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

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 ARRANGEMENTOF **LAURENTIAN UNIVERSITY OF SUDBURY**

Applicant

FACTUM OF THE APPLICANT
(Stay Extension, DIP Amendment, Approval of Settlement Agreements)

April 26, 2021

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PART I - OVERVIEW

1. On February 1, 2021, Laurentian University of Sudbury ("**LU**" or the "**Applicant**") commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). This step was taken as a result of an extreme liquidity crisis forcing the Applicant to either: (i) commence insolvency proceedings in an effort to restructure and save the university; or (ii) close its doors, as the Applicant would otherwise be unable to meet payroll obligations during the month of February.

2. This CCAA proceeding is novel in a number of ways. The Applicant is the first publicly-funded university in Canada to seek creditor protection pursuant to the CCAA. The sheer magnitude of cost savings required by the Applicant to attain financial sustainability required tremendous sacrifices from its labour partners, which have been achieved. From the outset of this proceeding, the Applicant has been engrossed in intensive, concurrent bilateral mediation with a number of stakeholders.

3. At the same time, the Applicant continued to operate in the ordinary course and provide communications to ensure that stakeholders, such as its students and employees, were

minimally disrupted through the Winter 2021 semester. All students will complete their Winter 2021 term on schedule.

4. All of this occurred on an extremely expedited, 90-day timeline as the Applicant could only secure $25 million in DIP financing at the outset of this proceeding to finance operations for that period of the restructuring. In addition, the Applicant had to demonstrate to the DIP Lender that it had achieved certain key operational restructuring milestones to immediately address expenses, and to demonstrate to the DIP Lender that a restructuring is viable and creates a financially sustainable university.

5. The relief sought on this motion brought by the Applicant is the product of the extraordinary effort made by the Applicant and various of its stakeholders, to achieve agreement on a number of foundational aspects of the restructuring.

6. The Applicant's motion is for an Order: (i) extending the Stay Period up to and including August 31, 2021, (ii) approving the DIP Amendment to increase the total amount of financing available under the DIP Facility from $25 million to $25 million, and (iii) approving the settlement agreements reached with LUFA, LUSU and Huntington.

7. The Court is asked to grant the relief requested by the Applicant for the following reasons:

   (a) **Stay Extension.** The proposed stay extension should be granted pursuant to section 11.02(2) of the CCAA because the Applicant is expected to have sufficient funds to continue operations during the proposed Stay Period, the Applicant needs the additional time to implement a claims process and have creditor claims determined, to continue negotiations with creditors and further develop all aspects of the restructuring to develop the framework for a Plan of Arrangement that may be put to creditors, and the Applicant continues to act in good faith and with due diligence;

(b) **DIP Amendment.** The DIP Amendment should be approved because the criteria under sections 11.2(1) and 11.2(4) of the CCAA are satisfied and, among other reasons, the Applicant requires an additional $10 million to continue into the next phase of its restructuring; and

(c) **Approval of Settlement Agreements.** The Settlement Agreements (as defined below) should be approved in accordance with this Court's jurisdiction pursuant to section 11.02 of the CCAA, each of the Settlement Agreements reflect heavily negotiated terms and the Monitor supports the Applicant entering into the Settlement Agreements.

PART II - FACTS

8. The relevant facts with respect to this motion are briefly summarized below and more fully set out in the Affidavit of Dr. Robert Haché sworn January 29, 2021 (the "**First Haché Affidavit**") and the Affidavit of Dr. Robert Haché sworn April 21, 2021 filed in support of this motion (the "**Second Haché Affidavit**").[1]

A. Background

9. In response to a liquidity crisis and recurring deficits of millions of dollars, the Applicant sought and received an initial order on February 1, 2021 (the "**Initial Order**") granting the Applicant protection under the CCAA, approving a stay of proceedings for the initial 10-day period (the "**Stay Period**") and certain Court ordered super-priority charges.[2]

10. Further to a case conference before Chief Justice Morawetz on February 5, 2021, the Court issued an order (the "**Mediator Appointment Order**") appointing the Honourable Justice

[1] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Second Haché Affidavit. All references to currency in this factum are to Canadian dollars, unless otherwise noted.
[2] Second Haché Affidavit at para. 12, Motion Record of the Applicant ("**Motion Record**"), Tab 2, Page 34.

Sean Dunphy of the Ontario Superior Court of Justice as the Court-appointed mediator (the "**Mediator**") to facilitate negotiations on the various aspects of the Applicant's restructuring (the "**Mediation**").[3]

11. On February 10, 2021, the Court held a comeback hearing on notice to all affected parties that resulted in the issuance of an amended and restated initial order (the "**Amended and Restated Initial Order**") which, among other things, approved a debtor-in-possession interim financing arrangement in the amount of $25 million (the "**DIP Facility**") and extended the Stay Period to April 30, 2021.[4]

B. Mediation Process

12. The initial focus of the Mediation was on undertaking a comprehensive review and restructuring of all academic programs and courses, and negotiating agreements with the Applicant's labour partners that were necessary to achieve immediate cost savings required for LU to continue operating as a going concern beyond April 30, 2021. The alternative was a cessation of operations. Negotiations in the Mediation process have primarily involved the Applicant, the Senate Sub-Committee, each of the Federated Universities, LUFA and LUSU (collectively, the "**Mediation Parties**").[5]

13. Since February 5, 2021, the Applicant and the Mediation Parties, with the assistance of the Mediator and the Monitor, have each dedicated themselves to the Mediation. The Mediation was an intensive process, being conducted on a near-daily basis, including

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[3] Second Haché Affidavit at para. 27, Motion Record, Tab 2, Pages 38-39.
[4] Second Haché Affidavit at para. 13, Motion Record, Tab 2, Page 35.
[5] Second Haché Affidavit at para. 29, Motion Record, Tab 2, Page 39. Other parties, including the Applicant's pre-filing lenders, also participated in the Mediation.

weekends and holidays, in an effort to achieve immediate and significant cost reductions that are necessary for the Applicant's operational restructuring.[6]

14. These cost reductions are necessary because, leading up to the commencement of the CCAA Proceedings, the Applicant experienced recurring annual deficits and, without immediate drastic efforts, would run out of liquidity required to continue operations. Prior to the achievement of any cost savings, the Applicant projected that it would incur recurring annual deficits in the range of $13.7 to $16 million annually as a result of its pre-filing operating cost structure.[7] These deficits relate only to its *status quo* operations and exclude payments owing to existing pre-filing creditors in respect of any amounts stayed by the Initial Order.

15. These deficits also do not include any consideration of the following obligations of the Applicant:

(a) Completion of research obligations or other obligations arising from the Deferred Contributions. LU's most recent estimate of the Deferred Contributions is approximately $28.5 million;

(b) Costs involved for the implementation of new governance policies and mechanisms, operational controls and processes;

(c) Investment in initiatives to protect and grow revenue such as new programming or courses, recruitment of students or other matters necessary to maintaining competitiveness, responding to student interest and demand, and building a long-term, financially sustainable university;

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[6] Second Haché Affidavit at para. 32, Motion Record, Tab 2, Page 40.
[7] Third Report of the Monitor at para. 53.

(d) Establishment of appropriate reserves to avoid a future liquidity crisis as a result of unforeseen events, greater than anticipated enrolment decreases, or other similar negative events;

(e) Restructuring costs to conclude the Applicant's CCAA proceedings which may be in the range of $6 million, or greater;

(f) Repayment of the DIP Facility, which is anticipated to be in the total principal amount of $35 million, subject to Court approval of the DIP Amendment sought by the Applicant at this motion and potentially higher if additional funds are required; or

(g) Payments to the Applicant's pre-filing unsecured creditors, including the Lenders who are owed amounts in excess of $100 million, plus other ordinary course pre-filing claims and claims that will arise as a result of the restructuring steps, such as termination and severance claims in respect of terminated employees.[8]

16. In light of these massive projected operational deficits and obligations, the Applicant sought to address certain aspects of its operations that required input and resolution with certain stakeholders through the Mediation.

C. Outcome of Mediation

i. Academic Restructuring

17. A preliminary issue for the Applicant to address as part of its restructuring was a full review and restructuring of the Applicant's academic programming. A considerable portion of the Applicant's program and course offerings had chronic low or no enrollment and it was not financially feasible to continue offering them.[9]

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[8] Third Report of the Monitor at para. 53.

[9] Second Haché Affidavit at paras. 37-39, Motion Record, Tab 2, Pages 41-43.

18. The Applicant conducted a viability analysis for each of the programs, taking into account the Applicant's bilingual and tri-cultural mandate. As a result of this analysis, the Applicant identified 38 English-language and 27 French-language undergraduate programs that were considered unsustainable going forward and were identified for closure.[10] In addition, 11 graduate programs (4 in French; 7 in English) were identified for closure as they each had fewer than 10 students enrolled.[11]

19. Although the number of programs identified for closure represented 39% of the total undergraduate programs offered by the Applicant, only approximately 7.5% of the Applicant's current undergraduate students will be affected by the closure of these programs, either directly or indirectly. This represents approximately 772 affected undergraduate students (557 in English-language programs and 215 in French-language programs). The Applicant is making reasonable efforts to accommodate those students who will be affected, and transition plans have been developed.[12]

20. As a result of LU's bi-cameral governance structure, the Senate is responsible for the academic policy of LU and any changes to the academic programming must involve the Senate.[13] The Senate appointed the Senate Sub-Committee to represent it in the Mediation.[14]

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[10] Second Haché Affidavit at para. 57, Motion Record, Tab 2, Page 47.
[11] Second Haché Affidavit at para. 80, Motion Record, Tab 2, Page 55.
[12] Second Haché Affidavit at paras. 58-62, Motion Record, Tab 2, Pages 47-48.
[13] Second Haché Affidavit at para. 40, Motion Record, Tab 2, Page 43.
[14] Second Haché Affidavit at para. 41, Motion Record, Tab 2, Page 43.

21. The Senate Sub-Committee was extensively involved in the review of the Applicant's academic programs.[15] As part of this process, the Senate Sub-Committee prepared an *in camera* report (the "**Sub-Committee Report**") outlining its analysis, including a recommendation to the Senate that the program closures be approved.[16]

22. On April 6, the Senate Sub-Committee presented the Sub-Committee Report to the Senate at an *in camera* Senate meeting (the "**April 6 Senate Meeting**"). At the conclusion of the April 6 Senate Meeting, the Senate passed a resolution accepting the recommendations of the Senate Sub-Committee and, accordingly, approving the Applicant's academic restructuring.[17]

ii. Agreements with Labour Partners

<u>LUFA</u>

23. LUFA and the Board of the Applicant are parties to the LUFA CA, which had a three year term that expired on June 30, 2020. Pursuant to the provisions of the LUFA CA, the agreement automatically continues year-to-year unless notice is provided that either LUFA or LU intends to terminate or amend the LUFA CA.[18]

24. Prior to the CCAA Proceedings, LU and LUFA engaged in bargaining with respect to a new collective agreement. Those negotiations continued within the Mediation.[19] The Applicant and LUFA have been engaged in extensive Mediation over the past two months.

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[15] Second Haché Affidavit at para. 96, Motion Record, Tab 2, Page 58.
[16] Second Haché Affidavit at para. 98, Motion Record, Tab 2, Page 59.
[17] Second Haché Affidavit at paras. 96-100, Motion Record, Tab 2, Pages 58-60. t
[18] Second Haché Affidavit at para. 115, Motion Record, Tab 2, Page 64.
[19] Second Haché Affidavit at para. 116, Motion Record, Tab 2, Page 64.

This has included voluminous information and document exchanges, near-daily Mediation sessions with the Mediator and the exchange of comprehensive mediation briefs.[20]

25. On April 7, 2021, LU and LUFA signed the LUFA Term Sheet, setting out the key terms and conditions agreed to by the parties[21] following the monumental efforts by both parties to reach agreement.

26. The key terms of the LUFA Term Sheet include, among others:

(a) a new collective agreement with a five-year term, expiring on June 30, 2025;
(b) 116 full-time faculty member positions were declared redundant;
(c) Redundant faculty members who are teaching courses will have an effective terminate date of May 15, 2021 to permit marking of final exams, papers and communicating grades;
(d) Redundant faculty members who are not teaching courses in Winter 2021 shall have an effective termination date of April 30, 2021;
(e) Faculty members who elected early retirement will receive certain non-financial incentives;
(f) Effective May 1, 2021, each faculty members' salary is decreased by 5%;
(g) Each faculty member is required to take five unpaid furlough days during the 2021-22, 2022-23 and 2023-24 academic years;
(h) The RHBP and SuRP are terminated; and
(i) Agreement on an additional term sheet in respect of pension plan issues, described more fully below.[22]

27. Despite the best efforts of LU and LUFA, certain terms of the existing collective agreement that were to be addressed in the Mediation were not resolved as part of the LUFA Term

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[20] Second Haché Affidavit at para. 118, Motion Record, Tab 2, Page 64.
[21] Second Haché Affidavit at paras. 118-120, Motion Record, Tab 2, Pages 64-65.
[22] Second Haché Affidavit at para. 121, Motion Record, Tab 2, Page 65.

Sheet. The LUFA Term Sheet provides that these issues will be determined by binding arbitration by June 18, 2021 and, once determined, will constitute amendments to the collective agreement.

LUSU

28. The Applicant and LUSU are parties to the LUSU CA, which expires on June 30, 2024. Similar to LUFA, the Applicant engaged in extensive mediation with LUSU, which negotiations had the aim of achieving cost reductions in furtherance of the Applicant's efforts to attain financial sustainability and to effect the changes required following the academic restructuring and the reduction in faculty.[23]

29. On April 5, 2021, LU and LUSU signed the LUSU Term Sheet, setting out the key terms and conditions agreed to by the parties following the intensive negotiations that took place during the Mediation.[24]

30. The key terms of the LUSU Term Sheet include, among others:

    (a) the termination of 42 LUSU members, which will be effective on April 30, 2021;
    (b) any terminated LUSU member will have preferential recall rights for a two-year period following the date of termination;
    (c) termination of the RHBP and the SuRP; and
    (d) agreement on an additional term sheet in respect of pension plan issues, described in further detail below.[25]

31. In addition, as part of the LUFA Term Sheet and the LUSU Term Sheet, the Applicant, LUFA and LUSU entered into a Pension Term Sheet which resulted in agreement on

[23] Second Haché Affidavit at paras. 126 - 127, Motion Record, Tab 2, Pages 66-67.
[24] Second Haché Affidavit at para. 128, Motion Record, Tab 2, Page 67.
[25] Second Haché Affidavit at para. 128, Motion Record of the Applicant, Tab 2, Page 67.

several changes to the Pension Plan designed to ensure the Pension Plan's sustainability and avoid the risk of future deficiencies and special payments.[26]

32. On April 13, 2021, LUFA and LUSU members ratified the LUFA Term Sheet and the LUSU Term Sheet, respectively.[27]

Pension Term Sheet

33. As part of the agreement reached with LUFA and LUSU in their respective term sheets, the Applicant reached consensus on amendments to the Pension Plan with the goal of ensuring that the Pension Plan would be sustainable moving forward and that the Applicant's funding obligations would not jeopardize the Applicant's financial sustainability after the conclusion of the CCAA Proceedings.[28]

34. Pursuant to the Pension Term Sheet, the following amendments to the Pension Plan have been agreed upon by LUFA and LUSU:

(a) Availability of Commuted Value Transfers: Commuted value transfer payments will not be available for terminated members of the Pension Plan who have reached their early retirement date. For employees who have not reached their early retirement date, commuted value transfers will be offered on a one-time basis in accordance with the *Pension Benefits Act*. The parties also agreed to certain transitional measures.

(b) Modified Early Retirement Provisions: The Pension Plan will be amended to eliminate the early retirement date for LUFA members and Senior Leaders and Designated Executives, effective July 21, 2021. LUSU members and other employees participating in the Pension Plan will continue to be eligible for unreduced early retirement at age 62.

[26] Second Haché Affidavit at paras. 212-219, Motion Record, Tab 2, Pages 91-96.
[27] Second Haché Affidavit at paras. 123,130, Motion Record, Tab 2, Pages 66-67.
[28] Second Haché Affidavit at para. 212, Motion Record, Tab 2, Page 91.

(c) Receipt of Pension While Employed: Effective July 1, 2021, members will no longer be entitled to receive their pension while employed after their normal retirement date.

(d) Freeze Best Average Pensionable Earnings. The five-year average of a Pension Plan member's highest average earnings to calculate the members' defined benefit entitlement will be frozen on June 30, 2021.

(e) Career Average Earnings Benefit Formula & Integration with Enhanced CPP: Effective July 1, 2021, members of the Pension Plan will accrue benefits based on a career average earnings formula rather than the best average earnings formula.

(f) Post-Retirement Indexation: This will no longer be provided, unless granted in accordance with the Pension Plan's new Benefits and Funding Policy.

(g) Contributions: Beginning July 1, 2021, members will contribute an average of 8% of pensionable earnings to the Pension Plan, which will be matched by the Applicant.

(h) Benefits and Funding Policy: The Pension Term Sheet included several key terms of such policy that will be developed, and which will govern the financial management of the Pension Plan.[29]

iii. Huntington Transition Agreement

Background

35. The Applicant operates within a federated structure whereby it has contractual affiliations with three independent universities under the overall umbrella of the Applicant: the University of Sudbury ("**SU**') the University of Thorneloe ("**Thorneloe**") and Huntington University ("**Huntington**" and, together with SU and Thorneloe, the "**Federated Universities**").[30]

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[29] Second Haché Affidavit at para. 215, Motion Record, Tab 2, Pages 92-95.
[30] Second Haché Affidavit at para. 139, Motion Record, Tab 2, Page 70.

36. Each of the Federated Universities are separate legal entities and are governed by a Board of Governors or Directors that is independent of the Applicant in all respects.

37. The Applicant's relationship with the Federated Universities is governed by three sets of agreements: (i) the Federation Agreements; (ii) the Indentures; and (iii) the Financial Distribution Notices, each of which are described in detail in the First Haché Affidavit.[31]

Negative Financial Impact of the Federated Universities on the Applicant

38. In addition to a handful of programs that are domiciled at each of the Federated Universities, the Federated Universities offer elective courses through the Faculty of Arts for the Applicant's students. All students, whether registered in programs or elective courses at one of the Federated Universities, or at LU proper, are LU students. Under the funding arrangements that exist between LU and each of the Federated Universities, each time that an LU student takes a course through one of the Federated Universities rather than a course taught at LU, that represents lost tuition revenue to LU.

39. In Fiscal Year 2020, as a result of LU students' enrollment in programs and courses through the Federated Universities,[32] LU transferred to the Federated Universities approximately $3.5 million in total grants, $5.3 million in net tuition, and $0.3 million in material fees, for a total of $9.1 million. That amount was offset by the Administrative Services Fee of approximately $1.4 million paid by the Federated Universities to LU, for a net transfer from LU to the Federated Universities of approximately $7.7 million in Fiscal Year 2020.[33]

[31] First Haché Affidavit at paras. 66 – 92, Application Record, Pages 43-51.
[32] Second Haché Affidavit at paras. 152-154, Motion Record, Tab 2, Pages 74-75.
[33] Third Report of the Monitor at para 174.

40. LU has the ability and the capacity to offer a broad range of courses and programs to its students within its existing cost structure, such that there is no need for the resulting loss in revenue to LU in continuing this arrangement. Since students enrolled in programs and courses offered through the Federated Universities could otherwise be accommodated and enrolled in programs offered by LU, a substantial portion of this represents lost revenue for LU.

Mediation with the Federated Universities and the Huntington Transition Agreement

41. As part of the Mediation, the Applicant sought a negotiated resolution with all three of the Federated Universities whereby the formal relationship would be terminated, but the Applicant and the Federated Universities would discuss how the historical legacy of the Federated Universities would be acknowledged and preserved.[34]

42. Unfortunately, the Applicant could only achieve a negotiated resolution with Huntington.

43. The Applicant and Huntington entered into a Transition Agreement on April 16, 2021 (the "**Huntington Transition Agreement**").[35] The Huntington Transition Agreement sets out the terms for an orderly transition from Huntington's federation with the Applicant and participation in the Pension Plan.

44. The salient terms of the Huntington Transition Agreement include the following, among others:

(a) Huntington will not oppose the Notice of Disclaimer;

(b) Huntington will no longer deliver programs or courses as credit towards a LU degree;

[34] Second Haché Affidavit at para. 157, Motion Record, Tab 2, Page 75.
[35] Second Haché Affidavit at para. 166, Motion Record, Tab 2, Page 78.

(c) there is a "most favoured nation clause" if Thorneloe or SU continue to teach courses and receive funding from the Applicant;

(d) the current programs and courses at Huntington will be discontinued and the Applicant will work on transitioning affected students;

(e) the Applicant will purchase Huntington's rights to the Gerontology program, in consideration for the assumption by the Applicant of a $600,000 retiree pension obligation;

(f) on or before June 30, 2021, Huntington will pay $1.2 million into the Pension Plan in respect of the wind-up deficit for its active and deferred members;

(g) Huntington shall retain its building and related facilities for its own benefit and the parties agree that the termination rights under the Indenture are not triggered; and

(h) effective June 30, 2021, Huntington will cease to be a participating employer in the Pension Plan and the RHBP.[36]

The Notices of Disclaimer

45. A negotiated resolution was not achieved with SU and Thorneloe. On April 1, 2021, LU delivered Notices to Disclaim or Resiliate pursuant to section 32 of the CCAA (the "**Notices of Disclaimer**").[37] The Notices of Disclaimer disclaim the Federation Agreements and the Financial Distribution Notices with each of SU and Thorneloe and, absent any Order which states otherwise, will become effective on May 1, 2021.[38]

46. Further factual background directly related to the motions filed by Thorneloe and SU is addressed in a separate Factum filed by the Applicant, which responds to motions brought by each of SU and Thorneloe in opposition to the Notices of Disclaimer.

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[36] Second Haché Affidavit at para. 167, Motion Record, Tab 2, Pages 78-79.

[37] The Applicant also delivered a Notice of Disclaimer to Huntington but, as noted above, was subsequently able to reach agreement on the Huntington Transition Agreement. Pursuant to the terms of the Huntington Transition Agreement, Huntington has not opposed the Notice of Disclaimer.

[38] Second Haché Affidavit at para. 160, Motion Record, Tab 2, Page 76.

PART III - ISSUES

47. The following three issues must be determined on this motion:

(a) Should the Stay Period be extended up to and including August 31, 2021?

(b) Should the DIP Amendment be approved by this Court?

(c) Should this Court approve the LUFA Term Sheet, the LUSU Term Sheet and the Huntington Transition Agreement?

PART IV - LAW AND ANALYSIS

Issue 1: This Court should extend the Stay Period up to and including August 31, 2021

48. The Applicant seeks an extension of the Stay Period up to and including August 31, 2021.

49. Pursuant to section 11.02 of the CCAA, the Court may, on an application in respect of a debtor company other than an initial application, grant an extension of a stay of proceedings where: (i) the applicant satisfies the Court that an extension of the stay of proceedings is appropriate in the circumstances; and (ii) the applicant further satisfies the Court that it has acted, and is acting, in good faith and with due diligence.[39]

50. In deciding whether to grant an extension of the stay of proceedings, the Court will focus on whether the foregoing requirements have been satisfied. The length of the stay extension is discretionary. The extension date should be one that allows the parties some flexibility.[40]

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[39] CCAA, s 11.02(2)-(3).

[40] *Sunrise/Saskatoon Apartments Limited Partnership (Re)*, 2017 BCSC 808 at para 21.

51. Since the granting of the Amended and Restated Initial Order on February 11, 2021, the Applicant has been engaged around the clock and taken significant steps towards its operational restructuring. The Applicant has, with the assistance of and in consultation with the Monitor, among other things:

(a) maintained ordinary operations during the Stay Period, including the continuance of all student classes (virtually, owing to the pandemic) without disruption;[41]

(b) effected a comprehensive communications plan to a broad group of stakeholders, including the launch of websites in French and English for informational purposes;[42]

(c) received and responded in a timely manner to a significant volume of telephone calls and emails from stakeholders;[43]

(d) opened registration for Spring term courses that commence on May 3, 2021;[44]

(e) implemented new fiscal restraint policies, in consultation with the Monitor;[45]

(f) participated extensively in the Mediation on a near-constant basis, in the pursuit of the operational restructuring necessary for the Applicant to continue operating;[46]

(g) undertook a review and analysis of its faculties and departments to streamline operations and eliminate inefficiencies;[47]

(h) undertook a review and analysis of the Applicant's full-time employees who are not represented by a union in order to identify departments and positions where further efficiencies could be found;[48]

(i) convened meetings with several research-granting agencies that are responsible for funding a significant amount of research conducted by the Applicant and responded to questions from such agencies;[49]

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[41] Second Haché Affidavit at para. 20, Motion Record, Tab 2, Page 36.
[42] Second Haché Affidavit at para. 21, Motion Record, Tab 2, Page 36.
[43] Second Haché Affidavit at para. 23, Motion Record, Tab 2, Page 37.
[44] Second Haché Affidavit at para. 24, Motion Record, Tab 2, Page 37.
[45] Second Haché Affidavit at para. 25, Motion Record, Tab 2, Page 38.
[46] Second Haché Affidavit at para. 32, Motion Record, Tab 2, Page 40.
[47] Second Haché Affidavit at para. 91, Motion Record, Tab 2, Page 57.
[48] Second Haché Affidavit at para. 137, Motion Record, Tab 2, Page 70.
[49] Second Haché Affidavit at paras. 236 - 239, Motion Record, Tab 2, Pages 99 - 100.

(j) liaised with the MCU and the Special Advisor appointed by the MCU of the steps taken by the Applicant during the CCAA Proceedings, other than confidential communications relating to the Mediaton;[50]

(k) provided updates to the DIP Lender on the status of the restructuring and engaged in negotiations with respect to the extension to the maturity date of the DIP Financing and an increase in the amount available under the DIP Facility;[51] and

(l) responded to the leave to appeal motion brought by OCUFA, LUFA and CUPE.[52]

52. The Applicant is acting in good faith and with due diligence in pursuit of its restructuring goals.

53. The Applicant requires an extension of the stay of proceedings until August 31, 2021, to preserve the status quo and permit the Applicant the breathing room required to continue its planned restructuring efforts in Phase 2, including, among other things:[53]

(a) the identification and quantification of the universe of claims against the Applicant;

(b) a review of all operational and governance matters within the university;

(c) the pursuit of value for all stakeholders, including a detailed assessment of all assets that can be monetized for stakeholders or that will create efficiencies;

(d) the planning, drafting and negotiation of a plan of compromise or arrangement; and

(e) the re-building of confidence and relationships with all stakeholders of the Applicant.

54. A substantial amount of work has already gone into this restructuring and significant progress has been made. However, a significant amount of work remains in order for the Applicant's restructuring to be completed successfully. An extension of the stay of

[50] Second Haché Affidavit at para. 247, Motion Record, Tab 2, Page 102.
[51] Second Haché Affidavit at paras. 252 - 256, Motion Record, Tab 2, Page 103 - 105.
[52] Second Haché Affidavit at paras. 15 - 19, Motion Record, Tab 2, Pages 35-36.
[53] Second Haché Affidavit at paras. 257 - 262, Motion Record, Tab 2, Pages 105 - 106.

proceedings until August 31, 2021, is in the best interests of the Applicants and all of its stakeholders.

55. The Revised Cash Flow Forecast demonstrates that, if the DIP Amendment is approved, the Applicant will have sufficient liquidity to operate its business and meet its obligations during the proposed extension of the Stay Period.[54]

56. The Monitor supports extending the Stay Period until August 31, 2021 and is of the view that the Applicant is acting in good faith and with due diligence.[55]

57. For all of the foregoing reasons, the Applicant respectfully submits that this Court should extend the Stay Period up to and including August 31, 2021.

Issue 2: This Court should approve the DIP Amendment

i. Background and Terms of the DIP Amendment

58. LU has drawn on the full \$25 million available pursuant to the DIP Facility.[56] As demonstrated in the Revised Cash Flow Forecast, LU will not be able to fund its operations during the requested extension of the Stay Period without additional funding.[57]

59. The Applicant requires additional financing to provide the Applicant with sufficient liquidity to make payroll, continue operating in the ordinary course,[58] and fund the restructuring costs while the Applicant proceeds into Phase 2 of its restructuring.

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[54] Third Report of the Monitor at para. 191.
[55] Third Report of the Monitor at paras. 201 and 205.
[56] Second Haché Affidavit at para. 253, Motion Record, Tab 2, Page 103.
[57] Third Report of the Monitor at para. 195; Revised Cash Flow Forecast, Third Report of the Monitor, Appendix "F".
[58] Second Hache Affidavit at para. 253, Motion Record, Tab 2, Page 103.

60. On April 19, 2021, the Applicant and FCC entered into an Amended DIP Term Sheet (the "**DIP Amendment**"), pursuant to which FCC agreed to increase the maximum principal amount available under the DIP Facility by a further $10 million, subject to the terms and conditions of the Amended DIP Facility.[59]

61. The salient terms of the DIP Amendment include, among others:

(a) an increase of $10 million to the maximum principal amount available under the DIP Facility from $25 million to $35 million;

(b) extension of the Maturity Date to August 31, 2021;

(c) a Loan Amendment Fee in the amount of $200,000, reflecting the same percentage rate (2.0%) on the additional principal amount of the loan as the original DIP Term Sheet; and

(d) an increase to the DIP Lender's Charge from $25 million to $35 million.[60]

62. In addition to the above terms, the DIP Amendment is conditional upon, among other things:

(a) ratification of the Union Term Sheets (as defined in the DIP Amendment);

(b) an order, in form and substance satisfactory to the DIP Lender increasing the DIP Lender's Charge to $35 million, approving the Union Term Sheets, approving the Huntington Transition Agreement and extending the stay of proceedings to August 31, 2021;

(c) the disclaimer of the Federation Agreements and Financial Distribution Notices, effective May 1, 2021;

(d) no further academic restructuring of the Applicant's programs without the consent of the DIP Lender;

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[59] Second Haché Affidavit at para. 254, Motion Record, Tab 2, Page 103.

[60] Second Haché Affidavit at para. 255, Motion Record, Tab 2, Page 104; See also DIP Amendment Agreement dated April 20, 2021, Motion Record of the Applicant, Tab 2, Exhibit "Z".

(e) a revised cash flow forecast and multi-year financial forecast demonstrating financially sustainability of the Applicant to the DIP Lender, in its sole discretion; and

(f) the issuance of a claims process order by May 31, 2021.[61]

63. The DIP Amendment was negotiated with the DIP Lender and its counsel following the agreements reached with LUFA, LUSU and Huntington and the issuance of the Notices of Disclaimer by the Applicant to Huntington, Thorneloe and SU.

ii. Jurisdiction to Approve the DIP Amendment

64. Section 11.2 of the CCAA provides statutory jurisdiction to approve the DIP Amendment and to order that the DIP Lender's Charge shall rank in priority over the claim of any secured creditor of the company.[62]

65. Section 11.2(4) sets out a non-exhaustive list of factors to be considered by the Court in deciding whether to grant such a charge: (i) the period during which the company is expected to be subject to proceedings under this Act; (ii) how the company's business and financial affairs are to be managed during the proceedings; (iii) whether the company's management has the confidence of its major creditors; (iv) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company; (v) the nature and value of the company's property; (vi) whether any creditor would be materially prejudiced as a result of the security or charge; and (vii) the monitor's report.[63]

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[61] *Ibid*.
[62] *CCAA*, 11.2.
[63] *CCAA*, s 11.2(4).

iii. The Criteria in Sections 11.2(1) and 11.2(4) are satisfied

66. The Applicant submits that the DIP Amendment and the DIP Lender's Charge should be approved for the foregoing reasons, taking into consideration section 11.2(4) of the CCAA:

(a) the notice requirements under section 11.2(1) of the CCAA have been met;

(b) the Applicant, with the assistance of the Monitor, has taken steps to reduce costs to the greatest extent reasonably possible during the CCAA Proceedings while ensuring that the Applicant remains operating in the ordinary course;[64]

(c) the DIP Amendment and increase of the maximum principal amount available under the DIP Facility is required in order for the Applicant to continue operations in the ordinary course and pursue its restructuring plan for the benefit of all stakeholders;[65]

(d) without the DIP Amendment, the Applicant would not be able to remain in business and make payroll, jeopardizing the continuing education of approximately 9,000 students, the employment of many employees, an abrupt termination of ongoing research activities at the university and result in the significant erosion of value for the stakeholders of the Applicant;

(e) the quantum and terms of the DIP Amendment and the DIP Lender's Charge is reasonable and appropriate having regard to the Revised Cash Flow Forecast;[66]

(f) stakeholders will not be materially prejudiced by the approval of the DIP Amendment and the granting of the DIP Charge; and

(g) the Monitor is of the view that the quantum and the terms and conditions of the DIP Amendment and the DIP Charge are reasonable and appropriate in the circumstances and should be approved.[67]

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[64] Second Haché Affidavit at para. 25, Motion Record of the Applicant, Tab 2, Page 38.
[65] Second Haché Affidavit at para. 253, Motion Record, Tab 2, Page 103.
[66] Third Report of the Monitor at para. 195.
[67] Third Report of the Monitor at para. 199.

Issue 3: This Court should approve the LUFA Term Sheet, LUSU Term Sheet and the Huntington Transition Agreement

i. Background

67. Through the Mediation, the Applicant reached agreement with its two major labour partners, LUFA and LUSU, and one of the Federated Universities, Huntington.

68. The Applicant seeks this Court's approval of the LUFA Term Sheet, LUSU Term Sheet and Huntington Transition Agreement (collectively, the "**Settlement Agreements**"), which, together with the Notices of Disclaimer and the academic programming restructuring, effect a substantial operational restructuring of the Applicant in order for the Applicant to achieve financial sustainability.

ii. Jurisdiction to Approve Settlement Agreements

69. The Court's jurisdiction to approve transactions and settlements is well recognized. Three sources of authority to make such approval have historically been acknowledged in connection with settlement agreements within a CCAA proceeding:

(a) the power of the Court to impose terms and conditions on the granting of a stay under s. 11(4) (now section 11.02) of the CCAA;

(b) the power of the Court to make an order "on such terms as it may impose" pursuant to s. 11(4) (now section 11.02) of the CCAA; and

(c) the inherent jurisdiction of the Court to "fill the gaps" of the CCAA in order to give effect to its objects.[68]

70. The flexibility of the CCAA has been cited as an important factor in facilitating settlements that avoid complex and costly legal battles. CCAA courts have also recognized that, as a

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[68] *Re Nortel*, [2009] O.J. No. 3169 at para 30; *Re Canadian Red Cross Society* [1998] O.J. No. 3306 at para 43.

general proposition, settlement of litigation is to be promoted, as settlement saves time and expense for the parties and the court.[69]

71. The Court has exercised its statutory authority to approve pre-plan settlements in numerous CCAA cases such as *Re Calpine Canada Energy Ltd.*, *Re Canadian Red Cross Society*, *Re Air Canada*, *Re Grace Canada*, *Re Nortel*, *Canwest* and *Sino-Forest*.[70]

72. Based on the foregoing, this Court clearly has the jurisdiction and authority to approve the Settlement Agreements as each of these agreements represent compromise and settlements within these CCAA Proceedings.

iii. This Court Ought to Exercise its Discretion to Approve the Settlement Agreements

73. The Settlement Agreements are the result of hundreds of hours of intensive work and negotiation by representatives of the Applicant, LUFA, LUSU and Huntington, including counsel and other advisors, and with the extensive involvement and assistance of the Monitor and the Mediator. The Applicant is not aware of any party in this proceeding who will be objecting to approval of the settlement agreements.

74. The Monitor has overseen and participated in many of the key discussions and negotiations with LUFA, LUSU and Huntington and supports court approval of the Settlement Agreements.[71]

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[69] *Re Walter Energy Canada Holdings, Inc.*, 2017 BCSC 1968 [*Walter Energy*] at paras. 35 - 36; *Robertson v. ProQuest Information & Learning*, 2011 ONSC 1647 at para. 28.
[70] *Walter Energy* at para. 35.; *Nortel Networks Corporation (Re)*, 2010 ONSC 1708 at paras. 68-71.
[71] Third Report of the Monitor at para. 205.

75. The Settlement Agreements represent a significant step forward to permit the Applicant to achieve financial sustainability, and to establishing the path forward absent the federation structure. The economic benefits achieved by the Applicant through the material reduction of annual expenses provide the Applicant with a foundation to achieve economic stability and a balanced budget year-over-year. Further, the Settlement Agreements represent the best bargain that could be achieved within the time constraints and circumstances.

76. All three agreements are necessary in the context of the changes to the Applicant's academic programs, the changes to the Applicant's relationship with the Federated Universities and the overall operational restructuring.

77. With respect to the Huntington Transition Agreement, the resolution achieves the Applicant's stated goal of ending its current federation relationship with Huntington in such a way that will preserve the historic legacy of Huntington while moving the Applicant towards financial sustainability. Further, the amount paid by Huntington to fund the wind-up deficiency associated with Pension Plan members of Huntington mitigates the risk that Huntington will not be able to make future payments.[72]

78. Finally, the DIP Amendment requires the Court's approval of the Settlement Agreements to ensure that the Applicant has access to the additional $10 million in DIP financing.

79. The Monitor supports the Applicant entering into the Settlement Agreements.

[72] Second Haché Affidavit at para. 169, Motion Record of the Applicant, Tab 2, Page 80.

80. For all of the foregoing reasons, the Applicant respectfully requests that this Court approve the Settlement Agreements.

PART V - RELIEF REQUESTED

81. For all of the foregoing reasons, the Applicant requests an Order substantially in the form of the draft Order included at Tab 3 of its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2021.

Thornton Grout Finnigan LLP

Thornton Grout Finnigan LLP

Counsel for the Applicant

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Sunrise/Saskatoon Apartments Limited Partnership (Re)*, 2017 BCSC 808
2. *Re Nortel*, [2009] O.J. No. 3169.
3. *Re Canadian Red Cross Society* [1998] O.J. No. 3306.
4. *Re Walter Energy Canada Holdings, Inc.*, 2017 BCSC 1968.
5. *Robertson v. ProQuest Information & Learning*, 2011 ONSC 1647.
6. *Nortel Networks Corporation (Re)*, 2010 ONSC 1708.

SCHEDULE "B" – RELEVANT STATUTES

Companies' Creditors Arrangement Act

<u>Section 11</u>

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.

<u>Section 11.02</u>

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make the order unless

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

<u>Section 11.2</u>

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(4) In deciding whether to make an order, the court is to consider, among other things,

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

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 File No. CV-21-656040-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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