Court of Appeal File No. M52471

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

FACTUM OF THE RESPONDING PARTY, LAURENTIAN UNIVERSITY OF SUDBURY (Motion for Leave to Appeal Order Regarding Disclaimer)

June 4, 2021

THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200|
Toronto, Ontario M5K 1K7
Fax: (416) 304-1313

D.J. Miller (LSO# 34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Scott McGrath (LSO #59346K)
Tel: (416) 304-1592
Email: smcgrath@tgf.ca

Derek Harland (LSO #79504N)
Tel: (416) 304-1127
Email: dharland@tgf.ca

Lawyers for the Responding Party,
Laurentian University of Sudbury

TO: **KOSKIE MINSKY LLP**
20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Andrew J. Hatnay (LSO# 31885W)
Tel: 416-595-2083
Email: *ahatnay@kmlaw.ca*

Sydney Edmonds (LSO# 79946K)
Tel: 416-595-2260
Email: *sedmonds@kmlaw.ca*

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Eugene Meehan, Q.C. (LSO# 29046T)
Tel: 613-695-8855
Email: *emeehan@supremeadvocacy.ca*

Lawyers for the Moving Party,
Thorneloe University

AND TO: **THE ATTACHED SERVICE LIST**

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PART I - OVERVIEW STATEMENT

1. The moving party, Thorneloe University ("**Thorneloe**"), seeks leave to appeal from an order of Chief Justice Morawetz (the "**CCAA Judge**" or "**Morawetz C.J.**"), the supervising judge in the proceeding brought by Laurentian University of Sudbury ("**Laurentian**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"). In his order, Morawetz C.J. dismissed a motion by Thorneloe opposing the disclaimer by Laurentian of two agreements between Laurentian and Thorneloe.

2. Thorneloe cannot satisfy the test for leave to appeal. The decision below was a highly discretionary decision and was based on a number of findings of fact that were clearly supported by the evidence before the Court. Thorneloe's proposed appeal is effectively a request that the Court of Appeal reweigh the factors relevant to the motion below and overturn a number of key findings of fact. Thorneloe has not identified any legal error by the CCAA Judge, who applied the correct test and gave cogent, fact-specific reasons why the motion by Thorneloe should be dismissed.

3. Thorneloe's motion for leave to appeal should be dismissed, with costs.

PART II - STATEMENT OF THE FACTS

(a) Laurentian and its Critical Financial Situation

4. Laurentian is a publicly-funded, bilingual and tricultural postsecondary institution in Sudbury, Ontario. Since inception, Laurentian has provided higher education to the

community of Sudbury and Northern Ontario at large and is an integral part of the economic fabric of the Northern Ontario community.[1]

5. On February 1, 2021, pursuant to the Initial Order of Morawetz C.J., Laurentian was found to be insolvent and was also declared an entity that is entitled to apply for CCAA protection.[2] Those findings were confirmed by a further Order on notice to all parties on February 10, 2021 (the Amended and Restated Initial Order).[3] No party appealed the findings of insolvency or the applicability of the CCAA to Laurentian under the Initial Order or the Amended and Restated Initial Order, and the time for doing so has long passed.

6. Laurentian obtained the protection of the Court under the CCAA so that it can financially and operationally restructure itself, to emerge as a financially sustainable university for the benefit of its stakeholders.[4]

(b) History of the CCAA Proceeding

7. Laurentian sought and obtained the Initial Order granting it protection under the CCAA on February 1, 2021. Absent the relief granted in the CCAA proceeding, Laurentian would have run out of cash to meet payroll in February.[5]

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[1] Endorsement of Morawetz C.J. dated February 1, 2021 (the "**February 1 Endorsement**") at para. 2, Motion Record of Thorneloe University dated May 31, 2021 ("**MR**"), Tab 13, p. 715.
[2] February 1 Endorsement at para. 3, MR, Tab 13, p. 715.
[3] Endorsement of Morawetz C.J. dated February 12, 2021 (the "**February 12 Endorsement**"), MR, Tab 13, p. 758.
[4] February 1 Endorsement at para. 4, MR, Tab 13, p. 715. Laurentian's application for relief was supported by a 110-page, 360-paragraph affidavit from Dr. Robert Haché, plus three volumes of Exhibits. Dr. Haché is the President and Vice-Chancellor of Laurentian and a member of its Board of Governors.
[5] February 1 Endorsement at para. 21, MR, Tab 13, p. 717.

8. Following a case conference on February 5, 2021, the court issued an order appointing the Honourable Sean Dunphy as the court-appointed mediator to facilitate negotiations on the various aspects of Laurentian's restructuring (the "**Mediation**"). The Service List in the proceeding, which included Thorneloe, was immediately provided with a copy of the Order appointing the Mediator.

9. On February 10, 2021, the court held a comeback hearing that resulted in the issuance of the Amended and Restated Initial Order which, among other things, approved a debtor-in-possession interim financing agreement in the amount of $25 million.[6]

10. As a result of its mediation efforts, Laurentian has entered into term sheets for new agreements with both the Laurentian University Faculty Association ("**LUFA**") and the Laurentian University Staff Union ("**LUSU**"). The term sheets with LUFA and LUSU were each approved by an order of Morawetz C.J. dated May 2, 2021.[7]

(c) Overview of the Federated University Structure

11. For many years Laurentian had operated within a federated structure whereby it had contractual affiliations with three independent Federated Universities: Huntington University ("**Huntington**"), the University of Sudbury ("**U Sudbury**") and Thorneloe (collectively with Huntington and U Sudbury, the "**Federated Universities**").[8]

[6] Amended and Restated Initial Order, MR, Tab 13, p. 728; February 12 Endorsement, MR, Tab 13, p. 758.
[7] Order of Chief Justice Morawetz dated May 2, 2021 ("**Stay Extension and Approval Order**"), MR, Tab 4, p. 49.
[8] Affidavit of Dr. Robert Haché sworn April 21, 2021 ("**Haché Affidavit**") at para. 139, MR, Tab 13, p. 656.

12. Each of the Federated Universities is a separate legal entity and is governed by a Board of Governors or Board of Regents that is independent of Laurentian in all respects.[9] All bank accounts, financial matters and financial statements are entirely separate from Laurentian and from one another.[10] Each Federated University employs its own employees and has entered into its own collective agreements, separate from Laurentian and one another.[11]

13. With the exception of Theology, all students enrolled in programs offered at any of the Federated Universities or taking elective courses at any of the Federated Universities are Laurentian students.[12] All programs and courses offered by the Federated Universities were offered through Laurentian. The Federated Universities did not admit or register students, nor did they grant their own degrees (other than Theology). All students who enrolled with Laurentian in a program offered through the Federated Universities, or who took elective courses offered through the Federated Universities, received credits towards a degree granted by Laurentian. [13]

14. As of the Fall 2020 academic term, there were 417 students enrolled in full-time and part-time programs offered by Laurentian through the three Federated Universities (271 full-time equivalents). This included 91 full-time and part-time students at Thorneloe (62.8 full-time equivalents), 108 full-time and part-time students at U Sudbury (69.6 full-time equivalents), and 163 full-time and part-time students at Huntington (103.2 full-time equivalents).[14] The remaining 55 students were enrolled in programs jointly offered through the Federated Universities.[15]

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[9] Reasons of Chief Justice Morawetz dated May 7, 2021 ("**Reasons**") at para. 8, MR, Tab 7, p. 67.
[10] Transcript from the Cross-Examination of Dr. John Gibaut on April 23, 2021 ("**Gibaut Transcript**") at pp. 36-39, q. 131-148, MR, Tab 18, pp. 1613-1616.
[11] Gibaut Transcript at p. 39, q. 143-145, MR, Tab 18, p. 1616.
[12] Reasons at paras. 8-9, MR, Tab 7, pp. 66-67.
[13] Reasons at para. 8, MR, Tab 7, p. 67.
[14] Haché Affidavit, Exhibit "J", MR, Tab 13, p. 924; Reasons at para. 11, MR, Tab 7, p. 67.
[15] Haché Affidavit at para. 148, MR, Tab 13, p. 659; Reasons at para. 11, MR, Tab 7, p. 67.

15. For many years, the main activity of Thorneloe has not been teaching students enrolled in Laurentian programs of study offered through Thorneloe. Rather, its main activity has been offering elective (one-off) courses through the Faculty of Arts for Laurentian's students enrolled in programs at Laurentian.[16] Historically, students who enroll at Laurentian have had the ability to take elective courses at any one or all of the three Federated Universities, as well as at Laurentian.[17]

(d) The Federation Agreements

16. Laurentian's legal relationship with the Federated Universities was set out in Federation Agreements signed with each of the Federated Universities (collectively, the "**Federation Agreements**"). Laurentian entered into a Federation Agreement with each of U Sudbury and Huntington on September 10, 1960, and with Thorneloe in 1962 (for the purposes of this factum, references to a singular "**Federation Agreement**" are references to the Federation Agreement with Thorneloe).[18]

17. The terms of the three Federation Agreements and the other documents relating to that agreement in each case were substantially similar and included the following key terms:

(a) an agreement by each of the Federated Universities to suspend its degree-conferring powers (with the exception of Theology);

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

[16] Haché Affidavit at para. 152, MR, Tab 13, p. 660; Reasons at para. 12, MR, Tab 7, pp. 67-68.
[17] Reasons at para. 8, MR, Tab 7, p. 67.
[18] Haché Affidavit at para. 140, MR, Tab 13, p. 657; Reasons at para. 3, MR, Tab 7, p. 66.

(c) an agreement by Laurentian to allocate and reserve land within its campus upon which each of the Federated Universities may construct buildings. The allocation of land was completed pursuant to certain indentures (as described further below).[19]

18. Each of the Federation Agreements contained more than eleven paragraphs which included mandatory language on various aspects of the agreement, such as "shall" and "agree to". In contrast to these other provisions of the agreement containing mandatory language, one paragraph included an aspirational statement – but not a commitment or agreement – that the federated relationship would be permanent:

> Both Laurentian University and [the Federated University] declare and express the firm hope and conviction that the relationship between the Universities established by this agreement will be a permanent one ….[20]

(e) The Indentures

19. Laurentian has Indenture agreements with each of the Federated Universities, pursuant to which they lease land owned by Laurentian and on which they have constructed their own buildings.[21] Each Indenture provides for a lease term of 99 years, with the possibility of further renewals.

20. The Indentures each contain termination provisions which, among other things, allow for the termination of the Indenture if the relevant Federated University withdraws from its federation with Laurentian.[22] No Notice of Disclaimer was issued by Laurentian in respect of any of the Indentures. The Indentures were not the subject matter of the motion below and are not directly relevant to the motion for leave to appeal.

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[19] Federation Agreement, Exhibit "A" to Affidavit of Sydney Edmonds sworn April 15, 2021 ("**Edmonds Affidavit**"), MR, Tab 9A, p. 98.
[20] Federation Agreement, Exhibit "A" to Edmonds Affidavit, MR, Tab 9A, p. 102.
[21] Haché Affidavit at para. 141, MR, Tab 13, p. 657; Reasons at para. 14, MR, Tab 7, p. 68.
[22] Haché Affidavit at para. 155, MR, Tab 13, p. 661; Reasons at para. 15, MR, Tab 7, p. 68.

(f) The Financial Distribution Notices

21. The Federated Universities do not receive funding directly from the provincial government. Historically, Laurentian has transferred a portion of the funding that it receives from the provincial government to each Federated University according to a calculation undertaken by Laurentian in respect of each specific Federated University.[23]

22. The method of calculating the distribution of funds to the Federated Universities has changed over time. Since May 1, 2019, the parties have operated in accordance with the Financial Distribution Notices delivered by Laurentian to each of the Federated Universities (the "**Financial Distribution Notices**"). The Financial Distribution Notices set out the terms for the distribution of amounts to the Federated Universities and service fees charged by Laurentian to the Federated Universities. [24]

23. The Financial Distribution Notices also stated that, in exchange for certain administrative services provided by Laurentian, each of the Federated Universities would be assessed an administrative service fee by Laurentian in the amount of 15% of grant revenue and tuition revenue received by Laurentian (the "**Administrative Services Fee**"). The Administrative Services Fee was intended to partially cover the costs incurred by Laurentian for a number of non-academic services it provided to the Federated Universities, which include but are not limited to: (i) student fee collection and accounting; (ii) central computing services; (iii) administration of all pension and employee benefits; (iv) campus security; and (v) student support services.[25] The Financial Distribution Notices provided that while the Administrative Services Fee is set at 15%, the actual administrative cost associated with

[23] Reasons at para. 10, MR, Tab 7, p. 67.
[24] Haché Affidavit at paras. 144-145, MR, Tab 13, p. 658; Reasons at para. 10, MR, Tab 7, p. 67.
[25] Haché Affidavit at para. 146, MR, Tab 13, pp. 658-659.

the provision of these types of services by Laurentian represented approximately 30% of Laurentian's total annual expenses.[26]

(g) Negative Financial Impact of the Federated Universities on Laurentian

24. The main activity of the Federated Universities was offering elective courses to Laurentian students, that were administered under the Faculty of Arts.[27] Each time a Laurentian student took an elective course through one of the Federated Universities rather than an elective course offered directly through Laurentian, it represented lost tuition revenue to Laurentian due to the amounts paid to the Federated University under the Financial Distribution Notices.[28]

25. In Fiscal Year 2020, based on the enrollment by Laurentian students in programs and courses offered through the Federated Universities, Laurentian transferred to the Federated Universities approximately $3.5 million in total grants, $5.3 million in net tuition, and $0.3 million in material fees, for a total of $9.1 million. That amount was offset by the Administrative Services Fee of approximately $1.4 million, for a net payment from Laurentian to the Federated Universities of approximately $7.7 million in Fiscal Year 2020.[29]

26. Laurentian's Faculty of Arts has the ability and capacity to offer a range of alternative electives to its students, such that there is no need for Laurentian to lose revenue through its students taking elective courses offered through the Federated Universities. Since students enrolled in programming offered by the Federated Universities could otherwise

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[26] Financial Distribution Notice, MR, Tab 9C, p. 116.
[27] Haché Affidavit at para. 152, MR, Tab 13, p. 660; Reasons at para. 12, MR, Tab 7, pp. 67-68.
[28] Haché Affidavit at para. 154, MR, Tab 13, pp. 660-661; Monitor's Third Report dated April 26, 2021 ("**Third Report**") at para. 176, MR, Tab 17, p. 1150.
[29] Haché Affidavit at paras. 152-153, MR, Tab 13, p. 660; Third Report at para. 174, MR, Tab 17, p. 1149.

be accommodated and enrolled in programs offered by Laurentian, a substantial portion of the grant revenue represents lost revenue for Laurentian.[30] The academic restructuring at Laurentian in March and April 2021 involved the termination of 65 of its undergraduate programs taught directly at Laurentian and the termination of more than 100 faculty members, in order to consolidate its program offerings as a matter of financial sustainability.[31] To have done so, while at the same time continuing to pay the Federated Universities to teach Laurentian students in programs and courses that Laurentian has the capacity and faculty to teach, would be absurd.

27. As a not-for-profit entity and a university, Laurentian has limited tools to increase revenue.[32] Approximately 70% of Laurentian's revenue in 2019-20 is comprised of tuition and grant funding. Due to the freeze of tuition fees, Laurentian cannot increase revenue through tuition fees.[33] Similarly, grant funding is at the discretion of the Province of Ontario. The only opportunity for Laurentian to fully utilize the revenue it receives in respect of Laurentian students, is for Laurentian students to be enrolled in programs and courses at Laurentian.

28. Laurentian engaged in discussions with the Federated Universities for six months prior to commencing the CCAA proceeding, and then for another two months as part of the Mediation. From June – December 2020, Laurentian's president, Dr. Haché, engaged in discussions with the presidents of the Federated Universities regarding the untenable structure of the federated relationship. Dr. Haché informed the Federated Universities that all options were on the table, including ending the existing federation agreement.[34]

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[30] Haché Affidavit at para. 154, MR, Tab 13, pp. 660-661; Reasons at para. 52, MR, Tab 7, p. 76.
[31] Haché Affidavit at paras. 57, 121(b) MR, Tab 13, pp. 663, 651.
[32] Third Report at para. 173, MR. Tab 17, p. 1149.
[33] Reasons at para. 19, MR, Tab 7, p. 68.
[34] Transcript from Cross-Examination of Dr. Robert Haché dated April 23, 2021 ("**Haché Transcript**"), pp. 144-147, q. 401-403, MR, Tab 18, pp. 1325-1328.

(h) Mediation with the Federated Universities and the Notices of Disclaimer

29. Beginning shortly after the court-appointed mediator was appointed in early February, Laurentian engaged in extensive mediation with the Federated Universities. Laurentian sought to achieve a mediated resolution whereby the formal relationship would be terminated, while acknowledging and preserving the historical legacy of the Federated Universities.

30. A negotiated termination of Laurentian's relationship with each of the Federated Universities was not achieved. Accordingly, on April 1, 2021, Laurentian delivered to each of the Federated Universities Notices to Disclaim or Resiliate pursuant to section 32 of the CCAA (the "**Notices of Disclaimer**").[35] The Notices of Disclaimer disclaim the Federation Agreements and the Financial Distribution Notices with each of the Federated Universities.

31. The Notices of Disclaimer were delivered by Laurentian on April 1, 2021 because it was critical that the Notices of Disclaimer become effective by May 1, 2021 (Notices of Disclaimer become effective under the CCAA 30 days after issuance). The May 1 date was critical for several reasons, including:

(a) Laurentian's Spring academic term began on May 3, 2021 – students needed to know which classes were available and Laurentian needed to collect tuition, as it had deferred the payment of tuition for the Spring term until such time as it could know that it would be able to continue in operation beyond the Winter term, with critical cost-cutting measures having been undertaken and additional DIP financing

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

being obtained.[36] While U Sudbury and Huntington had proactively requested that Laurentian's Registrar cancel the courses listed in the catalogue for the Spring term that would have otherwise been taught at those Federated Universities, Thorneloe did not do so.[37] This created an otherwise avoidable urgency with respect to communicating with students after Thorneloe's motion had been dismissed on May 2, 2021, and prior to the commencement of classes in the Spring term beginning on May 3, 2021;

(b) Pursuant to the terms of the Huntington Transition Agreement, Laurentian acquired and is offering certain online Gerontology courses in the Spring term commencing May 3, 2021 that were previously offered by Huntington. That could only occur if the Notices of Disclaimer for each of the Federated Universities became effective;[38] and

(c) The Huntington Transition Agreement was subject to no courses being taught by the other Federated Universities that count toward Laurentian's degrees and no money being paid by Laurentian to the other two Federated Universities for same (a most favoured nation clause, or "**MFN Clause**").[39]

32. Notwithstanding its delivery of the Notices of Disclaimer, Laurentian continued to seek a negotiated resolution with each of the Federated Universities whereby the formal relationship would be terminated, while acknowledging and preserving the historical legacy of the Federated Universities.[40]

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[36] Haché Affidavit at para. 24, MR, Tab 13, p. 623.
[37] Haché Affidavit at para. 164, MR, Tab 13, pp. 663-664.
[38] Haché Affidavit at para. 24, MR, Tab 13, p. 623.
[39] Haché Affidavit at para. 167(c), MR, Tab 13, p. 664.
[40] Haché Affidavit at para. 157, MR, Tab 13, pp. 661-662.

33. Thereafter, Laurentian achieved a negotiated resolution with Huntington, but did not reach agreement with U Sudbury or Thorneloe. Laurentian and Huntington entered into a Transition Agreement on April 16, 2021 (the "**Huntington Transition Agreement**") that set out the terms for an orderly transition ending Huntington's federation with Laurentian.[41]

34. On April 14, 2021, in a further effort to reach a consensual resolution, Laurentian delivered to each of Thorneloe and U Sudbury a with-prejudice, <u>open</u> settlement offer in the form of a Transition Agreement, similar in form to the Huntington Transition Agreement. Laurentian received no response to the open offers.[42]

35. Rather than respond to those open settlement offers, Thorneloe and U Sudbury filed motions opposing the Notices of Disclaimer alleging that the Notices of Disclaimer and termination of the federated relationships would cause significant financial hardship.

36. Laurentian opposed the motions brought by Thorneloe and U Sudbury. The parties submitted to the CCAA Judge an extensive record, including multiple (and supplemental) motion records, extensive cross-examination transcripts, and detailed facta.

37. In addition, the court-appointed Monitor filed a report with the Court that addressed the Notices of Disclaimer. It commented, among other things, that:

> …it is the Monitor's view that the Notices of Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of the Applicant. In fact, it is the Monitor's view that without the Notices of Disclaimer, the Applicant is unlikely to be able to complete a viable plan of compromise or arrangement.[43]

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[41] The Huntington Transition Agreement was approved by the Stay Extension and Approval Order, MR, Tab 4, pp. 51-52.
[42] Haché Affidavit at paras. 172-176, MR, Tab 13, pp. 667-668; Reasons at para. 68, MR, Tab 7, p. 78.
[43] Third Report at para. 169, MR. Tab 17, p. 1149.

(i) Statutory Framework Applicable on the Motion Below

38. Section 32(1) of the CCAA grants a debtor company the power to disclaim any agreement to which it is a party on the day that proceedings are commenced under the CCAA. Subsection 32(9) sets out some exceptions to this right (for example, collective agreements), but none of these statutory exceptions applies to the Federation Agreements or Financial Distribution Notices.

39. Within 15 days of receiving notice of an intention to disclaim an agreement, the counterparty to the agreement may apply to the court for an order that the agreement is not disclaimed pursuant to s. 32(2) of the CCAA.

40. Subsection 32(4) provides some guidance to the Court for the factors to consider on a motion not to enforce a disclaimer, noting that the court is to consider, among other things, (a) whether the monitor approved the proposed disclaimer; (b) whether the disclaimer would enhance the prospects of a viable compromise or arrangement; and (c) whether the disclaimer would likely cause significant financial hardship to a party to the agreement.

(j) The Decision Below

41. Thorneloe's motion was heard by Morawetz C.J. on April 29, 2021.[44] Morawetz C.J. released a short endorsement on Sunday, May 2, 2021 communicating His Honour's decision to dismiss Thorneloe's motion with detailed reasons to follow. The delivery of this decision on Sunday, May 2, 2021 was in response to the urgency relating to the

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[44] U Sudbury requested that its motion be heard in French. It was heard by Justice Gilmore on April 30, 2021. U Sudbury's motion was dismissed on May 2, 2021, it has not sought leave to appeal and the time for doing so has expired.

commencement of the Spring term the following day, and the various consequences that flowed from that.

42. On the evening of May 3, 2021, before receiving detailed reasons for the decision, Thorneloe served a Notice of Motion seeking leave to appeal from the decision, together with a stay pending appeal. It has not pursued its request for a stay pending appeal, and any stay of the decision below is moot as it has already been implemented.

43. Morawetz C.J. provided detailed reasons for his decision dismissing Thorneloe's motion on May 7, 2021 (the "**Reasons**").

44. In his reasons, Morawetz C.J. carefully and extensively considered the factors identified under Section 32(4) of the CCAA and applied them to the evidence and the parties' arguments on the motion.

45. Morawetz C.J. made the following key findings:

- The Monitor approved the proposed disclaimer and provided extensive reasons for its approval. Relatedly, the court found that the Monitor is an expert in the field of insolvency and restructuring, has been involved in Laurentian's CCAA proceedings since their inception, and has extensive knowledge of Laurentian's operations and restructuring efforts.[45]

- The Monitor's reasons for approving the disclaimer reflected a proper balancing of the competing interests of Laurentian and all stakeholders, including Thorneloe.[46]

- The Notices of Disclaimer are central to the Applicant's restructuring, will result in $7.7 million of additional funds remaining with Laurentian on an annual basis, and represent a real source of financial relief for Laurentian.[47]

[45] Reasons at paras. 37, 39, MR, Tab 7, pp. 72-73.
[46] Reasons at para. 45, MR, Tab 7, p. 74.
[47] Reasons at paras. 50, 52, MR, Tab 7, pp. 75-76.

- The savings to Laurentian created as a result of the disclaimer are necessary for the purpose of submitting a viable plan to creditors. Laurentian has required significant compromise and sacrifice from a number of stakeholders, including LUFA and LUSU, students, and the greater Sudbury community. The disclaimer is another critical part of that combined effort.[48]

- The fact that the disclaimer was a condition set by Laurentian's DIP lender for further advance of DIP funding is a relevant factor for the court to consider.[49]

- There is no evidentiary support for Thorneloe's contention that Laurentian is acting in bad faith.[50]

- The potential consequence of disallowing the disclaimer (unravelling Laurentian's restructuring plan, thereby forcing both Laurentian and Thorneloe to cease operations) outweighed the potential consequence of allowing the disclaimer (the cessation of operations by Thorneloe).[51]

46. Accordingly, after weighing the relevant factors, and based on the findings listed above, Morawetz C.J. dismissed Thorneloe's motion.

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

The Framework for Granting Leave to Appeal in this Case

47. Section 13 of the CCAA requires any person dissatisfied with an order or decision made under that statute to obtain leave to appeal.[52]

48. Leave to appeal is to be granted sparingly in CCAA proceedings. This is because of the "real time" dynamic of CCAA matters and the discretionary character underlying many of the orders made by supervising judges in such proceedings. A high degree of deference is

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[48] Reasons at paras. 57-58, MR, Tab 7, pp. 76-77.
[49] Reasons at para. 59, MR, Tab 7, p. 77.
[50] Reasons at para. 72, MR, Tab 7, pp. 78-79.
[51] Reasons at paras. 75-78, MR. Tab 7, p. 79.
[52] CCAA, s. 13.

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 court below.[53]

49. CCAA proceedings seek to resolve matters and finalize the debtor's affairs without undue delay. The requirement for leave to appeal similarly reinforces the finality of orders made under a CCAA proceeding.[54]

50. There is a clear intention of Parliament to restrict appeal rights having regard to the nature and object of CCAA proceedings. An appeal court should be cautious about intervening in the CCAA process.[55]

51. In considering whether to grant leave, the court will consider whether:[56]

(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.

52. In assessing these factors, consideration should also be given to the standard of review. Having regard to the commercial nature of insolvency proceedings which often require quick decisions, and to the intimate knowledge of a supervising judge in overseeing a

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[53] *New Skeena Forest Products Inc., Re,* 2005 BCCA 192 at para. 20; *Essar Steel Algoma Inc., Re,* 2017 ONCA 478 at para. 19.
[54] *Hurricane Hydrocarbons Ltd. v. Komarnicki,* 2007 ABCA 361 at para. 14, as cited in *Essar Steel Algoma Inc., Re,* 2016 ONCA 138 at para. 20.
[55] *Algoma Steel Inc., Re,* 2001 CanLII 5433 (Ont. C.A.) at para. 8; *Newfoundland and Labrador c. AbitibiBowater,* 2010 QCCA 965 at para. 26; aff'd 2012 SCC 67.
[56] *Nortel Networks Corp. Re,* 2016 ONCA 332 at para. 34.

CCAA proceeding, appellate courts have expressed a reluctance to interfere, except in clear cases.[57]

53. None of the four factors weigh in favour of Thorneloe in this case.

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

54. In its factum, Thorneloe identifies five "questions" for determination on appeal, each of which Thorneloe asserts are non-frivolous and evidence that this proposed appeal is *prima facie* meritorious.[58] The five "questions" – each of which contain imbedded assumptions and assertions with which Laurentian does not agree and which are not supported by the evidence – can be more accurately viewed as five accusations by Thorneloe that are at the heart of its proposed appeal:

(a) Thorneloe is a competitor of Laurentian, and a disclaimer should not be used to eliminate a competitor.

(b) The financial gain to Laurentian by virtue of the disclaimer is uncertain and immaterial.

(c) The DIP Lender refused to attend an oral examination or produce documents on the motion below.

(d) Laurentian and/or the DIP Lender failed to act in good faith.

(e) Thorneloe will go bankrupt if the disclaimer is upheld.

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[57] *Calpine Canada Energy Ltd., Re,* 2007 ABCA 266 at para. 14.
[58] Thorneloe's factum states that the questions for determination on the proposed appeal are summarized at paragraph 60 of its factum. However, paragraph 60 does not contain any such questions. The proper reference seems to be paragraph 71.

55. None of these accusations translates into a *prima facie* meritorious appeal, as set out in further detail below.

(i) The disclaimer is not aimed at eliminating a competitor

56. Thorneloe argues in its factum that it is a competitor of Laurentian, and that Laurentian is using the power to disclaim agreements to improperly eliminate its competitors.

57. As an initial matter, the premise underlying this argument is simply wrong: Thorneloe and Laurentian are not competitors. Laurentian is a bilingual university with approximately 8,200 full-time students enrolled in more than 100 different programs. Thorneloe, on the other hand, had 91 full-time Laurentian students enrolled in the 3 programs it offered.[59] In addition, as noted above, Thorneloe is not an independent degree-granting university that might "compete" with Laurentian – indeed, Thorneloe's primary activity is offering elective courses to Laurentian students enrolled in programs at Laurentian. In other words, Thorneloe is akin to a service provider to Laurentian. It is not a competitor.

58. In any event, the disclaimer was not a nefarious ploy to "eliminate" Thorneloe. The reality is that Laurentian is in dire financial straits. Through the CCAA process, Laurentian has undertaken an extensive overhaul of its financial and operational structure aimed at rightsizing its financial structure. The disclaimer was critical to that effort because it will mean that millions of dollars of additional tuition and grant revenue will remain within Laurentian, due to Laurentian's students taking their elective courses at Laurentian.

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[59] Haché Affidavit, Exhibit "J", MR, Tab 13, p. 924; Reasons at para. 11, MR, Tab 7, p. 67.

59. There is nothing improper about that motive and, indeed, Laurentian was quite explicit about the disclaimer's purpose in the materials filed before the CCAA Judge. In his affidavit on the motion, Dr. Haché stated:

> Specifically, in Fiscal Year 2020, LU transferred to the Federated Universities [a net transfer] of approximately $7.7 million. … This is revenue that can and needs to stay within LU, given LU's current liquidity challenges. LU's Faculty of Arts has the ability and capacity to offer alternative electives to its students, such that there is no need for the resulting loss in revenue to LU in doing so. Since students enrolled in programming offered by the Federated Universities could otherwise be accommodated and enrolled in programs offered by LU, a substantial portion of the grant revenue represents lost revenue for LU.[60]

60. In its factum, Thorneloe relies heavily on the answers to two questions it posed to Dr. Haché during cross-examination, purportedly on the basis that Dr. Haché admitted that Laurentian's intention was to eliminate the courses that compete with Laurentian's courses (which he did not). At paragraph 47, before excerpting the two questions at issue, Thorneloe puts the word "compete" in quotation marks. But that word does not appear anywhere in the questions or answers:

> 332 Q. And part of your solution is to stop students from being able to go, to sign up for courses at University of Sudbury, University de Sudbury and Thorneloe. You're trying – you're stopping them by bringing that agreement to an end. And the only reason you're doing that, and it's the only reason is because you want those students, instead of taking courses at those Federated Universities, to take courses at Laurentian University, correct?
>
> A. We have both the capacity and the need to provide those courses to our students, yet.
>
> 333 Q. So the answer to my question is yes, correct?

[60] Haché Affidavit at para. 153, MR, Tab 13, p. 660.

A. I believe I said yes.[61]

61. The quotation on which Thorneloe relies is effectively just a repetition of what Dr. Haché said previously in his affidavit: Laurentian cannot afford the lost tuition revenue that results from the Federation Agreements and thus determined the Notices of Disclaimer were a necessary step in the restructuring. There is nothing improper about that.

62. The case relied on by Thorneloe, *Laserworks Computer Services Inc, Re*,[62] a decision of Registrar Hill of the Nova Scotia Supreme Court, is easily distinguishable from these facts. *Laserworks* was not a disclaimer case, nor was it decided under the CCAA. It was a case in which the debtor had made a proposal to its creditors pursuant to the *Bankruptcy and Insolvency Act*. One of the debtor's competitors surreptitiously attempted to purchase claims from the debtor's creditors so that it could vote down the proposal, thereby forcing its competitor into bankruptcy.[63]

63. This improper attempt to force a competitor into bankruptcy was disapproved of by the Court. The case bears no resemblance to the current case, where a debtor in CCAA proceedings used a valid statutory means to disclaim agreements to which it was a party, which otherwise created a financial impediment to its future sustainability.

(ii) Laurentian's financial gain from the disclaimer is not uncertain or immaterial

64. Thorneloe questions the financial gains attributable to the disclaimers, and objects to being grouped with the other Federated Universities. It points to the purportedly modest savings

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[61] Haché Transcript, p. 119-120, q. 332 to 333, MR, Tab 18, pp. 1300-1301.
[62] 1997 CanLII 15009 (N.S.S.C.), Thorneloe Book of Authorities ("**Thorneloe BoA**"), Tab 1; aff'd 1997 CanLII 1229 (N.S.S.C.); further aff'd 1998 NSCA 42.
[63] *Ibid*, Thorneloe BoA, Tab 1 at para. 4.

gained by disclaiming Thorneloe's agreements when compared to the savings accrued by Laurentian in its negotiated settlements with LUFA and LUSU in the Mediation.

65. As a starting point, a disclaimer does not need to be essential for a restructuring in order for it to be upheld by the CCAA Court. It merely has to be advantageous and beneficial.[64] Thorneloe's arguments regarding the alleged "immateriality" of the benefits to Laurentian from the disclaimer, even if accepted, do not establish any error of the Court below.

66. However, Thorneloe's arguments on immateriality do not stand up in the face of the evidence on the motion. Upon review of the evidence, Laurentian, the Monitor, and the CCAA Judge all reached the same conclusion: disclaimer of the Federation Agreements was necessary for the restructuring efforts to be successful.

67. In particular, the savings achieved by the disclaimers for the Federated Universities represents approximately $7.7 million on an annual basis[65] and the CCAA Judge rightly found that this "represents a real source of annual financial relief for Laurentian" that makes the Notices of Disclaimer "central to [Laurentian's] restructuring".[66] The gains to Laurentian are not "uncertain" and there was ample uncontroverted evidence before the CCAA Judge to substantiate the savings to Laurentian generated by the disclaimers.

68. Thorneloe also claims that the CCAA Judge erred by considering the combined financial impact of the three Federated Universities on Laurentian when evaluating the appropriateness of the disclaimer. But the reality, as the CCAA Judge pointed out in his

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[64] *Timminco Ltd., Re*, 2012 ONSC 4471 at para. 54 [*Timminco*]; see also *Quest University Canada, Re*, 2020 BCSC 1883 at para. 96.
[65] Third Report, Appendix "C", MR, Tab 17, at p. 1163.
[66] Reasons at paras. 50, 52, MR, Tab 7, pp. 75-76.

reasons, was that Huntington had an MFN Clause in the Huntington Transition Agreement with Laurentian that let it benefit from any successful challenge to the disclaimer of the agreements with Thorneloe, and U Sudbury was also challenging the disclaimer of its agreements. Accordingly, the CCAA Judge rightly concluded that the positions of the three Federated Universities were "interlinked and interrelated to such a degree" that considering their combined impact on Laurentian's financial picture was relevant.[67]

69. Thorneloe notes in its factum multiple times that the Huntington Transition Agreement agreed to between Laurentian and Huntington, which contained the MFN Clause, was agreed to after the disclaimer. Of course that is the case. Laurentian was only able to reach an agreement with Huntington after the disclaimer had been issued, and on the condition that Huntington would not be prejudiced in reaching an agreement with Laurentian relative to the other Federated Universities which had not done so.

70. This proposed ground of appeal is meritless.

(iii) There was no right to cross-examine the DIP Lender

71. Thorneloe alleges that the CCAA improperly allowed the CCAA process to be disproportionately controlled by Laurentian's CCAA debtor-in-possession lender (the "**DIP Lender**"). That allegation is plainly wrong.

72. On April 19, 2021, having drawn on the full $25 million originally made available by the DIP Lender on February 10, 2021 which had a maturity and repayment date of May 1, 2021, Laurentian entered into an Amended DIP Term Sheet (the "**DIP Amendment**") with

[67] Reasons at para. 51, MR, Tab 7, pp. 75-76.

the DIP Lender pursuant to which the DIP Lender agreed to increase the maximum principal amount available under the DIP Facility by a further $10 million and extend the maturity date for payment. The DIP Amendment was conditional upon, among other things, ratification and court approval of the term sheets with LUFA and LUSU and Laurentian's disclaimer of the Federation Agreements and Financial Distribution Notices becoming effective by May 1, 2021 (the "**DIP Financing Condition**").[68]

73. Thorneloe's factum raises various objections to the DIP Financing Condition, all of which were fully canvassed before the CCAA Judge, and none of which are meritorious.

74. First, the timeline of events is important. The Notices of Disclaimer were issued on April 1, 2021, because Laurentian and the Monitor had concluded that they were necessary for a successful restructuring. The DIP Amendment was agreed to on April 19, 2021. The DIP Lender did not require the issuance of a disclaimer of the Federation Agreements as a condition of the DIP Amendment; those agreements had already been disclaimed by Laurentian. What it did require was that the disclaimers become effective on May 1, 2021 (thirty days after issuance, under the CCAA) so that the associated savings to Laurentian of $7.7 million annually could be realized.

75. Second, Thorneloe's contention that the DIP Financing Condition effectively "ousts the jurisdiction" of the CCAA Court is without merit. The CCAA Judge did not find that he was bound to accept the disclaimer because of the DIP Amendment; nor did the CCAA Judge solely rely on the DIP Financing Condition in upholding the disclaimer. Rather, the

[68] Haché Affidavit at para. 164 and Exhibit "Z", MR, Tab 13, pp. 663, 1050-1051; Reasons at para. 59, MR, Tab 7, p. 77.

continued availability of DIP Financing to Laurentian was a factor – among many – that His Honour properly considered.

76. The indisputable evidence before the Court was that the DIP Lender required the disclaimers to be upheld as a condition of advancing $10 million of additional financing and extending the May 1, 2021 maturity date on the DIP loan. The availability of DIP financing, and the terms upon which they may or may not continue to be available, are relevant on a motion such as the one below, because a loss of financing can jeopardize the entire CCAA proceeding. That factor has been taken into account by CCAA Courts before[69] when considering disclaimers, and it would have been an error to ignore the condition on the motion below. In addition, the insertion of the DIP Financing Condition had a clear commercial and financial basis, and it is obvious why a DIP lender who expects to be repaid $35 million from Laurentian would want to ensure that $7.7 million does not continue to leave Laurentian to the Federated Universities on an annual basis.

77. Finally, Thorneloe complains that the DIP Lender did not submit to a cross-examination. The CCAA Judge correctly noted that the DIP Lender had filed no affidavit in the proceedings, and Thorneloe therefore had no right to cross-examine the DIP Lender.

78. Thorneloe's attempts to attach an improper motive to the terms of the DIP Lender's commercial agreement that it reached with Laurentian were made to the CCAA Judge. Its arguments on appeal again amount to a plea to re-balance the relevant factors. That is not the role of this Court and therefore this is not a meritorious ground of appeal.

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[69] For example, see *Timminco*, *supra* note 64 at para 56.

(iv) Laurentian and the DIP Lender have not acted in bad faith

79. Thorneloe's contention that Laurentian and/or the DIP Lender were not acting in good faith is yet another argument raised before the CCAA Judge that was correctly rejected.

80. The allegation that Laurentian was acting in bad faith was addressed by the CCAA Judge as follows:

> I do not accept that Laurentian has acted in bad faith. Restructurings 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. In its Third Report, the Monitor makes specific reference to the bad faith argument being raised by Thorneloe. It is significant that the Monitor makes no statement that would suggest in any way that Laurentian has been acting in bad faith. The Monitor ultimately recommends at paragraph 206 of its Third Report that the court grant the relief sought by the Applicant, which includes the disclaimer and also an extension of the stay of proceedings.[70]

81. With respect to the DIP Lender, not only was there no evidence as to a lack of bad faith, but it does not necessarily follow that even if it was found to have been acting in bad faith, that such a finding would impact the decision below.

82. This ground of appeal is not *prima facie* meritorious.

(v) The evidence of financial hardship to Thorneloe is speculative and unproven

83. Thorneloe suggests that the CCAA Judge erred by upholding the disclaimer, despite its alleged significant financial impact on Thorneloe. That is incorrect. The issue of significant financial hardship is but one factor for the Court to consider. To the extent that Thorneloe would suffer significant financial hardship as a result of the disclaimer (which

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[70] Reasons at para. 72, MR, Tab 7, pp. 78-79.

was unproven), the impact on Laurentian if the disclaimer was not upheld was far greater, as held by the CCAA Judge.[71]

84. On the motion, Laurentian acknowledged, as did the CCAA Judge, that the disclaimer would have financial consequences for Thorneloe. Morawetz C.J. explicitly noted that "[t]he impact of the disclaimer on Thorneloe is significant. The consequence of the disclaimer is such that Thorneloe will be unable to operate in its current form."[72]

85. But a financial consequence is different from the "significant financial hardship" that would lead a Court to consider disallowing a disclaimer under the CCAA. The latter is a high bar to meet and requires specific evidence to substantiate such allegations.[73]

86. Thorneloe's allegations of significant financial hardship were plainly deficient. Thorneloe's claim of financial hardship is based entirely on a report submitted by its own financial advisor who suggested that the disclaimer would force Thorneloe into its own insolvency proceedings – an allegation that Thorneloe repeats on this motion for leave to appeal. However, despite that bald and unsubstantiated allegation, and despite a requested undertaking during a cross-examination of Thorneloe's president, Thorneloe refused to produce its financial statements.[74] Such refusal was in the face of Thorneloe's president John Gibaut referring to a portion of the financial statements in the affidavit on which he was being cross-examined.[75] A negative inference may be drawn from such refusal.

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[71] Reasons at para. 77, MR, Tab 7, p. 79.
[72] Reasons at para. 68, MR, Tab 7, p. 78.
[73] *Target Canada Co., Re,* 2015 ONSC 1028 at para. 26.
[74] Refusals and Undertakings Chart for Cross-Examination of Dr. John Gibaut, MR, Tab 18, p. 1667.
[75] Affidavit of John Gibaut sworn April 19, 2021 at para. 54, MR, Tab 10, pp. 193-194.

87. There was no way for Laurentian or the CCAA Judge to test any of Thorneloe's claims when its own financial statements inexplicably remained under lock and key. The CCAA Judge correctly found that the impact of the disclaimer on Thorneloe was significantly less than if the disclaimer was not upheld and Laurentian was forced to cease operations.[76]

88. Morawetz C.J. also noted that Thorneloe was offered an alternative. It was offered a form of transition agreement by Laurentian (which one of the other Federated Universities, Huntington, had accepted).[77] Thorneloe's factum does not address that point.

89. Finally, at paragraph 71(a) of its factum, Thorneloe seems to suggest that when a disclaimer may cause the bankruptcy of the counterparty to an agreement, the CCAA Court has no discretion and must not uphold the disclaimer. There is no authority cited for such a proposition and it is clearly wrong on its face. A CCAA Court is given an extraordinary amount of discretion whether to uphold a disclaimer under s. 32. Fettering that discretion is not appropriate.

90. Ultimately, Morawetz C.J. saw the motion as a choice between: (i) a risk that Thorneloe might cease operations, and (ii) a risk that both Thorneloe and Laurentian would cease operations. Given those two undesirable options, the CCAA Judge chose the least undesirable.[78]

91. The decision below was a discretionary decision. While Thorneloe wishes to re-argue its case at the Court of Appeal and ask that the factors be weighed in its favour, that is not

[76] Reasons at para. 77, MR, Tab 7, p. 79.
[77] Haché Affidavit at paras. 172-176 and Exhibit "U", MR, Tab 13, pp. 667-668, 994; Reasons at para. 68, MR, Tab 7, p. 78.
[78] Reasons at para. 78, MR, Tab 7, p. 79.

what this Court is tasked to do. Thorneloe has not identified any legal error on the part of the CCAA Judge and its proposed appeal is not *prima facie* meritorious.

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

92. The decision below was highly fact-dependent and discretionary. It is very unlikely to be of significance or precedential value for other proceedings.

93. Thorneloe argues that the proposed appeal is of significance to the practice because "the evidence shows that the debtor's motive is to eliminate the counter-party as a competitor."[79] That is not what the evidence shows, but this statement alone shows how fact-specific the proposed appeal is and that it is not of broader import to the practice.

94. Thorneloe also argues significance on the basis that this is the first time the CCAA has been used to restructure a public university. That point might have been relevant if Thorneloe was seeking leave to appeal from the Initial Order in the CCAA proceeding made on February 1, 2021, but that is not the subject of this proposed appeal. This point is irrelevant to the specific proposed appeal that Thorneloe brings forward now. Moreover, if Thorneloe's argument for significance is taken to its natural conclusion, then <u>every</u> order in Laurentian's CCAA proceeding would purportedly satisfy this factor of the test for leave to appeal, merely by virtue of Laurentian's status as a public university.

[79] Factum of Thorneloe University dated May 25, 2021 ("**Thorneloe Factum**") at para. 81.

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

95. The disclaimer of the agreements with the Federated Universities has already been fully implemented following the decision appealed from, and therefore is not of significance to the CCAA proceeding. The decision of Morawetz C.J. was issued at 10:00 p.m. on Sunday, May 2, 2021 in recognition of the fact that it would have to be implemented immediately, prior to the commencement of the Spring term on Monday, May 3, 2021. All steps in the CCAA proceeding that were dependent upon Morawetz C.J. dismissing Thorneloe's motion were immediately undertaken, as required. The DIP Amendment was implemented with additional financing confirmed, Laurentian began to teach the Gerontology course in the Spring Term that it had acquired from Huntington based on the Court's approval of the Huntington Transition Agreement, and the pension plan consideration under the Huntington Transition Agreement was completed, all in accordance with the steps outlined to Morawetz C.J.[80]

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

96. Thorneloe's proposed appeal also suffers from multiple practical problems.

97. Thorneloe admits that even if leave is granted and an appeal is successful, it would only be able to offer courses to Laurentian students again pursuant to the Federation Agreement in January 2022, at the earliest.[81] Laurentian has been clear that it expects to have fully exited the CCAA proceeding with an accepted Plan of Arrangement and a compromise of all claims by the end of 2021. The Claims Process Order recently approved by Morawetz C.J.

[80] Reasons at para. 47, MR, Tab 7, p. 75; Haché Affidavit at para. 24, MR, Tab 13, p. 623.
[81] Thorneloe Factum at para. 9.

requires claims (including those of Thorneloe) to be filed by no later than July 31, 2021, which date operates as a complete bar to any further claims being filed.[82]

98. The CCAA Judge released his decision in the evening on May 2, 2021 precisely because the Court's decision had to be implemented the following morning. The proceeding below, like many CCAA proceedings, involves fast-paced real-time litigation involving a full operational restructuring – not a liquidation of a non-operating debtor entity. Attempting to "unscramble the egg" through an appeal is impractical, in many respects impossible, and will no doubt unduly hinder the progress of the CCAA proceeding.

99. Laurentian also disputes Thorneloe's assertion that an appeal will not be a distraction from Laurentian's restructuring efforts.[83] There are still many steps left to achieve in the restructuring efforts including implementing a full claims process, operational and governance restructuring, development of a Plan of Arrangement and negotiations with creditors. Every minute devoted to this proposed appeal is time lost to the CCAA restructuring efforts.

100. Thorneloe has not satisfied the test for leave to appeal from a discretionary decision of a CCAA supervising judge, and its motion should be dismissed.

PART IV - ORDER SOUGHT

101. Laurentian seeks an order dismissing the motion for leave to appeal, with costs.

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[82] Endorsement of Chief Justice Morawetz dated May 31, 2021, which approved the Claims Process Order proposed by Laurentian, subject to certain amendments. The draft Order is currently in the process of being finalized which includes an approved claims bar date of July 31, 2021.
[83] Thorneloe Factum at para. 83.

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

THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200|
Toronto, Ontario M5K 1K7
Fax: (416) 304-1313

D.J. Miller (LSO# 34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Scott McGrath (LSO #59346K)
Tel: (416) 304-1592
Email: smcgrath@tgf.ca

Derek Harland (LSO #79504N)
Tel: (416) 304-1127
Email: dharland@tgf.ca

Lawyers for the Responding Party,
Laurentian University of Sudbury

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. *Hurricane Hydrocarbons Ltd. v. Komarnicki,* 2007 ABCA 361
4. *Essar Steel Algoma Inc., Re,* 2016 ONCA 138
5. *Algoma Steel Inc., Re,* 2001 CanLII 5433 (Ont. C.A.)
6. *Newfoundland and Labrador c. AbitibiBowater,* 2010 QCCA 965
7. *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67
8. *Nortel Networks Corp. Re,* 2016 ONCA 332
9. *Calpine Canada Energy Ltd., Re,* 2007 ABCA 266
10. *Laserworks Computer Services Inc., Re,* 1997 CanLII 15009 (N.S.S.C.)
11. *Laserworks Computer Services Inc., Re*, 1997 CanLII 1229 (N.S.S.C.)
12. *Laserworks Computer Services Inc., Re*, 1998 NSCA 42
13. *Timminco Ltd., Re*, 2012 ONSC 4471
14. *Quest University Canada, Re*, 2020 BCSC 1883
15. *Target Canada Co., Re,* 2015 ONSC 1028

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.

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

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE RESPONDING PARTY, LAURENTIAN UNIVERSITY OF SUDBURY

(Motion for Leave to Appeal Disclaimer Order)

THORNTON GROUT FINNIGAN LLP
TD West Tower, Toronto-Dominion Centre
100 Wellington Street West, Suite 3200|
Toronto, Ontario M5K 1K7
Fax: (416) 304-1313

D.J. Miller (LSO# 34393P)
Tel: (416) 304-0559
Email: djmiller@tgf.ca

Scott McGrath (LSO #59346K)
Tel: (416) 304-1592
Email: smcgrath@tgf.ca

Derek Harland (LSO #79504N)
Tel: (416) 304-1127
Email: dharland@tgf.ca

Lawyers for the Responding Party,
Laurentian University of Sudbury