

**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

FACTUM OF BARBARA ROBINSON

March 16, 2022

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I. OVERVIEW

1. The moving party, Barbara Robinson (“**BR**”), seeks an Order pursuant to paragraph 20 of the Amended and Restated Initial Order dated February 11, 2021, granting leave to the moving party, BR, to move under Rule 5.03 of the *Rules of Civil Procedure* RRO 1990 Reg. 194 [“*Rules*”] in the action bearing Court File No. CV-22-00078337-0000 (“**action**”), to join the Applicant herein, Laurentian University of Sudbury (“**LU**”) as a proper Defendant in the action, and,
2. Directions from this Honorable Court pursuant to Rule 1.05 of the *Rules*, including but not limited to: (i) limiting the enforceability of any judgment in the action to such insurance proceeds (if any) as are determined to be available to LU, and not as against LU’s current or future assets; and, (ii) the means for determining the extent of insurance proceeds available to LU.
3. The core grounds for this Motion arise from the equitable doctrine restated by this Honourable Court in terms of “the *Algoma Steel* principles” (*Algoma Steel Corp. v. Royal Bank of Canada* [1992 CanLII 7413](#) (ON CA), op. cit. Cary Canada Inc. (Re), [2006 CanLII 41289](#) (ON SC) at paras 6-16), and the fact that LU was self-insured in respect of such liabilities as would otherwise constitute operating deficits at the material time of BR’s loss, namely, in or about fall-winter 1979-1980.
4. This motion raises a novel question of law as to the equities arising from self-insurance on a motion to lift a stay of proceedings under the *Companies’ Creditors Arrangement Act* RSC 1985 c. C-36, as amended [“*CCAA*”].

II. FACTUAL AND PROCEDURAL BACKGROUND

5. The moving party, BR, was a student duly enrolled by LU at all material times: namely, in or about 1979-1980.

Affidavit of Barbara Robinson, sworn March 15, 2022. TAB 8, Motion Record.

6. BR claims damages as against LU on grounds of vicarious liability, arising from historical sexual abuse.

Proof of Claim, Notice of Dissallowance, Notice of Dispute. TABS 9-11, Motion Record.

7. The alleged tortfeasor, the late Professor John Sahadat, was at all material times employed by the University of Sudbury, and was duly authorized, appointed, and/or empowered by LU to occupy a position of trust and authority with respect to students enrolled by LU, including the moving party, BR. It is alleged that but for this position of trust and authority, BR would not have sustained the damages claimed.

Statement of Claim, Court File No. CV-22-00078337-0000. TAB 4, Motion Record.

8. BR has commenced an action against the University of Sudbury, to which LU is a proper party insofar as, within the meaning of Rule 5.03 of the *Rules*, LU's "presence is necessary to enable the court to adjudicate effectively and completely on the issues" in that proceeding, including but not limited to a just apportionment of vicarious liability for the damages claimed therein.

Rule 5.03, Rules. Schedule "A".

9. BR has undertaken to immediately withdraw her claim from the CCAA Claims Process in the event that the relief sought on the herein Motion is granted.

Affidavit of Barbara Robinson, sworn March 15, 2022. TAB 8, Motion Record.

10. BR has exercised her rights pursuant to the Claims Process Order to obtain financial statements from LU's April 30, 1979-April 30, 1980 fiscal year ("**1979-1980 FS**") from the lawyers for the Monitor.

Exhibit "D", Affidavit of Jeffrey A. Presler, sworn March 15, 2022. TAB 2, Motion Record.

11. The 1979-1980 FS indicates that LU was self-insured in respect of such liabilities as would otherwise constitute an "operating deficit", and that at the material time, it made a commitment of funds appropriated for the purpose of "self-insurance" in satisfaction of a corresponding "operating deficit".

III. ISSUE

12. How should self-insurance be treated on a motion to lift a CCAA stay of proceedings on equitable grounds?

IV. LAW AND ARGUMENT

13. This motion raises a novel question of law as to the equities arising from self-insurance on a motion to lift a CCAA stay of proceedings.
14. The equitable doctrine restated in terms of the "*Algoma Steel* principles" holds that the existence of third party insurance obviates any prejudice against a debtor entity engaged in CCAA restructuring that would arise from lifting a stay of proceedings to allow an action to proceed to a judgment whose enforceability is limited to the indemnity provided by that insurance: *Algoma Steel Corp. v. Royal Bank of Canada* [1992 CanLII 7413](#) (ON CA), op. cit. Cary Canada Inc. (Re), [2006 CanLII 41289](#) (ON SC) at paras 6-16.

***Algoma Steel Corp. v. Royal Bank of Canada* [1992 CanLII 7413](#) (ON CA). TAB 1, Moving party's Book of Authorities.**

Cary Canada Inc. (Re), [2006 CanLII 41289](#) (ON SC). TAB 2, Moving party's Book of Authorities.

15. Self insurance presents a legal issue which has yet to arise in the reported CCAA jurisprudence, as distinct from the *Algoma Steel* principles applicable in the event of the existence of third-party insurance.

16. The most authoritative treatment of self-insurance to date has been the decision of the Court of Appeal for Saskatchewan in *Royal & Sun Alliance Insurance Company of Canada v Community Electric Ltd.*, [2020 SKCA 17](#) [*"R&S"*], where the issue was whether self-insurance could be treated equivalently to other insurance contemplated under a contract of coverage. Although this was a matter of contractual interpretation, the Court formulated its approach "to determine whether a particular form of self-insurance can be treated like a traditional insurance policy" (at para 83).

***Royal & Sun Alliance Insurance Company of Canada v Community Electric Ltd.*, [2020 SKCA 17](#). TAB 3, Moving party's Book of Authorities.**

17. Reasoning that "the issue has not been extensively canvassed in this country" (*ibid.*), the Court in *R & S* instead canvassed a review of the American jurisprudence to derive four principled pillars of inquiry:

- (i) Whether the self-insurance operates to the benefit of the insured (at para 85, emphasis added):

The first consideration is whether the relationship between the self-insurer and the tortfeasor closely resembles insurance. Where the self-insurer's obligation does not operate for the benefit of the "insured"that weighs against a finding that self-insurance is other insurance: *Home Indemnity Co. v Humble Oil & Refining Co.*, 314 SW 2d 861 (Tex Civ App 1958). **Where the self-insurer provides a form of indemnification that a tortfeasor can collect, without retaining a right of subrogation, that weighs in favor of finding that self-insurance is other insurance:** *Hartford Casualty Insurance Company v Budget-Rent-A-Car-Systems.*,

Inc., 796 SW 2d 763 (Tex App 1990); see also *State Farm Fire and Casualty Co. v New Brunswick Housing Corp.* (1982), 1982 CanLII 2977 (NB CA), 141 DLR (3d) 12 (NBCA) [*New Brunswick Housing*].

- (ii) Whether the self-insurance corresponds to the nature of insurance at common law (at paras 86 and 88, emphasis added):

The second consideration is whether the self-insurance, on the facts, fits the ordinary definition of insurance...

...

In *New Brunswick Housing* [*State Farm Fire and Casualty Co. v New Brunswick Housing Corp.* 1982 CanLII 2977 (NB CA) at para 22, op. cit. *supra*; emphases added]:

...The fact that N.B.H.C. itself collected a consideration for its undertaking and that it maintained the fund from which it was to discharge the principal owing by a mortgagor at the time of a total loss by fire **does not** affect the nature of the undertaking so as to **deprive it of the nature of insurance**, either as defined by the *Insurance Act* or by court decisions, if it otherwise meets the test. Even a private individual may be an insurer under the *Insurance Act* as well as at common law. ...

- (iii) Proscriptions in the statutory framework (at para 89): “whether state – or in the Canadian context, provincial – financial responsibility laws affect whether self-insurance constitutes insurance”; and,

- (iv) Public policy (at para 90):

The fourth consideration concerns public policy. As *Goode* notes at 1277...When a self-insured contractually undertakes the responsibility for a risk, **treating a self-insured as anything other than an insurer would create a windfall for the self-insured.**

18. The first, second and fourth of the factors enumerated at paragraph 17, above, are relevant and apply to the self-insurance in evidence in the present case as follows:

- (i) **Self-insurance operates for the benefit of insured:** The 1979-1980 FS indicates a direct set off of “self insurance” as funds committed against LU’s

corresponding “operating deficit”. The appropriation of these “self-insurance” funds constituted an indemnity to the direct benefit of LU in respect of the “operating deficit”. There are no evidentiary indicia of subrogation associated with the “self insurance” appropriation, which would otherwise be a countervailing factor: *R & S, supra*, at para 85. These characteristics “closely resemble insurance”, for the purposes of the first principle of the analysis set out by the Court of Appeal for Saskatchewan in *R&S*;

(ii) **Ordinary definition of insurance at common law:** The self-insurance funds appropriated in the 1979-1980 FS correspond to the nature of insurance at common law and their appropriation “fits the ordinary definition of insurance” (*R&S, supra*, at para 86). Like the “mortgage forgiveness fund” which, in *New Brunswick Housing*, was maintained by the New Brunswick Housing Corporation, LU “maintained the fund from which it was to discharge the principal owing” in respect of appropriations for which it would otherwise be liable as “operating deficits” (see: *New Brunswick Housing, supra*, at para 22); and,

(iii) **Public policy:** public policy is engaged by the prospect that if BR is compelled to compromise her claim- both procedurally, and substantively- within the CCAA Claims Process, and LU retains the benefit of such self-insurance as would otherwise have been contractually liable to appropriation in satisfaction of BR’s claim, in any quantum in excess of such compromise, then LU would be unjustly enriched to that extent.

V. RELIEF SOUGHT

19. In the event that on the basis of the foregoing, this Court deems it just to treat LU's self-insurance as equivalent to traditional third party insurance, BR respectfully submits that the relief sought on the herien Motion should be granted, namely: the leave of this Honourable Court to lift the stay of proceedings to permit her to move under Rule 5.03 to join LU to the action.

20. In that event, BR proposes to limit the enforceability of any judgment against LU in the action to such insurance proceeds (if any) as are determined to be available to LU, and not as against LU's current or future assets.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16TH DAY OF MARCH,
2022**

"Aron Zaltz", LSO #71115B

SCHEDULE “A” - LIST OF AUTHORITIES

1. *Algoma Steel Corp. v. Royal Bank of Canada* [1992 CanLII 7413](#) (ON CA)
2. *Cary Canada Inc. (Re)*, [2006 CanLII 41289](#) (ON SC)
3. *Royal & Sun Alliance Insurance Company of Canada v Community Electric Ltd.*, [2020 SKCA 17](#)
4. *State Farm Fire and Casualty Co. v New Brunswick Housing Corp.* (1982), [1982 CanLII 2977](#) (NB CA)

SCHEDULE “B”- STATUTES AND REGULATIONS RELIED UPON

Rules of Civil Procedure RRO 1990 Reg. 194

Joinder of Necessary Parties

General Rule

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding. R.R.O. 1990, Reg. 194, [r. 5.03 \(1\)](#).

Claim by Person Jointly Entitled

(2) A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled. R.R.O. 1990, Reg. 194, [r. 5.03 \(2\)](#).

Claim by Assignee of Chose in Action

(3) In a proceeding by the assignee of a debt or other chose in action, the assignor shall be joined as a party unless,

- (a) the assignment is absolute and not by way of charge only; and
- (b) notice in writing has been given to the person liable in respect of the debt or chose in action that it has been assigned to the assignee. R.R.O. 1990, Reg. 194, [r. 5.03 \(3\)](#).

Power of Court to Add Parties

(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party. R.R.O. 1990, Reg. 194, [r. 5.03 \(4\)](#).

Party Added as Defendant or Respondent

(5) A person who is required to be joined as a party under subrule (1), (2) or (3) and who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent. R.R.O. 1990, Reg. 194, [r. 5.03 \(5\)](#).

Relief Against Joinder of Party

(6) The court may by order relieve against the requirement of joinder under this rule. R.R.O. 1990, Reg. 194, [r. 5.03 \(6\)](#).

Courts of Justice Act RSO 1990 c. C. 43

Rules of law and equity

96 (1) Courts shall administer concurrently all rules of equity and the common law. R.S.O. 1990, c. C.43, s. 96 (1); 1993, c. 27, Sched.

Rules of equity to prevail

(2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails. R.S.O. 1990, c. C.43, s. 96 (2); 1993, c. 27, Sched.

Insurance Act RSO 1990 c. I. 8

Right of claimant against insurer where execution against insured returned unsatisfied

132 (1) Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

1..."insurer" means the person who undertakes or agrees or offers to undertake a contract; ("assureur")

...**"contract"** means a contract of insurance, and includes a policy, certificate, interim receipt, renewal receipt, or writing evidencing the contract, whether sealed or not, and a binding oral agreement; ("contrat")

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 File No. 21-CV-656040-00CL

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

Proceedings commenced at Toronto

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RCP-E 4C (September 1, 2020)