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

RESPONDING FACTUM OF THE DIP LENDER

(Motion by Thorneloe University for Leave to Appeal)

June 4, 2021

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

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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

RESPONDING FACTUM OF THE DIP LENDER
(Motion by Thorneloe University for Leave to Appeal)

PART 1 - OVERVIEW STATEMENT

1. The disclaimer of federation agreements in these CCAA proceedings is at the heart of this leave to appeal motion. Laurentian University of Sudbury ("**Laurentian**"), as the debtor company, disclaimed the agreements; Ernst & Young Inc., as the monitor (the "**Monitor"**), approved the disclaimer; Firm Capital Mortgage Fund Inc. (the "**DIP Lender"**) negotiated the disclaimer as a condition of additional debtor-in-possession ("**DIP"**) financing; and Thorneloe University (**"Thorneloe"**) opposed the disclaimer. Morawetz C.J. dismissed Thorneloe's motion. Thorneloe now seeks leave to appeal from the decisions of Chief Justice Morawetz, the supervising judge of the application brought by Laurentian pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**").

2. In particular, Morawetz C.J., in his orders and endorsements dated May 2, 2021, with reasons that followed on May 7 and May 14, 2021, dismissed Thorneloe's motion under section 32 of the CCAA opposing Laurentian's disclaimer of the Federation Agreement and Financial Distribution Notice (together, the "**Federation Agreements"**); and

dismissed Thorneloe's and University of Sudbury's joint cross-motion seeking, among other things, the deletion or removal of the disclaimer of the respective Federation Agreements by May 1, 2021 as a condition in the DIP Loan Amendment Agreement between Laurentian and Firm Capital Corporation, as assigned to the DIP Lender, dated April 19, 2021 (and accepted April 20, 2021) (the "**DIP Loan Amendment Agreement**"), which made the advance of an additional $10 million in DIP financing to Laurentian and the extension of the DIP loan maturity date subject to several conditions, including the disclaimer of the respective Federation Agreements by May 1, 2021.

3. In his reasons with respect to the DIP Lender, Chief Justice Morawetz found no basis to question the legitimacy of the DIP Lender, nor question the conditions that the DIP Lender put forth with respect to any request to extend the DIP loan and to increase the amount of the DIP financing. He held that the DIP Lender was entitled to take into account commercial reality in assessing its options. Morawetz C.J. also noted that the DIP Lender was not a pre-existing lender to Laurentian, nor was there any evidence that the DIP Lender was engaged in a "loan to own strategy". Based on the facts, he distinguished this DIP Lender from a number of DIP lenders that were involved in the cases and commentary referred to by Thorneloe's counsel. There was no evidence that the DIP Lender had any ulterior motive in negotiating the condition to extend additional financing and to extend the term according to Morawetz C.J. He also reminded the parties that this was not a situation where the Court was being asked to approve DIP financing with this DIP Lender. These approvals had already been granted by the Court earlier in February 2021, with no party objecting and with no appeals being filed

according to Morawetz C.J. He concluded that it was a competitive process and the DIP Lender was one of eight potential DIP lenders identified.[1]

4. Another Federated University also opposed the disclaimer of its respective Federation Agreements in these CCAA proceedings. In a related motion by the University of Sudbury ("**SU"),** opposing the disclaimer of its respective Federation Agreements, Justice Gilmore dismissed SU's motion in a brief endorsement dated May 2, 2021, with reasons that followed on May 7, 2021. Gilmore J.'s reasons in the SU motion were released concurrently with the reasons or endorsement of Chief Justice Morawetz in the Thorneloe motion, on May 7, 2021. Regarding the DIP Lender, Justice Gilmore did not agree that the CCAA process was being pursued "at the whim of the DIP Lender"; that the DIP Lender was running this process; or that the DIP Lender had "ousted the jurisdiction of the Superior Court". Justice Gilmore held that the terms of the original DIP financing of $25 million in February 2021, including its expiry on May 1, 2021, were well known to all stakeholders and approved by the Court. Echoing the same reasons or reasoning of Chief Justice Morawetz in the Thorneloe motion, Justice Gilmore acknowledged that the DIP Lender is a stranger to Laurentian and was not a pre-filing lender. Justice Gilmore confirmed that the DIP Lender is an arm's length commercial lender who has risk in a novel lending situation where its security is over a public institution. Justice Gilmore concluded that the DIP Lender has already advanced a significant amount, and has specific conditions on advancing more including the

[1] Reasons of Chief Justice Morawetz, dated May 7, 2021, at paras. 59-66, and dated May 14, 2021, at para. 43 ("**Reasons of Chief Justice Morawetz")**, Motion Record of Thorneloe dated May 25, 2021 ("**MR**"), Tab 7, pp. 77-78 and Tab 8, p. 90.

disclaimers of the respective Federation Agreements so that Laurentian can increase its revenues.[2]

5. The DIP Lender did not file an affidavit in the disclaimer motions of Thorneloe and SU. Before these motions, DIP Lender's counsel made it abundantly clear, on several occasions, to counsel for Thorneloe, SU and others that the DIP Lender was not agreeable to being cross-examined since it had not filed affidavit evidence in the proceedings. Firstly, during a case conference before Chief Justice Morawetz on April 20, 2021, counsel for Thorneloe and/or SU requested, among other things, to cross-examine the DIP Lender. DIP Lender's counsel refused since the DIP Lender had not sworn or filed any affidavits in the proceedings.[3] In his Directions dated April 21, 2021, Chief Justice Morawetz held, among other things, that if Thorneloe or SU had questions in respect of the DIP loan, they could be directed to the Monitor.[4] Secondly, in a letter dated April 28, 2021, from DIP Lender's counsel to Monitor's counsel, which was shared with Thorneloe's and SU's counsel, the DIP Lender refused to be cross-examined since it had not filed affidavit evidence.[5] Finally, in "open", Zoom-hearing, court proceedings in the Thorneloe and SU disclaimer motions, DIP Lender's counsel repeated by way of submissions the DIP Lender's position that it had not filed affidavit evidence and therefore should not be required to be cross-examined. In response to the submissions made by counsel, Chief Justice Morawetz held in the Thorneloe motion:

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[2] Reasons of Justice Gilmore, dated May 7, 2021, at paras. 40-44 ("**Reasons of Justice Gilmore")**, MR, Tab 21, pp. 2022-2023.
[3] Email dated April 27, 2021 from Vern DaRe to Ashley Taylor and copying several parties including counsel for Thorneloe and SU, MR, Tab 5(C), p. 1987.
[4] Directions of Chief Justice Morawetz dated April 21, 2021, at para. 15, MR, Tab 19, p. 2007.
[5] Letter dated April 28, 2021 from Vern DaRe to Ashley Taylor, MR, Tab 5(F), p. 1999.

> Thorneloe also takes issue with respect to the reluctance of a representative of the DIP Lender to be cross-examined or to answer any questions with respect to the DIP Financing…With respect to the cross-examination of the DIP Lender, I note that no affidavit has been filed in these proceedings by a representative of the DIP Lender... [6]

In the SU motion, Justice Gilmore held as follows:

> …SU adds that it was not permitted to cross-examine the DIP Lender or access communication between the DIP Lender and LU…SU complained that it was not given access to information as between LU and the DIP Lender so that it could satisfy itself that the Disclaimer was truly an essential term of the second advance. SU was given the opportunity to submit written questions but was dissatisfied with the answers.[7]

6. Thorneloe cannot satisfy the test for leave to appeal. Leave to appeal from the orders or decisions of a CCAA judge will only be granted sparingly. The decisions above, and elaborated below, regarding the DIP Lender and/or conditions under the DIP Loan Amendment Agreement including the disclaimer of the Federation Agreements by May 1, 2021, were discretionary decisions by the Court. Morawetz C.J. considered the case law and commentary and applied them correctly, and gave cogent, fact-specific reasons for why it was appropriate to dismiss the motions. Thorneloe's motion materials largely ignore these reasons and repeat the same arguments that were rejected by the Chief Justice.

7. While the Thorneloe and SU disclaimer motions were heard by different Judges in these CCAA proceedings, respectively Chief Justice Morawetz and Justice Gilmore, the issues in each motion as they relate to the disclaimer of the respective Federation Agreements, the DIP Lender and the DIP Loan Amendment Agreement were similar, if not identical. Both disclaimer motions were dismissed. In their respective decisions released

[6] Reasons of Chief Justice Morawetz (May 7, 2021), at paras. 64, 66, MR, Tab 7, p. 77.
[7] Reasons of Justice Gilmore (May 7, 2021), at paras. 40, 43, MR, Tab 21, p. 2022.

concurrently, Chief Justice Morawetz and Justice Gilmore made similar findings of fact and provided similar reasons in dismissing the disclaimer motions. This supports the correctness of their decisions.

8. The DIP Lender has already advanced $25 million to Laurentian in these CCAA proceedings. The DIP financing represents a "lifeline" to Laurentian. Before advancing an additional $10 million to Laurentian and extending the original maturity date beyond May 1, 2021, the DIP Lender made the business decision that certain conditions would have to be satisfied under the DIP Loan Amendment Agreement. These were negotiated with Laurentian. One of those conditions was the disclaimer of the Federation Agreements. The conditions were not part of a "loan to own strategy", in the words of Chief Justice Morawetz. There was no intention by the DIP Lender, as found by Justice Gilmore, of "running this process" or ousting the "jurisdiction of the Superior Court" at the "whim of the DIP Lender". The conditions do not "pervert the reorganizational process" or "place the debtor in bondage", adopting some of the more colourful language from U.S. jurisprudence dealing with excessive lender control or overreaching DIP lenders in Chapter 11 proceedings.[8] Rather, the DIP Lender had already advanced $25 million to Laurentian and had specific conditions on advancing more taking into account, to paraphrase Morawetz C.J., "commercial reality in assessing its options" and in the words of Justice Gilmore, so that "LU can increase its revenues".

[8] *In re Tenney Village Co., Inc.*, 104 B.R. 562 (Bktcy. D.N.H., 1989) at p. 568, cited by Wael Rostom and Caitlin Fell, "Recent Trends in DIP Financing" at note 15 (2016) 5-4 IIC Journal, Book of Authorities of the Moving Party dated May 25, 2021, Tab 6.

9. This motion for leave to appeal should therefore be dismissed so that the "lifeline" provided by the DIP loan to Laurentian is not prejudiced or negatively impacted. The DIP Lender opposes the motion for leave which, if granted, would have the following negative ramifications: (a) Laurentian will be in default or potential default of the DIP facility or DIP Loan Amendment Agreement; and (b) significant uncertainty will arise for DIP lenders, including this DIP Lender, if terms and conditions in commercial contracts, as negotiated by sophisticated parties such as DIP lenders and debtors, are subsequently deleted, removed or held invalid by courts after advances are made under the DIP facility. In high risk lending situations, the uncertainty created by such judicial intervention may cause a "chill" in DIP financing, which is often a last resort for financially strapped debtors under the CCAA.

PART 2 - STATEMENT OF THE FACTS

10. Pursuant to the direction of Justice Hoy at a case conference heard on May 17, 2021, the parties are filing their factums on the motion for leave to appeal with the expectation that they will also be used on the appeal should leave be granted, as supplemented by supplementary materials, if necessary.[9]

The DIP loan as a "Lifeline"

11. Laurentian is a publicly funded, bilingual and tricultural postsecondary institution located in Sudbury, Ontario.[10]

[9] Directions of Case Management Judge dated May 17, 2021, MR, Tab 22.
[10] Endorsement of Morawetz C.J. dated February 1, 2021 (the "**February 1 Endorsement**") at para. 2, MR, Tab 13, p. 715.

12. After many years of recurring operational deficits in the millions of dollars and despite efforts to improve its financial stability, Laurentian experienced a liquidity crisis and was insolvent.[11] CCAA protection followed. Laurentian's first appearance before the Court seeking this protection was on an *ex parte* basis on February 1, 2021.[12]

13. DIP financing was crucial. Without it, Laurentian would have run out of cash to meet payroll as early as the end of February, 2021.[13]

14. Morawetz C.J. granted an Initial Order dated February 1, 2021 (the "**Initial Order**").[14]

15. In his reasons for granting the Initial Order, Morawetz C.J. reached the following conclusions:

    (a) Laurentian is plainly insolvent and faces a severe liquidity crisis;[15]

    (b) The CCAA applies to Laurentian notwithstanding its status as a not-for-profit, non-share capital corporation;[16] and

    (c) A stay of proceedings against Laurentian was necessary to give it the breathing room necessary to financially and operationally restructure itself, as doing so furthered the primary purpose of the CCAA, being the successful restructuring of an insolvent company.[17]

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[11] February 1 Endorsement at para. 3, MR, Tab 13, p. 715.
[12] February 1 Endorsement at para. 4, MR, Tab 13, p. 715.
[13] Endorsement of Chief Justice Morawetz dated February 12, 2021 (the **"February 12 Endorsement"**) at para. 73, MR, Tab 13, p. 769.
[14] Initial Order dated February 1, 2021 (the "**Initial Order**"), MR, Tab 13, pgs. 696-712.
[15] February 1 Endorsement at para. 33, MR, Tab 13, p. 719.
[16] February 1 Endorsement at para. 29, MR, Tab 13, p. 718.
[17] February 1 Endorsement at paras. 35-43, MR, Tab 13, pgs. 719-721.

16. The comeback hearing proceeded on February 10, 2021. This resulted in the issuance of an amended and restated initial order dated February 11, 2021 (the "**A&R Initial Order"**)[18]

17. The A&R Initial Order approved, among other things, the debtor-in-possession interim financing in the principal amount of $25 million (the "**DIP Facility**"), the super-priority charge in that amount in favour of the DIP Lender (the "**DIP Lender's Charge")** and the extension of the stay period to April 30, 2021.

18. In his reasons for approving the DIP Facility and DIP Lender's Charge under the A&R Initial Order, Morawetz C.J. reached the following conclusions:

(a) Laurentian is facing a liquidity crisis and that absent additional financing, Laurentian will be unable to meet payroll at the end of February;[19]

(b) A competitive process involving multiple potential DIP lenders was entered into, following which Laurentian secured the DIP Facility from the DIP Lender;[20]

(c) The notice requirements under s. 11.2(1) of the CCAA have been met; Laurentian has immediate liquidity needs and <u>cannot obtain alternative financing outside of these CCAA proceedings;</u> the terms of the DIP Term Sheet resulted from an arms-length negotiation; the DIP Facility is necessary in order for Laurentian to implement its restructuring plan and <u>without it, Laurentian will not be able to continue operatio</u>ns;[21] and

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[18] Amended and Restated Initial Order dated February 11, 2021, MR, Tab 13, pgs. 728-753.
[19] February 12 Endorsement at para. 73, MR, Tab 13, p. 769.
[20] February 12 Endorsement at para. 74, MR, Tab 13, p. 769.
[21] February 12 Endorsement at para. 78, MR, Tab 13, p. 769 (emphasis added).

(d) The quantum of the DIP Facility is reasonable and appropriate.[22]

The DIP Amendment

19. The DIP Loan Amendment Agreement gave rise to several motions in these CCAA proceedings. Under the DIP Loan Amendment Agreement, among other things and generally, the original term or maturity date of May 1, 2021 would be extended to August 31, 2021, and the original DIP Facility and DIP Lender's Charge in the principal amount of $25 million would be increased by $10 million, to $35 million, subject to several conditions being satisfied including the disclaimers of Laurentian's Federation Agreements and Financial Distribution Notices with each of Huntington University, Thorneloe University and the University of Sudbury by May 1, 2021 (the "**DIP Amendment**").[23]

20. On April 29 and 30, 2021, the following motions were heard by the Court regarding the DIP Amendment and other matters:

(a) a motion by Laurentian before Chief Justice Morawetz on April 29, 2021 seeking various relief including an extension of the stay period to August 31, 2021, the approval of the DIP Amendment and increase of the DIP Lender's Charge, and the approval of other agreements including the transition agreement with Huntington University, which was negotiated by the parties as a result of Laurentian's termination of its federated relationship with Huntington University ("**Laurentian's DIP Amendment Motion**");

[22] February 12 Endorsement at para. 79, MR, Tab 13, p. 769.
[23] DIP Loan Amendment Agreement dated April 19, 2021 (accepted April 20, 2021), MR, Tab 13, pgs. 1048-1053.

(b) a joint cross-motion by Thorneloe University and University of Sudbury heard by Chief Justice Morawetz on April 29, 2021 opposing the approval of the DIP Amendment (the "**Joint Cross-Motion")**;

(c) a motion by Thorneloe University heard by Chief Justice Morawetz on April 29, 2021 seeking to set aside the disclaimer of the Federation Agreement and the Financial Distribution Notice between Laurentian and Thorneloe University ("**Thorneloe Motion")**; and

(d) a motion, conducted as a bilingual hearing, by the University of Sudbury heard by Justice Gilmore on April 30, 2021 seeking to set aside the disclaimer of the Federation Agreement and the Financial Distribution Notice between Laurentian and the University of Sudbury ("**SU Motion"**).

21. At the conclusion of Laurentian's DIP Amendment Motion, Thorneloe's Motion and SU's Motion, the Court reserved its decision but granted a brief extension of the stay period to May 2, 2021.

22. On May 2, 2021, Chief Justice Morawetz and Justice Gilmore respectively released brief initial endorsements, with reasons to follow, that:

(a) granted Laurentian all of the relief in Laurentian's DIP Amendment Motion including the extension of the stay period to August 31, 2021, the approval of the DIP Amendment and the increase of the DIP Lender's Charge; and dismissed the Joint-Cross Motion;[24]

[24] Endorsement of Chief Justice Morawetz dated May 2, 2021 regarding Laurentian's DIP Amendment Motion, MR, Tab 6, pgs. 60-62.

(b) dismissed the Thorneloe Motion;[25] and

(c) dismissed the SU Motion.[26]

23. On May 7, 2021, Chief Justice Morawetz and Justice Gilmore released their full reasons for respectively dismissing the Thorneloe Motion[27] and SU Motion. [28]

24. On May 7, 2021, an Order was issued (dated May 2, 2021) granting Laurentian's relief in Laurentian's DIP Amendment Motion.[29]

25. On May 14, 2021, Chief Justice Morawetz issued his reasons regarding Laurentian's DIP Amendment Motion.[30] In his May 14 reasons, Morawetz C.J., in approving the DIP Amendment, adopted similar reasons regarding the DIP Lender from his May 7 decision dismissing Thorneloe's Motion. In particular, at paragraph 43 of his May 14 decision, Chief Justice Morawetz held that paragraphs 59 to 66 of his May 7 decision dismissing Thorneloe's Motion were equally applicable and incorporated, by reference, to his May 14 decision or endorsement, as follows:

> [59] It is also necessary to take into account the position of the DIP Lender. The DIP Lender has put forth a condition for its continued support and for increased financing. That condition is that the Disclaimer with respect to Thorneloe and U Sudbury had to be finalized by May 1, 2021, subject to any reserved decision of the court.
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> [60] Thorneloe challenges the position of the DIP Lender for two reasons. First, the condition relating to the Disclaimer was not a condition

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[25] Endorsement of Chief Justice Morawetz dated May 2, 2021 regarding Thorneloe's Motion, MR, Tab 5, pgs. 56-58.
[26] Endorsement of Justice Gilmore dated May 2, 2021 regarding the SU Motion, MR, Tab 20, pgs. 2011-2013.
[27] Reasons of Chief Justice Morawetz dated May 7, 2021 in Thorneloe's Motion, MR, Tab 7, pgs. 64-80.
[28] Reasons of Justice Gilmore dated May 7, 2021 in the SU Motion, MR, Tab 21, pgs. 2015-2039.
[29] Order of Chief Justice Morawetz dated May 2, 2021 regarding Laurentian's DIP Amendment Motion, MR, Tab 4, pgs. 49-54.
[30] Reasons of Chief Justice Morawetz dated May 14, 2021 in Laurentian's DIP Amendment Motion, MR, Tab 8, pgs. 82-92.

of the original DIP and was inserted only after the Notice of Disclaimer was issued. Second, the analysis performed by Farber indicates that the increased DIP Loan is not required until the latter part of June at the earliest.

[61] There is, in my view, no basis to question the legitimacy of the DIP Lender nor question the conditions that the DIP Lender has put forth with respect to any request to extend the DIP Loan and to increase the amount of the DIP Financing. The DIP Lender is entitled to take into account commercial reality in assessing its options.

[62] The DIP Lender is not a pre-existing lender to Laurentian, nor is there any evidence that the DIP Lender is engaged in a “loan to own strategy”. These facts distinguish this DIP Lender from a number of DIP lenders that have been involved in the cases referenced by counsel to Thorneloe, as referenced in Rostom and Fell, “Recent Trends in DIP Financing” (2016) 5-4 IIC Journal; *Essar Steel Algoma (Re),* Endorsement of Newbould J. dated November 16, 2015; and *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459.

[63] It is also relevant to remember that this is not a situation where the Court is being asked to approve DIP financing with this DIP Lender. These approvals were granted in February 2021 with no party objecting and with no appeals being filed. It was a competitive process and the DIP Lender was one of eight potential DIP lenders identified at the outset of the proceedings.

[64] Thorneloe also takes issue with respect to the reluctance of a representative of the DIP Lender to be cross-examined or to answer any questions with respect to the DIP Financing.

[65] In response, Laurentian takes the position that the terms for the continued DIP were negotiated as part of a process of achieving a viable long-term plan. Second, although the increased DIP may not be necessary until mid-June, it is a requirement for any extension of the stay to provide a cash flow statement that takes into account the entirety of the Stay Period, and it is necessary to provide the necessary assurances to faculty and students that Laurentian will be able to operate for the next academic term, which commences May 3, 2021 and extends towards the middle to the latter part of July 2021. It is simply not feasible, from its standpoint, to operate without the continued DIP Facility and the certainty that the DIP Facility will be available throughout the entirety of the academic term and the Stay Period.

[66] With respect to the cross-examination of the DIP Lender, I note that no affidavit has been filed in these proceedings by a representative of the DIP Lender. In addition, the DIP Lender is not a pre-existing

> lender. The DIP Lender is not involved in any of the pre-CCAA DIP contractual relationships. It is up to the debtor, with the assistance of the Monitor, to negotiate the terms of the DIP Financing. There is no evidence that the DIP Lender has any ulterior motive in negotiating the condition to extend additional financing and to extend the term.

26. On May 27, 2021, an Order was issued (dated May 2, 2021) dismissing the Thorneloe Motion and Joint-Cross Motion.[31]

The Moving Party

27. The opposition to the disclaimer of the Federation Agreements and to the DIP Amendment is by Thorneloe (the "**Moving Party**").

PART 3- THE RESPONDING PARTY'S POSITION ON THE ISSUES

The Framework for Granting Leave to Appeal in this Case

28. Section 13 of the CCAA requires any person dissatisfied with an order or decision made under that Act to obtain leave to appeal:[32]

> **Leave to appeal**
>
> 13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

29. Leave to appeal will be granted only sparingly by appellate courts in CCAA proceedings. The "real time" dynamic of CCAA proceedings often encourages this deference. The discretionary character underlying many of the orders made by supervising judges in such

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[31] Order of Chief Justice Morawetz dated May 2, 2021 dismissing the Thorneloe Motion and Joint-Cross Motion, MR, Tab 3, pgs. 45-46.
[32] *CCAA*, s. 13.

proceedings also explains the reluctance to grant leave. A high degree of deference is therefore to be accorded to a supervising judge's decisions, and appellate courts will not exercise their own discretion in place of that already exercised by the lower court.[33]

30. In deciding whether to grant leave, the court will consider whether:[34]

(a) The proposed appeal is *prima facie* meritorious or frivolous;

(b) The point on the proposed appeal is of significance to the practice;

(c) The point on the proposed appeal is of significance to the proceeding; and

(d) Whether the proposed appeal will unduly hinder the progress of the action.

31. In applying these factors, consideration should also be given to the standard of review. Given the commercial nature of the insolvency proceedings which often require quick decisions, and to the intimate knowledge of a supervising judge in overseeing a CCAA proceeding, appellate courts have expressed a reluctance to interfere, except in clear cases.[35]

32. Although none of the four factors support the Moving Party in this case, the courts have held that these four factors are cumulative and that the failure to establish any one of them will result in the dismissal of the motion.[36]

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[33] *New Skeena Forest Products Inc., Re,* 2005 BCCA 192 at para. 20, Book of Authorities of the DIP Lender ("**BOA**"), Tab 1; *Essar Steel Algoma Inc., Re,* 2017 ONCA 478 at para. 19, BOA, Tab 2.
[34] *Nortel Networks Corp. Re,* 2016 ONCA 332 at para. 34, BOA, Tab 3.
[35] *Calpine Canada Energy Ltd., Re,* 2007 ABCA 266 at para. 14, BOA, Tab 4.
[36] *Statoil Canada Ltd. (Arrangement relatif a)*, 2012 QCCA 665, at paras. 4 and 7, BOA, Tab 5.

(a) The proposed appeal is not *prima facie* meritorious

33. In its factum, Thorneloe argues, with respect to the DIP Lender, that Morawetz C.J. committed the following errors of law and factual findings in upholding the disclaimer of the Federation Agreements: (i) impliedly concluding that the DIP Lender would refuse to advance the additional $10 million unless the court upheld the disclaimer despite the absence of cogent evidence of that outcome other than the statements of the DIP Lender's lawyer in open court, who also stated he did not file an affidavit by the DIP Lender to avoid being cross-examined; (ii) allowing the CCAA process to be disproportionally controlled by the DIP Lender in the following circumstances: where the new DIP condition required the court to uphold the disclaimer against Thorneloe; the evidence showing that it would result in the insolvency of Thorneloe; the CCAA court erred by not inquiring further into the justification for the need of the new condition and instead remarking that "It is up to the debtor, with the assistance of the Monitor, to negotiate the terms of the DIP Financing"; and no evidence before the court that this condition was inserted at the insistence of the DIP Lender, who refused to attend an examination, refused to produce documents and invoked confidentiality to avoid fully answering written questions put to it; and (iii) not finding that the DIP Lender had not met the good faith requirement under s. 18.6 of the CCAA by seeking to close down Thorneloe for the admitted motive of eliminating Thorneloe as a competitor.[37]

34. None of these grounds are prima facie meritorious, as addressed below.

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[37] Factum of the Moving Party dated May 25, 2021 ("**Factum**"), at paras 14, 15, 63, 64, 71.

(i) Evidentiary Sources

35. Thorneloe states that there was no cogent evidence before Morawetz C.J. to support his implicit conclusion that the DIP Lender would refuse to advance the additional $10 million unless the court upheld the disclaimer. This is incorrect. There were several evidentiary sources before Chief Justice Morawetz supporting his conclusions in this regard, whether explicit or implicit, including: (i) the DIP Loan Amendment Agreement, which expressly made the additional advance of $10 million and extension of the maturity date to August 31, 2021 subject to the satisfaction of several conditions including the disclaimer;[38] (ii) the Affidavit of Robert Hache, sworn on April 21, 2021,in which the affiant swore at paragraph 189 that "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;"[39] and (iii) the letter dated April 28, 2021 from DIP Lender's counsel to Monitor's counsel, which was shared with counsel for Thorneloe and SU, and attempted to address their questions. Part of it reads as follows:

> Regarding the first question, the DIP Lender will not consider extending from April 30, 2021 until May 31, 2021 as the effective date for the disclaimers of the Federation Agreements for several reasons: Firstly, the DIP Lender has already advanced $25M to Laurentian University ("LU") to be used within a timeline that required immediate cost-savings to be achieved by April 30, 2021. The April 30, 2021 date was not random or arbitrary, and the reasons for that time period were outlined in the materials filed by LU in support of the Initial Order. It was a critical date tied to the need to obtain immediate cost savings…Secondly, in making its decision as to whether to advance further funds to LU, the DIP Lender does not view this one disclaimer with U of S in isolation or alone; it is

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[38] DIP Loan Amendment Agreement dated April 19, 2021 (accepted April 20, 2021), MR, Tab 13, pgs. 1048-1053.
[39] Affidavit of Robert Hache sworn April 21, 2021, at para. 189, MR, Tab 13, p. 671.

> tied together with the disclaimer of the other Federation Agreements to be effective as of May 1, 2021…Thirdly, the DIP Lender has made a business decision that these disclaimers are a necessary component to LU's financial sustainability. It therefore requires that this Condition to Funding be satisfied by May 1, 2021.[40]

36. As to the assertion by the Moving Party that the DIP Lender's lawyer in "open" court stated he did not file an affidavit by the DIP Lender to avoid being cross-examined, this is incorrect. As noted above, before and during the disclaimer motions, the DIP Lender's position on this issue was that it did not swear and file affidavits in these CCAA proceedings and therefore did not think it was subject to cross-examination. Since "open" court was actually a Zoom hearing and certain technical issues arose during the submissions of the DIP Lender's lawyer, this may explain the source of the misunderstanding. In any event, the Chief Justice clearly understood the submission or evidence before him, in that he found that with respect to the cross-examination of the DIP Lender, "no affidavit has been filed in these proceedings by a representative of the DIP Lender."[41]

(ii) Controlling DIP Lenders

37. There is no evidence to support the argument that the CCAA process is being disproportionally controlled by the DIP Lender. Two Judges in these CCAA proceedings rejected the idea. Morawetz C.J. held that there was no evidence that the DIP Lender was engaged in a "loan to own strategy"[42]; and Justice Gilmore rejected the argument that the CCAA process was being pursued "at the whim of the DIP Lender"; that the DIP Lender

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[40] Letter dated April 28, 2021 from Vern DaRe to Ashley Taylor, MR, Tab 5(F), p. 2000.
[41] Reasons of Chief Justice Morawetz, dated May 7, 2021, at para. 66, MR, Tab 7, p. 77.
[42] Reasons of Chief Justice Morawetz, dated May 7, 2021, at para. 62, and dated May 14, 2021, at para. 43, MR, Tab 7, p. 77 and Tab 8, p. 90.

was running this process; or that the DIP Lender had "ousted the jurisdiction of the Superior Court"[43].

38. Chief Justice Morawetz also distinguished this DIP Lender from a number of the DIP lenders involved in the cases and commentary referenced by counsel to Thorneloe regarding controlling DIP lenders.[44] This DIP Lender was not one of them.

39. Morawetz C.J. also held that: "It is up to the debtor, with the assistance of the Monitor, to negotiate the terms of the DIP Financing. There is no evidence that the DIP Lender has any ulterior motive in negotiating the condition to extend additional financing and to extend the term."[45] As recognized by Justice Gilmore in the SU Motion, the disclaimer of the Federation Agreements was essential for an increased revenue stream for Laurentian.[46]

40. Thorneloe and SU were given the opportunity to submit written questions to the DIP Lender through the Monitor. As noted above, Morawetz C.J. permitted this in his Directions dated April 21, 2021. However, as noted by Justice Gilmore in the SU Motion, SU was given the opportunity to submit written questions but was dissatisfied with the answers. The same applies to Thorneloe. For example, here are some of the questions that were asked by Thorneloe and/or SU, and the answers provided by the DIP Lender: Question 6. "For the DIP Lender: To produce any modelling of detailed financial analysis prepared by the DIP Lender as to why the termination of the Federated

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[43] Reasons of Justice Gilmore, dated May 7, 2021, at paras. 40, 41, MR, Tab 21, p. 2022.
[44] Reasons of Chief Justice Morawetz, dated May 7, 2021, at para. 62, and dated May 14, 2021, at para. 43, MR, Tab 7, p. 77 and Tab 8, p. 90.
[45] Reasons of Chief Justice Morawetz, dated May 7, 2021, at para. 66, and dated May 14, 2021, at para. 43, MR, Tab 7, p. 77-78 and Tab 8, p. 91.
[46] Reasons of Justice Gilmore, dated May 7, 2021, at paras. 44, 47, MR, Tab 21, p. 2023.

Agreements was now essential to the DIP extension and increase.." Response: "The DIP Lender did not do its own modelling and reviewed information provided by LU and by reviewing that information was able to ascertain or determine that the termination of the Federated Agreements would save costs in the millions of dollars." Question 8. "For the DIP Lender and Monitor: The DIP Agreement required a revised cash flow forecast and multiyear budget to be provided to the DIP Lender demonstrating that Laurentian is financially sustainable. When did the DIP Lender receive a copy of the revised cash flow forecast and a multiyear budget, and any drafts? To produce a copy of any and all drafts and communications regarding same." Response: "…Subject to LU's rights and protections under the Confidentiality Provision, the DIP Lender received a first draft of the cash flow forecast in support of the requested additional DIP advance on April 8, 2021, in which the forecast showed an amount of $12M needed as additional funding for LU with a maturity date to August 31, 2021. Upon reviewing the cash flow forecast, the DIP Lender agreed to advance $10M as additional funding subject to several conditions. That is, LU asked for an additional $12M and the DIP Lender only agreed to advance $10M subject to several conditions." [47] This was acknowledged by Justice Gilmore, in her summary of the facts in the SU Motion, when she noted: "…LU sought additional DIP funding of $12M. The DIP lender agreed to provide additional funding of $10M; however, the Disclaimer of the agreements with Federated Universities was a pre-condition of the second advance."[48]

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[47] Letter dated April 28, 2021 from Vern DaRe to Ashley Taylor, MR, Tab 5(F), pgs. 2002, 2003.
[48] Reasons of Justice Gilmore, dated May 7, 2021, at para. 5, MR, Tab 21, p. 2016.

(iii) Good Faith

41. There is no evidence that the DIP Lender is not acting in good faith pursuant to section 18.6 of the CCAA. Two Judges in these CCAA proceedings found that there was no ulterior motive in negotiating the disclaimer condition, and certainly no ulterior motive of eliminating Thorneloe as a competitor. Chief Justice Morawetz found no basis to question the legitimacy of the DIP Lender, nor question the conditions that the DIP Lender put forth with respect to any request to extend the DIP loan and to increase the amount of the DIP financing. He held that the DIP Lender was entitled to take into account commercial reality in assessing its options. Morawetz C.J. also noted that the DIP Lender was not a pre-existing lender to Laurentian.[49] Similarly, Justice Gilmore acknowledged that the DIP Lender is a stranger to Laurentian and was not a pre-filing lender. Gilmore J. confirmed that the DIP Lender is an arm's length commercial lender who has risk in a novel lending situation where its security is over a public institution. Justice Gilmore concluded that the DIP Lender has already advanced a significant amount, and has specific conditions on advancing more including the disclaimers of the respective Federation Agreements so that Laurentian can increase its revenues.[50]

42. In the end, the decisions of Chief Justice Morawetz involved a very high degree of discretion. There is an evidentiary and legal basis that supports his treatment of the DIP Lender and the disclaimer of the Federation Agreements as a condition of additional DIP financing and extension of the maturity date. The DIP Lender is not a controlling DIP

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[49] Reasons of Chief Justice Morawetz, dated May 7, 2021, at paras. 59-66, and dated May 14, 2021, at para. 43, MR, Tab 7, p. 77-78 and Tab 8, p. 90.

[50] Reasons of Justice Gilmore, dated May 7, 2021, at paras. 40-44, MR, Tab 21, p. 2022.

Lender and is acting in good faith in these CCAA proceedings. Justice Gilmore reached similar conclusions in the SU Motion in these CCAA proceedings. It is not for this Court to re-weigh the relevant considerations and second-guess Morawetz C.J.'s exercise of discretion.

43. For all of these reasons, the appeal is not *prima facie* meritorious.

(b) The points on the proposed appeal are not of significance to the practice

44. The decisions below were highly fact-dependent and discretionary. They are very unlikely to be of significance or precedential value for other proceedings. Also, Chief Justice Morawetz did not create any new legal theories or untested principles of law.

45. Regarding the DIP Lender, the premise underlying Thorneloe's opposition to Laurentian's disclaimer of the Federation Agreements under section 32 of the CCAA, is that the DIP Lender is a controlling DIP lender not acting in good faith pursuant to section 18.6 of the CCAA, and that the disclaimer condition operated as, a "threat" by the DIP Lender not to extend the maturity date and not lend a further $10 million and an "ultimatum" on the CCAA court.[51] At the same time, the Moving Party argued that there was an absence of cogent evidence that the DIP Lender would not extend the maturity date and advance the $10 million if the disclaimer condition was not met or satisfied in the circumstances.[52]

46. Whether the DIP Lender was a controlling DIP lender and acting in bad faith (or not in good faith) depended on the facts. As to controlling DIP lenders, Morawetz C.J. reviewed the cases and commentary provided by Thorneloe and held as follows:

[51] Factum, at paras 11, 12, 15.
[52] Factum, at para. 14.

> The DIP Lender is not a pre-existing lender to Laurentian, nor is there any evidence that the DIP Lender is engaged in a 'loan to own strategy'. These facts distinguish this DIP Lender from a number of DIP lenders that have been involved in the cases referenced by counsel to Thorneloe, as referenced in Rostom and Fell, “Recent Trends in DIP Financing” (2016) 5-4 IIC Journal; *Essar Steel Algoma (Re),* Endorsement of Newbould J. dated November 16, 2015; and *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459.[53]

Morawetz C.J. also held that there was no evidence that the DIP Lender had any ulterior motive in negotiating the condition to extend additional financing and to extend the term.[54] Finally, Chief Justice Morawetz noted that "[r]estructurings are not easy and often result in treatment that a party can consider to be extremely harsh. However, that does not necessarily mean that the other party has not been acting in good faith."[55]

(c) The point on appeal is not of significance to this CCAA proceeding

47. Thorneloe argues that the point on appeal is of significance to this CCAA proceeding as it will determine whether Thorneloe will have to become insolvent and closed down permanently.[56] Chief Justice Morawetz acknowledged that the disclaimer will have financial consequences to Thorneloe and could lead to the cessation of operations of Thorneloe. However, Morawetz C.J. also considered the broader implication of disallowing the disclaimer, namely the potential demise of Laurentian, unravelling of Laurentian's restructuring plan and collapse of Laurentian; and the significant impact on the greater Sudbury community.[57] In the SU Motion, Justice Gilmore also acknowledged

[53] Reasons of Chief Justice Morawetz dated May 7, 2021, at para. 62, in Thorneloe's Motion, MR, Tab 7, p. 77.
[54] Reasons of Chief Justice Morawetz dated May 7, 2021, at para. 66, in Thorneloe's Motion, MR, Tab 7, p. 77-78.
[55] Reasons of Chief Justice Morawetz dated May 7, 2021, at para. 72, in Thorneloe's Motion, MR, Tab 7, p. 78-79.
[56] Factum, at para. 82.
[57] Reasons of Chief Justice Morawetz dated May 7, 2021, at paras. 74-78, in Thorneloe's Motion, MR, Tab 7, p. 79.

that "SU will suffer financial consequences as a result of the Disclaimer".[58] However, Justice Gilmore went on to say that "any financial consequences suffered by SU must be balanced with the overall financial considerations in the restructuring which go far beyond SU's speculations of insolvency".[59] Justice Gilmore concluded that "…it is LU who is under CCAA protection and not SU. The only way for LU to put forward a viable plan for its creditors is to temporarily increase its liabilities [i.e., by additional DIP financing]." [60]

48. The potential financial consequences of the disclaimer to Thorneloe does not justify granting leave in the circumstances. The Court has already done that balancing act. The potential financial consequences suffered by Thorneloe were balanced against the overall financial considerations in Laurentian's restructuring.

(d) The appeal would unduly hinder the progress of the action

49. Thorneloe argues, in part, that there is no longer any risk that an appeal would be a distraction from restructuring efforts and that the proposed appeal will not have any material impact on the security, collateral or super-priority of the DIP Lender. The DIP Lender disagrees for various reasons.

50. If leave to appeal is granted, time devoted to an appeal is time lost to the CCAA process and Laurentian's restructuring efforts.

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[58] Reasons of Justice Gilmore, dated May 7, 2021, at para. 39, MR, Tab 21, p. 2022.
[59] Reasons of Justice Gilmore, dated May 7, 2021, at para. 39, MR, Tab 21, p. 2022.
[60] Reasons of Justice Gilmore, dated May 7, 2021, at para. 44, MR, Tab 21, p. 2023. (emphasis added)

51. If leave to appeal is granted, the proposed appeal will unduly hinder the restructuring as follows: (a) Laurentian will be in default or potential default of the DIP Facility or DIP Loan Amendment Agreement; and (b) Laurentian will experience challenges obtaining further DIP financing, if necessary, or at a higher cost, in the future, because significant uncertainty will arise for DIP lenders, including this DIP Lender, if terms and conditions in commercial contracts, as negotiated by sophisticated parties such as DIP lenders and debtors, are subsequently deleted, removed or held invalid by courts after advances are made under the DIP facility. In high risk lending situations, the uncertainty created by such judicial intervention may cause a "chill" or "price increase" in DIP financing, which is often a last resort for financially strapped debtors under the CCAA.

52. For all of these reasons, the Moving Party has not satisfied the test for leave to appeal from the discretionary decisions of a CCAA supervising judge, and its motion should be dismissed.

PART 4 - ORDER SOUGHT

53. The DIP Lender seeks an order dismissing the motion for leave to appeal, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of June, 2021.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *New Skeena Forest Products Inc., Re,* 2005 BCCA 192.

2. *Essar Steel Algoma Inc., Re,* 2017 ONCA 478.

3. *Nortel Networks Corp. Re,* 2016 ONCA 332.

4. *Calpine Canada Energy Ltd., Re,* 2007 ABCA 266.

5. *Statoil Canada Ltd. (Arrangement relatif a)*, 2012 QCCA 665.

SCHEDULE "B"
RELEVANT STATUTES

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

General power of court

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Leave to appeal

13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

Good Faith

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

Good faith — powers of court

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

Disclaimer or resiliation of agreements

32 (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 resiliation.

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

COURT OF APPEAL FOR ONTARIO

RESPONDING FACTUM OF THE DIP LENDER
(Motion by Thorneloe University for Leave to Appeal)

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