

CITATION: Laurentian University of Sudbury, 2021 ONSC 1975
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-03-17

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

Lisa Mills, Pension Counsel for the Applicant

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

David Salter, for the Board of Governors

Aryo Shalviri, for Royal Bank of Canada

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

George Benchetrit, for Bank of Montreal

Gale Rubenstein and Bradley Wiffen, for Financial Services Regulatory Authority

Susan Philpott, Insolvency Counsel for Laurentian University Faculty Association
("LUFA")

Rachel Moses, for Royal Trust

Andrew Hatnay, for Thorneloe University

Tracey Henry, for Laurentian University Staff Union

Dylan Chochla, for Toronto Dominion Bank

Caleb Leduc, Self-Represented

Brady Zapalski, Self-Represented

Ann Pegoraro, Self-Represented

William Oxley, Self-Represented

Shelia McGillis, Self-Represented

HEARD: March 15, 2021

RELEASED: March 17, 2021

ENDORSEMENT

[1] Laurentian University of Sudbury (“LU”) seeks an order, which, among other things,

(a) permits LU to apply the Transfer Ratio (as defined below) to commuted value transfer requests made by the 27 individuals who received a retirement or termination statement and election form indicating that they may elect to receive a 100% commuted value transfer from the pension plan that remains available for acceptance and for whom such transfers have not yet been completed from the pension plan (the “Interim CV Applicants”), pursuant to the terms of the Pension Plan, the *Ontario Pension Benefits Act* (the “PBA”) and Regulation 909 thereto, (the “Regulations”); and

(b) confirms that the payments by LU of its portion of the assessment in respect of the Pension Benefits Guarantee Fund (“PBGF”) due on March 30, 2021 for the Pension Plan prefiling period of July 1, 2019 to June 30, 2020 are stayed pursuant to the terms of the Amended and Restated Initial Order dated February 11, 2021;

[2] The factual background with respect to the requested relief is set out in the Second Report of the Monitor and the affidavit of Bobbie-Joe Brinkman (the “Brinkman Affidavit”), which references correspondence from Eckler Limited to LU, describing commuted value transfers, as well as the PBGF assessment in respect of the Pension Plan.

[3] Other than representations made by certain Interim CV Applicants, the factual background was not challenged.

[4] With respect to the requested confirmation that the stay applies to payments in respect of the PBGF assessment payment, the Monitor reports that the assessment in respect of the Defined Benefit Pension Plan (“DBPP”) for the period July 1, 2019 to June 30, 2020 (the “PGBF 2020 Assessment”) is payable by March 30, 2021 with an estimated total amount due of approximately \$842,000. If one was to include a proposed recalculation in light of the updated valuation as at January 1, 2020, an additional amount of \$288,000 (the “Incremental PBGF Assessment”) also has to be taken into consideration.

[5] LU takes the position, supported by the Monitor, that both the PBGF 2020 Assessment and the Incremental PBGF Assessment (collectively, the “PBGF Assessments”) relate to a period prior

to the commencement of the CCAA proceedings, and are pre-filing obligations which are stayed pursuant to the provisions of the Amended and Restated Initial Order.

[6] The Financial Services Regulatory Authority of Ontario (“FSRA”) does not oppose the relief.

[7] LU references *Collins & Aikman Automotive Canada Inc. Re*, 2007 CarswellOnt 7014 (S.C.) for the proposition that the determining factor of whether a payment is characterized as pre-filing or post-filing is not when the payment obligation crystallizes, but rather whether the amount of the payment was determined prior to the filing date.

[8] I accept this submission.

[9] The PBGF Assessments are obligations which were determined prior to the filing date and as such are pre-filing obligations which are stayed pursuant to the Amended and Restated Order. This court confirms the stay of the PBGF Assessments. This stay is limited to LU’s portion of the PBGF Assessments and does not impact those portions of the PBGF Assessments payable by the Federated Universities and the other participating employers.

[10] With respect to the request to permit LU to apply the Transfer Ratio to commuted value transfer requests made by the Interim CV Applicants, this issue is addressed at paragraphs 52 – 64 of the Monitor’s Second Report. It is also addressed in the letter attached as Exhibit “A” to the Brinkman Affidavit, being the letter from Eckler Limited, the actuary and third-party administrator of the Pension Plan to LU.

[11] The transfer ratio is a measure of a pension plan’s assets versus its liabilities as if it were wound-up. The Pension Plan’s transfer ratio, as described in the last actuarial valuation report as of January 1, 2020, is 65.8% (the “Transfer Ratio”).

[12] The Monitor reports that LU’s past practice has been to process commuted value transfers at 100% on the basis that such transfer volumes were low. However, as referenced in the Monitor’s Report and in Exhibit “A” to the Brinkman Affidavit, the number of inquiries and requests regarding commuted value transfers has increased significantly, and LU has determined that it should commence processing commuted value transfers at the Transfer Ratio with the balance to be payable over five years. LU takes the position that this will help to mitigate any potential deterioration of the DBPP’s financial position and will treat all plan members equitably, as it avoids having certain individuals remove assets from the DBPP at a rate greater than the Transfer Ratio.

[13] The Interim CV Applicants are impacted by this change. The group includes eight individuals who had already completed and returned their election forms by February 1, 2021, as well as a further 19 individuals who either: (a) had been issued termination or retirement statements within 120 days but no response had been received, or; (b) have indicated an intent to take a transfer or start receiving a pension but had not returned completed election forms by February 1, 2021.

[14] The Monitor reports that the aggregate commuted value amount in respect of the Interim CV Applicants is approximately \$4.8 million if processed at a 100% transfer ratio and if processed at the Transfer Ratio, this amount would be approximately \$1.6 million less.

[15] The Monitor also reports that, given LU's decision to commence processing go forward commuted value transfers at the Transfer Ratio (with the balance to be payable in five years), LU is of the view that it would be inequitable for the Interim CV Applicants to be transferred at a 100% ratio given that the hypothetical wind-up deficit is significant and the eventual outcome of LU's restructuring efforts is uncertain.

[16] Furthermore, LU proposes to contact each of the Interim CV Applicants to provide them with an updated pension statement and options package reflecting the application of the Transfer Ratio and permitting the individual to make a revised election in respect of his/her current options.

[17] The Monitor also reports that LU has consulted with LU's labour unions, the Federated Universities and the FSRA in respect of the proposed pension order. None of these parties objected to the relief sought.

[18] The Monitor is of the view that the Applicant's request is reasonable in the circumstances. Eckler has also commented that if these transfers are processed at 100% of the commuted value in accordance with past practice, there is a risk of unfairness to other beneficiaries whose entitlements remain in the Pension Plan.

[19] Representations were made by Caleb Leduc, Brady Zapalski, Ann Pegoraro, William Oxley and Sheila McGillis, who are among the Interim CV Applicants. These individuals take the position that they relied upon the contract documents and they are being treated unfairly and they should receive pension payments based on a 100% transfer ratio.

[20] The issues raised by these individuals are addressed in the factum submitted by counsel to LU and in the Monitor's Report. In essence, the Pension Plan permits members whose membership in the Pension Plan is terminated to be given the option to transfer their entitlements to another pension plan or other "locked in" retirement arrangement. Where a commuted value option is available, s. 42(2) of the *PBA* provides that the amount transferred is subject to the "prescribed limitations".

[21] Section 19 of the *Regulations* contains conditions and limits on the transfer of commuted values out of a pension plan. Subsections 19(2) and 19(7) require that a commuted value transfer be calculated by multiplying the commuted value of the member's entitlement by the lesser of the transfer ratio and one (1), and, if less than 100% of the commuted value, the balance can be transferred within five (5) years.

[22] Counsel to LU points out that LU's past practice of paying commuted values at 100%, despite its Transfer Ratio being less than one (1), is permitted by an exception under the *Regulations* applicable to low-volume commuted value activity under the *PBA* (*Regulations*, s. 19(6)(b)). Counsel submits that permitting transfers out of a pension plan in accordance with this past practice in effect "borrows" assets attributable to other pension plan members for the

benefit of the member leaving the pension plan. Given the funding status of the Pension Plan, continuing this practice would create further strain on the Pension Plan when the next actuarial valuation is prepared, and risks inequity between classes of beneficiaries under the Pension Plan.

[23] Counsel submits that the application of the Transfer Ratio to the Interim CV Applicants is consistent with the scheme of the *PBA* and the *Regulations* and applying the Transfer Ratio is a prudent preservation of the assets of the Pension Plan in the best interests of its current and future beneficiaries.

[24] Counsel LU also submits that as the Administrator of the Pension Plan, LU has a duty to treat all beneficiaries in an impartial manner, and that the fair and even-handed treatment of all beneficiaries requires that the Interim CV Applicants have their commuted value paid out at the Transfer Ratio, with the option to reelect to receive their commuted value transfer based on the Transfer Ratio, or alternatively, receive an immediate or deferred pension, as applicable.

[25] Finally, counsel submits that the transfer of 100% of the Interim CV Applicants commuted values out of the Pension Plan would have the effect of preferring them over the active members and the retirees of the Pension Plan.

[26] There is no doubt that the Interim CV Applicants may be negatively impacted by the application of the Transfer Ratio. However, it is undisputed that payments to the Interim CV Applicants based on a commuted value transfer at 100% had yet to commence. In my view, LU's past practice of processing commuted value transfers at 100%, despite its Transfer Ratio, cannot continue. This practice is, as noted above, permitted by an exception under the *Regulations* applicable to low-volume commuted activity under the *PBA*. However, given that low-volume activity is no longer present, this exception is no longer applicable.

[27] I am satisfied that given the current funding status of the Pension Plan, it is necessary to apply the Transfer Ratio to the Interim CV Applicants as this is, in my view, consistent with the scheme of the *PBA* and the *Regulations*. This determination is, also, prudent and necessary to preserve the assets of the Pension Plan in the best interests of its current and future beneficiaries.

[28] In the result, the relief requested by LU in paragraph [1] is granted. However, in view of the representations made by certain Interim CV Applicants, it is not appropriate, at this time, to include the release and discharge provisions in the order which relate to the Transfer Ratio. This requested relief is deferred to a future hearing.

[29] A revised form of order has been signed and transmitted to the Commercial List Office to be formally entered.



Chief Justice Geoffrey B. Morawetz

Date: March 17, 2021