

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

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

Applicant

**FACTUM OF THE APPLICANT
(Amendment to the Compensation Claims Process Order)**

September 29, 2021

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PART I - OVERVIEW

1. The Applicant seeks an Order amending the Compensation Claims Process Order (the “**Amended Compensation Claims Process Order**”) that includes the determination of the Third Party RHBP Claims against the Applicant.
2. The Compensation Claims Process Order excluded claims against the Applicant held by Third Parties or Third Party Employees (as defined below) and contemplated that the Applicant would continue discussions with the Third Parties in order to determine whether a consensual resolution was possible prior to re-attending before the Court.
3. The Applicant has since engaged in further discussion and negotiations with certain of the Third Parties. The result of those extensive efforts is the proposed Amended Compensation Claims Process Order which is now sought by the Applicant.
4. The Applicant requests that the Court grant the Order amending the Compensation Claims Process Order, which includes the Compensation Claims Methodology contained therein (together, the “**Compensation Claims Process**”) for the following reasons:

- (a) the Compensation Claims Process represents a fair and reasonable settlement of a matter in dispute;
- (b) the Amended Compensation Claims Process Order is the product of extensive negotiations among the Applicant, the Monitor, and the Third Parties; and
- (c) a consensual resolution avoids the need for costly litigation and instead allows the Applicant to continue to focus on its restructuring.

PART II - FACTS

- 5. The following provides a brief summary of the facts, as are more particularly described in the Affidavit of Robert Haché sworn September 10, 2021 (the “**Haché Affidavit**”), and the Eighth Report of the Monitor dated September 28, 2021.
- 6. Capitalized terms used herein that are not otherwise defined shall have the meaning ascribed to such terms as defined in the Haché Affidavit.

Background of the RHBP

- 7. Since July 1, 1998, the Applicant has offered the RHBP to employees of the Applicant. The RHBP was also available to employees of the Former Federated Universities, SNOLab, CEMI, and MIRARCO (collectively, the “**Third Parties**”).¹
- 8. On February 1, 2021, the Applicant ceased processing benefit claims made in respect of the RHBP. Further and in accordance with the LUFA Term Sheet and the LUSU Term

¹ Affidavit of Robert Haché sworn September 10, 2021 (“**Haché Affidavit**”) at para. 4, Motion Record of the Applicant dated September 10, 2021 (“**Motion Record**”), Tab 2.

Sheet, it was agreed among the Applicant and the respective unions that the RHBP would be terminated and the RHBP was terminated for all participants as of April 30, 2021.²

9. Prior to its termination, the RHBP was structured as a subsidy/benefit cost reimbursement program for eligible retirees of LU and the Third Parties who participated in the program.³ The RHBP Terms, the RHBP Memo, and the Retiree RHBP Memo are the three documents that govern the RHBP.⁴
10. The Applicant made the RHBP available to the Third Parties for the benefit of their employees and performed certain administrative tasks for participants in the RHBP.⁵ The Applicant received all contributions made to the RHBP by participating employees and their respective employers.⁶
11. Pursuant to the RHBP Terms, eligible retirees were supposed to have been reimbursed by their respective employer, up to maximum annual limits as set out in the RHBP Terms, for all or a portion of the cost of health care benefits they purchased through an external provider and for medical expenses.⁷
12. In practice, LU administered the RHBP for retirees of LU, Huntington, Thorneloe, SNOLab, CEMI, and MIRARCO. Retirees of these entities submitted eligible receipts for reimbursement directly to LU. The retirees of USudbury submitted their receipts directly

² Haché Affidavit at para. 15, Motion Record, Tab 2.

³ Haché Affidavit at para. 10, Motion Record, Tab 2.

⁴ Haché Affidavit at paras. 6 – 9, Motion Record, Tab 2.

⁵ Haché Affidavit at para. 13, Motion Record, Tab 2.

⁶ Haché Affidavit at para. 31, Motion Record, Tab 2.

⁷ Haché Affidavit at para. 11, Motion Record, Tab 2.

to USudbury, which reimbursed its own retirees. USudbury then submitted a summary of reimbursements to LU for payment.⁸

Eligibility for the RHBP

13. In order to be eligible to receive benefits under the RHBP, employees must satisfy the following conditions:

- (a) the employee must retire at age 55 or older;
- (b) the employee must have contributed for at least 15 years to the RHBP; and
- (c) either:
 - (i) the employee must purchase private coverage and provide the employer with receipts for private coverage; or
 - (ii) the employee may elect not to purchase private coverage but must provide the employer with receipts for medical expenses;

(the “**RHBP Criteria**”).⁹

14. If an employee ceased employment with the Applicant or a Third Party for any reason and did not meet the RHBP Criteria, that employee could not participate in the RHBP and was not entitled to a reimbursement of any contributions made by the former employee to the RHBP.¹⁰

Historical Contributions to the RHBP

15. Active employees participating in the RHBP were required to pay a premium that varied depending on the type of employee and whether the employee enrolled in single or family

⁸ Haché Affidavit at para. 12, Motion Record, Tab 2.

⁹ Haché Affidavit at para. 16, Motion Record, Tab 2.

¹⁰ Haché Affidavit at para. 17, Motion Record, Tab 2.

benefit coverage. These amounts were deducted from the payroll of the active employees participating in the RHBP.¹¹

16. In addition, the Applicant and each of the Third Parties agreed to contribute an annual amount on behalf of the employer in support of the RHBP. The Third Parties' annual employer contribution was proportionate relative to the Applicant's annual employer contribution based on the number of active employees participating in the RHBP.¹²

Discussions with the Third Parties

17. Shortly before the initial motion with respect to the Compensation Claims Process Order on August 17, 2021, certain of the Third Parties advised they intended to dispute the proposed treatment of Third Party RHBP Claims generally on the basis that the Third Party Employees should receive the same treatment as employees of LU with respect to the RHBP. Accordingly, the Applicant adjourned that aspect of the Compensation Claims Process in order to permit further discussions among the Applicant, the Monitor, and certain of the Third Parties.¹³
18. Since then, the Applicant, the Monitor, and certain of the Third Parties commenced discussions regarding a potential resolution of a Third Party RHBP Claim methodology and agreed to a litigation schedule should a consensual resolution not be reached.¹⁴
19. On September 10, 2021, in accordance with the litigation schedule, the Applicant served its Motion Record that sought a methodology for the determination of the Third Party

¹¹ Haché Affidavit at paras. 18 and 19, Motion Record, Tab 2.

¹² Haché Affidavit at paras. 20 and 23, Motion Record, Tab 2.

¹³ Eighth Report of the Monitor dated September 28, 2021 ("**Eighth Report**") at para. 21.

¹⁴ Eighth Report at para. 22.

RHBP Claims that was substantially similar to the methodology described in the Sixth Report of the Monitor dated August 12, 2021.¹⁵

20. Since then, the Applicant, the Monitor, and certain of the Third Parties have continued to have discussions with respect to the methodology to determine the Third Party RHBP Claims in the Amended Compensation Claims Process, which discussions culminated in agreement among LU and the Third Parties with respect to certain amendments to the Compensation Claims Process Order, which are set out in detail in the Eighth Report.¹⁶
21. In summary, the Applicant and the Third Parties agreed to the following methodology to determine the quantum of Third Party RHBP Claims that each Third Party will receive (on behalf of their employees). The Third Party RHBP Claim shall be in an amount that is the greater of:
 - (a) The total amount of RHBP contributions received by LU from the Third Party and on behalf of the Third Party's employees during the administration of the RHBP, net of any contributions refunded by LU to the Third Party;

Less

The aggregate amount of RHBP benefits paid to the Third Party retirees or surviving spouses on or prior to the Filing Date; and

¹⁵ Eighth Report at para. 23.

¹⁶ Eighth Report at para. 24.

- (b) The aggregate amount of all Third Party RHBP Claims calculated in respect of the Third Party's current or former employees, calculated in accordance with the methodology previously approved by this Court for employees of LU.¹⁷
22. The Applicant reached this settlement in order to avoid prolonged litigation in respect of dual motions to be heard before Chief Justice Morawetz and Justice Gilmore (to the extent that USudbury had any objections). Further, the Applicant considered the overall potential estimated aggregate quantum of the Third Party RHBP Claims, which are expected to be *de minimus* considering the entirety of claims filed against the Applicant.

PART III - ISSUES

23. The sole issue before the Court on this motion is whether the Amended Compensation Claims Process Order should be approved. The motion is unopposed by the Third Parties and the form of Order sought by the Applicant reflects the terms negotiated with the Former Federated Universities and SNOLab.

PART IV - LAW AND ANALYSIS

Issue 1: This Court should approve the Amended Compensation Claims Process Order

A. The Proposed Amended Compensation Claims Process Order Represents a Settlement

24. The Amended Compensation Claims Process Order is being sought with the agreement of the Former Federated Universities and SNOLab and effectively represents the Applicant's

¹⁷ Eighth Report at para. 24(c).

settlement proposal to avoid contentious and costly litigation, further distracting the Applicant from its restructuring efforts. In addition, the Applicant has provided the two remaining Third Parties, CEMI and MIRARCO, with copies of the Amended Compensation Claims Process Order and has not received any indication that either of these two entities take issue with the relief sought.

25. The flexibility of the CCAA has been cited as an important factor in facilitating settlements that avoid complex and costly legal disputes. The Courts in CCAA proceedings also recognize that, as a general proposition, settlement of litigation is to be promoted, as settlement saves time and expense for the parties and the Court.¹⁸
26. This Court has articulated the following considerations in approving a settlement in the context of the CCAA:
- (a) is the settlement fair and reasonable;
 - (b) does the settlement provide substantial benefit to stakeholders; and
 - (c) is the settlement consistent with the purpose and spirit of the CCAA?¹⁹

The Amended Compensation Claims Process Order is Fair and Reasonable

27. In determining whether to approve a proposed settlement, a Court will review the settlement from the perspectives of fairness and reasonableness with a view to assisting the CCAA debtor and its stakeholders in achieving a successful restructuring.²⁰

¹⁸ *Re Walter Energy Canada Holdings, Inc.*, 2017 BCSC 1968 at para. 35; *Robertson v. ProQuest Information & Learning Co.*, 2011 ONSC 1647 (“*Canwest*”) at para. 28.

¹⁹ *Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078 at para. 49; *Canwest*, at para. 22.

²⁰ *Re Air Canada*, 2004 CanLII 11700 (Ont. S.C.J.) at para 9. (“*Air Canada*”).

28. The Amended Compensation Claims Process Order should be granted because, taken as a whole, the Amended Compensation Claims Process is fair, reasonable and appropriately balances the interests of the various stakeholders.
29. The Amended Compensation Claims Process allows for claims by each of the Third Parties, on behalf of the Third Party Employees, who were eligible to receive benefits under the RHBP as at April 30, 2021 (the termination date of the RHBP) based on the same methodology previously approved by this Court in respect of employees of LU who were eligible to receive benefits under the RHBP.
30. As was the case with employees of LU, claim amounts will not be included in the Third Party RHBP Claim in respect of Third Party Employees who were not eligible to receive benefits under the RHBP as at April 30, 2021.
31. The Third Party RHBP Claims will be determined through Statements of Compensation Claim delivered by the Monitor to each of the Third Parties. If any of the Third Parties wish to dispute (on behalf of one or more of their Third Party Employees) any information in the Statement of Compensation Claim, the Third Party is required to deliver a Notice of Dispute to the Monitor and the Applicant. Likewise, any distributions will be administered by the Third Party to their former or current employees (including retirees).
32. This proposal allows the remainder of the Compensation Claims Process to proceed in an orderly and efficient manner that promotes certainty and fairness to creditors and avoids the cost, delay, and uncertainty of litigation. This overcomes another hurdle on the way to developing a plan of compromise or arrangement under the CCAA.

33. In assessing whether a proposed settlement meets the standards of fairness and reasonableness, the Court will be guided by the business judgment of its officer, in this case the Monitor, and the Court will look to the integrity of the process by which the transaction was agreed upon.²¹
34. Where, as here, a claims settlement and valuation process is the product of negotiation among counsel and certain financial advisors, the Court should not examine and evaluate each of the elements of that process on a point-by-point basis, nor attempt to amend or alter the process that has been negotiated and agreed upon by the interested parties unless there is good reason to do so. The process required all parties, including LU, to compromise. A change in one term may re-open negotiations on any number of other terms for other parties. Therefore, the Court should look at the fairness and reasonableness of the package as a whole, especially in light of the process by which it was developed.²²
35. The process by which agreement on the Amended Compensation Claims Process Order has been achieved and the Court's approval is sought meets the standards of fairness and integrity, including as a result of the following factors:
- (a) the Amended Compensation Claims Process Order is the product of extensive negotiations involving the Former Federated Universities and SNOLab;
 - (b) the Third Parties are well-advised and had the assistance of experienced counsel and in some cases, financial advisors; and

²¹ [Air Canada](#) at para. 9.

²² [Re Grace Canada](#), 2008 CanLII 54779 (Ont. S.C.J.) at para 74; [Re Nortel Networks Corporation](#), 2010 ONSC 5584 at para. 103.

(c) certain of the Third Parties who were not heavily involved in the negotiations were provided with an opportunity to raise any issues or concerns with the proposed Amended Compensation Claims Process Order and Compensation Claims Methodology in advance of the hearing.

36. Finally, the Monitor supports the Amended Compensation Claims Process Order²³ and played an integral role in the negotiations. The Court, in determining whether the proposed Compensation Claims Process is fair and reasonable, should be guided by the business judgment of its officer, and it will look to the integrity of the process by which the transaction was agreed upon.²⁴

37. For the foregoing reasons, the Amended Compensation Claims Process Order should be granted because it is fair and reasonable and appropriately balances the interests of the various stakeholders.

The Amended Compensation Claims Process Order Provides a Benefit to the Stakeholders

38. Based on the best information available to the Applicant and the Monitor at this time, it is estimated that the proposed methodology to quantify the Third Party RHBP Claims yields claims against the Applicant of less than \$1 million. In the context of the substantial quantum of claims filed in this proceeding, these claims are not material.

39. The benefit provided by the Amended Compensation Claims Process Order to the stakeholders of the Applicant is the time and money spent avoiding contentious litigation.

²³ Eighth Report at para. 26.

²⁴ [*Air Canada* at para. 9.](#)

Instead, the Applicant and its advisors can focus on the overall restructuring and the development and negotiation of a plan of compromise or arrangement.

40. Further, paragraph 40 of the Compensation Claims Methodology, among other things, preserves the right for the Applicant to take into consideration any amounts ultimately distributed to the Third Parties in respect of the Third Party RHBP Claims in the context of any other claims filed against the Applicant that relate to the RHBP.
41. For these reasons, the Applicant respectfully submits that the Amended Compensation Claims Process Order provides a benefit to stakeholders of the Applicant and should be approved.

The Amended Compensation Claims Process Order is Consistent with the Spirit and Purpose of the CCAA

42. The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. The spirit and purpose of the statute is to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both.²⁵
43. Settlement agreements which bring the debtor closer to finalizing a plan of arrangement and resolve uncertainties with outstanding claims are consistent with the purpose and spirit of the CCAA.²⁶

²⁵ [Elan Corp. v Comiskey](#), [1990] 1 O.R. (3d) 289 (Ont. C.A.); [Crystallex International Corp., Re](#), 2012 ONSC 2125 at para. 58.

²⁶ [Nortel Networks Corp., Re](#), 2010 ONSC 1708 [Commercial List] at paras. 27, 74; [U.S. Steel Canada Inc., Re](#), 2015 ONSC 6331 [Commercial List] at para. 70.

44. Avoiding the need for costly, protracted litigation and achieving an outcome which balances certainty and the interests of the parties, including both creditors and debtors, is an outcome which furthers the remedial objectives of the statute.²⁷
45. The Amended Compensation Claims Process Order is consistent with the spirit and purpose of the CCAA because it:
- (a) utilizes the structured environment of the CCAA to arrive at a unique compromise which is for the benefit of all parties;
 - (b) allows the Applicant to focus on the development of a plan of compromise or arrangement;
 - (c) resolves uncertainties with the Third Party RHBP Claims and appropriately balances certainty with clarity; and
 - (d) avoids the need for costly, protracted litigation which detracts from the Applicant's restructuring.

The Compensation Claims Process Order and Compensation Claims Process Methodology are Fair and Reasonable

PART V - RELIEF REQUESTED

46. For all of the foregoing reasons, the Applicant requests that this Court grant the Order amending the Amended Compensation Claims Process Order, reflecting the revisions made as a result of the negotiations among the Applicant, the Monitor, the Former Federated Universities, and SNOLab.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of September, 2021.

²⁷ [*Calpine Canada Energy Ltd., Re*, 2007 ABQB 504](#) (leave to appeal dismissed, [2007 ABCA 266](#)) at para. 82.

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**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [Re Walter Energy Canada Holdings, Inc.](#), 2017 BCSC 1968.
2. [Robertson v. ProQuest Information & Learning Co.](#), 2011 ONSC 1647.
3. [Labourers’ Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.](#), 2013 ONSC 1078.
4. [Re Air Canada \(2004\)](#), 2004 CanLII 11700.
5. [Hunters Trailer & Marine Ltd., Re](#), 2001 CanLII 1094.
6. [Re Grace Canada](#), 2008 CanLII 54779 (Ont. S.C.J.).
7. [Re Nortel Networks Corporation](#), 2010 ONSC 5584.
8. [Elan Corp. v Comiskey](#), [1990] 1 O.R. (3d) 289 (Ont. C.A.).
9. [Crystallex International Corp., Re](#), 2012 ONSC 2125.
10. [Nortel Networks Corp., Re](#), 2010 ONSC 1708 [Commercial List].
11. [U.S. Steel Canada Inc., Re](#), 2015 ONSC 6331 [Commercial List].
12. [Calpine Canada Energy Ltd., Re](#), 2007 ABQB 504 (leave to appeal dismissed, [2007 ABCA 266](#)).

**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.

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Proceedings commenced at Toronto

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