

CITATION: Laurentian University of Sudbury, 2021 ONSC 1453
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-02-26

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")

SUPPLEMENTARY ENDORSEMENT

[1] This Supplementary Endorsement to the Endorsement of February 12, 2021, addresses a challenge to the Sealing Order granted in the Initial Order of February 1, 2021. The Sealing Order covers Confidential Exhibits "EEE" and "FFF" (the "Exhibits") to the affidavit of Dr. Robert Haché, sworn January 30, 2021 (the "Haché Affidavit").

[2] "EEE" is a letter from the Ministry of Colleges and Universities (the "Ministry") to Laurentian University ("LU") dated January 21, 2021. "FFF" is a letter from LU to the Ministry dated January 25, 2021.

[3] LU contends that the Exhibits contain information with respect to LU and certain of its stakeholders, including various rights or positions that stakeholders or LU may take either inside or outside of these CCAA proceedings, the disclosure of which could jeopardize LU's efforts to restructure.

[4] Counsel to LU submits that the salutary effects of the Sealing Order far outweigh the deleterious effects of not disclosing the correspondence between LU and the Ministry.

[5] The position of LU is supported by the Monitor. The Monitor is fully aware of the state of negotiations, not only as between LU and the Ministry, but also between LU and various stakeholders, including the Laurentian University Faculty Association ("LUFA").

[6] Submissions in opposition to the Sealing Order were made by counsel on behalf of LUFA, the Ontario Confederation of University Faculty Associations (“OCUFA”), the Northern Ontario School of Medicine and Laurentian University Staff Union.

[7] The essence of the submissions in opposition to the Sealing Order was to the effect that there was no evidence that would suggest that the Sealing Order is necessary to protect a valid commercial interest. Therefore, there was no evidentiary basis on which to grant the Sealing Order.

[8] Mr. Gold, on behalf of OCUFA, took the position that the Sealing Order is not justified and is speculative in nature and it would be a dangerous precedent to seal the documents, just on the basis that they are not helpful to LU’s position.

[9] It is necessary to take into account that the position of the Ministry in these proceedings, if any, is unknown.

[10] However, it is clear that Dr. Alan Harrison has been appointed as Special Advisor by the Ministry. His mandate is to provide advice and recommendations to the Ministry with respect to the current financial state of LU and its path to return to financial sustainability.

[11] It is also clear that the Honourable Justice Sean Dunphy is the Court-Appointed Mediator in these proceedings and a critical aspect of the mediation is the relationship between LU and its stakeholders, including LUFA.

[12] Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides the court with the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

[13] In *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), Iacobucci, J. set out that a Sealing Order should only be granted when:

- (a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[14] The Supreme Court identified three important elements subsumed under the first branch of the above test. First, the risk in question must be real and substantial, in that the risk is well grounded in evidence and imposes a serious threat to the commercial interest in question. Second, a “commercial” interest must be an interest that goes beyond harm to the private commercial interests of a person or business. To qualify as an “important commercial interest”, the interest must be one that can be expressed in terms of a public interest in confidentiality. Third, the phrase

“reasonable alternative measures” requires the court to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[15] The evidence of Dr. Haché can be summarized as follows:

- (i) LU is insolvent;
- (ii) LU has been completely transparent with the Ministry regarding the financial challenges it faces, has provided details to the Ministry regarding its financial situation and the outcome if the efforts undertaken by LU to resolve its concerns cannot achieve the required results;
- (iii) LU has highlighted the benefits that it provides to the community of Northern Ontario and the costs and risks associated with attempting an informal restructuring outside of a proceeding and the costs and risks associated with the potential CCAA restructuring;
- (iv) in the days and weeks leading up to this CCAA application, LU has been in frequent communication with the Ministry, members of the Treasury Board and senior staff members at the Ministry of Finance;
- (v) LU has been in continuous dialogue with the Ministry and intends to continue this dialogue throughout the CCAA proceedings.

[16] Dr. Haché has not been cross-examined, although a number of parties at the comeback hearing reserved rights to cross-examine him at some point in the future.

[17] I have reviewed the Exhibits in detail.

[18] Firstly, the evidence as contained in the Haché Affidavit outlines that there has been continuous communication between LU and the Ministry with respect to the financial crisis currently facing LU. As such, the Ministry is well aware that a real-time solution to the crisis must be found if LU is to survive and continue operations beyond the current academic year. The crisis is real and immediate. The role, if any, that the Ministry will play is at this moment uncertain.

[19] In my view, the disclosure of the Exhibits, at this time, could be detrimental to any potential restructuring of LU. As such, the risk in disclosing the Exhibits is real and substantial and imposes a serious risk to the future viability of LU. I also note that it is speculative to conclude that the Exhibits contain information that is not helpful to LU’s position.

[20] Secondly, it seems to me that the “commercial” interest related to the Exhibits transcends the direct commercial interests of LU. It involves the entire LU community, including the faculty, students, employees, third-party suppliers, and the City of Greater Sudbury and the surrounding area. It is of paramount importance to all of these groups that all efforts to restructure LU be explored. In order to do so, it is necessary to maintain the confidentiality of the Exhibits. The

disclosure of the Exhibits, at this time, could undermine the restructuring efforts being undertaken by LU.

[21] Thirdly, I am required to consider whether there are any reasonable alternatives to a confidentiality order affecting the Exhibits. At this time the stakeholders are involved in a mediation being conducted by Justice Dunphy. It could very well be that negotiations are at a sensitive stage or will shortly be at a sensitive stage. In my view, it would not be appropriate, at this time, to implement any alternative to a confidentiality order, as to do so could negatively impact the mediation efforts being conducted by Justice Dunphy.

[22] At this stage of the proceedings, I am satisfied that it is in the interests of all stakeholders that the Mediator be provided with an adequate opportunity to consult with the various stakeholders in order to ascertain whether or not common ground can be found on which to formulate a restructuring of LU.

[23] I am satisfied that the first branch of the test has been met.

[24] I am also satisfied, based on the evidence, that the salutary effects of the Sealing Order outweigh its deleterious effects, which in this context, includes the public interest in accessing the Exhibits. Thus, the second branch of the test is satisfied.

Disposition

[25] Accordingly, I conclude that LU has satisfied the test set forth in *Sierra Club* and that it is necessary to maintain the confidentiality of the Exhibits and the existing provision in the Amended and Restated Order providing for the sealing of the Exhibits.



CHIEF JUSTICE MORAWETZ

Date: February 26, 2021