the funds for the Initiative will pay for salaries and benefits for Chairs and for graduate student scholarships. For remaining funds required to cover related costs to Osgoode, such as library and administrative costs, it is unclear how much of the remaining funds will be allocated directly to Osgoode and by what process.
- **Potential drain on existing resources in the Osgoode JD program.** An unspecified number of Visiting Fellowships will be offered to non-CIGI Osgoode faculty over the duration of the Agreement (Memo of 28 September 2011, p. 2). An implication of the Fellowships will be to draw such faculty away from teaching and administrative roles at Osgoode.
- **CIGI's leverage in the event of a dispute.** Based on the dispute settlement provisions of the Agreement, CIGI may withdraw funding in the event of an arbitrator finding a material breach of the Agreement by the University (provisions 26 and 34 of the Agreement). It is unclear from the Agreement what would constitute a material breach. For example, repeated failure by the University – including entities such as Osgoode Faculty Recruitment Committee or Osgoode Faculty Appointments Committee – to appoint individual candidates recommended by the Steering Committee could be characterized as a material breach of the Agreement.

Upon triggering the Agreement's dispute resolution process, CIGI would introduce the prospect of a withdrawal of funds schedule for future quarterly payments under the Agreement. The negotiations between CIGI and York over the dispute would thus take place in a context where, if a material breach was found, the University would absorb the salary and benefits costs of up to 10 existing Chairs recruited under the Program. Because CIGI funds are committed under the Agreement only after funds provided by the Ontario Government have been exhausted, a significant number of Chairs will likely have been appointed by the time of any dispute that might lead to the withdrawal of CIGI funding.

- **CIGI's leverage at the stage of renewal:** Any renewal of the external funding after the ten-year duration of the Agreement is dependent on the consent of CIGI (provision 13 of the Agreement). The negotiations between CIGI and York over renewal would thus take place in a context where, if the agreement was not renewed, the University would absorb the salary and benefits costs of up to 10 existing Chairs recruited under the Program.
- **Apparent intent to avoid processes of academic governance.** The Agreement does not mention York Senate or Osgoode Faculty Council. The Agreement's description of the Program as not being a "new program" and as not being an Organized Research Unit (ORU) at York suggests that the University is or was of the view that approvals are not required by Senate or Faculty Council (see provision 23 of the Agreement; Memo of 28 September 2011, p. 2).

Dean Sossin has since clarified to Osgoode Faculty Council that academic policy and programming aspects of the Agreement/ Program will be submitted for review and approval by Faculty Council (Memo of 28 September 2011, p. 2). On this aspect of York's governance process, the Agreement provides: "For greater certainty, in the event that any aspect of the operation of the Program requires approval by governing bodies within the University, the University undertakes to make best efforts to secure such approvals".

Further information and analysis regarding these concerns is attached (Appendix A). The underlying documents are also attached (Appendix B).

**CIGI-YORK INITIATIVE – REPORT OF CONCERNS RAISED BY OSGOODE FACULTY**

**APPENDIX A – DETAILED ANALYSIS**

Issue	CIGI-York Agreement provisions	Other documents provided by Osgoode Dean Sossin	Notes
Who entered into the Agreement?	<p>The Agreement is signed, for York, by York President Mamdouh Shoukri and Osgoode Dean Lorne Sossin.</p> <p>The Agreement is signed, for CIGI, by CIGI Chairman Jim Balsillie and CIGI Executive Director Thomas A. Bernes.</p>		
What are the sources of external funding under the Agreement?	<p><b>Preamble:</b> CIGI is "a non-share capital corporation incorporated under the laws of Canada..."</p> <p>19: "It is acknowledged that CIGI is seeking funding from the Government of... Ontario in connection with the Chairs and the Program generally.... The University acknowledges that the undertakings of this Agreement... is conditional upon CIGI receiving an agreement from the Province... for Government Funding in the aggregate amount of approximately \$30 million and on terms acceptable to CIGI and upon agreement of a matching grant of \$30 million to CIGI by Mr. Jim Balsillie."</p> <p>3(a): The Steering Committee will have "primary responsibility... as follows: (i) The development of research areas for each Chair; (ii) Establishing the specific financial terms and expectations for each of the Chairs, including their research plans and research support".</p> <p>3(a): The Steering Committee will have "primary responsibility... as follows: ... (iii) Making recommendations to the University regarding the appointment, renewal and termination of Chair candidates;"</p>	<p>Memo of 28 September 2011 from Osgoode Dean Sossin to Osgoode Faculty Council, p. 3: "The time pressure to conclude the Agreement over the summer came from the Ontario Government.... By concluding the Agreement prior to the election campaign, the full commitment of the Government has been locked in."</p>	<p>CIGI is a Canadian corporation the ownership of which is unclear from the Agreement, although presumably owned and/ or controlled substantially by Mr. Balsillie.</p> <p>It is unclear what terms have been required by CIGI for the \$30 million contribution by the Province. It is unclear what agreement has been reached between CIGI and Mr. Balsillie for the \$30 million matching funds.</p>
What role is CIGI given in determining academic priorities of York/ Osgoode?		<p>Memo of 28 September 2011 from Osgoode Dean Sossin to Osgoode Faculty Council, p. 1: "Under the terms of the Agreement, the program areas for the Centre will be international intellectual property, international environmental law, and international economic law including trade and investment law."</p>	<p>It is unclear how the identified program areas fit within Osgoode's existing academic program and how they relate to Osgoode's existing teaching and research priorities.</p>
What role is CIGI given in recruiting CIGI-York Chairs?		<p>Memo of 28 September 2011 from Osgoode Dean Sossin to Osgoode Faculty Council, p. 2-3: Additional information about how Osgoode recruitment processes would work under the Agreement are elaborated here.</p>	<p>It is unclear the extent to which further aspects of Osgoode's recruitment processes could constrain the role of the Steering Committee without constituting a material breach of the Agreement (see below).</p>

Issue	CIGI-York Agreement provisions	Other documents provided by Osgoode Dean Sossin	Notes
Who represents Osgoode on the Steering Committee?	<p><b>4(b):</b> "The University initially appoints its Dean of Law and the Chair of the Osgoode Faculty Recruitment Committee as its appointees to the Steering Committee".</p>		<p>Other than the University's initial appointment decision, there is no indication of any process to ensure ongoing representation of Osgoode, including Faculty Council or its committees, in the recruitment process.</p>
What is the process for the allocation of external funds?	<p><b>3(a):</b> The Steering Committee will have "primary responsibility... as follows: ... (iv) Approval of an annual budget for the Program (including all associated operational expenses) prepared by the Executive Director;"</p> <p><b>9:</b> "CIGI shall advance to the University, on each calendar quarter during the term of this Agreement an amount equal to one quarter of the budgeted cash requirement of the Program for the particular year...."</p>		<p>Unlike a typical private endowment arrangement, funds are advanced by CIGI on a quarterly basis and CIGI retains the primary responsibility for their operational use.</p> <p>It is unclear how the funds will be allocated and disbursed. How much, if any, will be available directly to Osgoode and what decision-making processes will govern allocation of such funds for distinct research, teaching, and administrative purposes?</p>
What authority does the University retain over academic affairs?	<p><b>3(a):</b> The Steering Committee will have "primary responsibility... as follows: ... (v) Subject to paragraph 6 and 14 hereof, all other aspects of the structure and operation of the Program from time to time other than matters related to academic programming."</p> <p><b>6:</b> "The parties acknowledge that, <u>subject to the terms of this provision and this Agreement</u>, generally, the University will have the final authority with respect to decisions regarding the appointment or renewal of Chairs and with respect to all matters related to academic programming for the Program" [subject to further conditions outlined below].</p>		<p>It is unclear what it means for the University's "final authority" over appointments and academic programming to be "subject to the terms of... this Agreement".</p> <p>It is unclear whether the term "generally" refers to the terms of this Agreement or whether it qualifies the Agreement's safeguarding of the University's authority over these matters.</p>

<b>Issue</b>	<b>CIGI-York Agreement provisions</b>	<b>Other documents provided by Osgoode Dean Sossin</b>	<b>Notes</b>
<p>What conditions attach to the University's "final authority" over appointments?</p>	<p><b>6:</b> "... the University acknowledges and agrees that: (a) It will only appoint or renew a Chair from amongst candidates that have been recommended to it by the Steering Committee..."</p> <p><b>6:</b> "... the University acknowledges and agrees that: (a) ... the Universities normal collegial processes for the appointment of tenure stream faculty will apply in respect of the appointment of Chairs..."</p> <p><b>6:</b> "... the University acknowledges and agrees that: (b) It is a condition of this agreement and this funding... that the Chairs be new appointments who will bring added strength and depth to the existing Osgoode faculty complement..."</p>		<p>New Chairs can be appointed only on the recommendation of the Steering Committee, are subject to the University's normal appointments process, and are tenure-stream or tenured faculty.</p> <p>Presumably the Chairs will become members of the Osgoode Hall Faculty Association (OHFA) or the York University Faculty Association (YUFA) as applicable, but not be subject to the same terms of employment as other members of the Association.</p>
<p>What conditions attach to the University's "final authority" over academic programming?</p>	<p><b>6:</b> "... the University acknowledges and agrees that: (c) On matters other than the appointment or renewal of Chairs, it will: (i) Consider the recommendations of the Steering Committee and the Advisory Committee before arriving at its decisions with respect to the above-noted matters; and (ii) Endeavour to be guided by the Objectives in arriving at its decisions with respect to the above-noted matters."</p>		<p>The provision appears to place on York/ Osgoode an obligation to notify and receive recommendations from the Steering Committee and the Advisory Committee before reaching decisions on academic policy and programming. Failure to do so may be a material breach of the Agreement (see below).</p>

<b>Issue</b>	<b>CI GI- York Agreement provisions</b>	<b>Other documents provided by Osgoode Dean Sossin</b>	<b>Notes</b>
<p>What provisions are in place for approval by York's academic governance processes?</p>	<p>There is no specific mention of York Senate or Osgoode Faculty Council in the Agreement.</p> <p>21: "The parties acknowledge that in <u>undertaking the Program</u>, it will be <u>necessary or desirable</u> to establish a number of policies, guidelines, procedures, committees related to various aspects of the Program and the relationship of the parties and <u>other constituents</u> involved in the Program. The parties agree to work together to establish the foregoing in a manner that is consistent with the terms of this Agreement...."</p> <p>23: "The graduate program and degrees offered by the law school in conjunction with the Program <u>will not be new programs....</u>"</p> <p>24: "For greater certainty, in the event that any aspect of the operation of the Program requires approval by governing bodies within the University, the University undertakes to make best efforts to secure such approvals."</p>	<p>Memo of 28 September 2011 from Osgoode Dean Sossin to Osgoode Faculty Council, p. 2: "This Centre will not be an Organized Research Unit (ORU) at York".</p>	<p>It is unclear whether the "undertaking" of the Program by CI GI and York is intended to require initial approval of the Program by York Senate or Osgoode Faculty Council.</p> <p>It is unclear what the Agreement requires of CI GI and the University, working together "according to the terms of the Agreement", to address "other constituents" in the Program.</p> <p>The description of the Program as not a new program, and as not an ORU at York, suggests the University is or was of the view that program approval is not required by York Senate or Osgoode Faculty Council. However, the Osgoode Dean has since clarified to Osgoode Faculty Council that academic policy and programming aspects of the Agreement/ Program do require approval of Faculty Council.</p> <p>The Agreement obliges the University to "make best efforts" to secure any required approvals by governing bodies within the University, but does not specify what this might entail and does not specify any affected process or governing body.</p>

<i>Issue</i>	<i>CIGI-York Agreement provisions</i>	<i>Other documents provided by Osgoode Dean Sossin</i>	<i>Notes</i>
<p>What financial cost/liability arises for York from the appointment of CIGI-York Chairs?</p>	<p><b>13:</b> "Each Chair shall be for a term of 10 years subject to renewal upon mutual agreement by the parties [i.e. CIGI and York]."</p> <p><b>16:</b> "The University shall contribute the following amounts to the Chairs: (i) the base faculty salary and related benefits costs associated with the tenure position for one of the Chairs.... (ii) An amount equal to \$1,000,000, in the aggregate, plus such greater amounts as the University is able to raise in respect of a second Chair. In this regard, the University agrees to make reasonable best efforts to raise an additional \$2,000,000 toward the funding of said Chair."</p> <p><b>17:</b> "For greater certainty, the University shall be solely responsible for all costs associated with the tenure position granted to a holder of a Chair upon the conclusion of the Chair Term."</p>		<p>The salary and benefit costs of the Chairs will be covered primarily by external funding for a period of 10 years, subject to any dispute with CIGI that leads to withdrawal of funding under the Agreement (see below). The University funds the salary and benefits costs of one Chair and a substantial amount of those costs for a second Chair.</p> <p>After the ten-year term, unless the Agreement is renewed, these costs will be borne by York for the remainder of the Chairs' employment as tenured faculty.</p>

<b>Issue</b>	<b>CIGI-York Agreement provisions</b>	<b>Other documents provided by Osgoode Dean Sossin</b>	<b>Notes</b>
<p>Within York, who bears financial cost/liability arising from the appointment of CIGI-York Chairs?</p>	<p>No mention in the Agreement, which refers consistently to the University and does not break down the University into any of its constituent entities, such as Osgoode Hall Law School, York Senate etc.</p>	<p>Memo of 19 September 2011 from Osgoode Dean Sossin to York President Shoukri (cc York VP Academic Patrick Monahan): "... In the course of negotiating [the CIGI-York] Agreement, York University and Osgoode were motivated by a set of shared principles, including: ... <b>During the term of the Agreement</b>, the Osgoode-CIGI Initiative will not negatively impact Osgoode's ability to make in-budget academic appointments, and will not prejudice Osgoode's ability to compete for resources made available centrally by the University.... The University will make all <b>reasonable efforts</b> to ensure Osgoode's operations are not impaired by any contingent liability resulting from the Osgoode-CIGI Initiative....."</p> <p>Email of 28 September 2011 from York President Shoukri to Osgoode Dean Sossin (cc York VP Academic Patrick Monahan): "Thank you for your memo setting out our common understandings regarding the principles applicable to the partnership with CIGI...."</p> <p>Memo of 28 September 2011 from Osgoode Dean Sossin to Osgoode Faculty Council, p. 6-7: "York and Osgoode have agreed to work together to ensure those additional salaries do not have an unduly disruptive impact on Osgoode's budget. This approach may involve York providing bridge funding so that Ontario may absorb the additional salaries on a gradual basis."</p>	<p>It is unclear what funds, i.e. Osgoode or York funds, will be used to fund the salary and benefits costs for the two Chairs funded by the University.</p> <p>It is unclear the impact on fundraising activities that might be put to other purposes in order to satisfy the University's obligation to make reasonable best efforts to raise an additional \$2,000,000 toward one of these Chairs.</p> <p>The University has not made any clear and specific commitment to cover all or part of these liabilities to the Osgoode budget. At most, the available documents indicate that the York President and Osgoode Dean have "common understandings" that the "shared principles" motivating the negotiation of the Agreement include that York will make "all reasonable efforts" to ensure that Osgoode's operations are not impaired by any contingent liability.</p> <p>Further, the shared principle that the Initiative will not affect in-budget or University-funded appointments is in place only for the ten-year term of the Agreement.</p> <p>The Dean has also reported that the University will work with Osgoode to avoid "unduly disruptive" impact or, possibly, to provide bridge funding to Osgoode. It is unclear what share of the costs arising from the Chairs would be covered by such commitments. The option of bridge funding would appear to have implications for future faculty appointments at Osgoode.</p>

<b>Issue</b>	<b>CIGI-York Agreement provisions</b>	<b>Other documents provided by Osgoode Dean Sossin</b>	<b>Notes</b>
<p>What is the potential impact on Osgoode's core JD program?</p>	<p>No mention in the Agreement.</p>	<p>Memo of 28 September 2011 from Osgoode Dean Sossin to Osgoode Faculty Council, p. 2: "... it is proposed that the Centre will sponsor a Visiting Fellowship for an Osgoode faculty member to spend a term at the Centre, with access to the same teaching release and research funding and a stipend as the Chairs located at the Centre".</p> <p>Memo of 28 September 2011 from Osgoode Dean Sossin to Osgoode Faculty Council, p. 5: "once hired, these faculty will also receive an appointment as a Chairholder and receive a separate stipend and course release pursuant to that role and for the duration of the Agreement..... During the term of the Agreement, the Chairholders will engage both in research and teaching. Their teaching will be focused on the graduate program but will include contributions to the J.D. program on the part of each Chair as well."</p>	<p>New Chairs will receive course release, which is understood to mean that they will not be required to teach in the core JD program.</p> <p>Although Chairs will make "contributions" to the JD program, this seems unlikely to include significant teaching in high-enrolment JD courses.</p> <p>It is unclear the number of Visiting Fellowships that will be offered to "non-CIGI" Osgoode faculty members over the term of the Agreement. An implication of Fellowships would be to draw such faculty away from teaching and administrative roles at Osgoode.</p> <p>It is unclear how Fellowships will be awarded and, in particular, whether decisions will be taken by established processes for collegial governance or by central administrators at CIGI, York, and/ or Osgoode.</p>

Issue	CIGI-York Agreement provisions	Other documents provided by Osgoode Dean Sossin	Notes
<p>What happens in the event of a dispute between CIGI and York?</p>	<p><b>26:</b> "... Subject to the dispute resolution provisions of paragraph 34, <u>this Agreement may be terminated by CIGI or the University upon the material breach of any representation or obligation under this Agreement on the part of the other...</u> which such Party has failed to remedy within ninety days after delivery of written notice requiring the breach to be remedied. Upon termination of the Agreement, all of the funds advanced by CIGI... that have not been used at the date of such termination shall be returned to CIGI. Each of the parties agrees to notify the other party of any facts that may reasonably give rise to a material breach of this Agreement by the party or may in the fullness of time reasonably give rise to such a breach forthwith upon becoming aware of such facts."</p> <p><b>34:</b> "If a dispute arises relating to the performance of any part of this Agreement, the parties shall attempt to resolve any dispute first through direct negotiation. If the dispute cannot be resolved within twenty days... the dispute will be resolved by arbitration... by a single arbitrator who shall be appointed pursuant to the provisions of the <i>Ontario Arbitrations Act</i>.... The decision of the arbitrator shall be final and binding and not subject to appeal.... Each party will pay its own costs."</p>		<p>CIGI may withdraw funding in the event that an arbitrator finds a material breach of the Agreement by the University.</p> <p>It is unclear what would constitute a material breach. For example, it is unclear whether repeated failure of the University – including such entities as Osgoode Faculty Recruitment Committee, Osgoode Faculty Appointments Committee, etc. – to appoint individual candidates recommended by the Steering Committee would give rise to a material breach of the Agreement.</p> <p>The University assumes an obligation to notify CIGI of "any facts" that may give rise to a material breach.</p> <p>Upon triggering the dispute resolution clause, CIGI introduces the prospect of a withdrawal of funds under the Agreement. The negotiations between CIGI and York over a dispute would thus take place in a high-pressure context where, if a material breach was found, the University would absorb immediately the salary and benefits costs of up to 10 existing Chairs associated with the Program.</p> <p>Because CIGI funds are employed under the Agreement only after Ontario Government funding is exhausted, a significant number of Chairs will have been appointed by the time of any dispute that might lead to withdrawal of CIGI funding.</p>

<b>Issue</b>	<b>CIGI-York Agreement provisions</b>	<b>Other documents provided by Osgoode Dean Sossin</b>	<b>Notes</b>
What is the process for renewal of external funding?	<p>26: "The terms of this Agreement shall commence on the date hereof and shall terminate on the 10<sup>th</sup> anniversary of this Agreement. The parties may renew this Agreement by mutual agreement. ... the parties agree to make best efforts to determine by no later than the 8<sup>th</sup> anniversary of the date hereof whether they wish to extend the terms of this agreement."</p>		Any renewal of the external funding after the ten-year term is dependent on the agreement of CIGI. The negotiations over renewal would thus take place in a context where, if the Agreement was not renewed, the University would absorb the salary and benefits costs of up to 10 existing Chairs associated with the Initiative.
How are the terms of employment for CIGI-York Chairs to be determined?	<p>13: "The remuneration package and the term of employment for a Chair shall be as agreed to by the parties [i.e. CIGI and York] based on the recommendation of the Steering Committee."</p>	<p>Memo of 28 September 2011 from Osgoode Dean Sossin to Osgoode Faculty Council, p. 5: "once hired, these faculty will also receive an appointment as a Chairholder and receive a separate stipend and course release pursuant to that role and for the duration of the Agreement."</p>	Salary and other terms of employment will be decided by CIGI and York, based on the recommendation of the Steering Committee. They will not be governed by the terms of employment that apply otherwise to members of OHFA/ YUFA. The employment-related implications of this aspect of the Agreement are not examined closely in this report.
What is the academic status of CIGI-York Chairs?	<p>14: "... each of the Chairs will be considered for tenure at the University in accordance with the University's tenure policy as it exists from time to time and... Chairholders will enjoy the customary rights and privileges associated with such an academic appointment."</p> <p>17: "... the University may require reasonable provisions as part of Chair terms that are intended to mitigate such tenure obligations for the University without materially impairing the attractiveness of such Chairs to prospective holders of same."</p>		<p>There is clearly a tension between the mitigation of the above continent liability to the University and the offer of tenure-stream or tenured positions so as to recruit candidates for the Chairs. The resolution of this tension unclear in the Agreement, making it possible that the tenure status of a Chair could be limited to mitigate the University's liabilities.</p> <p>There is no mention of academic autonomy or academic freedom in the Agreement.</p>

**CIGI-YORK INITIATIVE/ PROGRAM – REPORT OF CONCERNS RAISED BY OSGOODE FACULTY**

**APPENDIX B – DOCUMENTATION**

To: Jinyan Li, Chair, Faculty Council  
From: Lorne Sossin, Dean, Osgoode Hall Law School  
Date: **September 28, 2011**

Subject: **Centre on International Law in the Global Economy – a Collaboration between Osgoode Hall Law School and the Centre for International Governance Innovation (CIGI)**

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On August 8, 2011, York University (York) and the Centre for International Governance Innovation (CIGI) entered into a Collaboration Agreement (attached as Appendix "A") to launch an International Economic, Environmental and Intellectual Property Law program through Osgoode Hall Law School (Osgoode). The purpose of this memo is to elaborate on the proposed "Centre on International Law in the Global Economy" (the "Centre")

## **1.0 Background**

The objective of the Centre is to build research and policy capacity in international law, and to bring together a new cluster of globally recognized scholars to Ontario. The Centre for International Governance Innovation (CIGI) is an independent, non-profit, non-partisan think tank on international governance. CIGI is not part of any University but has ongoing partnerships with several schools. CIGI was founded by Jim Balsillie (co-CEO of Research in Motion) in 2001. The mandate of CIGI is to support research, form networks, advance policy debate and generate ideas for multilateral governance improvements in program areas including the Global Economy, Environment and Energy Governance, Global Security and Global Development.

Under the terms of the Agreement, CIGI has agreed to provide funding for the creation of 10 Chairs (one of whom would also serve as Executive Director) for a period of 10 years in order to support the creation of the Centre. York University will also provide partial funding for 2 of the 10 Chairs. The Centre will provide annual funding for up to 20 Osgoode Graduate Scholarships (to include both LL.M. and Ph.D. scholarships for both domestic and international students in proportions to be determined by Osgoode).

Under the Agreement, the program areas for the Centre will be international intellectual property, international environmental law and international economic law including trade and investment law.

## **2.0 Strategic Priorities**

The Centre advances important aspects of Osgoode's strategic priorities, including:

- Advancing Osgoode's capacity to meet its goal of research intensification;
- Enhancing Osgoode's experiential learning offerings;
- Strengthening Osgoode's graduate program, particularly in the context of the recruitment of qualified international students, and developing new and innovative graduate courses and programs;
- Addressing the faculty/student ratio and associated faculty workload issues, which has been identified as a key barrier to Osgoode's success;
- Strengthening Osgoode's commitment to collaboration with partners who share our vision of progressive scholarship and teaching; and
- To be and be recognized as a leading law school with a global reputation.

### **3.0 Activities of the Centre**

The Centre will be an institutional home for the collaboration between Osgoode with CIGI. This Centre will not be an Organized Research Unit (ORU) at York. The Centre will house the Chairs and graduate students as discussed above. It will also put on a range of conferences, symposia, visiting lecturers and project, guided by the participating Osgoode faculty and under the leadership of the Centre's Executive Director (who will also be a Chair).

The Centre will pursue institutional collaboration with other Osgoode clusters of expertise which overlap with its core areas of interest, including the Hennick Centre, the Nathanson Centre, and IP Osgoode. The Centre will also lead research collaborations which draw together various existing Osgoode faculty in addition to the new Chairs. To facilitate this integration, it is proposed that the Centre will sponsor a Visiting Fellowship for an Osgoode faculty member to spend a term at the Centre, with access to the same teaching release and research funding and a stipend as the Chairs located at the Centre.

The Centre will also broaden Osgoode's network through new interdisciplinary linkages, including partners at York such as YCPPL, IRIS, etc, as well as with the Balsillie School of International Affairs (BSIA) and some of CIGI's fellowship holders and partners around the world.

The Centre will develop new experiential learning opportunities (either by expanding existing programs such as ILP or proposing new internships and programs) and curriculum in the areas of its coverage, with a particular focus on graduate education. Any new curricular initiatives from the Centre will be developed through APPC, the Graduate Studies Committee and any other appropriate governance mechanism. Where appropriate, however, the Centre will also expand the capacity and depth of the JD program in these areas, particularly through expanding existing research based learning opportunities and developing new ones, particularly settings which bring together graduate and JD students.

### **4.0 Governance**

The Agreement establishes a five-person Steering Committee for the Centre (two representatives from CIGI, two representatives from Osgoode and the Executive Director of the Centre, also an Osgoode faculty member, who will be a non-voting member on the Steering Committee). Steering Committee decisions must be unanimous among voting members.

The Steering Committee will also appoint an Advisory Committee which will assist both in framing the criteria for the Chairs, and raising the profile of the initiative. Osgoode will have a leading scholar from each of the three core areas of the proposed Centre on the Advisory Committee. While the Advisory Committee is intended to facilitate a flow of information and perspective between internal and external communities in the field, the Advisory Committee has no decision-making role.

The recruitment process for the Chairs will be governed by, and in practice controlled by, FRC. The Steering Committee will feed into a sub-committee of FRC established for recruitment of these Chairs, which will consider candidates who apply for the Chairs, or are identified through a proactive process. As with all sub-committees of FRC, it will be the sub-committee that vets all potential candidates and recommends to plenary FRC which candidates should go to Stage 2 and later, to Stage 3. Again, as with all FRC appointments processes, only those identified by the plenary FRC as meeting FRC's standards, pursuant to FRC's policies, will be advanced to either stage.

Pursuant to the Agreement between Osgoode and CIGI, candidates appointed to these Chairs have to be selected from among those candidates recommended by the Steering Committee. That is the formal source of the final shortlist. However, in practice and because of FRC's powers, the Steering

Committee can only recommend to FRC what FRC is already prepared to approve through its own processes. Through the Chair of FRC's membership on the Steering Committee during the recruitment phase of the Centre, and the unanimous nature of Steering Committee decision-making, in effect, the Steering Committee will only make recommendations that are consistent with FRC's direction including FRC's own preliminary determinations on the desirable shortlist that will have been conveyed to the Steering Committee. Once a short-list is identified (i.e. Stage 3), FRC will conduct its usual scrutiny and process to determine a recommended person for each Chair, who would then be ratified by FAC in the usual fashion prior to any offers being made.

The CIGI representatives on the Steering Committee do not have any "veto" over Osgoode's recruitment. Osgoode would be free to pursue recruitment of any candidate not recommended by CIGI's representatives on the Steering Committee, using other funding for appointments and the longstanding "special distinction" category within Osgoode's recruitment. By contrast, FRC does possess a "veto" with respect to these Chair appointments, as no Chair may be appointed at Osgoode whom FRC does not recommend, and whom FAC does not approve.

With respect to Osgoode's representatives on the Steering Committee, one member will be the Dean and it is proposed the other member be appointed through Faculty Council, although for the first three years, in light of the focus on recruiting the 10 Chairs, that representative should be the Chair of the Faculty Recruitment Committee. In this way, a member of the Steering Committee will act under the direction of and be accountable to the FRC during the recruitment phase of the Centre. Since, as noted above, all Steering Committee decisions must be unanimous, FRC will exercise oversight over the recruitment activities of the Steering Committee.

## **5.0 Timing**

The Agreement was signed on August 8, 2011. The time pressure to conclude the Agreement over the summer came from the Ontario Government. As a lead funder, the Government indicated if the Agreement could not be put in place by the end of August, the Government could not move on it prior to the election scheduled for October 6, 2011. By concluding the Agreement prior to the election campaign, the full commitment of the Government has been locked in.

The Agreement puts in place a framework for the development of the partnership and allows funding to flow in support of the Centre and its programs. The core elements of the Centre (the recruitment of Chairs and graduate students, the design of research and educational initiatives) all remain to be developed and will separately be subject to academic oversight.

While this agreement came together in a matter of weeks in August, 2011, Osgoode colleagues have had contact with CIGI for some time, and in fact some of those colleagues raised the potential for collaboration with CIGI on its international law proposal in the past. Those overtures helped lay the groundwork for this initiative.

## **6.0 Funding**

CIGI will receive \$30 million from the Government of Ontario and \$30 million from Mr. Jim Balsillie, co-CEO of Research in Motion, over the 10 year period, to support the proposed Centre.

The Centre will be fully funded, including related administrative and incidental costs. Funds will be transferred from CIGI to Osgoode to cover the full cost of the salary and benefits for the Chairs (subject to York's contributions), full scholarships for the participating graduate students, relevant staffing, research related costs including RA, IT and library resources, all of the overhead at the

new Waterloo facility, and program funding (for internships, conferences, research collaborations, visiting fellowships, etc).

In particular, concerns over the library resources have been raised. While it is premature to determine the full needs of the library in relation to the proposed Centre, the commitment to have the Centre's activities fully funded from CIGI funds includes a commitment that there will be no negative impact on the resources of the Library, and that new services, licenses, collections, staffing needs, etc, will all be funded from the resources of the proposed Centre.

While the precise level of annual funding will depend on some contingencies such as the level of Chair stipends, level of research activity in a given year, a full costing of the resource requirements of the new Centre both in its start-up and steady state stages, etc, it is estimated that the funding will be between \$5-6 million annually when the initiative is at steady state.

Pursuant to the Agreement, York has made the following financial commitments in the Agreement:

- York will provide the base faculty salary and related benefits costs associated with the tenure position for one of the Chairs as designated by the parties.
- York will provide an amount equal to \$1,000,000, in the aggregate, plus such greater amounts as the University is able to raise in respect of a second Chair as designated by the parties. York agrees to make reasonable best efforts to raise an additional \$2,000,000 toward the funding of said Chair.
- York will provide a reasonable contribution to operating costs and overhead of the Program. This refers to the provision of office space for those Chairs located on Osgoode's campus and related kinds of expenditures (computer, etc). It does not refer to additional staffing costs. Faculty assistants, for example, will be funded from the Centre's resources, as would additional resources needed to administer additional graduate programs or library resources, and so forth.

## 7.0 The 10 Chairs

The Chairs would all be hired as tenured or tenure stream Osgoode faculty members, through the normal collegial process. Additionally, once hired, these faculty will also receive an appointment as a Chairholder and receive a separate stipend and course release pursuant to that role and for the duration of the Agreement. At the end of the 10 year period, if the Agreement were not renewed, the terms of the Chairs would end, although the Chairholders would continue to be members of Osgoode's faculty.

The subject area of the Chairs within the three pillars (international environmental law, international intellectual property law and international economic law) will be developed in a collaborative fashion with input from the Osgoode community as well as the Steering Committee and the Advisory Committee (each of which has Osgoode representation). Chair descriptions must be approved by Faculty Council upon proposal by the Faculty Recruitment Committee. This process is an opportunity to highlight the clusters of existing expertise which can be expanded and enhanced through this initiative – for example, a Chair in "Dispute Resolution in the Global Economy" would reflect a historic strength at Osgoode and enrich the proposed Centre's depth and breadth.

During the term of the Agreement, the Chairholders will engage both in research and teaching. Their teaching will be focused on the graduate program but will include contributions to the J.D. program on the part of each Chair as well.

Chairholders will also participate fully in Osgoode's governance (serving on Faculty Council committees, etc) and may also undertake other initiatives and leadership roles at Osgoode outside the Centre.

The Chairs, including the Executive Director, will be governed by Osgoode and York's academic oversight (Tenure and Promotions, etc) and will be subject to Osgoode and York's policies (from the equity provisions of our recruitment policy to protections relating to academic freedom).

The academic Executive Director position and nine other Chairs will be modeled loosely on the Tier 1 CRC model and this analogy may provide a useful guide for the development of the Chairs.

## **8.0 Location of the Centre**

The Osgoode-CIGI Centre on International Law in the Global Economy will be located at Osgoode and in a new facility adjacent to CIGI's campus in Waterloo, Ontario (approximately a 75 minute drive from Osgoode). That facility was opened in September, 2011, and also will house the Balsillie School of International Affairs, a collaboration between CIGI, the University of Waterloo and Wilfred Laurier University. Approximately 2/3 of the Chairs and 2/3 of the graduate students will have their primary office at the Waterloo facility.

The goal of the proposed Centre would be to create a seamless community of students, staff and scholars. This goal can be achieved through a mix of commuting (a handful of Osgoode faculty already live within a short distance of the Waterloo facility), technology (e.g. global classrooms bringing together people in the CIGI and Osgoode facilities), rotating faculty (e.g. Chairs spending time at each location rather than only one, etc) and collaborative initiatives (e.g. the Visiting Fellowship to be designated for an existing member of Osgoode's faculty).

## **9.0 Graduate Students**

Further to the input of the Graduate Studies Committee, a set of guiding principles will apply to the activities of the Centre and Chairs relating to graduate legal education. These principles are set out in Appendix "C" and address the following areas:

1. That the establishment of the Centre does not affect or diminish the Graduate Program Director and Graduate Studies Committee's ongoing responsibility for all aspects of the Graduate Program currently under their jurisdiction.
2. Osgoode Graduate Program's commitment to offer opportunities to obtain research based LLM's and PhD's in a wide range of specializations.
3. Osgoode's commitment, in light of the external funding support for students associated with the Centre, to balance out opportunities for higher levels of financial support among all students entering the program. This may include, among other initiatives, giving priority consideration for internal scholarship funds that are not tied to subject areas in the CILGE priority areas.
4. Osgoode's commitment that the additional graduate spaces funded by CILGE will not reduce the number of spaces available to domestic or international students applying to the program in other fields.

5. That Osgoode students who receive CILGE scholarships, including those students who are to be based in Waterloo, will be subject to all currently existing program requirements, including participation in required coursework, and study groups, at Osgoode.
6. That all Osgoode graduate faculty will be eligible to supervise all students, regardless of their funding source.
7. That notwithstanding the location of their offices, CILGE Chairs will be expected to participate in person in the teaching and supervision of graduate students at Osgoode.
8. That Osgoode will budget for anticipated additional expenses relating to additional costs of overhead and administration of the Graduate Program at Osgoode resulting from the Centre, including the need to provide services to students who may be primarily located in Waterloo.

## 10.0 Review & Oversight

To ensure the benefits of the Centre are being realized and to ensure contingent liabilities are addressed, it is proposed that the following Osgoode governance measures be instituted:

- 1) FRC will include in its annual report to Faculty Council a review of the recruitment of the Chairs;
- 2) A Report from the Graduate Studies Committee on the recruitment of graduate students funded through the scholarships made available through the Centre;
- 3) Once hired, the Executive Director will submit an annual report on the activities of the Centre to the Steering Committee. The Dean will table that report with Faculty Council; and
- 4) An ad hoc committee be appointed jointly by the Dean and Chair of Faculty Council to conduct a review of the Centre and the activities relating to this initiative after the completion of the 5<sup>th</sup> year of the Agreement (in the Spring of 2016) and to report to Faculty Council. A further review would take place after the 10<sup>th</sup> year of the Agreement (in the Spring of 2021) and if renewed, further reviews will take place at the end of each 5 year period.

## 11.0 The Future

Assuming the Centre is successful, there is a very real likelihood that funding for the Centre will be renewed. In the event that the funding is not renewed after 10 years, or at whatever point subsequent to renewal in the future that the funding is discontinued, York University may have to assume the faculty salary portion of up to 8 Chairs (beyond the two Chairs York already will be supporting), should those individuals continue their appointments as Osgoode faculty members. This risk of contingent liability may be mitigated by a number of factors.

As a practical matter, some of those holding Chair appointments will choose not to stay at Osgoode once the Chairs are no longer available. Other senior scholars may be recruited as Chairs as a bridge to retirement. For the remaining Chairholders who do seek to remain on Osgoode's faculty after the funding for the Chairs is discontinued, York and Osgoode have agreed to work together to ensure those additional salaries do not have an unduly disruptive impact on Osgoode's budget. This approach may involve York providing bridge funding so that Osgoode may absorb the

additional salaries on a gradual basis.

The principles on which York and Osgoode will approach the University's obligations under the Agreement are set out in a memorandum from the Dean of Osgoode to the President of York attached as Appendix "B". The President has indicated his concurrence with the content of the memorandum. These principles represent a point of departure, not a full recitation of all the ways in which the University will help maximize the benefits and mitigate the risk associated with the proposed Centre.

Risk factors associated with graduate scholarships provided under the Agreement may be mitigated as well. For example, toward the end of the life of the Agreement, it will make sense to provide more Masters scholarships and fewer Doctoral scholarships so that funding obligations for those students will not continue past the life of the Agreement.

## **12.0 Conclusion**

This proposal represents an extraordinary opportunity for Osgoode to advance its strategic priorities. This proposal also comes with risks. With the structure and governance proposed, the benefits of this initiative can be maximized and the risks associated with it can be minimized.

As a public announcement of the funding collaboration is planned for later in October, it is hoped that Faculty Council will approve the establishment of the Centre as the institutional home for this new initiative. This proposal remains for internal Faculty Council circulation only and should be treated as confidential.

**[Attachment omitted: Agreement of August 2011 – see appendix one of final report of panel]**



Lorne Sossin  
Dean  
Osgoode Hall  
Law School  
Ignat Kaneff  
Building  
Room 2026  
York University

To: President Mamdouh Shoukri  
From: Lorne Sossin, Dean, Osgoode Hall Law School  
CC: Patrick Monahan, Vice President, Academic & Provost  
Date: September 19, 2011  
Subject: Agreement between York University and the Centre for International Governance Innovation (CIGI)

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On August 8, 2011, York University (York) and the Centre for International Governance Innovation (CIGI) entered into a Collaboration Agreement to launch an International Law program through Osgoode Hall Law School (Osgoode). The purpose of this memo is to clarify the relationship between the University and Osgoode in relation to this collaboration.

Under the terms of the Agreement, CIGI has agreed to provide funding for the creation of 10 Chairs (one of whom would also serve as Executive Director) for a period of 10 years in order to support the creation of a Centre on International Law in the Global Economy. The Chairs would all be hired as tenured or tenure stream York/Osgoode faculty members, through the normal collegial process, and these faculty members would also then receive an appointment as a Chair holder and receive a separate stipend and course release pursuant to their role as Chairholder. At the end of the 10 year period, if the Agreement were not renewed, the terms of the Chairs would end, although the Chairholders would continue to be members of Osgoode's faculty and appropriate planning for this possibility (ie. through planned retirements, or securing other sources of funding) would be required in advance. The academic Executive Director position and nine other Chairs will be modeled loosely on the Tier 1 CRC model.

The Centre on International Law in the Global Economy will be located in a new facility located adjacent to CIGI's premises in Waterloo, Ontario, where approximately 2/3 of the Chairs will be located.

The Agreement also envisions funds provided to York to support 20 graduate scholarships annually (for both Masters and Doctoral students, 2/3 of whom would be located in Waterloo), who would be either LL.M. or Ph.D. students in Osgoode's Graduate Program, and a range of conferences, symposia, visiting lecturers and projects (together, the "Osgoode-CIGI Initiative").

The funds flowing to York will come from CIGI pursuant to the Agreement. CIGI, in turn, will receive \$30 million from the Government of Ontario and \$30 million in matching funds from Mr. Jim Balsillie, co-CEO of Research in Motion, over the 10 year period to support this initiative.

Pursuant to this Agreement and the Osgoode-CIGI initiative, York has made the following commitments:

- York will provide the base faculty salary and related benefits costs associated with the tenure position for one of the Chairs as designated by the parties.

- York will provide an amount equal to \$1,000,000, in the aggregate, plus such greater amounts as the University is able to raise in respect of a second Chair as designated by the parties. York agrees to make reasonable best efforts to raise an additional \$2,000,000 toward the funding of said Chair.
- York will provide all tuition received by the University from students enrolled in the Program, and any amounts received by the University from the Province of Ontario's Basic Operating Grant Program in respect of the Program.
- York will provide reasonable contribution to operating costs and overhead of the Program.

In the event that the funding is not renewed after 10 years, or at whatever point subsequent to renewal in the future that the funding is discontinued, York University may have to assume the faculty salary portion of up to 10 Chairs, if those individuals continued their appointments as Osgoode faculty members.

The Chairs will receive an academic base salary, along with a stipend that will cease in the event that the Agreement is terminated or not renewed after the initial 10 year term. Therefore, it is likely, in the event of the termination of the Osgoode-CIGI Initiative, that a significant number of the 8 Chairholders whose salary York is not otherwise responsible for, will choose not to remain at York. That said, it is important to reiterate the principles by which York and Osgoode will deal with any financial consequences arising from the Initiative if one or more of those Chairholders chooses to continue their faculty appointment.

In the course of negotiating this Agreement, York University and Osgoode were motivated by a set of shared principles, including:

- The University and Osgoode will make all reasonable efforts to ensure the Initiative thrives and is renewed.
- Funds provided by CIGI to York pursuant to the Osgoode-CIGI Initiative will be provided to Osgoode to administer for the benefit of the Initiative.
- During the term of the Agreement, the Osgoode-CIGI Initiative will not negatively impact Osgoode's ability to make in-budget academic appointments, and will not prejudice Osgoode's ability to compete for resources made available centrally by the University (such as the Strategic Appointments allocated in 2010 and 2011).
- The University will make all reasonable efforts to ensure Osgoode's operations are not impaired by any contingent liability resulting from the Osgoode-CIGI Initiative.

The success of the Initiative will require the University and Osgoode to work together, consult and collaborate on the financial arrangements. The principles outlined above are not exhaustive but simply illustrative the commitment of the University and Osgoode to ensure those arrangements enhance the benefits and mitigate the risks and any contingent liability associated with this Initiative.

Should any of the above not accord with your understanding of the University's commitments, please advise.

From: Mamdouh Shoukri <mamshou@yorku.ca>  
To: Lorne Sossin/osgoode <LSossin@osgoode.yorku.ca>  
Cc: pjmon@yorku.ca  
Date: 09/28/2011 01:52 PM  
Subject: CIGI memo  
Sent by: Irene Fezza <ifezza@yorku.ca>

Dear Lorne,

Thank you for your memo setting out our common understandings regarding the principles applicable to the partnership with CIGI. I look forward to working with you and your colleagues to make this extraordinary opportunity a reality for Osgoode and York.

Mamdouh

Mamdouh Shoukri  
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**Appendix Three**

**Second report by *ad hoc* committee of OHFA, dated October 28, 2011.**

**SUMMARY OF FACULTY MEMBERS' CONCERNS IN LIGHT OF REVISED CILGE PROPOSAL OF 27.10.2011**  
**28 October 2011**

This summary addresses issues that have been identified by various Osgoode faculty members in light of recent revisions or proposed revisions to the CILGE proposal. It does not address all issues, such as those identified by the graduate studies and library committees or various employment-related concern. It is based on an examination of:

- the Agreement of August 2011,
- the draft protocol of 25 October, 2011,
- the Dean's memo of 21 October 2011 outlining the proposed changes, and
- the Dean's revised memo of 27 October 2011 outlining the entire proposal.

A short summary of outstanding concerns is provided below followed by a table offering analysis of each concern based on the relevant documents. The summary and table are divided into two parts: (a) Issues related to the form and content of the proposal and (b) Other issues. Further information is provided in the 11 October 2011 report on concerns raised by Osgoode faculty members.

***A. Issues related to the form and content of the proposal***

- **Uncertain legal effect of the proposed changes:** As the revised proposal cannot effect any change to the terms of the Agreement, there is a concern that the problems with the Agreement remain unresolved, that an amendment to the Agreement would be needed to effect the desired changes, and that to the extent the revised proposal is inconsistent with the original Agreement it could give rise to a dispute between the parties to the Agreement.
- **Uncertain status of the University's assurances:** There is a concern that the documents before us at this time provide insufficient guarantee of the University's assurances.
- **Contingent liability:** The revised proposal would go a significant way toward resolving this concern, but it is impossible to be sure before the precise arrangements and documentation are in place. It remains unclear (a) how many Chairs would be hired as CLAs, (b) whether hiring of CLAs could give rise to a dispute under the Agreement, since it appears inconsistent with clauses 14 and 17 of the Agreement, (c) how many positions the University will fund and over what time period, (d) what form the University's assurances will take and to what extent they can be relied upon, and (e) what guarantee there is that the private and Government funding will be delivered.
- **Inappropriate role of external parties in determining faculty appointments:** The revised proposal goes some distance toward addressing the concern, but (a) an external party (the member or members of the Advisory Committee) still has the authority to block a candidate from being placed on the recruitment shortlist, (b) the proposal does not actually resolve the impasse it is intended to resolve because any member of the Steering Committee can still block a candidate simply by declining to agree on the Advisory Committee member who would decide on the candidate's suitability; and (c) it remains unclear whether the procedures set out in the protocol could be construed as a material breach of the Agreement. It is also unclear what procedures would apply to the renewal of Chairs. There is a concern that CIGI could block the renewal of a Chair even when the

renewal would continue past the end of the term of the Agreement, when CIGI would no longer be funding the position.

- **Creation of a two-tier faculty:** The revised proposal addresses this concern partially:
  - Compensation: The proposal resolves the concern about Chairs receiving large stipends, but does not make clear whether or how it would give effect to the principle that “Chair holders will receive salary and benefits commensurate with other Osgoode faculty of comparable seniority”.
  - Teaching responsibilities: The proposal appears to resolve this concern to the extent that Osgoode’s existing CRC is considered an appropriate model.
  - Administrative responsibilities: The proposal appears to resolve this concern.
  - Research and teaching support: It is difficult to judge whether the amounts earmarked for research and experiential learning, or the proposed “rotating chairs” for existing faculty, will more or less “level the playing field” between the Chairs and other faculty working in the CILGE program areas. For example: (a) disbursement of research funds appears to fall within the discretion of the Executive Director of the Centre rather than Osgoode’s existing collegial processes; (b) by restricting eligibility to the subject areas defined by the external donor, the revised proposal risks creating a two-tiered faculty defined not so much by differential terms of employment but by different subject matter focus, with teaching and research within the program areas receiving substantially more support than those outside.
- **Undue influence of external private funders over determination of academic priorities:** There is a concern that allowing a private donor to set the school’s academic priorities is fundamentally inappropriate, either in principle or on the large scale contemplated by this Agreement. There is also concern about the actual subject focus and goals of this Program and their apparent link to the economic interests of a particular company and industry. Although it seeks to enhance Osgoode’s capacity to shape the Program to reflect its own priorities, the revised proposal does not change the subject-matter focus or objectives as set out in the Agreement or the fact that they are established by an external donor.
- **Undue influence of external parties over faculty members’ employment terms and conditions:** There is a concern that the revised proposal does not resolve the problem of who sets the specific financial terms and condition of each Chair. The problem is that this is allocated under the Agreement both to the Steering Committee (clause 3(a)(ii)) and to the parties to the Agreement (clause 13). The revised proposal does not resolve the problem because (a) it simply restates clause 13 of the Agreement, which gives an external party (CIGI) shared decision-making power over Chairs’ compensation and (b) it does not resolve the apparent contradiction between clauses 3(a)(ii) and 13.
- **Undue influence of external parties over academic policy and programming:** There is still concern about the requirement to consult external parties and pursue the externally defined Program Objectives when making decisions on academic policy and programming. There is, for example, no carve-out of decisions on academic policy and programming, as determined by Faculty Council, from the Agreement’s provisions on material breach, termination, and arbitration.

- **Undue external control over budget:** There is a concern that, unlike with a typical endowment, there remains a high level of ongoing external influence over how the funds are spent plus a potential threat of cutting off funds should the donor be unsatisfied.
- **Lack of guarantee of Osgoode representation on the Steering and Advisory Committees:** The revised proposal appears to address the concern but, because the protocol is binding only on the Steering Committee, it is not clear how the protocol would bind the parties to the Agreement in appointing members to the Steering Committee.
- **Potential negative impact on the JD program:** The revised proposal goes some way toward resolving these concerns by clarifying that Chairs' ½ teaching load will normally include JD as well as graduate teaching. However, it remains unclear (a) how much of their load will be devoted to JD teaching, (b) to what extent they will be required to teach foundational first and upper year courses rather than specialized seminars, and (c) to what extent the program will improve the effective faculty-student ratio in the JD program.
- **Limitations on academic freedom of Chairs once appointed:** The clause in the draft protocol on academic freedom (1.1) goes some way toward addressing the concern by constraining the Steering Committee's discretion, but (a) it does not change the fact that the Agreement gives the Steering Committee a substantial role in relation to Chairs' renewal, termination, and research plans and (b) Chairs' academic freedom is potentially undermined by the fact that some may be hired without tenure.
- **Avoidance of normal University academic governance structures and processes:** There is a concern that an initiative of this scale, involving the de facto creation of a new campus and research Centre and appointment of ten new faculty members, should be subject to Senate approval and oversight as a new program, an organized research unit, or both. The draft protocol does not address this issue.
- **Unclear budgetary authority:** There is concern that the provision in the draft protocol for the Steering Committee to approve the budget "as developed by the Executive Director" implies that the Steering Committee may not make or require any modification to the budget prepared by the Executive Director, thereby giving the Executive Director sole control over the budget.
- **Uncertain impact on Faculty Association:** There are concerns that (a) holders of contractually limited appointments will not fit easily into OHFA since they have different status, interests, and needs than tenure stream faculty and are not presently voting members of OHFA, and (b) the Chairs in general may have different interests than other OHFA members, making it difficult for a single faculty association to represent all of their interests.

#### ***B. Other issues***

- **Insufficient knowledge of the proposed partners:** There is a concern that there is insufficient knowledge of the partner organization and its relationship with the private donor. Financial statements do not appear to be available on the CIGI website. There is a known history of issues around interference with academic freedom at CIGI, including a CAUT report, CIGI's institutional response to which is not known. In addition, neither CIGI nor Mr. Balsillie has made an appearance

at Osgoode to give the Osgoode community the opportunity to hear their rationales, goals, and vision for this proposal.

- **Uncertain implications of the creation of a new University campus:** There are concerns that the revised proposal might result in the creation of a campus with operations and employees that fall outside the University's established policies, procedures, and labour relations.

**A. Further analysis – issues related to the proposal itself**

<p><b>1. Uncertain legal effect of the proposed changes</b></p>	<p>The revisions take the form of a protocol under Article 21 of the Agreement. Article 21 provides for the establishment of policies, guidelines, and procedures related to the program that are consistent with the terms of the Agreement and the Program Objectives. It does not provide for changing the terms of the Agreement. Moreover the draft protocol expresses itself to be binding on the Steering Committee. It says nothing about binding the Parties to the Agreement. As there are no signature lines on the current draft protocol, it is unclear who would sign the protocol, in what capacity, and with what legal effect on the parties to the original Agreement.</p> <p>As the revised proposal cannot effect any change to the terms of the Agreement, <b>there is a concern that the problems with the Agreement remain unresolved, that an amendment to the Agreement would be needed to effect the desired changes, and that to the extent the revised proposal is inconsistent with the original Agreement it could give rise to a dispute between the parties to the Agreement.</b></p>
<p><b>2. Uncertain status of the University's assurances</b></p>	<p>The revised proposal includes an email from President Shoukri dated 20 Oct. 2011, confirming the University's intention to adhere to the principles set out the Dean's memo of 19 Sept. 2011.</p> <p>The Dean's memo of 21 Oct. 2011 states that the University has agreed to provide that no Osgoode faculty could be laid off due to this initiative. Further, the communication from the President indicating his concurrence with the memo setting out the principles underlying the University's support for this initiative will be clarified and the commitment of the University to adhere to these principles will be stated expressly.</p> <p><b>There is a concern that the documents we have before us at this time provide insufficient guarantee of the University's assurances.</b></p>
<p><b>3. Contingent liability</b></p>	<p>The Agreement provides that the Chairs are to be appointed for ten-year terms (13), that each will be considered for tenure and enjoy the rights and privileges associated with such an appointment (14), and that the University is solely responsible for all costs associated with the tenure position granted to chairholders upon the conclusion of the Chair term (17). It also provides for withdrawal of CIGI funding in the event of material breach of the Agreement. The Agreement says nothing about allocation of financial liability between the University and Osgoode. Nor does it guarantee that the donor's funds will be set aside in advance so that they are guaranteed to flow even if the donor experiences financial difficulty.</p>

The Dean's memo to the University President of 19 Sept. 2011 says that during the term of the Agreement the initiative will not negatively impact Osgoode's ability to make in-budget appointments or to compete for University resources; and that the University will make all reasonable efforts to ensure that Osgoode's operations are not impaired by contingent liability arising out the initiative.

The President's email of 28 Sept. 2011 thanks Dean Sossin for this memo setting out their "common understandings". A further email from the President dated 20 Oct. 2011 confirms the University's intention to adhere to the principles set out the Dean's memo of 19 Sept. 2011.

The draft protocol provides that, while the Agreement refers to the Chairs as tenured or tenure stream, Chairs may be recruited on a tenured basis or as contractually limited appointments.

The Dean's memo of 21 October reports that:

- Priorities and Finance Committee has agreed to conduct annual reviews of the budget of the Centre with a view to assessing its effect on Osgoode's existing academic programs and to ascertain any significant risks in that regard. The Priorities and Finance Committee will also take part in periodic reviews of the financial impact of the Centre. Each year of the Centre's funding, the Dean will provide an annual update to Faculty Council on the financial status of the Centre, which would also include the Executive Director's broader report on the Centre's activities.
- A number of the Chair holders will receive renewable five-year contracts rather than tenured positions.
- The University has agreed to provide a further backstop which provides that no Osgoode faculty could be laid off due to this initiative.
- Further, the communication from the President indicating his concurrence with the memo setting out the principles underlying the University's support for this initiative will be clarified and the commitment of the University to adhere to these principles will be stated expressly.
- All the funding, from the Government and Mr. Balsillie, must be confirmed and verified prior to the establishment of the Centre.

The Dean's memo of 27 October states that York and Osgoode have agreed to work together to ensure those additional salaries do not have an unduly disruptive impact on Osgoode's budget. This approach may involve York providing bridge funding so that Osgoode may absorb the additional salaries on a gradual basis.

**The steps described in the latter memos would go a significant way toward resolving this concern, but it is impossible to be sure before the precise arrangements and documentation are in place.** It remains unclear (a) exactly how many Chairs would be hired as CLAs, (b) whether CLAs could give rise to a dispute under the Agreement, since they appear inconsistent with clauses 14 and 17 of the Agreement, (c) exactly how many positions the University will fund and over what time period, (d) what form the University's assurances will

	<p>take and to what extent they can be relied upon, (e) what guarantee there is that the Balsillie and Government money will be delivered. Moreover, the revised proposal and the Dean's recent memos only address the contingent liabilities at the end of the term of the Agreement; <b>they appear not to address the risk of early termination.</b></p>
<p><b>4. Inappropriate role of external parties in determining faculty appointments</b></p>	<p>The Agreement gives the Steering Committee "primary responsibility" to make recommendations for appointment of Chairs (3(a)(iii)). It provides that the University will have final authority over faculty appointments subject to the terms of the Agreement, which include that the University will only appoint or renew a Chair from amongst candidates recommended by the Steering Committee (6(a)). Decisions of the Steering Committee require the unanimous approval of the CIGI and York representatives (4). The Agreement thus allows CIGI to block the appointment of any particular candidate by refusing to recommend the candidate. The Agreement also provides that the Steering Committee shall develop research areas for each Chair and establish the specific financial terms and expectations of each Chair including research plans (3(a)(i) and (ii)).</p> <p>The draft protocol provides that</p> <ul style="list-style-type: none"> <li>• before a search begins, the selection criteria for the Chair must be approved by Osgoode through its normal mechanism (1.2);</li> <li>• any Steering Committee input to the recruitment process shall be to advance the Chairs' general qualifications (research excellence, teaching excellence, policy relevance, leadership and collegiality) (1.3);</li> <li>• all candidates shall come through the usual FRC processes (1.4);</li> <li>• FRC will send the Steering Committee a list of recommended candidates for shortlisting (1.5);</li> <li>• the Steering Committee may give input to FRC and ask FRC to reconsider its recommendation of particular candidates (1.5);</li> <li>• if, after reconsideration, FRC still recommends the candidate, the Steering Committee will recommend that candidate for the shortlist unless it is unable to reach consensus on any of the candidates on the shortlist (1.5);</li> <li>• In which case will unanimously pick one or more Advisory Committee members who will decide whether or not to put the candidate on the shortlist (1.6); and</li> <li>• FRC and FAC have sole responsibility to determine whether to make an offer of appointment (1.7).</li> </ul> <p>The draft protocol does not address the renewal of Chairs. It is not clear whether the process it describes for appointments would also apply to renewals.</p> <p>The revised proposal goes some distance toward addressing the concern, but <b>(a) an external party (the member or members of the Advisory Committee) still has the authority to block a candidate from being placed on the recruitment shortlist, (b) the proposal does not actually resolve the impasse it is intended to resolve, because any member of the Steering Committee can still block a candidate simply by declining to agree on the Advisory Committee member who would decide on the candidate's suitability; and (c) it remains unclear whether the procedures set out in the protocol could be construed as a</b></p>

	<p>material breach of the Agreement.</p> <p>Moreover, it is not clear what procedures would apply to the renewal of Chairs. There is a concern that CIGI could block renewal of a Chair even when the renewal would continue past the end of the term of the Agreement, when CIGI would no longer be funding the position.</p>
<p><b>5. Creation of a two-tier faculty</b></p>	<p>There is a concern that the proposal would create a de facto two-tier system in which the CIGI Chairs received salary, benefits, teaching and administrative responsibilities, research and teaching support and other terms substantially more favourable than those enjoyed by other faculty members.</p> <p>The Agreement provides that the Chairs will be modelled loosely on the Tier 1 CRC model (Schedule A), which allows for a wide range of variation in compensation, teaching, administrative responsibilities and so on. The Agreement does not specify how the \$60 million will be spent after paying Chairs' salaries, reasonable office and administrative arrangements, and student scholarships. The Agreement requires Chairs to be provided with secretarial and administrative support that is reasonably appropriate given the nature of the Chair and seniority of the chair holder (15).</p> <p>On <b>compensation</b>, the draft protocol provides that salary and benefits for the Chairs will be set by the University in accordance with the applicable policies of York University and Osgoode Hall Law School, and no separate stipend will be provided to the Chairs (2.2, 2.3).</p> <p>On <b>teaching responsibilities</b>, the draft protocol provides that the Chair's teaching responsibilities will follow the CRC model at Osgoode Hall Law School, and constitute approximately half the regular teaching load of an Osgoode faculty member (3.1).</p> <p>On <b>administrative responsibilities</b>, the draft protocol provides that in addition to any administrative responsibilities they may be given in relation to the Centre, Chairs will also take part fully in the governance and administrative activities of Osgoode and the University (3.3).</p> <p>On <b>research and teaching support</b>, the draft protocol provides that at least \$100,000 per year will be devoted to experiential learning activities and at least \$200,000 per year to research collaboration in the areas of the Centre's activities, with existing Osgoode centres and programs being a priority target for such collaboration (5.3, 5.4).</p> <p>The Dean's memo of 21 October 2011 reports that, rather than providing for a visiting fellowship for existing faculty members as in the earlier version, the proposal will be revised to provide, instead, for an internal rotating Chair at Osgoode. The internal Chair would have the same teaching release and access to research funding as the other CILGE Chairs. The proposal will be for the internal Chair to rotate every 18 months among the three fields covered by the Centre. This proposal is not reflected in the Agreement or the draft protocol.</p> <p><b>The revised proposal addresses the concerns partially:</b></p> <ul style="list-style-type: none"> <li>- <b>Compensation:</b> It resolves the concern about CIGI Chairs receiving</li> </ul>

	<p>large stipends, but it <b>does not explicitly incorporate or is not clear on whether or how it would give effect to the principle stated in the Dean's memo of 21 Oct. 2011 that "Chair holders will receive salary and benefits commensurate with other Osgoode faculty of comparable seniority"</b>.</p> <ul style="list-style-type: none"> <li>- <b>Teaching responsibilities:</b> The proposal appears to resolve this concern to the extent that Osgoode's existing CRC is considered an appropriate model.</li> <li>- <b>Administrative responsibilities:</b> The proposal appears to resolve this concern.</li> <li>- <b>Research and teaching support:</b> It is difficult to judge whether the amounts earmarked for research and experiential learning, or the proposed "rotating chairs" for existing faculty, will more or less "level the playing field" between the Chairs and other faculty working in the CILGE program areas. At least three concerns remain: (a) disbursement of research funds appears to fall within the discretion of the Executive Director of the Centre rather than Osgoode's existing collegial processes; (b) by restricting eligibility to the subject areas defined by the external donor, the revised proposal risks creating a two-tiered faculty defined not so much by differential terms of employment but by different subject matter focus, with teaching and research within the program areas receiving substantially more support than those outside; and (c) there remains room for substantial disparity in secretarial/administrative support between Chairs and other faculty members.</li> <li>- <b>Legal effectiveness:</b> Unlike some of the other issues, where the draft protocol appears to change the terms of the Agreement, on this issue the protocol appears to do what clause 21 contemplates: it clarifies and further specifies the terms of the Agreement. As such, it appears not to give rise to all the same concerns about the legal effect of the protocol indicated above.</li> </ul>
<p><b>6. Undue influence of external private funders over determination of academic priorities</b></p>	<p>The Agreement specifies the general subject matter areas of the ten Chairs and the Program (Schedule A). It also specifies the objectives of this subject-matter focus.</p> <p><b>There is a concern that allowing a private donor to set the school's academic priorities is fundamentally inappropriate</b>, either in principle or on the large scale contemplated by this Agreement. There is also concern about the actual subject focus and goals of this Program and their apparent link to the economic interests of a particular company and industry.</p> <p>Although it seeks to enhance Osgoode's capacity to shape the Program to reflect some of its own priorities, <b>the revised proposal does not change the subject-matter focus or objectives as set out in the Agreement or the fact that they are established by an external donor.</b></p>
<p><b>7. Undue influence of external parties over faculty members' employment terms and conditions</b></p>	<p>The Agreement provides that the Steering Committee will establish the specific financial terms and conditions for each Chair (3(a)(ii)). It also provides that each Chair's remuneration package and term of employment shall be as agreed by the parties on the recommendation of the Steering Committee (13). It is not</p>

	<p>clear that these two provisions are consistent with each other and, if not, which would prevail.</p> <p>The draft protocol provides that the compensation for the Chairs is to be determined by the parties based on the recommendation of the Steering Committee (2.1).</p> <p><b>There is a concern that the draft protocol does not resolve the problem</b> because (a) it simply restates clause 13 of the Agreement, which gives an external party (CIGI) shared decision-making power over Chairs' compensation, and (b) it does not resolve the apparent contradiction between clauses 3(a)(ii) and 13 of the Agreement.</p>
<p><b>8. Undue influence of external parties over academic policy and programming</b></p>	<p>The Agreement provides that the Steering Committee will have primary authority for "all other aspects" of the Program except for academic programming (3(a)(v)); the University has final authority over all matters related to academic programming, subject to the terms of the Agreement (6); the University will consider the Steering Committee's and Advisory Committee's recommendations before making final decisions (6(c)(i)); and the University will endeavour to be guided by the Program Objectives in making such decisions (6(c)(ii)).</p> <p>The draft protocol provides that the Agreement does not alter any of the governance mechanisms of Osgoode Hall Law School or the University in relation to its consideration and approval of any new curricular or programming initiatives associated with or funded by the Centre (4.1).</p> <p>The revised proposal goes some way toward addressing the concern, but <b>there is still concern about the requirement to consult external parties and pursue the externally defined Program Objectives when making decisions on academic policy and programming. There is, for example, no general carve-out of decisions of this nature from the Agreement's provisions on material breach, termination, and arbitration.</b></p>
<p><b>9. Undue external control over budget</b></p>	<p>The Agreement provides that the Executive Director will prepare an annual budget, that the Steering Committee will approve it, and that CIGI will advance the Program funds to Osgoode in quarterly instalments (3(a), 9).</p> <p>The draft protocol contains some provisions on the allocation of the budget funds, which are described under "two-tiered faculty," above. It also states that the Steering Committee "expects" the Executive Director, in developing the mechanisms for allocating the Centre's budget, to establish a transparent, equitable and collegial approach to ensure the full participation of the Chairs and other Osgoode faculty in the activities of the Centre (5.5).</p> <p>There is a concern that, unlike with a typical endowment, <b>there remains a high level of ongoing external influence over how the funds are spent plus a potential threat of cutting off funds should the donor be unsatisfied.</b></p>
<p><b>10. Lack of guarantee of Osgoode representation on</b></p>	<p>The Agreement does not require Osgoode representation on the Steering or Advisory Committee, and specifies Osgoode representatives only as the</p>

<p><b>Steering and Advisory Committees</b></p>	<p>University's "initial" appointments to the Steering Committee. The Agreement describes the Advisory Committee as an "external expert advisory committee" (3(b)).</p> <p>The draft protocol provides that the University representatives to the Steering Committee will consist of the Dean of Osgoode Hall Law School and a faculty member at Osgoode selected annually by Osgoode's Faculty Council. (Preambular paragraph 3)</p> <p>The draft protocol also provides that the Advisory Committee will include no fewer than three members of the Osgoode Faculty, with one member in each of the three designated subject areas (6.1).</p> <p><b>The revised proposal appears on its face to address the concern, but since the protocol is binding only on the Steering Committee itself it is not clear how it would bind the Parties in appointing members to the Steering Committee.</b></p>
<p><b>11. Potential negative impact on the JD program</b></p>	<p>The Agreement does not mention the JD program. There are concerns that the initiative will draw resources away from the JD program, especially foundational first and upper year courses; and that it may reorient the curriculum towards international law and away from domestic law subjects.</p> <p>The draft protocol provides that the teaching load for the Chairs will normally include J.D. and Graduate teaching, to be determined according to the normal procedure by which teaching assignments are allocated at Osgoode Hall Law School (3.2). It also provides for a minimum of \$100,000 per year to be allocated to internships and other experiential learning activities.</p> <p>The Dean's memo of 27 October 2011 states that the Centre will be expected to expand the capacity and depth of the JD program in the program areas, with an emphasis on settings that bring together graduate and JD students.</p> <p>The revised proposal goes some way toward resolving these concerns by clarifying that Chairs' ½ teaching load will normally include JD teaching. <b>It remains unclear, however, (a) how much of their load will be devoted to JD teaching, (b) to what extent they will be required to teach foundational first and upper year courses rather than specialized seminars, and (c) to what extent the program will improve the effective faculty-student ratio in the JD program.</b></p>
<p><b>12. Limitations on academic freedom of CIGI chairs once appointed</b></p>	<p>The Agreement provides in clauses 3(a)(i) and (ii) that the Steering Committee shall develop research areas for each Chair and establish the specific financial terms and expectations of each Chair including research plans. <b>Nothing in the Agreement limits these powers to the faculty recruitment stage.</b></p> <p>The Agreement also provides that the Steering Committee shall make recommendations to the University regarding renewal and termination of Chairs (3(a)(iii)), that the University shall only renew a Chair from amongst candidates recommended by the Steering Committee (6(a)), and that the University shall consider the Steering Committee's recommendations regarding termination of Chairs (6(b)).</p>

	<p>The draft protocol provides that the research agendas of the Chairs, once appointed, will be determined by the Chairs themselves and be governed by the principles of academic freedom as with all faculty members at Osgoode Hall Law School (1.1). It also says that "it is expected" that the Steering Committee's development of research areas will serve as a point of departure for the activities of the Centre and the development of recruitment criteria (1.1).</p> <p>The draft protocol also provides that some of the Chairs may be hired as contractually limited appointments (1.8).</p> <p>The clause on academic freedom (1.1) goes some way toward addressing the concern by limiting the Steering Committee's discretion, but (a) it <b>does not change the fact that the Agreement gives the Steering Committee a substantial role in relation to Chairs' renewal, termination and research plans</b> and (b) Chairs' academic freedom is <b>potentially undermined by the fact that some may be hired without tenure</b> (1.8).</p>
<p><b>13. Avoidance of normal University academic governance structures and processes</b></p>	<p>The Agreement makes no mention of the University Senate or Osgoode Faculty Council. It provides that the graduate program and degrees offered in conjunction with the program are not new programs (23) and that, if any aspect of the Program requires approval by governing bodies within the University, then the University undertakes to make best efforts to secure such approval (24).</p> <p>The Dean's memo of 27 Oct. 2011 states that the centre will not be an ORU.</p> <p>The Dean has brought the proposal to Faculty Council for its approval.</p> <p><b>The draft protocol does not address this issue.</b></p> <p>It is not clear why the proposal should not be subject to all the collegial governance processes that would normally apply to major curricular or research collaboration initiatives. There is a concern that an initiative of this scale, involving the de facto creation of a new campus and research Centre, and appointment of ten faculty members, should be subject to Senate approval and oversight as a new program, an organized research unit, or both.</p>
<p><b>14. Unclear budgetary authority</b></p>	<p>The Agreement provides that the Steering Committee will approve an annual budget prepared by the Executive Director (3(a)(iv)).</p> <p>The draft protocol provides that the Steering Committee will approve the budget "as developed by the Executive Director" (5.1).</p> <p>The reason for this provision in the draft protocol is unclear. There is a concern that the phrase "as developed by" implies that the Steering Committee may not make or require any modification to the budget prepared by the Executive Director, thereby giving the Executive Director sole control over the budget.</p>
<p><b>15. Uncertain impact on Faculty Association</b></p>	<p>The Agreement does not address the question of Chairs' OHFA membership.</p> <p>The draft protocol provides that Chairholders will become members of OHFA.</p>

	<p>There are concerns that (a) holders of contractually limited appointments will not fit easily into OHFA since they have different status, interests, and needs than tenure stream faculty and are not presently voting members of OHFA, and (b) the Chairs in general may have different interests than other OHFA members, making it difficult for a single faculty association to represent all of their interests.</p>
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**B. Further analysis – other concerns**

<p><b>1. Insufficient knowledge of the proposed partners</b></p>	<p>There is a concern that there is insufficient knowledge of the partner organization and its relationship with the private donor, Mr. Balsillie. Financial statements do not appear to be available on the CIGI website. There is a known history of issues around interference with academic freedom at CIGI, including a CAUT report, CIGI's institutional response to which is not known. In addition, neither CIGI nor Mr. Balsillie has made an appearance at Osgoode to give the Osgoode community the opportunity to hear their rationales, goals, and vision for this proposal.</p> <p><b>These concerns are not addressed by the revised proposal.</b></p>
<p><b>2. Uncertain implications of the creation of a new University campus</b></p>	<p>The revised proposal contemplates that approximately 2/3 of the faculty and students funded by the program will be located in the CIGI building in Waterloo. In effect, this implies the creation of a new University campus for the duration of the agreement. Aside from saying that all Chairholders will be OHFA members and that the academic program will be an extension of Osgoode's existing graduate program, the revised proposal is not clear on whether and to what extent this campus and its operations will be subject to the health, safety, environmental, sustainability, accessibility and other policies applicable to the Keele and Glendon campuses, nor whether staff, graduate assistants or teaching assistants would be covered by the University's existing collective bargaining agreements, including those with YUSA and CUPE 3903.</p> <p>There are concerns that the revised proposal might result in the creation of a campus with operations and employees that fall outside the University's established policies, procedures, and labour relations.</p>

**Appendix Four**

**Third report by *ad hoc* committee of OHFA, dated November 7, 2011.**

## YORK-CIGI INITIATIVE

### REPORT OF SPECIFIC OUTSTANDING CONCERNS IN THE AGREEMENT/ DRAFT PROTOCOL

7 NOVEMBER 2011

The following is a summary of issues that require revision or clarification in the Agreement and other documentation underlying the CIGI-York Initiative for a Centre on International Law in the Global Economy (CILGE). It was prepared by Professors Tanguay-Renaud, Van Harten, and Wood in their personal capacities following an informal process of consultation with Osgoode faculty. It reflects their views and opinions only.

The summary is based on information in previous reports of 11 October 2011 and 28 October 2011 on concerns expressed by faculty about the proposed CIGI Initiative. It does not purport to be exhaustive of issues arising from the Initiative or to gauge the level of faculty support that the initiative might obtain if the issues are addressed. It is not intended as a bargaining position but rather as an outline of further changes thought necessary to protect institutional autonomy and academic integrity and to ensure the integrity of proposed reforms to the Initiative as communicated to Faculty Council on 31 October 2011.

The report is based on information from documents provided by the Dean within the confidentiality envelope of the Initiative. Some other documents on matters of private funding of academic institutions and of CIGI's institutional relationship to other universities were collected shortly before the report was finalized; however, there was insufficient time to review closely and incorporate into this report all of the information in those documents. The documents have been provided to the Dean and others acting within the confidentiality envelope. Finally, it is assumed that the Agreement and other documents associated with the Initiative will be made public when the Initiative, if approved, is announced publicly.

- **Institutional autonomy and academic integrity.** Reflecting basic principles of any academic institution, private funders cannot have any decision-making authority over the setting of academic priorities, the recruitment and appointment of faculty, the renewal of faculty appointments, the promotion and tenure of faculty, the setting of research agendas of individual faculty, the admission of students, the setting of curriculum, the issuance of degrees, and any other matters of academic policy and programming. Thus, if there is a reasonable basis for a perception that the Initiative gives authority over such matters to a private funder, then this will very likely preclude the success of the Initiative as an academic endeavour and damage the reputations in the scholarly community of all organizations involved in the Initiative.

Important steps have been taken to preserve the exclusive authority of Osgoode and York over various matters associated with the Initiative. However, as presently structured, the Initiative in various areas still gives undue authority to an external funder. A fundamental concern is the decision-making authority reserved for CIGI in the Agreement and the draft protocol in matters of priority-setting, recruitment and appointment, renewals, and the setting of individual research agendas. It is critical that this be corrected using clear and unambiguous language.

- **General authority over academic policy and programming.** The Agreement and the protocol must make clear that Osgoode and York retain exclusive authority over all matters of academic policy and programming and that CIGI is limited to an advisory role only in this area. To ensure this, a general carve-out should be included in the Agreement for matters of academic policy and programming to be determined as such in the sole and complete discretion of Osgoode Faculty Council or York Senate. The only exception to this principle should be the role played by the external funder in setting general priority areas for the Initiative. Clause 6 of the Agreement does not achieve this and the problem is not addressed by the draft protocol.

It is likewise improper for an external funder to be able to subject decisions of Faculty Council or Senate on matters of academic policy and programming to the authority of a private arbitrator and thus to obtain leverage over decision-making on academic policy and programming. To address this,

the Agreement's clauses on material breach and termination (clause 26 of the Agreement) and dispute settlement (clause 34 of the Agreement) must be limited to disputes over administrative or financial matters – such as commitments by CIGI on the provision (and by York on the allocation to academic purposes) of funds for the Initiative – with an unambiguous carve-out for matters of academic policy and programming to be determined as such in the sole and complete discretion of Faculty Council or Senate.

- **Recruitment and Appointment of Chairs.** Recruitment and appointment decisions must be under the authority of the established processes on these matters at Osgoode and York. The draft protocol does not resolve the problem of CIGI being able to block the shortlisting of candidates by Osgoode's faculty recruitment process because (a) it still allows a person outside the normal faculty recruitment process (i.e. a member of the Initiative's Advisory Committee) to block a candidate; (b) it allows any member of the Steering Committee to block a candidate by declining to agree to appoint the Advisory Committee member under clause 1.6 of the draft protocol, and (c) clause 1.6 of the draft protocol appears inconsistent with clauses 4 and 6(a) of the Agreement thus indicating a need for amendment of the Agreement. The role of CIGI must be advisory only in recruitment and appointments.
- **Renewal of Chairs.** Nothing in the proposed reforms of the Initiative appears to address the issue of renewal of Chairs, on which any CIGI member of the Steering Committee would have an effective veto. Given the number of Chairs likely to be appointed under CLAs, decisions on their renewal should fall with an existing process of collegial governance such as the recruitment and appointment process or the tenure and promotion process. The role of CIGI must be advisory only in renewal of faculty appointments.
- **Preservation of academic freedom.** The Initiative continues to give to an external funder undue influence over Chairs' academic freedom. Clause 1.1 of the draft protocol (preserving Chairs' academic freedom) is open to the interpretation that it is inconsistent with clauses 3(a)(i) and (ii) of the Agreement and thus is insufficient on its own to resolve the issue. An amendment to the Agreement appears necessary in order to limit these powers of the Steering Committee to the recruitment stage, limit the Steering Committee's veto over renewals (see above), and guarantee expressly Chairs' academic freedom.
- **Setting of ongoing research and budget priorities.** In general, neither the Agreement nor the draft protocol lay out a process for the allocation of funding to research or teaching projects based on principles of transparency, impartiality and collegiality. The Agreement should provide that fair, objective and transparent procedures shall be established for application for and allocation of funds to support faculty members' research or teaching; that evaluation and selection criteria shall be specified clearly; that funding shall be allocated only on the basis of scholarly merit as determined by independent, impartial peer review by competent experts who do not stand to derive any financial benefit from the Agreement or the private funders; and that funding allocation procedures shall include provisions against conflicts of interest. Principles of open access to publications, academic sharing of research, and author's intellectual property rights should also be recognized and protected explicitly.

On budgeting, clause 5.5 of the draft protocol gives insufficient assurances of an inclusive and transparent budget process because: (a) its language is too soft (for example, it could be strengthened to say that the Steering Committee will not approve a budget unless it has gone through such a process); and (b) it appears that an amendment to the Agreement would be needed to provide adequate assurances to this effect, given clauses 3(a)(iv) and 8 of the Agreement. Clause 5.1 of the draft protocol introduces ambiguity that should be clarified by providing explicitly that the Steering Committee has the authority to reject or require changes to the budget prepared by the Executive Director. To protect against possible encroachments on academic freedom, there should also be safeguards of the CILGE Executive Director's independence from being overruled on budgeting matters by the external funder's members of the Steering Committee.

On budgeting and the dispute settlement process, the Agreement should contain a provision that CIGI will pay the salaries of CILGE personnel for a specified period after giving notice that it will terminate the Agreement or withhold or reduce the funding under the Agreement.

- **Make-up of the Steering Committee.** For greater certainty, provisions must be included in the Agreement to confirm that York's members of the Steering Committee are from Osgoode and that one of those members is chosen by Faculty Council.
- **Contingent liability.** Assurances from the University regarding contingent liability both at the expiry of the Agreement term and in the event of early termination by CIGI should be clarified and strengthened. Also, documentation on the arrangements to guarantee the commitments of CIGI and provincial funding should be provided.
- **Contractually-limited appointments.** It has been proposed that about half of the Chairs will be CLAs instead of tenure-stream faculty. This proposal should be supported by: (a) an amendment to clauses 6(a), 14 and 17 of the Agreement (on Chairs' tenure) to address the concern that clause 1.8 of the draft protocol is insufficient on its own to override the terms of these clauses; (b) removal or revision of clause 2.2 of the draft protocol (Chairs' OHFA membership) given that the question of CLAs' membership in OHFA is yet to be resolved by OHFA (for now it might be sufficient to insert "Tenured or tenure-stream" before "Chairholders" in the last sentence of clause 2.2, leaving open the question of CLAs' OHFA membership). The prospect of non-tenured Chairs makes it even more critical to ensure that the Agreement provide full protection for academic freedom and institutional autonomy, as discussed above.
- **Academic governance.** Clause 24 of the Agreement should be amended to make clear the role of Faculty Council in approving and implementing the Initiative on all matters of academic policy and programming.
- **The circularity problem.** At present the draft protocol is concluded pursuant to clause 21 of the Agreement which makes the protocol "subject to the terms of this Agreement". To ensure the integrity of the proposed reforms, this circularity should be corrected to ensure that all of the parties to the Agreement are bound unambiguously by the protocol and that the protocol amends the Agreement.

**Appendix Five**

**Motion to approve conditionally the initiative, as approved by Faculty Council on**

**November 28, 2011.**

**Osgoode Hall Law School  
of York University**

**Meeting of Faculty Council  
Monday, November 28, 2011**

**Notice of Motion  
(Revised November 29, 2011)**

**Moved** by Dean Lorne Sossin, seconded by Associate Dean Poonam Puri, Chair Graduate Studies Committee and Professor Craig Scott, Chair, Faculty Recruitment Committee,

**that** Faculty Council approves the initiative to establish a Centre on International Law in the Global Economy, a collaboration between Osgoode Hall Law School and the Centre for International Governance Innovation (CIGI) as described in the Memorandum attached to the motion tabled by Dean Sossin before Faculty Council on 31 October 2011, *such approval to be conditional upon signature by January 16, 2012 or such other later date as approved by Faculty Council*, by all of the parties to the Agreement of August 2011 among CIGI and York University [attached] of (and subject in all respects to) the attached “Protocol to safeguard academic freedom and integrity and to clarify terms of the collaboration between CIGI and Osgoode Hall Law School of York University” (Protocol); and, to facilitate discussion with interested parties of any proposed changes to the Protocol,

**that** a panel of representatives, including Professors *Carys Craig, Giuseppina D'Agostino, Francois Tanguay-Renaud, Gus Van Harten, and Stepan Wood, a designee to be determined by Student Caucus and who is trusted by students to uphold the terms of the Protocol on behalf of the student interest in maintaining academic freedom and integrity, institutional autonomy, and previously announced reforms to the initiative*, and any other designees of Faculty Council, be tasked with (a) working in collaboration with the Dean to communicate with the parties to the Agreement of August 2011, on request, to clarify/ explain the choice of language in the Protocol, (b) responding to any concerns those parties might have with the language and considering any alternative language that the parties might propose, and (c) reporting to Faculty Council on these matters, subject in all cases to final approval by Faculty Council of any changes to the Protocol and, in turn, of the initiative.

**Rationale**

Based on the attached Protocol, the motion is intended to provide an opportunity for Faculty council to approve the proposed collaboration subject to (a) robust safeguards of academic

freedom and integrity and of institutional autonomy and (b) assurances of the integrity of the reforms previously announced regarding the graduate program, the library, contingent liability, and other matters outlined in documentation tabled by Dean Sossin at previous meetings of Faculty Council. In all respects, the Protocol is intended and understood, to the extent of any inconsistencies, to prevail over the Agreement of August 2011 or any other agreement or documentation relating to the proposed collaboration.

The Protocol was developed based on the earlier draft Protocol circulated by Dean Sossin in advance of the October Faculty Council meeting, and a subsequent drafting process coordinated by an *ad hoc* sub-committee established by the Osgoode Hall Faculty Association (OHFA) Executive. The role of this sub-committee was to provide an informal venue for review of the proposed collaboration. The corresponding drafting process involved approximately 12 faculty members who work in areas affected directly by the proposed collaboration as well as faculty who do not work in those areas. For the record, the members of the sub-committee and others involved in the drafting process acted in a personal capacity and without any authority to speak on behalf of OHFA or any group of faculty, and it is understood that OHFA itself has not taken any position on the initiative.

It is anticipated that minor or technical changes to the language of the Protocol may be requested following further communications with other parties. A panel is established to work with the Dean in order to facilitate such communications. Any changes to the Protocol would in all respects require further approval by Faculty Council, however. As such, it is understood that the proposed collaboration cannot be implemented until the final version of the Protocol has been signed by all parties to the Agreement of August 2011 and approved by Faculty Council. This process is intended to allow for and facilitate a discussion of possible changes to the Protocol while maintaining the integrity of Faculty Council's governance process. To summarize this process, for clarity and transparency:

(1) Faculty Council has an opportunity to decide whether to approve the proposed collaboration based on its approval of the precise terms of the Protocol which provide, among other things, that the Protocol takes effect only after it has been signed by all of the parties to the Agreement of August 2011;

(2) the parties to the Agreement of August 2011 have an opportunity to decide whether to sign the Protocol, as approved by Faculty Council, or to request minor or technical changes to the Protocol via discussions with a panel of Faculty Council, although any proposed changes to the Protocol would require a return to step (1); and

(3) after approval of the Protocol by Faculty Council and signature of the Protocol by all parties to the August Agreement, the proposed collaboration would be approved and could be implemented.

**Appendix Six**

**First report of the panel, dated January 6, 2011 [sic]**

**THE CIGI-YORK INITIATIVE**

**REPORT OF THE "PANEL OF REPRESENTATIVES"<sup>1</sup> TO OSGOODE FACULTY COUNCIL  
CONCERNING THE PROTOCOL TO PROMOTE AND PROTECT ACADEMIC FREEDOM**

**JANUARY 6, 2011**

The purpose of this report is to inform Osgoode Faculty Council of proposed revisions to the protocol that was approved by Faculty Council, as a condition of its approval of the initiative, on November 28, 2011. The report also provides background information on a significant outstanding issue that remains under discussion.

The panel has prepared this report and otherwise carried out its role as part of its mandate from to (a) work in collaboration with the Dean to communicate with the parties to the Agreement of August 2011, on request, to clarify/ explain the choice of language in the Protocol, (b) respond to any concerns those parties might have with the language and consider any alternative language that the parties might propose, and (c) report to Faculty Council on these matters, subject in all cases to final approval by Faculty Council of any changes to the Protocol and, in turn, of the initiative.

In the report, we have tended to err on the side of including details about changes and about the outstanding issue in an effort to avoid taking inordinate time to elaborate on this at Faculty Council. We are of course happy to respond to questions before and at the next Faculty Council meeting.

Process followed by the panel

The panel initiated its work shortly after it was established by Faculty Council on November 28, 2011, and this work is ongoing. The student member of the panel, Thomas Wilson, was identified by Student Caucus shortly after the panel was established and has participated in all discussions and decisions of the panel since that time. The panel's discussions and decision-making were based mainly on email exchanges amongst the panel members or between the panel and Dean Sossin. Its decisions have thus far reflected agreement by all panel members. The discussions among panel members have taken place generally on an assumption of confidentiality within the panel, with some exceptions as indicated below.

The panel sought input on the language of the protocol from outside contacts with expertise in public-private partnerships in the academic sector and in labour law. This was the first time at which input from persons outside of Osgoode faculty was sought in the drafting of the protocol. It was thought important to seek this input given that the protocol was drafted by a small number of Osgoode faculty under significant time pressure and within a confidentiality

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<sup>1</sup> The panel members include Thomas Wilson and Professors Carys Craig, Giuseppina D'Agostino, Francois Tanguay-Renaud, Gus Van Harten, and Stepan Wood.

envelope. The Dean was informed of the panel's intention to seek outside input and the input was sought on a confidential basis.<sup>2</sup> That said, the process for receiving input has not been particularly exhaustive and has involved fairly ad hoc exchanges with a limited range of persons who have volunteered their time. As such, the panel has indicated to the Dean that it might be useful to seek a legal opinion (perhaps jointly between OHFA and Osgoode) on highly technical aspects of the protocol, especially on dispute settlement as discussed further below.

Further input was also sought periodically from other colleagues who were involved in the drafting of the original protocol and those colleagues were apprised generally of the panel's proposals and of progress in discussions with the Dean.

All panel members attended a meeting on December 9, 2011 with Dean Sossin, Associate Dean Puri, and the Dean's Executive Assistants Amanda Wassermuhl and Michelle Berman, at which proposed revisions to the protocol were discussed. It is understood that this meeting took place after an earlier meeting of Dean Sossin and Associate Dean Puri with CIGI representatives. After the meeting on December 9, further discussions took place between the panel and the Dean on proposed revisions, resulting in the resolution of most issues except (especially) for the issue of dispute settlement/ enforceability as outlined later in this report.

#### Proposed revisions to the protocol

An attached version of the protocol, as revised, highlights most of the changes agreed between the panel and the Dean. In each case, a brief comment has been included to indicate the origin of the change. These comments have been generated by the panel for informational purposes and are not intended to reflect the views of the Dean or others. A small number of very minor changes to the protocol have not been highlighted.

The main changes are:

--in response to a request from the Dean, the panel agreed to modify language in the protocol to express more positively that it reflects a shared commitment of the parties to academic freedom etc.

--in response to a request from the Dean, the panel agreed to relocate provisions on collegial governance, allocation of funds, and earlier reforms of the initiative from the protocol to a separate document entitled Terms of Reference. The panel requested, and the Dean agreed, that this document be incorporated into the protocol and recognized as integral to the initiative and not inconsistent with the August Agreement, etc. in order to maintain the substance of the commitments in the original protocol.

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<sup>2</sup> The panel this week sought and received the consent of Paul Cavalluzzo to report to Faculty Council that he is the outside expert in labour law who was consulted by the panel. It should be stressed that Mr. Cavalluzzo did not provide legal advice but did carry on an extended discussion with a panel member on options and language regarding dispute settlement/ enforceability in the protocol, and the panel has sought to put the various options to the Dean and CIGI as outlined later in this report.

--in response to comments from Professor Cameron, the protocol's definition of academic freedom was elaborated with the agreement of Professor Cameron, Dean Sossin, and the panel members.

--in response to a request from the panel, the Dean agreed to incorporate language clarifying that a decision to refuse to approve the CILGE budget requires the unanimous agreement of both the CIGI and the Osgoode members of the Steering Committee and that the Osgoode members of the Advisory Committee are to be selected by Osgoode rather than the Steering Committee.

--in light of ongoing discussions on the issue, the language on dispute settlement in the protocol has been removed at the Dean's request.

In some cases, the panel expressed disagreement with proposed changes to the protocol on the basis that they could undermine the protections provided in the protocol, and the Dean accepted the panel's position.

It should be stressed that the revisions have been based on collaborative and constructive discussions with Dean Sossin, in which dedicated efforts have been made at all times by the Dean and by panel members to achieve an agreeable outcome.

Outstanding issue: dispute settlement/ enforceability of the protocol

This issue has emerged as a significant outstanding question, although it remains under discussion and we are hopeful that a satisfactory resolution may still be achieved. The issue has proven to be quite complex. However, the panel's position has two basic elements: (a) the protocol should be enforceable, and (b) its enforcement should not depend solely on CIGI and the York University administration.

The underlying concern about enforcement for the panel arose from the non-endowment structure of the initiative and the fact that CIGI will hold the purse strings for the duration of the initiative. It was also thought important for CIGI, while agreeing to sign a strongly-worded protocol, to accept also that its commitments would be enforceable according to the terms of the protocol. More broadly, it was thought, as alluded to by the President when he appeared at Faculty Council, that the non-endowment structure of this initiative charts new ground for York University and, in some respects, for the Canadian legal academy.

In the original protocol, clause 34, enforcement was based on an incorporation of the existing arbitration clause from the August Agreement, which involves a dispute settlement process between CIGI and York University. Osgoode Hall Law School was also identified explicitly as a party that could trigger enforcement of the protocol based on this dispute settlement process. The process was based on arbitration pursuant to the Ontario Arbitration Act, which is understood to entail a commercial arbitration process. Faculty Council and faculty were

recognized as parties with rights or interests protected by the protocol. Finally, the protocol provided that decisions of Faculty Council on academic matters were not subject to any external dispute settlement process.

After seeking input from outside experts, the panel was informed that a weakness of the protocol was its lack of an enforcement mechanism that was independent of CIGI and the York administration, such that those parties could potentially collude to act in violation of the protocol or to disregard concerns expressed by Osgoode faculty, staff, students, etc. about threats to or encroachments upon academic freedom. Also, disputes about academic freedom are usually resolved, not by commercial arbitration, but by arbitrators with labour relations experience in the university sector. Finally, the panel was informed that the protocol should incorporate a limitation-of-jurisdiction clause, if the intention was to contain the role of the commercial arbitrator to non-academic matters, and a standard protection clause in order to preclude variation of the August Agreement or the protocol by a labour or commercial arbitrator.

Around the time that this input was received, the panel was informed by Dean Sossin that there were objections to aspects of the dispute settlement provisions in the protocol and that various provisions called for clarification. These included the provision for York's undertaking to ensure equivalent safeguards of academic freedom for Osgoode faculty as are enjoyed by other York faculty, which the Dean suggested should be moved to a side letter from York to OHFA. They also included a request for clarification of the provision stating that Faculty Council and faculty are parties with rights or interests that are protected by the protocol.

In response, the panel studied closely the issue of dispute settlement and sought further information from others with expertise in the field. It then proposed a dispute settlement process that would (1) contain the commercial arbitration process in the August Agreement and give Faculty Council or OHFA standing to seek judicial review or appeal of a commercial arbitrator's decisions, (2) allow Osgoode or OHFA to trigger an arbitration in order to enforce CIGI's obligations under the protocol and, where the triggering party was OHFA, to use a labour arbitrator with experience in the university sector, and (3) provide for a side letter commitment by York to a York-OHFA arbitration mechanism modeled on the YUFA collective agreement.

After further discussions with the Dean, it was apparent that there were objections, apparently from York, to aspects of this proposal. The Dean proposed an alternative model that appeared to incorporate items (1) and (3) above but without clear language in the protocol itself on the enforceability of CIGI's obligations under the protocol, whether sought by York/Osgoode or OHFA. This last point was regarded by the panel as a fundamental concern. In response, the panel communicated (on December 29, 2011) the following to the Dean:<sup>3</sup>

"We have found it very helpful these past weeks to clarify aspects of dispute settlement. That said, it seems we are some ways apart on the issue. As we see it, a strong Protocol

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<sup>3</sup> Our communication has been quoted verbatim only for the sake of efficiency in producing this report.

must be enforceable and its enforcement must not depend solely on CIGI and the York administration for its effectiveness. With respect, your current proposal in our view does not achieve these objectives because, among other things, it excludes any enforcement mechanism from the Protocol, refuses OHFA any opportunity to participate in or seek review of arbitration or court proceedings under the Protocol or the August Agreement, and removes the enforceability of York's proposed commitment to a general arbitration process. So we have reflected further on various options which we think would achieve the two key objectives and which are outlined below, in order of preference from our perspective. Given the importance of the issue for the Protocol as a whole, we ask that you put each of these options to CIGI as soon as possible and that we be informed whether CIGI considers any of them not to be agreeable, and if so why, so that we can inform Faculty Council accordingly.

**Option 1 – OHFA becomes a party to the Protocol**

The simplest, clearest and strongest option in our view is to add OHFA as a party to the Protocol. This would recognize the important role and interests of faculty in the protection of academic freedom and allow for representation of that interest (as well as the related interests of academic staff and students) by the faculty association, which is the only viable actor in the picture that is independent of both CIGI and the York administration. It would also make it straightforward to ensure a strong enforcement mechanism by providing for either arbitration or court-based proceedings to enforce the Protocol at the instance of OHFA (or CIGI or York or Osgoode), such that the affected parties could all participate fully in the selection of an arbitrator, the process of the proceeding, the review of any decisions, etc. We do not understand why, if CIGI and York are serious about their commitments under the Protocol, they would not be amenable to this option. If any difficulties arise in relation to OHFA not yet having a mandate in relation to the initiative, then this can be resolved by language in the Protocol that invites OHFA to join the Protocol as a party in exchange for a commitment by OHFA to work collaboratively with the other parties and make best efforts to implement the protocol. For these reasons, we request and would very much appreciate it if this option were put to CIGI and if we were informed of their response including any rationales for rejecting this option.

**Option 2 – OHFA is not a party to the Protocol but is recognized as a protected third party that can seek enforcement**

This is the next-best option as we see it. It is strong but more complex than option 1 and carries the uncertainty that OHFA's status as a third party enforcer might not be recognized by a court or arbitrator on the basis of privity of contract. This risk is significant but may prove acceptable if Option 1 is rejected by CIGI, although it would require careful drafting of the dispute settlement clause (we would prefer it if Osgoode and OHFA jointly sought legal advice on the appropriate language) and would depend on a provision for either arbitration or court-based proceedings in the Protocol. In either

case, the third party could trigger enforcement of the protocol and participate as a party to the arbitration or court proceeding. In the case of arbitration, the third party would have the right to consent to the choice of arbitrator. If agreement was not reached on an appropriate arbitrator, the matter could be referred to court with a requirement that the judge appoint an arbitrator who had experience in academic freedom etc. where the dispute related to academic rather than commercial matters.

Option 3 -- OHFA is not a party to the Protocol and cannot seek enforcement directly under the Protocol, but has limited participatory rights in any direct proceeding and can pursue a remedy indirectly against York in the event of an alleged breach by CIGI

We see this as a much weaker option than the above two, especially because CIGI and York could together decline to seek enforcement of the Protocol in the face of a violation by either or both parties, with OHFA and individual faculty unable to force the issue. We are very concerned about this potential situation given the obvious interest that York will have to maintain good relations with a major private funder. Further, the resort to a side arbitration process between OHFA and York exacerbates the existing limitations of any enforcement process in the faculty interest due to the associated additional cost, delay, and legal uncertainty of an indirect enforcement method, rooted in OHFA's status as the weaker party (i.e. OHFA has no budget and no capacity to raise funds other than by voluntary contributions). That said, with careful design it might be possible to craft an alternative whereby OHFA maintained some basic rights of participation in the other arbitration or court proceedings with an option to pursue indirect enforcement against York. This design would at least need to incorporate the following (again, we would prefer it if Osgoode and OHFA jointly sought legal advice on the appropriate language): (1) OHFA could seek judicial review or appeal of any commercial arbitration award under the August Agreement, especially on the issue of whether the arbitrator exceeded his or her jurisdiction by encroaching on matters of academic freedom etc. (incidentally, we see this as a component of all options to ensure that a commercial arbitrator cannot, with CIGI and York's acquiescence, exceed his or her jurisdiction by ruling on academic matters); (2) York/ Osgoode could not agree to appointment of an arbitrator without OHFA's consent to the individual arbitrator where OHFA felt that the dispute related to academic freedom etc.; (3) in the absence of agreement between the parties on the appointment of an arbitrator in any specific case, the judge would be directed to appoint by default a person with experience in matters of academic freedom etc. who was perceived as neutral vis a vis the affected parties including OHFA, after receiving input on prospective arbitrators from the affected parties including OHFA; (4) CIGI, York, and Osgoode would agree not to object to OHFA being added as a party to an arbitration or court proceeding in the discretion of the arbitrator or judge, and (5) York's commitment to side arbitration would be detailed and enforceable, as outlined in the next paragraph.

This brings us to the proposal that the undertaking by York to ensure that Osgoode faculty have equivalent safeguards of academic freedom etc. to those enjoyed by other

York faculty should be removed from the Protocol and conveyed instead in a side letter to OHFA and, in turn, that the side letter would speak to York and OHFA agreeing to an arbitration process. We understand that this envisions a general arbitration mechanism (rather than one limited specifically to the York-CIGI initiative) between OHFA and York, given that pressure may obviously be brought to bear on a faculty member, student, etc., as a result of the initiative but in ways not evidently related to it. We assume also that York is favourably disposed to such a mechanism regardless of the CIGI initiative (if this is not so then we request to be informed of this). On this basis, we do not understand why York would refuse to make its commitment to such a mechanism, in a York-OHFA letter, binding by way of referral to a neutral third party (with reference to the YUFA-based mechanism but on a single-arbitrator model [which we understand is now common practice for cost reasons]) following a certain cut-off for York-OHFA discussions. While we are flexible on the 90-day deadline, we think it sensible not to extend the deadline into the distant future and, in any event, not to extend it beyond the current OHFA Executive's term which ends on June 30, 2012. Further, we think that the side agreement between York and OHFA would need to make very clear York's indirect obligations and the availability of a remedy in relation to a breach by CIGI along these lines: 'If CIGI or York breaches the protocol in any way, including but not limited to a withdrawal or withholding by CIGI of funds that relates to or affects academic freedom or academic integrity in any way, then York shall provide an appropriate remedy to Osgoode Hall Law School, OHFA, and/ or any affected Osgoode faculty member(s), staff member(s), or student(s) including, where there is a withdrawal or withholding of funds, providing an amount of funds to Osgoode Hall Law School that is equivalent to the funds that were withdrawn or withheld.'

Also, and critically, the Protocol itself would need to contain an enforcement mechanism based on an arbitration or court-based proceeding, as between CIGI, York, and Osgoode, with OHFA having limited participatory rights as outlined above.

Obviously, option 3 has a number of permutations and complexities which can best be avoided, we think, by adopting option 1. In any event, we hope that by laying out a series of specific options in detail, CIGI will have an opportunity to reflect on the importance and value of a strong protocol as an integral component of the initiative and to choose an approach that is amenable from its perspective. We hope that one or more of these is agreeable and, on this point, we ask to be advised before January 5 whether CIGI objects to any of these options (or any of their various elements) and, if so, which ones and why, so that we can inform Faculty Council accordingly...."

At present, issues raised in this email are outstanding, although the panel remains optimistic that an agreeable resolution can be reached through ongoing collaboration with the Dean. We also do not wish to fault the Dean in any way for not having been in a position to provide an answer on these options to this date, given their complexity. To reiterate, the key elements of the panel's position have been, again, that the protocol should provide for a mechanism by

which CIGI's obligations can be enforced and that such enforcement should not depend solely on CIGI and the York University administration for its effectiveness.

Lastly, there is no doubt an element of fatigue about the initiative at this stage. However, we think it important in these final stages to ensure that the initiative is neither accepted based on a compromise of fundamental principles in the protocol nor rejected without the utmost efforts to offer a range of options by which the initiative can proceed based on fundamental principles. For this reason, we have continued to invest a great deal of time and energy working on the key outstanding issue of dispute settlement/ enforceability.

**Protocol to promote and protect academic freedom and academic integrity in the collaboration between the CIGI and Osgoode Hall Law School of York University  
January 5, 2012**

1. In this protocol:

- a. "academic freedom" means the freedom to examine, question, teach, and learn; to disseminate opinion(s) on any questions related to the individual's teaching, service, professional activities, and research both inside and outside the classroom; to pursue without interference or reprisal the individual's research, extramural, creative, or professional activities, and to freely publish and make public the results thereof; to criticize a contributor for the University or society at large; and to be free from institutional censorship. Academic freedom does not require neutrality on the part of the individual nor does it preclude commitment on the part of the individual. Rather, academic freedom makes such commitment possible. In all respects, academic freedom is a general right of the academic and is not specific to or narrowly defined by a faculty member's specific area(s) of expertise.
- b. "academic partners" means York University and Osgoode Hall Law School.
- c. "Agreement" means the Agreement signed in August 2011 among the Centre for International Governance Innovation (a non-share capital corporation incorporated under the laws of Canada and hereinafter called "CIGI") and York University (a university incorporated under the laws of Ontario and hereinafter called the University) (attached);
- d. "CIGI" means the Centre for International Governance Innovation.
- e. "CLA" means a faculty member who has a contractually-limited academic appointment;
- f. "contributor" means any private or public actor, external to the academic partners, that contributes funds or other support to the initiative or otherwise to York University or Osgoode Hall Law School.
- g. "Executive Director" means the executive director referred to in clause 7 of the Agreement and/ or the executive director of any other centre associated with the initiative;
- h. "faculty" means tenure-stream faculty at Osgoode Hall Law School of York University and any CLAs hired pursuant to the Agreement;
- i. "Faculty Council" means Faculty Council of Osgoode Hall Law School of York University;
- j. "faculty recruitment processes" refers to the rules and procedures for faculty recruitment as set by Faculty Council subject to the relevant rules and procedures of York University Senate.
- k. "initiative" means the development, establishment, construction, operation, modification, and/ or termination of any program and/ or centre based on the terms of this Agreement and affiliated with Osgoode Hall Law School;
- l. "OHFA" means the Osgoode Hall Faculty Association as the customary bargaining agent for Osgoode Hall Law School faculty;

**Comment [GVH1]:** The Dean proposed to change the original "safeguard" to more positive language, here and throughout the protocol. After discussion, the panel and the Dean agreed to "promote and protect".

**Comment [GVH2]:** The highlighted additions to the definition of academic freedom in this clause were proposed by Professor Cameron and agreed by the panel and the Dean.

**Comment [GVH3]:** The Dean proposed to replace "donor" with "contributor". After discussion, the panel agreed, but expressed the view that this could be perceived as an attempt to avoid the University gifts policy. The change is reflected throughout the protocol.

**Comment [GVH4]:** The Dean proposed to include a reference to public actors, i.e., government, and the panel agreed, while expressing the view that, to bind the government would require an agreement to which the government was a party.

**Comment [GVH5]:** The Dean proposed to add the highlighted language as a means to strengthen the protocol and the panel agreed.

- m. "the parties" means the parties to the Agreement, namely CIGI, York University, and Osgoode Hall Law School;
- n. "program or centre" means the Centre for International Law in the Global Economy (CILGE) or any other program or centre that receives funding based on the terms of the Agreement;
- o. "Steering Committee" means the Steering Committee referred to in clause 3(a) of the Agreement; and
- p. "Terms of Reference" means the Terms of Reference for the program or centre (attached).

**Comment [GVH6]:** The attached Terms of Reference are new. They were developed after the Dean requested to move various clauses in the protocol to a separate document. After discussion, the panel and the Dean agreed to the attached Terms of Reference.

2. This protocol clarifies and elaborates on a collaboration involving CIGI and York University to establish a program and/ or centre affiliated with Osgoode Hall Law School. The purpose of the initiative is to advance research, teaching, and other scholarly activities (including contributions to public debate and policy activities) in the areas of international economic law (including trade, investment and finance), international intellectual property law, and international environmental law. The initiative is based on substantial funding from the Government of Ontario and Mr. Jim Balsillie.

**Comment [GVH7]:** The highlighted additions in this clause were requested by the Dean and agreed by the panel.

**Principles of academic freedom and integrity**

3. The parties recognize and agree that the success of the initiative depends on mutual trust and collaboration and on a shared commitment to ensure academic freedom, academic integrity, and the institutional autonomy of the academic partners. This includes the promotion and protection of the academic freedom of individual researchers and teachers who are engaged with the initiative, including faculty, students, and academic administrators, including the freedom to pursue research that may criticize the parties or a contributor. CIGI, York University and Osgoode Hall Law School share a commitment to these principles and agree to implement rigorous safeguards to ensure that the initiative does not infringe academic freedom, academic integrity, or the institutional autonomy of the academic partners.
4. The parties agree that the academic partners shall have exclusive decision-making authority over the setting of academic priorities, the recruitment or appointment of faculty, the renewal or termination of faculty, the tenure or promotion of faculty, the setting of research agendas of individual faculty or students, the admission of students, the creation or revision of academic programs, the design of curricula, the issuance of degrees, and all other matters relating to academic freedom and integrity. The sole exception to this principle is the role that has been played by the parties and/ or contributors in setting the subject areas for the initiative as described in Schedule "A" to the Agreement.
5. The parties agree that the Steering Committee will play an advisory role in the development of the initiative, consistent with and limited by the terms of this protocol.

**Comment [GVH8]:** The Dean requested to change the highlighted language in this clause and the next clause from "protection" etc. to more positive language. After discussion, the panel agreed.

**Comment [GVH9]:** The Dean requested the addition of language to this effect. After discussion, the panel agreed.

6. For greater certainty, any doubt in the interpretation of the Agreement, this protocol, or any other agreement or instrument relating to the initiative shall be resolved in favour of promoting and protecting academic freedom, academic integrity, and the institutional autonomy of the academic partners.

#### Academic policy and programming

7. The academic partners retain exclusive authority over all matters of academic policy and programming, determined as such in the sole and absolute discretion of Faculty Council, relating to the initiative. While it is expected that the Steering Committee will receive relevant information about decisions of Faculty Council, for greater certainty, the academic partners are under no obligation to provide notice of any decision of Faculty Council on any matter of academic policy and programming, notwithstanding any provision of the Agreement including but not limited to clause 6(c)(i) of the Agreement. Also for greater certainty, the authority of Faculty Council over such matters is not constrained or otherwise affected by any provision of the Agreement including but not limited to clauses 6, 8, 10, 24, or 25 of the Agreement.

#### Recruitment and appointment of faculty

8. All decisions related to the recruitment and appointment of faculty shall be taken based on the faculty recruitment processes of the academic partners. No contributor, and no party other than the academic partners, shall have any decision-making role in the recruitment and appointment of faculty. The role of a contributor or such party shall be limited to providing suggestions on the identification of candidates for recruitment, notwithstanding any provision in the Agreement including but not limited to clauses 4, 14, 17, and 25 of the Agreement.

#### Renewals of faculty appointments

9. All decisions related to the renewal of faculty appointments shall be taken based on processes that are designated and approved for this purpose by Faculty Council. These processes are expected to be based on aspects of the faculty recruitment and appointment process or the tenure and promotion process of Osgoode Hall Law School as determined and approved by Faculty Council. To ensure the promotion and protection of academic freedom, a contributor shall not have any role (including any role in making suggestions or in providing advice of any kind) in the renewal of any faculty appointment.

#### Academic freedom of faculty members

10. Faculty have the right to freedom of teaching and discussion and to freedom in carrying out research and disseminating and publishing the results. The planning and design of a research project, collection of data, and analysis and dissemination of results shall be under the control of the researcher and not a contributor or organizational partner. In the conduct

**Comment [GVH10]:** The Dean requested the addition of this clarification. The panel agreed.

**Comment [GVH11]:** The panel requested inclusion of this reference to clause 6 after receiving input from an outside expert. The Dean agreed.

**Comment [GVH12]:** The Dean requested the addition of this adjective. The panel agreed but requested the remaining highlighted language, to which the Dean agreed.

**Comment [GVH13]:** Language in the following clause of the original protocol stated that York would undertake to provide equivalent safeguards of academic freedom as are enjoyed by other York faculty. At the request of the Dean, this language has been moved to a separate letter from York to OHFA. The panel agreed, but sought clarification of York's commitment after receiving input from an outside expert. The content of the York-OHFA letter is still under discussion.

of their work, faculty and other researchers shall have access to all data and findings collected in a research project and shall retain the right to share results of their research with other academic researchers and to publish the product of their research without hindrance or delay. A contributor shall not have any influence over any matter of academic freedom or integrity relating to the initiative, notwithstanding any provision of the Agreement including but not limited to clause 25 of the Agreement.

**Comment [GVH14]:** The highlighted sentence was moved from the beginning to the end of the paragraph at the request of the Dean. The panel agreed.

11. The intellectual property of faculty and other researchers, inclusive of their research findings, shall be defined by the normal rules and procedures of the academic partners for the recognition and protection of such intellectual property.

#### **Terms and conditions of employment of faculty**

12. The salary and benefits of faculty appointed pursuant to the initiative shall be set in accordance with the normal policies and practices of the academic partners for faculty members of Osgoode Hall Law School. For greater certainty, no separate stipend shall be provided to any faculty associated with the initiative, other than the Executive Director, as a component of their academic appointment.
13. The terms and conditions of tenure-stream faculty appointed pursuant to the initiative shall be commensurate with those of other Osgoode Hall Law School faculty, except as follows in this clause. The teaching responsibilities of such faculty shall constitute approximately half of the regular teaching load of faculty at Osgoode Hall Law School and shall in general include, based on the normal procedures by which teaching responsibilities are assigned at Osgoode Hall Law School, responsibility for at least one high-enrolment course in the J.D. program. In addition to any administrative responsibilities they may be given in relation to the initiative itself, faculty appointed pursuant to the initiative shall take part fully in the governance and administrative activities (committees, etc.) of the academic partners.
14. Notwithstanding clauses 14 and 17 of the Agreement, which refer to faculty appointed pursuant to the initiative as tenured or tenure stream faculty, such faculty may be appointed by the academic partners with tenure, on a tenure-stream basis, or as CLAs. The parties expect that approximately half of the faculty appointed pursuant to the initiative will be CLAs, as determined by the academic partners.
15. All faculty who are appointed pursuant to the initiative shall be eligible for membership in OHFA according to its terms and conditions of membership. In this respect, it is expected that tenure-stream faculty associated with the initiative will become members of OHFA and that CLAs associated with the initiative may become OHFA members, in both cases as determined by OHFA.

#### **Academic freedom and integrity of the Executive Director**

16. The Executive Director of any program or centre associated with the initiative, once appointed, will be a tenured or tenure-stream faculty member of Osgoode Hall Law School who shall have all the protections of academic freedom of other faculty. The Director will be responsible for the direction and operations of the program or centre free from any actual or apparent pressure from any contributor on her or his academic freedom or integrity.

#### **Collegial academic governance of the initiative**

17. The process outlined in clauses 18 to 22 of this protocol is intended to ensure that: (a) the Executive Director is protected from any reasonable perception of improper influence by any contributor on her or his academic freedom or integrity or on that of the initiative as a scholarly endeavour and (b) the academic community of Osgoode Hall Law School has an ongoing and meaningful role in the governance of research, teaching, and other scholarly matters relating to the initiative. In this respect, the parties recognize that there are existing programs and activities at Osgoode Hall Law School relating to the subject areas of this initiative, such as the Osgoode Intellectual Property Law & Technology Program (IP Osgoode), that are integral to the success of the initiative. A range of funding commitments in this respect are set out in the Terms of Reference. Decisions on the allocation of funding will be made by the Executive Director, consistent with the terms of this protocol and subject to the involvement and oversight of Faculty Council in the manner set out in the Terms of Reference.

18. A body will be designated and approved by Faculty Council for the collegial academic governance of the initiative. It is expected that:

- a. this body will be a new or existing committee of Faculty Council;
- b. the mandate of this body will include the provision of advice and support to the Executive Director and the receipt and consideration of periodic reports from the Executive Director;
- c. the make-up of this body will include both faculty whose research activities fall within and faculty whose research activities fall outside the subject areas of the initiative; and
- d. one or more, but not a majority of, members of this body may be faculty who are members of the Advisory Committee referred to in clause 5 of the Agreement.

In all respects, the designation, establishment, mandate, make-up, rules, procedures, and all other aspects of this body shall be determined and approved by Faculty Council.

19. The Executive Director shall provide an annual report to the Steering Committee on financial and administrative matters that are not matters of academic policy and programming. Pursuant to clause 3(a)(iv) of the Agreement, the Steering Committee shall approve the annual budget for the program or centre as provided by the Executive Director. For greater certainty, any decision by the Steering Committee not to approve the annual budget shall require the unanimous approval of the members of the Steering Committee

**Comment [GVH15]:** The highlighted language has been revised at the request of the Dean. Portions have been moved to the attached Terms of Reference. After discussion, the panel agreed to the changes.

**Comment [GVH16]:** The Dean requested the addition of this language and the panel agreed.

described in subparagraphs (b) and (c) of clause 4 of the Agreement. Such a decision shall be accompanied by written reasons and shall not be based on any grounds relating, directly or indirectly, to matters of academic policy or programming.

**Comment [GVH17]:** The panel requested this clarification and the Dean agreed.

**Comment [GVH18]:** Additional language in this sentence that a decision of the Steering Committee would be based on financial or administrative grounds was removed at the request of the Dean, with the panel's agreement. The addition of "directly or indirectly" in this sentence was requested by the panel and the Dean agreed.

20. The Executive Director shall provide an annual report to the body referred to in clause 18 of this protocol on matters of academic policy and programming, including on research, teaching, and other scholarly activities relevant to the initiative, according to relevant rules and procedures approved by Faculty Council. Where there is an apparent overlap between the reporting mandates outlined in clauses 19 and 20 of this protocol, then the relevant matters shall be assumed to be matters of academic policy and programming for the purposes of this Agreement, except that the Executive Director shall report on the relevant matters both to the Steering Committee and to the body referred to in clause 18 of this protocol.

**Comment [GVH19]:** The highlighted language in this clause was added at the Dean's request and with the panel's agreement.

21. Any reports or other documentation exchanged between the Steering Committee and the Executive Director shall be provided at or around the same time to the body referred to in clause 18 of this protocol. Any reports or other documentation exchanged between that body and the Executive Director shall be provided at or around the same time to the Steering Committee.

22. York University's representatives to the Steering Committee shall include the Dean of Osgoode Hall Law School and a faculty member at Osgoode Hall Law School selected annually by Faculty Council. The Advisory Committee, to be appointed by the Steering Committee pursuant to clause 5 of the Agreement, shall be comprised of globally recognized leaders in each of the three designated subject areas. The members of the Advisory Committee shall include no fewer than three faculty members of Osgoode Hall Law School, one in each of the three designated subject areas or analogous/ cross-cutting areas, to be selected by Osgoode Hall Law School.

**Comment [GVH20]:** This highlighted language was proposed by the Dean and agreed by the panel.

**Comment [GVH21]:** This highlighted language was proposed by the panel, but provided for selection by the Osgoode members of the Steering Committee. After discussion with the Dean, the panel and the Dean agreed on selection by Osgoode Hall Law School, on the understanding that the selection of Osgoode's members of the Advisory Committee will be subject to Faculty Council's authority.

#### Publication of this protocol and the initiative

23. The Agreement and this protocol shall be made public at the time that this protocol takes effect and shall be posted without unreasonable delay on the website of the program or centre. No agreement relating to the initiative that is not public has any legal effect unless that agreement has been provided to Faculty Council and Faculty Council has approved, by a two-thirds majority of its voting members, a motion to keep confidential the agreement or any portion of it.

**Comment [GVH22]:** The Dean requested that various provisions on the "Collegial governance of Osgoode allocated funds", on "Disbursement of funds", and on "Other reforms to the initiative" be moved from the protocol to a separate Terms of Reference (attached). After discussion, the panel agreed.

#### Notice of any dispute and resulting termination of funding

24. In the event of a dispute under the Agreement or otherwise relating to the initiative, the salary and benefit costs of any personnel at the program or centre, in circumstances where those salary and benefit costs are otherwise paid through funds owed under the Agreement, shall continue to be paid through such funds for a period of six months after

notice of the dispute has been given by a party to the Agreement to another party to the Agreement. Upon receipt of notice of a dispute under the Agreement or otherwise relating to the Initiative, any party to the Agreement shall provide promptly a copy of such notice to the Dean of Osgoode Hall Law School who shall in turn provide a copy to Faculty Council at the earliest opportunity.

#### Pre-eminence of this protocol

25. The parties agree that this protocol amends and elaborates on, and in all respects takes precedence over, the Agreement and any other agreement(s) relating to the initiative and entered into by any one or more of the parties, to the extent of that party's or those parties' obligations. For greater certainty, this protocol is not subject to the terms of the Agreement, notwithstanding any provision to the contrary in the Agreement including but not limited to clause 21 of the Agreement.
26. In light of the shared goals of the parties to promote and protect academic freedom, academic integrity, and the institutional autonomy of the academic partners, and for greater certainty, the terms of this protocol shall prevail over any terms of the Agreement that are inconsistent with or otherwise limit, directly or indirectly, any provision of this protocol, including but not limited to clauses 3(a)(i) and 3(a)(ii) [concerning research agendas of individual faculty], clauses 3(a)(iii), 6(a), 6(c), and 22 [concerning appointment, renewal, and termination of faculty], and clause 3(a)(v).

#### Other provisions

27. The recruitment and appointment of faculty, hiring or appointment of staff and administrative personnel, and allocation of funds for research or other related expenses of the program or centre shall be consistent with the academic partners' policies on conflicts of interest. Related decisions shall be made in an objective manner and on objective grounds and must be seen to be so.
28. This protocol takes effect upon the signature of the protocol by all of the parties to the Agreement and approval of the initiative by Faculty Council. Any other agreement relating to this protocol, including any subsequent agreement, by any one or more the parties to the Agreement that purports to alter in any way this protocol shall take effect upon approval of the relevant alteration(s) by a two-thirds majority of the voting members of Faculty Council.
29. [Dispute resolution mechanism to be determined].
30. This protocol incorporates the Terms of Reference, the terms of which are integral to and not inconsistent with the initiative and shall prevail according to clauses 25 and 26 of this protocol, subject in all respects to the terms of this protocol.

**Comment [GVH23]:** The Dean requested that language in this and the next highlighted portion be modified to make it more positive. The panel agreed.

**Comment [GVH24]:** The additional references to the highlighted clauses were requested by the panel after receiving input from an outside expert. The Dean agreed.

**Comment [GVH25]:** The issue of dispute settlement/enforceability of the protocol remains under discussion, as outlined in the panel's attached report.

**Comment [GVH26]:** The panel requested this language in conjunction with the relocation of various clauses to the Terms of Reference. The Dean agreed.

**Attachment 1  
Terms of Reference**

1. These Terms of Reference elaborate on aspects of the initiative outlined in the Protocol to promote and protect academic freedom and academic integrity in the collaboration between the CIGI and Osgoode Hall Law School of York University ("the protocol") and in the Agreement signed in August 2011 among the CIGI and York University (the Agreement). The Terms of Reference apply to the Centre for International Law in the Global Economy and to any other program or centre (the program or centre) that receives funding based on the terms of the Agreement. The Terms of Reference are subject in all respects to the terms of the protocol and the Agreement.

**Comment [GVH27]:** This language was proposed by the panel as a component of the Terms of Reference and the Dean agreed. The language in the Terms of Reference tracks generally the language previously incorporated into the protocol.

**Collegial governance of Osgoode-allocated funds**

2. The budget for the initiative shall include an annual minimum of \$100,000 in funding (disbursed based on actual expenditures) for internship, external placements, and other experiential educational opportunities in the areas of the program or centre's activities.
3. The budget for the initiative will include an annual minimum of \$200,000 in funding (disbursed based on actual expenditures) for research and research collaborations at Osgoode Hall Law School in the areas of the program or centre's activities.
4. The process for disbursement of funds referred to in clauses 2 and 3 of these Terms of Reference shall be approved by the body referred to in clause 18 of the protocol according to procedures approved by Faculty Council. It is understood that the model for approval of disbursement of these funds may include, in the discretion of the aforementioned body, a process for general disbursement of funds to all faculty, project-specific approvals, and/or approval of specific projects as recommended by the Executive Director based on general criteria set by the aforementioned body.

**Comment [GVH28]:** The Dean proposed the addition of this language and the panel agreed, while expressing the view that the language maintains the discretion of the specified Faculty Council body to decide how to allocate the funds that are subject to this clause.

**Disbursement of other funds**

5. It is understood that any other funds, beyond those referred to in clauses 2 and 3 of these Terms of Reference and otherwise associated with the initiative, that flow to Osgoode will be used for the benefit of students and faculty at Osgoode Hall Law School for research and teaching purposes consistent with the subject areas and objectives of the program or centre, and that the disbursement of such funds will be at the discretion of the Executive Director, subject to the terms of the protocol and the Agreement. An important principle of the initiative is to enhance access to learning and educational opportunities for Osgoode students without increasing the tuition costs of students.
6. The Executive Director shall develop and implement transparent, fair, and objective procedures specifying how faculty, post-doctoral appointees, students, and others can

**Comment [GVH29]:** This language was requested by the panel and agreed by the Dean. The panel also requested a commitment from York/Osgoode to Osgoode student groups as follows: "In the unlikely event that there is any adverse impact on the budget of Osgoode Hall Law School arising from the initiative, whether directly or indirectly, York University agrees that there shall not be any tuition increase to Osgoode students as a result of this adverse impact." The panel understands that the Dean has agreed to this although an issue appears to have arisen recently as to its form. The panel is optimistic that this can be resolved.

apply for funding pursuant to the initiative and what evaluation and selection criteria will be used. The procedures shall include clear conflict of interest provisions.

7. To encourage collaboration and integration of the initiative in the general activities of Osgoode Hall Law School, the Executive Director shall consider the advice of the body referred to in clause 18 of the protocol when making decisions about disbursement of such funds and shall provide an annual report to that body on the outcomes of such disbursement. In this respect, the parties recognize that there are existing programs and activities at Osgoode Hall Law School relating to the subject areas of the initiative, such as IP Osgoode, that are integral to the success of the initiative and that, pursuant to the mechanism referred to in clause 7 of these Terms of Reference, will receive substantial funding as well as other forms of recognition and support from the initiative.
8. The parties expect that the Executive Director, pursuant to her or his responsibilities under clauses 7 and 3(a)(iv) of the Agreement, in developing the mechanisms for allocating the program or centre's budget will establish a transparent, equitable, and collegial approach to ensure the full participation of faculty in the activities of the program or centre.

#### Other reforms to the initiative

9. The parties agree that the components of the initiative relating to Osgoode Hall Law School's graduate program, J.D. program, and library as set out below are compatible with the Agreement and are integral to the initiative, subject in all respects to the terms of the protocol.
10. In addition to the other needs of the program or centre, as identified by the Executive Director, the budget for the program or centre shall include sufficient funding to address program-related needs of Osgoode Hall Law School, such as in areas of the library and graduate administration.
11. The commitment to have the program or centre's activities fully funded from CIGI funds includes a commitment that there will be no negative impact on the resources of Osgoode Hall Law School's library, and that new services, licenses, collections, staffing needs, etc. will all be funded from the resources of the proposed program or centre, as needed.
12. Further to the input of the Osgoode Hall Law School Graduate Studies Committee, the following set of guiding principles will apply to the activities of the program or centre, and of faculty appointed pursuant to the initiative, relating to graduate legal education.
  - a. The establishment of the program or centre does not affect or diminish the Graduate Program Director and Graduate Studies Committee's ongoing responsibility for all aspects of the Graduate Program currently under their jurisdiction.

**Comment [GVH30]:** The Dean requested the addition of this language and the panel agreed.

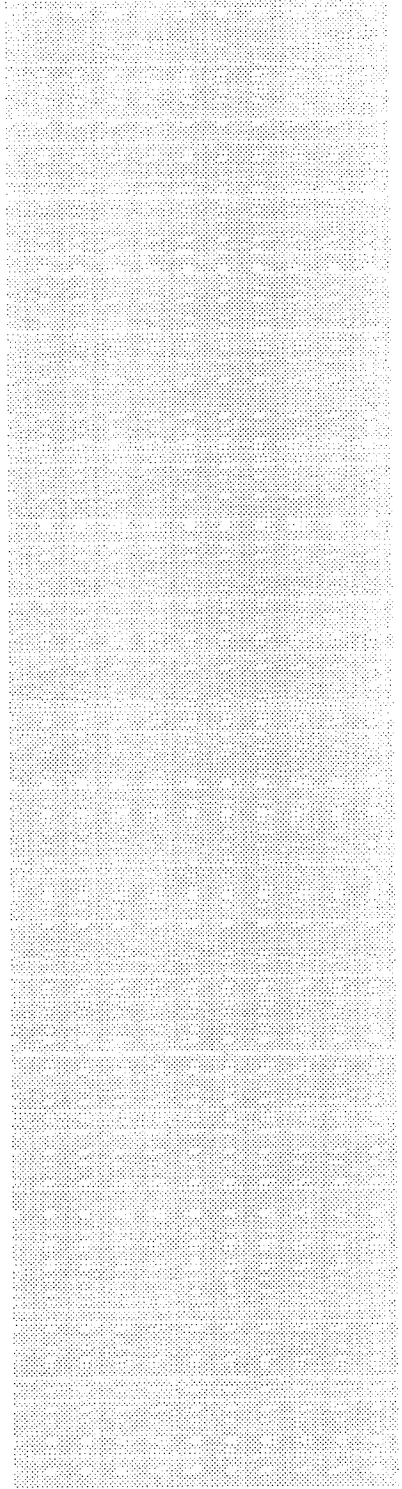
**Comment [GVH31]:** The Dean requested this highlighted modification of the language. After discussion, the panel agreed.

**Comment [GVH32]:** The Dean proposed that this portion of the protocol should refer to the list of commitments related to the library and the graduate program rather than to the various documents submitted previously to Faculty Council. After discussion and a review of the earlier documents, the panel agreed.

**Comment [GVH33]:** The following list of items is based on a cut and paste from the earlier Faculty Council documents on the graduate program, with some modification of language [proposed by the panel and agreed by the Dean] in order to clarify and ensure consistency with other language in the protocol.

- b. The establishment of the program or centre does not affect or diminish Osgoode Graduate Program's commitment to offer opportunities to obtain research based LLMS and PhDs in a wide range of specializations.
- c. The establishment of the program or centre does not affect or diminish Osgoode's commitment, in light of the external funding support for students associated with the program or centre, to balance out opportunities for higher levels of financial support among all students entering Osgoode's Graduate Program. This may include, among other initiatives, giving priority consideration for internal scholarship funds that are not tied to subject areas and objectives of the program or centre.
- d. The establishment of the program or centre does not affect or diminish Osgoode's commitment that the additional graduate spaces related to the initiative will not reduce the number of spaces available to domestic or international students applying to the program in other fields.
- e. Osgoode students who receive scholarships related to the initiative, including those students who are to be based in Waterloo, will be subject to all currently existing Osgoode Graduate Program requirements, including participation in required coursework, and study groups, at Osgoode.
- f. All Osgoode graduate faculty will be eligible to supervise all students, regardless of their funding source.
- g. Notwithstanding the location of their offices, faculty appointed pursuant to the initiative will be expected to participate in person in the teaching and supervision of graduate students at Osgoode.
- h. Osgoode will budget for anticipated additional expenses relating to additional costs of overhead and administration of the Graduate Program at Osgoode resulting from the program or centre, including the need to provide services to students who may be located primarily in Waterloo.

**Attachment 2**  
**Agreement of August 2011**  
**[see Faculty Council motion of November 28, 2011]**



**Appendix Seven**

**Second report of the panel, dated January 18, 2012**

## THE CIGI-YORK INITIATIVE

### SECOND REPORT OF THE "PANEL OF REPRESENTATIVES"<sup>1</sup> TO OSGOODE FACULTY COUNCIL CONCERNING THE PROTOCOL TO PROMOTE AND PROTECT ACADEMIC FREEDOM

JANUARY 18, 2012

The purpose of this report is to advise Faculty Council on an urgent basis about recent developments regarding the proposed protocol and associated documentation on which Faculty Council's conditional approval of the initiative has, to date, been founded. We may report further prior to the next Faculty Council meeting on February 6, 2012 and are of course happy to respond to queries or concerns.

The panel has prepared this report and otherwise carried out its role as part of its mandate from Faculty Council to (a) work in collaboration with the Dean to communicate with the parties to the original CIGI-York Agreement of August 2011 (the August Agreement), on request, to clarify/ explain the choice of language in the Protocol, (b) respond to any concerns those parties might have with the language and consider any alternative language that the parties might propose, and (c) report to Faculty Council on these matters, subject in all cases to final approval by Faculty Council of any changes to the Protocol and, in turn, of the initiative. We stress that our ultimate role, as we understand it, is to report to Faculty Council and not to negotiate on its behalf, especially where confronted with proposals that we think would weaken significantly the content of the protocol.

#### **Background and conclusions**

As outlined in our report to Faculty Council of January 6, 2012 (mis-dated 2011), since early December we have been engaged in a constructive and much appreciated dialogue with Dean Sossin regarding the protocol. In the course of this dialogue, we have expressed agreement to various changes and disagreement with others. We are grateful to the Dean for his efforts in this process.

On Monday, January 16, the panel received from Dean Sossin the University's "final position", as it was described to us, on a proposed dispute settlement mechanism and side letter. The panel also received additional changes to the protocol proposed by CIGI. The Dean also advised the panel to expect another change from CIGI on "how to recognize the Steering Committee's important role in non-academic aspects of the collaboration". The panel has not received a reply from CIGI to its proposals on dispute settlement/ enforcement options, and does not at this stage anticipate any reply.

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<sup>1</sup> The panel members include Thomas Wilson and Professors Carys Craig, Giuseppina D'Agostino, Francois Tanguay-Renaud, Gus Van Harten, and Stepan Wood.

We do not see it as our role to disclose these proposed changes or their detailed rationales to Faculty Council and leave this to the Dean's discretion. **We emphasize also that the Dean may have a different perspective on various aspects of this report and do not wish to pre-empt in any way his own opportunities to address Faculty Council.**

**The panel members studied and discussed the proposals from CIGI/ York and reached a shared view that, while CIGI/ York appear willing to commit to a strongly-worded protocol, either or both parties were not prepared to make the commitments enforceable in a meaningful way. In our view, this is not a minor or technical issue but rather pervades the protocol and initiative as a whole. Indeed, the issue appears to undermine all of the clarifications and commitments that have been made in relation to the initiative since discussions about the August Agreement began at Faculty Council.**

Based on this, and having elaborated at length our views and suggestions in earlier communications with the Dean, we have advised the Dean that we regard the position of CIGI/ York as incompatible with a strong protocol, although we remain open to any further proposals that meet the protections which we have presented, clearly and repeatedly, as a required floor.

#### **Reasons for conclusions**

The background for the panel's discussions with the Dean since December, and the content of those discussions, have been very involved. We cannot at this stage provide a comprehensive outline on all aspects, but will be pleased to respond to queries from Faculty Council members. The following is a non-exhaustive summary of our key concerns, arising from the recent proposals from CIGI/ York.

##### **A. York's proposal has indicated that it will not agree to a meaningful enforcement mechanism in the protocol**

York's rejection, as we see it, of a meaningful enforcement mechanism in the protocol has a number of elements that are summarized here. First, York's proposal is based on removal from the original protocol of the following provisions:

.... York University undertakes to enter into negotiations in good faith with OHFA, upon request by OHFA, to strengthen the provisions on academic freedom in the existing collective agreement between York University and OHFA in order to ensure that Osgoode Hall Law School faculty have equivalent substantive and procedural protections of academic freedom to those enjoyed by other York University faculty (clause 9).

.... Faculty Council and faculty are recognized as parties with rights or interests related to the initiative that are protected by this protocol and the Agreement. Where Osgoode Hall Law School is of the view that this protocol has been breached by a party to the Agreement, Osgoode Hall Law School may initiate the dispute resolution process that is

laid out primarily in clause 34 of the Agreement in order to resolve the dispute (clause 34).

The panel was open to various changes or clarifications to these provisions. However, the basis for the panel's agreement to this has now been withdrawn by York as outlined below.

Second, York's proposal indicates that it will not make binding its proposed commitment, in a side letter, to an arbitration mechanism based on the York-YUFA (York University Faculty Association) model. York has, in particular, rejected a clause allowing OHFA to refer the issue of arbitration to a neutral third party for a binding resolution, as follows:

... If OHFA requests to enter into such negotiations and York University and OHFA do not, by June 30, 2012, reach a mutual agreement on the appropriate terms of the substantive and procedural protections, then OHFA may refer the matter to a third party selected by the Chief Justice of Ontario, or if he or she is unavailable by the Associate Chief Justice of Ontario, who shall decide upon an appropriate procedure to add to the York-OHFA collective agreement (based on the model of the arbitration provisions contained in the collective agreement between York University and the York University Faculty Association (YUFA), but incorporating a single-arbitrator rather than a three-arbitrator panel) as appropriate to the circumstances of OHFA....

The panel had understood, prior to Monday, that the inclusion of this language in a side letter from York to OHFA was agreed. The panel had sought to include this clause, from an early stage, after a panel member – in response to a request from the Dean for ideas on how to clarify and strengthen the protocol's dispute settlement language – obtained input from an expert in labour law, Paul Cavalluzzo. Mr. Cavalluzzo has confirmed that York's proposal regarding this clause would make York's commitment to arbitration non-binding.<sup>2</sup>

Third, York's proposal indicates that it will not agree to any of a range of options presented by the panel that would make the protocol enforceable in clear terms. Instead, York has proposed including the following language: "The terms of this protocol are subject to enforcement under the laws of Ontario", and the Dean has indicated to the panel that this clause makes explicit that the protocol is intended to be enforceable through the courts. Our reading of this language, with the greatest of respect, is that it does not make explicit that the protocol is enforceable in the courts. Rather, the language may make the protocol enforceable in the courts (by CIGI or York only), but is open to an argument – based on surrounding language – that the protocol is enforceable only via the commercial arbitration process in the August

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<sup>2</sup> Various aspects of the panel's proposals and analysis are based on input from Paul Cavalluzzo, as mentioned in our report of January 6. The panel has not received a reply to its suggestion to the Dean that it might be useful to seek a legal opinion (perhaps jointly between OHFA and Osgoode) on technical aspects of the protocol, especially on dispute settlement.

Agreement and that the jurisdiction of the commercial arbitrator is limited to non-academic matters not engaged by the protocol.<sup>3</sup>

**The obvious point is this: if the intent is to make the protocol enforceable in the courts, then this should be made clear.** Notably, York's proposal, based on what we see as unclear language as quoted above, comes after various requests from the panel to include clear language in the protocol on its enforceability, as laid out in our report of January 6, 2012.<sup>4</sup>

**Simply put, we concluded that York's proposal would leave members of the Osgoode community dependent on CIGI's willingness to enforce York's commitments and on York's willingness to enforce CIGI's commitments. Also, attempts to develop the option of indirect enforcement of the protocol, via a side commitment to arbitration by York, have not been successful because York is unwilling to make such a commitment binding.**

#### **B. Wider concerns about possible threats to academic freedom**

The panel's close attention to ensuring strong protections of academic freedom is not an idle concern, as indicated by the following information.

- CIGI and associated University administrations were the subject of findings in a CAUT (Canadian Association of University Teachers) report of 27 September 2010 on the termination of Dr. Ramesh Thakur as director of the Balsillie School of International Affairs (which is affiliated with the University of Waterloo, Wilfred Laurier University, and CIGI). These include the following (p 21-22):

Dr. Thakur was unfairly treated in the months leading up to his dismissal as Director of the BSIA....

Dr. Thakur had every right to expect support from the Presidents of UW and WLU and their designates when he sounded the alarm on CIGI's proposals for tri-partite partnership on the BSIA. Insofar as his academic freedom depended on the protections of institutional autonomy, it became increasingly vulnerable to threats from the outside and complicity on the inside. UW and WLU misled Dr. Thakur about their commitment to his Directorship of BSIA and buckled under pressure from CIGI, possibly in the form of a threat to walk away from multiple commitments after ten years (as it is contractually entitled to do) and thus leave two overextended universities and their public funders to clean up the mess.

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<sup>3</sup> Our understanding on this specific point was also confirmed with Mr. Cavalluzzo. Notably, it is our understanding that clarifying language on limiting the jurisdiction of the commercial arbitrator to non-academic matters had been agreed and remains uncontroversial.

<sup>4</sup> With these requests, the panel also sought provisions to ensure limited participatory rights by OHFA on behalf of Osgoode faculty, whether in the protocol or a side letter. York's proposal does not incorporate any of these provisions.

Dr. Thakur's freedom to pursue his intellectual work on topics of his own choice, in the ways he deems most productive, and in collaboration with the scholars he feels most appropriate, was unfairly constrained by the Schedule "A" Release he was required to sign in order for CIGI's remaining funding of the ARC project to flow.

Dr. Thakur's personal and academic reputation has been unfairly damaged, but not as much the reputation of CIGI, UW, and WLU.... Meanwhile, the future of the BSIA remains in doubt while there is still a possibility that its new governance structure (still being worked on) will leave CIGI present at discussions where it should not be.

Members of independent think tanks may be inescapably subject to the whims of the donors who fund them in whole or in part, though that will surely sabotage any reputation for independence such tanks aspire to; but members of academic entities hosted by universities must function free from such whims, vagaries, and pressures.

It is our understanding that CIGI objects to all or some of these findings. However, to our knowledge, CIGI has not provided any formal written reply to the CAUT report.

- In light of the above, the panel members considered hypothetically: what would happen if the CILGE director or a faculty member or student expressed a concern that interventions by CIGI threatened their academic freedom or Osgoode's autonomy? What would happen if this concern was not thought to have been addressed by the Osgoode or York administration, as was reportedly the case for other University administrations in Dr. Thakur's case?

There are presently two scenarios based on proposals currently in play.

- "Option 3" as proposed by the panel,<sup>5</sup> and reflecting a significant compromise by the panel, envisioned a protocol that was enforceable between CIGI and York, combined with a binding commitment by York to an arbitration mechanism between York and OHFA (through which CIGI's obligations could be enforced indirectly). Based on this option, the person in question would likely be directed to OHFA, which would take up the issue with the Osgoode and York administrations. If an agreeable outcome was not reached, OHFA could resort to arbitration against York for its or CIGI's alleged breach of the protocol. This is a relatively weak option because OHFA has no resources, meaning that an arbitration would need to be funded by the affected person or by voluntary contributions. Consequently, the panel's preferred option was to permit OHFA to seek enforcement of the protocol directly in the courts. Nevertheless, this indirect enforcement option would at least provide some

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<sup>5</sup> Please see our report of January 6 for details.

mechanism by which to challenge any egregious encroachment on the protocol by CIGI/ York.

- Based on York's final position, the faculty member could approach OHFA, but OHFA would be able to pursue arbitration only if York followed through with its voluntary commitment to such an arbitration mechanism, and only then on terms voluntarily agreed by York. The faculty member could alternatively approach the Dean or York University, but would be dependent on York's willingness to take a stand against a major donor to the University. Even then, York would be in a somewhat questionable position regarding resort to the courts in order to enforce the protocol, based on unclear enforcement language in the protocol itself.

While members of the panel had different views about the first scenario, we share a fundamental concern that the second option is untenable. It suggests that CIGI/ York may be simply unwilling to agree to an enforceable protocol.

This, we think, may undermine the basis for a trusting relationship over the course of the initiative and could set the stage, if the initiative were to proceed, for a range of potential disputes over CIGI's role, apparent encroachments on the protocol, etc. Most importantly, it would be inconsistent with the principles of academic freedom, etc. that have motivated the effort to bring colleagues together in support of the initiative, based on a clear floor of protections for faculty and for the Osgoode community.

- It is our understanding that a document aimed at addressing concerns of Waterloo and Wilfred Laurier faculty, arising from their universities' relationship with CIGI and the implications for academic freedom and autonomy, has been under discussion for about two years and has undergone over 20 drafts.

### C. Other concerns

Various other concerns have arisen for panel members in light of the recent proposals from York/ CIGI. However, we have not given them close consideration due to the fundamental nature of our concerns about enforcement. Some of these other concerns, also potentially fundamental, are outlined below in order to provide further context for our conclusions stated above. That said, these are not intended to provide any firm position and would have required further discussion.

- **Preservation of CIGI's right to block budget/ withdraw funding:** The panel had proposed at an early stage to make clear in the protocol that the Steering Committee could block approval of the budget submitted by the CILGE Executive Director based only on consensus of the Steering Committee members. This would address the concern that CIGI's control of the purse strings could be used as leverage against faculty, students, etc. The panel's understanding was that this change was agreed, as indicated in our report to Faculty Council on January 6. On Monday, the panel was informed that CIGI prefers not to include

this clarification. The effect is to maintain CIGI's right, based on clause 9 of the August Agreement, not to extend funding following non-approval of the budget by any of CIGI's members of the Steering Committee.

- **Apparent dilution of remedial language for the “indirect enforcement” option:** York's proposal excludes the underlined portions of the following proposed language in a side letter between York and OHFA:

Pursuant to this procedure, an OHFA member or OHFA itself may bring forth a complaint alleging, among other things, that York University has breached the protocol or has failed to respond appropriately to an alleged breach of the protocol by CIGI. If the complaint is found to have merit – including in, but not limited to, circumstances where funding for the initiative was withdrawn or withheld by CIGI in any way that related to or affected academic freedom or academic integrity, then York University may be ordered by the arbitrator to provide an appropriate remedy to Osgoode Hall Law School, OHFA, and/ or any affected Osgoode faculty member(s), staff member(s), or student(s) including, where funding was withdrawn or withheld, the provision of an amount of funds to Osgoode Hall Law School that is equivalent to the funds that were withdrawn or withheld.”

Before Monday, the panel had understood that this proposed language was agreed, subject to resolution of other outstanding issues. The proposed language had been developed as an alternative to the more direct option of identifying OHFA as a party that could enforce CIGI's obligations under the protocol. The panel has not yet had an opportunity to research implications of York's proposed change, although it appears to dilute the remedial protections that would be available to an arbitrator in the event that CIGI withdrew funding in breach of the protocol.

- **Questionable comparisons to other York faculty:** York appears to have become focused of late on the question of whether the protocol could grant to Osgoode faculty any status or rights beyond those of other York faculty, as represented by YUFA. The panel would have been prepared to study and work through this issue further, had it been raised earlier in our discussions. That said, the issue does not appear central to the discussions because options put by the panel to the Dean, as outlined in our report of January 6, did not require adding OHFA as a party to the protocol. More broadly, York's position in this respect raises other potential concerns, including the following:
  - The panel is not in a position to know the status of other York faculty in relation to other programs and initiatives entered into by York. However, the initiative appears unique in light of its size and scope. The President appeared to indicate as much to Faculty Council when he described the initiative as charting a new course for the University. In this context, it seems unavoidable that protections extended to Osgoode faculty in the protocol might not presently have comparators among other York faculty.

- The comparison to other York faculty was mentioned in the original protocol as a basis for designing safeguards of academic freedom for Osgoode faculty, especially as envisioned in the proposed side letter between York and Osgoode. York now appears to view the status of other York faculty as a ceiling for the protections that Osgoode faculty can enjoy under the protocol as a whole.
- It is perhaps inapt to compare the position of OHFA and YUFA members, given that the latter have a statutorily certified organization with extensive resources, and that they have a right in their collective agreement (article 17) to object, including via binding arbitration, to changes to their terms of employment arising from an agreement between York and a third party. As such, if other York faculty can be said not to have a similar status to that proposed for Osgoode faculty under the protocol, then this may simply be the result of YUFA not having agreed to any initiatives of the sort currently before Faculty Council.
- **Institutional autonomy as a bar to a binding commitment on arbitration:** As a reason for not making its commitment to side arbitration binding, York has indicated that it cannot subject matters of academic governance to a third party outside of the university. This line of reasoning was introduced originally by the panel in an effort to support a strong protocol, by precluding a commercial arbitrator – chosen by CIGI and York – from ruling on or overriding the protocol. York now employs this rationale in order to avoid making a binding commitment on York-OHFA arbitration. Yet, a York-OHFA arbitration mechanism would by definition give a third party arbitrator power over matters relating to academic governance, as in the case of the existing York-YUFA arbitration mechanism. Also, if it is the case that the protocol is intended to be enforceable in the courts, as the panel has been informed by the Dean, then a third party (the judge) would obviously have powers over such matters. For these reasons, we have found York’s explanation to be unconvincing.
- **Choice of language with possible OHFA implications:** Faced with a proposal to refer to the existing York-OHFA agreement by its title of “memorandum of agreement” rather than the more generic “collective agreement”, a panel member was informed that this could be interpreted to mean that the University does not recognize OHFA as the bargaining agent for Osgoode faculty, in spite of past evidence of such recognition including in language in the original protocol. The panel did not discuss this aspect or form any position on it. However, because it appeared to have possible implications for Osgoode faculty in relation to the initiative, a clarification has been sought from the Dean on the issue.

In summary, we feel obliged to report, with considerable disappointment, our conclusion that the currently proposed protocol and related agreements no longer represent sufficiently strong commitments by York/ CIGI to protect academic freedom and to honour other commitments made to the Osgoode community since August.

In this respect, we recall the Dean's earlier statements to Faculty Council that this initiative will not proceed without broad-based faculty support. We do not wish in any way to pre-empt the discussion or decisions of Faculty Council. However, it is our understanding that the promise of a strong protocol was a condition of broad-based support for the initiative by the Osgoode community, in which case the absence of such a protocol may provide a strong basis on which to bring together members of the Osgoode community in a respectful and principled rejection of the initiative.

Finally, we wish to express our gratitude to Dean Sossin for his efforts to arrive at a workable arrangement, even if in our view they have not at this point met with success. We are aware that the Dean as much as ourselves has expended a great deal of time and energy on this process, with a shared aim to protect and advance the interests of the Osgoode community.

**Appendix Eight**

**Memorandum of Dean Sossin to Faculty Council, dated January 20, 2012**

## MEMORANDUM

TO: Faculty Council  
FROM: Dean Lorne Sossin  
DATE: January 20, 2012

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The Faculty Council designees are providing a detailed update on their perspective on our collective efforts to finalize the Protocol to Promote and Protect Academic Freedom, which was a condition of the approval of the initiative at our November 28, 2011, Faculty Council meeting. The deadline for reaching agreement was extended to January 23, 2012 at our last Faculty Council meeting. I appreciate the perspective of the Faculty Council designees but I see the situation differently.

First, apart from the outstanding issue of the wording of the enforcement/dispute resolution clause, we have agreed upon strengthening and clarifying the other terms of the Protocol. The Protocol reflects important commitments to academic freedom and to the autonomy of Osgoode over academic matters. The terms of the Protocol are supported by both York and CIGI.

Second, all parties agree that the academic freedom protections in the Protocol need to be enforceable. Further, York and CIGI support one of the models for enforcement suggested by the Faculty Council designees (which would allow OHFA and its members to enforce any alleged breaches of the Protocol against York, including a complaint that York had failed to enforce a breach of the Protocol by CIGI). Since there is an agreement on the principle that the Protocol should be enforceable, and an agreement with respect to the model of enforcement, I am confident that we can overcome any remaining hurdles with additional clarifications/revisions to the language of the enforcement and dispute resolution provisions, in the same constructive spirit that has accompanied discussions on the other aspects of the Protocol and related documents.

Third, to the extent that a gap remains between the suggestion of the Faculty Council designees and the University, it relates to specific language around the rights of OHFA in relations to dispute resolution. We have already agreed that a side letter between York and OHFA will lead to further negotiations by those parties to finalize in good faith the precise mechanism for ensuring OHFA has commensurate rights and remedies in relation to academic freedom as YUFA. I believe that any remaining differences can be dealt with more effectively through direct negotiations between York and OHFA. York and CIGI have agreed that faculty appointments would be made under this initiative only once these negotiations are complete and a mutually agreeable framework is in place.

I believe we have made significant progress toward resolving the outstanding issue. The benefits from this initiative which will flow to Osgoode's teaching and research program, and to Osgoode students, staff and faculty, will be substantial. That said, if by the time of the next Faculty Council meeting on February 6, 2012 we are unable to reach sufficient common ground to attract the broad support that this initiative requires, then I believe it is time for York to pursue this collaboration at the University level.

**MINUTES OF THE FOLLOWING MEETINGS OF  
OSGOODE FACULTY COUNCIL RELATING TO CILGE:**

- a) October 3, 2011
- b) October 31, 2011
- c) November 28, 2011
- d) January 9, 2012

a) **October 3, 2011**

**4. Centre on International Law in the Global Economy – L. Sossin**

- The motion before Faculty Council builds on a huge range of discussions in the Osgoode tradition that have been taking place over the past few months.
  - The discussion began with a communication to faculty at the beginning of August to advise of discussions leading toward an agreement to enable funding to flow.
  - At the Faculty Meeting on August 19, 2011, this was a core area of discussion.
  - The Management Committee has taken up the implications of initiative.
  - Dean Sossin has had exchanges with the Chairs of the Priorities and Finance Committee and the Equality Committee.
- Dean Sossin indicated that he hopes that today's discussion will carry forward the idea that with the right breadth and depth of support, this initiative will thrive and survive.
- Dean Sossin received a communication from OHFA on Friday which, while not an OHFA position, indicated that some OHFA members wanted more time to have further communications with the Dean on these important issues bound up in the establishment of CILGE.
  - The Dean indicated that he viewed the issues that concern OHFA members as distinct from the merit of the establishment of the centre, but he took the point that greater insight into that dimension would be helpful for some OHFA members.
- As such, Dean Sossin requested that this matter be discussed today, but that the motion be formally tabled and voted on at the next Faculty Council meeting.

***Context for Motion***

- Dean Sossin then took members of Faculty Council through a number of slides explaining the context for the motion:
  - Advancing Osgoode's strategic priorities
  - 10 Osgoode Chairs (including an Executive Director), 20 Osgoode graduate students
  - 2/3 at Osgoode in Waterloo
  - Full funded, fully integrated, fully collaborative Centre
  - Triple governance + oversight/review
- Professor Li invited clarification of anything in the supporting memoranda in the materials from Professors Puri, Scott, Mossman, or Jessica Diab.
- Professor Poonam Puri noted that the memo from Professor Buchanan on behalf of the Graduate Studies Committee is quite self-explanatory.

- The committee met on September 21, 2011 and had a good discussion on the principles that could guide implementation of centre as it relates to grad program.
  - Subject to these principles being adopted, the majority of the Graduate Studies Committee supported the creation of CILGE.
- Dean Sossin remarked that those principles are now embedded in the motion.
- Professor Mary Jane Mossman thanked the Dean for including the recommendations from the Library Committee, which identify two key concerns:
  - The library budget at Osgoode is already stretched – whatever is to be funded must be in addition to current support.
  - There is a possibility that the addition of chairs and graduate students would negatively impact current resources – this must be avoided.
- Professor Craig Scott noted that the section in the Dean’s memo describing the recruitment process is accurate: it will be an FRC-driven process.
- Jessica Diab explained that Dean Sossin had spoken with Student Caucus and had an opportunity to discuss the issues there, and members of Student Caucus will be voting individually.
  - Student Caucus did not canvass the student body as a whole due to the confidentiality issues.

*Discussion:*

- Professor Eric Tucker indicated that he saw many problems with this proposal. There is a fundamental problem with the idea that a donor can limit who will be appointed to positions it funds; this violates the principle of institutional autonomy. From this document, it seems that we have accepted that one-sixth of our faculty can only be appointed from an approved list of CIGI or its delegate. Of the ten chairs, two are fully funded by York, four are funded by the Ontario government, four are funded by Jim Balsillie’s money (which is a charitable donation and as such subsidized by the Canadian taxpayers). This means that 70-80% is public money; yet, CIGI has the right to vet the list of potential candidates for those ten candidates. If there is someone CIGI does not wish to have on the list, then we cannot appoint that person
  - Professor Craig Scott answered that, as FRC chair, he is trying to create procedures that are FRC-focused. However, he is coming from the starting point of the MOU. The Steering Committee receives the FRC shortlist of candidates, and the expectation is that it just comes back. The voting mechanism is unanimity, meaning that no list can be recommended or come back without the approval of the FRC Chair. If CIGI wanted to veto one candidate or substitute, then the FRC chair could resign, and this would result in a complete stalemate.
  - Dean Sossin remarked that there is the obligation to appoint chairs is not being imposed on Osgoode. Rather, this is an opportunity to grow the faculty complement with external funding. No decision relating to this centre will happen unless the will of collective governance is that it be so. Dean Sossin remarked on the contributions from York and the memo to President Shoukri indicating the shared nature of this enterprise.
- Professor Gus Van Harten thanked the Dean for deciding not to proceed with the motion today. He indicated that he was keen to support this initiative (which is within his areas of research interest), but he would not have been able to do so today based on the materials before him. The missing piece is the role of the Priorities and Finance Committee. This initiative introduces significant financial liabilities for Osgoode (8-10 faculty members). The impact of this liability if born substantially by the Osgoode budget would be devastating for the academic program. The agreement itself mentions protecting Osgoode’s ability to hire in budget, but only for 10 years. The statements in brief reply from the President are not sufficient to address the concerns.

- Dean Sossin explained that he had spoken with the Chair of the Priorities and Finance Committee on this initiative. The Chair had indicated that the Committee would be open to playing whatever constructive role would be imagined. Dean Sossin went on to say that the memo refers directly to a number of ways in which the contingent liability could be mitigated. At some point, we will have to move forward with some level of risk on all fronts (including the financial front). Osgoode has taken a number of leaps of faith in the past, including the establishment of Osgoode Professional Development.
- Professor Francois Tanguay-Renaud noted that he was in the same position as Professor Van Harten – he wanted to be able to support this initiative, but he had some concerns. In particular, Professor Tanguay-Renaud wondered: What were the grounds of rejection at Ottawa? How can we create a community in which we can relate to each other when the conditions that tie us to the community are so different? How much room is there to maneuver within the three categories?
- Professor Michael Mandel remarked that he was not keen on this project – it bothered him that a billionaire could shape the priorities of an institution and choose/influence who will be on faculty by throwing money at us.
- Professor Benjamin Geva explained that he found this proposal to be a non-starter in that we need to surrender the selection of 17% of our priorities and complement. Professor Geva also noted that he is on both the Graduate Studies Committee and the Library Committee, and it would be a mistake to say that the initiative was approved subject to these conditions. It was more like “If this initiative were to go ahead, then it should be on these terms...” The principle is still that somebody outside Osgoode will screen appointments. This is on top of the financial problems.
- Fahad Siddiqui identified two concerns: first, the total absence of student representation on the Steering Committee or the FRC Chair sub-committee; second, a practical concern of shoving procedural concerns onto already overburdened FRC.
- Professor Peer Zumbansen added another point regarding the model, which is said to be based on the Canada Research Chairs. However, the point is that there are no stipends for CRCs – the school gets funding, and faculty members get a level of salary that is acceptable. The stipend is tied to research.
- Professor Neil Brooks noted that he hasn’t had much time to work through the details of agreement or to consider it, and he appreciates the extra time and he remains to be persuaded. That being said, Professor Brooks indicated that he doesn’t like plutocrats and thinks they’re a menace – now they’re trying to buy professorships. The other issue is that this agreement has implications of changing dramatically the way that universities proceed in this country (once we do it, everyone will have to). If CIGI doesn’t intend to exert any significant control, then we should ask them to give it up. At the end of the day, we should make the decision about how the academic program proceeds.
- Professor Janet Mosher focused on the issue of the advancement of strategic priorities. She was not convinced that the agreement does advance the Law School’s strategic priorities; in particular, the faculty-student ratio in the JD program. Professor Mosher also noted that she was not comforted by the exchange between the Dean and the President in terms of where we’ll be in 10 years. She was troubled by the mention of managing this through “planned retirements” – does that refer to current faculty? Professor Mosher also indicated that she was a bit unsure of what Faculty Council was being asked to approve: the MOU doesn’t seem to be subject to Faculty Council approval, and the Dean indicated that he was aware that Faculty Council might decide not to proceed. Does this mean the if Faculty Council does not approve the establishment of the Centre, then the agreement still stays in effect and a different centre might be established?
- Professor Jamie Cameron explained that she was a member of FRC, so she made comments about the recruitment process as a member of that committee. She found it interesting that we haven’t

really heard from/seen CIGI and wondered whether it might be useful to have an information session.

- Professor Marilyn Pilkington emphasized the importance of the Dean's willingness to hear from others on the academic implications of proposals (which is squarely within jurisdiction of this body). She noted that there are some real issues in terms of our culture, and our commitment "through law to justice." The first concern is one of process – we didn't move in camera: Is this a confidential discussion? Another concern related to page 2 of the Dean's memorandum to the President – it's clear that during the term of the agreement, the initiative will not negatively impact the Law School's ability to make appointments, but there is nothing about what happens at conclusion of agreement. Professor Pilkington indicated her concern that we will lose other appointment priorities we have at that stage, which will be taken up by the CIGI Chairs. She also indicated a concern about the statement that this initiative will improve faculty-student ratio; it will in theory, but none of the CIGI Chairs will teach in the JD program.
- Dean Sossin thanked everyone for their constructive interventions and comments and indicated that many of these could be addressed with further information; for example, the "planned retirements" only refer to these chairs and no other faculty members.
- Dean Sossin reiterated that this initiative will only succeed to the extent that there is breadth and depth of support for it.
- Dean Sossin remarked that he thought the sense in the room was that this is about something other than Osgoode being imposed on us, which is not the case. These are all Osgoode faculty members being recruited, Osgoode graduate students, etc. There is a great benefit in understanding this as ultimately an Osgoode initiative. The intent is to see Osgoode grow – not to have plutocrats play a role in the Law School.
- Dean Sossin explained that the collaborative side is real as well. The Waterloo facility will play a significant role and linkage to other academic networks.
- Dean Sossin continued that there was nothing in the agreement or memo to suggest faculty members won't make significant contributions to the JD program. An Osgoode faculty member will serve as executive director and work with other committees to develop how students will benefit from access to these initiatives.
- Dean Sossin hoped that there would be a chance over the next few weeks to continue discussions and refine the characterization as Osgoode driving this initiative forward to address our priorities.
- Dean Sossin also indicated that he hoped that the confidentiality indicated at the end of his memo is the basis of this discussion.
  - Professor Wood asked whether the confidentiality extended to York groups specifically mentioned in the document (e.g.) Iris, and Dean Sossin remarked that it was probably okay if these groups were internal to York and also agreed to confidentiality.
- Dean Sossin noted that the other university collaboration (Ottawa) was not pursued. While he could not speak to the internal rationales, he could speak to what was communicated, which is that there was an impasse between the university, the law school, and CIGI as to how to work together to get this off ground, particularly the distance education issue (inability to commute like Osgoode can). It seemed as though the alignment between the law school and the university was not there.
- Dean Sossin indicated his commitment to ensuring that there is an opportunity for all concerns to be heard and to coming back to Faculty Council with a motion and revised memorandum, if revisions would be helpful.

**b) October 31, 2011**

**4. Centre on International Law in the Global Economy – L. Sossin**

- Dean Sossin indicated that the materials included a revised memo to Faculty Council that blends some aspects of the original and the modified position.
- A separate memo was sent to Faculty Council members on October 21, 2011 setting out the modifications.
- The materials also include a draft protocol attempting to capture in form that which would substantially change the way the agreement works.
- Dean Sossin explained that five areas have been modified:
  1. Nature of compensation for faculty members
    - All Osgoode faculty members, including these chairs, are subject to the same procedures. No stipend attaches to the academic appointment.
  2. Ambiguity in teaching obligations (JD program)
    - Each Chair will have a clear teaching allocation commensurate with the Canada Research Chair model at Osgoode. There is a commitment to JD and graduate teaching as well as supervision in the same manner as other Osgoode faculty.
  3. Contingent risk when funding is discontinued
    - This involves a process change: the Priorities and Finance Committee will take a leading role in monitoring any risk. There is also a substantive element: Chairs will be either tenure-stream appointments or contractually limited appointments. The liability, if any, belongs to the University.
  4. Funding associated with the Centre will include specific floors of funding flowing to Osgoode's operation.
    - \$200,000 per year in funding for research symposia; \$100,000 per year in funding for teaching initiatives.
  5. Recruitment process
    - The expectation is now that all candidates will come up through FRC's vetting (Stage 1 and Stage 2). At the stage of determining the short list, the expectation is that FRC's recommendations will be approved. Only in exceptional circumstances where consensus is not possible is a dispute resolution mechanism available. This would involve going to an internationally recognized person in the field.
- Dean Sossin remarked that ClGI has been keen to come meet with Osgoode; however, he had told them that it would be better if the modifications were agreed upon beforehand. The visit will now will be scheduled as soon as possible.
- Dean Sossin indicated that he hoped Faculty Council members would be able to continue working constructively together.
  
- Associate Dean Gavigan indicated that there were two points on page 5 that address the issue of the nature of the teaching load and the process for teaching assignments at Osgoode, as well as the issue of participation in governance.

- Teaching and committee assignments by Associate Deans at Osgoode are guided by three principles: the needs of the program, faculty preferences, and equity.
- The math is that a full teaching load is 12 hours and a half-load is six hours. This is usually made up of at least one four-credit course and a two-hour seminar.
- Professor Tom Johnson noted that the Priorities and Finance Committee met on Friday, October 21, 2011 and had a full discussion about several of the issues within its mandate:
  1. Contingent liability issue
    - The Committee was satisfied with the Dean's assurances with respect to hiring and the move to a mix of limited term and tenure-track positions. The Committee also understood that the funds for the Centre are available now in cash (not RIM shares).
  2. Ongoing monitoring of CILGE and effect on academic program
    - It is within the mandate of the Priorities and Finance Committee to monitor the ongoing effect of the program/institute on the existing JD program.
- Professor Craig Scott recognized that Dean Sossin provided a good overview with respect to the new approach to faculty recruitment procedures. As such, he would not be putting forward that section of the recruitment procedures in light of the tabling of the CIGI motion.

*Discussion:*

- Professor Stepan Wood noted that it would be helpful to have answers to the following questions:
  - How is this protocol sufficient to resolve the concerns (since it is non-binding and cannot change the terms of agreement, but only clarify)?
    - Dean Sossin commented that the protocol is in draft, but the intent of the parties is that it be put in place under whatever mechanisms are necessary to ensure the changes bind them. The protocol will govern the decision-making if this moves forward.
  - Is there room for further change to address outstanding concerns?
    - Dean Sossin remarked that there is room for change around making the agreement and modifications effective, but opening up whole new swaths would not be fair.
  - How do the draft protocol and the recruitment procedures address the problem that was identified – limiting the faculty's ability to say "yes" to certain candidates since the external party can stop names from coming forward?
    - Dean Sossin explained that there were safeguards in terms of the advisory role of the Steering Committee (FRC procedures).
      - ◆ The choice is always to have a failed search or to use our recruitment process otherwise to go after a person.
  - Professor Wood concluded by noting that he didn't see the compensation issue referred to in the memo in the protocol.
- James Stevenson commented that many of the issues are arising over the powers of the Steering Committee, and he was concerned that two members are listed in protocol as "University" members, not "Osgoode" members.
  - Dean Sossin explained that leadership is meant to bind the parties, and it is not open to University to pick other members. This doesn't always necessarily mean that the Chair of the Faculty Recruitment Committee will always sit on the Steering Committee, but it will be a member of Faculty Council that makes sense at any particular point in time.

- Mr. Stevenson went on to ask how we would determine the boundaries of these fields into which we're trying to slot people. He noted that he was concerned that CIGI can step up and say that's not what we're specifying this money for.
  - Dean Sossin remarked that, so far, the partners at CIGI have indicated this is why they're coming to us. They are not experts in these areas of law, but rather they are coming to Osgoode because they want to build capacity and they think we have the expertise and can deliver.
- Mr. Stevenson wondered if we could get the kinds of people that faculty members in those fields would want to work with.
- Jon O'Kane thanked the Dean for his openness to making modifications. He indicated that he was sufficiently convinced that the contingent liability and autonomy issues had been addressed. This agreement creates new opportunities for JD students based on teaching outcomes and allocations. It comes down to whether we're okay with a plutocrat shaping direction of research, and Mr. O'Kane noted that he saw CIGI as isolated in faculty (and so worth the risk). There is a tremendous opportunity in this program, and limiting the program would limit the advancement of knowledge.
- Professor Sonia Lawrence indicated that she had shared her personal views with a number of people and was happy to send them out to anyone else who wants them.
  - Instead, she spoke as the Chair of the Academic Planning and Policy Committee and wondered whether APPC needs some time to think about the implications of the deal.
    - Dean Sossin noted that this would be a welcome involvement from any committee of Faculty Council. APPC could have a voice around the right mix of tenure-stream and contractually limited appointments.

**c) November 28, 2011**

**4. Centre on International Law in the Global Economy – L. Sossin**

- Third time Faculty Council deals with matter
- Two parts:
  - Approve creation of Centre subject to signature of protocol
  - Approve creation of process to deal with associated issues
- Not sure if this is new or revised issue
- Urge colleagues to keep remarks brief to accommodate as many speakers as possible
  
- Lorne: Fresh copy of notice of motion
  - Changes word "pending" to make sure it is conditional
- Focus on new – not protocol itself
- Additional process piece
- Meetings:
  - Osgoode meeting w/CIGI reps
    - Since last talk in October, chance to meet with two reps from CIGI (came to Osgoode, meeting with FC colleagues)
  - Faculty Retreat
  - Faculty Meeting
  - Student Caucus has held series of meetings.
  - Staff from CIGI came to meet with counterparts here (IT, infrastructure, communications).

- Strengthening guarantees on academic freedom
  - All parties committed to this – question is how best to do so.
- Funding question
  - Remarkable commitment to funding at a time when public funding is being challenged
  - Challenging period around budgets of University
  - Funding helps access our priorities (graduate funding, faculty appointments, experiential education, library, grad studies, IT, conference planning, etc.)
- Clarity that this protocol will prevail over existing agreement from August
- Moving forward in conditional approval will not be end of governance, but point of departure.
  - Things will come back re protocol
  - But also other ways in which collegial governance plays role in shaping this (e.g. APPC, FAC, Pri & Fi)

- Gus: Will speak to process by which protocol was developed
  - Will share notes with Amanda to help with minute-taking
- Ad hoc sub-committee established by OHFA (get details)
- Members: FTR, Wood, Van Harten
  - Personal and voluntary capacity
  - OHFA has taken no position
- Key question: Academic freedom and integrity, institutional autonomy
  - Reviewed specific terms of initiative to ensure they maintained integrity of earlier reforms
  - Success of initiative would require removal of any reasonable perception in scholarly community that academic integrity had/could be compromised
  - Reviewed general criteria in comparable contexts
  - 12 days ago became apparent that intent was to seek FC approval of the agreement, in principle, subject to further discussion with CIGI/York to work out details including on academic freedom; but to ensure floor of safeguards for academic freedom
  - Prompted them to initiate collaborative process with colleagues
  - Informed that view of University was that policy on gifts would not apply
  - Protocol developed by about 12 colleagues in areas (but not all)
  - Process not intended to sway anyone from principled objections they might hold to initiative, but to ensure floor of integrity
  - Protocol is not an opening position in bargaining process – clear and firm statement
    - Conveyed to all outside parties as such
  - Developed under time constraints, so need process to allow for changes
    - Professor Cameron has identified some aspects
    - Would seek any further advice and support
- Understanding this motion approves protocol, in turn initiative
- However, if protocol is not agreed by any one or more of those parties, then initiative as a whole is not approved by FC
- If changes proposed by other parties present any dilution of protocol, this would challenge integrity of process by which the protocol was developed
- One further issue: Possibility of possible public announcement of initiative following this meeting
  - Expressed concerns to Dean
  - Would amount to bad faith by proceeding without support of protocol
- Various issues to which sub-committee did not turn attention

- Preclusion of hiring of Osgoode faculty
- Initial setting of priorities by CIGI
- Ongoing role of private funders in administrative issues
- Understands some colleagues would not support motion for other reasons
- View that should not support motion if opposed to initiative in principle or to protocol itself

*Discussion:*

- Michael Mandel: Two aspects of protocol cannot understand and seriously interfere with academic freedom:
  - Ability to hire people for these positions from within faculty
    - Prevent us from hiring best people for jobs
    - Provide continuing lopsided interference on priorities from CIGI
    - Should be able to fill priorities by people already in that area, then fill other needs with new faculty
    - Why is this not considered academic freedom or institutional autonomy?
    - Will propose amendment: Notwithstanding 6b as opposed to 6a
  - Teaching responsibilities of these faculty (half-load)
    - Will orient our research in a particular direction favoured by CIGI
    - Current faculty members' research will suffer – unfair
    - Para. 12
      - ◆ 4<sup>th</sup> line: the teaching responsibilities...shall be teaching responsibilities of regular faculty
    - para. 32
      - ◆ would include 6b as well as 6a
  - Even if such amendments were included, he couldn't support the protocol.
    - Rank exercise in plutocracy (private funder determining public priorities).
- Dave Shellnutt: Speaking for himself and several students who have raised concerns
  - Personally not sure how he feels about partnership – torn between personal views on international law (international human rights and governance issues), focus, benefits to Law School, risks to school, benefits/lack to JD students
  - Will make decision after hearing from everyone today
  - Appreciates all points raised and flexibility of Professor Van Harten and Dean Sossin
  - Student-driven program providing students with internships all over the world → more support to existing initiatives (ILP)
    - Stand for different kind of international internships
  - Worries about make-up of existing CIGI team – diversity issues
  - Accepting money from corporation
  - But not free from these kinds of relationships as is (Professor Trevor Farrow) – branding, Library space
  - Believes in Osgoode commitment to social justice
    - If partnership does go forward, begs those who will be around to ensure this remains a pillar.
- Sonia Lawrence: Intent is to vote against on a variety of concerns (grateful to colleagues who put in a huge amount of work)
  - Would like to draw attention to larger questions raised by these kinds of funding mechanisms for our admittedly cashstrapped public universities → did not adequately think this through
    - Still doesn't know enough about way CIGI is managed

- Still concerned about relationship between CIGI and CIC
  - Also an Impact on units at university that cannot accommodate private funding
- Sonia: Chair of APPC
  - Affects to agreement APPC might consider
  - Discussion has been compromised – still don't know completely enough about content of deal
  - Ways in which new faculty can/should participate in JD teaching
  - APPC would like to remind community that needs of JD program are always to be in the front of our minds and APPC considers watching brief in terms of how this is functioning
  - Committee members agreed
- Tom Wilson: Would like to thank Dean Sossin, rest of Student Caucus, and rest of faculty
  - In favour of motion to accept as is.
  - From JD perspective, allowing hiring of internal faculty members doesn't provide benefit to JD students (one of benefits is infusion of new blood).
  - The Agreement provides substantial opportunity to improve faculty-student ratio, internship, RA-ship, funding possibilities + opportunity to stand out as premiere law school with top-notch researchers in province/country
  - Small-minded to reject private funding for the sake of it.
  - This proposal provides sufficient safeguards (as opposed to Building Osgoode campaign).
  - Criticizes those who propose going to state as blanket protection – also has an agenda
  - Agreement as stands allows us to take ownership of agreement
- James Stevenson: Involvement of students in governance of structure
  - Part of motion is establishment of a panel of representatives – request that at least one of designees by a JD student
  - Hiring practices for Chairs
    - Would like to see Osgoode's equality principles in hiring adopted for these chairs
- Jamie Cameron: Not entirely satisfied with current definition of academic freedom
  - Vote today is contingent on revisions to that definition that will be made after vote today
  - Missing: explicit reference to extramural activity, also extends to service (especially on crossover committees), protects us generally and is not limited in topic-specific or expertise-specific areas
- Liora Salter: Knows one of the people who is currently a CIGI person – commitment to social justice and human rights is as strong as anyone in the room – should not assume otherwise just because it's CIGI
  - Speaking as member of "old guard" at Osgoode
    - In 1990, it wasn't possible to get anything through the system
    - About 10-15 years ago, breath of fresh air – able to get things through.
  - Let's not get back to the old ways.
- Aaron Dhir: para. 7 of protocol
  - Does this aspect of protocol deal with concern that's been discussed before about CIGI reps having veto over appointment process
- Lorne:
  - Michael Mandel:
    - Professor Mandel's comments are always friendly, but would not constitute friendly amendment
    - External element has been communicated as condition of Ontario's involvement in initiative
      - ◆ At that point, it wouldn't be amending a protocol but rather deciding we're not going forward (dealbreaker).

- Need to balance our internal recruitment with this in mind
    - Half-teaching load comes from CRC model
      - ◆ Also, internal chair ensures Osgoode participant from existing faculty
  - Dave Shellnutt:
    - We need to own this – these are our calls.
    - It’s about growing these areas of Osgoode’s programs in a way that supports our priorities.
  - Sonia Lawrence:
    - Reflect why someone may come to a place where, on principle, unable to support this
    - All cautionary tales should be on our mind and signposts by which we measure support.
  - Tom Wilson:
    - We need to go forward with view that everyone is an Osgoode faculty member → no “us” vs. “them.”
  - James Stevenson:
    - FRC procedures will include student representation on a sub-committee dealing with recruitment of these Chairs.
    - Assumes all other committees playing a role will have active student involvement.
  - Jamie Cameron:
    - We all wanted to resist a drafting, plenary session with many elements of protocol that could be improved.
    - Captured comments in minutes – see them as something that will strengthen.
    - Better process: take a number of these suggestions and have process for dealing with all of them.
- Gus:
  - In response to Michael Mandel, no authority to authorize any changes to protocol or motion itself.
  - Open to Faculty Council identifying other people as designees
    - Designee by student Caucus
    - Professors Craig, D’Agostino be added.
  - Equality principles are captured by article 28 of the protocol.
  - Separate discussion in faculty recruitment process.
    - Proposal before FRC that would involve external peer review process that would apply to all potential candidates – identified by FRC only – sole mandate is to verify that candidates are “fit” within three broad subject areas of initiative.
    - Compatible with Clause 7 of the protocol (removes external funder from process except to express concern)
  - Friendly amendment to add professors craig and D’agostino to list of designees and student representative on terms read out
- Trevor Farrow: Thinks the protocol has massively benefited from the concerns raised by colleagues
  - Ultimately will support motion because protocol addresses a lot of concern
  - In an imperfect landscape (private/public funding of universities) – would rather be at front end, then follow other schools doing not as good
- James Stribopoulos: Question as to how receptive CIGI will be to protocol
  - What about keeping the lid on this until final arrangement that institutionalizes protocol?
- Ben Geva: Thinks the whole thing is wrong
  - But utmost respect for all the wonderful work done by Van Harten etc.
  - Treating 50% teaching load issue a little too lightly

- CRC model works well because only 1-2 people
  - Having said that, will vote in favour
    - This is the world we live in.
    - A lot to suffer if we don't take it.
      - ◆ Would rather we take it than Schulich or another law school take it.
- Craig Scott: Perfectly agrees with Professor Lawrence's issues re structure, but places duty on us to do this right
  - Important we don't all leave this room thinking it's about international business law
  - Name of centre (CILGE) reflects this – we have control over what we can do
  - At a time in the world that will really matter (next 3-5 years).
    - If we can form critical mass contributing to these solutions, then it will have been worth it.
  - FRC
    - Steering Committee is completely outside of faculty recruitment process.
    - In terms of teaching, Associate Deans will always look at what certain person can bring.
  - Thinks we should go ahead – can do something really amazing.
- Brian Slattery: Strikes him as once-in-a-lifetime opportunity for Law School
  - But some clear disadvantages and risks
  - How to weigh?
    - In part, depends on wording of agreement and protocol.
      - ◆ Van Harten etc. have done great work in improving and clarifying
    - At end, people involved in carrying forward initiative are most important.
      - ◆ Looking around the room, there is every reason for optimism.
- Peer Zumbansen: The big concept is academic freedom, but important not just to posit it (social justice) against corporatism.
  - Institution does have to deal with its voice (i.e. what is program we put forward etc.)
  - If we worry that the institution will be engaged in agenda-setting, then we need to reflect even higher on setting our agenda.
  - Consider institutional advantage of connecting research and teaching in very visible way.
- David Vaver: Proposal yesterday to Dean Sossin re time-limited condition
  - Would suggest friendly amendment that the signature by Dec. 31, 2011 or such other later date as approved by Faculty Council.
- Lorne:
  - David Vaver:
    - Thinks we need to settle this very quickly for a whole range of reasons
    - Only hesitation of building in the Dec. 31<sup>st</sup> date is knowing how challenging it can be around holidays etc.
    - Mid to end of January – no hesitation
  - James Stribopoulos:
    - Confidence that in broad outlines everything we're doing has already been approved
    - Did not go through every point in protocol, but will do so and ask designees to join in back and forth, if necessary
    - But we need to steer clear of anything that would take us out of eligibility for the funding (i.e. internal appointments)
- Proposed amendment #1: para. 12 "the regular faculty shall be... strike constute of"

- Michael Mandel – seconded by Professor Doug Hay
- Michael: Agreement is between CIGI and Osgoode
  - Can't understand why Government of Ontario would propose this
  - There will be new blood for JD program.
  - Creating two-tier faculty (10 professors vs. one professor in CRC program)
- Lorne: Would like to clarify that this is not simply through CIGI -
- Para. 32
- Vote: 10 in favour, all others opposed

Friendly amendments:

- Jan. 16, 2012
  - David Vaver
- Designees
- Definition of academic freedom
  - Work in the three elements in the definition in the protocol

Motion

- 49 in favour – 6 opposed, 5 abstentions
- Congratulations to FC for approving this initiative
- Van Harten: Protocol is a public document and it has been approved by FC
  - Could we consult with outside parties outside university on terms of protocol to ensure it is as careful and strong as it should be?
  - Lorne: The only interest in the confidentiality is respecting the request of the funders (particularly, the Ontario Government)
    - What you're suggesting is in keeping with that as long as other parties are made aware of the need for confidentiality on the announcement of the initiative
    - Any public announcement needs to be contingent on broad buy-in of protocol, but a couple of things are non-contentious
      - ◆ Would like to communicate (with caveat) that there might be graduate scholarships available

d) January 9, 2012

**7. Centre on International Law in the Global Economy – L. Sossin**

- Lorne Sossin: Wants to preface any discussion about CILGE by saying that it has been a positive and fruitful process to get these areas clarified and strengthened.
  - There is an outstanding matter regarding enforcement and dispute resolution.
    - We need to have sufficient time to complete the process.
    - The original deadline was mid-January.
  - Today's motion moves the deadline to the 23<sup>rd</sup> of January.
    - This will give us time to resolve this last outstanding issue in the same spirit as we've resolved the other issues.
  - Thanks to the designees and the careful work they have done.
  - Everyone should review the material if they have not done so already.
- Gus Van Harten: Wants to echo what Dean Sossin said.
  - Wishes this process were over too.
  - Says there is an outstanding issue that seems quite significant.
  - Reminds everyone that if they have not yet read the material then to please do so.
  - Doesn't have a problem if this agenda item is just for information or if people want to discuss further.
    - Wants to highlight that in case people feel crunched in the next 90 seconds.
- Jinyan Li: Asks for questions and comments.
- Shelley Gavigan: Asks for clarification on what Professor Van Harten is saying.
- Gus Van Harten: Says that the purpose is to update everyone on what the panel feels is acceptable.
  - Does not want to pre-empt the discussion.
  - Also wants to highlight the outstanding issue, so suggests that if the Dean is agreeable then will treat this as for information purposes.
- Jinyan Li: Explains that we need to vote on the motion to get an extended time so that this business is kept alive.
- Lorne Sossin: Suggests to amend the motion to include the language in the first paragraph only.
- Gus Van Harten: Agrees for the purpose of extending the deadline for approval of the protocol to January 23, 2012.
- Jinyan Li: Asks if the other seconder agrees to the amendment [Carys Craig nods approval].

**Motion:** moved by **Dean Sossin**, seconded by **Professor Gus Van Harten** and **Professor Cary Craig**, that

the timeline to resolve the outstanding matters relating to the "Protocol to promote and protect academic freedom and academic integrity in the collaboration between the CIGI and Osgoode Hall Law School of York University" (the Protocol) be extended to January 23, 2012; and that

Faculty Council's approval of the initiative to establish a Centre on International Law in the Global Economy (CILGE) be conditional upon signature by January 23, 2012, by those individuals who signed the Agreement of August 2011 among CIGI and York University on behalf of the respective parties, of (and subject in all respects to) the Protocol, which shall replace the original protocol attached to the Faculty Council motion of November 28, 2011.

**Motion carried** – 2 opposed; 1 abstention.

