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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

Applicant

FACTUM OF THE APPLICANT
(Stay Extension and Approval of Second DIP Amendment)

August 25, 2021

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FACTUM OF THE APPLICANT

PART I - OVERVIEW

1. On February 1, 2021, Laurentian University of Sudbury ("**LU**" or the "**Applicant**") commenced proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). This step was taken as a result of a liquidity crisis forcing the Applicant to either: (i) commence insolvency proceedings in an effort to restructure the university to enable its continued operations; or (ii) close its doors, as the Applicant was otherwise unable to meet payroll obligations during the month of February and beyond.

2. Through significant and necessary steps taken during the CCAA proceeding to date, the Applicant has achieved permanent cost savings of approximately $40 million/year, representing a reduction of 25% in the university's annual expenses.

3. At the same time, the Applicant has continued to operate in the ordinary course and provide communications to ensure that stakeholders, including students and employees, were minimally disrupted throughout. The Applicant is now preparing to welcome back

students, faculty and staff to campus for the Fall 2021 term in a safe and focussed environment.

4. Within the CCAA proceeding, the Applicant's claims process has been commenced and the claims bar date of July 31, 2021 (except for Compensation Claims) has passed. Accordingly, the Monitor and the Applicant are working towards a review and determination of claims filed. The next steps in the CCAA proceeding involve the Applicant engaging in discussions with its stakeholders to develop a Plan of Compromise or Arrangement (a "**Plan**") that is acceptable to its creditors, as well as receiving, considering and, if appropriate, implementing the recommendations of the real estate and governance/operational reviews being conducted to promote efficiencies and accountability and provide potential sources of recovery to creditors.

5. The Applicant's motion is for an Order: (i) extending the Stay Period up to and including January 31, 2022, and (ii) approving the Second DIP Amendment to extend the Maturity Date of the Applicant's DIP Facility to January 31, 2022.

6. The Court is asked to grant the relief requested by the Applicant for the following reasons:

   (a) **Stay Extension.** The proposed stay extension should be granted pursuant to section 11.02(2) of the CCAA because the Applicant is expected to have sufficient funds to continue operations during the proposed Stay Period, the Applicant needs the additional time to have creditor claims determined, negotiate a Plan, implement the recommendations of its internal reviews and advance its restructuring in all respects, and the Applicant continues to act in good faith and with due diligence; and

(b) **Second DIP Amendment.** The Second DIP Amendment should be approved because the criteria under sections 11.2(1) and 11.2(4) of the CCAA are satisfied and, among other reasons, the Applicant requires the extension of the Maturity Date to provide the time necessary to develop a Plan with its creditors, which is required in order to be able to exit from the CCAA proceedings and effect a re-financing of the DIP Loan.

PART II - FACTS

7. The relevant facts with respect to this motion are briefly summarized below and more fully set out in the Affidavit of Dr. Robert Haché sworn August 20, 2021 (the "**Haché Affidavit**").[1]

A. Background

8. In response to a liquidity crisis and recurring deficits of millions of dollars, the Applicant sought and received an initial order on February 1, 2021 (the "**Initial Order**") granting the Applicant protection under the CCAA, approving a stay of proceedings for the initial 10-day period (the "**Stay Period**") and certain Court ordered super-priority charges.[2]

9. Further to a case conference before Chief Justice Morawetz on February 5, 2021, the Court issued an order (the "**Mediator Appointment Order**") appointing the Honourable Justice

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[1] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Haché Affidavit. All references to currency in this factum are to Canadian dollars, unless otherwise noted.
[2] Haché Affidavit at paras. 13, 16, Motion Record of the Applicant dated August 20, 2021 ("**Motion Record**"), Tab 2, Pages 36-37.

Sean Dunphy of the Ontario Superior Court of Justice as the Court-appointed mediator to facilitate negotiations in respect of various aspects of the Applicant's restructuring.[3]

10. On February 10, 2021, the Court held a comeback hearing on notice to all affected parties that resulted in the issuance of an amended and restated initial order (the "**Amended and Restated Initial Order**") which, among other things, approved a debtor-in-possession interim financing arrangement in the amount of $25 million (the "**DIP Facility**") and extended the Stay Period to April 30, 2021.[4]

11. On May 2, 2021, the Court issued an order (the "**Stay Extension Order**") extending the Stay Period to August 31, 2021. The Stay Extension Order also approved an amendment (the "**First DIP Amendment**") to the Applicant's DIP Facility that, among other things, increased the principal amount available under the DIP Facility by an additional $10 million and extended the maturity date of the DIP Facility to August 31, 2021.[5]

12. On June 9, 2021, following a motion brought by the Applicant, an Order was issued (dated May 31, 2021) approving a claims process to identify, determine and resolve claims of creditors of the Applicant, other than employee and related claims (as amended, the "**Amended and Restated Claims Process Order**").[6]

13. On July 5, 2021, following a motion brought by the Applicant, an Order was issued appointing Cushman & Wakefield as Real Estate Advisor of the Applicant.[7]

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[3] Haché Affidavit at para. 14, Motion Record, Tab 2, Page 36.
[4] Haché Affidavit at para. 15, Motion Record, Tab 2, Page 36.
[5] Haché Affidavit at paras. 20, 23, Motion Record, Tab 2, Pages 38-40.
[6] Haché Affidavit at para. 26, Motion Record, Tab 2, Page 40.
[7] Haché Affidavit at para. 27, Motion Record, Tab 2, Page 40.

14. On August 17, 2021, following a motion brought by the Applicant, an Order was issued approving the methodology for the identification and determination of Compensation Claims (as defined therein) other than Third Party RHBP Claims (the "**Compensation Claims Process Order**").[8]

15. Since the Stay Extension Order, the Applicant has worked very closely with the Monitor in advancing the restructuring including commencing the two claims processes, the review of the Applicant's real estate portfolio and in issuing a Request for Proposals through the university's procurement process to identify one or more consultants to undertake a comprehensive operational review and a governance review with respect to each of the Board of Governors and the Senate.[9]

16. The Applicant's efforts continue to be dedicated to its commitment to advance the restructuring towards a Plan to be presented to creditors, and to undertake all steps that could identify practices, policies, structures or challenges that may impede the Applicant's future success, and to proactively address same.[10]

B. Second DIP Amendment

17. On January 29, 2021, the Applicant and the DIP Lender entered into a binding DIP Term Sheet setting out the terms and conditions of the DIP Facility up to the maximum principal amount of $25,000,000 (the "**DIP Financing**"), which was conditional on the approval of this Court.[11]

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[8] Haché Affidavit at para. 28, Motion Record, Tab 2, Page 40.
[9] Haché Affidavit at para. 29, Motion Record, Tab 2, Page 41.
[10] Haché Affidavit at para. 29, Motion Record, Tab 2, Page 41.
[11] Haché Affidavit at para. 102, Motion Record, Tab 2, Page 60.

18. On February 10, 2021, the Applicant and the DIP Lender entered into the DIP Loan Agreement pursuant to which the DIP Lender agreed to advance the DIP Financing to the Applicant in accordance with the terms and conditions of the DIP Loan Agreement.[12]

19. On February 11, 2021, the Court approved the DIP Term Sheet, the DIP Financing and DIP Lender's Charge pursuant to the Amended and Restated Initial Order.[13]

20. Pursuant to the DIP Financing amendment letter dated April 19, 2021 (the "**Amended DIP Term Sheet**"), the DIP Lender agreed to amend the original terms of the DIP Financing as set out in the DIP Term Sheet and the DIP Loan Agreement, which Amended DIP Term Sheet included, among other things, an increase of $10,000,000 to the maximum principal amount under the DIP Facility to a maximum principal amount of $35,000,000, and an increase of the DIP Lender's Charge to $35,000,000.[14]

21. The Stay Extension Order approved the Amended DIP Term Sheet. On May 19, 2021, the DIP Lender and the Applicant entered into the First Amendment to the DIP Loan Agreement (the "**First DIP Amendment**").[15]

22. The DIP Loan Agreement has a Maturity Date of August 31, 2021. The Applicant has negotiated an extension of the Maturity Date with the DIP Lender to January 31, 2022, which corresponds to the proposed extension of the Stay Period.[16]

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[12] Haché Affidavit at para. 103, Motion Record, Tab 2, Page 60.
[13] Haché Affidavit at para. 104, Motion Record, Tab 2, Page 60.
[14] Haché Affidavit at para. 105, Motion Record, Tab 2, Pages 60-61.
[15] Haché Affidavit at para. 106, Motion Record, Tab 2, Page 61.
[16] Haché Affidavit at para. 107, Motion Record, Tab 2, Page 61.

23. In consideration for a five-month extension of the Maturity Date to January 31, 2022, the DIP Lender advised the Applicant that it would require payment of an extension fee equal to 1% of the total principal amount of the DIP Financing ($35 million), being $350,000 (the "**Extension Fee**"). This is reflected in the Second DIP Amendment dated August 20, 2021 (the "**Second DIP Amendment**").[17]

24. The Second DIP Amendment also amends paragraph 23 of the DIP Loan Agreement to require that any material changes made that could have a negative impact on the Applicant and its restructuring efforts, or create uncertainty or instability cannot be made without the DIP Lender's consent.[18]

PART III - ISSUES

25. The following three issues must be determined on this motion:

   (a) Should the Stay Period be extended up to and including January 31, 2022?

   (b) Should the Second DIP Amendment be approved by this Court?

PART IV - LAW AND ANALYSIS

Issue 1: This Court should extend the Stay Period

26. The Applicant seeks an extension of the Stay Period up to and including January 31, 2022.

27. Pursuant to section 11.02 of the CCAA, the Court may, on an application in respect of a debtor company other than an initial application, grant an extension of a stay of proceedings

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[17] Hache Affidavit at para. 108, Motion Record, Tab 2, Page 61.
[18] Haché Affidavit, Exhibit "E", Motion Record, Tab 2, Page 174.

where: (i) the applicant satisfies the Court that an extension of the stay of proceedings is appropriate in the circumstances; and (ii) the applicant further satisfies the Court that it has acted, and is acting, in good faith and with due diligence.[19]

28. In deciding whether to grant an extension of the stay of proceedings, the Court will focus on whether the foregoing requirements have been satisfied. The length of the stay extension is discretionary. The extension date should be one that allows the parties some flexibility.[20]

29. Since the granting of the Stay Extension Order on May 2, 2021, the Applicant has been engaged throughout and taken significant steps towards identifying opportunities for improvement in its operations, in implementing the restructuring changes arising from the Term Sheets approved by the Court in late April, 2021, resolving outstanding issues with its stakeholders and is taking the necessary steps in order to be in a position to develop a framework for a Plan to present to creditors. The Applicant has, with the assistance of and in consultation with the Monitor and the CRO, among other things:

(a) maintained operations in the ordinary course during the Stay Period, including the continuance of all student classes (virtually, due to the pandemic) in the Spring 2021 term without disruption;[21]

(b) developed a return to campus plan for thousands of students that strives to ensure the health and safety of students, faculty, staff and visitors;[22]

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[19] CCAA, s 11.02(2)-(3).
[20] *Sunrise/Saskatoon Apartments Limited Partnership (Re)*, 2017 BCSC 808 at para 21.
[21] Haché Affidavit at para. 32, Motion Record, Tab 2, Page 42.
[22] Haché Affidavit at paras. 34-36, Motion Record, Tab 2, Pages 42-43.

(c) received and responded in a timely manner to a significant volume of telephone calls and emails from stakeholders;[23]

(d) opened registration for Fall term courses that commence on September 8, 2021;[24]

(e) negotiated the terms of a transition of services with Thorneloe University and University of Sudbury following the applicable disclaimers;[25]

(f) implemented amendments to the Pension Plan to ensure the long-term sustainability of the Pension Plan and reduce the risk of going concern or solvency special payments;[26]

(g) resolved all pre-filing grievances with LUFA;[27]

(h) engaged extensively with several key stakeholders and various government agencies regarding the Applicant's ongoing commitment to deliver robust, dynamic French-language programming to its students;[28]

(i) cooperated with the investigations of the Auditor General of Ontario and the *French Language Services Act* Commissioner and facilitated on-site access;[29]

(j) convened meetings with several research-granting agencies that are responsible for funding a significant amount of research conducted by the Applicant to secure continued funding;[30]

(k) commenced a review of the Applicant's real estate portfolio, working closely with the Real Estate Advisor;[31] and

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[23] Haché Affidavit at para. 38, Motion Record, Tab 2, Page 43.
[24] Haché Affidavit at paras. 8-11, Motion Record, Tab 2, Pages 34-35.
[25] Haché Affidavit at paras. 42-44, Motion Record, Tab 2, Pages 44-45.
[26] Haché Affidavit at paras. 45-52, Motion Record, Tab 2, Pages 45-47.
[27] Haché Affidavit at para. 59, Motion Record, Tab 2, Page 49.
[28] Haché Affidavit at paras. 62-68, Motion Record, Tab 2, Pages 50-51.
[29] Haché Affidavit at paras. 69-74, Motion Record, Tab 2, Pages 51-53.
[30] Haché Affidavit at paras. 85-89, Motion Record, Tab 2, Page 56.
[31] Haché Affidavit at paras. 113-117, Motion Record, Tab 2, Pages 62-64.

(l) issued a Request for Proposals for a full-scale operational and governance review intended to establish policies, procedures and systems that will promote accountability and sustainability within the Applicant's operations and governance.[32]

30. The Applicant is acting in good faith and with due diligence in pursuit of its restructuring goals.[33]

31. The Applicant requires an extension of the stay of proceedings until January 31, 2022, to preserve the *status quo* and permit the Applicant to continue its planned restructuring efforts in Phase 3, including, among other things:[34]

(a) the determination and resolution of the universe of claims against the Applicant and its directors and officers;

(b) receiving, considering and, if applicable, implementing the recommendations arising out of each of the real estate and governance and operational reviews;

(c) the planning, drafting and negotiation of a Plan; and

(d) the ongoing re-building of confidence and relationships with all stakeholders of the Applicant.

32. A substantial amount of work has already gone into this restructuring and significant progress has been made. However, a lot of work remains for the Applicant's restructuring to be completed successfully. An extension of the stay of proceedings until January 31, 2022, is in the best interests of the Applicants and all of its stakeholders.

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[32] Haché Affidavit at paras. 118-123, Motion Record, Tab 2, Pages 64-67.
[33] Haché Affidavit at para. 133, Motion Record, Tab 2, Page 69.
[34] Haché Affidavit at paras. 124-12, Motion Record, Tab 2, Pages 67-68.

33. The Revised Cash Flow Forecast demonstrates that the Applicant will have sufficient liquidity to operate its business and meet its obligations during the proposed extension of the Stay Period.[35]

34. The Monitor supports extending the Stay Period until January 31, 2022 and is of the view that the Applicant is acting in good faith and with due diligence.[36]

35. For all of the foregoing reasons, the Applicant respectfully submits that this Court should extend the Stay Period up to and including January 31, 2022.

Issue 2: This Court should approve the Second DIP Amendment

i. Background and Terms of the DIP Amendment

36. The Applicant obtained $35 million from the DIP Lender pursuant to the First DIP Amendment.[37] The First DIP Amendment extended the Maturity Date to August 31, 2021. Given the pending expiry of the Maturity Date, which would make the amount drawn under the DIP Facility immediately due and payable, the Applicant sought an extension of the Maturity Date from the DIP Lender.[38]

37. The Second DIP Amendment was negotiated with the DIP Lender and its counsel. As described above, the DIP Lender requires payment of the Extension Fee to extend the Maturity Date by five months to January 31, 2022.[39]

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[35] Seventh Report of the Monitor dated August 24 ("**Seventh Report**") at para. 78.
[36] Seventh Report at paras. 88 – 89.
[37] Haché Affidavit at para. 105, Motion Record, Tab 2, Pages 60-61.
[38] Haché Affidavit at para. 107, Motion Record, Tab 2, Page 61.
[39] Haché Affidavit at para. 108, Motion Record, Tab 2, Page 61.

ii. Jurisdiction to Approve the DIP Amendment

38. Section 11 and section 11.2 of the CCAA provides statutory jurisdiction to approve the Second DIP Amendment.[40]

39. In *U.S. Steel Canada Inc., (Re)*,[41] the Court approved an agreement that extended the maturity of an existing DIP loan. In approving the agreement, the Court noted, among other things:

(a) the DIP loan provided an important cash buffer to meet any unforeseen working capital needs during the extended period;

(b) the DIP loan provided for stability in the debtor's restructuring;

(c) the DIP loan provided confidence to employees, customers and suppliers about the continuity of the debtor company's operations; and

(d) there was no evidence of any material prejudice to any creditor of the debtor company if the amendment was approved and implemented.[42]

40. These factors, as well as the enumerated factors set out in section 11.2(4) of the CCAA[43], support the approval of the Second DIP Amendment. The Applicant has successfully continued operations during the CCAA proceeding while pursuing its restructuring goals. The Second DIP Amendment ensures stability in the Applicant's operations and provides breathing room in the event of unanticipated expenses.

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[40] CCAA, 11.2.
[41] *U.S. Steel Canada Inc. (Re)*, 2016 ONSC 4838 at paras. 16 – 19.
[42] *Ibid* at para. 18.
[43] CCAA, s. 11.2(4).

41. The extension of the Maturity Date provided by the Second DIP Amendment is also necessary to allow the Applicant, the Monitor and the Applicant's creditors to focus their collective efforts towards developing a Plan that, if accepted by creditors, will ultimately allow the Applicant to emerge from CCAA protection.

42. No stakeholders will be materially prejudiced by the approval of the Second DIP Amendment.

iii. The Extension Fee is Reasonable and Appropriate in the Circumstances

43. As consideration for the extension of the Maturity Date, the Applicant (subject to court approval) and the DIP Lender have agreed to the Extension Fee for a five-month extension.

44. A 1% extension fee is not uncommon in insolvency proceedings and, in several instances, the extension of the maturity date was only for one month, as the below chart demonstrates:

Debtor	Amount of DIP Loan	Extension Fee
Solis Foods Corporation Inc.[44]	$500,000	$5,000 (1%) for each 30-day extension of the maturity date.
Viafoura Inc.[45]	$1,000,000	1% of loan payable upon each 30-day extension of loan maturity.
Forme Development Group Inc.[46]	$5,000,000	$25,000 (0.5%) for each 4-month extension (pro-rated fee if duration amended).

[44] Motion Record of Solis Foods Corporation Inc. dated June 9, 2021 at Pages 523-526.
[45] Motion Record of Viafoura Inc. dated December 3, 2019 at Page 39.
[46] Pre-Filing Report of KSV Advisory dated November 6, 2018 at Page 10.

Aralez Pharmaceuticals Inc.[47]	$10,000,000	1% of loan payable upon one-time, 90-day extension of loan maturity.
North American Tungsten Corporation Ltd.[48]	$3,000,000	$10,000 per month (0.033%) for each 30-day extension.
Great Basin Gold Ltd.[49]	$35,000,000 USD	1% extension fee for each 30-day extension.

45. Given the five-month duration of the extension of the Maturity Date and the quantum of funds advanced, the quantum of the Extension Fee appears to be within the range of that approved by the Court in other proceedings.

46. The Monitor is also of the view that the quantum of the Extension Fee and the terms and conditions of the Second DIP Amendment are reasonable and appropriate in the circumstances. The Monitor supports the approval of the Second DIP Amendment, as it will provide the Applicant with continued access to necessary funds to operate through the 2021-22 academic year while working with its stakeholders to complete its restructuring.[50]

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[47] Affidavit of Kathryn Esaw sworn August 10, 2018, Exhibit "A" at Page 32.
[48] Affidavit of Dennis Lindahl sworn July 6, 2015 at Page 4.
[49] *Great Basin Gold Ltd., Re*, 2012 BCSC 1459 at para. 46.
[50] Seventh Report at paras. 85 to 86.

PART V - RELIEF REQUESTED

47. For all of the foregoing reasons, the Applicant requests an Order substantially in the form of the draft Order included at Tab 3 of its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of August, 2021.

Thornton Grout Finnigan LLP

Thornton Grout Finnigan LLP

Counsel for the Applicant

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Sunrise/Saskatoon Apartments Limited Partnership (Re)*, 2017 BCSC 808.

2. *U.S. Steel Canada Inc., (Re)*, 2016 ONSC 4838.

3. *Great Basin Gold Ltd., Re*, 2012 BCSC 1459.

SCHEDULE "B" – RELEVANT STATUTES

Companies' Creditors Arrangement Act

Section 11

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.

Section 11.02

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make the order unless

> (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
>
> (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Section 11.2

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

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

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

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