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
(Claims Officers and Grievance Resolution Process)

December 17, 2021

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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**") and Ernst & Young Inc. was appointed as monitor (the "**Monitor**") of LU.

2. On May 31, 2021 and August 17, 2021, respectively, the Court granted the Claims Process Order (as amended and restated, the "**Claims Process Order**") and the Compensation Claims Process Order (as amended, the "**Compensation Claims Process Order**").

3. Approximately 1,500 claims in the aggregate amount of approximately $360 million have been filed in the claims processes. Over the last several months, the Monitor, with the assistance of the Applicant, has been diligently reviewing these claims. Although the exact number is unknown at this time, it is anticipated that there will be several disputed claims (the "**Disputed Claims**"), including several disputed claims that allege significant amounts owed to the claimant.

4. The Applicant and the Monitor must resolve these claims and, if necessary, determine the Disputed Claims to provide certainty regarding the development of terms of a Plan of Arrangement and the Applicant's emergence from these CCAA proceedings.

5. The relief sought on this motion seeks to continue to advance the Applicant's restructuring efforts. The Applicant seeks three Orders:

   (a) an Order (the "**Claims Officer Order**") appointing the Honourable Clément Gascon, the Honourable J. Douglas Cunningham, Q.C., and W. Niels Ortved (collectively, the "**Claims Officers**" and each individually, a "**Claims Officer**") as claims officers to determine claims that have been disputed pursuant to the Claims Process Order;

   (b) an Order (the "**Grievance Resolution Process Order**") approving a grievance resolution process for certain of the grievances filed by the Laurentian University Faculty Association ("**LUFA**") against the Applicant prior to October 14, 2021 and until the Applicant's emergence from this CCAA proceeding (the "**Grievance Resolution Process**") and appointing Ken Rosenberg of Paliare Roland Rosenberg Rothstein LLP (the "**Grievance Resolution Officer**") to case manage and, if necessary, determine and resolve any issues arising as a result of the Grievance Resolution Process; and

   (c) an Order (the "**Fee Cap Order**") amending the Amended and Restated Initial Order dated February 11, 2021, (the "**A&R Initial Order**") to remove the cap on fees that may be incurred by Board Counsel.

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

(a) **Appointment of Claims Officers.** The proposed Claims Officers have the requisite expertise and experience to adjudicate the Disputed Claims and three Claims Officers will be required, given the anticipated number of Disputed Claims, in order to proceed on a reasonable timeline for emergence from CCAA;

(b) **Grievance Resolution Process.** The proposed Grievance Resolution Process is a fair, efficient, and reasonable process for the classification and resolution of disputed Compensation Claims and certain grievances. The Grievance Resolution Process has been negotiated with LUFA and LU has listened to the concerns raised by LUFA. The proposed Grievance Resolution Officer is well-versed in labour and insolvency matters; and

(c) **Removal of Cap on Board Counsel's Fees.** Board Counsel has been, and is expected to continue to be, extremely busy throughout this CCAA proceeding to address and advise on issues relevant to the Board, necessitating a removal of the existing cap on fees that may be incurred by Board Counsel.

7. All capitalized terms used herein that are not otherwise defined shall have the meaning ascribed to them in the Haché Affidavit. All references to currency are in Canadian dollars unless otherwise noted.

PART II - FACTS

A. Appointment of the Claims Officers

8. During the next several months, the Monitor and the Applicant will seek to determine and resolve the claims filed against the Applicant. Many of these claims are ordinary course unsecured claims filed by trade creditors and similar parties. Such claims are unlikely to

require the involvement of a Claims Officer. However, there are a number of complex claims that are expected to require the involvement of a Claims Officer in order to obtain a determination of the quantum and status of such Disputed Claims.[1]

9. Pursuant to the Claims Process Order, the Monitor may seek to refer the Disputed Claims to a Claims Officer or the Court. Given the number of claims received, the Applicant and the Monitor propose that if claims filed against the Applicant cannot be resolved consensually, such Disputed Claims will be referred to the Claims Officers for determination at first instance.[2]

10. The Monitor and its counsel, together with the Applicant's counsel, considered the background and experience of potential claims officers, and the availability of such persons to commit the resources and time required to address Disputed Claims in this CCAA proceeding.[3]

11. The Monitor, with input from the Applicant's counsel, determined that the Honourable Clément Gascon, the Honourable J. Douglas Cunningham, and W. Niels Ortved each have the background and experience necessary to determine the Disputed Claims in a manner that is most efficient, given the anticipated complexity and quantum of the Disputed Claims. [4]

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[1] Haché Affidavit at para. 12, Motion Record of the Applicant dated December 13, 2021 (the "**Motion Record**"), Tab 2.

[2] Haché Affidavit at para. 13, Motion Record, Tab 2; Ninth Report of the Monitor dated December 16, 2021 (the "**Ninth Report**") at para. 23.

[3] Haché Affidavit at para. 16, Motion Record, Tab 2.

[4] Ninth Report at para. 27.

12. Given the anticipated number and complexity of the Disputed Claims, and based on discussions with prospective individuals for whom consideration was given for appointment as Claims Officers, the Applicant is of the view that three Claims Officers are required in order to not unduly delay the timeline for this CCAA proceeding. Each of the Claims Officers have advised the Monitor that their ability to serve in that role is subject to three Claims Officers being appointed by the Court.[5]

13. The fees and expenses incurred by the Claims Officers, including any staff or other lawyers reasonably required by the Claims Officers to assist them, will be paid by the Applicant at their standard hourly rates for similar matters as approved by the Monitor.[6]

B. Grievance Resolution Process

14. The Compensation Claims Process Order applies to, among others, claims by any union in respect of grievances under any collective agreement to which the Applicant is party, whether such grievance arose prior to or after the date of the Initial Order and is in respect of any matter that:

    (a) is based in whole or in part on facts existing prior to the Filing Date, related to a time period prior to the Filing Date ("**Pre-Filing Grievances**"); or

    (b) arises as a result of the restructuring of the Applicant prior to the date of the Compensation Claims Process Order ("**Restructuring Grievances**").[7]

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[5] Haché Affidavit at para. 18, Motion Record, Tab 2.

[6] Ninth Report at para. 29.

[7] Haché Affidavit at para. 20, Motion Record, Tab 2; Ninth Report at para. 30.

15. On or before October 14, 2021, LUFA filed 36 grievances against LU (collectively, the "**October 14 Grievances**"). Two of the October 14 Grievances have either been resolved or withdrawn and one is expected to be withdrawn shortly. The balance of the October 14 Grievances remain unresolved.[8]

16. As a first step, it is necessary to classify the October 14 Grievances as: (i) Pre-Filing Grievances, (ii) Restructuring Grievances, or (iii) post-filing grievances. For post-filing grievances, the Monitor, following consultation with LU and LUFA, must determine whether or not any post-filing grievances are material due to the fact that they may affect the ongoing restructuring (the "**Material Post-Filing Grievances**") or if they are ordinary course grievances. For any Material Post-Filing Grievances, the Grievance Resolution Process proposes that such grievances will be addressed in the same manner as Pre-Filing Grievances and Restructuring Grievances.[9]

17. The classification of the October 14 Grievances affects how the grievances may be addressed under a Plan of Arrangement put forward by LU, including whether any monetary award arising from a determination of the grievance is subject to compromise.[10]

18. LU has made several requests to LUFA for particulars regarding the October 14 Grievances. On December 6, 2021, LUFA provided some particulars for certain of the October 14 Grievances. However, LU and the Monitor continue to require additional

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[8] Haché Affidavit at para. 21, Motion Record, Tab 2; Ninth Report at para. 31.

[9] Haché Affidavit at para. 22, Motion Record, Tab 2; Ninth Report at para. 34.

[10] Haché Affidavit at para. 23, Motion Record, Tab 2; Ninth Report at para. 35.

particulars from LUFA before certain of the October 14 Grievances can be properly classified.[11]

19. In an effort to advance the process to classify the October 14 Grievances and resolve the October 14 Grievances, LU and the Monitor have developed a Grievance Resolution Process. The Grievance Resolution Process is intended to apply to Pre-Filing Grievances, Restructuring Grievances, and Material Post-Filing Grievances, including any further grievances that are filed until LU emerges from CCAA.[12]

20. On December 10, 2021, counsel to the Monitor provided counsel to LUFA with the proposed Grievance Resolution Process. The substantive issues addressed by the Grievance Resolution Process have been discussed by LU and LUFA a number of times during the correspondence relating to the October 14 Grievances.[13] Subsequent discussions were held among counsel to LU, counsel to the Monitor and counsel to LUFA regarding the Grievance Resolution Process. Late in the evening on December 17, 2021, agreement was reached among LU, the Monitor, and LUFA.

21. The proposed schedule provides for the classification of the October 14 Grievances by no later than January 28, 2022, and an ultimate resolution of Pre-Filing Grievances, Restructuring Grievances and Material Post-Filing Grievances by March 31, 2022, or such other date as the Grievance Resolution Officer determines. The Grievance Resolution

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[11] Haché Affidavit at paras. 24-29, Motion Record, Tab 2.

[12] Haché Affidavit at para. 30, Motion Record, Tab 2; Ninth Report at para. 37.

[13] Haché Affidavit at para. 31, Motion Record, Tab 2.

Process does not address any non-material post-filing grievances, which will proceed in the ordinary course in accordance with the LUFA collective agreement and the term sheet between LU and LUFA that was previously approved by this Court.

22. The Monitor and its counsel considered the availability and experience of individuals who may be suitable to serve as Grievance Resolution Officer. Following such consideration, Ken Rosenberg of Paliare Roland Rosenberg Rothstein LLP is proposed to be appointed as Grievance Resolution Officer.[14]

23. The Grievance Resolution Process proposes that the Monitor will first determine the classification of grievances. If there is a dispute regarding the Monitor's classification, the disputes shall be referred to the Court-Appointed Mediator for mediation. If the parties are unable to agree at mediation to the classification, the Grievance Resolution Process proposed that the Court-Appointed Mediator has the authority to make a determination solely in respect of that classification and such decision shall be final and binding.[15]

24. The Grievance Resolution Process proposes that the Grievance Resolution Officer will have the jurisdiction to hear all Pre-Filing, Restructuring and Material Post-Filing Grievances and will have the authority to establish a procedure for the determination of any issue related to the Grievance Resolution Process.[16]

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[14] Haché Affidavit at para. 33, Motion Record, Tab 2; Ninth Report at para. 46.

[15] Haché Affidavit at para. 34, Motion Record, Tab 2; Ninth Report at para. 41.

[16] Haché Affidavit at para. 35, Motion Record, Tab 2; Ninth Report at para. 42.

C. Removal of Cap on Board Counsel Fees

25. Paragraph 36 of the A&R Initial Order limited the amount of professional fees incurred by Board Counsel that LU is permitted to pay to a maximum amount of $250,000 plus HST, pending further Order of the Court.[17]

26. Pursuant to an Endorsement of Chief Justice Morawetz dated May 31, 2021, the maximum amount of fees that could be incurred by Board Counsel was increased to $500,000.[18]

27. Board Counsel has been, and is expected to continue to be, extremely active throughout the CCAA proceedings. Board Counsel has reached the amount of its cap and accordingly, the Applicant is seeking the removal of the cap on Board Counsel's professional fees.[19]

PART III - ISSUES

28. The following three issues must be determined on the motions brought by the Applicant:

    (a) should this Court appoint the Claims Officers?

    (b) should this Court approve the proposed Grievance Resolution Process and appoint the Grievance Resolution Officer?

    (c) should this Court remove the cap on the maximum amount of fees that Board Counsel may incur?

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[17] Haché Affidavit at para. 40, Motion Record, Tab 2; Ninth Report at para. 49.

[18] Haché Affidavit at para. 41, Motion Record, Tab 2; Ninth Report at para. 50.

[19] Haché Affidavit at paras. 42-43, Motion Record, Tab 2.

PART IV - LAW AND ANALYSIS

Issue 1: This Court should appoint the Claims Officers

29. Pursuant to paragraph 37 of the Claims Process Order, either the Monitor or the Applicant are authorized to bring a motion to Court seeking an order appointing a Claims Officer in respect of any and all disputed Claims. The Applicant has done so through this motion.

30. Claims officers are routinely appointed in CCAA proceedings to facilitate the expeditious resolution of claims filed against the debtor.[20]

31. Each of the proposed Claims Officers have considerable experience in insolvency and claims resolution matters to competently act in such capacity.[21]

32. The Honourable Clément Gascon is fluently bilingual in English and French. He can hear and determine Disputed Claims in either language. The Applicant is aware of at least one material claim filed in French for which a determination may need to proceed in French.[22]

33. Appointing the Claims Officers now will avoid any delays in the Applicant's CCAA proceeding. With the assistance of the Claims Officers, the Disputed Claims can be determined in a timely manner. This will allow the Applicant to emerge from this CCAA proceeding as soon as possible.

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[20] *8640025 Canada Inc., Re*, 2018 BCCA 93 at para. 34, citing *Alternative Fuel Systems Inc., Re*, 2004 ABCA 31 at para. 53.

[21] Haché Affidavit at para. 16 and Exhibit "D", Motion Record, Tab 2; Ninth Report at para. 27.

[22] Haché Affidavit at para. 17, Motion Record, Tab 2; Ninth Report at para. 25(a).

34. The Monitor supports the appointment of the Claims Officers to facilitate an expeditious and efficient resolution of claims filed against the Applicant.[23]

35. The fees of the Claims Officers, and any staff or lawyers reasonably required to assist the Claims Officers, will be approved by the Monitor before the Applicant makes payment.

Issue 2: This Court should approve the proposed Grievance Resolution Process

A. The Court has the Jurisdiction to Approve the Grievance Resolution Process

36. The Court's general power under section 11 of the CCAA is broad enough to include the authority to approve a process to resolve grievances filed pursuant to a collective agreement the debtor is party to.[24] Further, this Court has approved processes to resolve grievances filed within CCAA proceedings before.

37. In *Canwest*, the claims procedure order included grievances filed under the applicable collective agreement. Justice Pepall (as she then was) found that grievances should be adjudicated in the CCAA claims process (emphasis added):

> The claims process is summary in nature for a reason. It reduces delay, streamlines the process, and reduces expense and in so doing promotes the objectives of CCAA. Indeed, if grievances were to customarily proceed to arbitration, potential exists to significantly undermine the CCAA proceedings. Arbitration of all claims arising from collective agreements would place the already stretched resources of insolvent CCAA debtors under significant additional strain and could divert resources away from the restructuring. <u>It is my view that generally speaking, grievances should</u>

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[23] Ninth Report at paras. 27-28.

[24] *Canwest Global Communications Corp., Re*, 2011 ONSC 2215 [Commercial List] ("***Canwest***"); *Essar Steel Algoma Inc., Re*, 2016 ONCA 274 ("***Algoma***").

> be adjudicated along with other claims pursuant to the provisions of a claims procedure order within the context of the CCAA proceedings.[25]

38. Further, Justice Pepall held that a CCAA claims process that captured grievances was not precluded by section 33 of the CCAA.[26]

39. In the *Algoma* CCAA proceeding, the debtor sought and obtained an order providing for a process to advance and resolve the approximately 3,000 unresolved grievances filed against the debtor. The contested order was granted in the CCAA proceeding and the Ontario Court of Appeal dismissed the union's appeal. The Ontario Court of Appeal held that grievances were caught by the stay of proceedings and that a CCAA judge had the jurisdiction to establish a procedure for resolving grievances, including those which the parties had previously agreed to have resolved by arbitration.[27]

40. The Court of Appeal also affirmed the CCAA judge's findings that there was "no question" that the grievance claims procedure would assist the debtors in their restructuring attempts and would provide some certainty regarding the potential impact of the unresolved grievances.[28]

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[25] *Canwest, ibid* at para. 33.

[26] *Canwest, ibid* at para. 40.

[27] *Algoma, ibid* at para. 33.

[28] *Algoma, ibid* at para. 34.

B. It is Appropriate for the Court to Approve the Grievance Resolution Process and Appoint the Grievance Resolution Officer

41. Given the timeline in which the Applicant is seeking to address its restructuring, the Grievance Resolution Process will streamline the manner in which the October 14 Grievances (and any subsequent grievances) can be classified, determined and adjudicated, if necessary. The Grievance Resolution Process represents a fair, efficient, and reasonable process for the resolution of grievances and disputed Compensation Claims against the Applicant. Further, the revised version of the Grievance Resolution process represents a negotiated outcome among LU, the Monitor, and LUFA, which is consistent with the spirit and intent of the CCAA.

42. The Grievance Resolution Process will provide certainty for the Applicant and its stakeholders regarding the potential impact of the unresolved grievances and any disputed Compensation Claims. Further, the Grievance Resolution Process is flexible in that it allows for a fair and efficient determination of any Material Post-Filing Grievances that may impact the overall restructuring.

43. The proposed Grievance Resolution Officer is sufficiently knowledgeable and experienced in grievance resolution matters to competently act in such capacity. He is well-versed in both labour and restructuring matters, which will make him particularly suited to fulfill the mandate set out in the Grievance Resolution Process Order.

44. The Monitor supports the approval of the Grievance Resolution Process and the appointment of the Grievance Resolution Officer.[29]

45. The fees of the Grievance Resolution Officer, and any staff or lawyers reasonably required to assist the Grievance Resolution Officer, will be approved by the Monitor before the Applicant makes payment.[30]

Issue 3: This Court Should Remove the Cap on the Board Counsel's Fees

46. The Board has been extremely busy during the CCAA proceeding so far, dealing with various unforeseen and complex issues that have arisen during the CCAA proceeding.

47. Having the benefit of experienced independent counsel representing the Board as it navigates numerous issues in this precedent-setting CCAA proceeding has been helpful to the Applicant and the Monitor and has created efficiencies.[31]

48. The Monitor has reviewed the amount of professional fees incurred by Board Counsel and will continue to do so and report to the Court from time to time.[32]

49. The Monitor supports the Applicant's request for the removal of the cap on the Board Counsel's professional fees and believes it is reasonable in the circumstances and will

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[29] Ninth Report at para. 56(b).

[30] Ninth Report at para. 48.

[31] Ninth Report at para. 51.

[32] Ninth Report at para. 52.

allow the Board's counsel to continue to assist the Board through the CCAA process as the Applicant progress towards a Plan of Arrangement.[33]

PART V - RELIEF REQUESTED

50. For all of the foregoing reasons, the Applicant requests that this Court grant the Order Appointing Claims Officers, the Grievance Resolution Process Order, and the Order to Amend the A&R Initial Order, located at Tabs 3, 4 and 5 of the Motion Record, respectively.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of December, 2021.

Thornton Grout Finnigan LLP

Thornton Grout Finnigan LLP

Counsel for the Applicant

[33] Ninth Report at para. 53.

SCHEDULE "A" – LIST OF AUTHORITIES

1. *8640025 Canada Inc., Re*, 2018 BCCA 93.

2. *Alternative Fuel Systems Inc., Re,* 2004 ABCA 31.

3. *Canwest Global Communications Corp, (Re)*, 2011 ONSC 2215.

4. *Essar Steel Algoma Inc., Re*, 2016 ONCA 274.

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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