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
(Disclaimer Motions)

April 26, 2021

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PART I - OVERVIEW

1. The Motions brought by the University of Sudbury ("**SU**") and Thorneloe University ("**Thorneloe**"), if successful, would jeopardize the Applicant's ability to successfully restructure its operations. For the reasons discussed below, the relief sought on the Motions should be denied.

2. Laurentian University of Sudbury (the "**Applicant**" or "**LU**") is a publicly-funded postsecondary institution in Sudbury, Ontario, serving approximately 9,300 undergraduate and graduate students.

3. The Applicant is in financial crisis. Facing recurring annual deficits and the prospect of an inability to meet payroll for February 2021, the Applicant sought protection under the CCAA on February 1, 2021.

4. Since February 1, 2021 the Applicant has engaged in an extensive review and overhaul of its entire operational and financial structure, all with the overarching goal of rightsizing the Applicant's operations, academic delivery model and structure, finances, and creating a financially sustainable operational structure for the future.

5. A critical component of the Applicant's operational restructuring is the termination of the Applicant's contractual relationship with three Federated Universities: the University of Sudbury ("**SU**"), Thorneloe University ("**Thorneloe**"), and Huntington University ("**Huntington**", and together with SU and Thorneloe, the "**Federated Universities**"). The Applicant has contractual affiliations with the Federated Universities that provide, among other things, that the Applicant's students may take elective courses and enrol in programs at any of the Federated Universities, which are all located on the Applicant's campus.

6. The Federated Universities model comes at significant cost to the Applicant. In Fiscal Year 2020, the Applicant transferred approximately $7.7 million to the Federated Universities as a result of the Applicant's students taking programs and courses offered through the Federated Universities, rather than solely those programs and courses offered by the Applicant.

7. This represents lost revenue that the Applicant cannot afford – overwhelmingly, these funds relate to the delivery by the Federated Universities of elective courses taken by students enrolled in programs offered by the Applicant. The Applicant has the capacity to offer its students the necessary electives and programs, such that the funding received in respect of the delivery of such courses and programs would stay "in-house".

8. The Applicant is insolvent, and the Federated Universities model is no longer sustainable. In short, there is no prospect for a successful exit from CCAA protection if millions of dollars in revenue continue to be transferred to the Federated Universities each year.

9. After attempts at a negotiated separation failed, on April 1, 2021, the Applicant issued Notices of Disclaimer pursuant to Section 32 of the CCAA to disclaim certain contracts between the Applicant and the Federated Universities.

10. SU and Thorneloe have each filed motions (the "**Motions**"), opposing the Notices of Disclaimer and seeking to have them set aside on the basis of financial hardship.

11. While LU recognizes that the Notices of Disclaimer will necessarily have financial consequences for the Federated Universities, the unfortunate reality is that the termination of the federated relationships, and the financial impact of that result for LU, is a necessary component for a viable restructuring of LU.

12. The Applicant respectfully requests that the Motions be denied.

PART II - FACTS[1]

A. Background

13. The Applicant sought and received an Initial Order on February 1, 2021 granting it protection under the CCAA,[2] and approving a stay of proceedings.[3]

14. At the request of the Applicant, on February 5, 2021, the Court issued an order appointing the Honourable Justice Sean Dunphy as mediator (the "**Mediator**") to facilitate negotiations on various aspects of the Applicant's restructuring (the "**Mediation**").[4]

15. On February 10, 2021, the Court extended the Stay Period to April 30, 2021.[5]

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[1] The 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 Second Haché Affidavit.
[2] 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.
[3] Second Haché Affidavit at para. 12, Motion Record, Tab 2, Page 34.
[4] Second Haché Affidavit at para. 27, Motion Record, Tab 2, Pages 38-39.
[5] Second Haché Affidavit at para. 13, Motion Record, Tab 2, Page 35.

B. The Court-Ordered Mediation

16. Since February 5, 2021, the Applicant, with the assistance of the Mediator and the Monitor, has undertaken an intensive Mediation process aimed at achieving immediate cost reductions that are necessary for the Applicant's operational restructuring.[6]

17. The Mediation was focused on three areas: (i) a restructuring of the Applicant's academic course and program offerings; (ii) obtaining agreements with the Applicant's labour partners, LUFA and LUSU; and (iii) seeking a consensual agreement with the Federated Universities to effect a cessation of the Applicant's federated relationships.[7]

18. A resolution on each of these areas is critical to the Applicant's restructuring.[8]

19. As described below, the Applicant successfully achieved resolution of both the academic restructuring and agreements with its labour partners. These agreements required material sacrifices from all parties with a focus on the Applicant's continued existence in the short-term, and its long-term financial sustainability. The Applicant also reached agreement with one of the three Federated Universities, Huntington University.

i. Academic Restructuring

20. An academic restructuring was necessary because a considerable portion of LU's academic offerings had chronic low enrollment and were not financially sustainable.[9]

21. On April 6, 2021, the Applicant's Senate passed a resolution approving the Applicant's academic restructuring which included the closure of 38 English-language and 27 French-

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[6] Second Haché Affidavit at para. 32, Motion Record, Tab 2, Page 40.
[7] Second Haché Affidavit at para. 29, Motion Record, Tab 2, Page 39.
[8] Second Haché Affidavit at paras. 32-34, Motion Record, Tab 2, Pages 40-41.
[9] Second Haché Affidavit at paras. 37-39, Motion Record, Tab 2, Pages 41-43.

language undergraduate programs and 11 graduate programs (4 in French; 7 in English) that were identified as unsustainable.[10]

ii. Agreements with Labour Partners

22. On April 7, 2021, LU and LUFA signed the LUFA Term Sheet, setting out the key terms and conditions agreed to by the parties[11] which include, among other things, the declaration of 116 full-time faculty member positions redundant, a salary decrease of 5% for each remaining faculty member, and a requirement for each faculty member to take five unpaid furlough days during the 2021-22, 2022-23, and 2023-24 academic years.[12]

23. On April 5, 2021, LU and LUSU signed the LUSU Term Sheet, setting out the key terms and conditions agreed to by the parties which include, among other things, the termination of 42 LUSU members.[13] Non-union redundancies also occurred.

C. The Federated Universities

i. Overview of the Federated University Structure

24. The Applicant operates within a federated structure whereby it has contractual affiliations with the three independent Federated Universities within the overall LU umbrella.[14]

25. Each of the Federated Universities is a separate legal entity and is governed by a Board of Governors that is independent of the Applicant in all respects.[15]

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[10] Second Haché Affidavit at paras. 57, 80, Motion Record, Tab 2, Pages 47, 55.
[11] Second Haché Affidavit at paras. 118-120, Motion Record, Tab 2, Pages 64-65.
[12] Second Haché Affidavit at para. 121, Motion Record, Tab 2, Pages 65-66.
[13] Second Haché Affidavit at para. 128, Motion Record, Tab 2, Page 67.
[14] Second Haché Affidavit at para. 139, Motion Record, Tab 2, Page 70.
[15] First Haché Affidavit at para. 61, Application Record of the Applicant dated January 30, 2021 ("**Application Record**"), Tab 2, Page 42.

26. All programs and courses offered by the Federated Universities are offered through the Applicant.[16] The Federated Universities do not admit or register students, nor do they grant their own degrees (other than Theology, in the case of Thorneloe and Huntington)[17]. All students who enrol with the Applicant in a program offered through the Federated Universities, or who take elective courses offered through the Federated Universities, receive credits towards a degree that is granted by the Applicant. [18]

27. As of the Fall 2020 academic term, there were 417 students enrolled in full-time and part-time programs through the three Federated Universities (271 full-time equivalents). This includes 91 full-time and part-time students at Thorneloe (62.8 full-time equivalents), 108 full-time and part-time students at SU (69.6 full-time equivalents), and 163 full-time and part-time students at Huntington (103.2 full-time equivalents). The remainder of the students are enrolled in programs jointly offered by the Federated Universities.[19]

28. Historically, students who enroll at LU have had the ability to take elective courses at any or all of the three Federated Universities, as well as at LU.[20] The main activity of both SU and Thorneloe is to offer elective courses through the Faculty of Arts for students enrolled in the Applicant's programs.[21]

ii. The Federation Agreements

29. The Applicant's legal relationship with the Federated Universities is contractual, formalized in Federation Agreements signed with each of the Federated Universities

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[16] First Haché Affidavit at para. 63, Application Record, Tab 2, Page 42; Third Report of the Monitor dated April 26, 2021 ("**Third Report**") at para. 147.
[17] First Haché Affidavit at para. 63, Application Record, Tab 2, Page 42; Third Report at para. 147.
[18] *Ibid*.
[19] Second Haché Affidavit at para. 148, Motion Record, Tab 2, Page 73.
[20] Second Haché Affidavit at para. 152, Motion Record, Tab 2, Page 74; First Haché Affidavit at para. 63, Application Record, Tab 2, Page 42.
[21] Second Haché Affidavit at para. 152, Motion Record, Tab 2, Page 74

(collectively, the "**Federation Agreements**"). LU entered into a Federation Agreement with each of SU and Huntington on September 10, 1960, and with Thorneloe in 1962.[22]

30. The terms of the three Federation Agreements and the other documents relating to that agreement in each case are substantially similar and each includes the following key terms:

(a) an agreement by each of the Federated Universities to suspend its degree-conferring powers (with certain limited exceptions) in favour of LU;

(b) an agreement by LU to distribute to the relevant Federated University a portion of the revenue received by LU in respect of students who enrol in a program or take elective courses in one of the Federated Universities, most recently reflected in a Financial Distribution Notice (as defined below); and

(c) a requirement for LU to allocate and reserve land within its campus upon which each of the Federated Universities may construct buildings. The allocation of land was completed pursuant to certain indentures (as described in more detail below).[23]

31. Each of the Federation Agreements contains an aspirational statement – but not a commitment – that the federated relationship would be permanent:

> "Both Laurentian University and [the Federated University] declare and express the firm **<u>hope</u>** and conviction that the **<u>relationship</u>** between the Universities established by this agreement will be a permanent one … and to build a great institution of learning which **<u>shall</u>** forever be bi-lingual and non-denominational in its character.[24]

iii. The Indentures

32. The Applicant has Indenture agreements with each of the Federated Universities, pursuant to which they lease land owned by the Applicant and on which they have constructed their

[22] Second Haché Affidavit at para. 140, Motion Record, Tab 2, Page 71.
[23] First Haché Affidavit at paras. 75-77, 82-84, 89-91, Application Record, Tab 2, Pages 46-48, 50.
[24] First Haché Affidavit, Exhibits "K", M", P", Application Record, Tab 8, Pages 391-392, 409-410, 442-443.

own buildings.[25] Each Indenture provides for a lease term of 99 years, with the possibility of further renewals.

33. The Indentures each contain termination provisions which, among other things, allow for the termination of the Indenture if the relevant Federated University withdraws from its federation with the Applicant.[26] No Notice of Disclaimer was issued by the Applicant in respect of any of the Indentures and the Indentures are not the subject matter of the Motions.

iv. The Financial Distribution Notices

34. The Federated Universities do not receive funding directly from the provincial government. Historically, the Applicant has transferred a portion of the funding that it receives from the provincial government to each Federated University according to a calculation undertaken by the Applicant in respect of each specific Federated University.[27]

35. The method of calculating the distribution of funds to the Federated Universities has changed over time. Since May 1, 2019, the parties have operated in accordance with the Financial Distribution Notices delivered by LU to each of the Federated Universities (the "**Financial Distribution Notices**"). The Financial Distribution Notices set out the terms for the distribution of amounts to the Federated Universities and service fees charged by LU to the Federated Universities. [28]

36. The Financial Distribution Notices also provide that, in exchange for certain administrative services by LU, each of the Federated Universities would be assessed an administrative service fee by LU in the amount of 15% of grant revenue and tuition revenue received by

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[25] Second Haché Affidavit at para. 141, Motion Record, Tab 2, Page 71.
[26] Second Haché Affidavit at para. 155, Motion Record, Tab 2, Page 75.
[27] First Haché Affidavit at para. 62, Application Record, Tab 2, Page 42.
[28] Second Haché Affidavit at paras. 144-145, Motion Record, Tab 2, Page 72.

LU (the "**Administrative Services Fee**"). The Administrative Services Fee is intended to partially cover the costs incurred by LU for a number of non-academic services it currently provides to the Federated Universities, which include but are not limited to: (i) student fee collection and accounting; (ii) central computing services; (iii) administration of all pension and employee benefits; (iv) campus security; and (v) student support services.[29] The Financial Distribution Notices provide that while the Administrative Services Fee is set at 15%, the actual administrative cost associated with the provision of these types of services by LU represents approximately 30% of LU's total annual expenses.[30]

v. Negative Financial Impact of the Federated Universities on the Applicant

37. As noted above, the main activity of the Federated Universities is offering elective courses that are administered under the Faculty of Arts, for LU's students.[31] Each time an LU student takes an elective course through the Federated Universities rather than an elective through LU, that represents lost tuition revenue to LU.[32]

38. In Fiscal Year 2020, as a result of LU students' enrollment in programs and courses through the Federated Universities, 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, for a net payment from LU to the Federated Universities of approximately $7.7 million in Fiscal Year 2020.[33]

39. LU's Faculty of Arts has the ability and capacity to offer a range of alternative electives to its students, such that there is no need for LU to lose revenue because its students take

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[29] Second Haché Affidavit at para. 146, Motion Record, Tab 2, Pages 72-73.
[30] First Haché Affidavit, Exhibit "H", Application Record, Tab 8, Page 362.
[31] Second Haché Affidavit at para. 152, Motion Record, Tab 2, Page 74.
[32] Second Haché Affidavit at para. 154, Motion Record, Tab 2, Pages 74-75; Third Report at para. 176.
[33] Second Haché Affidavit at paras. 152-153, Motion Record, Tab 2, Page 74; Third Report at para. 174.

elective courses offered through the Federated Universities. Since students enrolled in programming offered by the Federated Universities could otherwise be accommodated and enrolled in programs offered by LU, a substantial portion of the grant revenue represents lost revenue for LU.[34]

40. As a not-for-profit entity and a university, the Applicant has limited tools to increase revenue.[35] Approximately 70% of the Applicant's revenue in 2019-20 is comprised of tuition and grant funding.[36] Due to the freeze of tuition fees, the Applicant cannot increase revenue through tuition fees.[37] Similarly, grant funding is at the discretion of the Province of Ontario. The only opportunity for the Applicant to fully utilize the revenue it receives in respect of LU students, is for LU students to be enrolled in programs and courses at LU.

41. The Applicant engaged in discussions with the Federated Universities for six months prior to commencing the CCAA proceeding, and then for another two months through the Mediation process. From June of 2020 until the end of the year, Dr. Haché engaged in discussions with the presidents of the Federated Universities regarding the untenable structure of the existing federated relationship. Dr. Haché informed the Federated Universities that all options were on the table, including ending the existing federation agreement.[38]

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[34] Second Haché Affidavit at para. 154, Motion Record, Tab 2 at pages 74-75.
[35] Third Report at para. 173.
[36] First Haché Affidavit, Exhibit OO, Application Record, Tab 8, Page 1204.
[37] First Haché Affidavit at para. 274, Application Record, Tab 2, Page 105.
[38] Transcript from Cross-Examination of Dr. Robert Haché dated April 23, 2021 ("**Haché Transcript**"), Pages 144-147, Qs. 401-403.

vi. Mediation with the Federated Universities

42. As part of the Mediation, the Applicant sought a negotiated resolution with each of the Federated Universities whereby the formal relationship would be terminated, while acknowledging and preserving the historical legacy of the Federated Universities.[39]

43. Notably, in the midst of the Mediation, on March 12, 2021, SU, in conjunction with the Assembly of the Francophonie in Ontario (the "**AFO**"), announced that its Board of Regents had decided to form an independent, unilingual Francophone university.[40] As stated by Mr. Pierre Riopel, the Chair of Regents of SU, it is the view of SU that the interests of Francophone students cannot be met in a bilingual university.[41]

44. LU currently has 1,256 full-time equivalent undergraduate students (approximately 20% of its undergraduate population) enrolled in French programs offered at LU. The Federated Universities, including SU, have 16.8 full-time equivalent undergraduate students registered in French programs.[42]

45. The Applicant achieved a negotiated resolution with Huntington, but did not reach agreement with SU or Thorneloe. The Applicant and Huntington entered into a Transition Agreement on April 16, 2021 (the "**Huntington Transition Agreement**") that sets out the terms for an orderly transition that ends Huntington's federation with the Applicant.[43]

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[39] Second Haché Affidavit at para. 157, Motion Record, Tab 2, Pages 75-76.
[40] Second Haché Affidavit at para. 158, Motion Record, Tab 2, Page 76.
[41] Transcript from Cross-Examination of Pierre Riopel dated April 24, 2021 ("**Riopel Transcript**"), Pages 69-70, Q. 171.
[42] Second Haché Affidavit at para. 8, Motion Record, Tab 2, Pages 33-34.
[43] Approval of the Huntington Transition Agreement is the subject of a separate Motion brought by the Applicant and is addressed in a separate factum filed in respect of that Motion.

vii. The Notices of Disclaimer

46. On April 1, 2021, LU delivered Notices to Disclaim or Resiliate, pursuant to section 32 of the CCAA (the "**Notices of Disclaimer**").[44] The Notices of Disclaimer disclaim the Federation Agreements and the Financial Distribution Notices with each of SU and Thorneloe and will become effective in accordance with the CCAA on May 1, 2021.[45]

47. It is critical that the Disclaimers are effective as of May 1, 2021 for several reasons, including:

(a) The Applicant's Spring academic term is beginning May 3, 2021 – students need to know which classes are available and the Applicant needs to collect tuition.[46] While SU and Huntington requested that LU's Registrar cancel the courses listed in the catalogue for the Spring term that would have otherwise been taught at those Federated Universities, Thorneloe has not done so.[47] Students need to know whether courses are to be offered at Thorneloe, and that is based on the outcome of the Motions;

(b) Pursuant to the terms of the Huntington Transition Agreement, the Applicant has acquired and will be offering certain online Gerontology courses in the Spring term commencing May 3, 2021 that were previously offered by Huntington. That will only occur if the Disclaimers for each of the Federated Universities are effective;[48] and

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[44] 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.
[45] Second Haché Affidavit at para. 160, Motion Record, Tab 2, Page 76.
[46] Second Haché Affidavit at para. 24, Motion Record, Tab 2, Page 37.
[47] Second Haché Affidavit at para. 164, Motion Record, Tab 2, Page 77
[48] Second Haché Affidavit at para. 24, Motion Record, Tab 2, page 37.

(c) The Huntington Transition Agreement is subject to no courses being taught by the other Federated Universities that count toward the Applicant's degrees and no money being paid by the Applicant to the other Federated Universities for same.[49]

48. On April 14, 2021, in a further effort to reach a consensual resolution, the Applicant delivered to each of Thorneloe and SU a with-prejudice, open settlement offer in the form of a Transition Agreement, similar in form to the Huntington Transition Agreement. The Applicant has not received any response to the open offers.[50]

49. Thorneloe and SU have filed motions opposing the Notices of Disclaimer alleging that the Notices of Disclaimer and termination of the federated relationships will cause significant financial hardship to SU and Thorneloe.

PART III - ISSUE TO BE DETERMINED

50. The following issue must be determined on this motion:

(a) Should this Court set aside the Notice of Disclaimer of the Federation Agreements and the Financial Distribution Notices issued by LU to Thorneloe and SU?

PART IV - LAW AND ANALYSIS

A. The Law

51. Section 32(1) of the CCAA expressly permits a debtor company, on notice to the other parties to the agreement and the Monitor, to disclaim **any** agreement to which the debtor company is a party on the day on which CCAA proceedings commence.[51]

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[49] Second Haché Affidavit at para. 167(c), Motion Record, Tab 2, Page 78.
[50] Second Haché Affidavit at paras. 172-176, Motion Record, Tab 2, Pages 81-82.
[51] CCAA, s. 32(1).

52. The only exceptions to Section 32(1) are specifically identified in Section 32(8): an eligible financial contract; a collective agreement; a financing agreement if the company is a borrower; and a lease of real property or of an immovable if the company is the lessor. None of the statutory exceptions are applicable here.

53. A disclaimer under Section 32(1) becomes effective 30 days after it is delivered. Under Section 32(2), a party receiving a disclaimer may seek an order disallowing the disclaimer.

54. Where a party seeks such an order disallowing the disclaimer, Section 32(4) of the CCAA requires the Court to consider the following list of non-exhaustive factors when deciding whether or not to permit or reject the disclaimer of an agreement:

- First, whether the Monitor approved the proposed disclaimer;
- Second, whether the disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- Third, whether the disclaimer would likely cause significant financial hardship to a party to the agreement.

55. The Courts have identified certain guiding principles for the analysis. The following principles can be discerned from case law:

(a) the recommendation of the Monitor is afforded significant weight in CCAA proceedings;[52]

(b) the disclaimer does not need to be essential to the restructuring, it only need be advantageous and beneficial;[53]

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[52] *Nortel Networks Corp. Re*, 2018 ONSC 6257 [Commercial List] at para. 27; *Aralez Pharmaceuticals Inc., Re*, 2018 ONSC 6980 [Commercial List] at para. 36; *Aveos Fleet Performance Inc.*, 2012 QCCS 4074 at para. 50(f); *Arclin Canada Ltd.*, 2009 CarswellOnt 6161 (S.C. [Commercial List]) at para. 11.

[53] *Timminco Ltd., Re*, 2012 ONSC 4471 at para. 54 [*Timminco*]. See also *Homburg Invest Inc.*, 2011 QCCS 6376 at para. 103.

(c) the threshold to establish "significant financial hardship" in opposing a disclaimer is high. There must be specific evidence of financial hardship that is significant. Mere loss or damage is not sufficient, and it must be likely that the hardship is caused by the disclaimer; [54]

(d) the test to establish "significant financial hardship" is subjective and depends on an examination of the individual characteristics and circumstances of the counterparty;[55] and

(e) the Court should take into consideration the effect that the disclaimer will have on the outcome for all other unsecured creditors and be an equitable result that is dictated by the guiding principles of the CCAA.[56]

B. The Notices of Disclaimer Should be Approved

i. The Monitor Has Approved the Notices of Disclaimer

56. The Monitor approved both Notices of Disclaimer prior to their delivery.[57] As noted above, the Monitor's decision should be afforded significant weight by the Court.

57. The Monitor has been intensely involved in all aspects of the Applicant's CCAA Proceeding and is intimately familiar with the Applicant's financial challenges and forecasts, including the Cash Flow Forecast and the Revised Cash Flow Forecast and has a thorough understanding of the Applicant's prospects for financial sustainability. As a result, the Monitor fully understands the necessity for the significant changes that the Applicant is implementing in its restructuring, including through the Notices of Disclaimer.

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[54] *Target Canada Co. Re*, 2015 ONSC 1028 at para. 26.
[55] *Timminco*, *supra* note 49 at para. 60.
[56] *Timminco*, *supra* note 49 at para. 62.
[57] Third Report at para. 169.

58. After taking all of those considerations into account, with knowledge as to the impact of the Notices of Disclaimer on SU and Thorneloe, the Monitor approved the Notices of Disclaimer. Indeed, the Monitor concluded that, absent the Notices of Disclaimer, the Applicant is unlikely to be able to put forward a viable plan of compromise or arrangement.[58]

59. Given its familiarity with the Applicant and this CCAA Proceeding, the Monitor is well-positioned to thoughtfully evaluate the necessity of the Notices of Disclaimer. The Monitor's approval, therefore, should carry substantial weight.

ii. The Notices of Disclaimer Will Enhance the Prospects of a Viable Compromise or Arrangement

60. The Notices of Disclaimer will unquestionably enhance the prospects of a viable compromise or arrangement. Indeed, the Applicant believes that the Notices of Disclaimer are essential to achieving that goal. That far exceeds the standard set by the Court of being "advantageous and beneficial" to the restructuring.[59]

61. As this Court found at the time of the initial application, the Applicant is insolvent and has experienced recurring operational deficits in the millions of dollars for many years leading up to the CCAA Proceedings.[60]

62. The Applicant has undertaken an extensive overhaul of its financial and operational structure, all of which has been aimed at rightsizing the Applicant's financial picture through decreasing expenses and capturing all possible revenues.

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[58] *Ibid*.
[59] *Timminco*, *supra* note 49 at para. 54.
[60] Endorsement of Chief Justice Morawetz dated February 1, 2021, at para. 3.

63. That overhaul has necessitated a multi-faceted restructuring approach that has included profound changes to both LU's academic programming and its employee composition, including the elimination of more than 150 faculty and employee positions.

64. The cost savings achieved through the restructuring to date are significant, but, on their own, are not enough. Each aspect of the Applicant's top-to-bottom overhaul is essential to any prospect of a successful compromise or arrangement.[61]

65. The Notices of Disclaimer are central to the Applicant's restructuring because they will result in millions of dollars of additional tuition and grant revenue remaining within LU.[62]

66. Each time an LU student takes an elective course offered through SU or Thorneloe, revenue associated with that course is transferred from the Applicant to SU or Thorneloe. Because the Applicant has the necessary capacity to independently offer its students all necessary programs and electives within its existing cost structure, each course taken by an LU student through SU or Thorneloe represents lost revenue for the Applicant.[63]

67. During the 2019-20 academic year, the combined amount paid to all of the Federated Universities was $7.7 million. That amount was not an aberration. It is projected that LU will generate savings in the range of $7.1 to $7.3 million annually through the disclaimer of the Federated Universities as part of this restructuring.[64]

68. The Applicant simply cannot afford to continue its relationship with the Federated Universities. In circumstances where the Applicant has terminated approximately 38% of its own programs[65] in order to "right size" the university, the Applicant cannot continue

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[61] Second Haché Affidavit at para. 29, Motion Record, Tab 2, Page 39.
[62] Second Haché Affidavit at paras. 182-187, Motion Record, Tab 2, Pages 83-85.
[63] Second Haché Affidavit at para. 154, Motion Record, Tab 2, Pages 74-75.
[64] Third Report at para. 177.
[65] Second Haché Affidavit at para. 80, Motion Record, Tab 2, Page 55.

paying for programs and courses supplied by the Federated Universities that it does not require and are revenue-negative for the Applicant.[66]

69. As explained in the Initial Hache Affidavit, the Applicant is limited in its means to increase revenue as a result of tuition freezes and a general state of decline of provincial grant funding.[67] However, the Applicant can increase its annual revenue by recapturing the tuition and grant amounts paid to the Federated Universities, which is the practical effect of the Notices of Disclaimer.

70. Increasing and retaining cash that the Applicant receives each year strengthens the Applicant's financial position and will permit the Applicant to invest in its internal growth following this restructuring.

71. Absent recapturing such amounts, the prospects that the Applicant can achieve a viable plan of compromise or arrangement are significantly lowered. Notwithstanding the significant cost savings achieved through the academic and faculty restructuring with the Senate, LUFA and LUSU, those savings are not enough, standing alone, to permit the Applicant to emerge from this restructuring.[68]

72. For the Applicant to put forward a plan of compromise or arrangement and successfully emerge from this restructuring, the Applicant requires funds to:[69]

    (a) repay in full the DIP Facility, which will likely require exit financing and the servicing of principal and interest payments on $35 million, in addition to ordinary course operating lines of credit;

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[66] If the Applicant determines that students of the Applicant would benefit from offering certain programs or courses, the Applicant has the infrastructure in place to offer them itself. For example, as part of the arrangement with Huntington, the Applicant purchased the popular Gerontology program.

[67] First Haché Affidavit at para. 116, Application Record, Tab 2, Page 56.

[68] Third Report at para. 141.

[69] Third Report at paras. 53, 172.

(b) comply with its obligations to the various research agencies in respect of Deferred Contributions received, which is approximately $28 million;

(c) fund an upfront amount and an annual contribution amount over a period of time to the unsecured creditors of the Applicant whose claims will be compromised as a result of the restructuring;

(d) ensure there are funds available for ordinary course maintenance of the remaining buildings of the Applicant that must be maintained; and

(e) responsibly establish an annual reserve to permit the Applicant to sustainably invest in itself and grow in the future.

73. These expenses are in addition to the ordinary costs of operating the university. The Applicant cannot simply "balance its budget" in order to achieve financial sustainability. The Applicant must generate positive cash flow from operations on an annual basis, prior to the funding of the above expenses, to achieve financial sustainability.

74. All of this requires the Applicant to terminate its current relationship with the Federated Universities and recapture the approximately $7 million that is paid to the Federated Universities each year. Without such a significant amount of revenue, the Applicant's prospects of achieving a viable plan of compromise or arrangement are significantly curtailed. This basic proposition was agreed by Thorneloe's financial advisor, Mr. Alan Nackan during cross-examination who stated "the more [money] that you offer, the more likely it is that creditors will find [a Plan of Arrangement] acceptable."[70]

iii. SU and Thorneloe Have Not Shown Financial Hardship Sufficient to Disallow the Notices of Disclaimer

75. The Applicant recognizes that the Notices of Disclaimer will have financial consequences for both Thorneloe and SU. Unfortunately, that is an unavoidable consequence in the

[70] Transcript from Cross-Examination of Allan Nackan dated April 23, 2021, Page 40, Q. 78.

pursuit of the successful restructuring of the Applicant. During a restructuring, it is expected that financial consequences will occur as a byproduct of the restructuring itself and sacrifices will be required.[71] LU's other stakeholders have also made significant sacrifices in order to provide for its financial sustainability.

76. A financial consequence is different from "significant financial hardship" sufficient to disallow a disclaimer under the CCAA. The Court has made clear that the latter is a high bar to meet and requires specific evidence to substantiate such allegations.

77. SU's Motion Record provides unsubstantiated allegations that the Notices of Disclaimer will lead to various alleged costs: [72]

(a) SU alleges that there will be costs of approximately $4 million associated with the lay-off of its employees. However, that figure is not explained in SU's Motion Record and, on cross-examination, Mr. Riopel, the Chair of SU's Board of Regents, was unable to explain how the $4 million in alleged costs was calculated or what specific costs it incorporated.[73]

(b) SU alleges that it will incur costs of approximately $400,000 per year for the upkeep of its buildings. However, that figure is also not explained in SU's Motion Record and, in any event, as Mr. Riopel confirmed on cross-examination, those building upkeep costs are costs that SU is already responsible for and are not attributable to the Notice of Disclaimer.[74]

78. These unsubstantiated allegations, which were either unexplained or contradicted on cross-examination, do not meet the high bar of demonstrating significant financial hardship.

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[71] *Nova Metal Products Inc. v. Comiskey (Trustee of)*, 1990 CarswellOnt 139 (C.A.) at para. 69.
[72] Affidavit of Pierre Riopel sworn April 14, 2021 at paras. 42-45, Motion Record of SU, Tab 2, Page 14.
[73] Riopel Transcript, Pages 128-129, Qs. 286-288.
[74] Riopel Transcript, Page 131, Qs. 295-297.

79. Thorneloe's allegations of significant financial hardship are similarly deficient. Thorneloe retained a financial advisor who has opined that the termination of the Applicant's Federation relationship with Thorneloe will result in financial losses to Thorneloe of $13.7 million[75] or more, and force Thorneloe into its own insolvency proceedings.[76] However, Thorneloe refused to produce its financial statements on which that opinion is purportedly based. There is no way to substantiate or test any of Thorneloe's claims when its financial statements inexplicably remain under lock and key.

80. Even if Thorneloe's numbers were verifiable, the vast majority of the financial losses ($11.2 million) Thorneloe claims are attributable to estimates in respect of future grant and tuition fees paid to Thorneloe. These estimates have a built-in assumption that students would continue to take courses at the rates expected by Thorneloe, and are contingent at best. Following the Applicant's academic restructuring to recalibrate its own course offerings, Thorneloe's assumption is far from a certainty – and it is therefore similarly uncertain that Thorneloe would receive the amount of grant and tuition funds it projects. Finally, the Applicant submits that Thorneloe fails to acknowledge that it would not be prevented from mitigating such losses by exploring other opportunities or by pursuing an alternative structure.

81. In any event, when considering any alleged financial impacts to SU or Thorneloe, this Court must balance and take into consideration the overall financial considerations at play in this restructuring. LU is insolvent – that is a fact as determined by the Court. Suggestions of a potential future insolvency of SU or Thorneloe are purely speculative.

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[75] Affidavit of John Gibaut sworn April 19, 2021 ("**Gibaut Affidavit**") at para. 63, Supplementary Motion Record of Thorneloe, Tab 1, Page 21.
[76] Gibaut Affidavit at para. 62, Supplementary Motion Record of Thorneloe, Tab 1, Page 21.

82. As discussed extensively above, if the Notices of Disclaimer are not permitted, it is highly unlikely that a successful restructuring of the Applicant will occur. The Monitor agrees.

83. The Applicant has made a difficult but necessary decision that the termination of the federated relationships is necessary for a financially sustainable future. That is no different in nature than the decision Thorneloe made less than a year ago when it abruptly decided to terminate all four years of its Theatre Arts and Motion Picture Arts department, over the objections of LU's Senate. In rejecting an attempt by the LU Senate to keep the department open, Thorneloe's President stated:

> "Thorneloe University, as an independent institution with its own autonomy, is solely responsible for the financial costs and operation of the programs which fall under the department of Theatre Arts and Motion Picture Arts…"[77]

84. On cross-examination, Dr. Gibaut confirmed that he "stand[s] by that [quote]".[78] In other words, Thorneloe felt it appropriate to independently make judgments about its academic future when the *status quo* was not financially viable.

85. In this case, the Applicant has made this difficult choice to avoid the devastating financial implications that will reverberate through the entire Sudbury community and beyond in a liquidation scenario, including:

(a) the loss of employment for many employees of the Applicant;

(b) a hard shutdown of LU students' education, requiring significant effort and cost to transition students to new programs at different universities;

(c) the loss of a major customer for suppliers and service providers to the Applicant, which includes many local Sudbury businesses;

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[77] Transcript from Cross-Examination of John Gibaut dated April 23, 2021 ("**Gibaut Transcript**"), Exhibit No. 1: Article entitled "Despite Senate rulings, there's no money to restart cancelled Thorneloe programs, president says", published by Sudbury.com, May 26, 2020.
[78] Gibaut Transcript, Page 70, Q. 269.

(d) the significant erosion of value to all other stakeholders of the Applicant; and

(e) the loss of other economic stimulus and spending by the Sudbury community that is directly attributable to a post-secondary organization of approximately 9,000 students operating within the community.

86. These repercussions to the stakeholders of the Applicant and the communities of Northern Ontario will be far greater than any financial hardship experienced by either Thorneloe or SU. Further, a liquidation scenario for LU would mean the Applicant's federated relationships with Thorneloe and SU will end in any event.

iv. Other Relevant Factors

SU Announces Intent to Become Independent Francophone University

87. Before the Applicant issued its Notice of Disclaimer to SU, SU had already publicly announced that it intends to create a unilingual Université de Sudbury **"by"** and **"for"** Francophones and to provide current and future students with programs exclusively in French as soon as possible.[79] The SU Board of Regents passed a resolution to that effect on March 12, 2021, several weeks before the Notice of Disclaimer was delivered.[80]

88. SU has stated that it does not believe that Francophone interests cannot be met in a bilingual university and can only be met in a unilingual Francophone university.[81]

89. SU's plan is plainly not compatible with a continuation of the federation structure with the Applicant, whose mandate is bilingual and tri-cultural. It is also directly contrary to the

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[79] Affidavit of Pierre Riopel sworn April 18, 2021 at para. 11.
[80] Second Haché Affidavit at para. 158, Motion Record, Tab 2, Page 76.
[81] Riopel Transcript, Pages 69-70, Q. 171.

mandatory language in the Federation Agreement that provides that the federation **shall** be bilingual,[82] a fact acknowledged by SU's deponent on cross-examination.[83]

90. Given SU's publicly-announced plan, including a pivot away from the principles agreed to in the Federation Agreement, it is unclear why SU opposes the Notice of Disclaimer. SU is free to pursue a path as a unilingual Francophone institution, but – even absent the Disclaimer – it would not be possible within the current federation.

The Parties Recognized that the Federation Agreements Might Not be Permanent

91. Contrary to the suggestions of both SU and Thorneloe, there was never an agreement that the Federation Agreements would be permanent. Indeed, the parties explicitly recognized that the federated relationships might eventually come to an end.

92. The Federation Agreement contains an aspirational statement in which the parties "declare and express the firm **hope** and conviction that the **relationship** between the Universities established [by] this agreement will be a permanent one".[84] But hope and conviction are not the same as an agreement. Affiants from both SU and Thorneloe acknowledged that on cross-examination.[85]

93. Moreover, a review of the Federation Agreement makes it clear that when the parties intended to agree to key terms of the Federation Agreement they used the words "agree" or "shall".[86] That was also acknowledged on cross-examination.[87]

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[82] First Haché Affidavit, Exhibit K, Application Record, Tab 8, Pages 391-392.
[83] Riopel Transcript, Pages 124-125, Qs. 278-279.
[84] First Haché Affidavit, Exhibits "K", M", P", Application Record, Tab 8, Pages 391-392, 409-410, 442-443.
[85] Riopel Transcript, Pages 22-24, Qs. 47-50; Gibaut Transcript, Page 18, Q. 53.
[86] First Haché Affidavit, Exhibits "K", M", P", Application Record, Tab 8, Pages 391-392, 409-410, 442-443. For example, "Thorneloe University shall be entitled to give instruction in Theology…", "Laurentian University shall allocate and reserve land".
[87] Riopel Transcript, Pages 25-26, Qs. 54-57; Gibaut Transcript, Pages 17-18, Qs. 49-52.

94. Further, the Indentures reflect an understanding that the federated relationships might not be permanent. Specifically, the Indentures provide a number of bases for their termination, including where SU or Thorneloe "withdraws" from the federation – clearly contemplating a scenario where the relationship was not permanent.[88]

95. It is plain from the parties' agreements that, while the aspirational goal of all parties – including the Applicant – was that the federated relationships would continue indefinitely, that was not a term of the agreements. Even if it was, that would not prevent the disclaimer of an agreement within the context of a CCAA proceeding.

<u>Disclaimer is a Condition of Additional DIP Funding</u>

96. The disclaimer of the Federation Agreement and the Financial Distribution Notices of the Federated Universities is a condition for the advance of a further $10 million by the DIP Lender. First, the effectiveness of the Notices of Disclaimer is expressly a condition in the DIP Amendment.[89] The failure by the Applicant to satisfy this condition will cause the DIP Lender to revoke both its extension of the maturity date of the DIP financing to August 31, 2021 and the opportunity for an additional $10 million in DIP financing that the Applicant requires to fund its operations during the Stay Period.

97. Second, contrary to the arguments made by Thorneloe and SU, the condition that the Notices of Disclaimer is not arbitrary or the DIP Lender attempting to control the CCAA Proceedings. As described above, the termination of the current relationship with the Federated Universities, in their entirety, will increase the annual revenue of the Applicant (and thus its financial sustainability) by approximately $7 million.[90] It is an error to suggest that the DIP Lender is attempting to usurp control of this restructuring from the Court. A

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[88] First Haché Affidavit, Exhibits "L", "N", "Q", Application Record, Tab 8, Pages 395-396, 425-426, 446-447.
[89] Second Haché Affidavit, Exhibit "Z", Motion Record, Tab 2, Pages 464-465.
[90] Second Haché Affidavit at paras. 152-153, Motion Record, Tab 2, Page 74; Third Report at para. 174.

primary concern of the DIP Lender is the repayment of its loan. Including a condition that will increase the cash position of the Applicant by approximately $7 million per year addresses such concern.

98. Finally, it is trite law that the Supreme Court of Canada has held that the Court will not override the freedom of commercially sophisticated parties to contract specific terms and this Court should not do so where it will jeopardize the restructuring.[91] The Court will determine whether to approve the DIP Amendment, but it cannot amend the terms of the agreement. The reality is that the Applicant has no other alternative for financing and the conditions required for the DIP Amendment are consistent with the Applicant's restructuring requirements and are supported by the Monitor.

Increased Recoveries to Creditors

99. The disclaimer of the Federation Agreement and the Financial Distribution Notices of the Federated Universities will ensure that the Applicant retains approximately $7 million annually that is currently paid to the Federated Universities, materially increasing assets that can be available to fund a Plan of Arrangement for the creditors of the Applicant.

PART V - RELIEF REQUESTED

100. For all of the foregoing reasons, the Applicant requests that the Motions be denied and an Order substantially in the form of the draft Order included at Tab 3 of its Motion Record.

[91] *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4 at paras. 85-86; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 1999 CarswellBC (S.C.C.) at para. 41.

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. *Nortel Networks Corp. Re*, 2018 ONSC 6257 [Commercial List].

2. *Aralez Pharmaceuticals Inc., Re*, 2018 ONSC 6980 [Commercial List].

3. *Aveos Fleet Performance Inc.*, 2012 QCCS 4074.

4. *Arclin Canada Ltd.*, 2009 CarswellOnt 6161 (S.C. [Commercial List]).

5. *Timminco Ltd., Re*, 2012 ONSC 4471.

6. *Homburg Invest Inc.*, 2011 QCCS 6376.

7. *Target Canada Co. Re*, 2015 ONSC 1028.

8. *Nova Metal Products Inc. v. Comiskey (Trustee of)*, 1990 CarswellOnt 139 (C.A.).

9. *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4.

10. *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 1999 CarswellBC (S.C.C.).

SCHEDULE "B" – RELEVANT STATUTES

Companies' Creditors Arrangement Act

<u>Section 32</u>

Agreements

Disclaimer or resiliation of agreements

(1) Subject to subsections (2) and (3), a debtor company may – on notice given in the prescribed form and manner to the other parties to the agreement and the monitor – disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resilitation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

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

> **(a)** whether the monitor approved the proposed disclaimer or resiliation;
>
> **(b)** whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> **(c)** whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

> **(a)** if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1);

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is to be disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property – including the party's right to enforce an exclusive use – during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

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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