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

AMENDED NOTICE OF MOTION FOR LEAVE TO APPEAL

The Moving Party, the Ontario Confederation of University Faculty Associations ("OCUFA") will make a motion to the Court on a date fixed by the Registrar to be heard, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

~~**TAKE NOTICE THAT THE MOVING PARTY**, the Ontario Confederation of University Faculty Associations ("OCUFA") will make a motion to a panel of the Court of Appeal for Ontario, in writing or as otherwise determined by this Court, 36 days after service of the moving party's motion record and factum, or on the filing of OCUFA's reply factum, if any, whichever is earlier, unless otherwise fixed by the Court of Appeal, 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 determined by this Court.

THE MOTION IS FOR:

1. An order granting OCUFA 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 validating the manner of service of the notice of motion and motion materials herein, if necessary;

3. An order abridging the time for the hearing of this motion;

4. If leave to appeal is granted, an order expediting the hearing of this appeal;

5. Costs of this motion, to be fixed by the court; and

6. Such further and other relief as this Honourable Court deems fit.

THE GROUNDS FOR THIS MOTION ARE:

1. This case 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 *Companies Creditors Arrangement Act.* The proposed appeal raises serious and arguable grounds with respect to the use of sealing orders and engages issues of 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.

Background to the Sealing Order

2. 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).

3. 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. The Laurentian University Faculty Association ("LUFA") is a member of OCUFA.

4. 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, exhibits "EEE" and "FFF" to the Affidavit of Robert Haché, were exchanged between the Ministry of Colleges and Universities and Laurentian on January 21, 2021 and January 25, 2021 (the "Sealed Documents").

5. 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]

6. On February 1, 2021, the Motion Judge, as part of the Initial Order, sealed exhibits "EEE" and "FFF".

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

8. 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:

   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;

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

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.

9. On February 10, 2021, at the comeback hearing, OCUFA and several other parties challenged the sealing order made in respect of the Sealed Documents.

10. 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.

11. 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".

12. He also noted that the "commercial" interest related 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".

13. 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". No evidence has been filed with respect to this issue.

The proposed appeal

14. 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?

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

15. 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 funds and supports it.

16. 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*.

17. 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.

18. 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 a record bereft of any insight into the position of the Government of Ontario with respect to an Ontario University in financial crisis. All of the Applicant, the Monitor and the Motion Judge acknowledge that the Sealed Documents are not only relevant to this proceeding, but also so significant that they could change stakeholder positions.

19. 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.

20. The significance of the point on appeal to this proceeding is heightened by the engagement of the Applicant's duty to bargain in good faith, as constitutionally protected under section 2(d) of the *Charter*.

21. 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*;

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 *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;

e. In interpreting *Sierra Club*'s requirement to connect “commercial interest” to wider interests (and not merely a 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 the mediation or interests of parties in knowing position of an interested public body (government) that elected not to participate in mediation despite being in “constant contact” with Laurentian;

f. 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.

22. 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

1. Rules 1.04, 1.05, 61.03 and 61.03.1 of the Rules of Civil Procedure.

2. Sections 2, 6, 11, 13 and 14 of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36.

3. Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The orders and endorsements made in the CCAA Proceedings;

2. Report of the Proposed Monitor, dated January 30, 2021;

3. First Report of the Monitor, dated February 7, 2021;

4. Affidavit of Dr. Robert Hache, sworn January 30, 2021;

5. Affidavit of Susan Wurtele, sworn March 1, 2021;

6. Affidavit of Karen Ducharme, sworn March 5, 2021;

7. Factum of the Applicant, dated January 30, 2021; and

8. Such further and other evidence as counsel may advise and as this Honourable Court may permit.

~~March 5, 2021~~ March 9, 2021

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TO: SEE ATTACHED SERVICE LIST

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