

CITATION: Laurentian University of Sudbury, 2021 ONSC 1098
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-02-12

SUPERIOR COURT OF JUSTICE - ONTARIO

**RE: 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**

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell, Andrew Hanrahan and Derek Harland*, for the
Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for Ernst & Young Inc., Monitor

Peter J. Osborne and David Salter, for the Board of Governors

Pamela L.J. Huff and Aryo Shalviri, for Royal Bank of Canada

Stuart Brotman and Dylan Chochla, for Toronto Dominion Bank

Vern W. DaRe, for Firm Capital Mortgage Fund Inc., DIP Lender

Michael Kennedy, Labour Counsel for the Applicant

Charles Sinclair, Susan Philpott and Clio Godkewitsch, Insolvency Counsel for
Laurentian University Faculty Association ("LUFA")

David Wright, Labour Counsel for LUFA

Tracey Henry and Brendon Scott, for Laurentian University Staff Union

Alex McFarlane and Lydia Wakulowsky, for Northern Ontario School of Medicine

Daniel Loberto, for Queen's University

André Claude, for University of Sudbury

Joseph Bellissimo, for Huntington University

Andrew J. Hatnay and Sydney Edmonds, for Thorneloe University

Linda H-C. Chen, for the Information and Privacy Commissioner of Ontario

Gale Rubenstein and *Bradley Wiffen*, Counsel for Financial Services Regulatory Authority

Murray Gold and *James Harnum*, for Ontario Confederation of University Faculty Associations

George Benchetrit, for Bank of Montreal

Shahana Kar, for Her Majesty the Queen in Right of Ontario

Guneev Bhinder, for Canada Foundation for Innovation

James MacLellan, for Zurich Insurance Company Ltd.

Tushara Weerasoriya and *Stephen Brown-Okruhlik*, for St. Joseph's Health Centre of Sudbury

Mark Baker and *Andriy Luzhetskyy*, for Laurentian University Students' General Association ("LUSGA")

Miriam Martin, for Canadian Union of Public Employees ("CUPE")

HEARD: February 10, 2021

DETERMINED: February 11, 2021

REASONS: February 12, 2021

ENDORSEMENT

Background

[1] On February 1, 2021, an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was granted, the effect of which was to provide Laurentian University of Sudbury ("LU" or the "Applicant") protection under the CCAA.

[2] At the time of seeking the Initial Order, LU indicated that it intended to seek additional relief at the comeback hearing, upon notice to affected parties, pursuant to a more fulsome order (the "Amended and Restated Initial Order").

[3] The Applicant filed a factum in respect to both the relief sought in the Initial Order and the relief to be sought at the comeback hearing.

[4] The facts to support the requested relief for the Initial Order and for the comeback hearing were set out in the Affidavit of Dr. Robert Haché, sworn January 30, 2021 (the “Haché Affidavit”). Additional evidence was provided in the form of the Report of the Proposed Monitor dated January 30, 2021, and the First Report of the Monitor dated February 7, 2021.

[5] In granting the Initial Order, I made certain findings of fact, including:

- i. the Applicant falls under the *Corporations Act*, R.S.O. 1990, c. C.38;
- ii. the Applicant’s status as a not-for-profit, non-share capital corporation does not impact the applicability of the CCAA to the Applicant;
- iii. the Applicant is insolvent;
- iv. the Applicant is a “debtor company” to which the CCAA applies;
- v. the financial information required pursuant to s. 10(2) of the CCAA was provided;
- vi. Ernst & Young Inc. is qualified to act as Monitor;
- vii. the requested relief was limited to relief that was reasonably necessary for the continued operation of the Applicant in the ordinary course of business.

[6] The Initial Order provided for relief which included:

- i. a stay of proceedings pursuant to s. 11.02(1) of the CCAA, which stay also covered the LUSGA;
- ii. authorization to make certain pre-filing and post-filing payments;
- iii. the granting of a super priority Administration Charge on the Property (as defined in the Initial Order) in favour of the Monitor, counsel to the Monitor, the Applicant’s counsel and advisors, and independent counsel to the Board in the amount of \$400,000;
- iv. the granting of a priority charge in favour of the Applicant’s current and future directors and officers (“Directors and Officers”) in the amount of \$2 million (the “Directors’ Charge”); and
- v. a Sealing Order in respect of Confidential Exhibits “EEE” and “FFF” to the Haché Affidavit, relating to correspondence between the Applicant and the Ministry of Colleges and Universities (the “Ministry”).

[7] The Endorsement of February 1, 2021, also referenced that LU sought an order for the appointment of a Mediator by the Court (the “Court-Appointed Mediator”) to oversee negotiations

with respect to the various restructuring initiatives necessary for the Applicant to achieve a successful restructuring.

[8] At the conclusion of a case conference held on February 5, 2021, the Honourable Justice Sean Dunphy was appointed as Court-Appointed Mediator.

[9] At this comeback hearing, the Applicant sought, among other things, the following relief:

- i. an extension of the stay of proceedings to April 30, 2021;
- ii. approval of a debtor in possession facility (the “DIP Facility”) in the amount of \$25 million and a DIP Lender’s Charge (defined below) to secure the DIP Facility;
- iii. an increase in the Administration Charge from \$400,000 to \$1.25 million; and
- iv. an increase in the Directors’ Charge from \$2 million to \$5 million (the increase of \$3 million was not to have priority over the DIP Charge).

[10] In its First Report, the Monitor states that since the date of the Initial Order, the Applicant has focused on maintaining normal day-to-day operations. Student classes are continuing (virtually due to the pandemic) with no disruption.

[11] In addition, the Applicant has commenced communications with its various stakeholders. It has launched a website to provide further information to stakeholders, including a detailed list of frequently asked questions and answers, contact information for support services for students, faculty and staff, and a method to contact LU by email for other information.

[12] The Monitor also reports that the Applicant does not anticipate any material change in the weekly Cash Flow Forecast for the period from January 30, 2021 to April 30, 2021 (the “Cash Flow Forecast”), attached to the First Report.

[13] The Monitor also reports that the Applicant is in urgent need of funding in order to permit it to continue operations. LU, through its legal counsel, approached external lenders that specialize in real estate and infrastructure-based lending, including debtor-in-possession financing. The inquiries embarked upon by LU resulted in LU receiving nonbinding draft term sheets from three potential lenders. The Applicant and the Monitor reviewed the terms submitted by the prospective lenders and after further negotiations, the Applicant executed the term sheet (the “DIP Term Sheet”) with Firm Capital Corporation. Subsequently, Firm Capital Corporation assigned its interest to Firm Capital Mortgage Fund Inc. (the “DIP Lender”).

[14] The material terms of the DIP Facility are set out at paragraph 34 of the Monitor’s report.

[15] The Monitor comments that the Applicant will be unable to maintain operations and address its operational and financial restructuring needs without access to DIP financing.

[16] The Monitor states that it is of the view that the Applicant's request for approval of DIP Financing and the DIP Term Sheet is required and reasonable.

Stay Extension

[17] The Monitor is of the view that the requested extension is appropriate for the following reasons:

- a. the extension will provide comfort to LU students that the Applicant will continue in the ordinary course for the duration of the winter semester;
- b. the Applicant requires the extension in order to conduct a mediated negotiation with its stakeholders; and
- c. the Applicant continues to operate in good faith and with due diligence since the date of the Initial Order.

[18] In addition, based on the Cash Flow Forecast, and with the approval of the DIP Term Sheet and the DIP lender's charge ("DIP Lender's Charge"), the Monitor is of the view that the Applicant should have sufficient liquidity to fund its operations until April 30, 2021.

[19] The Monitor supports the Applicant's request for an order extending the stay to April 30, 2021.

Pension and Benefit Plans

[20] The Applicant administers three employee pension and benefit plans: (a) a registered defined benefit pension plan (the "DB Pension Plan"); (b) a supplementary unfunded retirement plan (the "SURP"); and (c) a retirement health benefits plan (the "RHBP").

[21] The proposed Amended and Restated Order requests a stay of the payment of any pre-filing or post-filing special payments to the DB Pension Plan to assist LU with its current liquidity crisis.

[22] The Monitor reports that while the Applicant will have access to funding through the DIP Facility, that funding is limited and is only projected to be sufficient to fund operations through to the end of the current academic term. Given the Applicant's overall liquidity constraints, the Monitor is of the view that permitting a stay of special payments to the DB Pension Plan during the stay period is appropriate and reasonable.

Freedom of Information and Protection of Privacy Act

[23] The proposed Amended and Restated Order provides for a stay of any existing, pending or future information requests to the Applicant pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA").

[24] The Monitor reports that the Applicant expects to receive a significant increase in volume of FIPPA information requests and that the Applicant does not have the resources to deal with the increased volume. The Applicant is of the view that it must focus all of its efforts in either serving the needs of students or supporting the operational restructuring process.

[25] The Monitor expects that there will continue to be substantial disclosure of information to all stakeholders through materials filed in the CCAA proceedings as well as additional communications from LU directly to stakeholders. Given the anticipated distraction that would result in attempting to deal with these requests, the Monitor is of the view that extending the stay to FIPPA requests is reasonable in the circumstances.

Super Priority Charges

[26] The proposed Amended and Restated Initial Order provides for the following super priority charges (collectively, the “Charges”) on current and future assets of the Applicant, in the following order:

- a. first, the Administration Charge (up to a maximum amount of \$1.25 million);
- b. second, the Directors’ Charge (up to a maximum amount of \$2 million);
- c. third, the DIP Lender’s Charge (up to a maximum of \$25 million); and
- d. fourth, the Directors’ Charge (up to an additional \$3 million for a total maximum Directors’ Charge amount of \$5 million).

[27] The Applicant’s secured creditors are primarily comprised of subcontractors who registered construction liens and equipment lessors. These parties have been served with notice of the comeback motion and the relief sought at the comeback motion will provide for the Charges to rank in priority to these potential claims.

[28] The Administration Charge and the proposed Amended and Restated Initial Order provide for a charge up to \$1.25 million in favour of counsel and advisors to the Applicant, the Monitor, the Monitor’s independent counsel and independent counsel to the Board as security for the professional fees and disbursements incurred prior to and after the commencement of the CCAA proceedings.

[29] The Monitor is of the view that the proposed Administration Charge is reasonable and appropriate in the circumstances.

DIP Lender’s Charge

[30] In addition to the approval of the DIP Term Sheet, the proposed Amended and Restated Initial Order provides for the creation of a super priority charge in the amount of \$25 million to match the maximum allowable borrowing amount proposed in the DIP Term Sheet. The DIP

Lender's Charge will be secured by all Property (as defined in the Amended and Restated Initial Order) of the Applicant.

[31] The Monitor notes that the DIP Lender's Charge is a condition of the DIP Financing.

[32] The Monitor further reports the Applicant is in urgent need of the financing to fund operations and is of the view that the DIP Lender's Charge is appropriate and reasonable.

Directors' Charge

[33] The proposed Amended and Restated Initial Order provides for the amount not to exceed \$5 million to secure the indemnity in favour of the current and future directors and officers of the Applicant against obligations and liabilities that they may incur as Directors and Officers for actions taken after the commencement of the CCAA proceedings, except to the extent that the obligation or liability is incurred as a result of such Directors' or Officers' gross negligence or wilful misconduct.

[34] The Directors and Officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any insurance policy.

[35] The DIP Term Sheet provides that a Directors' Charge may only rank ahead of the DIP Lender's Charge to a maximum of \$2 million. Accordingly, the Applicant proposes that \$2 million of the Directors' Charge rank behind the Administration Charge and ahead of the DIP Lender's Charge, with the balance of \$3 million ranking behind the DIP Lender's Charge.

[36] The Monitor has reviewed the calculation of the Directors' Charge, taking into account the amount of LU's payroll, current service pension contributions and vacation pay and notes that the Directors' Charge is less than the quantum of such amounts that will accrue during the CCAA proceedings.

[37] The Monitor is of the view that the Directors' Charge is required and is reasonable in the circumstances.

Conclusions of the Monitor

[38] In its conclusions, the Monitor states that it supports the relief sought by the Applicant in the proposed Amended and Restated Initial Order.

Oral Submissions

[39] A number of oral submissions were made by various parties, but no additional evidence was filed at the comeback hearing.

[40] I note that a number of these submissions, while of interest, were not germane to the relief being sought on this motion.

[41] Counsel also expressed concerns with respect to the scope of proposed language in paragraph 17(b) of the Amended and Restated Order. Counsel referenced certain protections which arise by way of tenure and academic freedom.

[42] Counsel also raised concerns with respect to the Sealing Order which formed part of the Initial Order. Counsel submitted that the relevant portions of the Haché Affidavit (paragraphs 284 – 291) did not establish the basis for a Sealing Order. This submission was echoed by a number of other counsel, including for the Ontario Confederation of University Faculty Associations, the Northern Ontario School of Medicine, the Laurentian University Staff Union, and CUPE.

[43] In addition, counsel indicated that he wished to reserve all rights to cross-examine Dr. Haché on his Affidavit. However, no such relief was requested on this motion. Should the need arise, this issue can be revisited by any interested party.

[44] A reservation of rights was also raised with respect to a potential trust claim for former retirees in respect of the RHBP, as referenced in paragraph 8(a) of the proposed Amended and Restated Initial Order. This reservation of rights is noted.

[45] Counsel on behalf of LUFA and Mr. Gold, on behalf of the Ontario Confederation of University Faculty Associations (the “Associations”), raised concerns about the absence of the Ministry in these proceedings. Although this issue is of interest to LUFA and the Associations and perhaps other stakeholders, it does not, in my view, impact the issues that have to be determined on this comeback motion.

[46] Mr. Gold also raised questions as to whether LU is insolvent. The evidence before me at the time of granting the Initial Order was sufficient for me to find that LU was insolvent. There is nothing in the evidence before me on this comeback hearing that would alter this finding.

[47] Mr. Gold also requested that the extension of the stay be restricted to the end of February, namely February 26, 2021. He reasoned that this timeline could result in the participation of the Ministry.

[48] Counsel on behalf of St. Joseph’s Continuing Care and St. Joseph’s Health Care Centre raised a concern that the granting of the CCAA charges may give rise to a default under St. Joseph’s financing arrangements with, among others, Royal Trust. This issue was addressed by the affected parties and they are content with the following being included as part of my endorsement. Details of Royal Trust’s financing of St. Joseph’s and the negative covenant relating to encumbrances on the fee simple are set out at paragraphs 192 – 194 of the Haché Affidavit. Royal Trust has been served with these materials and has not objected to the granting of the charges. If St. Joseph’s and Royal Trust need to, they may come back before this Court to discuss issues relating to their loan agreement. For greater certainty, this does not constitute a comeback or any reservation of rights with respect to the DIP Charge granted.

[49] Mr. McFarlane, on behalf of the Northern Ontario School of Medicine, submitted that all references to timing provisions in the proposed Initial Restated Order at paragraphs 59, 60 and 61

should be deleted. He reasoned that restructurings are unpredictable and issues may arise at the last moment.

[50] Counsel on behalf of CUPE supported the position put forth by Mr. Sinclair, counsel to LUFA, that there is gratuitous language in paragraph 20 of the proposed Amended and Restated Order. In particular, counsel objected to the inclusion of the words (“including pursuant to any collective agreement”) which addresses the stay of proceedings. The inclusion of these words is not necessary. The jurisprudence establishes that a stay of proceedings is to be broadly interpreted. Paragraph 20 is broad enough and is interpreted as establishing that the stay of proceedings includes any actions taken in respect of any collective agreement.

[51] Counsel on behalf of CUPE also made reference to paragraph 17(b) of the proposed Amended and Restated Order which permits the Applicant to terminate the employment of such of its employees or temporarily lay off such of its employees as they deem appropriate. This language is contained in the Commercial List Model Order and reflects the current state of the jurisprudence.

[52] Counsel representing the Information and Privacy Commissioner raised concerns with respect to the stay provisions extending to requests made to the Applicant under the FIPPA. Concerns were expressed with respect to the overly broad language of this provision.

[53] Counsel on behalf of the Ministry of the Attorney General advised that she had not been provided with any instructions on this motion.

[54] Counsel on behalf of Royal Bank of Canada did not oppose the requested relief.

[55] In reply, counsel for LU, on the issue of the Sealing Order, submitted that there had been full and clear disclosure in the Affidavit of Dr. Haché with respect to the necessity and the need for the sealing provision. Counsel added that the Monitor is fully aware of the contents of the documents and supports the view that the sealing provision should be maintained.

LAW AND ANALYSIS

Stay Period and Scope of Stay

[56] Section 11.02(2) of the CCAA provides the authority to extend the stay beyond the initial 10 day stay period. The burden of proof on such an application is on the Applicant.

[57] I am satisfied that the Applicant has established that circumstances exist that make the order appropriate and further that the Applicant is acting in good faith and with due diligence.

[58] In my view it is reasonable and appropriate to grant the request of the Applicant, supported by the Monitor, to extend the stay, until April 30, 2021.

[59] In arriving at this conclusion, I have taken into account that the key stakeholders are participating in a mediation with a Court-Appointed Mediator, which mediation will focus on the

key aspects of any proposed restructuring. It is both necessary and important that the Applicant should focus on its proposed restructuring. If this restructuring is to be successful, it will have to be largely completed by the end of April 2021. With the approval of the DIP Facility, the Applicant will have liquidity to the end of this period. It is my expectation that the Monitor will file periodic reports with the Court and these reports will provide updates to interested stakeholders. To the extent that any party is of the view that issues relating to the Stay Period should be brought to the attention of the Court, they can schedule such an attendance. The ability to schedule such an attendance addresses the concerns raised by Mr. Gold to the effect that the Stay Period should not extend beyond the end of February, 2021.

[60] With respect to whether the Amended and Restated Initial Order should provide that information requests made under the FIPPA be stayed, I accept the view expressed by the Applicant and the Monitor that the Applicant expects to receive a high volume of FIPPA requests at this time and the limited resources of the Applicant should not be diverted from its restructuring efforts. I also accept that the Monitor will, during this period, provide alternative means through which information can be obtained.

[61] However, I am unable to determine at this stage of the proceeding as to whether it would be appropriate to extend this specific provision of the stay for an indefinite period of time. I am prepared to continue the stay on the understanding that the Information and Privacy Commissioner can request that this issue be revisited in 30 days. Any request for reconsideration can be made through the Monitor and if the matter remains unresolved, a hearing on this issue can be expedited.

[62] With respect to the request that the court authorize the termination of employees as the Applicant deems appropriate, this provision has been fundamental to CCAA proceedings and is broadly worded to facilitate a restructuring (see: *Windsor Machine and Stamping Limited, Re*, Amended and Restated Initial Order dated September 2, 2008 and *Windsor Machine and Stamping Limited, Re*, 2009 CarswellOnt 4471 at para. 23; and *Aveos Fleet Performance Inc.*, Initial Order dated March 19, 2012 and *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à [2013] QCCS 5924*.

[63] I also note that the Applicant has acknowledged the challenges that will be faced in this aspect of the restructuring, including as it relates to tenure. The Applicant has also acknowledged the existence of the LUFA collective agreement which was entered into on July 1, 2017, which initial term expired on June 30, 2020, and remains in force during any negotiating period.

[64] The Applicant also points out that the relief sought will not substantially alter the LUFA collective agreement. Indeed, the collective agreement does not prevent employees from being terminated and specifically allows that they may be terminated in certain circumstances, which include redundancy and financial exigency.

[65] I am satisfied that the requested relief is not inconsistent with the provisions of s. 33 of the CCAA. The Applicant has addressed this issue at paragraphs 74 – 75 of its factum. Nor is it inconsistent with the provisions of section 18(b) of *An Act to incorporate Laurentian University*

of Sudbury, S.O. 1960, c. 151, which provides that the Board has the sole discretion to terminate faculty (Application Record – Vol. 2A, Tab 8A, p. 251).

Special Payments

[66] The Applicant requests that the Amended and Restated Initial Order stay any outstanding pre-filing special payments to the pension plan. I am satisfied that the liquidity crisis facing LU and restrictions on the use of the DIP Facility is such that it is necessary to stay any outstanding pre-filing or post-filing special payments to the pension plan. This will assist the Applicant with its severe liquidity crisis. This stay is limited to the special payments and does not apply to the Applicant's regular (ordinary course) contributions to the pension plan.

The CCAA Charges

Administration Charge

[67] The Applicant requests that an Administration Charge be granted super priority on the Property in the increased amount.

[68] Section 11.5 of the CCAA provides the court with statutory jurisdiction to grant the Administration Charge.

[69] In *CanWest Publishing Inc./Publications CanWest Inc., (Re)*, 2010 ONSC 222 at para. 54, Pepall J (as she then was) identified the following non-exhaustive list of factors the court may consider when granting an administration charge:

- a. the size and complexity of the business being restructured;
- b. the proposed role of the beneficiaries of the charge;
- c. whether there is an unwarranted duplication of roles;
- d. whether the quantum of the proposed charge appears to be fair and reasonable;
- e. the position of the secured creditors likely to be affected by the charge; and
- f. the position of the monitor.

[70] I am satisfied that the Administration Charge is warranted, necessary, and appropriate in the circumstances, given that the proposed restructuring will require the extensive involvement of professional advisors and there does not appear to be an unwarranted duplication of roles, so that the professional fees will be minimized. I also note that the Monitor is supportive of the proposed quantum of the Administration Charge.

[71] Based on the forecasted costs and the Cash Flow Forecast for the professionals covered under the Administration Charge, I am satisfied that the requested relief should be granted.

DIP Facility and DIP Charge

[72] The Applicant seeks approval of the DIP Facility and also seeks a super priority charge on the Property in the amount of \$25 million, subject to the terms of the DIP Term Sheet. The DIP Charge is proposed to rank behind the Administration Charge (up to a maximum amount of \$1,250,000) and the Directors' Charge (up to a maximum of \$2 million), but ahead of all other interests in the Property of the Applicant, save and except properly perfected purchase money security interest on specific equipment.

[73] The evidence establishes that the Applicant is facing a liquidity crisis and that absent additional financing, the Applicant will be unable to meet payroll at the end of February.

[74] The evidence also establishes that a competitive process involving multiple potential DIP lenders was entered into, following which the Applicant secured the DIP Facility from the DIP Lender pursuant to the DIP Term Sheet.

[75] The Applicant's access to the DIP Facility is conditional upon an order of the court approving the DIP Term Sheet and the DIP Facility and granting the DIP Charge.

[76] Section 11.2 of the CCAA provides the Court with authority to approve the DIP Facility and the DIP Charge. Section 11.2(2) also provides the court with authority to order that the DIP charge rank in priority over the claim of any secured creditor of the company.

[77] Section 11.2 (4) sets out the factors to be considered by the court in deciding whether to grant a super priority charge in respect of DIP financing.

[78] I have concluded that it is appropriate to approve the DIP Facility and the DIP Charge. In arriving at this conclusion, I have taken into account that the notice requirements under s. 11.2(1) have been met; the Applicant has immediate liquidity needs and it is apparent that the Applicant cannot obtain alternative financing outside of these CCAA proceedings; the terms of the DIP Term Sheet resulted from an arms-length negotiation; the DIP Facility is necessary in order for the Applicant to implement its restructuring plan and without it, the Applicant will not be able to continue operations.

[79] In my view, the quantum of the DIP Facility is reasonable and appropriate. I also note that the Monitor is of the view that the DIP Term Sheet and DIP Charges are appropriate and limited to what is reasonably necessary in the circumstances.

Directors' Charge

[80] A Directors' Charge in the amount of \$2 million was granted at the initial hearing. The Applicant seeks to increase the Directors' Charge to \$5 million, \$3 million of which will rank subordinate to the DIP Charge.

[81] Section 11.51 of the CCAA provides the court with the jurisdiction to grant a directors' charge in an amount the court considers appropriate, provided notice is given to the secured

creditors likely to be affected by it. In order to grant a directors' charge, the court must be satisfied of the following factors:

- a. notice has been given to the secured creditors likely to be affected by the charge;
- b. the amount is appropriate;
- c. the applicant could not obtain adequate indemnification insurance for the directors at a reasonable cost; and
- d. the charge does not apply in respect of any obligation incurred by directors as a result of the directors' gross negligence or wilful misconduct. (see: *Jaguar Mining Inc., Re*, 2014 ONSC 494 at para. 45).

[82] I am satisfied that the Directors' Charge is reasonable in the circumstances. In arriving at this conclusion, I accept the submissions that the Applicant will benefit from the active and committed involvement of the Directors and Officers; the Applicant cannot be certain whether the existing insurance will be applicable or respond to any claims made; the Directors' Charge is not to secure obligations incurred by the Directors as a result of gross negligence or wilful misconduct, and the Monitor is of the view that the Directors' Charge is reasonable and appropriate.

Confidential Exhibits – Sealing Order

[83] A Sealing Order was granted at the initial hearing.

[84] A number of parties raised concerns with respect to the Sealing Order at the comeback hearing. In view of the expiration of the Stay Period on February 11, 2021, it was necessary to determine this comeback motion no later than that date. In order to address the sealing provision, I require additional time. Accordingly, the sealing order in respect of Confidential Exhibits "EEE" and "FFF" to that Haché Affidavit will remain in effect pending the issuance of a Supplementary Endorsement addressing this issue.

Provisions in the Draft Order Relating to the Objection Deadline

[85] Paragraphs 57 - 62 of the proposed Initial and Restated Order purport to establish deadlines to file materials for court hearings. The *Rules of Civil Procedure* address this issue. I acknowledge the concerns raised by Mr. McFarlane that the establishment of strict deadlines may not be practical in the context of a time sensitive restructuring. There is always the possibility that events dictate that materials have to be filed on the eve of the hearing. I expect that counsel will cooperate with each other to minimize the delivery of any last-minute materials, but I also acknowledge that in certain circumstances this may be unavoidable. In the circumstances, I have determined that it is not necessary or desirable to include the proposed paragraphs 57 - 62.

INITIAL AND RESTATED ORDER

[86] In accordance with my brief endorsement of February 11, 2021, I modified the proposed Initial and Restated Order to reflect the foregoing. The signed order was provided to the Commercial List Office on February 11, 2021, for distribution to the parties.



CHIEF JUSTICE G.B. MORAWETZ

Date: February 12, 2021