

CITATION: Laurentian University of Sudbury, 2021 ONSC 3545
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-05-14

SUPERIOR COURT OF JUSTICE - ONTARIO

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

**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 the Court-appointed Monitor
Ernst & Young Inc

Vern W. DaRe, for the DIP Lender

Susan Philpott, Charles Sinclair and David Sworn, Insolvency Counsel for LUFA

Tracey Henry and Danielle Stampley, for Laurentian University Staff Union
(LUSU)

Aryo Shalviri and Pamela Huff, for the Royal Bank of Canada

Andrew Hatnay, Demetrios Yiokaris and Sydney Edmonds and Eugene Meehan,
Q.C., for Thorneloe University

Dylan Chochla and Stuart Brotman, for the Toronto Dominion Bank

André Claude, for the University of Sudbury

Donia Hashem, for the Canada Foundation for Innovation

Virginie Gauthier, for Lakehead University

George Benchetrit, for the Bank of Montreal

Joseph Bellissimo and Natalie Levine, for Huntington University

Gale Rubenstein and Bradley Wiffen, for the Financial Services Regulatory
Authority

Sarah Godwin, for the Canadian Association of University Teachers

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

Rachel Moses, for Royal Trust

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General Association

Michelle Pottruff, for the Ministry of Colleges and Universities

Charlotte Servant-L'Heureux, for the Assemblée de la francophonie de l'Ontario

Linda Chen, for the Information and Privacy Commissioner of Ontario

HEARD: April 29, 2021

DETERMINED: May 2, 2021

REASONS: May 14, 2021

ENDORSEMENT

[1] At the conclusion of the hearing on April 29, 2021, the stay of proceedings was extended until 11:00 p.m. on May 2, 2021.

[2] On Sunday, May 2, 2021, the following endorsement was released:

[1] Laurentian University of Sudbury ("Laurentian" or the "Applicant") brings this motion for an Order (the "Order") substantially in the form attached at Tab 3 of the Motion Record of the Applicant dated April 21, 2021 that, among other things:

- (a) extends the Stay Period to and including August 31, 2021;
- (b) approves the Term Sheet entered into between the Applicant and the Laurentian University Faculty Association ("LUFA"), together with all Schedules;
- (c) approves the Term Sheet entered into between the Applicant and the Laurentian University Staff Union (LUSA"), together with all Schedules;
- (d) approves the Transition Agreement entered into between the Applicant and Huntington University dated April 16, 2021;

(e) approves an Amendment (the “DIP Amendment”) to the Applicant’s DIP facility that, among other things, increases the principal amount available under the DIP Facility by an additional \$10 million; and

(f) increases the DIP Lender’s Charge granted in the Amended and Restated Initial Order dated February 11, 2021 to a maximum principal amount of \$35 million.

[2] The motion was heard via Zoom on April 29, 2021.

[3] This endorsement should be read in conjunction with my earlier endorsement of May 2, 2021 and the endorsement of Gilmore J, also dated May 2, 2021.

[4] For reasons to follow, this motion is granted and an Order shall issue substantially in the form attached at Tab 3 of the Motion Record.

[3] These are my reasons.

Background

[4] Laurentian brings this motion for an order: (i) extending the Stay Period up to and including August 31, 2021, (ii) approving the DIP Amendment to increase the total of financing available under the DIP Facility (defined below) from \$25 million to \$35 million, and (iii) approving the settlement agreements reached with LUFA, LUSA and Huntington University (“Huntington”).

[5] The facts are fully set out in the Affidavit of Dr. Robert Haché, sworn July 29, 2001 (the “First Haché Affidavit”) and in the Affidavit of Dr. Haché sworn April 21, 2021 filed in support of this motion (the “Second Haché Affidavit”). Further information is also contained in the Third Report of the Monitor dated April 26, 2021.

[6] The Applicant sought and received an Initial Order on February 1, 2021 (the “Initial Order”) granting the Applicant protection under the CCAA, approving a stay of proceedings for the initial 10 day period (the “Stay Period”) as well as court ordered super priority charges.

[7] Following a case conference on February 5, 2021, an order was issued (the “Mediator Appointment Order”) appointing the Honourable Sean Dunphy as the court-appointed mediator (the “Mediator”) to facilitate negotiations on the various aspects of the Applicant’s restructuring (the “Mediation”).

[8] On February 10, 2021, the court held a comeback hearing that resulted in the issuance of an amended and restated initial order (the “Amended and Restated Initial Order”) which, among other things, approved a debtor-in-possession interim financing agreement in the amount of \$25 million (the “DIP Facility”) and extended the Stay Period to April 30, 2021.

[9] The Mediation focused on the need to achieve immediate and significant cost reductions necessary for the Applicant's operational restructuring.

[10] The Applicant takes the position that these cost reductions are necessary because, leading up to the commencement of the CCAA proceedings, the Applicant experienced recurring annual deficits and, without immediate efforts, would run out of liquidity required to continue operations. Prior to the achievement of any cost savings, the Applicant projected that it would incur recurring annual deficits in the amount of \$13.7 million to \$16 million as a result of its pre-filing operating cost structure. These deficits relate only to its status quo operations and exclude payments owing to existing pre-filing creditors in respect of any amounts stayed by the Initial Order.

[11] The Applicant also reports that these deficits do not include any consideration of its following obligations:

- (a) completion of research obligations or other obligations arising from the Deferred Contributions, estimated at \$28.5 million;
- (b) costs involved for the implementation of new governance policies and mechanisms, operational controls and processes;
- (c) investments in initiatives to protect and grow revenue such as new programming of courses, recruitment of students and building a long-term, financially sustainable university;
- (d) establishment of appropriate reserves to avoid a future liquidity crisis;
- (e) restructuring costs to conclude the Applicant's CCAA proceedings; and
- (f) payments to the Applicant's pre-filing unsecured creditors, including the Lenders who are owed amounts in excess of \$100 million.

[12] The outcome of the Mediation was such that the Applicant was able to achieve agreement for an academic restructuring.

[13] As a result of Laurentian's bi-cameral governance structure, the Senate is responsible for the academic policy of Laurentian and any changes in the academic programming must involve the Senate. The Senate appointed a Senate Sub-Committee to represent it in the Mediation. Ultimately, the Senate passed a resolution accepting the recommendations of the Senate Sub-Committee and, accordingly, approved the Applicant's academic restructuring.

[14] The Applicant has also signed a term sheet with LUFA which will form the basis of a new collective agreement. It is noted that certain terms of the existing collective agreement were not resolved as part of the term sheet, but these issues will be determined by binding arbitration and once determined, will constitute amendments to the collective agreement.

[15] The Applicant also engaged in extensive mediation with LUSA, which negotiations had the aim of achieving cost reductions in furtherance of the Applicant's effort to attain financial sustainability. A term sheet was agreed to, which sets out the key terms and conditions agreed to by the parties.

[16] The Applicant, LUFA and LUSA also entered into a pension term sheet which resulted in agreement on several changes to the pension plan designed to ensure the pension plan sustainability and avoid the risk of further deficiencies and special payments.

[17] On April 13, 2021, LUFA and LUSA members ratified their respective term sheets.

[18] The Applicant operates within a Federated structure and has affiliations with three independent universities under the overall umbrella of the Applicant: the University of Sudbury ("U Sudbury"), the University of Thorneloe ("Thorneloe") and Huntington (Huntington, together with U Sudbury and Thorneloe, the "Federated Universities").

[19] As part of the Mediation, the Applicant states that it sought a negotiated resolution with the Federated Universities, whereby the formal relationship would be terminated, but the Applicant and the Federated Universities would discuss how the historical legacy of the Federated Universities would be acknowledged and preserved.

[20] The Applicant could only achieve a negotiated resolution with Huntington and entered into a Transition Agreement on April 16, 2021(the "Huntington Transition Agreement").

[21] A negotiated resolution was not achieved with U Sudbury and Thorneloe and Notices of Disclaimer pursuant to section 32 of the CCAA were delivered to U Sudbury and Thorneloe. U Sudbury and Thorneloe each brought a motion opposing the disclaimer. By orders dated May 2, 2021, the motions were dismissed.

Issues

[22] There are three issues to be determined on this motion:

- (a) Should the Stay Period be extended up to and including August 31, 2021?
- (b) Should the DIP Amendment (defined below) be approved by this court?
- (c) Should this court approve the LUFA term sheet, the LUSA term sheet and the Huntington Transition Agreement?

Issue 1: Extension of the Stay

[23] The Applicant seeks an extension of the Stay Period up to and including August 31, 2021.

[24] Pursuant to section 11.02(2) of the CCAA, the court may grant an extension of a stay of proceedings where: (i) the applicant satisfies the court that an extension of the stay of proceedings

is appropriate in the circumstances; and (ii) the applicant further satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[25] The Applicant submits that since the granting of the Amended and Restated Initial Order of February 11, 2021, it has taken significant steps towards its operational restructuring and has, with the assistance of and in consultation with the Mediator, among other things:

- (a) maintained ordinary operations during the Stay Period;
- (b) opened registration for Spring term courses that commenced on May 3, 2021
- (c) implemented new fiscal restraint policies;
- (d) undertaken a review and an analysis of the Applicant's full-time employees who are not represented by a union in order to identify departments and positions where further efficiencies could be found; and
- (e) provided updates to the DIP Lender on the status of the restructuring and engaged in negotiations with respect to the extension to the maturity date of the DIP Facility and an increase in the amount available under the DIP Facility.

[26] The Applicant contends that it requires an extension of the stay of proceedings until August 31, 2021 to preserve the status quo and permit it the necessary breathing room required to continue its planned restructuring efforts in Phase 2, including, among other things:

- (a) the identification and quantification of claims against the Applicant;
- (b) a review of all operational and governance matters;
- (c) the pursuit of value for all stakeholders, including a detailed assessment of all assets that can be monetized for stakeholders or that will create efficiencies;
- (d) the planning, drafting and negotiation of a plan of compromise or arrangement;
and
- (e) the re-building of confidence in relationships with all stakeholders.

[27] A revised cash flow forecast has been submitted which illustrates that, if the DIP Amendment is approved, the Applicant will have sufficient liquidity to operate its business and meet its obligations during the proposed extension of the Stay Period.

[28] The Applicant submits that it is acting in good faith and with due diligence in pursuit of its restructuring goals.

[29] The Monitor supports extending the Stay Period until August 31, 2021 and is of the view that the Applicant is acting in good faith and with due diligence.

[30] I am satisfied that the Applicant has made considerable progress in its restructuring efforts since the CCAA proceedings commenced on February 1, 2021. This progress has been achieved in very difficult circumstances. Counsel representing both LUFA and LUSA have recounted that the process has been “brutal” and the impact on their members has been significant. The impact on both U Sudbury and Thorneloe is also significant and has been recounted in decisions rendered on May 2, 2021, with reasons released on May 7, 2021, cited as *Laurentian University of Sudbury*, 2021 ONSC 3272; and *Laurentian University v. Sudbury University*, 2021 ONSC 3272.

[31] Having reviewed the record and hearing submissions, I am satisfied that an extension of the Stay Period to August 31, 2021 is warranted and is appropriate in the circumstances. The Applicant has satisfied me that it has acted and is acting in good faith and with due diligence.

[32] In arriving at these conclusions, I have taken into account the progress that has been made to date and the very detailed Phase 2 plan that the Applicant has submitted. I have also taken into account the Monitor’s assessment and view that the Applicant is acting in good faith and with due diligence.

Issue 2: Approval of the DIP Amendment

[33] The Applicant has drawn on the full \$25 million available pursuant to the DIP Facility and takes the position that, as illustrated in the revised cash flow forecast, it will not be able to fund its operations during the requested extension of the Stay Period without additional funding.

[34] The Applicant submits that it requires additional funding to provide sufficient liquidity to make payroll, continue operating in the ordinary course and fund the restructuring costs while it proceeds into Phase 2 of its restructuring.

[35] On April 19, 2021, the Applicant and Firm Capital Corporation (“FCC”) entered into an Amended DIP Term Sheet (the “DIP Amendment”), pursuant to which FCC agreed to increase the maximum principal amount available under the DIP Facility by a further \$10 million, subject to the terms and conditions of the amended DIP Facility.

[36] The salient terms of the DIP Amendment include, among other things:

- (a) an increase of \$10 million to the maximum principal amount available under the DIP facility to \$35 million;
- (b) extension of the maturity date to August 31, 2021;
- (c) a Loan Amendment Fee in the amount of \$200,000; and
- (d) an increase of the DIP Lender’s Charge to \$35 million.

[37] The DIP Amendment is conditional upon, among other things:

- (a) ratification of the LUFA and LUSA term sheets;

- (b) an order, in form and substance satisfactory to the DIP Lender;
- (c) the disclaimer of the Federation Agreements and Financial Distribution Notices, effective May 1, 2021 in connection with U Sudbury and Thorneloe;
- (d) no further academic restructuring of the Applicant's programs without the consent of the DIP Lender;
- (e) a revised cash flow forecast and multi-year financial forecast demonstrating financial sustainability of the Applicant; and
- (f) the issuance of a claims process order by May 31, 2021.

[38] The Applicant reports that the DIP Amendment was negotiated with the DIP Lender and its counsel following the agreements reached with LUFA, LUSA and Huntington and the issuance of the Notices of Disclaimer to Huntington, Thorneloe and U Sudbury.

[39] Section 11.2 of the CCAA provides the statutory basis to approve the DIP Amendment and to order priority of the DIP Lender's Charge.

[40] Section 11.2(4) sets out the non-exhaustive list of factors to be considered by the court in deciding whether to grant such a charge.

[41] The Applicant submits that the DIP Amendment and the DIP Lender's Charge should be approved, taking into consideration section 11.2(4) of the CCAA, for the following reasons:

- (a) the notice requirements under section 11.2(1) of the CCAA have been met;
- (b) the Applicant, with the assistance of the Monitor, has taken steps to reduce costs while ensuring that it remains operating in the ordinary course;
- (c) the DIP Amendment and the increase of the amount available under the DIP Facility is required in order for the Applicant to continue operations in the ordinary course and pursue its restructuring plan;
- (d) without the DIP Amendment, the Applicant would not be able to remain in business;
- (e) the quantum in terms of the DIP Amendment and the DIP Lender's Charge is reasonable and appropriate;
- (f) stakeholders will not be materially prejudiced; and
- (g) the Monitor is of the view that the quantum and the terms and conditions of the DIP Amendment and the DIP Charge are reasonable and appropriate in the circumstances and should be approved.

[42] The Monitor supports the position of the Applicant.

[43] The amendments to the DIP Facility are opposed by both Thorneloe and U Sudbury. Thorneloe, in particular, submitted that the increase in the DIP Facility was not necessary at this time. The arguments in opposition were addressed in the endorsement of May 2, 2021, with reasons released on May 7, 2021, cited as *Laurentian University of Sudbury*, 2021 ONSC 3272. Paragraphs [59] to [66] are equally applicable and are incorporated, by reference, to this endorsement, and read as follows:

[59] It is also necessary to take into account the position of the DIP Lender. The DIP Lender has put forth a condition for its continued support and for increased financing. That condition is that the Disclaimer with respect to Thorneloe and U Sudbury had to be finalized by May 1, 2021, subject to any reserved decision of the court.

[60] Thorneloe challenges the position of the DIP Lender for two reasons. First, the condition relating to the Disclaimer was not a condition of the original DIP and was inserted only after the Notice of Disclaimer was issued. Second, the analysis performed by Farber indicates that the increased DIP Loan is not required until the latter part of June at the earliest.

[61] There is, in my view, no basis to question the legitimacy of the DIP Lender nor question the conditions that the DIP Lender has put forth with respect to any request to extend the DIP Loan and to increase the amount of the DIP Financing. The DIP Lender is entitled to take into account commercial reality in assessing its options.

[62] The DIP Lender is not a pre-existing lender to Laurentian, nor is there any evidence that the DIP Lender is engaged in a “loan to own strategy”. These facts distinguish this DIP Lender from a number of DIP lenders that have been involved in the cases referenced by counsel to Thorneloe, as referenced in Rostom and Fell, “Recent Trends in DIP Financing” (2016) 5-4 IIC Journal; *Essar Steel Algoma (Re)*, Endorsement of Newbould J. dated November 16, 2015; and *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459.

[63] It is also relevant to remember that this is not a situation where the Court is being asked to approve DIP financing with this DIP Lender. These approvals were granted in February 2021 with no party objecting and with no appeals being filed. It was a competitive process and the DIP Lender was one of eight potential DIP lenders identified at the outset of the proceedings.

[64] Thorneloe also takes issue with respect to the reluctance of a representative of the DIP Lender to be cross-examined or to answer any questions with respect to the DIP Financing.

[65] In response, Laurentian takes the position that the terms for the continued DIP were negotiated as part of a process of achieving a viable long-term plan. Second, although the increased DIP may not be necessary until mid-June, it is a requirement for any extension of the stay to provide a cash flow statement that takes into account the entirety of the Stay Period, and it is necessary to provide the necessary assurances to faculty and students that Laurentian will be able to operate for the next academic term, which commences May 3, 2021 and extends towards the middle to the latter part of July 2021. It is simply not feasible, from its standpoint, to operate without the continued DIP Facility and the certainty that the DIP Facility will be available throughout the entirety of the academic term and the Stay Period.

[66] With respect to the cross-examination of the DIP Lender, I note that no affidavit has been filed in these proceedings by a representative of the DIP Lender. In addition, the DIP Lender is not a pre-existing lender. The DIP Lender is not involved in any of the pre-CCAA DIP contractual relationships. It is up to the debtor, with the assistance of the Monitor, to negotiate the terms of the DIP Financing. There is no evidence that the DIP Lender has any ulterior motive in negotiating the condition to extend additional financing and to extend the term.

[44] I am also satisfied that the Applicant has satisfied the criteria in section 11.2 of the CCAA that the DIP Amendment and the DIP Lender's Charge should be approved. In arriving at this conclusion, I have taken into account a number of factors referenced in s. 11.2(4) of the CCAA as reflected in the submissions of the Applicant in para. [41] above.

Issue 3: Approval of the LUFA Term Sheet, LUSA Term Sheet and Huntington Transition Agreement

[45] The Applicant submits that the court has jurisdiction to approve transactions and settlements and sources of authority have been acknowledged in connection with settlement agreements within a CCAA proceeding through either section 11.02 of the CCAA or the inherent jurisdiction of the court to "fill the gaps" of the CCAA in order to give effect to its objects.

[46] The Applicant submits that the settlement agreements are the result of intensive work and negotiation by representatives of the Applicant, LUFA, LUSA and Huntington. Further, the Monitor has overseen and participated in many of the discussions and negotiations with LUFA, LUSA and Huntington and supports approval of the settlement agreements.

[47] I am satisfied that the settlement agreements negotiated between the Applicant, LUFA, LUSA and Huntington should be approved.

[48] The Information and Privacy Commissioner took no position on the stay extension but did request that that the accommodation provided to the Commissioner at paragraph [61] of the endorsement of February 12, 2021 be maintained. This provision provides that the stay does apply to the Commissioner, but that the Commissioner can request reconsideration of the applicability of the stay at a future time. This request is most reasonable and is continued.

[49] It is also noted that counsel to the Canadian Association of University Teachers, as well as the Federated Universities, have reserved their rights with respect to all intellectual property issues that may arise.

Disposition

[50] In the result, the motion is granted and the order has been signed.



Chief Justice Morawetz

Date: May 14, 2021