

CITATION: Laurentian University of Sudbury, 2022 ONSC 5645
COURT FILE NO.: CV-21-00656040
DATE: 2022-10-11

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 Grossell and Derek Harland*, for the Applicant

Ashley Taylor and Elizabeth Pillon, for the Court-appointed Monitor Ernst &
Young Inc.

Bradley Wiffen, for His Majesty the King in Right of Ontario as represented by the
Minister of Colleges and Universities

Scott Rollwagen, for the Board of Governors

Natasha MacParland, Lender Counsel for the Applicant

Charles Sinclair, for Laurentian University Faculty Association

Brendan Scott, for Laurentian University Staff Union

Stuart Brotman and Dylan Chochla, Toronto-Dominion Bank

Laura Culleton, for Bank of Montreal

Joseph Bellissimo, for Huntington University

Andrew Hatnay, for Thorneloe University

André Claude, for University of Sudbury

Alex MacFarlane and Charlotte Chen, for NOSM

Stephen Gaudreau, for the Art Gallery of Sudbury

Roderic McLauchlan, Barry Stork and Colby Linthwaite, for the Canadian
Universities Reciprocal Insurance Exchange

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

Heather Fisher, for the Auditor General of Ontario

Dawne Jubb, Interim General Counsel for Laurentian University

HEARD and

DETERMINED: October 5, 2022

REASONS: October 11, 2022

ENDORSEMENT

[1] At the conclusion of the hearing, I granted the motion with reasons to follow. These are the reasons.

[2] Laurentian University of Sudbury ("LU") brings this motion for the following orders:

- (a) the Sanction Order that sanctions the Plan pursuant to the *Companies' Creditors Arrangement Act* ("CCAA");
- (b) the Unsealing Order that, at the Effective Time on the Plan Implementation Date, unseals the Sealed Exhibits to the Affidavit of Dr. Robert Haché sworn January 30, 2021; and
- (c) the Stay Extension Order that extends the Stay Period up to and including November 30, 2022.

[3] The evidentiary support for the requested relief is set out in the affidavit of Dr. Robert Haché, sworn on September 28, 2022 and in the 16th Report of Ernst & Young Inc., in its capacity as Monitor of LU (the "Monitor") (the "Report").

[4] The motion was not opposed.

BACKGROUND

[5] LU commenced this CCAA proceeding on February 1, 2021. In granting the Initial Order I made a number of findings of fact, including:

- (a) LU was a "debtor company" to which the CCAA applies;
- (b) LU was "plainly insolvent and faces a severe liquidity crisis";
- (c) absent additional financing, LU would be unable to meet payroll at the end of February, 2021;

- (d) the financial crisis was “real and immediate”; and
- (e) with the approval of the interim financing, LU would have liquidity for the duration of the Stay Period.

[6] Subsequent to the granting of the Initial Order, LU commenced a comprehensive operational, financial and academic restructuring to ensure that it could emerge from the CCAA Proceeding as a going concern and as a financially sustainable university.

[7] LU engaged in negotiations with the assistance of Justice Sean Dunphy, the Court-Appointed Mediator with respect to the various restructuring initiatives which LU felt were necessary in order to achieve financial sustainability, including, among other things: (a) a full review and restructuring of its academic programs; (b) reducing its faculty complement based upon the academic restructuring; and (c) negotiating an end to, or terminating, LU’s historic relationship with the former federated universities. LU achieved agreement with several of the key parties who participated in the Mediation, including Laurentian University Faculty Association (“LUFA”), Laurentian University Staff Union (“LUSA”) and Huntington University.

[8] In addition to entering into restructuring agreements with critical stakeholders, LU states that it achieved the following key milestones during the CCAA proceeding:

- (a) academic Restructuring;
- (b) LUFA Term Sheet;
- (c) LUSA Term Sheet;
- (d) disclaimer of Federation Agreements with Former Federated Universities;
- (e) cost savings;
- (f) pension plan amendments;
- (g) completion of operational and governance reports;
- (h) completion of the real estate review;
- (i) resolution of grievances; and
- (j) resolution of claims.

The Meeting

[9] On July 28, 2022, the Plan was accepted for filing and the Meeting Order was issued authorizing LU to call, hold and conduct the Meeting. No party objected to the granting of the Meeting Order authorizing the Plan to be presented to creditors.

[10] The meeting was held on September 14, 2022 and was attended in person or by proxy by 606 Affected Creditors and/or Unresolved Claimants holding an aggregate value of \$178,893,641 in Proven Claims. A total of 597 Affected Creditors voted by proxy or in person at the Meeting, holding an aggregate value of \$62,937,935.

[11] The Plan was approved by 87.4% in number representing 68.9% in value of Affected Claims of the Affected Creditors who voted in person or by proxy at the Meeting. The Monitor determined that the votes of Unresolved Claimants would not have impacted the outcome of the vote.

[12] The resolution to approve the Plan was carried by the Requisite Majority of Affected Creditors and the Plan was approved.

[13] The aim of the Plan is to: (a) complete LU's restructuring and provide the opportunity for LU to operate as a going concern bilingual and tri-cultural post-secondary university in the City of Sudbury; (b) provide for a compromise of, and consideration for Affected Claims that are Proven Claims; and (c) effect a release and discharge of all Affected Claims, Released Claims and the Huntington Released Claims.

[14] The salient terms of the Plan include:

- (a) certain post-implementation steps that will be undertaken which are intended to better position LU from an operational and governance perspective;
- (b) Unaffected Claims will remain unaffected by the Plan, subject to the treatment of the Unaffected Claims in the Plan;
- (c) a Guaranteed Minimum Plan Consideration Amount of \$45.5 million from the sale of the Designated Real Estate Assets will be received by LU within three years of the Plan Implementation Date;
- (d) payment in full of all amounts owing to holders of CCAA Priority Claims, Secured Claims and Vacation Pay Compensation Pay Claims;
- (e) a *pro rata* distribution of the Distribution Pool remaining after the payments referred to above and any reimbursement to LU for amounts pre-funded into the Distribution Pool;
- (f) a full and final release of any Released Claims that may be made against the Released Parties, which is subject to a carve out for Non-Released Claims;
- (g) an injunction against claims that may be asserted against any of the Released Parties, save and except as it relates to the Non-Released Claims; and
- (h) a limited third-party release in favour of Huntington University regarding any claims that may be made against Huntington in respect of the discontinuance of

the RHBP or the discontinuance of any academic programs or courses by Huntington.

[15] The Plan is also subject to certain conditions to implementation, including (a) the resolution of all grievances that are subject to the Grievance Resolution process, and (b) the renewal of two senior management positions at LU (the President and the Provost) prior to the Plan Implementation Date.

Plan Releases

[16] The Plan provides the Plan Releases in respect of the Released Claims in favour of LU, the Chief Redevelopment Officer, the Monitor, and each of their respective representatives.

[17] Released Claims include all claims, obligations or liabilities in respect of the Released Parties existing or taking place at or prior to the Effective Date.

[18] The Plan does not affect (a) Crown claims as described in s. 6(3) of the CCAA, (b) employee-related payments as described in s. 6(5) of the CCAA, or (c) pension claims as described in s. 6(6) of the CCAA.

Implementation of the Plan

[19] It is LU's expectation that the plan will be implemented by November 30, 2022. LU is currently negotiating with the Ministry of Colleges and Universities ("MCU") regarding the terms of the Exit Financing Documentation. Subject to receipt of the requisite government approvals, LU intends to seek an order on November 1, 2022 authorizing it to enter into the Exit Financing Documentation.

[20] The issues for consideration on this motion are:

1. should the Court sanction the Plan?
2. should the Court grant the Unsealing Order? and
3. should the Court grant the Stay Extension Order?

Issue One: Should the Court Sanction the Plan?

[21] Pursuant to s. 6(1) of the CCAA, the court has the discretion to sanction a plan if it has achieved the requisite "double majority" vote at any meeting of creditors held pursuant to s. 4 of the CCAA. Once a court sanctions a plan, it becomes binding on the debtor company and all of its creditors.

[22] The Plan was approved by the requisite double majority of Affected Creditors who voted. The Plan was approved by 87.4% in number and 68.9% in value of the Affected Claims.

[23] Having satisfied the voting criteria, the issue is whether the Court should exercise its discretion to approve and sanction the Plan. The test for court approval of a plan is well-established:

- (a) there must be strict compliance with all statutory requirements;
- (b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
- (c) the plan must be fair and reasonable.

(see: *CanTrust Holdings Inc., et al. (Re)*, 2021 ONSC 4408 at para 13)

[24] When considering if the applicant has complied with all statutory requirements under the CCAA, the court will typically consider the following:

- (a) if the applicant comes within the definition of a “debtor company” under section 2(1) of the CCAA;
- (b) if the applicant has total claims in excess of \$5 million;
- (c) if the creditors were properly classified;
- (d) if the notice of meeting was sent in accordance with the Meeting Order;
- (e) if the meeting was properly constituted;
- (f) if the voting was properly carried out; and
- (g) if the plan was approved by the requisite majorities.

(see: *Canwest Global Communications Corp.*, 2010 ONSC 4209 at para. 15)

[25] Each of the foregoing factors are factual issues which have been established on the record.

[26] The Monitor has also stated in its Report that LU has strictly complied with all statutory requirements. I accept this statement.

[27] In addition, I am satisfied that the Plan complies with the statutory requirements set out in sections 6(3), 6(5) and 6(6) of the CCAA, which provides that the court may not sanction a plan unless it contains certain provisions concerning certain Crown claims, employee claims and pension claims.

[28] I conclude that LU has complied with all statutory requirements under the CCAA and this part of the test has been met.

Issue Two – Were Any Unauthorized Steps Taken?

[29] The Monitor has filed 16 Reports. These Reports have detailed the activities of LU and I am satisfied that LU has acted in good faith and with due diligence throughout the course of this proceeding, complying with the requirements of the CCAA and all orders of the court.

[30] I am satisfied that there is no basis for any assertion that LU has proceeded in a manner that is not authorized by the CCAA. In my view, the second part of the test has been met.

Issue Three: The Plan is Fair and Reasonable

[31] Courts have emphasized that “perfection is not required” when assessing whether a plan is fair and reasonable (See: *AbitibiBowater Inc. (Re)*, 2010 QCCS 4450 para. 33). Instead, a court should consider the relative degrees of prejudice that would flow from granting or refusing to grant the relief sought and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (See: *(Re) Canadian Airlines Corp.*, 2000 ABQB 442 at para. 3). Counsel to LU submits that the discretion of the court should be guided by the objectives of the CCAA – namely to “enable compromises to be made for the common benefit of the creditors and of the company, particular to keep a company in financial difficulties alive and out of the hands of liquidators” (See: *Northlands Properties Ltd. v. Excelsior Life Ins. Co. of Canada* 1989 CanLii 2672 (BCCA) at para. 17).

[32] In assessing whether a plan is fair and reasonable the court will consider:

- (a) whether the claims were properly classified and whether the requisite majorities of creditors approved the plan;
- (b) what creditors would receive on bankruptcy or liquidation as compared to the plan;
- (c) alternatives available to the plan and bankruptcy;
- (d) oppression of the rights of creditors;
- (e) unfairness to shareholders (inapplicable to LU); and
- (f) the public interest.

(See: *Canwest Global*, *supra* at para. 21)

[33] With respect to classification, the Affected Creditors were classified in a single class. The classification of Affected Creditors was supported by the Monitor and approved in the Meeting Order without objection.

[34] As previously noted, the double majority test was satisfied and this level of support allows me to conclude that the assenting creditors believe that their interests are treated fairly and equitably under the Plan.

[35] With respect to alternatives, as set out in the 14th Report of the Monitor, the Monitor believes that if the Plan is not implemented, the most likely outcome is some form of liquidation of LU's assets which would produce an inferior result for the Affected Creditors than that provided for under the Plan. Under the Plan, the Monitor estimates the unsecured creditors will recover approximately 14.1% to 24.2%. In liquidation, the Monitor estimates a recovery of approximately 8.5% to 16.7%. I note that if the Plan is not sanctioned, LU will not be able to successfully complete its restructuring and likely would be required to cease operations and liquidate. A liquidation would give rise to additional claims and increase the likelihood of an inferior result.

[36] With respect to oppression of creditors, LU submits that creditor treatment must be equitable, however, "equitable treatment is not necessarily equal treatment". In this case, I am satisfied that the Plan treats all Affected Creditors equally in terms of treatment under the Plan and distributions under the Plan. The only persons that receive different treatment are the Unaffected Creditors. I am satisfied, due to the factual or legal nature of their claims, they must be treated differently than the Affected Creditors.

[37] The issue of unfairness to shareholders is not applicable in this case as LU is a not for profit corporation without share capital.

[38] Finally, with respect to whether the Plan is in the public interest, if the Plan is sanctioned, LU will continue as a going concern, as a bilingual and tri-cultural post-secondary university in Sudbury. As counsel to LU submits, the continuation of LU will provide the opportunity for thousands of students that attend LU each year to continue to attend LU and complete their degrees. Further, implementation of the Plan will preserve the employment of hundreds of faculty and staff members at LU. I am satisfied that sanctioning of the Plan is in the public interest.

Plan Releases

[39] Turning now to the Plan Releases and the Huntington Third-Party Release, counsel to LU submits that it is well established that courts have the jurisdiction to sanction plans of compromise and arrangement under the CCAA containing third-party releases. (See: *Pacific Exploration & Production Corporation (Re)*, 2016 ONSC 5429 at para. 30; and *Lydian International Limited (Re)*, 2020 ONSC 4006).

[40] The following list of factors has been considered in respect of the approval of releases in CCAA proceedings, including third-party releases:

- (a) whether the released claims are rationally connected to the purpose of the plan;
- (b) whether the plan can succeed without the releases;
- (c) whether the parties being released contributed to the plan;

- (d) whether the releases benefit the debtors as well as the creditors generally;
- (e) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and
- (f) whether the releases are fair, reasonable and not overly-broad.

(See: *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54)

[41] As submitted by counsel to LU it is not necessary for each of these factors to be satisfied in order for the release to be granted.

[42] Having reviewed the record and the submissions as set out in LU's factum at para. 46, I am satisfied that the Plan Releases are necessary and appropriate in these circumstances. The Plan Releases are rationally connected to the purpose of the plan. The object of the Plan Releases is to provide LU with a fresh start so that it may continue to provide university education to thousands of students and employment to hundreds of people in the Greater Sudbury region and northern Ontario. Further, I am satisfied that the Plan cannot succeed without the Plan Releases. For LU to continue operating and fulfilling the purpose of the Plan, it must have finality in respect of its obligations and liabilities moving forward. In addition, the Released Parties are, in my view, necessary and essential to the restructuring and they contributed to the Plan. Each of LU, the Monitor and the CRO played a part in advancing the restructuring and achieving approximately \$40 million in annual savings. The Directors and Officers of LU were active and engaged in overseeing and making key strategic decisions leading to the Plan.

[43] I am also satisfied that the creditors were, at all relevant times, aware of the nature and effect of the Plan Releases. Full disclosure of the Plan Releases was made to Affected Creditors at the time that LU applied for the Meeting Order. Further, the Monitor provided the meeting materials to over 1,100 Affected Creditors and these materials included the Information Circular, which described the Plan Releases in detail. I have also taken into account that at no point did any creditor or other stakeholders make any submissions on the scope of the Plan Releases or express any objection to the Plan Releases, nor were any submissions made in opposition to the Plan Releases on this motion.

[44] On this issue, I am satisfied that the Plan Releases are fair, reasonable and rationally connected to the overall purpose of the Plan, such that they should be approved.

[45] I am also satisfied that the Huntington Third-Party Release is appropriate in the circumstances. The Huntington Transition Agreement was a significant step in the restructuring of LU and LU derived certain benefits from the Huntington Transition Agreement. I am also satisfied that Huntington contributed in a tangible way to LU's restructuring and the Plan and the release of the Huntington Released claims is consistent with the terms reached in the Huntington Transition Agreement, previously approved.

CONCLUSION

[46] In conclusion, I am satisfied that LU has complied with all requirements for the Court to sanction the Plan.

Issue 2: Unsealing Order

[47] LU has also requested that the Exhibits which were sealed on the Initial Order be unsealed. LUFA and LUSU requested that the Sealed Exhibits no longer be sealed at the appropriate time. LU has advised that all Affected Parties agreed that the appropriate time is at the Effective Time on the Plan Implementation Date, because the sensitivity associated with the correspondence that gave rise to the Sealing Order will no longer apply. Further, MCU has no objection to an unsealing of the Sealed Exhibits. In my view it is appropriate to grant the unsealing order.

Issue 3: Stay Extension Order

[48] Finally, LU seeks an extension of the Stay Period up to and including November 30, 2022.

[49] After the Plan has been sanctioned, the final step to conclude the restructuring is to satisfy the conditions precedent to implementation of the Plan. This will occur over the next few weeks. I am satisfied that LU continues to act in good faith and with due diligence as it moves towards Plan implementation. The required Cash Flow Forecast has been filed and LU will have sufficient liquidity to operate its business and meet its obligations to November 30, 2022. Further, the Monitor supports extending the Stay Period until November 30, 2022. In my view it is both reasonable and appropriate to extend the Stay Period to November 30, 2022.

DISPOSITION

[50] In the result, the motion is granted. Three orders - the Sanction Order, the Unsealing Order and the Stay Extension Order have been signed.



Chief Justice G.B. Morawetz

Date: October 11, 2022