Court of Appeal File No. M52287
Court File No. CV-21-656040-00CL

COURT OF APPEAL FOR ONTARIO

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

FACTUM OF THE MOVING PARTIES

(Motion for Leave to Appeal)

March 9, 2021

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PART I - STATEMENT OF THE CASE

1. The Laurentian University Faculty Association ("LUFA"), the Canadian Union of Public Employees ("CUPE") and Ontario Confederation of University Faculty Associations ("OCUFA"), and collectively with LUFA and CUPE, the "Moving Parties") seek leave to appeal the decision of Chief Justice Morawetz of the Ontario Superior Court of Justice (Commercial List) (the "Motion Judge"), dated February 26, 2021, upholding the sealing order granted initially on February 1, 2021 and on an interim basis, pending release of the February 26, 2021 decision, on February 12, 2021 (the "Sealing Order").

2. The Sealing Order was granted by the Motion Judge as part of the initial order obtained on an *ex parte* basis by Laurentian University of Sudbury ("Laurentian" or the "Applicant") on February 1, 2021 (the "Initial Order") as that institution entered proceedings under the *Companies' Creditors Arrangement Act,* RSC 1985, c. C-35 (the "CCAA Proceedings").

3. At the comeback hearing on February 10, 2021, the Moving Parties objected to the continuation of the Sealing Order.

4. On February 12, 2021, the Motion Judge issued an endorsement extending the stay of proceedings, but informed the parties that he needed more time to draft reasons on the Sealing Order, which was extended on an interim basis until he could issue further reasons on the issue.

5. On February 26, 2021, the Motion Judge released a supplementary endorsement, upholding the Sealing Order indefinitely.

PART II - THE FACTS

A. Overview

6. The proposed appeal in this matter raises important issues with respect to open court processes and the necessity of full and frank disclosure of information by public institutions that seek to utilize the provisions of the CCAA. The proposed appeal raises serious and arguable grounds with respect to the use of sealing orders and engages issues that are important to the parties and to these CCAA proceedings, but are also significant to the public and the practice of insolvency law in general.

7. In his decision of February 26, 2021, the Motion Judge utilized the leading case on sealing orders, *Sierra Club of Canada v. Canada (Minister of Finance*) ("*Sierra Club*"), to justify withholding relevant, non-privileged communications between Laurentian and the Ministry of Colleges and Universities, on the basis that the disclosure of those communications might impair Laurentian's ability to restructure.[1] This decision, and its potential impact on this unprecedented insolvency and other potential CCAA proceedings involving publicly-funded institutions, warrants scrutiny from this Court.

B. The Moving Parties

8. LUFA represents Laurentian's 612 faculty members. Of these, 335 are full-time, with the balance being sessional faculty members.[2] LUFA and Laurentian's Board of

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1 *Sierra Club of Canada v. Canada (Minister of Finance*), [2002] 2 SCR 522, Book of Authorities of the Moving Parties ("BOA"), Tab 1.

2 Affidavit of Robert Haché, sworn January 30, 2021, at para. 121, Motion Record of OCUFA ("MR"), Tab 14, p. 224.

Governors are party to a collective bargaining agreement which expired on June 30, 2020.[3]

9. In its initial Application Record, Laurentian cites the urgent need to reduce the number of faculty members as a justification for its filing for *CCAA* protection.[4] According to Laurentian, currently LUFA's members represent approximately 60% of total salaries and benefits.[5]

10. CUPE represents over 300 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 894-05 (food service employees); and Local 5011 (teaching assistants).[6]

11. 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

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[3] Affidavit of Robert Haché, sworn January 30, 2021, at para. 126, MR, Tab 14, p. 225.

[4] Affidavit of Robert Haché, sworn January 30, 2021, at para. 305, MR, Tab 14, p. 281.

[5] Affidavit of Robert Haché, sworn January 30, 2021, at para. 125, MR, Tab 14, p. 225.

[6] Affidavit of Karen Ducharme, sworn March 5, 2021, at para. 3, MR, Tab 16, p. 306.

maintenance, painters, carpenters, plumbers, electricians, etc.), grounds maintenance (garbage, snow removal, digging, gardening), electrical services, and heating plant operators.[7]

12. OCUFA is a major stakeholder in the university sector in Ontario. It is an umbrella group for faculty associations across the province, and provides a voice for over 17,000 members across 30 different faculty associations. The application of the CCAA to the university sector is unprecedented, and poses real jeopardy to the sector's students, faculty and employees at Laurentian, and to the many stakeholders who depend upon it.[8]

B. Background to the Sealing Order

13. On February 1, 2021, Laurentian applied for and was granted protection under the CCAA from the Ontario Superior Court of Justice (Commercial List).

14. When seeking the initial order in this proceeding, Laurentian sought to seal certain letters that it was relying on for the purposes of establishing its entitlement to access the CCAA. These letters were exchanged between the Ministry of Colleges and Universities and Laurentian on January 21, 2021 and January 25, 2021, which

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[7] Affidavit of Karen Ducharme, sworn March 5, 2021, at paras. 4 to 6 and Exhibit A, MR, Tab 16, p. 306, 309-311.

[8] Affidavit of Susan Wurtele, sworn March 1, 2021, at para. 4, MR, Tab 15, p. 301.

documents were sealed on February 1, 2021 (the "Sealed Documents") by the Motion judge as part of the Initial Order.[9]

15. 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".[10]

16. As is the norm in CCAA proceedings, the Initial Order was granted on an *ex parte* basis.[11]

17. 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 confidential 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:

a. the review and restructuring of the Applicant's existing academic programs;

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[9] Affidavit of Robert Haché, sworn January 30, 2021, MR, Tab 14, p. 189; Initial Order of Chief Justice Morawetz, dated February 1, 2021 ("Initial Order"), MR, Tab 4, p. 42.

[10] Factum of the Applicant dated January 30, 2021 (filed in support of the Initial Order), at paras. 112-113, MR, Tab 17, p. 350.

[11] Initial Order, MR, Tab 4, p. 42.

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.[12]

18. On February 10, 2021, at the comeback hearing, OCUFA and several other parties challenged the Sealing Order made in respect of the Sealed Documents.

19. 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.

C. The Endorsement of February 26, 2021

20. 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

[12] Order (Re: Appointment of Mediator), dated February 5, 2021, at para. 3, MR, Tab 6, p. 73.

the Sealing Order, finding that the disclosure of the Sealed Documents "could be detrimental to any potential restructuring".[13]

21. He began by noting that Laurentian "contends that the [Sealed Documents] 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".[14]

22. While this comes directly from the factum of Laurentian filed in support of the Initial Order, the Motion Judge did not reference the fact that Laurentian also argued that "[i]f the Confidential Exhibits are not sealed, stakeholders **<u>may react</u>** in such a way that jeopardizes the Applicant's restructuring" [emphasis added].[15]

23. The Motion Judge identified the *Courts of Justice Act,* RSO 1990, c. C.43 as providing the relevant authority, and the *Sierra Club* decision as the leading case. He identified and explained the test from Sierra Club as follows:

> [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

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[13] Supplementary Endorsement of Chief Justice Morawetz, dated February 26, 2021 ("Supplementary Endorsement"), at paras. 19 & 25, MR, Tab 11, p. 126-127.

[14] Supplementary Endorsement, at para. 3, MR, Tab 11, p. 124.

[15] Factum of the Applicant, dated January 30, 2021 (filed in support of the Initial Order), at para. 13, MR, Tab 17, p. 316.

> (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.[16]

24. The Motion Judge then reviewed some of the evidence provided by Laurentian's President, Dr. Robert Haché, and summarized it in the following manner:

a. LU is insolvent;

b. 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;

c. LU has highlighted the benefits that it provides to the community of Northern Ontario and the costs and risks associated with attempting an

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16 *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at paras. 13-14, BOA, Tab 1.

informal restructuring outside of a proceeding and the costs and risks associated with the potential CCAA restructuring;

d. 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; and

e. LU has been in continuous dialogue with the Ministry and intends to continue this dialogue throughout the CCAA proceedings.[17]

25. The Motion Judge then considered certain elements of the analysis set out in *Sierra Club*, and noted that the "commercial" interest asserted by the Applicant in relation to the Sealed Documents "transcends the direct commercial interest" of Laurentian and includes that of various stakeholders – some of whom have objected to the Sealing Order – including "faculty, students, employees, third-party suppliers, and the City of Greater Sudbury".[18]

26. 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".[19]

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[17] Supplementary Endorsement, at para. 15, MR, Tab 11, p. 126.

[18] Supplementary Endorsement, at para. 20, MR, Tab 11, p. 126.

[19] Supplementary Endorsement, at para. 21, MR, Tab 11, p. 127

27. No evidence has been filed in support of the confidentiality of the Sealed Documents.

PART III - QUESTIONS TO BE ANSWERED IF LEAVE IS GRANTED

28. 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 without balancing the various competing interests applicable to such order pursuant to the relevant jurisprudence?

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?

PART IV - ISSUES AND ARGUMENT

A. The test for granting leave to appeal

29. The CCAA requires that leave be granted prior to a hearing of the proposed appeal, and factors relevant to the issue of whether to grant leave are well-established in the case law. They are:

a. whether the point on the proposed appeal is of significance to the practice;

b. whether the point is of significance in the proceeding;

c. whether the proposed appeal if *prima facie* meritorious; and

d. whether the appeal will unduly hinder the progress of the action.[20]

30. In the present case, each of these factors weigh heavily in favour of granting leave to appeal, and while leave in such cases is to be granted sparingly, this is precisely the type of case where it is important that this Court exercise its appellate oversight.

B. Use of a sealing order in these circumstances is of significance to the practice

31. These CCAA Proceedings are the first time that a publicly-funded university has utilized the CCAA to attempt to restructure. In fact, it appears to be the first time that an institution that is a recipient of and dependent upon significant public funding has entered into such proceedings. The use of the Sealing Order to withhold otherwise relevant and non-privileged documents from the parties to the proceedings, on the basis that such information might change the positions of the parties is an issue of fundamental importance to the practice, especially if the Laurentian CCAA proceeding is a harbinger of insolvencies to come.

32. The basic rationale underlying the Motion Judge's reasons – the idea that the Sealed Documents, if unsealed, might cause parties to react and change their positions – comes close to describing the very basis for most disclosure in court proceedings: *relevance*.

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[20] See, for example, *Nortel Networks Corporation (Re)*, 2016 ONCA 332, at para. 34, BOA, Tab 2.

33. If a document might have an impact on the positions of the parties on the issues in a proceeding, it is relevant and, generally speaking, if it is not privileged, needs to be disclosed. The Motion Judge's reliance on the *relevance* of the Sealed Documents as a basis for denying their disclosure is a surprising result, and one that if left undisturbed, may have a significant impact on the frequency with which sealing orders are sought in restructuring proceedings. For this reason, it is of significance to the practice.

C. The point on appeal is of significance to this CCAA proceeding

34. This issue is also significant to this proceeding, as the mediation and restructuring proceeding is continuing with one party, the Applicant, having a full record, while other parties, including labour parties, have an incomplete record that is completely bereft of any insight into the position of the Government of Ontario with respect to an Ontario University in financial crisis. The Applicant, the Monitor and the Motion Judge all acknowledged that the Sealed Documents are not only relevant to this proceeding, but also so significant that they could change stakeholder positions.

35. It has been argued that the fact of the Sealed Documents possibly changing stakeholder positions in regard to the restructuring supports restricting access to the those 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.

36. The significance of the point on appeal is heightened by the interaction between the Sealing Order and the exercise by the Moving Parties of the freedom of association enshrined in section 2(d) of the Charter.

37. The Applicant, the Monitor and the Motion Judge all agree that the Sealed Documents are relevant to the mediation insofar as their disclosure might alter the positions taken by the parties to that mediation, which has as one of its objectives the conclusion of a new collective agreement with LUFA.

38. Absent the CCAA Proceedings and the Sealing Order, the withholding of relevant information about Laurentian or the positions of the Ontario Government could amount to a breach of the duty to bargain in good faith, which has been afforded constitutional protection by the Supreme Court of Canada pursuant to section 2(d).[21] The content of the duty to bargain has consistently been held to include the disclosure of relevant information to the bargaining parties to promote fairness in negotiations.[22]

39. This duty has been held to include a duty on an employer to "disclose pertinent information needed by a union to adequately comprehend a proposal or employer response at the bargaining table" and to "inform the union during negotiations of

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[21] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, at para. 90, BOA, Tab 3.

[22] *Royal Conservatory of Music Faculty Association v. University of Toronto (Royal Conservatory of Music)*, 1985 CanLII 1085 (ON LRB), BOA, Tab 4.

decisions already made which will be implemented during the term of a proposed agreement and which may have a significant impact on the bargaining unit" and finally to "answer honestly whether it will probably implement changes during the term of a proposed agreement that may significantly impact on the bargaining unit."[23]

40. In this case, the disclosure of the relevant information contained in the Sealed Documents is a necessary precondition to exercising these constitutionally protected rights and to satisfy the requirement to bargain in good faith. As a result, the issue of the propriety of the Sealing Order is of immense significance to these CCAA Proceedings and the conduct of the negotiations between Laurentian and its labour stakeholders.

D. The proposed appeal is *prima facie* meritorious

41. The proposed appeal is *prima facie* meritorious. At any future appeal, OCUFA will argue that the Motion Judge made at least four errors of law in ordering that the Sealed Documents be kept sealed and confidential from the parties to the proceeding, as set out below.

(1) The Motion Judge failed to apply all aspects of Sierra Club and did not address the impact his decision would have on freedom of expression

42. The Motion Judge did not apply the balancing test set out in *Sierra Club.* In that case, the Supreme Court of Canada 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

[23] *Saskatchewan (Re),* [1989] S.L.R.B.D. No. 52 (Sask. L.R.B.), at para. 15, BOA, Tab 5.

the requirement that justice be done and be seen to be done, and the concomitant need for public scrutiny and open courts.[24]

43. In his endorsement, the Motion Judge adverted to none of these considerations and focused only on the Applicant's assertion of an important commercial interest – which, as an aside, is a somewhat odd way to describe the relationship of a public institution to the provincial government – and on the lack of availability of alternative measures to protect the purported commercial interest.

44. The Motion Judge's failure to advert, specifically, to the impact that his ruling would have on freedom of expression is also troubling as the Sealing Order would deny public access to and public scrutiny of the Sealed Documents; this would clearly infringe the public's freedom of expression guarantee. In *Sierra Club*, the Supreme Court expressed the importance of the constitutional guarantee of free expression in the context of a confidentiality order in this way:

> 36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:
>
>> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(*b*). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of

[24] *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41, at para. 52, BOA, Tab 1.

> the courts is clearly within the ambit of the freedom guaranteed by s. 2(*b*), so too is the right of members of the public to obtain information about the courts in the first place.

> Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.[25]

45. In *Canadian Broadcasting Corporation v. Ferrier,* the Court of Appeal for Ontario considered an administrative decision maker's failure to pay adequate attention to the section 2(b) *Charter* right to freedom of expression by failing to require an open disciplinary hearing of police officers under the *Police Services Act*, R.S.O. 1990, c. P.15. The Court stated that an unexplained refusal or failure to consider an applicable *Charter* right cannot survive appellate scrutiny:

> 60 While I reach that conclusion on a correctness standard, I add here that even if a reasonableness standard of review applies, I fail to see how a decision resulting from an unexplained refusal or failure to consider an applicable Charter right could be considered reasonable … A decision that fails to consider an applicable Charter right cannot satisfy that standard or "the principle that the exercise of public power must be justified, intelligible and transparent": Vavilov, at para. 95.[26]

46. Courts have consistently recognized that open courts are integral to the democratic process, and without full public access and at least the possibility of

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[25] *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 at para 36, BOA, Tab 1.

[26] *Canadian Broadcasting Corporation v. Ferrier,* 2019 ONCA 1025, at para. 60, BOA, Tab 6.

independent scrutiny, public confidence in the independence and impartiality of the judicial system are in jeopardy:

> 25 Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, supra, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.[27]

(2) In Sierra Club, relevant documents were not withheld from the litigants

47. *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. In his endorsement, 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*.

(3) The Sealing Order was granted without evidentiary support

48. *Sierra Club* required that a claim of confidentiality in respect of a commercial interest be "well grounded in the evidence". In this case, the Applicant's claims of confidentiality and damage by disclosure were made in argument and without any evidentiary support at all. Yet, it is an essential prerequisite to a Sealing Order that objective evidence, in the public record and open to public scrutiny, be filed

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[27] *Vancouver Sun, Re*, 2004 SCC 43, at para. 25, BOA, Tab 7.

in support of any claim to withdraw a judicial process, or any part of it, from the public sphere.

49. The Ontario Court of Appeal has held that the "centrality of freedom of expression and the open court principle to both Canadian democracy and individual freedoms in Canada demands that a party seeking to limit freedom of expression and the openness of the courts carry a significant legal and evidentiary burden".[28]

(4) The Sealing Order did not address a free-standing commercial interest but rather speculative damage to the proceeding itself and the commercial interest that was identified was overly restrictive in its application

50. The purported damage that the 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 speculative damage to the outcome of the proceeding itself. In this case, it is premature to determine the preferred outcome of this CCAA process prior to a Plan of Arrangement and, under the *Companies' Creditors' Arrangements Act*, 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.

51. Further, in interpreting *Sierra Club*'s requirement to connect "commercial interest" to wider interests (and not merely private interests), the Motion Judge selectively connected it to interests of Laurentian within the mediation, and Sudbury outside the mediation, but did not include the interests of the bargaining parties inside

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28 *R. v. Canadian Broadcasting Corporation,* 2010 ONCA 726, at paras. 22-23, BOA, Tab 8.

the mediation or interests of parties in knowing the position of an interested public body (government) that elected not to participate in mediation despite being in "constant contact" with Laurentian.

E. The proposed appeal will not unduly hinder the progress of the proceeding

52. 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.

53. The point on appeal is discrete and can be argued in a half-day hearing before the Court of Appeal. If leave is granted, the moving parties intends to ask the court to expedite the hearing of the appeal to help address any concerns with delaying the proceeding.

PART V - ORDER SOUGHT

54. The Moving Parties respectfully request that leave to appeal be granted from the Sealing Order first granted on February 1, 2021, maintained on an interim basis on February 12, 2021, and upheld indefinitely by the endorsement dated February 26, 2021.

55. If this Court grants leave, the Moving Parties also respectfully request that the hearing of the appeal be expedited.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of March, 2021.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41

2. *Nortel Networks Corporation (Re)*, 2016 ONCA 332

3. *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27

4. *Royal Conservatory of Music Faculty Association v. University of Toronto (Royal Conservatory of Music),* 1985 CanLII 1085 (ON LRB)

5. *Saskatchewan (Re),* [1989] S.L.R.B.D. No. 52 (Sask. L.R.B.)

6. *Edmonton Journal (The) v. Alberta (Attorney General)*, [1989] S.C.J. No. 124

7. *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025

8. *Vancouver Sun, Re*, 2004 SCC 43

9. *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726

SCHEDULE "B"

RELEVANT STATUTES

1. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

General Principle
1.04. (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Proportionality
(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Matters Not Provided For
(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them.

(3) Revoked: O. Reg. 231/13, s. 2.

"Party and Party" Costs
(4) If a statute, regulation or other document refers to party and party costs, these rules apply as if the reference were to partial indemnity costs.

"Solicitor and Client" Costs
(5) If a statute, regulation or other document refers to solicitor and client costs, these rules apply as if the reference were to substantial indemnity costs.

ORDERS ON TERMS
1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

MOTION FOR LEAVE TO APPEAL TO COURT OF APPEAL

Motion in Writing
61.03.1 (1) Where an appeal to the Court of Appeal requires the leave of that court, the motion for leave shall be heard in writing, without the attendance of parties or lawyers.

Notice of Motion
(2) The notice of motion for leave to appeal shall state that the motion will be heard on a date to be fixed by the Registrar.

(3) The notice of motion,

(a) shall be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(b) shall be filed with proof of service in the office of the Registrar within five days after service.

Moving Party's Motion Record, Factum and Transcripts

(4) The moving party shall serve a motion record and transcripts of evidence, if any, as provided in subrule 61.03 (2), and a factum consisting of the following elements:

1. Part I, containing a statement identifying the moving party and the court from which it is proposed to appeal, and stating the result in that court.

2. Part II, containing a concise summary of the facts relevant to the issues on the proposed appeal, with such reference to the evidence by page and line as is necessary.

3. Part III, containing the specific questions that it is proposed the court should answer if leave to appeal is granted.

4. Part IV, containing a statement of each issue raised, immediately followed by a concise statement of the law and authorities relating to that issue.

5. Schedule A, containing a list of the authorities referred to.

6. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws.

(5) Parts I to IV shall be arranged in paragraphs numbered consecutively throughout the factum.

(6) The moving party shall file three printed copies of the motion record, factum and transcripts, if any, and an electronic version of the factum, and may file three copies of a book of authorities, if any, with proof of service, within 30 days after the filing of the notice of motion for leave to appeal.

Responding Party's Motion Record and Factum

(7) The responding party may, if of the opinion that the moving party's motion record is incomplete, serve a motion record as provided in subrule 61.03 (3).

(8) The responding party shall serve a factum consisting of the following elements:

1. Part I, containing a statement of the facts in the moving party's summary of relevant facts that the responding party accepts as correct and those facts with which the responding party disagrees and a concise summary of any additional

facts relied on, with such reference to the evidence by page and line as is necessary.

2. Part II, containing the responding party's position with respect to each issue raised by the moving party, immediately followed by a concise statement of the law and authorities relating to it.

3. Part III, containing a statement of any additional issues raised by the responding party, the statement of each issue to be followed by a concise statement of the law and authorities relating to it.

4. Schedule A, containing a list of the authorities referred to.

5. Schedule B, containing the text of all relevant provisions of statutes, regulations and by-laws.

(9) Parts I to III shall be arranged in paragraphs numbered consecutively throughout the factum.
(10) The responding party shall file three printed copies of the factum, and of the motion record, if any, and an electronic version of the factum, with proof of service, within 25 days after service of the moving party's motion record and other documents.

Moving Party's Reply Factum
(11) If the responding party's factum raises an issue on which the moving party has not taken a position in the moving party's factum, that party may serve a reply factum.

(12) The reply factum shall contain consecutively numbered paragraphs setting out the moving party's position on the issue, followed by a concise statement of the law and authorities relating to it.

(13) The moving party shall file three copies of the reply factum with proof of service within 10 days after service of the responding party's factum.

Date for Hearing
(14) The Registrar shall fix a date for the hearing of the motion, which shall not be before the earlier of the filing of the moving party's reply factum, if any, and the expiry of the time for filing the moving party's reply factum.

Oral Hearing
(15) If, on considering the written materials, the court determines that an oral hearing is warranted, the court shall, despite subrule (1), order an oral hearing to determine the motion, and the Registrar shall fix a date for it.

Time for Delivering Notice of Appeal
(16) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave.

Costs Appeal Joined with Appeal as of Right
(17) Where a party seeks to join an appeal under clause 133 (b) of the *Courts of Justice Act* with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal as of right;

(c) where leave is granted, the panel may then hear the appeal.

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right
(18) Where a party seeks to join a cross-appeal under a statute that requires leave for an appeal with an appeal or cross-appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Court of Appeal hearing the appeal or cross-appeal as of right;

(c) where leave is granted, the panel may then hear the appeal.

Application of Rules
(19) Subrules (1) to (16) do not apply where subrules (17) and (18) apply.

2. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

Interpretation

Definitions

2 (1) In this Act,

aircraft objects[Repealed, 2012, c. 31, s. 419]

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

collective agreement, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies; (*compagnie*)

court means

(a) in Nova Scotia, British Columbia and Prince Edward Island, the Supreme Court,

(a.1) in Ontario, the Superior Court of Justice,

(b) in Quebec, the Superior Court,

(c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,

(c.1) in Newfoundland and Labrador, the Trial Division of the Supreme Court, and

(d) in Yukon and the Northwest Territories, the Supreme Court, and in Nunavut, the Nunavut Court of Justice; (*tribunal*)

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

director means, in the case of a company other than an income trust, a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever named called; (*administrateur*)

eligible financial contract means an agreement of a prescribed kind; (*contrat financier admissible*)

equity claim means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (*réclamation relative à des capitaux propres*)

equity interest means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (*intérêt relatif à des capitaux propres*)

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account; (*garantie financière*)

income trust means a trust that has assets in Canada if

> **(a)** its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or
>
> **(b)** the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act; (*fiducie de revenu*)

initial application means the first application made under this Act in respect of a company; (*demande initiale*)

monitor, in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company; (*contrôleur*)

net termination value means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; (*valeurs nettes dues à la date de résiliation*)

prescribed means prescribed by regulation; (*Version anglaise seulement*)

secured creditor means a holder of a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, all or any property of a debtor company as security for indebtedness of the debtor company, or a holder of any bond of a debtor company secured by a mortgage, hypothec, pledge, charge, lien or privilege on or against, or any assignment, cession or transfer of, or a trust in respect of, all or any property of the debtor company, whether the holder or beneficiary is resident or domiciled within or outside Canada, and a trustee under any trust deed or other instrument securing any of those bonds shall be deemed to be a secured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds; (*créancier garanti*)

shareholder includes a member of a company — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; (*actionnaire*)

Superintendent of Bankruptcy means the Superintendent of Bankruptcy appointed under subsection 5(1) of the *Bankruptcy and Insolvency Act*; (*surintendant des faillites*)

Superintendent of Financial Institutions means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; (*surintendant des institutions financières*)

title transfer credit support agreement means an agreement under which a debtor company has provided title to property for the purpose of securing the payment or performance of an obligation of the debtor company in respect of an eligible financial contract; (*accord de transfert de titres pour obtention de crédit*)

unsecured creditor means any creditor of a company who is not a secured creditor, whether resident or domiciled within or outside Canada, and a trustee for the holders of any unsecured bonds issued under a trust deed or other instrument running in favour of the trustee shall be deemed to be an unsecured creditor for all purposes of this Act except for the purpose of voting at a creditors' meeting in respect of any of those bonds. (*créancier chirographaire*)

Meaning of related and dealing at arm's length

(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to or dealing at arm's length with a debtor company.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

> **(a)** on all the creditors or the class of creditors, as the case may be, and on any trustee for that class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> **(b)** in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

> **(a)** subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a provincial pension plan as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Leave to appeal

13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Court of appeal

14 (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice

(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.

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

FACTUM OF THE MOVING PARTIES
(Motion for Leave to Appeal)

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