

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

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

**AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR
ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY**

AMENDED NOTICE OF MOTION FOR LEAVE TO APPEAL

TAKE NOTICE THAT THE MOVING PARTY, the CANADIAN UNION OF PUBLIC EMPLOYEES (“**CUPE**”) will make a motion to the Court of Appeal for Ontario, on an expedited basis, for the date to be fixed by the Registrar of the Court, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing or as otherwise directed by the Court.

THE MOTION IS FOR:

1. An order granting CUPE leave to appeal to the Court of Appeal for Ontario from the decision of Chief Justice Morawetz (the “**Motion Judge**”) dated February 26, 2021, which indefinitely maintained the Sealing Order originally granted on an interim basis on February 1st, 2021 and February 12th, 2021;
2. An order that this motion be heard on an expedited basis and waiving or abridging the time for notice, service and filing in connection with this motion;
3. An order validating the manner of service of the notice of motion and motion materials herein, if necessary;
4. Costs of this motion, to be fixed by the court; and
5. Such further and other relief as this Honourable Court deems fit.

THE GROUNDS FOR THIS MOTION ARE:

6. This case raises novel and important issues with respect to open court processes and the need for transparency and full disclosure of information by public institutions that seek protections under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“**CCAA**”). The proposed appeal raises serious and arguable grounds with respect to the use of sealing orders in CCAA proceedings and engages issues that are important to the parties and to these CCAA proceedings and are also significant to the public and the practice of insolvency law in general.

Background to the Sealing Order

7. On February 1, 2021, Laurentian University of Sudbury (“**Laurentian**” or the

“**Applicant**”) applied for and was granted protection under the CCAA from the Ontario Superior Court of Justice (Commercial List).

8. CUPE represents a total of 396 employees working at Laurentian, who fall into one of three locals: Local 895-04 (sessional instructors at Thornloe University, an affiliate of Laurentian University); Local 895-05 (food service employees); and Local 5011 (teaching assistants).

9. More broadly, CUPE represents approximately 38,600 employees at Ontario public universities. CUPE members in academic positions include teaching assistants, research assistants, graduate student academic employees, lab technicians, contract academic staff (teachers), postdoctoral fellows and librarians. CUPE members in academic support services include administrative staff (clerical, clerks), custodians, food service, cooks, building services, maintenance, skilled trades (locksmiths, elevator maintenance, painters, carpenters, plumbers, electricians, etc.), grounds maintenance (garbage, snow removal, digging, gardening), electrical services, and heating plant operators.

10. The use of the CCAA by a publicly-funded educational institution in Ontario is unprecedented and will have real risks and impacts on Laurentian’s employees and other stakeholders, to the community of Sudbury and to Ontario’s north. It also has significant implications for Ontario’s post-secondary sector.

11. When seeking the initial order in this proceeding, Laurentian sought to seal certain correspondence it was relying on for the purposes of establishing its entitlement to use a CCAA proceeding to protect it from creditors and restructure its affairs. This

correspondence is contained in Exhibits “EEE” and “FFF” to the Affidavit of Robert Haché made in support of the initial application, and is letters exchanged between the Ministry of Colleges and Universities and Laurentian on January 21, 2021 and January 25, 2021 (the “**Sealed Documents**”).

12. In its factum in support of the Initial Order, Laurentian described the Sealed Documents as containing “information with respect to the Applicant and certain stakeholders of the Applicant, including various rights or positions that stakeholders of the Applicant may take either inside or outside of a CCAA proceeding” and argued that if the letters were not sealed, “stakeholders may react in such a way that jeopardizes the viability of the Applicant's restructuring”.¹

13. On February 1, 2021, the Motion Judge, as part of the Initial Order, sealed the Sealed Documents.

14. As is the norm in CCAA proceedings, the Initial Order was granted on an *ex parte* basis.

15. Prior to the comeback hearing, Laurentian returned to court on February 5, 2021 and obtained an order appointing Justice Sean Dunphy for the purposes of conducting a mediation between Laurentian's stakeholders. This mediation is ongoing, and in accordance with the order appointing the mediator, is intended to deal with the following issues:

¹ See paras. 112 and 113 of the Applicant's Factum, dated January 30, 2021, filed in support of the Initial Order.

- a. the review and restructuring of the Applicant's existing academic programs;
- b. the review and restructuring of the faculty necessary to deliver the Applicant's restructured academic programs;
- c. a new collective agreement between the Applicant and LUFA, including resolving all outstanding grievances;
- d. the review and restructuring of the Applicant's Federated Universities' model;
- e. the framework for the Applicant's restructuring and future operations; and
- f. any other matters that are referred to the Court-Appointed Mediator by the Applicant, the Monitor, the relevant stakeholders or this Court;

16. On February 10, 2021, at the comeback hearing, several parties challenged the sealing order made in respect of the Sealed Documents, including CUPE, the union representing faculty at Laurentian (“**LUFA**”) and the federation of Ontario faculty associations of which LUFA is a member (“**OCUFA**”).

17. By an endorsement dated February 12, 2021, the Motion Judge upheld the Sealing Order on an interim basis and informed the parties that he needed more time to prepare reasons on the issue.

18. On February 26, 2021, the Motion Judge released a supplementary endorsement addressing the issue of the maintenance of the Sealing Order. The Motion Judge upheld the Sealing Order, finding that the disclosure of the Sealed Documents “could be detrimental to any potential restructuring.”

19. The Motions Judge also noted that the “commercial” interest related to the Sealed Documents “transcends the direct commercial interest” of the Applicant and includes that of various wider stakeholders – some of whom have objected to the Sealing Order – including “faculty, students, employees, third-party suppliers, and the City of Greater Sudbury.” The Motions Judge did not include the Ontario Government’s interests as the largest funder of the Applicant, and primary funder of the public post-secondary institutions in Ontario, in this list of wider public interests.

20. Finally, the Motion Judge determined that it would not be appropriate “at this time”, to implement some type of alternative arrangement to the Sealing Order, as such an alternative “could negatively impact the mediation efforts being conducted by Justice Dunphy.”

21. No evidence has been filed with respect to the impact on the mediation process.

The proposed appeal

22. If leave is granted, this court would be asked to answer the following questions:

- a. Did the Motion Judge err in focusing solely on the Applicant's assertion of an important commercial interest and not balancing the various competing interests applicable to such order under *Sierra Club of Canada v. Canada*, [2002] 2 SCR 522 ("*Sierra Club*")?
- b. Did the Motion Judge err in allowing the Sealing Order without a sufficient evidentiary foundation?
- c. Did the Motion Judge err in concluding that the Sealing Order was justified as a result of speculative concerns about the impact the Sealed Documents might have on the outcome of the CCAA restructuring process?

The factors relevant to granting leave to appeal favour leave being granted

23. The issue of the propriety of the use of the Sealing Order is of significance to the practice, given the unprecedented use of the CCAA proceeding by a publicly-funded institution, and the importance of all parties to such a proceeding having a full understanding of the interactions between a public institution of this nature and the relevant governmental body that appoints some members of its governing body, is the primary funder of the institution and otherwise supports it and the sector in which it operates.

24. This issue is also significant to this proceeding, as the mediation and restructuring proceeding is continuing with one party, the Applicant, having access to a full record supporting the proceedings, while other parties, including employees, have a partial record and one that does not include any insight into the position of the major funding stakeholder

of the Applicant, the Government of Ontario, with respect to an Ontario university in financial crisis.

25. The Applicant, the Monitor and the Motion Judge all acknowledge that the Sealed Documents are not only relevant to this proceeding, but also so significant that they could affect or change stakeholder positions.

26. That the Sealed Documents could change stakeholder positions in regard to the restructuring has been argued to support restricting access to the Sealed Documents. To the contrary, however, the admitted significance of the documents to the restructuring provides a strong rationale for their disclosure. If important documents that would have an effect on the positions of the parties are not being disclosed, the mediation and other restructuring negotiations are being conducted on a plainly uneven playing field, in which the Applicant has a full and complete record while other stakeholders are provided, quite deliberately, with a partial record, specifically so that they cannot act on a fully informed rational basis.

27. The proposed appeal is *prima facie* meritorious. The Motion Judge erred in ordering that the Sealed Documents be kept sealed and confidential from the parties to the proceeding, as:

- a. the Supreme Court of Canada in *Sierra Club* required a balancing of a number of competing interests, including litigants' interests in a full and fair proceeding and achieving a just result through open and accessible court proceedings, the right to free expression, and the requirement that justice be done and be seen to be done and the concomitant need for public

scrutiny and open courts; however, the Motion Judge adverted to none of these considerations and focused only on the Applicant's assertion of an important commercial interest and on a speculative lack of availability of alternative measures to protect the commercial interest;

- b. *Sierra Club* was a case concerning public access to potentially confidential materials filed in a legal proceeding in which the litigants' access to the same confidential documents was uncontested; however, the Motion Judge applied the *Sierra Club* test to deny access to admittedly relevant documents to the litigants themselves without consideration of the controlling factors set out by the Supreme Court of Canada in *Sierra Club* and without consideration of the constitutionally protected interests of the litigants subject to the mediation;
- c. *Sierra Club* required that a claim of confidentiality in respect of a commercial interest be "well grounded in the evidence"; however, the Applicant's claims of confidentiality and damage by disclosure were made in argument and without any evidentiary support at all; and
- d. the purported damage that release of the Sealed Documents would cause was not damage to a self-standing commercial interest independent of this proceeding, as in *Sierra Club*, but was a speculative damage to the outcome of the proceeding itself; however, it is premature to determine the preferred outcome of this CCAA process prior to a Plan of Arrangement and, under the CCAA, it is for the Applicant's creditors and stakeholders,

and not the Motion Judge or the Monitor, to determine the direction and nature of the restructuring appropriate to this publicly-funded university serving the communities of Northern Ontario;

- e. the claimed basis for restricting access by some stakeholders to the Sealed Documents – that fully informed stakeholders may change their positions in a manner not considered desirable by the Applicant if they were provided with the Sealed Documents – is offensive to basic precepts of fair civil procedures, fair process, accessible Court proceedings, open public scrutiny, free expression and, in the context of a CCAA proceeding, serves to undermine what should be a transparent procedure conducted amongst parties with a full understanding of the issues.

28. The proposed appeal will not unduly hinder the progress of the CCAA proceeding. On the contrary, as long as the Sealed Documents remain confidential, the possibility of a successful restructuring is hindered as a key piece of information is being withheld from the relevant stakeholders.

Statutory Grounds

- a. Rules 1.04, 1.05, 61.03 and 61.03.1 of the Rules of Civil Procedure.
- b. Sections 2, 6, 11, 13 and 14 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36.
- c. Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used in support of the motion:

1. Orders and endorsement of the court made in this CCAA proceeding;
2. The Affidavit of Robert Haché, sworn January 30, 2021;
3. The Appointment of Mediator Order dated February 5, 2021; and
4. The affidavit of Karen Ducharme, sworn March 5, 2021;
5. Such further and other evidence as counsel may advise and as this Honourable Court may permit.

March 10, 2021

A handwritten signature in dark ink, appearing to read 'Miriam Martin', with a stylized flourish at the end.

Miriam Martin
Counsel to the Moving Party
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**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**

Court of Appeal File No. M52287

Court File No. CV-21-656040-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

**NOTICE OF MOTION FOR
LEAVE TO APPEAL**

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