

**Our efforts have not borne fruit:  
A further analysis of the York-CIGI initiative**

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Executive summary

We have prepared this analysis to assist colleagues in dealing with the complex documentation that surrounds the York-CIGI initiative. In ten areas, it tracks concerns arising from the York-CIGI Agreement of August 2011, steps to address these concerns in the Osgoode protocol of November 2011, and the corresponding gaps in York's new governing documents.

Tomorrow at Faculty Council, the Osgoode Administration is proposing to proceed with the CIGI collaboration. Although the terms remain unclear, they fall well short of the protections contained in the Osgoode protocol. We think that most or all of the problems outlined below should be treated as deal-breakers, and ask colleagues to oppose the initiative.

**1: There is no enforcement mechanism for CIGI's obligations.** CIGI and the University have not included any enforcement mechanism for CIGI's obligations to protect academic freedom and institutional autonomy, despite longstanding opportunities to do so. Yet the University's obligations to CIGI under the York-CIGI Agreement are subject clearly to binding arbitration. This undermines all of the assurances that CIGI's rights in the York-CIGI Agreement have been modified or limited effectively.

**2: CIGI retains alarming rights.** Even if they contained an enforcement mechanism, York's protocols leave intact CIGI's rights relating, for example, to appointment, renewal, and termination of faculty and to individual research plans. Language to the contrary in York's protocols is imprecise and unreliable.

**3: The governing documents give CIGI, the central University Administration, and an external Panel unprecedented influence over faculty recruitment.** This is a striking variation from what was understood to have been agreed at Osgoode in the Fall 2011.

**4: York's protocols encroach on the role of Senate and Faculty Councils in academic governance.** Among other things, the collaboration will require quarterly reports to CIGI on curriculum and other programming matters. York's governing documents remove various roles and protections for Osgoode Faculty Council. They transfer various roles from Faculty Council to the central Administration (instead of Senate).

**5: CIGI retains the power to cut off funding.** The University has allowed CIGI to keep its veto over the budget of the academic program, despite a clear proposal to remove this power. CIGI's discretion to cut off all funding under the Agreement is the main source of CIGI's leverage over the University as a whole.

**6: There is no role for any independent party in dispute settlement.** CIGI and the University have not allowed any meaningful role for any independent party in dispute settlement

processes. This is troubling because arbitrations under the CIGI-York Agreement could affect academic freedom or institutional autonomy significantly. CIGI and the University have rejected even the mild statement in the Osgoode protocol that faculty and Faculty Councils have rights and interests protected under the Agreement and protocol.

**7: The initiative is based on a stunted definition of academic freedom.** York's protocols have clipped the definition of academic freedom in the Osgoode protocol, which was based on the statement of principle in Article 10 of the YUFA Collective Agreement. This makes little sense unless CIGI intends to influence the teaching and service activities of faculty.

**8: CIGI and York are not precluded from striking secret deals.** York's protocols remain open to being amended confidentially by CIGI and York and are unacceptably vague about making relevant documents public. This is very troubling in light of clearly-worded provisions in the Osgoode protocol to preclude secret deals and ensure transparency.

**9: Virtually all commitments made to the Osgoode community have been removed.** A wide range of commitments to the Osgoode community during the Fall 2011 have been removed. We see this either as punishment against Osgoode or as evidence that the previous assurances were unreliable.

**10: The process employed by York taints the initiative.** The initiative and any implementation of it has been tainted irreparably by the process followed by the University Administration in the past three months, if not longer.

We were supporters of the York-CIGI initiative at Osgoode from September 2011 until January 2012. Based on what we have learned from our unique access to various processes, we have changed our minds and are now firmly opposed to any collaboration with CIGI.

**We believe that the proposed collaboration is a grave threat to academic freedom and institutional autonomy.** The threat is not removed by the University's new protocols and governance framework. If anything, it is exacerbated by them due to their potential to lull others into a false sense of security. If the initiative proceeds, we think the collaboration will do serious damage to the reputation of Osgoode and York University.

**York and CIGI have had nine months to address the problems in the York-CIGI Agreement of August 2011.** They clearly have failed to do so. Only last Thursday, York presented Faculty Council with a further draft governance framework that repeats problems and intensifies serious concerns arising from York's new protocols of February and March 2012. Most of the commitments to Faculty Council since the discussion of the proposed collaboration began last September have been withdrawn or proven unreliable.

**The process to consider the initiative has taken a huge toll on Osgoode's governance processes.** Faculty Council has allocated time to the CIGI initiative at all of its meetings since September. This has delayed important business and placed significant pressures on colleagues, students, and Osgoode as an institution.

Speaking personally, we have invested hundreds of hours of time trying to make the initiative work. We sought to do what the University should have done from the beginning: devise documents and an

institutional framework that protected the fundamental values on which the University's academic enterprise is based.

**With considerable regret, we ask colleagues to accept that Osgoode's efforts to make this work have not borne fruit.** We think it right to conclude that they never will, and to put aside further consideration of the proposed CIGI collaboration.

### Introduction

We were open supporters of the York-CIGI initiative at Osgoode from September 2011 until January 2012. This support was based on assurances that CIGI and the University were committed to protecting academic freedom and institutional autonomy. We saw the formalization of these assurances as essential to reassure colleagues who work in areas that might be of interest to CIGI or Mr. Balsillie and to preserve Osgoode's scholarly reputation. We were sincere about making the initiative work and contributed hundreds of hours of voluntary time to study the York-CIGI Agreement and develop the Osgoode protocol to protect academic freedom and institutional autonomy.

The Osgoode protocol was adopted by Faculty Council on November 28, 2011, as a condition of its approval of the initiative. We then served as coordinators and spokespersons of the Faculty Council panel that was tasked, from November 28, 2011 to February 6, 2012, with discussing with CIGI and York the Osgoode protocol to provide a floor of protections of academic freedom and institutional autonomy. This protocol was developed in November 2011 by ourselves and other Osgoode colleagues, most of whom work in research areas affected by the initiative, with input from the student representative on the Faculty Council panel.

**From what we have learned from our unique access to various processes, we are now firmly opposed to any collaboration with CIGI.** We are convinced that the initiative poses grave concerns on various levels. These concerns go to our scholarly reputation and thus to the core of Osgoode's role as an academic institution and as a public forum for independent research and debate. They are not addressed by the governing documents which York now presents, after months of to and fro, as the basis for Osgoode Faculty Council to endorse the initiative.

It has been suggested that rejecting this initiative could damage York's reputation and its ability to attract funding. On the contrary, we think that rejecting this initiative will provide a well-documented basis for York, other universities, governments, and potential benefactors to identify and understand the conditions on which partnerships with private donors can succeed and generate lasting benefits. It will also protect Osgoode and the University from potentially-serious damage to their reputations as academic institutions.

We have prepared this analysis to assist colleagues in reviewing the complex documentation that surrounds the York-CIGI initiative. The University Administration has not provided a serious analysis of the documentation, especially the many variations from the Osgoode protocol of November 28, 2011. We urge colleagues who may still consider supporting the proposed collaboration in spite of our analysis to carry out their own careful review of the full record before doing so.

In particular, the aim of our analysis is to highlight – for those not familiar with the intricacies of the massive CIGI-related record – some of the most glaring problems with the package of **governing documents** presented by York. These consist of:

- the York-CIGI Agreement signed in August 2011 (**York-CIGI Agreement – AA**);
- the February protocol on academic freedom (**AFP**);
- the March protocol on faculty recruitment (**FRP**);
- York’s draft governance framework as included in the Osgoode Faculty Council materials distributed on March 29, 2012 (**draft governance framework - DGF**); and
- York’s draft “binding academic freedom enforcement mechanism,” as included in the same Faculty Council materials (**purported enforcement mechanism – EM**).

For purposes of comparison, we also examined the protocol developed at Osgoode and adopted by Faculty Council as a condition of its approval of the initiative on November 28, 2011, but not signed by CIGI and York (**Osgoode protocol – OP**); a revised version of the Osgoode protocol that was reported to Faculty Council by the Faculty Council panel on January 9, 2012; and the panel’s reports January 6, January 18, and February 2, 2012.

We have carried out the analysis in a personal capacity, relying on the latest terms of the proposed initiative, as provided to Faculty Council. We have not had time to produce a comprehensive analysis due to the inadequate notice of the documents and because some documents are in draft form or, potentially, not yet disclosed. It is quite possible that we have not identified all problems and risks associated with the current terms.

#### Detailed analysis

We think that most or all problems outlined below should be treated as deal-breakers.

1. **CIGI and the University have not included any mechanism to enforce CIGI’s obligations to protect academic freedom and respect institutional autonomy.** This is despite numerous opportunities to do so at Osgoode. In contrast, the University’s obligations under the York-CIGI Agreement are subject to binding arbitration. This undermines all of the assurances that CIGI’s rights in the York-CIGI Agreement have been modified or limited effectively.

The Osgoode protocol incorporated the arbitration mechanism in the York-CIGI Agreement (**OP s. 34**). This made CIGI’s obligations enforceable directly by the University, based on binding arbitration, in the unfortunate event that CIGI was thought to have breached the protocol. Further, the protocol required York to extend to Osgoode faculty substantive and procedural protections equivalent to those enjoyed by other York faculty (**OP s. 9**). It also recognized that Faculty Council and faculty members had rights and interests in relation to dispute settlement (**OP s. 34**).

When York balked at these provisions, the Osgoode Faculty Council panel floated alternatives in an extended effort to reach agreement. The panel’s least-preferred option entailed direct enforcement between York and CIGI, based on either court or arbitration proceedings, combined with an indirect enforcement mechanism for faculty in the form of the extension of the YUFA-York arbitration mechanism (Article 9 of the YUFA-York Collective Agreement) to Osgoode faculty.

In stark contrast, York’s governing documents contain no mechanism whatsoever by which to enforce CIGI’s obligations on academic freedom and institutional autonomy. Thus, these obligations cannot be enforced directly (by York) or indirectly (by affected faculty or others).

Instead, each of York's protocols states that it is "enforceable in accordance with its terms" (**AFP s. 9; FRP s. 12**). This is an ambiguous and likely meaningless statement, because the protocols contain no terms outlining any enforcement mechanism.

**York's protocols are carefully-lawyered to give the impression of enforceability, where probably there is none.** We draw from this the conclusion that CIGI is not willing to subject its commitments to protect academic freedom and institutional autonomy to a meaningful enforcement mechanism.

Notably, a purported "binding academic freedom enforcement mechanism" circulated by the University on March 29, 2012 is in fact not an enforcement mechanism. It is an agreement by the University to agree with OHFA to a mechanism that, on its face, is deeply flawed. Among other things, the mechanism has no ultimate appointing authority in the event that the OHFA and York arbitrators fail to agree on who to appoint as chair. This allows either side to preclude a panel being constituted in the event of a dispute.

Further, the "agreement to agree" contains no backstop under which a default enforcement mechanism (for example, the YUFA Article 9 arbitration mechanism) would take effect if York and OHFA fail to reach agreement within a certain time. This allows York to block the establishment of an enforcement mechanism simply by delay, which it has already demonstrated its preparedness to do on this very issue.

In short, the enforcement proposal is unreliable. Notably, the University released it only when the deadline for Faculty Council materials was upon them, without proper notice to or consultation with OHFA itself. The mechanism appears to be a public-relations device and the circumstances of its release undermine the credibility of the University's assurances in general.

2. **CIGI retains alarming rights.** Even if York's protocols had an enforcement mechanism, they leave intact CIGI's rights relating, for example, to appointment, renewal, and termination of faculty and to individual research plans.

A fundamental problem with the York-CIGI Agreement is that it gives the York-CIGI Steering Committee – on which CIGI has two of four voting members and all decisions require unanimity – powers in the development of research areas for each Chair; in making recommendations to the University regarding the appointment, renewal, and termination of Chair candidates; and in establishing faculty research plans (**AA s. 3(a)**).

The Osgoode protocol removed these powers expressly (**OP s. 32**):

"To avoid any perception that a donor could exercise improper influence over matters of academic freedom and integrity, the following clauses of the Agreement are of no force and effect to the extent that they conflict with or otherwise limit any provision of this protocol: clauses 3(a)(i) and 3(a)(ii) [concerning research agendas of individual faculty] and clauses 3(a)(iii) and 6(a) [concerning appointment, renewal, and termination of faculty]."

In the Faculty Council panel's discussions with York, this clause was enhanced by adding other items to the list of provisions in the York-CIGI Agreement that were of no force and effect.<sup>1</sup> York never proposed to remove or limit this clause.

The clause is now omitted from the University's governing documents. Instead, those documents contain general commitments that purport to limit the role of CIGI and the funder. These commitments are not subject to any enforcement mechanism, as discussed under item 1 of this analysis. Even if they were subject to enforcement, we think them unreliable.

For example, the draft governance framework says that the University has "exclusive jurisdiction" over academic priority-setting; faculty recruitment and appointment; renewal, tenure, promotion, or termination of faculty; and so on (**DGF s. 6**). However, this general language appears not to conflict with any of the specific roles given to CIGI in the York-CIGI Agreement. Nor does it conflict with specific legal obligations of York to give effect to these roles. Put differently, the University can maintain its exclusive jurisdiction so long as the ultimate process for giving effect to CIGI's role rests with University officials. In this way, CIGI retains its ability to participate in University decisions about core academic affairs. In turn, the University must still consider CIGI recommendations and consult with CIGI on these matters, with a reasonable presumption that the University will in some cases give effect to CIGI's views and preferences on each topic (**AA s. 3(a)(iii), 6(c)(i) and 25**).

For these reasons, even if there was an enforcement mechanism in York's governing documents, the language purporting to remove CIGI's rights is open to doubt. Given that precise language was included in the Osgoode protocol to remove these powers, the absence of such language must be a deliberate choice.

**3. The governing documents give CIGI, the central University Administration, and an external Panel unprecedented influence over faculty recruitment.** This is a striking variation from what was understood to have been agreed at Osgoode in the Fall 2011.

The autonomy of the University depends on its control of faculty recruitment and appointment processes.

Since being withdrawn from Osgoode, the York-CIGI deal contemplates a two-stage process. Stage 1 involves the allocation of Chairs among York's Faculties. Stage 2 involves recruitment of individual faculty members to hold the Chairs.

Incidentally, under the York-CIGI Agreement, the majority of the funding is public funding. On this, York's recruitment process applies not just to the Chairs funded by CIGI, but also to those funded by the Government and to the two Chairs funded by the University (**FRP s. 5**).

This arrangement compromises institutional autonomy in three ways.

**First, it gives unprecedented influence to a private benefactor in creating and allocating Chairs and in recruiting faculty.**

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<sup>1</sup> In particular, s. 6(c) and 22 [concerning appointment, renewal, and termination of faculty] and s. 3(a)(v) were added to the list.

In Stage 1, CIGI has an effective veto over the creation and institutional allocation of each Chair. This is because the Steering Committee must reach consensus on which Proposals, recommended by the University Review Committee, should proceed (**FRP s. 6, AGF s. 15**).

CIGI also has inappropriate influence in Stage 2, notwithstanding the draft governance framework's statement that "CIGI shall not have any decision-making role in the appointment or renewal of Chairs" (**AGF s. 17**). For example:

- The candidates selected by the Faculties will be recommended to the Executive Director of CIGI for appointment as Chairs, implying that he or she has the authority to make such appointments (**FRP s. 11**).
- The Steering Committee (on which CIGI has half the votes) may submit names of potential candidates for Faculties to consider (**FRP s. 8**).
- The Steering Committee may be consulted on the composition of the Expert Panel that approves recruitment shortlists (**AGF s. 20**).
- The draft governance framework says that the Expert Panel approves shortlists (**AGF s. 20**). This contradicts the faculty recruitment protocol, under which the Steering Committee approves shortlists (**FRP s. 10**).
- The draft governance framework says that the University Review Committee establishes the Expert Panel (**AGF s. 20**). This contradicts the faculty recruitment protocol, under which the Steering Committee establishes the Expert Panel if it is unable to agree on a shortlist (**FRP s. 10**). Since the governance framework is not binding, CIGI can, if it wishes, insist on the Steering Committee's powers as set out in the Agreement and protocols.
- The governing documents do not remove the Steering Committee's advisory role in relation to appointment, renewal, and termination of faculty members, or the University's legal obligation to consider such advice, as outlined in item 2 of this analysis.

All of this would have been precluded by the Osgoode protocol. It provided explicitly that CIGI's role in faculty recruitment would be limited to providing suggestions of potential recruitment candidates, and that CIGI would play no role whatsoever in renewal of faculty appointments (**OP s. 7 and 8**).

These provisions were understood as accepted by the University when the initiative was withdrawn from Osgoode.

**Second, this arrangement gives the Provost unprecedented power over processes and decisions that are properly matters for Faculty Councils.**

In Stage 1, the Provost sets the criteria for assessing Proposals (**AGF s. 12**). This is a function normally exercised by the recruiting Faculty itself, subject to University approval.

Also, the composition of the University Review Committee is weighted heavily in favour of the central Administration, consisting of three senior administrators and at least three senior scholars, the latter presumably selected by the Provost (**FRP s. 5, AGF s. 14**).

In Stage 2, there is no guarantee that the recruiting Faculty will have any representation on the University Review Committee, which establishes the Expert Panel that approves shortlists of candidates.

None of these departures from the normal faculty recruitment and appointment processes were contemplated in the Osgoode context. Faculty Council's authority to decide the description of each Chair and to recruit Chair holders was preserved, without any added role for the central Administration.

**Third, the arrangement gives an external Expert Panel unprecedented authority to approve faculty recruitment shortlists.**

The draft governance framework gives external peer reviewers an influence over faculty recruitment that is not found in any of the major programs on which the Expert Panel process is purportedly modelled. These programs include Canada Research Chairs, Canada Excellence Research Chairs, and Ontario Research Chairs.

Under those programs, an external review body reviews and evaluates the specific nominee put forward by the university. This takes place after the university has conducted a search, chosen a shortlist, interviewed the shortlisted candidates, and selected a candidate for the position.

In contrast, under the York-CIGI deal, the Expert Panel evaluates and approves the entire shortlist of candidates (**AGF s. 20**). Thus, it exercises a critical function that is reserved to the recruiting university in the CRC, CERC and ORC programs.

In the process contemplated at Osgoode, which was understood as accepted by the University when it withdrew the initiative, the shortlist chosen by the Faculty was subject to a very narrow external review. This review was limited to the question of whether the candidates' expertise "fit" with one of the initiative's three broad subject areas. This was understood to be responsive to the only concern that had been voiced by CIGI about faculty recruitment at Osgoode, namely that the University might appoint someone whose expertise did not fall within the initiative's broad target areas.

The Expert Panel process in York's governing documents is an undue interference in the recruitment process and an unjustified departure from the CRC-CERC-ORC model. That model leaves the entire faculty recruitment process (including shortlisting) to the University's internal procedures. It evaluates only the final output of that process, in the form of a review of the individual nominee.

Finally, the fact that the draft governance framework says that York may elect not to proceed with a shortlist that is approved by the Expert Panel and may undertake a fresh search (**AGF s. 21**) is not a solution. This is because the new search would be subject to the same process, such that the Expert Panel would have to approve the new shortlist.

4. **York's governing documents take away various roles and protections for our collegial governance processes.** Some of these roles and protections are removed outright; others are transferred from Osgoode Faculty Council to the central Administration.

The Osgoode protocol sought to identify and protect the role of Senate and Faculty Councils in various ways, as outlined in more detail below.

In the University's governing documents, all of these provisions have been removed or transferred elsewhere. Where they have been transferred from Osgoode Faculty Council, they have been given not to Senate but to the Provost or to Senate processes in which the Provost acts as the gatekeeper. **York's**



**governance documents thus mark a significant transfer of power over academic policy and programming to the central University Administration.**

The York-CIGI Agreement places obligations on the University that extend to responsibilities of Senate and Faculty Councils for academic policy and programming (e.g. **AA s. 3(a) and 6**). For example, the University must consult with and report to CIGI “no less than quarterly” on all aspects of Chairs, on curriculum, and on other programming issues (**AA s. 25**). These matters clearly engage the decision-making roles of Senate and Faculty Councils.

Yet the York-CIGI Agreement does not recognize any express role for Senate or Faculty Councils. With respect to academic governance, it states only (**AA s. 24**):

“For greater certainty, in the event that any aspect of the Program requires approval by governing bodies within the University, the University undertakes to make best efforts to secure such approvals”.

The Osgoode protocol sought to protect and specify the role of Senate and Faculty Councils. York’s governing documents have removed these protections and transferred a wide range of responsibilities to the central Administration.

**First, in York’s governing documents, the duty to report to CIGI on curriculum and academic programming is reinvigorated.**

As mentioned, the York-CIGI Agreement includes a duty to consult and report regularly to CIGI on curriculum and programming issues (**AA s. 25**). This duty presumably extends in some way to Senate and Faculty Councils.

To preserve Faculty Council from this reporting requirement in academic affairs, the Osgoode protocol explicitly removed clause 25 of the York-CIGI Agreement (**OP s. 7**).

York’s governing documents have removed this specific exclusion and reinvigorated the duty to consult and report.

This is presumably a deliberate choice to impose on Senate and Faculty Councils an apparently unprecedented consultation and reporting relationship with an external funder. What is the purpose of the quarterly reports to CIGI on curriculum and other programming issues? What input is CIGI to have in these matters? What is Senate or Faculty Council’s role in the consultation and reporting process?

**Second, the role of Faculty Council or Senate in the collegial governance of the initiative has been withdrawn.**

The York-CIGI Agreement makes no reference to Faculty Council in governing academic matters that arise from the initiative.

The Osgoode protocol would have established a body, fully accountable to Faculty Council, for the collegial governance of the initiative (**OP s. 17**). The governance body was to be a new or existing committee of Faculty Council. It was to consist of faculty whose research fell both within and outside the subject areas of the initiative. Its roles included:

- to receive reports from the Executive Director of the program on research, teaching, and other scholarly activities (**OP s. 19**).
- to receive documentation exchanged between the Steering Committee and the Executive Director (**OP s. 20**).
- to develop procedures, with wide flexibility, for disbursing set amounts of funding for educational opportunities and research at Osgoode (**OP s. 24**).
- to advise the Executive Director on ways to encourage collaboration and integration of the initiative into general activities at Osgoode (**OP s. 17(b)**).
- although unstated, the body was also intended to offer an academic forum for support and, if necessary, cover for the Executive Director.

In York's governing documents, all of these roles have been removed. The only express references to Senate processes in York's governing documents are extremely limited, and often controlled by the Provost as gatekeeper (**DGF s. 25 and 26**):

- APPRC will be consulted in advance by the Provost on academic policy and programming and on academic freedom issues under the initiative.
- APPRC will be consulted in advance by the Provost before amendments, as disclosed by the Provost, are made to the York-CIGI Agreement or York's protocols.
- The Steering Committee's minutes will be tabled at APPRC.
- APPRC will provide an annual report to Senate.

Thus, Senate is given virtually no express decision-making role in academic matters under the initiative. This is a stark contrast with Faculty Council's role under the Osgoode protocol.

In these respects, York's governing documents transfer power from academic governance bodies to the central Administration.

**Third, the University Administration has re-established its control over the two University members of the Steering Committee, one of which had been allocated to an academic governance body.**

Under the Osgoode protocol, Faculty Council had the right to select one of the University's two members of the Steering Committee. The other member was to be the Dean.

This role of the relevant academic governance body has been removed from York's governing documents. That is, Senate – unlike Faculty Council under the Osgoode protocol – does not have a right to select a member of the Steering Committee.

It is not clear who in the University Administration will select the University's two members of the Steering Committee.

**Fourth, Faculty Council no longer has the right to approve the protocol or related agreements, or to be notified of a dispute between York and CIGI under the York-CIGI Agreement.**

The Osgoode protocol required CIGI and the University, on receipt of notice of a dispute under the York-CIGI Agreement, to give a copy of the notice to the Dean, who had to provide it to Faculty Council (**OP s.**

**30).** This right is removed from York's governing documents. Neither Senate nor any affected Faculty Council has this right.

The Osgoode protocol required Faculty Council approval before the protocol could take effect (**OP s. 34**). It also required approval of subsequent agreements relating to the protocol by a super-majority of Faculty Council (**OP s. 34**). In York's governing documents, neither Senate nor any affected Faculty Council has any of these rights.

Other aspects of Faculty Council's role in the Osgoode context – including its protection from secret amendments of the protocol and its role in faculty recruitment – are discussed in items 3 and 8 of this analysis.

5. **The University has allowed CIGI to retain its veto over the budget of the academic program, despite a clear proposal to remove it.** This gives CIGI the discretion, on an annual basis, to cut off all funding under the Agreement. It is the main source of CIGI's leverage over the University as a whole.

The main source of leverage of CIGI over the initiative is its power to cut off quarterly funding (**AA s. 9**). Obviously, this provides a means to influence the University, once the University is reliant on CIGI-controlled funds. CIGI has this power not for Mr. Balsillie's funds but also for public funds.

There are various grounds for CIGI to cut off funding under the York-CIGI Agreement. First, CIGI can cease funding by alleging a "material breach" and triggering the dispute settlement process (**AA s. 26**). In the dispute resolution process, it is doubtful that York could rely on its protocols or governance framework to protect itself. This is because they omit reference to any dispute settlement process, including the Agreement's arbitration mechanism, as discussed under item 1 of this analysis.

More importantly, CIGI can cease all funding simply by blocking the annual budget of the academic program. If the budget is not approved by a unanimous vote of the Steering Committee – where CIGI has two of four votes – then CIGI has a basis for cutting off any further funding (**AA s. 9**).

At Osgoode this power was sometimes described as the "IMF clause" because it gives CIGI a power over Osgoode and York analogous to that by which the International Monetary Fund (IMF) influences government policy in developing countries, through conditional loans.

In early-December 2011, during the Faculty Council panel's discussions, Dean Sossin expressed the view that the Steering Committee's unanimity requirement applied only to decisions to block the budget, not to decisions to approve the budget. The panel objected to this interpretation and, to resolve the issue, proposed to add this provision to the protocol (**OP s. 19**):

"For greater certainty, any decision by the Steering Committee not to approve the annual budget shall require the unanimous approval of the member of the Steering Committee.... 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."

York's governing documents omit this clause. In doing so, they confirm very clearly CIGI's power to cut off funds by declining to approve the budget, without even an express requirement for CIGI to give reasons before doing so.

The retention of this power is central to CIGI's leverage over research agendas and other academic activities of anyone working on the initiative and, potentially, of others at the University.

6. **CIGI and the University have not allowed any role for parties that are independent of them, such as a Faculty Council or Faculty Association, in any enforcement process.** They have declined to include even a mild statement from the Osgoode protocol that faculty and Faculty Councils have rights and interests that are protected under the Agreement and the protocol.

The parties to the August Agreement are CIGI and York University. The Osgoode protocol added a modest recognition of other actors with affected interests. For example (**OP s. 34**):

“Faculty Council and faculty are recognized as parties with rights or interests related to the initiative that are protected by this protocol...”

In the panel's discussions, the Dean sought from an early stage to remove this statement. This led to a discussion of dispute resolution and enforcement, and the need to ensure some role for other actors in dealings or in any disputes between CIGI and the University.

At the Dean's invitation, the panel canvassed options by which an independent actor, such as OHFA, could play a role in dispute settlement. One concern of the panel was that CIGI and York, in a dispute over academic freedom, could appoint an arbitrator who did not have the confidence of faculty or Faculty Council. To address this, it was suggested, among other things, that CIGI and York should agree to allow OHFA a role in the appointment of York's arbitrator where a dispute related to academic freedom.

All of the panel's proposals to recognize interests of faculty and Faculty Council were rejected, presumably, when the initiative was pulled from Osgoode in January. None of these proposals are found in any of York's new governing documents. In some respects, this is not surprising, given that none of the protocols have an enforcement mechanism. On the other hand, some of the proposals at Osgoode would have given faculty interests some protection in arbitrations under the York-CIGI Agreement itself. All are now gone.

Notably, the purported “binding... enforcement mechanism” with OHFA, publicized by the University on March 29, 2012, is highly problematic. As discussed under item 1 of this analysis, it is really only an agreement to agree. It clearly does not provide “equivalent substantive and procedural protections of academic freedom to those enjoyed by other York University faculty” as proposed in the Osgoode protocol (**OP s. 9**). Both this statement and the mild recognition of faculty interests found in the Osgoode protocol are absent from any of the documents now relied on by the University.

The only review role that is contemplated in York's governing documents for any body other than CIGI and York is outlined in the draft governance framework. It contemplates a very limited role for Senate APPRC to be consulted by the Provost on various matters (**AGF s. 25**). This is far from any kind of independent enforcement mechanism for commitments of CIGI and the University on academic freedom and institutional autonomy.

7. **The initiative is based on a stunted definition of academic freedom.** York's protocols have clipped the definition of academic freedom in the Osgoode protocol, which was based on the

statement of principle in Article 10 of the YUFA Collective Agreement. This makes little sense unless CIGI intends to direct the teaching and service activities of faculty.

York's protocols have trimmed the definition of academic freedom in the Osgoode protocol. This definition was drawn from Article 10 of the YUFA-York Collective Agreement and supplemented by amendments proposed by an Osgoode professor with expertise in academic freedom at Faculty Council on November 28, 2011. There was never any suggestion of changing this language in the Faculty Council panel's discussions with the Dean.

York's protocols do not contain any definition of academic freedom, and the York-CIGI Agreement itself does not even mention academic freedom.

York's draft governance document includes a definition of academic freedom (**AGF s. 9**), but it omits important elements of the definition in the Osgoode protocol, including:

- The freedom to "examine, question, teach, and learn", not just to conduct research.
- Teaching, service, and professional activities, not just research activities.
- A statement that academic freedom is a general right that is not limited to a faculty member's specific areas of expertise.

These are strange omissions, especially in a document that has no enforcement mechanism, unless CIGI wishes to have influence over how colleagues teach and engage in community and public service, for example.

8. **CIGI and York are not precluded from striking secret deals.** York's protocols remain open to being amended confidentially by CIGI and York and are vague about making the relevant documents public. This is very troubling in light of clearly-worded provisions in the Osgoode protocol to preclude confidential agreements and ensure transparency.

Openness and transparency are essential to institutional autonomy, academic freedom, and the integrity of University governance. All the initiative's governing documents should be publicly available, and CIGI and York should be precluded from secretly amending the initiative.

York's governing documents do not provide such assurances.

The Osgoode protocol, on the other hand, precluded CIGI and York from entering into secret agreements. It stated (**OP s. 29**):

"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."

No concerns were raised about this clause in the panel's discussions with York. The clause was understood to be accepted by CIGI and the University at the time the initiative was withdrawn from Osgoode in January 2012.

York's governing documents omit this explicit language requiring public disclosure, and precluding secret deals. Worse, the new protocols say expressly that CIGI and the University have the right to augment the protocols (**AFP s. 8**).

The only mention of openness in the governing documents is in the draft governance framework, which says (**DGF s. 24**):

“The initiative will be implemented and administered in accordance with principles of transparency and accountability.”

This is a vague statement that shifts discretion to CIGI and the University Administration to decide what protocols and other instruments should be kept from the wider University community and the public.

Notably, York's draft governance framework requires the Provost to consult the APPRC in advance about proposed amendments to the York-CIGI Agreement, the two protocols, or other binding agreements between York and CIGI (**DGF s. 25**). It also says that the governance framework can only be amended by Senate under certain circumstances (**DGF s. 5**) (it is ambiguous whether this means that only Senate can make the amendments, or that simply that Senate is limited in its ability to make amendments while CIGI and the University Administration are not). This applies only to the governance framework itself, not to the Agreement or protocols.

These provisions are highly problematic, because:

- They do not include a clear requirement that all agreements and amendments will be made public, or a provision precluding secret deals.
- They do not require matters considered by APPRC, possibly *in camera*, to be communicated to or approved by Senate.
- They apply only to “binding” agreements between CIGI and York, not to informal and non-binding arrangements.

Incidentally, the draft governance framework is not yet binding on CIGI and does not modify the rights and obligations in the York-CIGI Agreement or protocols. As a result, it does not preclude York and CIGI from entering into new agreements and keeping them confidential from APPRC, if they so agree.

Indeed, this possibility has been left open, presumably deliberately. Language in the Osgoode protocol to deny legal effect to secret agreements has been removed. Thus, there is no way for Senate or APPRC to hold CIGI and the University to this commitment, if they fail to share confidential agreements with APPRC.

The governing documents appear to have been carefully-crafted to remove clear checks against secret agreements, while allowing the parties to claim fidelity to transparency and accountability.

9. **Numerous commitments made to the Osgoode community have been withdrawn.** A wide range of commitments to the Osgoode community during the Fall 2011 have been removed. Many still appear relevant to the University-level initiative, such as in the case of the graduate

program and the library. We see this either as punishment against Osgoode or as evidence that the previous assurances were unreliable.

The Osgoode protocol sought to protect faculty, student, and staff interests. Among other things, it incorporated the wide-ranging commitments made by the Dean during Fall meetings of Faculty Council (Osgoode protocol s. 28). These included commitments related to the graduate program, the library, contingent liability, and the protection of student interests, for example.

None of these commitments appear in York's governing documents. Moreover, a range of related clauses have been removed. For example, this statement from the Osgoode Protocol (**OP s. 25**) on the disbursement of funds is gone:

"It is understood that other funds beyond those referred to in clauses 22 and 23 of this protocol and otherwise associated with the initiative will flow to the benefit of students and faculty at Osgoode Hall Law School for research and teaching purposes."

Likewise, two provisions that were added on the recommendation of students are gone: one stating that the initiative should "enhance access to learning and educational opportunities for Osgoode students without increasing the tuition costs of students" (**OP s. 5** [terms of reference, as reported to Faculty Council on January 9, 2012]), the other a non-binding commitment by the University to the student body (**OP** [proposed side letter reported by Faculty Council on January 9, 2012]):

"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 exclusion of these provisions from York's governing documents highlights just how much was withdrawn from Osgoode, but also from academic programs more broadly, when the initiative was pulled from Osgoode in January 2012.

**10. The initiative and any implementation of it has been tainted irreparably by the process followed by the University Administration in the past three months, if not longer.**

The process for considering this initiative has been extremely disappointing. This has tainted the prospect of implementation and has presumably demoralized many of those who were willing to pursue a collaboration with CIGI.

**In the first place, the York-CIGI Agreement was signed without prior consultation with Faculty Council.** This was a serious omission because the Agreement involves matters that fall within the jurisdiction of Senate and Faculty Council and because it was a great concession of academic freedom and institutional autonomy to a private donor. To this day, it is unclear on what basis and by whom the Agreement was negotiated, and indeed how the idea of a York-CIGI collaboration arose. For example, did CIGI approach York or did York approach CIGI, and with what expectations on each side?

**Second, consistent with the lack of notice of the York-CIGI Agreement, over months of discussions York has repeatedly circulated documents with grossly insufficient notice for proper study.** For example, the draft governance framework and a memorandum on the purported enforcement mechanism were released only on March 29, 2012. This pattern changed only when Faculty Council

adopted its own process in late November. The University then pulled the plug on that process in January. Since then, we have returned to the previous process, but worse. Faculty Council is no longer asked to approve the initiative, as it was in Fall 2011. Now it is being asked to express its openness to participating in the initiative, based on a draft governance framework that is subject to amendment by CIGI, the Administration, and/ or Senate once it has been endorsed by Faculty Council. This process does not provide a sound basis for proceeding with the initiative, with broad support.

**Third, the University has never explained why it withdrew the initiative from Osgoode, except to make dubious statements that the initiative stalled due to opposition from Osgoode faculty.** In fact, the initiative stalled at Osgoode because York and CIGI failed to sign the protocol that Osgoode Faculty Council endorsed overwhelmingly as a condition of its approval for the initiative.

When York pulled the plug on Osgoode, the Faculty Council panel was still willing to continue discussions. Indeed it was waiting for responses to issues that it had raised. It is unreasonable now for York to return to Faculty Council, having not explained its decision to withdraw the initiative in January. There are also outstanding questions about how the York-CIGI Agreement, and elements of the initiative (such as the role of the graduate program and library) that were discussed at Osgoode in the Fall 2011, will be adapted to a University-wide setting.

**Fourth, the Administration has not presented a detailed analysis of the differences between York's governing documents and the Osgoode protocol.** If the former are based on the latter, as the University has claimed, then Faculty Council is entitled to a clear account of how they compare, along with an explicit rationale for all deviations from the Osgoode protocol. The fact that this has not been provided symbolizes the wider disrespect for Faculty Council processes.

**Fifth, the governing documents do not address the issues which led the Faculty Council panel to conclude that CIGI and the University were not prepared to commit to the floor of protections, as required by Faculty Council.** These issues are detailed at length in the panel's reports. The Administration has never replied to them. Yet the Administration is now – after causing a delay of three months – returning to Osgoode with far less than what was on the table when it withdrew the initiative in January, or indeed when Faculty Council approved the initiative conditionally on November 28.

As discussed under item 9 of this analysis, virtually all commitments made to Faculty Council in response to concerns that were raised at Osgoode, including many that remain pertinent at the University-level, have been removed. We see this either as a punishment directed at Osgoode or as an indication that the assurances were unreliable.

\* \* \*

In conclusion, we think that the initiative poses a grave threat at various levels. The threat is not addressed by the governing documents that York has presented, after many months of to and fro, as the basis for Faculty Council and Senate to endorse the initiative. The threat goes to our scholarly reputation and thus to the core of Osgoode's role as an academic institution.

It is possible that we have not identified all problems and risks associated with the proposed York-CIGI collaboration, due to inadequate notice and the fact that some documents are in draft form or not yet disclosed. Even so, the problems and risks that we have identified constitute grave threats to academic



freedom and institutional autonomy and, in our view, it is no longer realistic to expect them to be addressed.

Supporters of the initiative may say that York's governing documents are a work-in-progress that will be finalized in coming months. However, York and CIGI have now had nine months to correct their mistakes in the original York-CIGI Agreement. It has been apparent since November 2011 what Osgoode Faculty Council considered the minimum floor of protections for academic freedom and institutional autonomy. Despite this, York and CIGI signed protocols in February and March that fall well below this floor. York has now presented Faculty Council with a draft governance framework that repeats problems and intensifies concerns arising from the new protocols. The target has been moved repeatedly since October 2011 in a repeated pattern of verbal assurances followed by limited notice and consultation on written documents which, on close study, have proven seriously inadequate. We suggest that Faculty Council should judge the initiative and base its decision on the documents as they stand, accepting that they are extremely unlikely to receive the required corrections.

We remind readers that we supported the CIGI initiative at Osgoode for months. We invested hundreds of hours of time, together with other colleagues and students, to do what the University should have done from the start: devise documents and institutional processes that protected the fundamental values on which the University's academic enterprise is based. These efforts have not borne fruit. It is reasonable to conclude that they never will. It is time for Osgoode to move on by ending, respectfully, this proposed collaboration.

It has been an honour to have participated in processes to support the decision-making of Osgoode Faculty Council in this matter.