

**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N

IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985 c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF **LAURENTIAN UNIVERSITY OF SUDBURY**

FACTUM OF THE AUDITOR GENERAL OF ONTARIO
(Laurentian University's Motion for A Stay of Enforcement of Speakers' Warrants)

January 11, 2022

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I. FACTS

1. The Factum filed by Laurentian University is yet another example of its repeated unfounded attacks on the integrity of the Office of the Auditor General of Ontario and the Auditor General personally.
2. The Factum filed by Laurentian University attempts to confuse and obfuscate two matters. The first matter is the Auditor General's Rule 14.05 Application seeking an interpretation of section 10 of the *Auditor General Act* regarding whether there is a right of access by the Office of the Auditor General to privileged information. The second matter relates to the issuance of the Speakers' Warrants requesting Laurentian University to provide documents requested by the Standing Committee on Public Accounts to the Legislative Assembly.
3. This Factum only addresses the unfounded allegations in Laurentian University's Factum regarding the Office of the Auditor General, the Auditor General, and the Standing Committee on Public Account's special assignment requesting the Auditor General to conduct a value-for-money audit of Laurentian University.

II. SUBMISSIONS

A. THE AUDITOR GENERAL'S "UPDATE ON THE SPECIAL AUDIT OF LAURENTIAN UNIVERSITY" (DECEMBER 1, 2021)

4. Paragraph 18 of Laurentian University's Factum states:

"At 11:16 a.m. on December 1, less than one hour before the appearance began and without notice to Laurentian, the Auditor General publicly released an "Update on the Special Audit of Laurentian University." Laurentian had no opportunity to review or comment on a draft of this report before it was released, despite the Auditor General's repeated claims that she always works "cooperatively" and allows audit subjects such an opportunity.¹"

5. The Auditor General is required pursuant to subparagraph 12(2)(a) of the *Auditor General Act* to report in the Annual Report "the work of the office of the Auditor General and on whether, in carrying on the work of the office, the Auditor General received all the information and explanations required". This particular chapter was included in the Auditor General's Annual Report tabled in the Legislative Assembly on December 1, 2021 in accordance with the requirements of subparagraph 12(2)(a) of the *Auditor General Act*. Subparagraph 12(2)(a) does

¹ Emphasis added to the underlining in quotes from Laurentian University's Factum.

not require that notice be provided to an auditee such as Laurentian University and regardless, Laurentian University was well aware of the concerns of the Office of the Auditor General.

6. Further, the “Update” was not a report about the findings of the audit. When the Office of the Auditor General has completed its audit work, a draft audit report will be written and provided to Laurentian University.

B. MEETINGS OF THE PUBLIC ACCOUNTS COMMITTEE

(a) October 6, 2021

7. Paragraph 13 of Laurentian University’s Factum states:

“Despite this agreement [the Joint Memorandum dated September 27, 2021], and while her application was pending, on October 6, the Auditor General met with the Committee in camera for approximately two and a half hours. During that meeting, the Committee decided to make a list of requests for documents and information of Laurentian, expressly including privileged information. While there is apparently no transcript or recording of the meeting, the Auditor General evidently told the Committee that she was not obtaining certain documents and information, and the Committee resolved to get them for her”.

8. Firstly, the Auditor General attends meetings of the Standing Committee on Public Accounts that are regularly scheduled on Wednesdays. October 6th was a Wednesday. The Auditor General is under an obligation pursuant to section 16 of the *Auditor General Act* to attend meetings of the Committee and to report to the Committee on any matter referred to the Auditor General in respect of the Public Accounts and reports issued by the Auditor General. Given that the audit of Laurentian University is being conducted because of a formal motion passed by the Standing Committee on Public Accounts, it is incumbent on the Auditor General to bring significant concerns regarding such an audit to the Committee’s attention.

9. Secondly, counsel for the Legislative Assembly informed counsel for Laurentian University that there are never recordings made of *in camera* meetings of the Standing Committee on Public Accounts.

(b) December 8, 2021

10. Paragraph 21 of Laurentian University’s Factum states that during the December 8, 2021 meeting of the Standing Committee on Public Accounts “the Auditor General incorrectly claimed that she was only seeking documents *until, but not after*, the date of the CCAA filing (February 1, 2021).” The Auditor General agrees with paragraph 21 - the date was incorrect, which was inadvertent.

C. THE GOVERNMENT OF ONTARIO'S FUNDING OF LAURENTIAN UNIVERSITY IS PART OF THE PUBLIC ACCOUNTS

11. Paragraph 77 of Laurentian University's Factum states:

"The Speaker's warrants call for production to the Committee. The Committee's mandate, as set out in the Standing Orders of the Assembly [Standing Orders, 13(h)], is to "review and report to the House its observations, opinions and recommendations on the Report of the Auditor General and the Public Accounts." It is critically important to observe that the Committee does not perform audits itself, nor does it gather information for audits. Since universities are not included in Ontario's Public Accounts, the Committee's only relevant function in relation to Laurentian is to review and report to the House its observations *on the reports of the Auditor General*."

12. Universities are part of the Broader Public Sector and receive on average 23% of their operating revenue from the Ministry of Colleges and Universities. According to the Public Accounts of Ontario, over the last five fiscal years, Laurentian University has received on average \$85.9 million per year from the Government of Ontario (45% of its total annual revenues).²

13. While Laurentian University is not consolidated into the Public Accounts of the Province of Ontario, the funds that Laurentian University receives from the Province are part of the Public Accounts, and fall under the scrutiny and purview of the Standing Committee on Public Accounts. Given Laurentian University's insolvency, there is a clear risk related to the Province's spending (i.e. the Public Accounts).³

D. LAURENTIAN UNIVERSITY'S UNFOUNDED ALLEGATION THAT THE AUDITOR GENERAL IS EVADING COMPLIANCE WITH THE AUDITOR GENERAL ACT

14. Paragraph 83 of Laurentian University's Factum states in part:

"The Committee considers [the Auditor General's] reports but is prohibited from accessing her working papers. It would violate that statutory scheme if the Committee could use parliamentary privilege to obtain information for the Auditor General. That could allow the Auditor General access to information that ss. 10 and 11 do not allow. It would also allow the Committee access to the Auditor General's working papers."

15. Paragraph 84 of Laurentian University's Factum states in part:

² Motion Record of Laurentian University ("MR"), Tab 3(N), excerpts of 2021 Annual Report, p193, Caselines A6321/A193.

³ Responding Motion Record of the Speaker of the Legislative Assembly of Ontario ("RMR"), Hansard, April 28, 2021, Tab 1(B), p21, Caselines B-1-3207/B-1-18.

“The *Assembly* cannot employ parliamentary privilege to evade compliance, and to help the Auditor General to evade compliance, with a law passed by the Legislature to govern the auditing function, with a law passed by the Legislature to govern the auditing function”.

16. The Auditor General is in no way attempting to evade compliance with any law with the assistance of the Legislative Assembly or the Standing Committee on Public Accounts. The exercise of Parliamentary privilege engages a law that is entirely separate from any provision in the *Auditor General Act*. In addition, the Auditor General does not exercise Parliamentary privilege, the Legislative Assembly does.
17. Although paragraphs 83-84 of Laurentian University’s Factum have prejudged that section 10 of the *Auditor General Act* does not provide the Auditor General a right of access to privileged information, the Auditor General makes no comment about the outcome of the Rule 14.05 Application.

E. THE AUDITOR GENERAL’S WORKING PAPERS

18. Paragraph 83 of Laurentian University’s Factum claims that if the Standing Committee on Public Accounts uses Parliamentary privilege to obtain information for the Auditor General, it would allow the Committee access to the Auditor’s General’s working papers. This proposition is illogical and absurd. If the Standing Committee on Public Accounts obtains documents pursuant to the exercise of its Parliamentary privilege and provides those documents to the Auditor General for an audit that the Committee itself requested, the Committee is not accessing the Auditor General’s working papers.

F. LAURENTIAN UNIVERSITY’S UNFOUNDED ALLEGATION THAT THE AUDITOR GENERAL CIRCUMVENTED THE RULE 14.05 APPLICATION

19. Paragraph 2 of Laurentian University’s Factum states:

“Having changed her mind twice about whether she even needed privileged information, the Auditor General asked this Court to determine whether she was legally permitted to access it. Days later, however, she began secretly working with the Committee to circumvent that very process.”

This allegation is unfounded and troubling. The Auditor General has not worked with the Standing Committee on Public Accounts to circumvent the Rule 14.05 Application that seeks a statutory interpretation of section 10 of the *Auditor General Act*.

20. The Standing Committee on Public Accounts and the Legislative Assembly enjoy a Parliamentary privilege to demand the production of papers and things. The Speakers’ Warrants

have demanded documents from Laurentian University pursuant to a request by one of the Committees of the Legislative Assembly. There was “no circumvention” of the Auditor General’s Rule 14.05 Application, an entirely separate proceeding from the exercise of Parliamentary privilege by the Speaker of the Legislative Assembly (an entirely different law).

21. There was no “secret” agenda. The audit of Laurentian University was undertaken by the Auditor General at the request of the Standing Committee on Public Accounts. Pursuant to section 16 of the *Auditor General Act*, the Auditor General quite properly raised the issue of access to information that directly impacts the Office’s ability to complete the Committee’s special assignment to conduct a value-for-money audit of Laurentian University. The Auditor General only assists the Committee and does not dictate the decisions to be made by the Committee.

G. THE AUGUST 15TH LETTER

22. Paragraphs 10 and 11 of the Laurentian University’s Factum state in part:

“Then, on August 15, her then-lawyer formally stated that she had “decided not to legally pursue the production of privileged documents.” A few weeks later, however, the Auditor General sought to resile from her position and once again demanded privileged information and documents from Laurentian.”

23. Paragraph 11 of the Factum also states that “on September 3, Laurentian University offered to provide access to emails and server drives by applying search terms provided by the Auditor General, but she later described this offer as unacceptable”. On September 3rd, counsel for Laurentian University informed officials from the Office of the Auditor General that access to emails and server files would not be provided because it would take years to review and redact the privileged information contained in 2.4 million emails.⁴ Firstly, providing search terms to an auditee to retrieve information for the audit is an unacceptable limitation on the work of the auditors. Secondly, the withholding of 2.4 million emails has denied the Auditor General access to all of the non-privileged information in those 2.4 million emails.

⁴ MR, Tab 2(M), Letter from the Office of the Auditor General to President Robert Hache dated September 8, 2021, p73, Caselines A6201/A73.

24. The conduct of Laurentian University after August 15, 2021 caused the Auditor General to justifiably “legally pursue” an interpretation of section 10 of the *Auditor General Act*. Laurentian University agreed that the Auditor General could bring a Rule 14.05 Application seeking a statutory interpretation of section 10 of the *Auditor General Act* (vs. an Order to compel Laurentian University to produce privileged information and documents that was not sought by the Application).

H. THE SUMMONS

25. Paragraph 10 of the Factum states:

“The Auditor General served a summons on Laurentian’s President, which she withdrew after a case conference before Chief Justice Morawetz”.

26. The Auditor General did not withdraw the summons regarding non-privileged information.

I. THE INESCAPABLE INFERENCE

27. Paragraph 14 of the Factum states:

“Laurentian had no notice that the Auditor General was reporting to the Committee, and no opportunity to participate or respond. Then, the Committee concealed its decision from Laurentian for nine days until it was delivered, late in the evening of October 15, only hours after Laurentian had served its responding material in the Auditor General’s application, in accordance with the litigation timetable agreed to and endorsed by Chief Justice Morawetz. The inescapable inference is that the Committee and Auditor General coordinated their action so that the request was delivered only just after Laurentian had responded to the Auditor General’s application”.

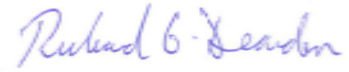
This so-called “inescapable inference” is false and offensive, to both the Standing Committee on Public Accounts and the Auditor General, and is without any evidentiary foundation.

28. The Auditor General fails to understand the purpose of Laurentian University’s repeated attacks on the integrity of the Auditor General personally and the integrity of the Office of the Auditor General which are unfounded and inappropriate for a publicly funded Broader Public Sector organization and academic institution.

III. RELIEF SOUGHT

29. The Auditor General of Ontario supports the positions on this motion of the Legislative Assembly of Ontario and the Attorney General of Ontario.

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Court File No. CV-21-656040-00CL

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PROCEEDING COMMENCED AT
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**FACTUM OF THE AUDITOR GENERAL OF ONTARIO
(Laurentian University's Motion For A Stay)**

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