

Court of Appeal File No.: M52471
Superior Court File No.: CV-21-656040-00CL

COURT OF APPEAL FOR ONTARIO

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, C. c-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF LAURENTIAN UNIVERSITY OF SUDBURY**

REPLY FACTUM OF THE MOVING PARTY
(Motion by Thorneloe University for Leave to Appeal)

June 8, 2021

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TO: SERVICE LIST

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1. This is the Reply factum of Thorneloe to the two responding facta filed by Laurentian and the DIP Lender (collectively the "**Respondents**").¹

2. The issue at this stage is applying the four-factor CCAA leave to appeal test which Thorneloe submits is readily met. The Respondents' arguments focus largely on the wrong test: they argue that the appeal should not be allowed, not whether the motion for leave to appeal should be granted. These submissions will reply to certain of the Respondents' misleading and incorrect factual arguments.

Laurentian does not subsidize the Federated Universities

3. At paragraphs 21 to 23 of its factum, Laurentian mischaracterizes the Financial Distribution Notices and erroneously suggests that Laurentian was subsidizing the Federated Universities by this arrangement. That is incorrect. There was no subsidizing by Laurentian. The Federated Universities earn their own tuition and grant money from the courses they produce and taught, which were made part of the Laurentian Faculty of Arts curriculum with Laurentian's approval. The tuition and grant money generated by those courses were collected by Laurentian in a clearing house manner and then sent on to Thorneloe. Laurentian does not pay Thorneloe out of its own revenues.

4. The tuition and grants funds paid by students and the government respectively are received by Laurentian in an administrative arrangement flow-through via Laurentian to Thorneloe pursuant to the Financial Distribution Notice. Those funds do not belong to Laurentian. They are not a subsidy.

¹ All abbreviations from Thorneloe's factum are continued in this Reply factum.

5. The administrative arrangement between the Federated Universities and Laurentian from their inceptions was to distribute the tuition collected and government grants to the Federated Universities in respect of the courses the Federated Universities provided. This arrangement was reflected in the bilateral Proposed Grant Distribution and Services Fees agreement dated November 10, 1993 between Laurentian, Thorneloe, Sudbury, and Huntington.

Edmonds Affidavit, Exhibit B – Proposed Grant Distribution and Services Fees, Thorneloe's Motion Record, Tab 9 B, pp. 105-107

6. Laurentian unilaterally changed the above funding arrangement starting in the 2019-2020 year, per the Financial Distribution Notice, which notice was also disclaimed by the CCAA court in the motion below.

Gibaut Affidavit, at para. 20, Thorneloe's Motion Record, Tab 10, p. 184; and,
Edmonds Affidavit, Exhibit C – Financial Distribution Notice, Thorneloe's Motion Record, Tab 9 C, pp. 109-117

7. Provincial funds flow from Laurentian to Thorneloe based on the same enrollment-based approach used by the province since 2019-2020.

Gibaut Affidavit, at para. 21-22, Thorneloe's Motion Record, Tab 10, p. 184

8. This flow through arrangement was admitted 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.

Haché Transcript, at p. 84, q. 252 and pp. 90-91, q. 270, Thorneloe's Motion Record, Tab 18(1)(A), pp. 1265 and 1271-1272

9. Also set out in the arrangement in the Financial Distribution Notice is that Laurentian charges Thorneloe 15% of Thorneloe's earned tuition and government grants as an administration fee, which Thorneloe pays to Laurentian.

Gibaut Affidavit, at para. 23, Thorneloe's Motion Record, Tab 10, p. 185; and,
Edmonds Affidavit, Exhibit C – Financial Distribution Notice, Thorneloe's Motion Record, Tab 9 C, pp. 109-117

10. The stated objective of the Funding Distribution Notice and Laurentian imposing the 15% fee was to ensure that the Federated Universities and Laurentian would not subsidize the operations or services of each other, and that each would be responsible for covering their own costs:

The underlying principle is that none of Laurentian University or any of the Federated Universities will subsidize the operations or services of another, and each will be responsible for covering its own costs.

Edmonds Affidavit, Exhibit C – Financial Distribution Notice, Thorneloe's Motion Record, Tab 9 C, pp. 110

11. Haché conceded at his cross-examination that this objective was met, and that the changes in the 2019 funding model "more correctly reflects the costs that are incurred by the university", and "more appropriately balances the revenues and costs."

Haché Transcript, at pp. 129-133, q. 365-375; pp. 123-125, q. 344-345; and pp. 133-135, q. 377-380, Thorneloe's Motion Record, Tab 18(1)(A), pp. 1310 to 1314, and 1314 to 1315

No meaningful discussions about terminating the Federated Universities prior to the CCAA

12. At paragraph 28 of its factum, Laurentian overstates Haché's evidence on cross-examination. Laurentian argues that Haché stated that for the six months prior to the CCAA – as Laurentian was addressing its myriad of financial problems, the major ones not caused by the Federated Universities – he "engaged in discussions with the presidents of the Federated Universities regarding the untenable structure of the federated relationship" and that "all options were on the table, including ending the existing federation agreement." In fact, at his cross-examination, Haché clarifies that while "all options" were on the table, there was never any discussion about terminating the federated relationships nor what the consequences would be if the federation ended.

414 Q. So let's -- and then I think it's -- in fairness, so you had discussions. I think we can both agree that the issue of **terminating the agreement was never actually discussed**. You advised that that was one of the options **but there was never any discussion, is that fair?**

A. **Yeah**, there was no conclusion, but that was the -- that what needed to be done. There might have been another way to -- you know, **we were having conversations to see how we could work through the issues that existed**.

415 Q. **But you never had a discussion, for example, of what the consequences would be if that ended? Like, it never got to that in your discussions? Is that fair?**

A. **No**, there was not an interest to entertain that discussion.

[emphasis added]

Haché Transcript, pp. 152, q. 414-415, Thorneloe's Motion Record, Tab 18(1)(A), p. 1333

Laurentian's arguments regarding Thorneloe's financial statements are both misleading and irrelevant

13. At paragraphs 86 and 87 of its factum, Laurentian alleges that Thorneloe did not provide its financial statements and that a negative inference may be drawn. This complaint is factually incorrect, disingenuous, and a "red herring".

14. Firstly, as Thorneloe is a public university, Laurentian could always obtain the financial statements if it wanted them. Thorneloe's financial statements are publicly available and the information in the financial statements was always available to Laurentian. They are accessible at a public website operated by the Council of Ontario Universities ("COU"). Laurentian personnel would surely have access to and knowledge of this site: <http://couprod.tgtsolutions.com:94/customized-reports.aspx>

15. The members of the Council of Ontario Finance Officers ("COFO") prepare a large financial report of all Ontario universities. All universities have access to, for comparison and contrast, each other's COFO financial information on the COU website. The information is taken directly from the audited financial statements.

16. At the link, there are drop-down options to access financial information for public universities in Ontario. Under "Institution", one can click "Filter by Single Institution", and in the box that pops up below, one can choose "Thorneloe University". It provides the financial information for the past two decades.

17. There was no withholding of the financial statements by Thorneloe – by definition, one cannot "withhold" information that is publicly available and obtainable.

18. Second, Laurentian made the same complaint at the motion below, and the CCAA court made no mention of this issue in the reasons. Laurentian has not sought leave to appeal the Decision below. In addition to being irrelevant and incorrect, to allow this argument now would be tantamount to allowing Laurentian to cross-appeal, which it has not done.

19. Third, Laurentian did not ask for Thorneloe's financial statements when it cross-examined Thorneloe's financial expert, Allan Nackan of Farber on his April 19, 2021 expert report; nor was Mr. Nackan's review of those statements or any reliance on same challenged or questioned by Laurentian at his cross-examination (certainly not in any material way).

20. Instead, and as an afterthought, Laurentian's request for the publicly available documents, were asked at the very end of *Mr. Gibaut's* subsequent cross-examination (the president of Thorneloe), following a break before Laurentian concluded their cross-examination of him.

21. Fourth, despite always being publicly obtainable, the above-noted website link with the information from Thorneloe's audited financial statements and the audited financial statements themselves were nevertheless provided by Thorneloe's counsel to Laurentian (with a copy to the CCAA court) at the day of hearing.

22. In these circumstances, and with Laurentian's casual approach to requesting a publicly available document, it is disingenuous for Laurentian to now complain this information was material to Laurentian or the DIP Lender to challenge the conclusions of Farber, who they had full opportunity to cross-examine and indeed did so.

There was no alternative offered to Thorneloe other than closing down or reducing to a parking lot operation or residence landlord – which is not a reasonable or fair alternative to teaching higher education

23. At paragraph 88 of its factum, Laurentian states that Thorneloe was offered an alternative to ceasing operations, which another Federated University, Huntington, accepted. That is misleading. There was no substantive alternative offered to Thorneloe other than it closing down. The purported "alternative" to which Laurentian refers was to close down Thorneloe University as an academic institution of higher learning for over sixty years, and reduce it to a parking lot operation and/or a residence landlord with no university teaching and no faculty. That is hardly a reasonable or fair "alternative" offered to a university.

Rule 39.03 allows for an examination even where no affidavit is filed

24. At paragraph 5 of its factum, the DIP Lender says that it did not agree to being examined because it did not file an affidavit at the motion below. It erroneously suggests that because it did not file an affidavit, it has no obligation to provide evidence even though it strongly supported the disclaimer against Thorneloe and its counsel told the CCAA court it would refuse to lend further *unless* the court upheld the disclaimer. However, the obligation on a party to provide evidence on motions is broader than simply having to attend for a cross-examination on an affidavit.

25. Put another way, a party taking an adversarial position on a motion should not be able to evade providing evidence for its position by deliberately not filing an affidavit, which is what the DIP Lender admitted in court it had done.

26. Rule 39 of the *Rules of Civil Procedure* sets out four ways in which evidence can be adduced on a motion or application. They include:

- (a) affidavit evidence (39.01);
- (b) evidence by cross-examination on an affidavit (39.02);
- (c) ***evidence by examination of a witness (39.03)***; and,
- (d) evidence by examination for discovery (39.04)

27. Rule 39.03 expressly allows for an examination of a witness *even if they do not file an affidavit*. This is as a matter of right, and leave is not required. Despite this Rule, the CCAA court directed that the DIP Lender not be orally examined but that questions to it could be made in writing, not to the DIP lender, but through the Monitor.

28. When requested by Thorneloe counsel to attend for an oral examination, the DIP Lender refused.

29. Thorneloe counsel did submit questions to the DIP lender via the Monitor, which for the most part the DIP lender did not answer, invoking confidentiality.

30. This is despite: a) the concerns itemized at paragraphs 63 and 64 of Laurentian's factum filed on leave to appeal; b) that the DIP Lender was *de facto* requiring as a new condition that the disclaimer against Thorneloe be upheld by the CCAA court; c) that the DIP Lender's counsel made oral submissions that were tantamount to giving evidence; and d) that the DIP Lender was an interested party to the outcome, had material evidence, and took an adverse position to Thorneloe on the motion below.

Before the Hearing

39.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

(2) A witness examined under subrule (1) **may be cross-examined by the examining party** and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination. R.R.O. 1990, Reg. 194, r. 39.03 (2). [emphasis added]

Rule 39.03(1) and (2), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Lack of cogent evidence and misapplication of CCAA court powers

31. It is established law that a lawyer's submissions should not amount to giving evidence at a hearing. Evidence is to be introduced by witness testimony, not a lawyer.

1298781 Ontario Inc. et al. v. Levine et al., [2013 ONSC 2894](#), at paras. 16-18.

32. As held by Justice Gillese (as she then was) in *Urquhart v. Allen Estate*:

27 When counsel appears as a witness on a contentious matter, it causes two problems. First, it may result in a conflict of interest between counsel and his client. That conflict may be waived by the client, as indeed, was done in this case. The second problem relates to the administration of justice. The dual roles serve to create a conflict between counsel's obligations of objectivity and detachment, which are owed to the court, and his obligations to his client to present evidence in as favourable a light as possible. This is a conflict that cannot be waived by the client as the conflict is between counsel and the court/justice system.

Urquhart v. Allen Estate, [1999] O.J. No. 4816 (Ont. S.C.J.), at para. 27.

33. Yet, that is what occurred at the motion hearing below. After not filing an affidavit to avoid a cross-examination, and not answering written questions fully about the new DIP condition that required the CCAA court to uphold the disclaimer against Thorneloe, the DIP Lender's lawyer starkly told the court that if the court did not do so, the DIP would

refuse to advance the next \$10M nor extend the DIP loan maturity date. The CCAA court, while recognizing the "dilemma" that was pressed on him, upheld the disclaimer. In so doing, he erred both due to the lack of cogent evidence for his conclusion, and by misconstruing his power under to CCAA and not ordering the DIP to advance the funds if it refused (which was relief sought in Thorneloe's cross-motion).

34. First, at paragraph 35 of its factum, the DIP Lender asserts that despite that it did not file any evidence before the CCAA court, there are three evidentiary sources of evidence from which the CCAA court could infer that the DIP Lender would refuse to advance the additional \$10M unless the court upheld the disclaimer against Thorneloe:

- (a) the DIP Loan Amendment Agreement;
- (b) the Affidavit of Haché, paragraph 189; and,
- (c) an April 28, 2021 letter from the DIP lender in response to questions posed by Thorneloe and Sudbury.

35. Firstly, the DIP Lender fails to address how these can be cogent evidence in light of the issues raised at paragraphs 63 and 64 of Thorneloe's factum on leave to appeal.

36. Second, the April 28, 2021 letter from the DIP lender's lawyer was in response to the questions posed to the DIP Lender by Thorneloe counsel and was a brief lawyer's letter with general statements lacking meaningful answers or foundational documents, which was sent two days before the motion below.

37. Third, Haché's brief statement at paragraph 189 of his affidavit is not cogent evidence on this issue.

38. At cross-examination, Haché admitted that he was not directly involved in any discussions or meetings with the DIP Lender. Other than the written DIP term sheet produced, there were no direct communication between Haché and the DIP Lender. Communications all went through Laurentian's counsel.

Haché Transcript, pp. 26-27, q. 66-67; and pp. 196-199, q. 510-519; Thorneloe's Motion Record, Tab 9(1)(A), pp. 1207-1208, and 1377-1380

39. Further, Haché admitted under cross-examination that he had no or limited knowledge on a number of issues relating to the DIP, including:

- (a) no knowledge as to whether any of the *other* DIP Lenders that Laurentian approached expressly required the termination of the Federation Agreements;

Haché Transcript, at p. 336, q. 873, Thorneloe's Motion Record, Tab 9(1)(A), p. 1517

- (b) no 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, Thorneloe's Motion Record, Tab 9(1)(A), pp. 1518-1519

- (c) Haché admitted that the first time he was aware that the DIP Lender required the termination of the Federation Agreements was sometime in April, 2021, which is *after* the Notice of Disclaimer was sent;

Haché Transcript, at p. 338-339, q. 879-881, Thorneloe's Motion Record, Tab 9(1)(A), pp. 1519-1520

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

Haché Transcript, p. 340, q. 885, Thorneloe's Motion Record, Tab 9(1)(A), p. 1521

(e) Haché had no knowledge as to how the conditions imposed by the DIP Lender were arrived at: "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, Thorneloe's Motion Record, Tab 9(1)(A), p. 1463

40. The statement by Haché at paragraph 189 of his affidavit on which the DIP lender relies in its factum on this leave motion simply states, in entirety that: "I am *advised* by Jonathan Mair of the DIP Lender, and do so 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." [emphasis added]

41. In reality, Haché was never so "advised" because he never spoke with Mr. Mair. His evidence is hearsay evidence, wherein the source evidence is, at best – brief, manufactured, devoid of analysis or foundational documents, and was provided last minute before the motion below with no other purpose other than to support Laurentian's disclaimer against Thorneloe after it had been sent.

42. The evidence shows that on the eve of Haché swearing his April 21, 2021 affidavit to oppose Thorneloe's motion for an order to reject the disclaimer (which was three weeks after the disclaimer was sent by Laurentian), Laurentian's lawyer sent Mr. Mair (the DIP

Lender) a late-night brief email requesting him to simply confirm that the evidence at paragraph 189 of Hache's affidavit is accurate. Laurentian requested a response as soon as possible as they required this evidence to finalize Haché's affidavit. At 10:40 a.m. on April 21, 2021, a few hours before Haché swore his 79-page affidavit (before exhibits) in support of the disclaimers, Mr. Mair responded via his iPhone, in entirety: "Hi. Confirmed".

Email from Jonathan Mair to Laurentian, dated April 21, 2021, 10:40 a.m., Thorneloe's Motion Record, Tab 18(5)(e), pp. 1997; and,
Letter from DIP Lender's counsel, dated April 28, 2021, response to question #2, Thorneloe's Motion Record, Tab 18(5)(f), pp. 2001.

43. In addition to erring based on the lack of cogent evidence, the CCAA court also erred by not rebuffing the threat of the DIP lender in court to refuse to lend further and not directing the DIP lender to advance the next \$10M if in fact the DIP refused to do so. As Justice Pepall (as she then was) correctly stated in *Canwest* when she also faced with a similar threat from a lender:

[26] I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31 (i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. ***It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.*** [emphasis added].

Canwest Publishing Inc., [2010 ONSC 1328](#), at para. 26

The DIP loan is not at risk – rejecting the disclaimer has no impact on its super-priority nor the collateral

44. In its factum, the DIP Lender argues that the DIP loan is at "high risk". That is false. As noted, the DIP Lender did not file any evidence at the motion below to show the existence of such a purported "high risk", let alone evidence about any purported risk to its loan.

45. In fact, in the Amended and Restated Initial CCAA Order, the DIP Lender is provided with the customary super priority charge over Laurentian's assets. There is no evidence to suggest that the DIP Loan priority nor the collateral would be at "high risk" if the disclaimer against Thorneloe was rejected.

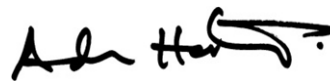
Haché Affidavit, Exhibit B – Amended and Restated Initial Order, paras. 42 to 47, Thorneloe's Motion Record, pp. 744-745

46. Further, the DIP Lender was content to previously lend \$25M to Laurentian *without* requiring the disclaimer, and only required the CCAA court to uphold the disclaimer shortly prior to the motion hearing below wherein the DIP Amendment approval was being sought and after the disclaimer was sent to Thorneloe.

47. There is no risk to the DIP loan. This argument should also be rejected.

48. Thorneloe University respectfully request that leave to appeal be granted.

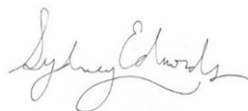
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of June, 2021.

A handwritten signature in black ink, appearing to read "Andrew J. Hatnay". The signature is stylized with a large, sweeping flourish at the end.

Andrew J. Hatnay

A handwritten signature in black ink, appearing to read "Demetrios Yiokaris". The signature is written in a cursive, flowing style.

Demetrios Yiokaris

A handwritten signature in black ink, appearing to read "Sydney Edmonds". The signature is written in a cursive, flowing style.

Sydney Edmonds

SCHEDULE “A”

LIST OF AUTHORITIES

1. *1298781 Ontario Inc. et al. v. Levine et al.*, 2013 ONSC 2894
2. *Canwest Publishing Inc.*, 2010 ONSC 1328
3. *Urquhart v. Allen Estate*, [1999] O.J. No. 4816 (Ont. S.C.J.)

SCHEDULE “B”

RELEVANT STATUTES

1. *Rules of Civil Procedure, R.R.O. 1990, Reg. 194*

RULE 39 EVIDENCE ON MOTIONS AND APPLICATIONS

EVIDENCE BY AFFIDAVIT

Generally

39.01 (1) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 39.01 (1).

Service and Filing

(2) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served with the notice of motion or notice of application and shall be filed with proof of service in the court office where the motion or application is to be heard at least seven days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (2); O. Reg. 171/98, s. 18 (1); O. Reg. 394/09, s. 17 (1).

(3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed with proof of service in the court office where the motion or application is to be heard at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (3); O. Reg. 171/98, s. 18 (2); O. Reg. 394/09, s. 17 (2).

Contents — Motions

(4) An affidavit for use on a motion may contain statements of the deponent’s information and belief, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (4).

Contents — Applications

(5) An affidavit for use on an application may contain statements of the deponent’s information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).

Full and Fair Disclosure on Motion or Application Without Notice

(6) Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself

sufficient ground for setting aside any order obtained on the motion or application. R.R.O. 1990, Reg. 194, r. 39.01 (6).

Expert Witness Evidence

(7) Opinion evidence provided by an expert witness for the purposes of a motion or application shall include the information listed under subrule 53.03 (2.1). O. Reg. 259/14, s. 8.

EVIDENCE BY CROSS-EXAMINATION ON AFFIDAVIT

On a Motion or Application

39.02 (1) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under rule 39.03 may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, r. 39.02 (1).

(1.1) Subrule (1) does not apply to an application made under subsection 140 (3) of the Courts of Justice Act. O. Reg. 43/14, s. 11.

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under rule 39.03 without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).

To be Exercised with Reasonable Diligence

(3) The right to cross-examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of cross-examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.02 (3).

Additional Provisions Applicable to Motions

(4) On a motion other than a motion for summary judgment or a contempt order, a party who cross-examines on an affidavit,

(a) shall, where the party orders a transcript of the examination, purchase and serve a copy on every adverse party on the motion, free of charge; and

(b) is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 39.02 (4); O. Reg. 284/01, s. 10.

EVIDENCE BY EXAMINATION OF A WITNESS

Before the Hearing

39.03 (1) Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

(2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination. R.R.O. 1990, Reg. 194, r. 39.03 (2).

(2.1) Subrules (1) and (2) do not apply to an application made under subsection 140 (3) of the Courts of Justice Act. O. Reg. 43/14, s. 12.

To be Exercised with Reasonable Diligence

(3) The right to examine shall be exercised with reasonable diligence, and the court may refuse an adjournment of a motion or application for the purpose of an examination where the party seeking the adjournment has failed to act with reasonable diligence. R.R.O. 1990, Reg. 194, r. 39.03 (3).

At the Hearing

(4) With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (4).

Summons to Witness

(5) The attendance of a person to be examined under subrule (4) may be compelled in the same manner as provided in Rule 53 for a witness at a trial. R.R.O. 1990, Reg. 194, r. 39.03 (5).

EVIDENCE BY EXAMINATION FOR DISCOVERY

Adverse Party's Examination

39.04 (1) On the hearing of a motion, a party may use in evidence an adverse party's examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the adverse party, and rule 31.11 (use of discovery at trial) applies with necessary modifications. O. Reg. 534/95, s. 1.

Party's Examination

(2) On the hearing of a motion, a party may not use in evidence the party's own examination for discovery or the examination for discovery of any person examined on behalf or in place of, or in addition to, the party unless the other parties consent. O. Reg. 534/95, s. 1.

**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 of Appeal File No. M52471

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

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

REPLY FACTUM OF THE MOVING PARTY

(Motion by Thorneloe University
for Leave to Appeal)

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