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 ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

FACTUM OF THORNELOE UNIVERSITY

April 26, 2021

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TO: SERVICE LIST

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PART I - OVERVIEW

1. Court-process or DIP process?

1. Thorneloe University ("**Thorneloe**") brings this motion under section 32(2) of the *Companies' Creditors Arrangement Act* ("**CCAA**") for an order that the following two agreements in the Notice of Disclaimer of Laurentian University of Sudbury ("**Laurentian**") dated April 1, 2021 are not to be disclaimed or resiliated:

(a) the Federation Agreement between Laurentian and Thorneloe dated 1962 (the "**Federation Agreement**"); and,

(b) the Financial Distribution Notice between Laurentian and Thorneloe dated May 1, 2019, amending the Proposed Grant Distribution and Services Fees agreement between Laurentian, the University of Sudbury, Thorneloe University, and Huntington University dated November 10, 1993 (the "**Financial Distribution Notice**") (collectively, the " **Agreements**").

Affidavit of Sydney Edmonds, sworn April 15, 2021 (the "Edmonds Affidavit"), Exhibit A – Federation Agreement; Exhibit B - Proposed Grant Distribution and Services Fees; and Exhibit C – Financial Distribution Notice.

2. And, for an order amending the Loan Amendment Agreement dated April 20, 2021 (the "**DIP Amendment Agreement**"), to delete the following newly-added condition:

> 4. The Disclaimers of the Borrower's Federation Agreements and Financial Distribution Notices with each of Huntington University, Thorneloe University and the University of Sudbury (collectively, the Federated Universities") issued on April 1, 2021 shall become effective, binding and final on May 1, 2021 (the "**New Disclaimer Term**");

Affidavit of Dr. Robert Haché, sworn on April 21, 2021 (the "Second Haché Affidavit"), Exhibit Z – DIP Amendment Agreement.

2. Disclaimer: terminal financial consequences

3. Disclaimer would result in terminal financial consequences for Thorneloe. It is not fair or reasonable and would not enhance the prospects of a viable restructuring for Laurentian. This Honourable Court ought to prohibit disclaimer and excise the New Disclaimer Term from the DIP Amendment Agreement.

PART II – THE FACTS

1. Federated Universities established

4. In or around 1960, Thorneloe and the other two Federated Universities, Huntington University ("**Huntington**"), and University of Sudbury ("**Sudbury**"), were established by the Anglican, United, and Roman Catholic churches, respectively, in order to meet a need for higher-level education in northern Ontario.

> **Affidavit of John Gibaut, sworn on April 19, 2021 (the "Gibaut Affidavit") at paras. 8, 10, and 13.**

2. Problem: government funding

5. But, as religious-affiliated institutions, they were not eligible for government funding. This was due to a policy adopted by the Government of Ontario in the late 1860's, which ended government grants to religious universities.

> **Gibaut Affidavit, at para. 9.**

3. Problem solved

6. As a result, the three churches petitioned the province to establish a public, non-denominational and bilingual university in northern Ontario, with which they could "federate" and thereby receive provincial funding. The province agreed. Accordingly, in 1960 the Legislature of

Ontario passed *An Act to incorporate Laurentian University* (the "***Laurentian Act***"), and Laurentian established. The campus was set up on land provided by Ontario, where Laurentian and the Federated Universities (collectively, the "**Federated Partners**") continue to operate today. In the same year, Sudbury and Huntington entered into federation agreements with Laurentian.

Gibaut Affidavit, at paras. 10 and 11.

7. The Anglican church's efforts to establish a university to federate with Laurentian culminated in 1961. *An Act to Incorporate Thorneloe University,* S.O. 1960-1961, c. 135 (the "***Thorneloe Act***") received Royal Assent on March 29, 1961. In 1962, Thorneloe entered into the Federation Agreement with Laurentian.

Gibaut Affidavit, at para. 13.

4. Ubiquity of federation model

8. The federation structure adopted by the Federated Partners was and continues to be widespread in Ontario, due to the funding challenges faced by religious-affiliated universities in the province. These federation arrangements "made it possible for students at church colleges to be taken into account for purposes of provincial funding"; "[t]he government paid the publicly supported university, which in turn passed on funds to the affiliated university in accordance with whatever agreement the two institutions made between them."

Gibaut Affidavit, at para. 12.

5. The federation agreements; financial flow-through

9. By 1962 all of the Federated Universities had entered into federation agreements with Laurentian. They agreed to suspend the degree-granting authority that they possessed pursuant to their incorporating statutes (with the exception of Thorneloe's authority to grant degrees in Theology) and all operate as a single university and teach courses to students at the Federated

Universities, for credit at Laurentian. Funding was flowed from the provincial government to all four Federated Partners, through Laurentian.

> **Gibaut Affidavit, at paras. 14, 15, 16.**

6. "Permanent"

10. The federation agreements all set out the intention to be bound into what was specifically termed a "permanent" federation. Thorneloe's Federation Agreement, illustrative of the federation agreements for all of the Federated Universities, states as follows:

> 12. Both Laurentian University and Thorneloe University declare and express the **firm hope and conviction that the relationship between the Universities established this agreement will be a permanent one** and that they and the other universities and colleges which become federated or affiliated with Laurentian University will work together to fulfill the objects of the Act of Incorporation of Laurentian University and to build **a great institution of learning** which shall *forever* be bilingual and non-denominational in its character. The parties fully realize that the success of the task which they have set themselves will depend more on mutual understanding, goodwill, and co-operation between the institutions now or hereafter associated together in Laurentian University, than upon any formal agreements.
>
> **Edmonds Affidavit, Exhibit A [emphasis added].**

11. In their CCAA Application material, the Applicant expressly acknowledges that the stated intent of the Federation Agreements was that the "relationship between LU and Thorneloe [and Sudbury and Huntington] will be permanent, and the success of the relationship is to be predominantly fostered through “mutual cooperation and goodwill”.

> **Affidavit of Dr. Robert Haché, sworn on January 30, 2021 ("First Haché Affidavit") at paras. 73, 81, and 88.**

12. In fact, the *Laurentian Act* expressly requires that its Senate be composed of the "principal or head of each federated university or college" and "one full time professor elected annually by each federated university and college."

> **First Haché Affidavit, Exhibit A – *An Act to Incorporate Laurentian University of Sudbury*, S.O. 1960, c. 151. C. 154, at section 19.**

13. Further, the lease agreement between Thorneloe and Laurentian expressly provides for a 99-year lease, with a 99-year option to renew, and no authority to be terminated by Laurentian in the termination clause.

> **First Haché Affidavit, Exhibit Q – Indenture between Laurentian and Thorneloe, dated October 26, 1964, clauses 2 and 5.**

7. Government grants too

14. The arrangement among the Federated Partners to distribute the government grants was originally set out in the bilateral Proposed Grant Distribution and Services Fees agreement dated November 10, 1993 between Laurentian, Thorneloe, Sudbury, and Huntington.

> **Edmonds Affidavit, Exhibit B.**

8. But unilaterally changed by Laurentian

15. However, Laurentian unilaterally changed the above funding arrangement starting in the 2019-2020 year, per the Financial Distribution Notice. Laurentian now wants this disclaimed too.

> **Gibaut Affidavit, at para. 20.**

9. Flow-through funds: do not belong to Laurentian; not a subsidy

16. The funds flow through Laurentian to Thorneloe pursuant to the Financial Distribution Notice: they do not belong to Laurentian; do not represent a subsidy. Provincial funds flow from Laurentian to Thorneloe based on the same enrollment-based approach used by the province since 2019-2020. Some of the funds the province transfers to Laurentian are attributable to enrollment in courses that Thorneloe provides as part of Laurentian's Faculty of Arts curriculum.

> **Gibaut Affidavit, at paras. 21 and 22.**

17. As described by the Applicant's President, Dr. Robert Haché ("**Haché**"), at his cross-examination, the "funding flows through Laurentian" and "the Ministry flows money to a single entity in the federation and that is Laurentian and it is passed on thereafter" to the Federated Universities.

> **Transcript from the Cross-Examination of Dr. Haché on April 23, 2021 (the "Haché Transcript") on the Second Haché Affidavit, at p. 84, q. 252 and pp. 90-91, q. 270.**

10. And Laurentian takes an additional 15% off the top

18. As set out in the Financial Distribution Notice, Laurentian charges Thorneloe an additional 15% of Thorneloe's earned government grants and tuition.

> **Gibaut Affidavit, at para. 23.**

19. The stated underlying principle of the Funding Distribution Notice (and Laurentian unilaterally imposing the 15% fee) was to ensure that the Federated Universities and Laurentian would not subsidize the operations or services of another and each would be responsible for covering its own costs. Haché conceded at cross-examination that this intention was met, and that the 2019 funding model "more correctly reflects the costs that are incurred by the university", and "more appropriately balances the revenues and costs."

> **First Haché Affidavit, Exhibit J – 2019 Financial Distribution Notice; Haché Transcript, at pp. 129-133, q. 365-375; pp. 123-125, q. 344-345; and p. 135, q. 377-380.**

11. Thorneloe and Laurentian in fact operate as "one university"

20. Thorneloe and Laurentian are highly integrated, both academically and administratively, and operate as a single university with Sudbury and Huntington. Notably:

(a) Thorneloe is **physically located** on the Laurentian campus;

(b) Thorneloe **runs and physically houses three academic departments**, *Ancient Studies, Religious Studies*, and *Women's, Gender, and Sexuality Studies*, which are integrated with the Laurentian Faculty of Arts;

(c) **Thorneloe's employees are members of the Retirement Plan** of Laurentian University of Sudbury and its Federated and Affiliated Universities (the "**Retirement Plan**") and have the same pension and benefit arrangements as all other Laurentian faculty and staff;

(d) **Thorneloe nominates three members** of the Laurentian Board of Governors;

(e) **The current director** of the Faculty of Arts M.A. Program ("**HUMA**") is a Thorneloe professor; and

(f) Thorneloe and Laurentian **share utilities and services** including hydro, IT, security and sewage services.

Gibaut Affidavit, at paras. 24-27 and 30.

12. Thorneloe is small – a "micro audit" in accounting terminology

21. Thorneloe is a small component of the Laurentian federation, employing a total workforce of 28, including 7 full-time faculty members, 12 sessional faculty members, 6 staff and 3 casual staff. Thorneloe has collective agreements with the Laurentian University Faculty Association ("**LUFA**") and the Canadian Union of Public Employees ("**CUPE**").

Gibaut Affidavit, at paras. 28-29.

13. But Thorneloe has a big impact

22. In 2019-2020, Thorneloe taught 2,861 Laurentian students, representing 297 full-time equivalents ("**FTEs**") and 186 represent courses supporting other Laurentian programs. In 2020-2021, Thorneloe taught slightly fewer (2,477) Laurentian students, after it made the decision to

close two under-performing programs (*Theatre Arts* and *Motion Picture Arts*) and also, in response to Laurentian's unilateral reduction of flow-through funds by 30%.

Gibaut Affidavit, at para. 32.

14. Laurentian insolvency; self-caused issues

23. Laurentian's financial problems began as far back as 2008-2009. Attributable primarily to:

(a) financial mismanagement by Laurentian, including a failure to constrain costs in the face of reductions to its revenue first identified in 2008-2009, due to low student enrollment and retention, and reductions to provincial funding in 2019-2020; and

(b) a costly campus modernization project that Laurentian launched in 2014, which failed to increase revenues and resulted in even more debt for Laurentian.

Gibaut Affidavit, at paras. 36-39.

24. These financial problems are not attributable to Thorneloe or the federation model. Laurentian's worsening financial position caused it to retain Ernst & Young ("**E&Y**") as its financial advisor.

Gibaut Affidavit, at paras. 35, 40.

15. $25M DIP loan

25. Laurentian obtained a $25M DIP loan from Firm Capital Corporation (the "**DIP Lender**"), subject to terms in the DIP agreement summarized in the First Report of the Monitor dated February 7, 2021 (the "**DIP Agreement**"). Per the DIP Agreement, Laurentian was required by May 1, 2021 to reach a collective agreement with LUFA that provides for faculty terminations and program cancellations and to resolve outstanding grievances, as follows:

> 34. The following is a summary of the material terms of the DIP facility, which will be reflected in the DIP Agreement:
>
> > b. the maximum principal amount is $25 million with a maturity date of May 1, 2021. The maturity date may be extended for an additional 90 days if LU achieves the following milestones, to the satisfaction of the DIP Lender in its sole and unfettered discretion:
> >
> > > i. LU reaches a consensus among all necessary stakeholders on an academic restructuring and reduction of LU's program offerings;
> > >
> > > ii. ***LU enters into a negotiated settlement with LUFA with respect to terminations to be effected, resolution of outstanding grievances, and the terms of a new collective agreement between LUFA and LU***; and
> > >
> > > iii. LU provides the DIP Lender with a revised cash flow forecast and a multiyear budget demonstrating to the DIP Lender, in its sole and unfettered discretion, that LU is financially sustainable. [emphasis added]
> > >
> > > **Gibaut Affidavit, at paras. 44-45, Exhibit E [emphasis added].**

16. Thorneloe is non-existent

26. No mention in the terms of Thorneloe or the other Federated Universities. So, the DIP Agreement does not require – nor even reference – a termination of the Agreements.

17. LUFA and LUSU cuts

27. Laurentian reached collective agreements with LUFA and the Laurentian University Staff Union ("**LUSU**"). 116 fulltime professors, 42 LUSU members and 37 non-union positions were terminated, and about 60 programs were cancelled. The term sheets were ratified by the unions on April 13, 2021.

Gibaut Affidavit, at paras. 47-48; Monitor's third report, paras. 93b), 101a), and 104.

18. DIP satisfied

28. The new collective agreements and associated faculty and program reductions satisfy the requirements in the DIP Agreement for Laurentian to obtain a further advance on the DIP loan. Haché confirmed at cross-examinations that this resulted in "substantial" savings for

Laurentian. He noted that in addition to eliminating about one third of the faculty and 20% to 25% of the other unionized workers, there were additional financial concessions, including: salary rollbacks, FRO (ph) days, and changes to work rules that involve some economic value.

Gibaut Affidavit, at para. 49.

Haché Transcript, at pp. 246-247, q 639-641; and pp. 252-253, q 654-655.

29. Contrary to the conditions of the DIP Agreement, Laurentian did not resolve the labour grievances by April 30, 2021; but nevertheless, the DIP Lender provided an extension to May 31, 2021 for fulfillment of that condition.

Haché Transcript, at pp. 258-260, q. 669-673.

19. But Laurentian still wants more

30. Laurentian sent a Notice of Disclaimer trying to terminate the federation relationship and disclaim the Agreements. Thorneloe next day told Laurentian (by letter): Thorneloe would oppose the proposed disclaimer in Court under subsection 32(2).

Edmonds Affidavit, Exhibits D and E.

20. The New Disclaimer Term

31. Laurentian seeks a further $10M DIP loan. Laurentian now says termination is a required condition, pursuant to the DIP Amendment Agreement and the newly-added New Disclaimer Term. At paragraph 189 of his second affidavit, Haché writes:

> 189. I am advised by Jonathan Mair of the DIP Lender, and do verily believe, that the DIP Lender has made clear that the satisfaction of this Condition to Funding is essential to the DIP Lender's willingness to advance further funds under the Amended DIP Facility.

Second HachéAffidavit, at para. 189.

32. However, at cross-examination, Haché conceded that he was not directly involved in any discussions or meetings with the DIP Lender. Other than the written term sheet produced, there has been no direct communication between Haché and the DIP Lender. Communications all went through counsel. Despite this, Laurentian still refuses to produce any correspondence or other documents memorializing negotiations with the DIP Lender or potential other DIP Lenders. Moreover, Laurentian has refused to produce financial modelling of what the finances would be if the Federated Universities were not terminated.

Haché Transcript, pp. 27-28, q. 66-67; pp. 335-336, q. 872; pp. 324-325, q. 837-839; pp. 196-199, q. 510-519; pp. 186, q. 491; pp. 190-192, q. 499-501; pp. 289, q. 752; and p. 198, q. 519.

33. Despite that evidence, and despite indicating that he does not believe he has seen emails exchanged between Laurentian's lawyer and the DIP Lender, Haché later on in his cross-examination says Jonathan Mair of the DIP Lender wrote a letter to him through counsel confirming the evidence at paragraph 189 of his Second Affidavit. But, despite request, that evidence has not been provided.

Haché Transcript, see specifically, pp. 197-198, q. 518; and pp. 288, q. 749.

34. In fact, Haché at cross-examination had no or limited knowledge on a number of issues relating to the DIP, including:

(a) knowledge as to whether any of the other DIP Lenders approached regarding the DIP expressly required the termination;

Haché Transcript, at p. 336, q. 873.

(b) knowledge as to whether any other potential DIP Lender was consulted or canvassed about securing the additional $10M DIP Funding;

Haché Transcript, at pp. 337-338, q. 877-878.

(c) the first time Dr. Haché was aware that the DIP Lender required termination was sometime in April, 2021, which is after the Notice of Disclaimer was sent;

Haché Transcript, at p. 338-339, q. 879-881.

(d) not seen any modelling of detailed financial analysis from the DIP Lender as to why the termination was suddenly now essential to the extension; and,

Haché Transcript, p. 340, q. 885.

(e) no knowledge as to how the conditions imposed by the DIP Lender were arrived to "They are conditions that are imposed by the DIP Lender. Exactly how they got to that, I'm not fully aware".

Haché Transcript, p. 282, q. 729-732.

21. Laurentian "guessing"

35. At cross-examination, Haché could "not recollect" how much of the $25M DIP has been used, and stated that he "would be guessing". Despite going to Court asking for $10M more in DIP funds – all based on a guess – and despite recently receiving a cash flow analysis, he could not recall the amount of the $25M that had been spent nor how much is left. Moreover, he did not know how much had been spent on professional fees or how much of the $25M DIP loan previously advanced was used for professional service fees. He expected it would be more than $1M. When it was put to him that the amount spent on professional fees is actually in excess of $5M, or more than 20% of the $25M, he could not confirm that.

Haché Transcript, at pp. 31-32, q. 85-87; pp. 32, q. 89-90, and pp. 33-36, q. 93-108.

36. Haché's evidence is that, since the CCAA filing, no representatives of Laurentian have been involved in any discussions with representatives of the Federated Universities where they gave them an opportunity to discuss the issues of whether or not the Agreements should come to an end. Further, Laurentian never discussed the option of increasing the 15% administration fee to a higher number with the Federated Universities.

Haché Transcript, at pp. 24-25, q. 59-61 and pp. 92, q. 273-274.

37. From the start of the CCAA, Laurentian "strongly expected" that the Federation Agreements would be terminated.

Haché Transcript, at pp. 19-20, q 47-48.

38. Moreover, Haché conceded that he was not even present at mediation and has no specific knowledge as to what was discussed at mediation.

Haché Transcript, at pp. 21-22, q. 53-55.

39. Laurentian concedes that it has not done any formal surveys or studies of current or prospective students to see whether the retention in total enrollment levels will stay the same if the Federated Universities are terminated.

Haché Transcript, at pp. 118-120, q. 330-333; and pp. 310-313, q. 785-792.

40. But he did confirm Laurentian was not able to offer students equivalent courses to the ones offered by the Federated Universities.

Haché Transcript, at pp. 313-316, q. 793-815.

41. In addition, Laurentian refused to produce a multi-year forecast. Worse yet, even though admitting a draft was prepared and provided to the DIP Lender, Laurentian refused to provide the draft to the Federated Universities.

Haché Transcript, at pp. 190-192, q. 499-501 and Laurentian's Responses to Under Advisements and Refusals, #2 and #3

42. Laurentian's refusal to provide the material described in the preceding paragraphs, and Haché's limited knowledge on other key financial and DIP loan matters, is particularly concerning. Notably, at his cross-examination, Haché stated that the CCAA provides for a transparent process

and that transparency is "integral to the process." Haché also confirmed that he played a leading role in determining that the Agreements with the Federated Universities be terminated.

Haché Transcript, at pp. 63-64, q. 187-190; and p. 65, q. 192-194.

43. Based on the Monitor's Cash Flow Variance Report for the 6 weeks ending April 16, 2021, there have been positive variances in cash balances totaling $18M. The Monitor says that majority of this difference relates to delays in processing invoices as well as the deferral of expenditures (i.e. timing differences) but there is clearly excess liquidity on the existing DIP facility of $18M, and this before obtaining the additional $10M DIP facility. From this we conclude that Laurentian has sufficient liquidity to get beyond May 1, at least for a few weeks. Their revised cashflow forecast only projects the next DIP draw of $6M during the week of June 12 to June 18 2021.

Monitor's Third Report dated April 26 2021, at pp. 179-185; Appendices E and F.

PART III – THE ISSUE

44. **There is one issue on this motion: should the Court excise the New Disclaimer Term and prohibit disclaimer?**

45. **Answer: Yes. The terminal financial consequences of disclaimer can be prohibited and the extended DIP loan can proceed.**

PART IV – THE LAW

1. This Honourable Court retains jurisdiction to prohibit disclaimer

46. The Court has express jurisdiction to prohibit disclaimer or resiliation of an agreement under subsection 32(2) of the *CCAA*.

2. Factors

47. The factors that the Court ought to consider on a subsection 32(2) motion include whether or not the disclaimer "would enhance the prospects of a viable compromise or arrangement" Laurentian or "would likely cause significant financial hardship" for Thorneloe, as follows:

> **32(4) Factors to be considered**
>
> 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.

3. Balancing

48. The test under subsection 32(2) requires the Court to balance the benefit of the proposed disclaimer for the debtor (Laurentian) against the detrimental impact on the creditor (Thorneloe).

4. Fair, appropriate, reasonable, good faith

49. Courts have consistently held that disclaimer of a contract must be fair, appropriate, reasonable, and must have been issued after good faith negotiations.

> ***Allarco Entertainment Inc. (Re),* 2009 ABQB 503. See Thorneloe's Book of Authorities ("Thorneloe BOA") at Tab 1, para. 59.**

50. The Court will exercise its direction by ultimately weighing the competing interests and prejudice of the parties in and assessing whether resiliation is fair and reasonable.

> ***Dylex Ltd. (Re),* [1995] O.J. No. 595 (Ont. C.J. Gen. Div.), Thorneloe BOA at Tab 2, para. 7**

5. Not if NOT fair and reasonable

51. Re: ss. 32(4)(b), the debtor must establish the disclaimer would be "advantageous and beneficial" to its restructuring. Courts have refused to allow disclaimer where termination of the contract would not be fair and reasonable, and have held that evidence that the company would be more profitable as a result of disclaimer is not sufficient.

> ***Timminco Ltd., Re*, 2012 ONSC 4471, Thorneloe BOA at Tab 3, para. 54; *Doman Industries et al., Re*, 2004 BCSC 733, Thorneloe BOA, at Tab 4, para. 38**

52. The Court will also consider the economic conditions of the industry in which the parties do business.

> ***AbitibiBowater Inc. (Arrangement relatif à),* 2009 QCCS 2188, Thorneloe BOA at Tab 5, para. 45.**

6. NOT if "significant financial hardship"

53. Re: ss. 32(4)(c), the Courts have held that disclaimer should not be permitted if it would result in significant financial hardship to the party opposing the disclaimer. The Court ought to apply a subjective test for significant financial hardship, because an objective one "would make it difficult to debtor companies to disclaim large contracts regardless of the financial ability of the counter parties to absorb the resultant losses", which would "be contrary to the purpose of principles of the CCAA":

> 60 I am in agreement with the submission of the Timminco Entities that the test of whether a disclaimer of an agreement will cause significant financial hardship to the counter party depends and is centered on an examination of the individual characteristics and circumstances of such counter party. Further, an objective test for "significant financial hardship" would make it difficult to debtor companies to disclaim large contracts regardless of the financial ability of the counter parties to absorb the resultant losses. It seems to me that such a result would be contrary to the purpose of principles of the CCAA.

> ***Timminco Ltd., Re*, 2012 ONSC 4471, Thorneloe BOA, Tab 3 at para. 60.**

54. The onus is on the debtor to establish that disclaimer or resiliation of an agreement is appropriate; where the debtor fails to offer sufficient evidence to establish that disclaimer is "fair and reasonable", the Court will decline to permit the disclaimer.

***Doman Industries et al., Re*, 2004 BCSC 733, Thorneloe BOA, Tab 4 at para. 38.**

7. Ss. 32(4)(b) factor: Disclaimer will not enhance prospects of a viable compromise or arrangement

55. As the evidence of A. Farber & Partners Inc. ("**Farber**") demonstrates: Thorneloe is a small entity such that termination of the Agreements does not materially impact Laurentian's financial position; will not enhance Laurentian's prospects of a viable compromise or arrangement.

56. Farber's report dated April 19, 2021 (the "**Farber Report**") establishes that Thorneloe is a relatively minor component of the Laurentian federation, and that disclaimer would have an "immaterial impact on the current cost-cutting measures and restructuring efforts of Laurentian":

> 6.21. Termination of the Federation Agreement would have an immaterial impact on the current cost-cutting measures and restructuring efforts of Laurentian, as demonstrated from the financial metrics presented below. Disclaimer of the Federation Agreement will not enhance the prospects of a viable compromise or arrangement being made by Laurentian, as Thorneloe is immaterial to its overall restructuring.
>
> 6.22. In the financial year 2020, Thorneloe received approximately $568,770 in grants which is **a mere 0.66%** of the total grants of approximately $86 million received by Laurentian.
>
> 6.23. Thorneloe's revenues from tuition fees in 2020 were approximately $1.5 million whereas Laurentian received $50.5 million in tuition fees. The ancillary revenue earned by Thorneloe in 2020 of approximately $381,000 is **only 2.72%** of the ancillary revenue of approximately $14 million earned by Laurentian.
>
> 6.24. **Thorneloe employs only 7 full time faculty whereas Laurentian employs 355** full-time faculty members. The salary and benefits paid by Thorneloe to its faculty members in 2020 was approximately $2.4 million whereas Laurentian paid $134 million to its faculty members during the same period.

Farber Report, Exhibit A to the Affidavit of Allan Nackan, sworn on April 19, 2021 (the "Nackan Affidavit") [emphasis added].

57. Of the total $86,420,000 in government grants that Laurentian received in 2020, only $568,771 was directed to Thorneloe. This represents **only 0.66%** of the grants that Laurentian received.

8. Thorneloe funds; not Laurentian

58. Moreover, these funds belong to Thorneloe, not Laurentian. As noted above, enrollment in the courses that Thorneloe teaches are included in the calculation by which the province allocates funds to Laurentian. The flow of funds from the province to Thorneloe, through Laurentian, is intentional and is traceable to Laurentian's origins as an institution established by the three churches, in order to facilitate provision of provincial funds to the Federated Universities and expand higher-level education in northern Ontario.

9. 15% off the top; academic/financial value

59. In addition, the grants that Thorneloe receives are offset by the 15% service fee Laurentian charges off the top ($358,086 in 2020). These amounts are further offset by the numerous contributions that Thorneloe makes to Laurentian: including Thorneloe's representation on the Laurentian Board of Governors; Faculty of Arts Council; the Laurentian Senate; the Laurentian Nominating Committee; the Pension Committee; the work of Thorneloe faculty members including supervising graduate students and sitting on academic committees, all of which have financial value.

Gibaut Affidavit, at para. 59.

10. Miniscule percentages

60. Thorneloe's small size is further evident by its number of staff and faculty and revenue. Thorneloe has 7 full-time faculty members in comparison with 355 full-time faculty members at Laurentian, representing **only 1.97%** of same. Thorneloe's expenditures on salaries and benefits in 2020 was $2.44M, compared to $134M paid by Laurentian, **or 1.82%** thereof. With respect to tuition fees revenue, in 2020, Thorneloe earned approximately $1.5M, which is 3.11% of the approximately $50.5M earned by Laurentian. With respect to ancillary revenue, in 2020 Thorneloe earned approximately $381,000, or 2.72% of $14M in ancillary revenue earned by Laurentian.

Gibaut Affidavit, at paras. 55 and 61.

11. Disclaimer will not enhance restructuring

61. Laurentian fails to demonstrate how disclaimer of the Agreements will enhance a viable restructuring. As established in the Farber Report, Thorneloe has an immaterial impact on Laurentian's financial restructuring, and consequently disclaimer of the Agreements should not be a condition of the DIP Agreement. In support of the sudden inclusion of the New Disclaimer Term in the DIP Amendment Agreement, Laurentian has provided only the statement from Haché that Jonathan Mair of the DIP Lender states it is essential.

62. To speak plainly, there is no evidence before this Honourable Court as to why disclaimer, which would result in Thorneloe's insolvency, is material to Laurentian's restructuring and has been added as a new condition of the DIP Agreement. The foregoing statement from Haché regarding the DIP Lender's view that disclaimer is "essential" to its willingness to advance further funds is hearsay and is not sufficient evidence to justify disclaimer of the Agreements. This

evidence does not meet the threshold of "fair and reasonable", of which the Court must be satisfied to permit the disclaimer.

63. Laurentian concedes it has done no formal surveys or studies of current or prospective students to see whether the retention in total enrollment levels will stay the same if the Federated Universities are terminated. Their best evidence is vague, anecdotal evidence based on double hearsay of what others have told Haché about unnamed students, which is in contrast to the 40 pages worth of direct testimonials from students, alumni and community partners produced by Thorneloe.

> **Haché Transcript, at pp. 310-313, q. 785-792.**
>
> **Gibaut Affidavit, Exhibit D – Testimonies from Students, Alumni and Community Partners.**

64. Laurentian has also failed to provide evidence as to why the New Disclaimer Term is suddenly a material condition to the DIP Agreement. Indeed, on Haché's cross-examination, he was unaware and was unable to provide any information of as to how much of the original DIP loan has been used, how much is left and whether or not Laurentian negotiated or consulted with any other DIP lenders in respect of a second advance.

65. Furthermore, the Court ought to draw a negative inference as a result of Laurentian's refusal to provide correspondence, documents, negotiations, and other information relating to the DIP Amendment Agreement and the addition of the New Disclaimer Term.

12. Ss. 34(2)(c) factor: Disclaimer will result in significant financial hardship

66. Disclaimer of the Agreements will cause literally terminal financial hardship for Thorneloe, jeopardizing its very existence and necessitating its own insolvency proceedings under the under the *Bankruptcy and Insolvency Act* ("**BIA**") or the CCAA.

67. As the Farber Report demonstrates, disclaimer would result in liabilities and recurring losses estimated to be approximately **$13.7M** over the next 5 years, which does not include a significant as-yet undetermined pension liability. This estimate includes the following:

(a) approximately $2.2M in termination costs and liabilities, including employee severance;

(b) annual loss of income of approximately $2.5M, due to recurring loss of annual revenue and incremental costs as a result of termination, of a present value over the next 5 years of approximately $11.5M; and

(c) pension liabilities, which are a further significant liability that could arise upon termination of the Agreements, but which are presently unknown.

13. Disclaimer not fair or reasonable

68. Disclaimer would not meet the test of fairness and reasonableness as articulated in the case law above. In addition to the terminal financial consequences of the proposed disclaimer for Thorneloe and the lack of any material restructuring purpose for Laurentian, disclaimer would result in a plentitude of additional negative outcomes for Thorneloe, Laurentian, and the broader community. Additional financial hardships as a result of termination include *inter alia*:

(a) further erosion of higher-level education in northern Ontario, and loss of an educational institution that has been serving the region for 60 years;

(b) job losses for all Thorneloe faculty and staff and resulting severance pay obligations;

(c) the cancellation of approximately 140 courses and programs provided by Thorneloe, leaving approximately 2,477 students with incomplete degrees;

(d) collateral economic damage to outside businesses in northern Ontario that have indirect or direct commercial relationships with Thorneloe;

(e) further reputational harm for Laurentian and further discouraging future students from selecting Laurentian as their university of choice; and

(f) costs and complications arising from the disentanglement of Thorneloe from Laurentian and resulting disputes, litigation and increased costs into the future.

Gibaut Affidavit, at para. 4.

14. The disclaimers: in bad faith; ought to be prohibited

69. Laurentian's attempt to terminate its 60-year federation relationship with Thorneloe, knowing that disclaimer would result in the insolvency of Thorneloe and in the face of evidence that termination would not materially assist Laurentian's restructuring, is in bad faith and ought to be prohibited.

70. Section 18.6 of the CCAA provides that all parties have a duty to act in good faith, and that the Court may make any order that it considers appropriate in the event that a party fails to do so:

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

71. Good faith, appropriateness, and due diligence are "baseline considerations" that the Court ought to consider in adjudicating CCAA proceedings:

> … [T]he requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority.

***Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60, Thorneloe BOA, Tab 6, at para. 70.**

72. Courts have held that disclaimer will only be fair and reasonable where the parties have engaged in good faith negotiations prior to attempting to disclaim or resiliate.

***Allarco Entertainment Inc.*, Thorneloe BOA, Tab 1, at para. 59.**

73. Laurentian has consistently and continually wanted to terminate, and thereby failed to engage in good faith negotiations. Indeed, at the April 20, 2021 case conference before this Court to schedule this motion, Laurentian took the position that the First Haché Affidavit, expressing a mere intention to disclaim the Agreements, constituted a *de facto* Notice of Disclaimer by Laurentian.

74. This affidavit was prepared and sworn well before the New Disclaimer Term was added to the DIP Amendment Agreement. In addition, Haché stated on cross-examination that he did not become aware that the DIP Lender required disclaimed until April, 2021, which was after the Notice of Disclaimer was delivered.

15. Disclaimer of collective agreements in contravention of ss. 32(9)(b)

75. Disclaimer constitutes an impermissible collateral attack on Thorneloe's collective agreements with LUFA and CUPE. Subsection 32(9)(b) provides that a collective agreement cannot be disclaimed or resiliated:

> **32(9) Exceptions**
> 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.

76. Subsection 33(1) provides further that any collective agreement that the debtor is party to remain in force during the CCAA proceedings:

> **33(1) Collective agreements**
>
> If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

77. The disclaimers sought in this case are not in respect of a normal commercial relationship, but an academic amalgamation, whereby the Federated Partners operate as a single university. The high degree of integration between Laurentian and Thorneloe is such that disclaimer would result in Thorneloe's insolvency, and the resulting termination of its collective agreements with LUFA and CUPE, which apply to employees working to provide courses through Laurentian. Disclaimer would violate both the wording and the spirit of subsections 32(9)(b) and 33(1) and the principle that the CCAA ought not to be used to circumvent collective bargaining relationships – neither of which ought not to be permitted by this Honourable Court.

78. This is further evident by the fact that Laurentian, given the circumstances, would be a related employer for the purposes of these two collective agreements under the *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A.

16. Why should a DIP lender oust the jurisdiction of the Ontario Courts?

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

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

> **Waël Rostom and Caitlin Fell, "Recent Trends in DIP Financing" (2016) 5-4 IIC Journal, Thorneloe BOA, Tab 7 at p. 4 [emphasis added].**

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

> **I do not see the DIP lenders as being merely altruistic. Like any DIP lender, it is in their interest to take what they can get.** Their interest, of course, in a situation such as this in which they are all ABL or Term lenders, is to see the business successfully restructure, but to be sure they work it on their terms as much as possible.
>
> ***Essar Steel Algoma, Re,* Endorsement of Newbould J. dated November 16, 2015 [emphasis added], Thorneloe BOA, Tab 8**

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

> 179 …**I recognize that in some restructuring proceedings, certain stakeholders may use existing leverage, to the extent that they have it, to take advantage of the chaos and uncertainty that are inherent in these situations.** Strategies might be employed to secure for themselves advantages that they would not otherwise obtain. These advantages inevitably come at the expense of other stakeholders in the proceedings. These advantages are also almost always court approved so that they cannot be later revisited. **In those circumstances, the court must be constantly vigilant against such strategies.**
>
> ***Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459, Thorneloe BOA, Tab 9 at para. 79 [emphasis added].**

17. Conclusion: condition excised; disclaimer dismissed; DIP funded

83. This Honourable Court ought not to permit the disclaimer on the basis of the New Disclaimer Term. Not justified by the financial analysis. Terminal financial consequences for Thorneloe. DIP can still be funded.

PART V - ORDER REQUESTED

84. Thorneloe respectfully requests an order in the form of the draft order to be presented to the Court.

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

Andrew J. Hatnay / Sydney Edmonds

Eugene Meehan Q.C.

Eugene Meehan, Q.C.

Lawyers for Thorneloe University

SCHEDULE "A"
LIST OF AUTHORITIES

1. *AbitibiBowater Inc. (Arrangement relatif à),* 2009 QCCS 2188
2. *Allarco Entertainment Inc. (Re),* 2009 ABQB 503
3. *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60
4. *Doman Industries et al., Re*, 2004 BCSC 733
5. *Dylex Ltd. (Re),* [1995] O.J. No. 595
6. *Essar Steel Algoma, Re*, Endorsement of Newbould J. dated November 16, 2015
7. *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459
8. *Timminco Ltd., Re,* 2012 ONSC 44

SCHEDULE "B"
RELEVANT STATUTES

1. *An Act to Incorporate Laurentian University of Sudbury,* S.O. 1960, c. 151. C. 154, s. 19

Composition of Senate

19. There shall be a Senate of the University composed of,

a) the President, ex officio, who shall be its chairman;

b) the Academic Vice-President, ex officio, when there is such an official;

c) the principal or head of each federated university or college;

d) the dean of each faculty and school of the University;

e) the Librarian;

f) the Registrar of the University, who shall be the secretary of the Senate;

g) the Director of the Extension Department of the University;

h) one full-time professor elected annually by each federated university and college;

i) two full-time professors elected annually by each faculty, school and college of the University.

2. *An Act to Incorporate Thorneloe University,* S.O. 1960-1961, c. 135

3. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

4. *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, ss. 18.6, 32(2), 32(4), 32(9), and 33(1)

18.6(1) Good faith

Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

18.6(2) Good faith — powers of court

If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

…

32(2) Court may prohibit disclaimer or resiliation

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.

…

32(4) Factors to be considered

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.

…

32(9) Exceptions

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

…

33(1) Collective agreements

If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

5. *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A

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

Applicant

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

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

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