Court File No./N° du dossier du greffe: CV-21-00669471-00CL

Court File No.

Electronically issued
Délivré par voie électronique : 29-Sep-2021
Toronto

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

AUDITOR GENERAL OF ONTARIO

Applicant

and

LAURENTIAN UNIVERSITY OF SUDBURY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing *(choose one of the following)*

☐ In person
☐ By telephone conference
☒ By video conference

at the following location:

[location]

(Courthouse address or telephone conference or video conference details, such as a dial-in number, access code, video link, etc. if applicable)

on a date to be determined.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date _____ Issued by _____
Local Registrar

Address of court office: Superior Court of Justice
330 University Avenue, 9th Floor
Toronto ON M5G 1R7

TO: Laurentian University of Sudbury
935 Ramsey Lake Road
Sudbury, Ontario
P3E 2C6

APPLICATION

THE APPLICANT MAKES APPLICATION FOR:

(a) a Declaration that every grant recipient is required to give the Auditor General the information and records described in subsection 10(1) of the *Auditor General Act*, R.S.O. 1990, c A. 35(as amended), including information and records that are subject to solicitor-client privilege, litigation privilege, or settlement privilege;

(b) a Declaration that the Auditor General has a right to free and unfettered access to the information and records described in subsection 10(2) of the *Auditor General Act* that are subject to solicitor-client privilege, litigation privilege or settlement privilege;

(c) the costs of this proceeding; and,

(d) such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE APPLICATION ARE:

A. MOTION BY STANDING COMMITTEE ON PUBLIC ACCOUNTS: VALUE-FOR - MONEY AUDIT OF THE OPERATIONS OF LAURENTIAN UNIVERSITY

1. The Standing Committee on Public Accounts passed a motion on April 28, 2021 requesting the Auditor General to conduct a value-for-money audit on the operations of Laurentian University of Sudbury for the period of 2010 to 2020.

2. The Auditor General of Ontario is an Officer of the Legislative Assembly of Ontario. The Office of the Auditor General is an independent, non-partisan Office of the Legislative Assembly of Ontario that serves the Members of Provincial Parliament and the people of Ontario. One of the roles of the Auditor General is to hold Public Sector and Broader Public Sector organizations (such as universities) accountable for financial responsibility and transparency.

3. The Auditor General notified the President and Vice-Chancellor of Laurentian University of Sudbury in May 2021 that the Standing Committee on Public Accounts passed a motion to request the Auditor General to conduct a value-for-money audit of Laurentian University's operations for the period of 2010 to 2020. The value-for-money audit is ongoing.

B. LAURENTIAN UNIVERSITY'S REFUSAL TO PROVIDE PRIVILEGED INFORMATION AND RECORDS TO THE AUDITOR GENERAL

4. The *Ontario Public Sector Guide for Interaction with the Office of the Auditor General of Ontario: Value-for-Money Audits* was signed by Auditor General Bonnie Lysyk and the Secretary of the Cabinet in April 2019. Appendix B to the

Guide informs auditees about the Auditor General's right of access to privileged information and records. The *Ontario Public Sector Guide for Interaction with the Office of the Auditor General of Ontario: Value-for-Money Audits* was provided by the Auditor General to the President and Vice-Chancellor of Laurentian University of Sudbury.

5. Section 10 of the *Auditor General Act* imposes a mandatory duty on a grant recipient to give information and records to the Auditor General and entitles the Auditor General to have free access to a grant recipient's information and records. The Office of the Auditor General has consistently advised Laurentian University of Sudbury employees that section 10 of the *Auditor General Act* provides the Auditor General with a right of access to privileged information and records.

6. Laurentian University of Sudbury disagrees with the Auditor General's interpretation of section 10 of the *Auditor General Act* and has consistently denied the Auditor General access to its privileged information and records.

C. LEGISLATIVE HISTORY OF SECTION 10 OF THE AUDITOR GENERAL ACT

7. The *Audit Act* was amended in 2004 by way of *Bill 18 (The Audit Statute Law Amendment Act, 2004*, SO 2004, c 17). Bill 18 received Royal Assent on November 30, 2004.

8. Bill 18 added section 9.1 of the *Auditor General Act,* authorizing the Auditor General to conduct special audits of grant recipients.

9. Bill 18 repealed section 10 of the *Audit Act*, R.S.O. 1990, c.A.35 which read:

> Every ministry of the public service, every agency of the Crown and every Crown controlled corporation shall furnish the Auditor with such information regarding its powers, duties, activities, organization, financial transactions and methods of business as the Auditor from time to time requires, and the Auditor shall be given access to all books, accounts, financial records, reports, files and all other papers, things or property belonging to or in use by the ministry, agency of the Crown or Crown controlled corporation and necessary to the performance of the duties of the Auditor under this Act.

10. Bill 18 replaced section 10 of the *Audit Act* with the following provisions regarding the duty of a grant recipient to give information to the Auditor General and the Auditor General's entitlement to have free access to a grant recipient's information and records:

> **(1)** Every ministry of the public service, every agency of the Crown, every Crown controlled corporation and every grant recipient shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act.
>
> **(2)** The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by a ministry, agency of the Crown, Crown controlled corporation or grant recipient, as the case may be, that the Auditor General believes to be necessary to perform his or her duties under this Act.
>
> **(3)** A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege.

11. Bill 18 added section 27.1 which requires the Auditor General and employees of the Office of the Auditor General to preserve the secrecy of privileged information obtained under section 10 of the *Auditor General Act*:

> **(1)** The Auditor General, the Deputy Auditor General and each person employed in the Office of the Auditor General or appointed to assist the Auditor General for a limited period of time or in respect of a particular matter shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her employment or duties under this Act.
>
> **(2)** Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate to another person any matter described in subsection (1) except as may be required in connection with the administration of this Act or any proceedings under this Act or under the *Criminal Code* (Canada).
>
> **(3)** A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.

12. On December 9, 2003, the Minister of Finance (the Honourable Greg Sorbara) introduced Bill 18's amendments to the *Audit Act* (Hansard, 38th Parl., 1st sess., No. 12A at 541) and stated:

> The amendments I am introducing today would give the Provincial Auditor the expanded power to conduct full-scope value-for-money audits of the so-called SUCH sector – that is school boards, universities, colleges and hospitals – and also all crown-controlled corporations and their related subsidiaries. These value-for-money audits will report whether money was expended with due regard to economy and efficiency and whether procedures were established to measure and report on the effectiveness of those programs. They will go a long way to ensure that the people of Ontario get the value they deserve from the money they invest in these public services. Organizations subject to this expanded mandate will be required to provide the Provincial Auditor with information and access to their books and records.

13. On April 19, 2004, Member of Provincial Parliament Mike Colle made the following statement about Bill 18 (Hansard, 38th Parl., 1st sess., No. 33 at 1548):

> …Just to give you an example of how thorough this is, for instance, the Provincial Auditor under this act will have free access to records, all books, accounts, financial records, electronic data, processing records,

> reports, files, all papers and things on property belonging to or used by a ministry, an agency of the crown, a crown-controlled corporation or grant recipient. So the auditor will have unfettered access to all papers, books and documents.

14. On May 17, 2004, Member of Parliament David Zimmer made the following statement about Bill 18 (Hansard, 38th Parl., 1st sess., No. 49 at 2311):

> Let me just briefly refer to what I think are four important sections of Bill 18, because nobody has referred to these sections. I've talked about the philosophy, what we want to do, why we want Bill 18, why we want an empowered Auditor General. I've given a list of abuses that were garnered from a reading of the last report, for 2003. Let me just turn my mind to Bill 18 for a minute or two.
>
> Section 10 is entitled "Duty to furnish information," and this is critical: "Every ministry of the public service, every agency of the Crown, every Crown controlled corporation and every grant recipient shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act." That is a powerful tool.
>
> Subsection 10(2), "Access to records," another hand-in-hand powerful tool along with the duty to finish information: "The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records ... files and all other papers, things or property belonging to or used by a ministry, agency of the Crown, Crown controlled corporation or grant recipient"—that's the transfer payments— "as the case may be," and any other information "that the Auditor General believes to be necessary to perform" his duties. Another very important tool.
>
> Section 11 is the third tool that the Auditor General has to root out this malfeasance: "The Auditor General may examine any person on oath on any matter pertinent to an audit or examination." That is a powerful tool.
>
> The last, and the overarching authority given to the auditor under Bill 18, is the authority to give an opinion on statements: "In the annual report in respect of each fiscal year, the Auditor General shall express his or her opinion as to whether the consolidated financial statements of Ontario, as reported in the Public Accounts, present fairly information in accordance with appropriate generally

> accepted accounting principles and the Auditor General shall set out"—and this is important—"any reservations he or she may have."
>
> These are powerful tools to enable the Auditor General under Bill 18 to root out financial mismanagement and to hold all of us here in this Legislature from all parties, and hold the government, accountable to the taxpayers of Ontario. That's why I am proud to support Bill 18.

15. Prior to the introduction of Bill 18, the Provincial Auditor and the Deputy Attorney General signed an *Interim Protocol on Access by the Office of the Provincial Auditor of Ontario to Privileged Documents* (dated July 25, 2003). The purpose of the Protocol was to enable the Office of the Provincial Auditor to have access to all documents subject to solicitor-client privilege, litigation privilege and settlement privilege, and to recognize the government's interest in maintaining confidentiality and preserving privilege in those documents:

> The purpose of this Protocol is to enable the OPA [Office of the Provincial Auditor] to have access to all documents subject to solicitor-client privilege, litigation privilege or settlement privilege (the "privileged documents") required by the Provincial Auditor to perform his or her duties under the *Audit Act* and to recognize the government's interest in maintaining confidentiality and preserving the privilege in those documents. The Protocol is intended to accomplish this purpose in a consistent way across government.

16. The 2003 *Handbook for Interaction with the Office of the Provincial Auditor of Ontario* (November 2003) stated that privileged documents must be provided to the Provincial Auditor:

> … [C]ertain other documents may be subject to solicitor-client, litigation or settlement privilege. Such "privileged documents" are to be provided to the OPA [Office of the Provincial Auditor] under the terms of a protocol between the OPA and the Ministry of the Attorney General (MAG) concerning access by the OPA to privileged documents. The protocol enables the OPA to have access to all documents required by the

Provincial Auditor to perform his duties under the *Audit Act* while preserving the government's privilege in those documents.

17. The Ontario Internal Audit Division's 2006 *Handbook for Interaction with the Auditor General of Ontario,* informed auditees that prior to the 2004 amendments to the *Audit Act*, the Auditor General's access to privileged documents was governed by the *Interim Protocol* of *Access by the Office of the Provincial Auditor of Ontario*:

> Prior to the amendments to the Auditor General's enabling legislation in 2004, the Auditor General's access to privileged documents (solicitor-client, litigation and settlement) was governed by a protocol between the Auditor General (previously the Provincial Auditor) and the Ministry of the Attorney General. The Protocol confirmed the Auditor General's right to access to privileged information but more importantly it confirmed that the disclosure to the Auditor General does not constitute a waiver of the privilege by the privilege holder and it stated conditions for the treatment of this information by the Auditor General.
>
> The amendment to the *Act*, (s. 10 (3)) *"A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege"* gave legal status to the privilege holder's right to maintain privilege and confirmed that disclosure to the Auditor General does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege. The amendment also clarified the Auditor General's responsibility of preserving the confidentiality of privileged information, therefore, employees of the Office of the Auditor General, (s. 27.1 (3)) *"shall not disclose any information or document disclosed to the Auditor General under section 10 that is subject to solicitor – client-privilege, litigation privilege or settlement privilege unless the person has the consent of the holder of the privilege."*
>
> Since the legal rights and responsibilities of the Auditor General with respect to these privileges have been formalized in the *Act*, the past Protocol now exists only to assist legal counsel with the processes to follow in providing this information to the Auditor General.
>
> Under this Protocol, Legal Directors are responsible for reviewing documents subject to solicitor-client privilege, litigation privilege and settlement privilege requested by the Auditor General, on a timely basis, before releasing the documents. The purpose of the review is to determine

> whether the documents are subject to solicitor-client privilege, litigation privilege or settlement privilege, to identify any privileged documents that raise special confidentiality concerns such as documents relating to ongoing litigation, and to advise the Auditor General accordingly. Generally, the Auditor General will be provided with copies of privileged documents, however, if the privileged document raises a special confidentiality concern, the Auditor General will inspect such documents on site.
>
> For the Auditor General's audits of the BPS [Broader Public Sector], the BPS entity's legal counsel should provide the necessary assistance in dealing with the Auditor General's request for information and documents subject to solicitor-client privilege, litigation privilege and settlement privilege.

D. SECTION 10 OF THE AUDITOR GENERAL ACT – DUTY TO FURNISH INFORMATION AND ACCESS TO RECORDS

18. As a grant recipient, Laurentian University of Sudbury is obligated to give the Auditor General the information the Auditor General believes is necessary to conduct the value-for-money audit of Laurentian University of Sudbury, including privileged information and records. Subsection 10(1) of the *Auditor General Act* states:

> Every ministry of the public service, every agency of the Crown, every Crown controlled corporation and every grant recipient shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act.

Pursuant to subsection 10(3) of the *Auditor General Act,* a grant recipient's disclosure to the Auditor General under subsection 10(1) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege.

19. The Auditor General has a right to free and unfettered access to all records belonging to or used by a grant recipient that the Auditor General believes to be

necessary to conduct the value-for-money audit of Laurentian University of Sudbury, including privileged information and records. Subsection 10(2) of the *Auditor General Act* states:

> The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by a ministry, agency of the Crown, Crown controlled corporation or grant recipient, as the case may be, that the Auditor General believes to be necessary to perform his or her duties under this Act.

Pursuant to subsection 10(3) of the *Auditor General Act,* a grant recipient's disclosure to the Auditor General under subsection 10(2) does not constitute a waiver of solicitor client privilege, litigation privilege or settlement privilege.

20. Laurentian University of Sudbury's interpretation of section 10 of the *Auditor General Act* is set out in an email from the President and Vice-Chancellor (Dr. Robert Haché) sent on August 4, 2021 to Assistant Auditor General Gus Chagani:

> "… the Auditor General does not have the right to access privileged information. The *Auditor General Act* allows, but does not require, an entity under audit to disclose privileged information to the Auditor General. The Act provides that, if such disclosure occurs, it is not a waiver of privilege, but, again, does not entitle the Auditor General to such disclosure. Of course, the University may choose to disclose privileged information to the Auditor General, but that decision is the University's to make."

21. Subsection 10(3) of the *Auditor General Act* begins with the words: "A disclosure to the Auditor General under subsection (1) or (2)…".

A disclosure under subsection 10(1) is mandatory and an auditee has no choice other than to make the disclosure of privileged information requested by the Auditor

General ("every grant recipient shall give the Auditor General the information…"). The disclosure required under subsection 10(1) is not voluntary or a choice that lies in the hands of Laurentian University of Sudbury.

The Auditor General is entitled under subsection 10(2) to free access to a grant recipient's books, accounts, and financial records. An auditee is accorded no right by subsection 10(2) to deny the Auditor General access to privileged information. The Auditor General's right of access to a grant recipient's information and records is unfettered.

22. Subsections 10(1) and 10(2) of the *Auditor General Act* are mandatory provisions, not discretionary provisions that confer a choice on an auditee to disclose privileged information to the Auditor General. There is no carve out for privileged information contained in the disclosures required under subsections 10(1) and 10(2) of the *Auditor General Act*. This is why subsection 10(3) protects the privileged information by providing that the disclosure of the privileged information to the Auditor General does not constitute a waiver of solicitor-client privilege, litigation privilege, or settlement privilege.

23. The disclosures mandated by subsections 10(1) and (2) of the *Auditor General Act* are further protected by the confidentiality and secrecy provisions set out in section 27.1 of the *Auditor General Act.* Section 27.1(3) of the *Auditor General Act* preserves secrecy over privileged information required to be disclosed to the Auditor General under section 10 of the *Auditor General Act*:

> A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.

24. Section 27.1(3) of the *Auditor General Act* makes it clear that the disclosures mandated by subsections 10(1) and 10(2) include documents that contain privileged information and protects the disclosure of that privileged information by imposing a duty of confidentiality and secrecy on the Auditor General and employees of the Office of the Auditor General of Ontario.

25. The refusal by Laurentian University of Sudbury to provide the Auditor General of Ontario with access to privileged information and records based on Laurentian University's interpretation of section 10 of the *Auditor General Act* necessitated this Application.

E. OTHER

26. *Auditor General Act*, RSO 1990, c. A.35 (as amended).

27. Rules 14.05(3)(d), 14.05(3)(h) and 39 of the *Rules of Civil Procedure*, RRO 1990, Reg 194.

28. It is unlikely that there will be any material facts in dispute requiring a trial.

29. Such further and other grounds as the lawyers may advise and this Honourable Court permits.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

(a) the Affidavit of Auditor General Bonnie Lysyk, sworn on September 28, 2021; and

(b) such further and other evidence as the lawyers may advise and this Honourable Court may permit.

Date: September 28, 2021

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5
Tel: 416-862-7525
Fax: 416-862-7661

Richard Dearden (19087H)
richard.dearden@gowlingwlg.com
Tel: 613-786-0135

Heather Fisher (75006L)
heather.fisher@gowlingwlg.com
Tel: 416-369-7202

Sarah Boucaud (76517I)
sarah.boucaud@gowlingwlg.com
Tel: 613-786-0049

Lawyers for the Applicant

OFFICE OF THE AUDITOR GENERAL OF ONTARIO -and- LAURENTIAN UNIVERSITY
Applicant Respondent

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GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Richard Dearden (19087H)
Richard.dearden@gowlingwlg.com
Tel: 613-786-0135
Heather Fisher (75006L)
Heather.fisher@gowlingwlg.com
Tel: 416-369-7202
Sarah Boucaud (76517I)
Sarah.boucaud@gowlingwlg.com
Tel: 613-786-0049

Lawyers for the Applicant