

**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

SUPPLEMENTARY FACTUM OF BARBARA ROBINSON

RE: S. 19(2)(b)(i), *Companies' Creditors Arrangement Act* RSC 1985, c. C-36, as amended

April 4, 2022

PRESZLER INJURY LAWYERS

151 Eglinton Avenue West
Toronto, ON M4R 1A6

Jeffrey A. Preszler LSO #53820W
jpreszler@preszlerlaw.com

Aron Zaltz LSO# 71115B
azaltz@preszlerlaw.com

Tel: (416) 364-2000
Fax: (416) 364-7027

Lawyers for the Claimant, Barbara
Robinson

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SUDBURY**

**SERVICE LIST
(as at March 14, 2022)**

THORNTON GROUT FINNIGAN LLP 100 Wellington St. West, Suite 3200 TD West Tower, Toronto-Dominion Centre Toronto, ON M5K 1K7 D.J. Miller Tel: 416-304-0559 Email: djmiller@tgf.ca Mitchell W. Grossell Tel: 416-304-7978 Email: mgrossell@tgf.ca Andrew Hanrahan Tel: 416-304-7974 Email: ahanrahan@tgf.ca Derek Harland Tel: 416-304-1127 Email: dkharland@tgf.ca Lawyers for the Applicant	ERNST & YOUNG INC. 100 Adelaide Street West EY Tower Toronto, ON M5H 0B3 Sharon Hamilton Tel: 416-943-2153 Email: sharon.s.hamilton@ca.ey.com Michael Nathaniel Tel: 416-932-5837 Email: michael.nathaniel@ca.ey.com Court-appointed Monitor of the Applicant
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STIKEMAN ELLIOTT LLP 5300 Commerce Court West 199 Bay Street Toronto, ON M5L 1B9 Ashley Taylor Tel: 416-869-5236 Email: ataylor@stikeman.com Elizabeth Pillon Tel: 416-869-5623 Email: lpillon@stikeman.com Zev Smith Tel: 416-869-5260 Email: zsmith@stikeman.com Ben Muller Tel: 416-869-5543 Email: bmuller@stikeman.com Lawyers for the Monitor	LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP 130 Adelaide Street West, Suite 2600 Toronto, ON M5H 3P5 Peter J. Osborne Tel: 416-865-3094 Email: posborne@litigate.com David Salter Tel: 416-649-1818 Email: dsalter@litigate.com Lawyers for the Board of Governors of Laurentian University of Sudbury
MINISTRY OF THE ATTORNEY GENERAL McMurtry-Scott Building 720 Bay Street, 11th floor Toronto, ON M7A 2S9 Michelle Pottruff Tel: 416-528-1235 Email: michelle.pottruff@ontario.ca Lawyer for the Ministry of Colleges and Universities	HICKS MORLEY LLP 77 King Street West 39th Floor Toronto, ON M5K 1K8 Michael J. Kennedy Tel: 416-864-7305 Email: michael-kennedy@hicksmorley.com Labour Counsel to the Applicant

FOGLER, RUBINOFF LLP 77 King Street West, Suite 3000 Toronto, ON M5K 1G8 Martin R. Kaplan Tel: 416-941-8822 Email: mkaplan@foglers.com Vern W. DaRe Tel: 416-941-8842 Email: vdare@foglers.com Joseph Fried Tel: 416-941-8836 Email: jfried@foglers.com Lawyers for the DIP Lender, Firm Capital Mortgage Fund Inc.	BLAKE, CASSELS & GRAYDON LLP 199 Bay Street Suite 4000, Commerce Court West Toronto, ON M5L 1A9 Pamela L.J. Huff Tel: 416-863-2958 Email: pamela.huff@blakes.com Aryo Shalviri Tel: 416-863-2962 Email: aryo.shalviri@blakes.com Cristina Cataldo Tel: 514-982-6312 Email: cristina.cataldo@blakes.com Lawyers for Royal Bank of Canada
FASKEN MARTINEAU DUMOULIN LLP Bay-Adelaide Centre 333 Bay Street, Suite 2400 P.O. Box 20 Toronto, ON M5H 2T6 Stuart Brotman Tel: 416-865-5419 Email: sbrotman@fasken.com Dylan Chochla Tel: 416-868-3425 Email: dchochla@fasken.com Mitch Stephenson Tel: 416-868-3502 Email: mstephenson@fasken.com Lawyers for Toronto-Dominion Bank	CHAITONS LLP 5000 Yonge Street, 10th Floor Toronto, ON M2N 7E9 George Benchetrit Tel: 416-218-1141 Email: george@chaitons.com Gary Feldman Tel: 416-218-1130 Email: gary@chaitons.com Lawyers for Bank of Montreal

CAISSE POPULAIRE VOYAGEURS INC. 40 Elm Street, Unit 166 Sudbury, ON P3C 1S8 Richard Dupuis, Director Tel: 705-525-2373 Email: richard.u.dupuis@desjardins.com	ATTORNEY GENERAL OF CANADA Department of Justice Ontario Regional Office The Exchange Tower 130 King Street West Suite 3400, Box 36 Toronto, ON M5X 1K6 Diane Winters Tel: 647-256-7459 Email: diane.winters@justice.gc.ca Lawyer for Canada Revenue Agency including Charities Directorate
RYDER WRIGHT BLAIR & HOLMES LLP 333 Adelaide Street West, 3rd Floor Toronto, ON M5V 1R5 David Wright Tel: 416-340-9070 Ext. 237 Email: dwright@rwbh.ca Labour Counsel for Laurentian University Faculty Association (LUFA)	GOLDBLATT PARTNERS LLP 20 Dundas Street West, #1039 Toronto, ON M5G 2C2 Clio Godkewitsch Tel: 416-979-4059 Email: cgodkewitsch@goldblattpartners.com Insolvency Counsel for LUFA Susan Philpott Tel: 416-979-6417 Email: sphilpott@goldblattpartners.com Charles Sinclair Tel: 416-979-4234 Email: csinclair@goldblattpartners.com Insolvency Counsel for LUFA and lawyers for Ontario Public Service Employees Union (OPSEU), Local 667

WRIGHT HENRY LLP

200 Wellington Street West, Suite 602
Toronto, ON M5V 3C7

Tracey Henry

Tel: 416-306-8275
Email: thenry@wrighthenry.ca

Michael D. Wright

Tel: 416-306-8270
Email: mwright@wrighthenry.ca

Danielle Stampley

Tel: 416-306-8272
Email: dstampley@wrighthenry.ca

Brendan Scott

Tel: 416-306-8277
Email: bscott@wrighthenry.ca

Lawyers for Laurentian University Staff Union
(LUSU)

MCMILLAN LLP

Brookfield Place
181 Bay Street, Suite 4400
Toronto ON M5J 2T3

Tushara Weerasooriya

Tel: 416-865-7890
Email: tushara.weerasooriya@mcmillan.ca

Stephen Brown-Okruhlik

Tel: 416-865-7043
Email: stephen.brown-okruhlik@mcmillan.ca

Lawyers for St. Joseph's Health Centre of
Sudbury and St. Joseph's Continuing Care
Centre of Sudbury

Wael Rostom

Tel: 416-865-7790
Email: wael.rostom@mcmillan.ca

Peter Giddens

Tel: 416-307-4042
Email: peter.giddens@mcmillan.ca

Guneev Bhinder

Tel: 416-307-4067
Email: guneev.bhinder@mcmillan.ca

Lawyers for Canada Foundation for Innovation

**DELL FINANCIAL SERVICES CANADA
LIMITED**

155 Gordon Baker Road, Suite 501
North York, ON M2H 3N5

Gregory J. Segal, Legal Counsel

Tel: 416-758-3316

Email: gregory_segal@dell.com

KOSKIE MINSKY LLP

20 Queen Street West
Suite 900, Box 52
Toronto, ON M5H 3R3

Murray Gold

Tel: 416-595-2085

Email: mgold@kmlaw.ca

James Harnum

Tel: 416-542-6285

Email: jharnum@kmlaw.ca

Lawyers for Ontario Confederation of
University Faculty Associations

Andrew J. Hatnay

Tel: 416-595-2083

Email: ahatnay@kmlaw.ca

Sydney Edmonds

Tel: 416-595-2260

Email: sedmonds@kmlaw.ca

Demetrios Yiokaris

Tel: 416-595-2130

Email: dyiokaris@kmlaw.ca

Lawyers for Thorneloe University

LENOVO FINANCIAL SERVICES 5035 South Service Road Burlington, ON L7R 4C8 Randy Poulton, Regional Leasing Manager Email: customerservice@lenovofs.ca	DAVIES WARD PHILLIPS & VINEBERG LLP 155 Wellington Street West 40 th Floor Toronto, ON M5V 3J7 Natasha MacParland Tel: 416-863-5567 Email: nmacparland@dwpv.com Natalie Renner Tel: 416-367-7489 Email: nrenner@dwpv.com Lender Counsel to the Applicant
--	--

BORDEN LADNER GERVAIS LLP

Bay Adelaide Centre, East Tower
22 Adelaide Street West, Suite 3400
Toronto, ON M5H 4E3

Alex MacFarlane

Tel: 416-367-6305

Email: amacfarlane@blg.com

Lydia Wakulowsky

Tel: 416-367-6207

Email: lwakulowsky@blg.com

Charlotte Chien

Tel: 416-367-7267

Email: cchien@blg.com

Lawyers for Northern Ontario School of
Medicine

James W. MacLellan

Tel: 416-367-6592

Email: jmaclellan@blg.com

Lawyer for Zurich Insurance Company Ltd.

DENTONS CANADA LLP

77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, ON M5K 0A1

Kenneth Kraft

Tel: 416-863-4374

Email: kenneth.kraft@dentons.com

Daniel Loberto

Tel: 416-863-4760

Email: daniel.loberto@dentons.com

Lawyers for Queen's University

SHEPPARD & CLAUDE 202-1173 Cyrville Road Ottawa, ON K1J 7S6 André Claude Tel: 613-748-3333 Email: aclaude@sheppardclaud.ca Lawyer for University of Sudbury	CASSELS BROCK & BLACKWELL LLP 2100 Scotia Plaza 40 King Street West Toronto, ON M5H 3C2 Joseph Bellissimo Tel: 416-860-6572 Email: jbello@casells.com Jed Blackburn Tel: 416-860-6725 Email: jblackburn@casells.com Natalie Levine Tel: 416-860-6568 Email: nlevine@casells.com William Onyeaju Tel: 416-869-5498 Email: wonyeaju@casells.com Lawyers for Huntington University
SUDBURY NEUTRINO OBSERVATORY LABORATORY Creighton Mine #9 1039 Regional Road 24 Lively, ON P3Y 1N2 Tel: (705) 692-7000 Clarence Virtue Email: Clarence.Virtue@snolab.ca	MINING INNOVATION REHABILITATION AND APPLIED RESEARCH CORPORATION Cliff Fielding Building, Room CF203 935 Ramsey Lake Road Sudbury, ON P3E 2C6 Tel: (705) 675-1151 Nadia Mykytczuk, Interim President and CEO Email: NX_Mykytczuk@laurentian.ca

CENTRE FOR EXCELLENCE IN MINING INNOVATION 105 Elm Street, Unit A Sudbury, ON P3C 1T3 Tel: (705) 673-6568 Douglas Morrison, President Email: dmorrison@cemi.ca	BAKER & COMPANY 130 Adelaide Street West, Suite 3300 Toronto, ON M5H 3P5 Mark G. Baker Tel: 416-777-0100 Email: mbaker@bakerlawyers.com Andre Luzhetskyy Tel: 416-777-0100 Email: aluzhetskyy@bakerlawyers.com Lawyers for Laurentian University Students' General Association
INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO 2 Bloor Street East, Suite 1400 Toronto, ON M4W 1A8 Linda Hsiao-Chia Chen, Legal Counsel Tel: 416-326-3333 Email: linda.chen@ipc.on.ca	CORFAB COMPANY LIMITED 1360 Kelly Lake Road Sudbury, ON P3E 5P4 John Corsi, President Tel: 705-522-9096 Email: jcorsi@jcorsi.com
F&M CAULKING LIMITED 10 Kenmore Avenue, Unit #1 Stoney Creek, ON L8E 5N1 Jeffrey Lucato, Manager Tel: 905-643-8085 Email: jlucato@fmcl.ca	ACCEL ELECTRICAL CONTRACTORS LIMITED 100 Haist Avenue Woodbridge, ON L4L 5V4 George Caufin, President Tel: 905-850-8668 Email: georgecaufin@accelectric.com

BIANCHI PRESTA LLP 9100 Jane Street Building A, 3rd Floor Vaughan, ON L4K 0A4 Domenic Presta Tel: 905-738-1078 Ext. 2223 Email: dpresta@bianchipresta.com Lawyer for 1033803 Ontario Inc. o/a Forma-Con Construction and Forma Finishing and B.B.M. Excavation Company Limited	PARISÉ LAW OFFICE 58 Lisgar Street, Suite 200 Sudbury, ON P3E 3L7 Réjean Parisé Tel: 705-674-4042 Email: pariselaw@unitz.ca Lawyer for Interpaving Ltd.
DEDIANA, ELORANTA & LONGSTREET 219 Pine Street Sudbury, ON P3C 1X4 James Longstreet Tel: 705-674-4289 Email: spisani@bellnet.ca Lawyer for Sandro Steel Fabrication Ltd.	CANADIAN UNION OF PUBLIC EMPLOYEES 1378 Triole St Ottawa, ON K1B 3M4 Miriam Martin, In-House Counsel Tel: 613-212-4325 Email: mmartin@cupe.ca
MINDEN GROSS LLP 2200-145 King Street West Toronto, ON M5H 4G2 Rachel Moses Tel: 416-369-4137 Email: rmoses@mindengross.com Lawyer for Royal Trust Corporation of Canada	MINISTRY OF INFRASTRUCTURE 777 Bay Street, 5th Floor Toronto, ON M5G 2C8 Aryn Azzopardi, Chief of Staff Tel: 416-327-4412 Email: aryn.azzopardi@ontario.ca

SILVIA LAROCQUE 905 Cambrian Heights, Unit 36 Sudbury, ON P3C5R5 Tel: 705-675-1151 ext. 3804 Email: kennethlarocque@hotmail.com	ZAYO CANADA INC. 625, Rue Belmont Montreal, QC H3B 2M1 Derek Wilk, Associate General Counsel Tel: 416-644-6705 Email: dwilk@zayo.com
MINISTRY OF FINANCE 777 Bay Street College Park 11th Floor Toronto, ON M5G 2C8 Anthony R. Golding, Senior Counsel Tel: 416-938-5069 Email: anthony.golding@ontario.ca	CLYDE & CO LLP 401 Bay Street Suite #2500 Toronto, ON M5H 2Y4 Barry Stork Tel: 647-789-4848 Email: barry.stork@clydeco.ca Roderic McLauchlan Tel: 647-789-4849 Email: roderic.mclauchlan@clydeco.com Mark Mandelker Tel: 647-789-4821 Email: mark.mandelker@clydeco.ca Lawyers for Canadian Universities Reciprocal Insurance Exchange (CURIE)
CANADIAN INSTITUTES OF HEALTH RESEARCH 160 Elgin Street, 10th Floor Address Locator 4809A Ottawa, ON K1A 0W9 Anita Ploj, Senior Corporate Advisor Email: anita.ploj@cihr-irsc.gc.ca	CANADA FOUNDATION FOR INNOVATION 55 Metcalfe Street, Suite 1100 Ottawa, ON K1P 6L5 Isabelle Henrie, Vice President Tel: 613-943-1123 Email: isabelle.henrie@innovation.ca

MCKENZIE LAKE LAWYERS 140 Fullarton Street Suite 1800 London, ON N6A 5P2 Michael J. Peerless Tel: 519-667-2644 Email: mike.peerless@mckenzielake.com Emily Assini Tel: 519-672-5666 Ext. 7359 Email: emily.assini@mckenzielake.com Class Counsel for Representative Plaintiff	NORTON ROSE FULBRIGHT CANADA LLP 222 Bay Street, Suit 3000 Toronto, ON M5K 1E7 Evan Cobb Tel: 416-216-1929 Email: evan.cobb@nortonrosefulbright.com Lawyer for Ernst & Young Inc. in its capacity as Monitor of Bondfield Construction Company Limited
ALLAN SNELLING LLP 340 March Road, Suite 600 Ottawa, ON K2K 2E4 David Contant Tel: 613-270-8600 Email: dcontant@compellingcounsel.com Lawyer for Cy Rheault Construction Limited	HUGH CONNELLY LAW 92 CentrepoinTE Drive Nepean, ON K2G 6B1 Hugh Connelly Tel: 613-723-7007 Email: info@hughconnellylaw.com Lawyer for Lindsay Lotan
HAMEED LAW 43 Florence Street Ottawa, ON K2P 0W6 Yavar Hameed Tel: 613-232-2688 Email: yhameed@hameedlaw.ca Lawyer for Issyakha Camara	DEVRY SMITH FRANK LLP 95 Barber Greene Road, Suite 100 Toronto, ON M5C 3E9 David Schell Tel: 416-446-5096 Email: david.schell@devrylaw.ca Lawyer for Zhiju Zhu

DIAMOND AND DIAMOND LAWYERS 255 Consumers Road, 5th Floor Toronto, ON M2J 1R4 Simon Diamond Tel: 1-800-567-4878 Ext. 207 Email: simon@diamondlaw.ca Lawyer for Petra Spencer	LAMER STICKLAND LLP 101 Worthington Street East North Bay, ON P1B 8G6 Geoffrey Larmer Tel: 705-478-8100 Email: larmer@larmerstickland.com Lawyer for Nina Kucheran and Mary-Catherine Kucheran
CITY OF GREATER SUDBURY P.O. Box 5000, Station ‘A’ 200 Brady Street Sudbury, ON P3A 5P3 Carolyn A. Dawe, Assistant City Solicitor Tel: 705-674-4455 Ext. 4545 Email: carolyn.dawe@greatersudbury.ca	MARSH CANADA LIMITED 120 Bremner Boulevard, Suite 800 Toronto, ON M5J 0A8 Murray Davidson, Senior Vice-President Tel: 416-349-4354 Email: murray.s.davidson@marsh.com
MARKEL CANADA LIMITED 200 Wellington Street West, Suite 400 Toronto, ON M5V 3C7 Maeve O’Malley, Senior Claims Specialist Tel: 416-601-2477 Email: maeve.omalley@markel.com	DOOLEY LUCENTI LLP 10 Checkley Street Barrie, ON L4N 1W1 Scott R. Fairley Tel: 705-792-7963 Email: sfairley@dllaw.ca Lawyer for Cladco Limited

GOODMANS LLP Bay Adelaide Centre 333 Bay Street, Suite 3400 Toronto, ON M5H 2S7 Gale Rubenstein Tel: 416-597-4148 Email: grubenstein@goodmans.ca Bradley Wiffen Tel: 416-597-4208 Email: bwiffen@goodmans.ca Michael Wilson Tel: 416-597-4130 Email: mwilson@goodmans.ca Lawyers for Financial Services Regulatory Authority	MCKENZIE LAKE LAWYERS LLP 140 Fullarton Street, Suite 1800 London, ON N6A 5P2 Michael J. Peerless Tel: 519-667-2644 Email: mike.peerless@mckenzielake.com Matthew D. Baer Tel: 519-667-2646 Email: matt.baer@mckenzielake.com Emily Assini Tel: 519-672-5666 Email: emily.assini@mckenzielake.com Lawyers for Sarah Connell
ATTORNEY GENERAL FOR ONTARIO Crown Law Office - Civil 720 Bay Street, 8th Floor Toronto, ON M7A 2S9 Shahana Kar Tel: 416-571-2100 Email: shahana.kar@ontario.ca Jonathan Sydor Tel: 416-689-8279 Email: jonathan.sydor@ontario.ca Lawyer for Her Majesty the Queen in Right of Ontario	FRED TAYAR & ASSOCIATES PROFESSIONAL CORPORATION 65 Queen Street West Suite 1200 Toronto, ON M5H 2M5 Fred Tayar Tel: 416-363-1800 Email: fred@fredtayar.com Lawyers for Canadian Universities Reciprocal Insurance Exchange (CURIE)

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS 2705, promenade Queensview Drive Ottawa, ON K2B 8K2 Sarah Godwin Tel: 613-820-2270 Email: godwin@caut.ca	THORNELOE UNIVERSITY 935 Ramsey Lake Road Sudbury, ON P3E 2C6 Tel: (705) 673-1730 Dr. John Gibaut, President Email: president@thorneloe.ca
GOWLING WLG (CANADA) LLP 1 First Canadian Place 100 King Street West, Suite 1600 Toronto, ON M5X 1G5 Virginie Gauthier Tel: 416-844-5391 Email: virginie.gauthier@gowlingwlg.com Thomas Gertner Tel: 416-369-4618 Email: thomas.gertner@gowlingwlg.com Lawyers for Lakehead University	XEROX CANADA LTD. 20 York Mills Road, Suite 500 Toronto, ON M2P 2C2 Stephanie Grace, Senior Legal Counsel Tel: 416-250-3917 Email: stephanie.grace@xerox.com
POWER LAW LLP 130 Albert Street, #1103 Ottawa, ON K1P 5G4 Francis Poulin Tel: 613-702-5569 Email: fpoulin@powerlaw.ca Charlotte Servant-L'Heureux Tel: N/A Email: cservantlheureux@powerlaw.ca Lawyers for the Assemblée de la francophonie de l'Ontario	AIRD & BERLIS LLP Brookfield Place 181 Bay Street, Suite 1800 Toronto, Ontario M5J 2T9 Steven L. Graff Tel: 416-865-7726 Email: sgraff@airdberlis.com Jonathan Yantzi Tel: 416-865-4733 Email: jyantzi@airdberlis.com Lawyers for the David Harquail and the Harquail family, The Goodman Family Foundation, Rob McEwen and The Bharti Charitable Foundation

FARBER GROUP INC. 150 York Street, Suite 1600 Toronto, ON M5H 3S5 Allan Nackan Tel: 416-496-3732 Email: anackan@farbergroup.com Hylton Levy Tel: 416-496-3070 Email: hlevy@farbergroup.com Financial advisors for Thorneloe University	WEISZ FELL KOUR LLP 100 King Street West, Suite 5600 Toronto, ON M5X 1C9 Pat Corney Tel: 416-613-8287 Email: pcorney@wfkllaw.ca Lawyer for Weeneebayko Area Health Authority
UNITED STEELWORKERS Canadian National Office, Legal Department 234 Eglinton Avenue East, Suite 800 Toronto, ON M4P 1K7 Shaheen Hirani Tel: 416-544-5987 Email: shirani@usw.ca Lawyers for the Respondent, United Steel, Paper and Forestry, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers)	OSLER, HOSKIN & HARCOURT LLP 1000 De La Gauchetière Street West, Suite 2100 Montréal, QC H3B 4W5 Julien Morissette Tel: 514-904-5818 Email: jmorissette@osler.com Lawyer for Canadian Research Knowledge Network
William Edward Oxley Tel: 249-878-3901 Email: bill.oxley1975@gmail.com 13 Levack Drive, Box 65 Levack, Ontario P0M 2C0 Self-represented person	MBC LAW PROFESSIONAL CORPORATION 265 Carling Avenue, Suite 500 Ottawa, ON K1S 2E1 James Alden Christian Tel: 613-564-3005 Email: achristian@mbclaw.ca Lawyer for CY Rheault Construction Ltd.

CONWAY BAXTER WILSON LLP 401-411 Roosevelt Avenue Ottawa, ON K2A 3X9 David Taylor Tel: 613-691-0368 Email: dtaylor@conwaylitigation.ca M. Alyssa Holland Tel: 613-691-0373 Email: aholland@conwaylitigation.ca Counsel for the Speaker of the Legislative Assembly of Ontario	ATTORNEY GENERAL OF CANADA Ontario Regional Office National Litigation Sector 120 Adelaide Street West, Suite #400 Toronto, ON M5H 1T1 Eric Peterson Tel: 647-256-7550 Email: eric.peterson@justice.gc.ca Mark Taggart Email: mark.taggart@canada.ca Shaun Harrington Email: shaun.harrington@canada.ca Lawyers for the Natural Sciences and Engineering Research Council of Canada and the Social Sciences and Humanities Research Council
LEVITT SHEIKH LLP 130 Adelaide St West Suite 801 Toronto, ON M5H 3P5 Kathryn Marshall Tel: 416-597-7887 Email: kmarshall@levittllp.com Lawyer for Shelley Watson	LOUIS PAGNUTTI Email: lou@pagnutti.ca Chief Redevelopment Officer

STOCKWOODS LLP

Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto, ON M5K 1H1

Brian Gover

Tel: 416-593-2489
Email: briang@stockwoods.ca

Fredrick R. Schumann

Tel: 416-593-2490
Email: fredricks@stockwoods.ca

Regulatory Counsel to the Applicant

TEPLITSKY, COLSON LLP

70 Bond Street, Suite 200
Toronto, ON M5B 1X3

James M. Wortzman

Tel: 416-865-5315
Email: jwortzman@teplitskycolson.com

Lawyer for Michael Atkins

E-Service List

djmiller@tgf.ca; mgrossell@tgf.ca; धारलंद@tgf.ca; ahanrahan@tgf.ca;
sharon.s.hamilton@ca.ey.com; michael.nathaniel@ca.ey.com; posborne@litigate.com;
dsalter@litigate.com; ataylor@stikeman.com; lpillon@stikeman.com; bmuller@stikeman.com;
michael-kennedy@hicksmorley.com; nmacparland@dwpv.com; nrenner@dwpv.com;
pamela.huff@blakes.com; aryo.shalviri@blakes.com; sbrotman@fasken.com;
dchochla@fasken.com; mstephenson@fasken.com; george@chaitons.com; gary@chaitons.com;
dwright@rwbh.ca; sphilpott@goldblattpartners.com; csinclair@goldblattpartners.com;
thenry@wrighthenry.ca; diane.winters@justice.gc.ca; mkaplan@foglers.com;
vdare@foglers.com; jfried@foglers.com; richard.u.dupuis@desjardins.com;
gregory_segal@dell.com; jbellissimo@cassels.com; jblackburn@cassels.com;
wonyeau@cassels.com; NX_Mykytczuk@laurentian.ca; dmorrison@cemi.ca;
jcorsi@jcorsi.com; jluato@fmcl.ca; georgecaufin@accelelectric.com;
dpresta@bianchipresta.com; pariselaw@unitz.ca; spisani@bellnet.ca;
aryn.azzopardi@ontario.ca; barry.stork@clydeco.ca; roderic.mclauchlan@clydeco.com;
carolyn.dawe@greatersudbury.ca; mike.peerless@mckenzielake.com;
emily.assini@mckenzielake.com; info@hughconnellylaw.com; yhameed@hameedlaw.ca;
simon@diamondlaw.ca; murray.s.davidson@marsh.com; maeve.omalley@markel.com;
evan.cobb@nortonrosefulbright.com; mwright@wrighthenry.ca; bscott@wrighthenry.ca;
amacfarlane@blg.com; lwakulowsky@blg.com; sfairley@dllaw.ca;
michelle.pottruff@ontario.ca; mmartin@cupe.ca; grubenstein@goodmans.ca;
bwiffen@goodmans.ca; mwilson@goodmans.ca; dcontant@compellingcounsel.com;
david.schell@devrylaw.ca; shahana.kar@ontario.ca; customerservice@lenovofs.ca;
tushara.weerasooriya@mcmillan.ca; stephen.brown-okruhlik@mcmillan.ca; dwilk@zayo.com;
mgold@kmlaw.ca; jharnum@kmlaw.ca; cristina.cataldo@blakes.com;
anthony.golding@ontario.ca; larmer@larmerstickland.com; aclaude@sheppardclaudelaw.ca;
president@thorneloe.ca; kenneth.kraft@dentons.com; daniel.loberto@dentons.com;
linda.chen@ipc.on.ca; isabelle.henrie@innovation.ca; wael.rostom@mcmillan.ca;
peter.giddens@mcmillan.ca; guneev.bhinder@mcmillan.ca; ahatnay@kmlaw.ca;
sedmonds@kmlaw.ca; jmaclellan@blg.com; mike.peerless@mckenzielake.com;
matt.baer@mckenzielake.com; emily.assini@mckenzielake.com;
cgodkewitsch@goldblattpartners.com; jonathan.sydor@ontario.ca;
kennethlarocque@hotmail.com; mbaker@bakerlawyers.com; aluzhetskyy@bakerlawyers.com;
anita.ploj@cihr-irsc.gc.ca; godwin@caut.ca; nlevine@cassels.com;
virginie.gauthier@gowlingwlg.com; thomas.gertner@gowlingwlg.com;
rmoses@mindengross.com; stephanie.grace@xerox.com; fpoulin@powerlaw.ca;
cservantlheureux@powerlaw.ca; dstampley@wrighthenry.ca; sgraff@airdberlis.com;
jyantzi@airdberlis.com; anackan@farberggroup.com; hlevy@farberggroup.com;
pcorney@wfkaw.ca; shirani@usw.ca; zsmith@stikeman.com; cchien@blg.com;
jmorissette@osler.com; bill.oxley1975@gmail.com; dviokaris@kmlaw.ca;
achristian@mbclaw.ca; Clarence.Virtue@snolab.ca; eric.peterson@justice.gc.ca;
mark.taggart@canada.ca; shaun.harrington@canada.ca; lou@pagnutti.ca;
briang@stockwoods.ca; fredricks@stockwoods.ca; fred@fredtayar.com;
mark.mandelker@clydeco.ca; dtaylor@conwaylitigation.ca; aholland@conwaylitigation.ca;
kmarshall@levittllp.com; jwortzman@teplitkskycolson.com

I. OVERVIEW

1. **Primary relief sought-** The moving party, Barbara Robinson (“BR”), submits this Supplementary Factum Re: S 19(2)(b)(i), *Companies’ Creditors Arrangement Act* RSC 1985 c. C-6 [“CCAA”] in support of the relief sought in paragraph 1 of the “Fresh as Amended” Notice of Motion served April 4, 2022 (“Primary Relief”): for leave to bring a motion under Rule 5.03 of the *Rules of Civil Procedure* RRO 1990 Reg. 194 [“Rules”], to add Laurentian University of Sudbury (“LU”) as a Defendant to the action bearing Court File No. CV-22-00078337-0000 (hereinafter “action”), on grounds of s. 19(2)(b)(i) of the *CCAA*.

2. **Relief sought in the alternative-** It is only in the event that the Court does not grant the Primary Relief that the moving party would seek leave to add LU as a Defendant to the action on the terms of the directions proposed at paragraph 3 of the “Fresh as Amended Notice of Motion”:
 - (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, including but not limited to:
 - (a) cross-examination of Mr. Raymond Coutu on his Affidavit sworn March 2, 2022, and Mr. Normand Lavallee on his Affidavit sworn March 4, 2022, by way of written questions pursuant to Rule 35 of the Rules, with any rights arising therefrom to be exercisable pursuant to the Rules;

(b) to make peremptory application, under Rule 14.05(3)(d) of the Rules, for a declaration under s. 97 of the Courts of Justice Act RSO 1990 c. C. 43, to the effect that LU has insurance coverage corresponding to s. 132 of the Insurance Act and/or Rule 30.02(3).

II. FACTUAL AND PROCEDURAL BACKGROUND

3. BR was an admitted undergraduate student at LU in and about the years 1978-1980. She was enrolled in several courses taught by Professor John Sahadat, who was employed by the University of Sudbury, which at the time was federated with LU. She has brought an action for damages alleging that Professor John Sahadat sexually assaulted her during this time, which is proceeding as against the University of Sudbury on grounds of vicarious liability.

Statement of Claim, CV-22-00078337-0000. TAB 4, Amended Motion Record.

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

4. BR seeks the leave of this Court to move in the action to add Laurentian University as a proper Defendant to the action pursuant to Rule 5.03 of the *Rules of Civil Procedure*.

Amended and Restated Initial Order, dated February 11, 2021. TAB 3, Amended Motion Record.

Rule 5.03, *Rules of Civil Procedure* RRO 1990 Reg. 194 [“*Rules*”]. Schedule “A”.

“Fresh as Amended” Notice of Motion. TAB 1, Amended Motion Record.

5. Further to the Amended and Restated Claims Process Order dated May 31, 2021, stating that “Any creditor that does not file a Proof of Claim as provided for herein...shall be and is hereby forever barred from making or enforcing such Claim against the Applicant”, BR

participated in the Claims process. She has undertaken to immediately withdraw in the event lift stay is granted.

Amended and Restated Claims Process Order dated May 31, 2021. TAB 5, Amended Motion Record.

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

III. ISSUE

6. Should BR be granted leave to move under Rule 5.03 to add LU as a Defendant to the action on grounds of s. 19(2)(b)(i), CCAA?

IV. LAW AND ARGUMENT

7. Section 19(2)(b)(i) of the CCAA has never been judicially considered on a creditor's motion for leave to lift a stay of proceedings granted pursuant to s. 11.02 of the CCAA. As such, the issue before this Court in respect of s. 19(2)(b)(i) of the CCAA is a question of statutory interpretation. There has been only limited judicial consideration *in obiter*, which is presented further to BR's submissions on statutory interpretation.

(i) S. 19(2)(b)(i), CCAA and the “modern principle” of statutory interpretation

8. S. 19(2)(b)(i) of the CCAA provides for an “exception”, carved out from those “Claims that may be dealt with by a compromise or arrangement” (subsection (a)). The scope of this “exception” encompasses “any claim that relates to any of the following debts or liabilities” enumerated, including “(b) any award of damages by a court in civil proceedings in respect of...(i) sexual assault”:

19 (2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

....

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault...

S. 19(2)(b)(i), CCAA. Schedule “A”.

9. The modern principle of statutory interpretation has been restated as follows (*Wilk v Arbour* [2017 ONCA 21](#) [“*Wilk*”] at paras 19-20):

the words of an [Act](#) are to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the [Act](#), the object of the [Act](#) and the intention of Parliament or the legislature: *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, [\[2002\] S.C.J. No. 43](#), 2002 SCC 42, at para. 26, quoting Elmer [page 714] Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths-Heinemann, 1983), at p. 87.

The purposive approach required the judge to first consider the ordinary meaning of the word or words being interpreted; next, the context in which the words are found and the purpose of the legislation; and then, whether the proposed interpretation produced a just and reasonable result: *Blue Star Trailer Rentals Inc. v. 407 ETR Concession Co.* (2008), 91 O.R. (3d) 321, [\[2008\] O.J. No. 2776](#), 2008 ONCA 561, 295 D.L.R. (4th) 83, at paras. 24-25; *Wawanesa Mutual Insurance Co. v. Axa Insurance (Canada)* (2012), 112 O.R. (3d) 354, [\[2012\] O.J. No. 4196](#), 2012 ONCA 592, at para. 34.

(ii) Ordinary meaning

10. In the context of the CCAA, the grammatical and ordinary sense of the words in s. 19(2)(b)(i) is to be construed pursuant to the definition of “claim” in s. 2(1), which is itself indexed to the definition of “claim provable” under the *Bankruptcy and Insolvency Act* RSC 1985 c. B-3 [“*BIA*”]:

S.2(1), CCAA

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of [section 2](#) of the [Bankruptcy and Insolvency Act](#); (*réclamation*)

S.2, BIA

claim provable in bankruptcy, provable claim or claim provable includes any claim or liability provable in proceedings under this Act by a creditor; (*réclamation prouvable en matière de faillite ou réclamation prouvable*)

11. The interpretive starting point is the link between “liability”, as the word is used in s. 19(2)(b)(i), CCAA, in terms of a “claim that relates to any of the following debts or liabilities”, and the maximally broad meaning of “claim” provided by s. (2)(1), in terms of “any indebtedness, liability, or obligation of any kind that would be a claim provable within the meaning of [section 2](#) of the [Bankruptcy and Insolvency Act](#)”.
12. It follows that the “exception” provided by s. 19(2)(b)(i) is not just limited to a judgment “debt” for an “award of damages by a court in civil proceedings”, but also encompasses “liability” for such indebtedness.
13. While s. 19(2)(b)(i) provides for the compromise of a “claim that relates to...liabilities” for “any award of damages in a civil proceeding in respect of...sexual assault” in the event that “the compromise or arrangement explicitly provides for the claim’s compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement”, there has been no compromise in this matter, and no vote.
14. Rather, this motion whereby BR seeks leave to move to add LU as Defendant to her action against University of Sudbury raises LU’s liability for “any award of damages” in the action, within the ordinary meaning of the legislative language providing for the statutory “exception” under s. 19(2)(b)(i), CCAA.

(iii) Context and purpose of legislation

15. There are two canons of construction which, with respect to “the scheme of the Act” and “the object of the Act”, can help to ascertain the scope of the “exception” defined by s.

19(2)(b)(i), CCAA: (a) the “rule of effectivity”; and, (b) the “*noscitur ad sociis*” rule, also known as the associated words rule.

(a) Rule of effectivity

16. The “rule of effectivity” is simply that “Parliament chooses its words carefully: it does not speak gratuitously”: *Kerr v. Peterborough (City)*, [1996 CanLII 8239 \(ON SC\)](#).
17. Put another way, Parliament would not have chosen to legislate by using the words “debt” and “liability” if the meaning of those words was to be conflated.
18. “Debt” must mean something different than “liability”, as a matter of the scope of the “exception” provided for by s. 19(2)(b)(i) of the CCAA, which not only includes a judgment “debt” for “any award of damages in a civil proceeding in respect of...sexual assault”, but also “liability” for the same.

(b) *Noscitur ad sociis* rule

19. The *noscitur ad sociis* or associated words rule “is properly invoked when two or more terms linked by “and” or “or” serve an analogous grammatical and logical function within a provision”, and “invites the reader to look for a common feature among the terms”: *Marche v Halifax Insurance Co.* [2005 SCC 6](#) [“*Marche*”] at para 68.
20. On this point, the Supreme Court of Canada has endorsed Professor Sullivan’s suggestion that “Often the terms are restricted to the scope of their broadest common denominator” (*ibid.*).
21. The “common feature” of debts and liabilities as contemplated by s. 19(2)(b)(i) is that both relate to “claims” as defined by s. 2(1), CCAA, defined as “any indebtedness, liability, or obligation of any kind that would be a claim provable within the meaning of [section 2](#) of the [Bankruptcy and Insolvency Act](#)”.

22. Accordingly, the legislative purpose in providing the statutory “exception” for both “debts” and “liabilities” under s. 19(2)(b)(i) is to carve out both distinct types of claim from “Claims that may be dealt with by compromise or arrangement”: this includes both “indebtedness” and “liability” (as per s. 2(1), CCAA) for “any award of damages by a court in a civil proceeding in respect of...sexual assault”.

23. It is liability that is the “broadest common denominator” (*Marche, supra*) of the “exception” provided for by s. 19(2)(b)(i). It is on the basis of LU’s liability for an “award of damages by a court in a civil proceeding in respect of...sexual assault” that BR moves for the Primary Relief sought: leave on grounds of the s. 19(2)(b)(i) “exception”.

(iv) Legislative intention: a just and reasonable result

24. There is no direct evidence as to Parliament’s intention in enacting s. 19(2)(b)(i), CCAA. The Parliamentary Hansard does not indicate any debate specific to this provision, which was enacted further to the amendments to the CCAA legislated by [Bill C-55](#). Certain comments in the [Seventeenth Report of The Standing Senate Committee on Banking Trade, and Commerce](#), provide helpful context for the dearth of debate; for example, as cited by Senator Grafstein during the Senate’s [Third Reading](#): “too few witnesses were heard and there was insufficient study at Committee in the House of Commons during its examination of Bill C-55”.

25. Thus, as pertains to Parliament’s intention, in the broadest sense, “it may be presumed that the legislature does not intend unjust or inequitable results to flow from its enactments”, and “judicial interpretations should be adopted which avoid such results”. In this regard, “consideration of the consequences of competing interpretations will assist

the courts in determining the actual meaning intended by the legislature”: *Ontario v. Canadian Pacific Ltd.*, [1995 CanLII 112 \(SCC\)](#) [“*Canadian Pacific*”] at para 65.

26. Thus, it may assist the Court on the instant motion to consider the consequences of the proposed interpretation of s. 19(2)(b)(i), CCAA against the consequences of an interpretation which would limit the “exception” in respect of “any debts or liabilities” relating to claims for “any award of damages by a court in civil proceedings” to judgment “indebtedness” (s. 2(1), *supra*), rather than “liability” (*ibid.*) for same.
27. The consequence of the proposed interpretation of s. 19(2)(b)(i), CCAA is to posit that LU’s liability to BR for an award of damages in a civil proceeding in respect of sexual assault falls within the scope of the statutory “exception” provided to distinguish such claims as BR’s from “Claims that may be dealt with by a compromise or arrangement” (s. 19(2)(a), *supra*).
28. To the extent that such claims “in respect of..sexual assault” are also- at least in Ontario- subject to ss. 16(h) and (h.1) of the *Limitations Act* SO 2002 c 24 Sch. B [“*Limitations Act*”], BR’s proposed interpretation preserves the force and effect of ss. 16(h) and (h.1), *Limitations Act*:

No limitation period

16 (1) There is no limitation period in respect of,

(h) a proceeding based on a sexual assault;

(h.1) a proceeding based on any other misconduct of a sexual nature if, at the time of the misconduct, the person with the claim was a minor or any of the following applied with respect to the relationship between the person with the claim and the person who committed the misconduct:

(i) the other person had charge of the person with the claim,

(ii) the other person was in a position of trust or authority in relation to the person with the claim,

(iii) the person with the claim was financially, emotionally, physically or otherwise dependent on the other person;

29. Conversely, a narrower interpretation of s. 19(2)(b)(i)- that, for example, conflates the reference to “any debts or liabilities” to judgment indebtedness- would have inequitable and inconsistent results on the applicability of ss. 16(h) and (h.1), *Limitations Act, supra*.
30. On one hand, if the “exception” provided by s. 19(2)(b)(i): that “any claim that relates to...liabilities” for an “award of damages by a court in a civil proceeding in respect of...sexual assault”, were applicable to BR’s claim, there would be no conflict with ss. 16(h) and (h.1), *Limitations Act, supra*.
31. On the other hand, the narrower interpretation of s. 19(2)(b)(i) that would conflate the statutory reference to “any debts or liabilities” with judgment indebtedness would lead to a conflict between enactments: one which would render meaningless the protection provided to sexual assault claimants by ss. 16(h) and (h.1), *Limitations Act, supra*.
32. Pursuant to such an interpretation, claimants faced by any CCAA Order corresponding to the provision in the Amended and Restated Claims Process Order dated May 31, 2022 that “Any creditor that does not file a Proof of Claim...shall be and is hereby forever barred” would be forced to either forfeit their rights ss. 16(h) and (h.1), *Limitations Act*, or have their claims extinguished.
33. This result would directly contravene the clearly stated intentions of Ontario’s Legislature in promulgating ss. 16(h) and (h.1), *Limitations Act*:

[Ontario, Legislative Assembly, Debates and Proceedings \(Hansard\), 41st Leg., 1st Sess. \(7 March 2016\)](#)

1340:....Another important element of Bill 132 is the changes it would make, if passed, to the justice system. This bill would remove barriers for victims of sexual assault in accessing the justice system. It would remove the limitation period for all civil proceedings based on sexual assault, and in certain cases sexual misconduct or assault, so that the survivors can bring their civil claims forward whenever they choose to do so.

1440:....Schedule 2 allows survivors of sexual assault to pursue civil proceedings at any time. Certainly, Speaker, there was no controversy about these schedules. In fact, they allow Ontario to catch up with several other provinces that have already acted to put these changes in place. BC, Saskatchewan, Manitoba and Nova Scotia have all already removed limitation periods for sexual assault. The two-year limitation has unquestionably been a legal barrier that has prevented sexual abuse survivors from going through the court process to seek compensation and acknowledgment of the harm that was perpetrated against them.

[Ontario, Legislative Assembly, Debates and Proceedings \(Hansard\), 41st Leg., 1st Sess. \(2 December 2015\)](#)

1610:....It amends the Limitations Act, 2002, removing the limitation period for all civil proceedings based on sexual assault or sexual misconduct, so that victims, both adults and minors, can submit claims when they are comfortable. Survivors will no longer run out of time, based on the statute of limitations, before they can even bring their claims to court. We've certainly heard that it is a very difficult thing to come forward, and sometimes it takes decades.

1740:....Altogether these changes in schedules 1 and 2 are welcome changes for survivors who need to focus on their own recovery before they are ready to move forward with a civil claim. The proposed amendments will eliminate the prospect of legal wrangling over whether the Limitations Act applies. It will result in less costly litigation, less risky litigation and improved access to justice for victims.

[Ontario, Legislative Assembly, Debates and Proceedings \(Hansard\), 41st Leg., 1st Sess. \(5 November 2015\)](#)

1510:....A couple of things in terms of support for victims: I want to mention that the sexual violence and harassment action plan, if passed, would amend the Limitations Act...What is proposed there is the elimination of the limitations period for all sexual assault actions to encourage more survivors of sexual assault to come forward with their cases, regardless of how long it's been since that incident occurred.

...These are very important changes, because we know that, sometimes, survivors don't feel comfortable coming forward about assaults immediately, so allowing more time, I believe, is the right thing to do. If passed, that will allow civil processes to move forward quickly.

I would say that this is a very important conversation that we're having here today.

34. As Driedger has said of conflicts between enactments (Driedger, *Construction of Statutes* (2nd Ed.), pp. 235-236, op. cit. *Stagman v. Hamm* [1984 CanLII 2565 \(SK CA\)](#) at para 51):

... In all of these situations, and other overlapping situations not within the scope of the maxims (conflict between two special or between two general provisions or conflict between two statutes enacted at the same time), the task is the same, namely, to find the intention of the legislature.

35. S. 19(2)(b)(i), CCAA and ss. 16(h) and (h.1), *Limitations Act* are all “special” or specialized statutes within the meaning of the *generalia specialibus non derogant* doctrine. Accordingly, legislative intention is the ultimate criterion of interpretation for resolving any apparent conflict. In this regard, it is especially significant that the CCAA is federal legislation, but the *Limitations Act* is provincial legislation: the separation of powers between federal and provincial governments is the key to arriving at an interpretation of s. 19(2)(b)(i) CCAA together with ss. 16(h) and (h.1), *Limitations Act* that resolves any conflict between these enactments.
36. The Court in *Calgary v. Walters Trucking Service Ltd.* [1964 CanLII 747 \(AB QB\)](#) aff'd [1965 CanLII 821 \(AB CA\)](#) has provide the following helpful guidance on this point (emphasis added):

where there is a conflict between enactments of the parliament of Canada within the field in which it is supreme, and enactments in that same field by the province, the federal enactment will override the provincial enactment, **but this does not apply to subjects coming under the sole jurisdiction of a province under sec. 92** [i.e. of *The Constitution Act, 1867*, 30 & 31 Vict, c 3].

37. Notably, while s. 19(2)(b)(i), CCAA falls within the “bankruptcy and insolvency” head of federal power under s. 91(21), *The Constitution Act, 1867*, [30 & 31 Vict, c 3](#) [“*Constitution Act*”], ss. 16(h) and (h.1) of the *Limitations Act* fall within the provincial

powers over “civil rights” provided for by s. 92(13), *Constitution Act*. S. 19(2)(b)(i), *CCAA* is not paramount because ss. 16(h) and (h.1) do not conflict. If the most basic legislative intentions which can be ascribed to the federal and provincial governments are to legislate within their respective spheres pursuant to ss. 91 and 92 of the *Constitution Act*, the task for the Court is to find an interpretation of these respective legislative intentions that produces a just and reasonable result.

38. Where a provision is open to two or more interpretations, the absurdity principle may be employed to reject interpretations which lead to negative consequences, as such consequences are presumed to have been unintended by the legislature: *Canadian Pacific, supra*.

39. In light of ss. 16(h) and (h.1), *Limitations Act*, a narrower interpretation of s. 19(2)(b)(i)- i.e. one that would conflate the reference to “any debts or liabilities” to judgment indebtedness- would either:

(i) if ss. 16(h) and (h.1) are read down: posit a forfeiture of sexual assault claimant’s “civil rights” provided by the *Limitations Act* within a sphere of provincial legislative supremacy; or,

(ii) otherwise: incentivize sexual assault claimants to conceal their claims by waiting out any stays of proceedings under the *CCAA*.

This latter situation would be an absurd result, and “a statute should be interpreted to avoid absurd results”: *Canadian Pacific, supra*.

(v) Jurisprudence

40. Although s. 19(2)(b)(i) has never been judicially considered on a creditor’s motion for leave to lift a stay of proceedings, there has been limited judicial treatment of ss.

19(2)(b)(i), CCAA *in obiter*; and of the principles that can reasonably be inferred to have compelled its enactment.

41. In *Bankruptcy and Insolvency Law of Canada, 4th Edition* (The Honorable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra), there is a reference to *Arrangement relatif à Servites de Marie* [2021 QCCS 2212](#), an initial application opposed by the main creditor, the representative in an ongoing class action relating to allegations of sexual assault committed by community priests on students. Justice Dumas noted *in obiter* that unless the victims of the class action group voted in favor of the plan of arrangement, it would not be enforceable against them.
42. This reasoning is significant for the purposes of BR's motion because it contemplates sexual assault claims as being beyond the enforceability of any plan of arrangement unless the plan is specifically agreed to. Consistent with the proposed interpretation of s. 19(2)(b)(i) posited on BR's motion, it follows that a compromise or plan of arrangement does not extinguish claims against which it would not otherwise be enforceable.
43. In any event, the reasons for the implementation of s. 19(2)(b)(i) are easily inferred from Justice Schwartz's comment in *Re Les Oblats de Marie Immaculee du Manitoba*, [2004 MBQB 71 \(CanLII\)](#) at para 58, that:

The Court is also satisfied that the variety of claims which include claims for loss of cultural status and sexual abuse demand some sort of distinction and any vote based on equal comparison of complaints is on its face unfair.
44. The distinctiveness of sexual assault claims was subsequently codified with the promulgation of s. 19(2)(b)(i), CCAA pursuant to Bill C-55.
45. This Court should accord a meaning to s. 19(2)(b)(i), CCAA which is just, reasonable, and consistent with the legislature's manifest remedial intent.

V. RELIEF SOUGHT

46. BR seeks leave to bring a motion under Rule 5.03 of the *Rules* to add LU as a Defendant to the action, on grounds of s. 19(2)(b)(i) of the *CCAA*, or, in the alternative, pursuant to the directions proposed at paragraph 3 of the “Fresh as Amended Notice of Motion”:

(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, including but not limited to:

(a) cross-examination of Mr. Raymond Coutu on his Affidavit sworn March 2, 2022, and Mr. Normand Lavallee on his Affidavit sworn March 4, 2022, by way of written questions pursuant to Rule 35 of the *Rules*, with any rights arising therefrom to be exercisable pursuant to the *Rules*;

(b) to make peremptory application, under Rule 14.05(3)(d) of the *Rules*, for a declaration under s. 97 of the Courts of Justice Act RSO 1990 c. C. 43, to the effect that LU has insurance coverage corresponding to s. 132 of the Insurance Act and/or Rule 30.02(3).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF APRIL, 2022.

“ARON ZALTZ” LSO #71115B

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

**FACTUM OF THE MOVING PARTY SERVED APRIL
4, 2022**

**RE: S. 19(2)(b)(i), *Companies' Creditors Arrangement Act*
RSC 1985, c. C-36, as amended**

PRESZLER INJURY LAWYERS

151 Eglinton Avenue West
Toronto, ON M4R 1A6

Jeffrey A. Preszler LSO #53820W
jpreszler@preszlerlaw.com

Aron Zaltz LSO# 71115B
azaltz@preszlerlaw.com

Tel: (416) 364-2000
Fax: (416) 364-7027

Lawyers for the Claimant, Barbara Robinson

RCP-E 4C (September 1, 2020)

