Court File No. CV-656040-00CL

*ONTARIO*
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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# FRESH AS AMENDED
# FACTUM OF UNIVERSITÉ DE SUDBURY

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## I. OVERVIEW

1. This Court is presently being asked by Laurentian to disclaim an agreement with the only avowed goal of eliminating l'Université de Sudbury, which it clearly views as a competitor, a university with which the debtor has been federated for over 60 years.

2. Laurentian has admitted that its only goal in disclaiming its agreements with l'Université de Sudbury is to prevent it from offering programs and courses to Federated Laurentian University students and to steer them away from Université de Sudbury, leaving them to a significantly reduced program offering at Laurentian.

3. Presently l'Université de Sudbury offers courses to students, and funding provided by government grants and tuition fees to pay for such courses, as per an agreement that has been in place since the creation of the Federation in 1961, flows through Laurentian to l'Université de Sudbury. These funds are not owed to or destined for Laurentian, the

funding is for l'Université de Sudbury programs and courses it delivers to the Laurentian Federation student body, paid by government and students. Laurentian effectively charges a 15% fee for the services it offers to the students taking courses at Université de Sudbury.

4. Laurentian has wrongly characterized these funds as paid to it: Laurentian is but a channel for the funds, paid for and destined for Université de Sudbury,

5. Laurentian is not asking to have the terms of the agreement with its Federated university modified so as to make it more favourable to it, or even to reduce or eliminate a financial burden: it simply wishes to eliminate a competitor so as to be able to 'scoop' its present clientele, its students, as a result of the void that will result with l'Université de Sudbury being eliminated as a university capable of offering programs and courses.

6. This proceeding of disclaimer taken pursuant to the CCAA is made in bad faith. It needs to be refused in no uncertain terms as: it is being taken for the collateral purpose of eliminating a competitor; it is an attempt to seek a collateral advantage; and its dominant purpose is to obtain an important business advantage, resulting a flagrant abuse of process.

7. The disclaimer would also prevent l'Université de Sudbury from meeting its linguistic obligations pursuant to the French Language Services Act, and result in a violation of the Franco-Ontarian community's constitutional and quasi-constitutional rights.

8. Of great concern it the position taken by Laurentian that the Courts need to kowtow to the DIP Lender, resulting in a effective usurping by the DIP lender of the Superior Court's jurisdiction.

9. The disclaimer needs to be set aside.

## II. THE FACTS

**Parties and History**

10. Situated in what is now the City of Greater Sudbury, Université de Sudbury ("**Sudbury**") was founded by francophone Jesuit Fathers as Collège du Sacré-Coeur in 1913. On April 20, 1914, the Ontario legislature adopted the *Charte du Collège du Sacré-Coeur.* In 1957, the Collège du Sacré-Coeur changed its name to University of Sudbury[1].

11. Under its enabling statute, Sudbury was bestowed with a number of powers, including the power to confer degrees.[2]

12. Due to its denominational character and orientation, Sudbury was unable to access provincial funding for its programs and courses, a serious impediment to its growth and to the development of its programs and courses. [3]

13. Laurentian University of Sudbury ("**Laurentian**") owes its very existence to an initiative led by Sudbury.[4]

14. In 1960, seeking a means to access provincial funding, Sudbury, the Anglican Diocese of Algoma, and the United Church Presbytery petitioned the Ontario government to establish Laurentian as a non-denominational, bilingual university to serve the Sudbury community. These efforts resulted in the adoption of *An Act to Incorporate Laurentian University of*

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[1] Par. 3, Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Motion Record at Tab 2, p. 1
[2] Par. 4 and 5, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p. 2
[3] Par. 23-24, 32, 44, Affidavit of Serge Dupuis sworn on March 3, 2021, AFO Motion Record dated 31 March 2021
[4] Par. 7, Affidavit of P. Riopel, sworn on April 14, 2021, Motion Record at Tab 2, p. 2

*Sudbury*, S.O. 1960, c. 151 C. 154 4(c). by the Ontario Legislature. [5]

15. Laurentian's enabling legislation specifically contemplates that Laurentian would enter into federation agreements with church-related universities or colleges and that credits from such institutions would be treated as if they were given in Laurentian's "University College." This legislated objective was to allow a federation of independent universities to operate collaboratively together, with Laurentian acting in a general administrative capacity for the registration of all students, the perception of tuition fees and government grants and the conferring of degrees. [6]

16. In 1960, Laurentian entered into a Federation Agreement with Sudbury (the "**Federation Agreement**"). The Federation Agreement includes the declarations of Laurentian and Sudbury that they each:

> [E]xpress the firm hope and conviction that the relationship between the Universities established by this agreement will be a permanent one and that they and the other universities and colleges which become federated or affiliated with Laurentian University will work together to fulfil the objects of the Act of Incorporation of Laurentian University…The Parties fully realize that the success of the task which they have set themselves will depend more on the mutual understanding, goodwill and cooperation between the institutions now or hereafter associate together in Laurentian University, than upon any formal agreements.[7]

17. As part of the federation arrangement between Laurentian and Sudbury, the parties entered into a perpetual lease dated April 9, 1965 for an initial term of 99 years (the "**Lease**"). Consistent with the parties' stated intention for a permanent and perpetual federated

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[5] Par. 7, 8, Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Motion Record at Tab 2, pp.2-3

[6] Par. 9, Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Motion Record at Tab 2, p. 3

[7] Par. 10, and Exhibit "A", Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Motion Record, at Tab 2, p. 3 and Sudbury Supplementary Motion Record #2
Par. 74, Haché Affidavit of January 30, 2021, Application Record at Tab 2, p. 45

relationship, the Lease contained an option for Sudbury to renew for another 99 years, with the options to renew and continue on each renewal.[8]

18. Both Huntington University ("**Huntington**") and Thorneloe University ("**Thorneloe**") signed very similar federation agreements with Laurentian. Clearly, all these agreements were meant to establish a permanent and perpetual relationship, having the parties work collaboratively to maintain a strong federated union, the Federation Relationship. [9]

19. Since entering into the Federation Relationship, Sudbury has been a bilingual and tri-cultural university, comitted to promoting the traditions and culture of the francophone community as well as of the Indigenous people. It provides French and English language electives to students enrolled in a program at Laurentian or at another Federated University.[10]

20. The Federation Relationship required Sudbury to leave "dormant" its right to confer diplomas on students in favour of Laurentian (except for diplomas in Theology), give up its right to receive tuition funds directly from students ("**Tuitions**") or money directly from the Ministry of Colleges and Universities for students ("**Grants**"), pay out of its own funds for the construction and operating costs of buildings and student housing (the "**Buildings**") on lands belonging to Laurentian (the "**Leased Lands**") and maintain and pay the full costs of its professors and teaching staff for all courses it offers. [11]

21. Sudbury has two buildings on the Leased Lands, a main building for administration and

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[8] Par. 11-12 and Exhibit "B", Affidavit of P. Riopel, of April 14, 2021, Motion Record at Tab 2, p. 3 and Sudbury Supplementary Motion Record #2

[9] Par. 21, Affidavit of P. Riopel, sworn on April 14, 2021, Motion Record at Tab 2, p. 6

10 Par. 5-6, Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Motion Record at Tab 2, p. 2

11 Par. 16, Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Motion Record at Tab 2, p. 5

classrooms, and a residence, which were constructed by Sudbury at its cost of more than $5 million (the "**Buildings**") several years ago. [12]

22. Section 6 of the Lease provides that:

> … this lease and any renewal thereof shall at the option of [Laurentian] cease and be void if at any time during the term hereby granted [Sudbury] shall withdraw from federation with [Laurentian] or if the lands and premises cease for a period of three years to be used by [Sudbury] for educational instruction at a university level, or if [Sudbury] shall cease for a period of three years to operate as a University. In the event of such termination [Sudbury] shall have the right to purchase the demised lands forthwith…[13]

23. In the event of any of the foregoing, Sudbury has the right to purchase the demised lands on which Sudbury's building has been constructed at a value to be determined in accordance with the terms set out in the lease. If Sudbury does not exercise its right to purchase the demised lands, then Laurentian shall have the option to purchase the Sudbury's building at cost minus depreciation (based on a formula set out in the Sudbury Lease). [14]

24. During their 60-year federation, Laurentian and the Federated Universities agreed to the allocation of funding formulas to cover delivery costs of services. The last real agreement between the Federated Universities and Laurentian was a Grant Distribution and Service Fees Agreement dated November 10, 1993 (the "**1993 Funding Agreement**").[15]

25. In May 2019, Laurentian unilaterally sought to modify the 1993 Funding Agreement by

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12 Par. 18, Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Motion Record at Tab 2, p. 5
13 Exhibit "B", Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Supplementary Motion Record #2
14 Exhibit "B", Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Supplementary Motion Record #2
15 Par. 23 of Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Motion Record at Tab 2, p. 23, and Sudbury Supplementary Motion Record #2

imposing a 15% administrative charge for services provided to the Federated Universities on a cost-recovery basis. Laurentian's objective was twofold: to realign the allocation of funds remitted to the Federated Universities and to ensure that no university within the federation, including Laurentian, would be subsidizing another's operations or services. This administrative charge was to be deducted from the tuition fees and provincial grant amounts received on account of the programs and courses provided by the Federated Universities and destined to them. [16]

**Laurentian's insolvency and CCAA application**

26. Laurentian has been experiencing serious financial problems over a significant period of time going back to 2008-2009. As at April 30, 2020, its liabilities totaled $322 million.[17]

27. At the root of Laurentian's insolvency is the debt burden it carries due to capital expenditures and construction, bank lending, labour costs, disputed grievances and low enrolment. They are principally due to Laurentian's poor decisions regarding its operations and its mismanagement of its financial affairs and assets over time. The Federated Universities have nothing to do with these expenditures or problems. [18]

28. At the end of August 2020, Laurentian retained the services of Ernst & Young as a financial advisor to assist in its restructuring efforts. At its very inception, Ernst & Young was intended to act as Court-appointed Monitor in a contemplated protection process pursuant

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16 Par. 23, Riopel Affidavit, April 14, 2021, Sudbury Motion Record, p. 7
Par. 144-147 of Haché Affidavit, April 21, 2021, Laurentian Motion Record at Tab 2, p. 72-73 (Motion for extension of stay et al.)
Cross-examination of R. Haché, Questions 365-375,377-380, Transcript pp. 129-133, 135
17 Par. 8-10, 212, 263 of Haché Affidavit sworn January 30, 2021, Application Record at Tab 2, p. 27-28, 87, 102
18 Par. 11-15, 113-197, 212-260, 293, Haché Affidavit sworn January 30, 2021, Application Record at Tab 2, p.28-29, 55-83, 87-101, 110
Par. 5, P. Riopel Affidavit sworn April 23, 2021, Sudbury Supplementary Motion Record #2

to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("**CCAA**").[19]

29. Prior to the filing of the CCAA Application, Laurentian did not engage the Federated Universities about the termination of the Federation Relationship nor the ensuing consequences of such a scenario, nor was Sudbury consulted or involved in Laurentian's analysis of the Federated Universities Model (the "FUM").[20]

30. In his affidavit, Mr. Haché states that a "remolding" of the existing FUM is being sought "in such a way that creates economies of efficiency for LU and the Federated Universities". However, Laurentian's plan was clearly devised from the very beginning to drive the process towards termination of the Federated Relationship.[21]

31. With Laurentian driven to reach its prime objective of termination, unsurprisingly the mediation process involving the Federated Universities led to an impasse.[22]

32. Laurentian served Sudbury with a formal notice of disclaimer on April 1, 2021 (the "**Proposed Disclaimer**"). Huntington and Thorneloe were dealt the same way.[23]

33. On April 14, 2021 Sudbury moved to oppose the Proposed Disclaimer. Thorneloe followed suit on April 15, 2021.[24]

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19 Par.320, Haché Affidavit sworn January 30, 2021, Application Record at Tab 2, p.121

20 Par. 4, Riopel Affidavit, April 23, 2021, USubbury Supplementary Motion Record #2
Cross-examination of R. Haché, Questions 405-410, 415-417, pp. 148-151,152-154

21 Par. 295, 298, 300, 301, Haché Affidavit sworn January 30, 2021, Application Record at Tab 2, p.111-113
Cross-examination of R. Haché, Questions 41-42, 47-49, 192-194, Transcript pp. 18, 19-20, 65

22 Par. 158, Haché Affidavit sworn April 21, 2021, Laurentian Motion Record, Tab 2, p.76
Par. 8.e., Riopel Affidavit sworn April 23, 2021, Sudbury Supplementary Motion Record #2

23 Par. 160 and Exh. "L", "M" and "N" to Haché Affidavit sworn April 21, 2021, Laurentian Motion Record, Tab 2, pp.76, 344-352

24 Sudbury Notice of Motion, Sudbury Motion Record, Tab 1, p.1-14

**Breach of CCAA's good faith requirement**

**Permanency of Federation Relationship**

34. The federation relationship is reflected in the Federation Agreement, the Financial Distribution Notice and the Lease, their terms being interdependent and interlocked. Sudbury expected that the Federation Relationship would be permanent and relied on it being so when it entered into the Federation Agreement and the Lease. [25]

**The 2019 Financial Distribution Notice**

35. In May 2019, Laurentian, without the consent of any of the Federated Universities, simply imposed its will to replace the 1993 Funding Agreement and unilaterally changed the allocation of funding between Laurentian and each of the Federated Universities through the issuance of separate "Notices of Terms of Financial Distribution" to each of them. [26]

36. By purporting to revise the allocation of revenues as it did, Laurentian was not acting within the guiding principles of the Federation Agreement or in good faith.[27]

37. Based on its own proposed formula, Laurentian retains 15% of the Tuition funding per student, releasing only 85% of the funding from Grants and Tuitions to the Federated Universities although they actually deliver the courses and programs at their own expense

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[25] Par. 15, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p. 4

[26] Par. 25, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p. 7

[27] Par. 3, Riopel Affidavit, April 23, 2021, Sudbury Supplementary Motion Record #2
Par. 26, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p. 7

to Laurentian Federation students. It is a flow-through arrangement allowing Laurentian to keep 15% “off the top”.[28]

38. The current funding formula was Laurentian’s idea; it was not forced upon Laurentian by Sudbury or the Federated Universities. The 2019 revised funding formula reflected Laurentian’s own unilateral assessment of the economic allocation of Grants and Tuition and funding between Laurentian and the Federated Universities, meant to guard against one university subsidizing any other.[29]

39. Through the CCAA Laurentian is seeking termination of the Federation Agreement in an effort to get all it can out of Sudbury. Yet, the agreement causes no financial obligations on Laurentian that either hinders or hampers it from making a viable plan to its creditors. By pressing to disclaim the agreement, Laurentian is acting in bad faith.[30]

**The Lease**

40. The Lease gives Laurentian the right to elect whether to trigger its termination, leading to its right to purchase the Buildings. The Lease was intended to work in parallel with the Federation Agreement so that neither party could withdraw from the Federation Arrangement without the consent of the other. In effect, the disclaimer of the Federation Agreements, effective May 1, 2021, will saddle Sudbury with Buildings and land and no revenue from Tuitions or Grants, all of which will be kept by Laurentian. In doing so,

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[28] Par. 27, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p. 7
[29] Par. 28, Riopel Affidavit sworn April 14, 2021, Sudbury Motion Record at Tab 2, p. 8
[30] Par. 29, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p. 8

Laurentian is not acting in good faith in connection with the Lease, the Agreements or the Proposed Disclaimers.[31]

41. Furthermore, Laurentian claims that it is not interested in Sudbury's Buildings and does not object to its continued "existence" in same. It even appears the restructuring will leave Laurentian with unused building space. Laurentian intends to have its real property assets evaluated for the purposes of monetizing them in the next phase of its restructuring plan. Cutting off all revenue to Federated Universities appears to be only the first phase of ridding them altogether from Laurentian's campus.[32]

**The mediation process**

42. The Court ordered mediation process involving the Federated Universities and Laurentian should have provided the parties with a real opportunity to revamp the Federated University Model at Laurentian – as was contemplated in its CCAA Application. From Mr. Haché's own admission, he entered the process convinced that termination was the only option, unless someone could persuade him otherwise.[33]

43. The confidentiality terms imposed on the parties within the various mediation subgroups further impeded any attempts at meaningful discussions for compromise and restructuring of the FUM as between the Federated Universities, Laurentian and internal stakeholders.[34]

**New condition for DIP Facility extension**

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[31] Par. 30 and 31, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p. 8

[32] Par. 161, 194, 261, Haché Affidavit sworn April 21, 2021, Laurentian Motion Record, Tab 2, p. 76, 86, 106

[33] Par. 7, 8.e., Riopel Affidavit sworn April 23, 2021, Sudbury Supplementary Motion Record #2
Par. 156-157, 159, Haché Affidavit, April 21, 2021, Laurentian Motion Record, Tab 2, p.75-76

34 Par. 29-33, Haché Affidavit, April 21, 2021, Laurentian Motion Record, Tab 2, p.39-41

44. Laurentian sought and received Court approval for DIP financing in the order of $25 million. The Term sheet presented in support of the DIP loan includes three (3) conditions to be met for the purposes of an extension of the maturity date of the loan. None of those conditions contain a specific requirement that the federated agreements be dealt with in a specific manner, including termination.[35]

45. Only after Sudbury and Thorneloe had filed their respective Notices of motion opposing the Disclaimer Notices, did Laurentian file its materials for an extension of the stay on April 29. Laurentian's Motion Record contains a new letter from the DIP lender advising that it is now requiring the disclaimers against the Federated Universities as a pre-condition to advancing a further $10 million.[36]

46. Under cross-examination, Mr. Haché said his counsel had negotiated this condition with the DIP Lender without any direct involvement from him other than the letter of April 19, 2021 being sent to him. He could not explain why termination of the Federation had become a loan condition. Furthermore, Laurentian's counsel has objected to disclosing any document or correspondence about the matter despite this new lending condition being raised as a relevant factor for the Court to consider when dealing with the Disclaimer Notices and the Motion to extend the stay and increase the DIP loan.[37]

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35 Par. 348 and Exh. "HHH" to Haché Affidavit sworn January 30, 2021, Application Record at Tab 2, p. 129-130 and at volume 4, Tab 8, p.1426-1469
Cross-examination of R. Haché, Questions 475, 482, 486-503, Transcript pp. 178-179, 182, 184-193

36 Par. 188-190, 254-256 and Exh. "Z" to Haché Affidavit sworn April 21, 2021, Laurentian Motion Record, Tab 2, p.85, 103-105, 461-467

37 Cross-examination of R. Haché, Questions 66-71, 510-519, 729-732, 744-749, 752 Transcript pp. 27-28, 196-199, 282, 286-288, 289

47. Sudbury has not been afforded an opportunity to speak directly with the DIP Lender to canvass the reason why it is now requiring the Federated Agreements be disclaimed as a pre-condition to the loan extension or why additional time cannot be given to the Federated Universities to hold truly meaningful discussions with Laurentian about alternatives to termination of the Federated Agreements. Access via the Court Monitor has left important questions unanswered and some or all of the truth hidden from the court's view. [38]

48. While the DIP Lender's position with respect to the Disclaimer Notices appears firm, it also seems unreasonable. None of the Federated Universities is listed as recipients for any part of the next tranche of $10 million loan advance. In the case of Sudbury, it has passively agreed to cancel its courses for the Spring semester, taking no revenue away from Laurentian, so why such haste to terminate the agreement? Furthermore, the DIP Lender has been agreeable to grant an extension of time (until May 31, 2021) to address the 102 outstanding labour grievances with (LUFA) employee representatives. [39]

**Sudbury's new French-language mission**

49. Considering Laurentian's clear intention to disclaim the Federation Agreements, Sudbury resolved to change its mission going forward. It is actively exploring transforming itself into a French language university to provide university-level education. Given the opportunity, Université de Sudbury could transition towards teaching all French language programs at Laurentian, within the Federation.[40]

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38 April 26, 2021 email to Court Monitor, Sudbury Supplementary Motion Record #2
39 Par. 11, Riopel Affidavit sworn April 23, 2021, Sudbury Supplementary Motion Record #2
Cross-examination of R. Haché, Questions 669-673, Transcript pp. 258-260
DIP Lender email response dated April 26, 2021, Sudbury Supplementary Motion Record
40 Par. 41, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p. 12

50. It is now well known that Laurentian has made drastic cuts to its programs, including its French-language programs and courses. Unfortunately, it proceeded without the benefit of real consultation with external stakeholders, neglecting the francophone community. Meanwhile, Sudbury has resolved to take steps to preserve and expand its status as a designated provider of French-language services under the *French Language Services Act*, R.S.O. 1990, c. F.32. It is doing so for and with the francophone community's urgent call for the establishment of a university dedicated to French-language programming and self-governance in Northern Ontario. Sudbury has garnered wide support for this initiative within the Franco-Ontarian community as well as with other important stakeholders.[41]

51. Sudbury approached Laurentian for the purposes of opening a discussion about the possibility of taking over French-language programming, services and infrastructure, in an effort to avoid irreparable harm to the Franco-Ontarian community and alleviate Laurentian's obligations. In its response, Laurentian made clear that it would not entertain any discussion with Sudbury about any such transfer in the course of its restructuring. [42]

52. Even a recent proposal by members of the Laurentian Senate to transfer to Sudbury the French-language programs and/or courses, which were jettisoned by Laurentian, was voted

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41 Par. 3, 5-8, 11 and Exh. "PR-2", "PR-3" and "PR-4" to P. Riopel Affidavit sworn April 18, 2021, Sudbury Supplementary Motion Record
Par. 11, Riopel Affidavit, April 23, 2021, Sudbury Supplementary Motion Record #2
Cross-examination of R. Haché, 625, Transcript pp. 625
Cross-examination of P. Riopel, Transcript

42 Par. 42 and Exh. "D" and "E" to Affidavit of P. Riopel, sworn on April 14, 2021, Sudbury Motion Record at Tab 2, p. 12. Exhibits D and E
Par. 9-10 and Exh. "PR-5.1" and "PR-5.2", Riopel Affidavit sworn April 18, 2021, Sudbury Supplementary Motion Record, p. 038 and 042
Par. 170-171 and Exh. "R" and "S" of Haché Affidavit sworn April 21, 2021, Laurentian Motion Record, Tab 2, p.80-81, 387-389, 395-396
Cross-examination of R. Haché, Questions 611-625, Transcript p. 235-241

down by President Haché. He justifies his rejection of the proposal on the basis that it was not practically feasible.[43]

53. No such impediment prevented Sudbury from making its teaching materials available to Laurentian to enable six Indigenous Studies courses to be taught during the Spring semester by Laurentian. Sudbury even gave Laurentian its list of sessional instructors for this purpose. Sudbury prioritized its students' needs and made the transfer possible even during these trying times.[44]

**Use of disclaimer for improper purpose**

54. Laurentian has expressly admitted that it has chosen to disclaim the Federated Agreements to prevent students from choosing programs and courses offered by the Federated Universities. In the short term, Laurentian's assumption is that through program reduction and its disclaimers, it can direct students to opt for the restructured programs and classes available, without any revenue-sharing obligation towards Sudbury. This is a reduced program offering without any competition from the Federated Universities. It is Laurentian 2.0, defederated and in violation of its obligations under the French Language Services Act.[45]

55. Laurentian seeks to hold on to certain benefits it was able to acquire as a result of the FUM, including controlling all incoming tuition and grant revenue, ownership of the campus

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43 Cross-examination of R. Haché, Questions 584-593, Transcript pp. 226-229

44 Par. 16-18 and Exh. "PR-7", Riopel Affidavit, April 18, 2021, Sudbury Supplementary Motion Record, p. 048
Par. 24 and Exh. "G" of Haché Affidavit sworn April 21, 2021, Laurentian Motion Record, Tab 2, p.37, p. 220-222
Cross-examination of R. Haché, Questions 542, Transcript p. 206

45 Par. 150-154, 182-187 of Haché Affidavit sworn April 21, 2021, Laurentian Motion Record, Tab 2, p.37, 74-75, 83-85
Cross-examination of R. Haché, Questions 325, 330-333, 430-431,436-438, 686, 691, 699, 785-792 Transcript pp. 115-116,118, 120, 160-161, 163-164, 264-265, 267, 270, 310-313

lands as well as a claim that the students enrolled at Laurentian are “its own students”, while getting rid of the federation’s founding partners. It fully understands that by disclaiming the Federated Agreements it is starving these universities of revenue in a clear attempt to put them out of business and, in the process, claim that revenue for itself. [46]

56. Clearly, the Disclaimer Notices are aimed at getting rid of competition: the Federated Universities are expendable. Mr. Haché has unequivocally admitted as much.[47]

**Impact of Proposed Disclaimers and financial hardship**

57. If the Proposed Disclaimers come into effect, Sudbury will be subjected to the following impacts and financial constraints without having access to the revenues it would have otherwise received :

a) An annual cost of maintaining the Buildings of $400,000, not including any additional repairs or replacements that are required from time to time;

b) In the 2019/2020 academic year, Sudbury had a faculty of 13 full-time professors and 37 sessional instructors. Sudbury had a Full Student Course Equivalent (full-year) enrolment of 2,228 and individual registrations in all courses of 4,080 students. Sudbury has estimated the cost of terminating its employees, if the Proposed Disclaimer becomes effective, to be as high as $4 million;

c) Laurentian is or will be claiming a contribution from Sudbury of $6.6 million towards its defined pension benefit plan;

[46] Par. 4, Riopel Affidavit, April 23, 2021, Sudbury Supplementary Motion Record #2
Cross-examination of R. Haché, Questions 325-327, 683-684, Transcript pp. 115-117, 263-264

47 Cross-examination of R. Haché, Questions 325, 330-333, 430-431,436-438, 686, 691, 696, 699, 785-792 Transcript pp. 115-116, 118-120, 160-161, 163-164, 264-265, 267, 269, 270, 310-313

d) The carrying costs of a skeletal administrative team required to restructure Sudbury's academic program and activities geared towards providing a variety of programs and courses in the French language;

e) The costs to disentangle itself physically and administratively from the Federation Relationship;

f) Laurentian's control on student enrollment hinders Sudbury's access to student lists and its ability to market any new programming as well as the availability of its residence for said students.[48]

**Sudbury's commitment to discontinued discussions with Laurentian**

58. Sudbury seeks an arrangement with Laurentian within the Federation Agreement and Relationship, to offer all the French programs and courses. The significance to the Francophone community of ensuring not only the survival but the actual promotion of these programs and courses cannot be overstated. Such an arrangement can be arrived at, or imposed if necessary, within the scope of the Federation.[49]

59. Sudbury continues to believe a viable solution can be achieved if given a real opportunity to propose and discuss creative means to address Laurentian's dire financial woes while maintaining a federated union.[50]

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[48] Par. 47 of P. Riopel Affidavit sworn April 14, 2021, Sudbury Motion Record at Tab 2, p.13
Par. 8.g., 10, Riopel Affidavit, April 23, 2021, Sudbury Supplementary Motion Record #2
Par. 63, Haché Affidavit, January 30, 2021, Application Record at Tab 2, p. 42
Par. 172-175 and Exh. "T", Haché Affidavit, April 21, 2021, Laurentian Motion Record, Tab 2, p.81-82, 398-401

[49] Par. 44, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p.12-13
Par. 12-14, Riopel Affidavit, April 18, 2021, Sudbury Supplementary Motion Record at Tab 1, p.6
Par. 11, 12, Riopel Affidavit, April 23, 2021, Sudbury Supplementary Motion Record #2

[50] Par. 12, 13, 18, Riopel Affidavit, April 18, 2021, Sudbury Supplementary Motion Record at Tab 1, p. 3-4
Par.12, Riopel Affidavit, April 23, 2021, Sudbury Supplementary Motion Record #2

60. The viability of Laurentian's restructured plan outside the FUM is questionable given that its projected revenues are based on enrolment modeling and presumptions made regarding student retention and its ability to attract of new students. Laurentian has not conducted surveys of existing or prospective students to validate the foundational bases of its budget forecasts.[51]

61. Following receipt of Laurentian's Disclaimer Notices, Sudbury chose to suspend its teaching for the Spring semester and advised students enrolled in its courses of this decision. Sudbury's staff was also given advance notice of imminent lay offs should Laurentian be successful with its Disclaimers. This was done as pre-emptive measure to prioritize student needs and to mitigate potential financial damages flowing from such termination.[52]

**Disclaimer Means Substantially Higher Claims and Creditor Opposition to any Plan**

62. Under their respective Federation Agreements, Sudbury and the other Federated Universities have a unique commonality of interest sufficient for them to be put into their own separate class for voting purposes. Their combined claims for damages will be substantially higher by millions of dollars if their respective agreements are disclaimed. The result of this is that a viable plan that will be accepted by all classes of creditors is less, not more likely, to occur if the Proposed Disclaimer is permitted.[53]

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51 Cross-examination of R. Haché, Questions 310-316, Transcript pp.785-815
52 Par. 17, Riopel Affidavit, April 18, 2021, Sudbury Supplementary Motion Record at Tab 1, p.4
53 Par. 45, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p.13

63. Sudbury will be seeking to have the Federated Universities put into one class for voting purposes and will vote against any plan that includes the disclaimer of the Agreements without its consent. The likelihood that Laurentian will be able to file a viable plan acceptable to all classes of creditors is smaller, not greater, if that plan includes the termination of the Federation Arrangement.[54]

## III. THE ISSUES

a) Is Laurentian acting in good faith in using the CCAA to terminate the Federation Relationship or attempting to disclaim the Federation Agreements?

b) Will the proposed Disclaimer likely cause significant financial hardship to Université de Sudbury?

c) Will the proposed Disclaimer violate the *French Language Services Act* and other constitutional and quasi-constitutional rights?

d) Is the DIP Lender effectively ousting the jurisdiction of the Superior Court?

## IV. The Law

### A) ISSUE #1: Laurentian is not acting in good faith in using the CCAA to terminate the Federation Relationship or attempting to disclaim the Federation Agreements

***Obligation of Good Faith***

64. The Supreme Court of Canada has very recently enunciated the baseline considerations that

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[54] Par. 46, Riopel Affidavit, April 14, 2021, Sudbury Motion Record at Tab 2, p.13

must be met by an applicant in convincing the Court to exercise its discretion pursuant to the CCAA. The Court stated that:

> [49] The discretionary authority conferred by the CCAA, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the CCAA, which we have explained above (see Century Services, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).[55]

65. In this recent Supreme Court decision, Professor Sarra was also quoted for the proposition that: "If the CCAA is to be interpreted in a purposive way, the Courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute" (underlined in original).[56]

66. Section 18.6 of the CCAA refers to good faith as follows:

> 18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

67. The duty of good faith has been held to include "to ensure that neither party substantially nullifies the bargained objective or benefit contracted for by the other, or causes significant harm to the other, contrary to the original purpose and expectation of the parties."[57]

68. In the context of a stay application, it has been held that, while the duty to act in good faith in the CCAA is generally focused on the debtor's dealings with stakeholders, concern for

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[55] *9354-9186 Québec Inc. v. Callidus Capital Corp*., 2020 SCC 10, para 49.
[56] *9354-9186 Québec Inc. v. Callidus Capital Corp*., 2020 SCC 10, para 75.
[57] *Fairview Donut Inc. v. The TDL Group Corp*., 2012 ONSC 1252 (CanLII), <https://canlii.ca/t/fq8sb>, at [502] citing: *Katotikidis v. Mr. Submarine Ltd.,* 2002 CanLII 49646 (ON SC), [2002] O.J. No. 1959 at para. 72 (S.C.J.); *TDL Group Ltd. v. Zabco Holdings Inc.,* [2008] M.J. No. 316 at para. 272 (Q.B.), upheld on appeal *Fairview Donut Inc. v. TDL Group Corp*. 2012 ONCA 867, [2012] O.J. No. 5775

the broader interest must be addressed if the result will be to condone wrongdoing. The Court went on to say that the role of a Judge supervising CCAA proceedings included being responsible for protecting the institutional integrity of the CCAA courts, preserving public esteem and doing equity.[58]

69. The present disclaimer proceeding is not being taken for a bona fide intention as per the CCAA, but for a collateral purpose that violates the 'raison d'être' of the legislation: seeking to prevent a competitor from being able to continue operating, thereby constituting an abuse of process.[59]

70. This disclaimer proceeding is seeking to obtain a collateral advantage that does not respect either the letter or the spirit of the CCAA, namely the elimination of a competitor.[60]

71. This disclaimer proceeding is an abuse of the process / legislation provided to allow the Applicant to disclaim agreements for improper purposes. The Court has defined an improper purpose as being "*any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament*".[61] The Supreme Court, in the recent case of *Callidus*, confirmed that this definition was "entirely harmonious with the nature and scope of judicial discretion afforded by the CCAA".[62]

72. As Professor Roderick Wood has stated in Bankruptcy and Insolvency Law: "Courts will

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[58] *Re San Francisco Gifts Ltd*. (Companies' Creditors Arrangement Act), 2005 ABQB 91 (CanLII), paras 28 to 30.
[59] *In re E. De La Hooke*, 1934 CarswellOnt 95, 15 C.B.R. 485, para 18; *Re Dallas/North Group Inc*. 2001 CanLII 3636 (ON CA), para 5; *Dimples Diapers Inc. v. Paperboard Industries Corp*. 1992 CarswellOnt 192, [1992] O.J. No. 1961, para 34; *Dallas/North Group Inc., Re,* 1999 CarswellOnt 4720, [1999] O.J. No. 5744, para 15.
[60] *Hydrofoil Lake Jet Lines Inc., Re*, 2000 CanLII 22485, paras 19-20; *Dallas/North Group Inc., Re,* 1999 CarswellOnt 4720, [1999] O.J. No. 5744, para 14.
[61] *Re Westlake*, 1984 CarswellOnt 183, [1984] O.J. No. 2341, para 10; *Re Dallas/North Group Inc*. 2001 CanLII 3636 (ON CA), para10 ; *Re C.B. Distribution*, 2004 CanLII 24874, para 29, quoting *Laserworks Computer Services Inc. (Bankruptcy), Re,* 1998 NSCA 42, 165 N.S.R. (2d) 296, para 28ff.
[62] *9354-9186 Québec Inc. v. Callidus Capital Corp*., 2020 SCC 10, para 74.

also dismiss a bankruptcy application if it is shown that the applicants brought it for an improper purpose…It also occurs where the application is brought in order to obtain a business advantage such as the elimination of a competitor or the termination of a contract".[63]

73. Laurentian's disclaimer proceeding does not have as its dominant purpose to accomplish the aims and purposes of the CCAA, but rather, and wrongfully, obtain a very important business advantage.[64]

74. This disclaimer proceeding was invoked for an improper motive, namely it was motivated by a desire to seek to harm a competitor.[65]

75. The Court must exercise its discretion judicially according to common sense and justice, and in a manner which does not occasion a miscarriage of justice. This can only be attained by denying the requested disclaimer.[66]

76. This Court has more that sufficient cause to refuse the requested disclaimer and should grant the present motion and reject the disclaimer.

77. The Court needs to apply special policy considerations when dealing with attempts to wrongfully resort to the CCAA and act to prevent such an abuse of the legislation.[67]

78. As Doherty J.A., stated, dissenting in part in *Elan Corp. et al. v. Comiskey*:

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[63] *Daniel Diena (Re)*, 2012 ONSC 5849 (CanLII), para 10.
[64] *Re Shepard,* (1996) 109 Man. R. (2d) 306, 40 C.B.R. (3d) 145, para 5.
[65] *Re C.B. Distribution*, 2004 CanLII 24874, para 38; *Shepard, Re,* 1995 CarswellMan 417, 106 Man. R. (2d), paras 6 and 9.
[66] *Re Churchill Forest Industries (Manitoba) Limited*, 1971 CarswellMan 78, 23 D.L.R. (3d) 30, para 64.
[67] *Re Dallas/North Group Inc*. 2001 CanLII 3636 (ON CA), para 14.

> A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the Court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the Court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors.[68]

79. By proceeding with the present disclaimer as it has done, Laurentian has breached its duty of good faith and fair dealing, in relation to the agreement, toward its Federated Universities.

80. Laurentian had a duty, which it has failed miserably to meet, to act both in its own interest and in the interests of its Federated Universities.[69]

81. As so well stated by Justice Topolniski: '*The well established remedial purpose of the CCAA is to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business. The premise is that this will result in a benefit to the company, its creditors and employees*'.[70] The proposed disclaimer advanced by Laurentian violates the most basic premise of this remedial legislation.

82. As Justice Farley so aptly stated: '*I would think that public policy also dictates that a company under the CCAA protection or about to apply for it should not be allowed to engage in very offensive business practices against another and thumb its nose at the world*

[68] *Elan Corp. et al. v. Comiskey*, 1990 CarswellOnt 139, 1 C.B.R. (3d) 101, 1 O.R. (3d) 289, at para 84.
[69] *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONCA 867, para 6.
[70] *San Francisco Gifts Ltd.*, 2005 ABQB 91, para 11.

*from the safety of the CCAA*'. [71] To attempt to kill off a competitor in the hope of obtaining all of his revenue is as offensive as a business practice can get.

83. From the outset of the CCAA proceedings, none of Laurentian's proposals, negotiations or discussions included a scenario where there could be any competition from the Federated Universities, nor any revision of the terms of the Federation Agreements. Instead, Laurentian only sought agreement on a single predetermined outcome: the termination of the Federation Agreements and the cessation of the Federated Universities as a *fait accompli*.

84. At no point did Laurentian actin good faith. It attempted to terminate the Federation Relationship, which it has admitted it has no right to terminate, with no negotiations or discussions about revising the Federation Agreements. It simply advised that it was bringing the agreements to an end.

***Disclaimer or Resiliation of Agreements***

85. The CCAA outlines the disclaimer procedure at section 32 (see Schedule "A").

86. Disclaimers cannot be decided in a vacuum. The Court needs to know what range of alternatives is available to decide whether or not to permit disclaimer.[72]

87. A proposed disclaimer need not be essential for the restructuring period, it merely needs to be advantageous and beneficial[73].

88. But the disclaimer must be directly related to allowing relief to the applicant seeking the

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[71] *Sairex GmbH v Prudential Steel Ltd*., 1991 CarswellOnt 215, 1991 8 CBR (3d) 62 at p. 63.
[72] *The Clover On Yonge Inc*., 2020 ONSC 5444 (CanLII), para 23.
[73] *Timminco Limited (Re)*, 2012 ONSC 4471 (CanLII), para 54.

disclaimer under the CCAA: it cannot be invoked so as to create an opportunity to eliminate a 'competitor' and be the recipient of their source of revenue. In this case, disclaimer of the Federation Agreements themselves has not been demonstrated to be advantageous and beneficial. It is only the termination of the Federated Universities that may benefit Laurentian, with the hope that it will pick up the spoils of its wrongful action, namely all students and their related revenues.

89. The Financial Distribution Notice sets out Laurentian's proposed allocation of revenues between itself and the Federated Universities. The allocation contained in it is only one of many possible allocations, any of which could have been attempted to have been negotiated by Laurentian by good faith negotiations.

90. Given that its underlying principle is that none of Laurentian or any of the Federated Universities shall subsidize the operations or services of another and each will be responsible for covering its own costs, disclaiming the Financial Distribution Notice, <u>as an agreement</u>, cannot result in any advantage or benefit to Laurentian's ability to formulate a viable plan.

91. Only the cessation of the Federated Universities as operating entities can result in that advantage or benefit. It is not disputed that Laurentian might gain an advantage or benefit by the demise of its competitors. This demise is not an unintended byproduct of Laurentian's use of the disclaimer process, it is the fully intended and required result. Laurentian's restructuring allegedly depends on it.

92. Courts have repeatedly recognized that they have discretion and jurisdiction to prevent an insolvency process from being used for an improper purpose, such as to eliminate a

competitor[74] or to gain a business advantage. This Court should not permit Laurentian to use the CCAA process to unilaterally terminate the Federation Relationship and thereby eliminate its competition for students and their revenues, with the resulting significant damages its fellow Federated University, namely Université de Sudbury.

**B) ISSUE #2: The proposed Disclaimer will likely cause significant financial hardship to Université de Sudbury**

93. Aside from being improper and an abuse of process, the proposed Disclaimer will likely cause significant financial hardship to Université de Sudbury, forcing them to pay out over $4 million as severance and other expenses. This significant financial hardship will be caused as a direct consequence of the implementation of the disclaimer. Setting aside the disclaimer will fully eliminate the financial hardship.

**C) ISSUE #3: The proposed Disclaimer violates the *French Language Services Act* and other constitutional and quasi-constitutional rights**

94. L'Université de Sudbury is designated as a "public service agency" within the meaning of the *French Language Services Act*. Consequently, members of the public have a quasi-constitutional right[75] to communicate with l'Université de Sudbury, and to receive services from it in French. The province must provide the necessary funding to ensure that this public service agency meets its legal obligations.

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[74] The governing legal principals for which are canvassed by Justice Brown in paras 9 to 11 of *Daniel Diena* (Re), 2012 ONSC 5849 (CanLII), <https://canlii.ca/t/ft9mp

[75] *Lalonde v. Ontario (Commission de restructuration des services de santé*), 2001 CanLII 21164 (ON CA) ((2001) 56 O.R. (3d) 577 (CA)).

95. Under subsection 3.2(1) of the *Designation of Public Service Agencies Regulation* made under the *French Language Services Act*, l'Université de Sudbury is required to provide, and the province is required to fund, the following programs and services:

| | |
|---|---|
| *1. The provision of French-language and bilingual undergraduate programs leading to a Bachelor of Arts degree, with the exception of the Indigenous studies program, including academic support services for those programs.* | *1. La prestation de programmes de premier cycle en français et bilingues menant à un baccalauréat ès arts, à l'exception du programme d'études autochtones, y compris les services de soutien aux études liés à ces programmes.* |
| *2. Reception services, the sale of course materials, the provision of parking passes, the distribution of internal mail, library services and the provision of housing in university residences.* | *2. Les services de réception, la vente de matériel de cours, la fourniture de permis de stationnement, la distribution du courrier interne, les services de bibliothèque et la fourniture de logements dans les résidences universitaires.* |

96. For example, subsection 2(1) of the *Designation of Public Service Agencies Regulation* protects the provision of programs leading to a "Bachelor of Education (B.Ed.)." There is a significant shortage of Francophone teachers in Ontario, and as a result, Francophone school boards in Ontario and most Anglophone school boards offering French immersion or other French-language programs are under-staffed and rely on under-qualified staff.[76]

97. Under section 23 of the *Charter*, the province has a positive obligation to implement institutional measures to give effect to the Franco-Ontarian community's right to receive an educational experience in French that is substantively equivalent to the educational experience of the Anglophone majority, and this requires the allocation of resources to

[76] See Affidavit of D. Chartrand at para. 7, Second Supplementary Motion Record, Tab 2.

finance education with public funds. This positive obligation includes the obligation to provide sufficient operational funding to post-secondary institutions, including l'Université de Sudbury, to train a sufficient number of teachers and other staff to enable Ontario's twelve Francophone school boards to achieve substantive equivalence.

98. In this regard, the Supreme Court of Canada recently explained that "*a school whose teachers are not properly trained cannot provide [the] substantively equivalent educational experience*" to which Francophone communities are entitled under section 23 of the Charter.[77]

99. Taking into account the particular needs of the Franco-Ontarian community requires meaningful consultation[78]. Moreover, Laurentian receives federal funding under the *Protocol for Agreements for Minority-Language Education and Second-Language Instruction 2013-2014 to 2017-2018*, in part due to its "bilingual" mandate, and this protocol requires, at a minimum, effective, meaningful consultation with the Franco-Ontarian community, the ultimate beneficiary of this funding in the province,[79] before any decisions is made that will have a negative impact on the Franco-Ontarian community.

100. Government decisions on post-secondary education and the decisions of Laurentian have a major impact on French-language schools. Accordingly, when exercising its discretion over its programs and structures, Laurentian must take into account the particular needs of the Franco-Ontarian community, even in *CCAA* proceedings.[80]

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[77] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, para. 115.
[78] *DesRochers v. Canada (Industry)*, 2009 SCC 8, paras. 51-53.
[79] See Affidavit D. Hurtubise at para. 28, Second Supplementary Motion Record, Tab 2.
[80] *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCS 1920, para. 74; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586, paras. 128-129.

101. The Court should also take into account the fact that since it was founded, Laurentian has had a well-established practice of consulting and involving the Franco-Ontarian community before implementing major reforms.[81]

102. The Franco-Ontarian community is concerned about Laurentian's disregard for French, and even more so since the university applied for protection under the CCAA.[82]

103. This proceeding is being conducted in English and the documentation available is almost entirely in English, even in the French version of the monitor's website.

104. As part of its restructuring plan, Laurentian has identified savings relating to its least profitable programs, courses and services. These changes will have had a disproportionate impact on the smallest programs, courses and services offered in French.

105. The restructuring of LU is already affecting French Ontario and causing disproportionate harm to numerous members of the Franco-Ontarian community[83].

106. The Franco-Ontarian community's concerns about the status and use of French in the CCAA proceeding stem in large part from Laurentian's failure in the past to honour its commitments to French and French-language courses, programs and services. Laurentian's charter states that it is a "bilingual" institution, yet French-language programs, courses and services are not managed or controlled by the Franco-Ontarian community[84]. LU neglects the status and use of French. English predominates at Laurentian in the provision of courses

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[81] See Affidavit of S. Dupuis at paras. 6, 9, 31, 48-49, Second Supplementary Motion Record, Tab 2.
[82] See Affidavit of D. Hurtubise at para. 31, Exhibit DH-7; Affidavit of T. Bissonnette at paras. 18-20, Exhibits TB-4, TB-5; Affidavit of A. Lacassagne at para. 19, Exhibit AL-5.
[83] See Affidavit of C. Jolin at para. 5, Second Supplementary Motion Record, Tab 2.
[84] See Affidavit of D. Hurtubise at paras. 3-5, Second Supplementary Motion Record, Tab 2.

and services as well as in governance, despite the fact that the university has been informed of numerous deficiencies and dissatisfaction among its Francophone faculty[85].

107. The Supreme Court of Canada has explained on numerous occasions that the Francophone minority cannot always be certain that the majority will take into account all its linguistic and cultural concerns, and that this failure is not necessarily intentional: the majority cannot be expected to understand and appreciate the various ways in which decisions may affect the language and culture of the minority[86].

108. The offering of courses and programs in French has also decreased at Laurentian, and this has contributed to the decline in enrolment in French-language programs. The reduction in faculty has led to a decrease in the offering of courses and programs in French[87].

109. For several years, the Franco-Ontarian community has been expressing its desire and need for a university "by" and "for" Francophones in mid-northern and northern Ontario and it is currently reiterating this position.[88]

110. Institutions "by" and "for" the community enhance the vitality of official language minority communities such as the Franco-Ontarian community. These communities need institutions that operate in their language and that provide services only in that language (in other words, homogeneous institutions), rather than "bilingual" institutions in which the majority

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[85] See Affidavit of D. Hurtubise at paras. 6-23; affidavit of T. Bissonnette at paras. 12-13 and Affidavit of A. Lacassagne at para. 3, Second Supplementary Motion Record, Tab 2.
[86] *Mahe v. Alberta*, [1990] 1 SCR 342, p. 372; *Arsenault-Cameron v. Prince Edward Island*, 2000 SCC 1, para. 43; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia,* 2020 SCC 13, para. 86.
[87] See Affidavit of A. Lacassagne at paras. 10-11, Second Supplementary Motion Record, Tab 2.
[88] See Affidavit of A. Lacassagne at paras. 12, 15-16, Exhibits AL-2 and AL-3; Affidavit of S. Dupuis at para. 100; Affidavit of T. Bissonnette at paras. 23-24, 31, Exhibits TB-7, TB-8, TB-14, Second Supplementary Motion Record, Tab 2.

language is the dominant language. The Franco-Ontarian community is not thriving in a "bilingual" Laurentian.

111. The Provincial Forum on Post-Secondary Education in French Ontario revealed a consensus within the Franco-Ontarian community to strengthen access to French-language programs and to obtain university governance "by" and "for" Francophones extending to administration, finance, student life, university activities, research and physical infrastructure, including mid-northern and northern Ontario[89].

112. On March 12, 2021, the AFO organized a northern round table that brought together some sixty stakeholders and organizations representing the Franco-Ontarian communities of Sudbury and northern Ontario. They reiterated the community's preference for a university "by" and "for" Francophones.[90]

113. That same day, l'Université de Sudbury announced at a joint press conference with the AFO that it had decided, by a resolution of its Board of Regents passed unanimously on March 11, 2021, to become a university managed and controlled "by" and "for" the Franco-Ontarian community.

**D) ISSUE #4: The DIP lender has effectively ousted the jurisdiction of the Superior Court**

114. The addition of the New Disclaimer Term to the DIP Amendment Agreement – despite the fact that disclaimer is not a condition of the DIP Agreement – is an impermissible attempt by the DIP lender to control the CCAA process and oust the jurisdiction of the Court.

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89 See Affidavit of A. Lacassagne at paras. 12, 15-16, Exhibits AL-2 at p. 3, AL-3 at pp. 4-5, Second Supplementary Motion Record, Tab 2.

90 See Affidavit of C. Jolin at para. 11, Exhibit CJ-2, Second Supplementary Motion Record, Tab 2.

115. Commentators have been clear: cautioning against attempts by DIP lenders to use the DIP loan "*as a tool to gain an inappropriate or overreaching level of control in the proceedings to the prejudice of other stakeholders*".[91]

116. This Honourable Court has jurisdiction to strike terms of DIP agreements where they are not fair and reasonable. In the *Essar Steel Algoma Inc.* case, Newbould J. refused to approve certain provisions in a DIP financing proposal and required that certain changes be made. Newbould J. recognized the inherent self-interested pre-disposition of a DIP lender and the necessity of Court control over the process:

> I do not see the DIP lenders as being merely altruistic. Like any DIP lender, it is in their interest to take what they can get. Their interest, of course, in a situation such as this in which they are all ABL or Term lenders, is to see the business successfully restructure, but to be sure they work it on their terms as much as possible.[92]

117. Indeed, courts in Canada have recognized that the courts must be "vigilant" of strategies by DIP lenders to use existing leverage to "take advantage of the chaos and uncertainty that are inherent in these situations":

> 179 …**I recognize that in some restructuring proceedings, certain stakeholders may use existing leverage, to the extent that they have it, to take advantage of the chaos and uncertainty that are inherent in these situations.** Strategies might be employed to secure for themselves advantages that they would not otherwise obtain. These advantages inevitably come at the expense of other stakeholders in the proceedings. These advantages are also almost always court approved so that they cannot be later revisited. **In those circumstances, the court must be constantly vigilant against such strategies.[93] (emphasis added)**

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[91] Waël Rostom and Caitlin Fell, "Recent Trends in DIP Financing" (2016) 5-4 IIC Journal, Thorneloe BOA, Tab 7 at p. 4 [emphasis added].
[92] *Essar Steel Algoma*, Re, Endorsement of Newbould J. dated November 16, 2015 [emphasis added], Thorneloe BOA, Tab 8.
[93] *Great Basin Gold Ltd.* (Re), 2012 BCSC 1459, Thorneloe BOA, Tab 9 at para. 79 [emphasis added].

## IV. ORDER SOUGHT

L'Université de Sudbury seeks:

a) an order that the Federation Agreement and Financial Distribution Notice described in Laurentian's Notice to Disclaim or Resiliate an Agreement dated April 1, 2021 directed to Université de Sudbury are not to be disclaimed or resiliated under section 32 of the CCAA; and

b) a declaration that Laurentian has not acted in good faith in connection with the Proposed Disclaimers and an Order terminating the stay of proceedings under the CCAA and prohibiting Laurentian from filing a plan of compromise; and

c) an order for its costs.

DATE: April 27, 2021

All of which is respectfully submitted,

Sheppard & Claude

______________________________

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**TO:** **See attached Service List**

**SCHEDULE "A"**

1. Section 18.6, *Companies' Creditors Arrangement Act* RSC 1985 *https://canlii.ca/t/7vdw*

2. Section 32, *Companies' Creditors Arrangement Act* RSC 1985 *https://canlii.ca/t/7vdw*

Court File No. CV-656040-00CL

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**

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**(COMMERCIAL LIST)**

Proceedings commenced at Toronto

# FACTUM
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