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 ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

FACTUM OF THORNELOE UNIVERSITY

(Appeal of decision of claims officer re loss of value claim, returnable November 18, 2022)

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PART I - OVERVIEW

1. Does Thorneloe University, whose business was destroyed by having its programs and courses cancelled and its $2.2M/year income terminated by Laurentian immediately following its disclaimer of the Federation Agreement, have a claim against Laurentian for the loss of its value? If so, what should be the amount of this claim? These are the core questions for this appeal.

2. As part of its restructuring objectives while under *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**") protection which it obtained on February 1, 2021, Laurentian breached its contract with Thorneloe by disclaiming the Federation Agreement that had been in place since 1961.

3. Thorneloe went from being an operating, going-concern university that produced courses for students and generated grant and tuition income of $2.2M/year (prior to the Disclaimer), to losing its courses, faculty, students and income. As noted by the Claims Officer:

> 18. Following the Disclaimer, Thorneloe ceased all academic operations, except in relation to its Theology program. Thorneloe had been a relatively small component of the Laurentian federation, employing a workforce of 28 persons, including 7 full-time faculty members, 12 sessional faculty members, 6 staff and 3 casual staff. As a result of the Disclaimer its faculty and staff were reduced to four persons. Only 36 students remained in its on-line Theology program.[1]

4. The Federation Agreement is not simply a commercial contract for profit. Instead, it is an academic arrangement from 1961 that facilitated Thorneloe's and Laurentian's creation as universities, teach courses to students in northern Ontario, and facilitate the payment of grant and tuition income. The Federation Agreement expressly states that the parties intended for it to

[1] Decision of Claims Officer W. Niels Ortved, September 8, 2022 [Decision of Claims Officer].

continue indefinitely and not be terminated, let alone be breached by Laurentian. The Federation Agreement was the framework for Thorneloe becoming an institution with faculty and staff and generating revenue, operating a residence, and attracting donations for student scholarships.

5. The manner and timing in which Laurentian disclaimed the contract also deprived Thorneloe of an opportunity to restructure. First, by invoking the disclaimer process under section 32 of the CCAA, Laurentian could breach the Federation Agreement while being shielded from a lawsuit for breach of contract.

6. Second, it was a mere 30 days from the time of Laurentian's delivery of the disclaimer notice, the decision of the court upholding the disclaimer, to Laurentian's removal of Thorneloe's courses from the Laurentian curriculum *the next day*.[2] In such circumstances, it was not possible for Thorneloe to mitigate and preserve its business value in an orderly manner by making arrangements for it to operate separately from Laurentian, market its programs and courses for sale, nor to negotiate to federate with another university.

7. The CCAA court acknowledged the significant harm caused to Thorneloe as a consequence of Laurentian's disclaimer in its May 7, 2021 Endorsement:

> [67] Thorneloe also raises the concern that the Disclaimer will result in significant financial hardship for Thorneloe and result in Thorneloe having to make insolvency filings pursuant to the CCAA or the *Bankruptcy and Insolvency Act*.
>
> [68] There is no doubt that this is a legitimate point being raised by Thorneloe. ***The impact of the disclaimer on Thorneloe is significant. The consequence of the disclaimer is such that Thorneloe will be unable to operate in its current form.***[3]

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[2] The delivery of the disclaimer by Laurentian was on April 1, 2021, the court hearing on April 29, 2021, the decision of the court was on Sunday April 31, 2021, and the removal of Thorneloe's courses by Laurentian from the curriculum on Monday May 1, 2021.

[3] [emphasis added] *Laurentian University of Sudbury,* 2021 ONSC 3272 at paras 67-68.

8. Thorneloe submitted claims for its losses in the Laurentian CCAA Claims Process. The Monitor only allowed two claims: a claim for the amount paid by Thorneloe's for severance pay costs ($1,481,673.00) to its faculty and staff that it had to terminate, and a claim for "separation" costs ($100,000) incurred by Thorneloe to separate it from the various systems (e.g., telephone, internet) that it had from Laurentian prior to the disclaimer. These claims of course will only be paid in the range of 16-24% over the ensuing years.

9. Thorneloe also submitted a claim for the loss of its business value. This claim was supported by the report of an independent valuation expert: Glenn Bowman[4] who prepared a comprehensive valuation report that estimated Thorneloe's value just prior to the upholding of the disclaimer and the removal of Thorneloe courses from the curriculum. Notably, and as will be discussed further herein, the report correctly does not calculate this claim based on the lost profit approach.

10. It is well accepted under business valuation principles that there are two approaches that can be used to measure the loss of value of an entity: a) the <u>*loss of business value*</u> approach and b) the <u>*loss of cash flow* or *loss of profit*</u> approach. The approach to use depends on the circumstances. The valuation literature and caselaw hold that when an entity has been destroyed by the actions of another such as by a breach of contract, the appropriate approach is the *loss of business value* approach.

> When a business is destroyed as a result of wrongdoing, there are two commonly used methods by which the plaintiff's damages may be measured. One method is to *appraise <u>the value of the plaintiff's business at the date of loss;</u> the loss to the plaintiff is the amount that the plaintiff could have sold the business for at*

[4] Courts in prior cases have recognized his expertise, for example: "Glen Bowman is an experienced chartered business valuator.": *Passarello v Passarello*, [1998] OJ No 2792, 1998 CarswellOnt 2983 at para 97 (Ontario Court of Justice - Gen Division).

> *the date of the loss. Another method is to calculate the plaintiff's annual loss of profits.*
>
> Under the business valuation method, the remedy applied is to have the defendant "purchase" the destroyed business from the plaintiff at its "fair market value" at the date of the loss.[5]

11. Thorneloe's claim is for its lost business value, not for "lost profits." Thorneloe is a university under statute and a not-for-profit entity. Its mission is to educate students in northern Ontario and perform academic research, not to pursue profit. As noted, it produced courses and students and faculty, had a residence and generated $2.2M/year of income.

12. The Bowman Report concluded that, prior to the disclaimer, Thorneloe had a total enterprise value of $9.8M based on its programs, courses and income which comprised its Operating Enterprise Value, plus its Non-Operating Assets which is essentially its remaining cash on hand that is being steadily being depleted until it has to permanently close. With the loss of its programs, courses and income and being put out of operation by Laurentian, Thorneloe lost its value. Thus, to place Thorneloe in the position it would have been in if there had been no breach by Laurentian's disclaimer and its subsequent actions, means that Thorneloe is entitled to a claim for its loss of value.

Settlement Efforts

13. Thorneloe made efforts to settle its claim and avoid litigation. It offered to answer questions about the claim, which occurred at a Zoom meeting on June 20, 2022. When the Monitor did not accept the answers to its questions, Thorneloe proposed a mediation, which was refused.

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[5] [emphasis added] Ephraim Stulberg, "Adding up the Damage: Lost Profits vs. Business Value", *The Lawyer's Weekly* 34:35 (30 January 2015) (QL). See also: Joe Gardemal, "Damages Measured by Lost Profits or Lost Business Value?" (21 November 2013), online (pdf): Alvarez & Marsal Holdings, LLC <www.alvarezandmarsal.com/printpdf/3866>.

Thorneloe served an Offer to Settle. The Monitor did not respond to the offer. The Monitor only offered to proceed to a more expeditious claims hearing conducted in writing.

14. On September 8, 2022, Claims Officer Niels Ortved, after receiving written submissions, upheld the Monitor's disallowance. The Claims Officer erred by applying the wrong principles. He held that Thorneloe's claim could only be for "lost profits" and since Thorneloe did not show it had lost profits, it had no claim. That is an error of law and principle which requires correction from this court.

PART II - THE FACTS

15. Since its inception in 1961, Laurentian operated under the "Federated University model." Three universities established in their own rights under statute, namely, Thorneloe University (the moving party/appellant herein), University of Sudbury ("**USudbury**"), and Huntington University ("**Huntington**") entered into agreements to be integrated with Laurentian, provide their own courses and programs for the Laurentian Faculty of Arts curriculum, suspend their own degree-granting powers, and operate with Laurentian as "one university." The terms of the federation, the administrative integration of the universities, and the flow of tuition and grant money to the three federated universities for the courses they provided were governed by contracts known as the Federation Agreements and they operated for decades.

16. Upon obtaining CCAA protection, one of Laurentian's objectives was to remove the federated universities' courses from its curriculum and then solicit the students in those courses to enroll in Laurentian courses instead. Laurentian forecast it would gain $2.1M a year by removing

Thorneloe courses from its curriculum (and combined with the removal of the other federated universities, that it would gain $7.2M total).

17. Huntington entered into an agreement with Laurentian which included paying Laurentian a sum ($1.2M) and selling Laurentian its on-line Gerontology Program which the parties agreed to value of $400,000, in exchange for releases in the future CCAA Plan. Under this arrangement it would not oppose a Disclaimer.

18. No similar arrangement was reached with Thorneloe or USudbury. On April 1, 2021, Laurentian delivered Notices of Disclaimer of the Federation Agreement to Thorneloe and USudbury under s. 32(1) of the CCAA.

19. Facing the threat to their existence, Thorneloe and USudbury opposed the disclaimers under section 32(2) in a contested motion brought before the CCAA Judge on Friday April 29, 2021.

20. On Sunday, May 2, 2021, (with further reasons released on May 7, 2021[6]) the court released a short Endorsement upholding the disclaimer of the Federation Agreement.[7]

21. The next Monday morning, May 3, 2021, the day classes were scheduled to start for the spring term, and without notice to Thorneloe, Laurentian removed all Thorneloe's courses and programs from its curriculum and directed the affected students to instead enroll in other Laurentian courses.

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[6] *Laurentian University of Sudbury*, 2021 ONSC 3272 (CanLII).

[7] Huntington entered into an agreement with Laurentian and did not oppose its disclaimer. USudbury also opposed the disclaimer of its Federation Agreement by Laurentian. See *Laurentian University v. Sudbury University*, 2021 ONSC 3392 (CanLII).

22. Based on Laurentian's actions after the Disclaimer was upheld, overnight, Thorneloe went from a highly-regarded teaching university that produced programs and courses, generated income, employed faculty and was popular with students, to having no courses and soon to be terminated workforce.[8] Thorneloe sustained losses all related to and caused by Laurentian's disclaimer of the Federation Agreements and its immediate actions commencing the next day removing Thorneloe's courses from the curriculum.

<u>The Claims Process</u>

23. On May 31, 2021, Laurentian commenced a Claims Process calling for the claims of its creditors. Thorneloe submitted claims under section 32(7) of the CCAA which states that "a party to the agreement *who suffers a loss in relation to the disclaimer* or resiliation *is considered to have a provable claim*." [9]

24. At the creditors meeting on September 14, 2022, Laurentian's Plan of Compromise passed the "double majority" vote required under the CCAA. It was approved by the CCAA Court on October 5, 2022.

25. The estimates of distribution recoveries to creditors by the Monitor in the range of 16-24%. Those estimates will not change with the allowance of Thorneloe's loss of value claim.

26. To prove the basis and the calculation of its loss of value claim amount, Thorneloe retained an independent expert valuator (Glen Bowman, CBV of Farber Corporate Finance Inc.) whose report was sent to the Monitor on December 17, 2021. The Monitor did not challenge Glen

[8] Thorneloe only has its on-line Theology course remaining, which is not part of the Laurentian curriculum.
[9] [emphasis added] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 32(7).

Bowman's qualifications as an expert, did not formally cross-examine Glen Bowman, nor did it provide a responding expert report contesting his calculations and conclusions. As noted, the claims officer disallowed Thorneloe's loss of value claim, and in so doing he erred in law.

PART III – THE ISSUES

a) Did the Claims Officer err in law in holding that the legal principle to apply is that Thorneloe could only claim for lost profits, and that since it did not show that it had lost profits, he erred by disallowing its claim for lost business value?

b) What is the appropriate approach to value Thorneloe's loss of value claim?

c) What amount should be accepted for Thorneloe's loss of value claim against Laurentian?

PART IV – THE LAW AND ARGUMENT

The Standard of Review

27. The standard of review of a decision of a claims officer in a CCAA proceeding was set out in *Target Canada Co. (Re),* 2017 ONSC 2595:

> 11 The applicable standard of review is set out in *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras. 8 and 25, which dictates that on appeal, findings of fact and factual inferences are not to be reversed absent a "palpable and overriding error". On a question of law, the standard is one of correctness.
>
> 12 Housen, supra relates to the review of decisions of a trial judge. This court has held that the same standard of review is to apply on an appeal of a Claims Officer's Ruling in an insolvency proceeding (see: *General Motors Corp. v. Tiercon Industries Inc*. (2009), 62 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]) at para. 12, aff'd 2010 ONCA 666 (Ont. C.A.).

Issue #1 - The Claims Officer erred in law in holding that Thorneloe could only claim for lost profits, which it did not show

28. The Claims Officer's erred at law by holding that a claim by Thorneloe for loss of value can only be for "lost profits" and "according to the principles regarding unprofitable contracts, the Claimant is not entitled to damages for lost profits."[10] He erred further in concluding that "the principles regarding unprofitable contracts …*is the correct approach* to the assessment of damages, not the measurement of alleged loss of commercial value."[11] [emphasis added]

29. The Claims Officer's statement is an error of law and principle for which no deference should be afforded.

30. As noted earlier, the law applicable to business loss valuations holds that there are two approaches to calculating the loss of value to a business: the business value approach and the lost cash flow (or lost profit) approach. The method to apply depends on the circumstances of the harmed entity, in this case, Thorneloe. The two different approaches and their application to different scenarios are explained below.

> **<u>The purpose of loss quantification</u>**
>
> In order to fully understand the business value approach to loss quantification, it is helpful to begin with first principles - namely, by discussing the purpose behind the quantification of loss.
>
> The ultimate objective of loss quantification is to calculate, in an objective and independent manner, with due diligence and consideration of the available facts, assumptions and restrictions of each situation, the financial loss, if any, incurred by a plaintiff as a result of the alleged actions of a defendant. A quantification of loss should normally restore a plaintiff to the position that he or she would have been in had an alleged wrongful act or breach not occurred.
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> …

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[10] Decision of Claims Officer, *supra* note 1 at para 65.
[11] *Ibid* at paras 65-66.

"Compensation" or "restitution" is an important characteristic of loss quantification. Eminent Canadian law professor and author Stephen Waddams states that "the object of compensatory damages is to put the party complaining in the position that would have been occupied if the wrong had not been done' or if his rights had been observed.'"[3] Note that it is ultimately up to a court to decide whether a particular amount (or amounts) quantified by a valuator (or valuators) will restore a particular plaintiff to a position of "wholeness," or whether some alternate amount(s) or other remedy established by the court would be more equitable.

…

Now that the distinctions between the business value and lost cash flow approaches have been discussed, identifying the circumstances in which it is appropriate to use one approach rather than the other can be explored.

<u>Permanent loss of business or cash flow</u>

The permanence of the loss in question is an important criterion to justify the use of a business value approach in a loss quantification context. Permanence can manifest itself in the following scenarios (among others):

- There is a *complete* business shutdown or cash flow loss.

- The business *winds down* initially, and then there is a complete shutdown or cash flow loss (the "slow death" scenario).

- A *portion or segment* of a business shuts down (or there is a *partial* cash flow loss), but the rest of the business carries on operations.

<u>Complete business shut down or cash flow loss</u>

A business value approach is applicable in situations where a business has been permanently and completely shut down or destroyed as a result of the actions of a defendant.

…

The concept of quantifying loss using business value where there is a permanent and complete loss of business is cited in a number of Canadian and U.S. legal cases. In *Jim's Hot Shot Service Inc. v. Continental Western Insurance Co*. and *Sun West Insurance Agency*,[5] the court indicated that "when, as in this case, the claim is that a business was destroyed by negligence, the measure of damages is the difference in fair market value immediately before the negligence caused damage and the fair market value that remained when the business stopped..."

Similarly, in *Taylor v. B. Heller and Co*.[6] the court recognized that "the action for damages for destruction of a business [should be] measured by the difference between the value of the business before and after the injury or destruction.

> In either case, the value of the business after a complete business shutdown would either be negligible or represent any net residual proceeds received or recoverable from the liquidation of any remaining assets.
>
> Other notable cases that echo the same concept include *Indu Craft Inc. v. Bank of Baroda*[7] and *Aetna Life & Casualty Co. v. Little*.[8]
>
> **Business winds down initially, and then completely shuts down**
>
> A business value approach is also applicable in situations where a business has been harmed, carries on operations for a period of time during which it experiences lost cash flows, and then is forced to cease operations as a result of the harm (sometimes described as the "slow death scenario).[12]

31. In this case, the disclaimer of the Federation Agreement and the immediate subsequent actions by Laurentian caused the destruction of Thorneloe. It no longer has faculty, courses, nor the income those courses generated. It is currently drawing on its cash on hand and will be forced to cease remaining operations as a result of Laurentian's breach. This outcome was acknowledged by the court in its decision upholding the disclaimer. Accordingly, the appropriate valuation approach to value Thorneloe's business loss is the business value approach, not the lost profits approach. The claims officer erred in his statement of the law and then, applying his error, reached the wrong conclusion to disallow Thorneloe's claim.

32. Where a business has been destroyed, or as explained above, has been put into a "slow death" state, the assessment of damages is for lost business value. In *Jim's Hot Shot Serv v Continental W Ins Co*, the Supreme Court of North Dakota endorsed the following regarding the measure of damages for a business destroyed by negligence:

> When, as in this case, the claim is that a business was destroyed by negligence, the measure of damages is the difference in fair market value immediately before the

[12] Farley J Cohen & Prem M Lobo, "Business value as a measure of loss in litigation contexts: Reflecting business 'reality' over hypothetical 'fantasy'" (2011) 30:1 Adv J 3 at 3-5

> negligence caused damage and the fair market value that remained when the businesses stopped, together with any losses incurred in the interim.[13]

33. Similarly, the United States Court of Appeal for the Second Circuit approved the measure of damages arising from a breach of contract resulting in the termination of a business as "the value of a business that was completely terminated."[14] The Court of Appeal stated,

> …proof of lost profits is but one method of proving the amount necessary to restore plaintiff to the economic position he would have been in absent the breach. An [*496] alternative methodology, extrapolating *the value of a business as an ongoing entity from the company's past earnings*, establishes a plaintiff's damages without suffering the same defect…
>
> *In fact, when the breach of contract results in the complete destruction of a business enterprise and the business is susceptible to valuation methods, such an approach provides the best method of calculating damages*.[15] [emphasis added]

34. Moreover, even though the Bowman Report applies the correct loss of value approach, it does take into account Thorneloe's declining profitability.

> According to management, over the past few years, various discretionary changes in Laurentian operations and policies had negatively impacted Thorneloe's financial performance including but not limited to changes to Thorneloe's funding arrangement with Laurentian and reduction of grants. Given that Thorneloe's operations were dependent on the grants received pursuant to the federated agreement with Laurentian, as Laurentian's imposed changes were made, Thorneloe Management expressed that it had no choice but to adjust, restructure, and revise operations as appropriate in order to maintain financial feasibility of its operations. ***Despite these adjustments, profitability still declined***.[16]

35. Third, the caselaw supports that that even if a business is unprofitable it can still have value. In *McLachlan v Canadian Imperial Bank of Commerce*, the British Columbia Court of Appeal

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[13] *Jim's Hot Shot Serv v Continental W Ins Co*, 353 NW2d 279, 1984 ND LEXIS 333 at 6-7.
[14] *Indu Craft v Bank of Baroda*, 47 F3d 490, 1995 US App LEXIS 2193 at 7.
[15] *Ibid* at 6.
[16] [emphasis added] The Bowman Report at 41.

ruled that although the plaintiff's business was considered unprofitable by the defendant bank, it still held value as a business of "going concern."[17] Likewise, the Ontario Court of Appeal found a plaintiff's retail business should not be seized simply because it operated at a loss.[18] Instead, the court held the business should be sold for its going concern value rather than its liquidation value.[19]

36. The Claims Officer erred in distinguishing these cases solely on his interpretation that the court commented that the shut-down businesses *could* return to profitability sometime in the future (if they survived), while he concluded that Thorneloe would never be profitable. The decisions of the courts in those cases do not turn on speculative future profitability as the Claims Officer suggests. Moreover, his conclusion that Thorneloe could never be profitable is conjecture for which there is no supporting evidence.

37. The Monitor's argument that Thorneloe cannot have value because it is not profitable (and Thorneloe does not agree it is unprofitable) is also readily disproven by the fact that distressed and insolvent going-concern businesses are routinely sold for cash in insolvency proceedings despite not generating a profit, thus confirming that unprofitable businesses can still have value.

38. Finally, and from a fairness perspective, the "lost profits" approach should not be the method to value damages for not for profit entities whose business has been destroyed by another party. Otherwise, there would be no damage claim or other consequence if a contracting party's breach destroyed the business of a not for profit entity. That result could not be correct.

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[17] [1989] BCJ No 389, [1989] BCWLD 1106 (BCCA) at para 163.
[18] *Ronald Elwyn Lister Ltd v Dayton Tire Canada Ltd*, [1985[OJ No 2633, 52 OR (2d) 88 (ONCA) at paras 5 & 57.
[19] *Ibid* at paras 63 & 64.

39. As can be seen, for Thorneloe, the business value approach – not the lost profits approach - is the correct way to value Thorneloe's loss of value. That is the approach used by Glen Bowman.

Issue #2 - The Bowman Report correctly values Thorneloe's loss of value claim using the business value approach

40. The Bowman Report calculates two amounts that comprise the total loss of value of Thorneloe. One is the "**operating enterprise value**" component, which estimates Thorneloe's enterprise value immediately prior to the disclaimer between $2.8M to $3.3M. It is noteworthy that the Monitor acknowledged that: "[A]t most, the Farber Report supports a claim for the loss of Thorneloe's academic and commercial value in the range of $2.8 million to $3.3 million".[20]

41. The second component is the value of Thorneloe's "**non-operating assets**" of approximately $6.7M, which is arrived at by taking the total investments reported on Thorneloe's financial statements of $8.6M and subtracting $1.9M, which represents restricted investments that can only be used for specific purposes.

42. To reach his final valuation conclusion, Mr. Bowman added the two components together and arrived at a range of $9.5M to $10M, the midpoint of which is $9.8M for the total value of Thorneloe's claim.[21]

43. The Bowman Report is comprehensive and detailed. Its methodology is sound. Glen Bowman is an acknowledged expert valuator.

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[20] Decision of Claims Officer, *supra* note 1 at 11.
[21] The Bowman Report at 70.

44. Excerpts from the Bowman Report state starting at p. 45-68 are attached hereto as **Appendix "A".**

The Monitor's criticisms of the Bowman Report are without merit

45. The Monitor criticized the Bowman Report on the basis that it "does not expressly take a position on the loss to Thorneloe's academic and commercial value as a result of the Disclaimer and does not provide an opinion on Thorneloe's enterprise value immediately after the Disclaimer."[22]

46. That criticism should be disregarded. Under the loss of value approach, which the Bowman Report applies, he calculated the value of Thorneloe just prior to the disclaimer coming into force. Further, as noted earlier the "Assignment" section of the Bowman Report acknowledges that the purpose of the report is to determine Thorneloe's loss of value for the purpose of Thorneloe filing a claim in Laurentian's CCAA claims process:

> Thorneloe University ("Thorneloe" or the "University") has requested that Farber Corporate Finance Inc. ("Farber") provide our estimate of Enterprise Value ("Estimate Valuation") of Thorneloe on or about April 30, 2021 ("Valuation Date"), being that date on which Laurentian delivered disclaimers of the Thorneloe Federation Agreement and Financial Distribution Notice pursuant to section 32(7) of the CCAA.
>
> [Note: the court upheld the disclaimer on Sunday May 1, 2021, two days after the disclaimer hearing on Friday April 29, 2021].
>
> ***We understand that our report will be used in connection with filing a claim for loss of Thorneloe's academic and commercial value/business value as a part of its proof of claim in the claims process in Laurentian University's*** ("Laurentian") CCAA proceedings. [emphasis added][23]

[22] Decision of Claims Officer, *supra* note 1 at para 48.
[23] The Bowman Report at 5.

47. The Monitor also says that Thorneloe should not have a claim for loss of value because it was not profitable. Again, Thorneloe's loss of value claim is not based on the lost profits approach. This criticism should also be disregarded.

<u>Issue #3 - What amount should be accepted for Thorneloe's loss of value claim against Laurentian?</u>

48. As noted, the Bowman Report calculates Thorneloe's value by combining two components: Thorneloe's $6.7M cash on hand and an Operating Enterprise Value component of $2.8M - $3.3M to arrive on a total enterprise value of $9.8M prior to the Disclaimer.

49. It is submitted that the claims officer erred by not allowing Thorneloe's loss of value claim in the amount of $9.8M. Alternatively, he should have allowed the loss of value claim at least in the range of $2.8M - $3.3M, or applying the midpoint approach, $3.15M which claim the Monitor acknowledged that "the Farber Report supports a claim for the loss of Thorneloe's academic and commercial value in the range of $2.8 million to $3.3 million".[24] Instead, he disallowed the claim in full. Had the claims officer applied the correct legal approach to the loss of value claim, at least the latter amount should have been allowed.

PART V - ORDER REQUESTED

50. Thorneloe respectfully requests an order allowing Thorneloe's loss of value claim in the amount of $9.8M. Alternatively, Thorneloe requests an order allowing the loss of value claim at least for $3.15M.

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[24] Decision of Claims Officer, *supra* note 1 at 11.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of October, 2022.

Andrew J. Hatnay

Demetrios Yiokaris

APPENDIX "A"

When determining the **value of a business enterprise**, there are three general approaches available to the valuation professional: the market approach, the income approach, and the asset approach. These are also commonly referred to as the market capitalization, discounted case flow ("DCF") and adjusted book value approaches, respectively. The choice of which approach to use in a particular situation will depend upon the specific facts and circumstances associated with the company, as well as the purpose for which the valuation analysis is being conducted

1. Market Capitalization Approach

The ***market capitalization approach*** is a useful method of determining the fair market value of a company ***which is currently profitable and is expected to remain profitable in the future*** This methodology may be used for closely-held private companies to determine what the company or security would be worth in the public market. In addition, it can be used to value a company as a private entity, subject to adjustments for size or liquidity. This approach provides indications of value by studying either transactions or market trading metrics of companies or securities similar to the subject company for which a value conclusion is desired.

The approach is one of determining a level of earnings which is considered to be representative of the future performance of the company, and capitalizing this figure by an appropriate risk-adjusted rate. This approach provides an indication of value for the security, which corresponds with the particular earnings figure being capitalized (for example, capitalizing net earnings available to common stockholders would yield an indication of value for the common stock).

There are several different forms of "earnings" used in the market capitalization approach, because each form isolates particular nuances of the company's operating performance.

Hence, the various "earnings" figures used throughout this report, including EBITDA, earnings before interest and taxes ("EBIT"), debt-free cash flow ("DFCF"), debt-free earnings ("DFE"), cashflow ("CF"), and earnings ("E"), are all just variations of the conventional net income figure determined according to generally accepted accounting principles.

The capitalization rate is an expression of what investors believe to be a fair and reasonable rate of return for the particular security, given the inherent risks of ownership. It incorporates expectations of growth and rests on the implicit assumption that some level of earnings will be generated by the enterprise into perpetuity. The most common means of obtaining capitalization rates is through the market comparison method, whereby companies ("**Comparable Companies**") having their stock traded in the public market are selected for comparison purposes and used as a basis for choosing reasonable capitalization rates for the subject company. Capitalization rates obtained in this manner are generally expressed as ratios of the various earnings figures, and are referred to as "market multiples."

Another common method of obtaining such multiples is to examine companies that have recently been sold in the public marketplace ("**Transaction Comparables**"). For this method, the total price paid for the company is related to earnings figures which yield implied transaction multiples. The acquired company is then compared with the subject company on the basis of risk and expected return, and the comparable transaction multiples are used as a basis for selecting appropriate multiples for the subject company.

Market multiples are categorized as either "leveraged" or "debt-free" depending on whether or not the earnings figures being capitalized are net of interest expense. The most common leveraged multiple is the price/earnings ("P/E") ratio, which relates the price paid for the common stock of a company with that company's earnings per share. The multiple is considered to be "leveraged" because earnings per share is net of any interest expense, and capitalization of this figure effectively incorporates the impact of any debt the company has into the final value for the equity.

Another leveraged market multiple is the price/cash flow ("P/CF") ratio, where cash flow equals net earnings plus depreciation expense. The P/CF multiple is used primarily in instances where the operating assets of the business, and the resulting depreciation expense, are large relative to total assets, total revenues and net earnings. This multiple tends to compensate for differences in the depreciation practices of companies, which could result in differing P/E multiples when the P/CF multiples are more comparable.

A third form of leveraged market multiple, which is used in very specific instances, is the price/net book value ("P/NBV") ratio. This form is typically employed for businesses which have substantial investments in tangible assets and for which operating earnings provide a reasonable return on investment. Examples of such businesses include banks, trust companies, and insurance companies, where a majority of the company's assets are financial in nature.

Debt-free market multiples relate the value of the company's enterprise value (**"EV" or "Enterprise Value"),** or debt plus equity, to earnings figures from which no interest expense has been deducted. The more common debt-free multiples are enterprise value/earnings before interest, taxes, depreciation and amortization ("EV/EBITDA"), enterprise value/earnings before interest and taxes ("EV/EBIT"), enterprise value/debt-free cash flow ("EV/DFCF"), and enterprise value/debt-free earnings ("EV/DFE"). The use of these multiples may be appropriate when comparing companies that have substantially different amounts of financial leverage, because the multiples are based on total company value, which is generally independent of the amount of leverage in the company's capital structure. Their use effectively separates the issue of company valuation from the specific financing decisions that are made to operate the business. Furthermore, EV/EBITDA and EV/EBIT multiples, which are developed from pre-tax earnings figures, may be appropriate when comparing companies that have substantially different income tax situations, as well as different amounts of financial leverage. In general, these debt-free methods reduce distortions in P/CF and P/E that might be present due to differences in financial leverage or income taxes among firms. Another debt-free multiple is the enterprise value/revenue ("EV/R") ratio, which may be applicable in certain situations.

The market comparison method may also be useful in the valuation of individual assets. However, comparable transaction values of individual assets are seldom available because individual assets typically are transferred only as part of the sale of a business, not in piecemeal transactions. Furthermore, because individual assets are unique to a particular enterprise, comparison between enterprises is difficult. For these reasons, the market approach is seldom used and is rarely appropriate in the valuation of individual assets, unless exchanges of individual assets comparable to the subject asset can be observed.

2. DCF Approach

The DCF approach is another popular method of determining the fair market value of a company. The approach is one of estimating the present value of the projected future cash flows to be generated from the business and theoretically available (though not necessarily paid) to the capital providers of the company. In the DCF approach, the counterpart to the market multiple described above is the discount rate applied to the projected future cash flows to arrive at the present value. The discount rate is intended to reflect all risks of ownership and the associated risks of realizing the stream of projected future cash flows. It can also be interpreted as the rate of return that would be required by providers of capital to the company to compensate them for the time value of their money, as well as the risk inherent in the particular investment. However, unlike the market multiple approach, the discount rate employed in the DCF approach contains no implicit expectations of growth for the cash flows. Instead, the projected cash flows themselves reveal growth expectations, while allowing for a great deal more flexibility in projecting such growth rates.

In contrast to the "cash flow" or "earnings" figures used in the market capitalization approach, the figure used in the DCF approach more accurately represents the true cash flow being generated by the operations of the business. In short, it incorporates cash expenditures on working capital and fixed assets, while also recognizing the non-cash expenses contained in earnings figures. The cash flows are typically projected over a limited number of years, which will depend on the planning horizon of the specific firm or asset and other factors related to the particular industry and the general economy.

As a result, it is necessary to compute a terminal value as of the end of the last period for which cash flows are projected. This terminal value is essentially an estimate of the value of the enterprise as of that future point in time, and it incorporates the assumptions of perpetual operations and implicit growth found in the market capitalization approach. Discounting each of the projected future cash flows and the terminal value back to the present, and summing the results, yields an indication of value for the enterprise as a whole.

Treatment of Redundant Assets in the Market Capitalization and DCF Approaches

When used in combination, the various forms of the market capitalization approach and the DCF approach can lead to a reasonable indication of value for the subject company. However, these approaches do not generally capture the value of assets and liabilities that are not required for the operation of the business. Examples of such "non-operating" assets and liabilities include excess cash, investments not related to the company, unnecessary land an equipment, and contingent liabilities such as an under-funded pension plan. ***If such items exist, they must be valued separately and used to adjust the going-concern value indications determined by the market capitalization and DCF approaches.***

3. Adjusted Book Value Approach

The adjusted book value approach also provides meaningful indications of value for a company, although its applicability is generally limited to specific situations in which the market capitalization and DCF approaches are less suitable. The market capitalization and DCF approaches are appropriate in most going concern situations as the worth of a company is generally a function of its ability to earn future income or cash flow to provide an appropriate rate of return on investment. Asset values can sometimes constitute the prime determinant of corporate worth. This depends on the nature of the company's operations (such as an investment holding company), or if the outlook for a company's earnings is somewhat uncertain, or returns based on earnings are insufficient to justify the investment in assets.

The adjusted book value approach differs from the market capitalization and DCF approaches in two important ways. First, it focuses on individual asset and liability values from the company's balance sheet, which are adjusted to fair market value. In contrast, the market capitalization and DCF approaches focus on the aggregate returns generated by all the company's assets. Second, it can be applied in situations where liquidation is imminent. The market capitalization and DCF approaches have very limited applicability in a liquidation scenario.

The adjusted book value approach can also be used in going-concern situations to provide an additional indication of value. The approach may be appropriate in instances where the subject company has a heavy investment in tangible assets or where operating earnings are insignificant relative to the value of the underlying assets. On the other hand, it may not be the best approach in instances where the company has substantial operating earnings relative to the value of the underlying assets. In such cases, the residual equity value resulting from the adjusted book value approach may not reflect the value inherent in the company's superior cash-generating capability.

Approach to Value

The Estimate Valuation is based upon assumptions and approaches that Farber considered appropriate in the exercise of its professional judgement for the purpose of arriving at an estimate of the range of fair market values of the University.

In Farber's analysis of Thorneloe, Farber has taken into consideration the income and cash-generating capability of the University. Typically, an investor contemplating an investment in a company with income and cash-generating capability will evaluate the risks and returns of the investment on a going-concern basis.

Earnings or cash flow based valuations are often used where it is assumed that the assets employed are providing, or are reasonably expected to provide, an appropriate rate of return on investment. Asset based approaches are typically favored in most other situations.

Thorneloe is a non-for-profit entity and has historically operated at close to break-even. Therefore, the discounted cash flow approach was not used as free cash flows are not available to Thorneloe upon which the discounted cash flow approach would be applied.

Given the lack of precedent transactions with publicly disclosed financial information available which may be considered comparable to Thorneloe, the market capitalization of precedent transactions approach was not used in our analysis.

In order to determine the operating enterprise value of the University on or about the Valuation Date, Farber has relied upon the following valuation methodologies:

Market capitalization – comparable companies; and

Adjusted book value approach

Thereafter, Farber understands that there are cash and cash equivalents, and non-operating investment assets of the University which Farber determined to be redundant assets and forms value to the University in addition to the operating enterprise value.

The valuation results under the approaches employed are summarized in Appendix A.

Market Capitalization Approach – Publicly Traded Comparable Companies

General

Given the universe of North American private universities that are publicly traded, Farber used the market capitalization approach to estimate the valuation of Thorneloe. We also took note of certain publicly traded international universities and transactions in the sector for which financial information was available and relevant. The section below outlines the procedures Farber performed to identify comparable public companies or comparable market transactions.

Revenue and EBITDA

Farber has reviewed Thorneloe's internally prepared financial statements for FY2021 and estimated normalized income statement for operations going forward. Based on the foregoing, Farber has reviewed the revenue and expense items that form Thorneloe's reported operating results summarized in Appendix D and Appendix E.

Given that Thorneloe is winding down its operations and does not expect to generate the same level of revenue in the future (i.e. certain grants will no longer be available), ***it is Farber's view that Thorneloe's historical revenue is not an inaccurate representation of the University's maintainable revenue for the purpose of the Estimate Valuation on or about the Valuation Date. Additionally, given that Thorneloe is a not-for-profit enterprise, it is Farber's view that Thorneloe's historical EBITDA is not an accurate measure of value for the purpose of the Estimate Valuation.***

Based on the foregoing, it is Farber's view that Thorneloe's estimated normalized revenue of approximately $2.2 million (based on discussions with Management) is not an unreasonable measure of Thorneloe's value upon which the market capitalization approach may be applied on or about the Valuation Date.

Market Multiples

The selection of an appropriate capitalization rate or earnings multiple to apply to the selected level of earnings is, of necessity, a matter of informed judgment and is dependent upon a number of factors, including:

i. the length of time Thorneloe has been in existence;

ii. the size and profitability of Thorneloe’s operations;
iii. the location of Thorneloe’s campus;
iv. the campus size and courses offered at Thorneloe;
v. Thorneloe's historical revenue and profitability trends for the period under review;
vi. the level of maintainable normalized revenue selected;
vii. the outlook for the Canadian Colleges & Universities industry on or about the Valuation Date; and
viii. the competitive landscape of the Canadian Colleges & Universities industry on or about the
Valuation Date.

Farber has also considered market multiples for publicly traded companies, as of the Valuation Date, which Farber deems to be comparable (Appendix B).

Selection of Comparable Public Companies

When performing a comparable company analysis under the Market Capitalization Approach, it is important to examine a representative list of publicly owned companies that are similar to Thorneloe. In some cases, companies may be quite similar from an investment standpoint, even though they appear to be engaged in somewhat different lines of business or industries. Primarily, they should offer operational and economic comparability in the area of major importance to potential investors.

…

After reviewing numerous companies fitting the general criteria described above, ***Farber selected twenty-six companies for comparative purposes. Of these comparable companies, four are publicly traded private universities listed in the U.S. and six are publicly traded private universities listed internationally. Farber believes that the selected companies are comparable to Thorneloe seeing as the comparables are academic institutions which generate earnings through tuition fees and other certain revenue sources similar to Thorneloe.*** Notwithstanding that certain of the comparable companies may be larger in size, liquidity, historical growth and certain other characteristics further set out herein, the similar nature of the comparable companies’ operations provides a reasonable comparative measure of value of universities such as Thorneloe upon which the Market Capitalization approach may be applied. A description of each of the Comparable Companies is provided in Appendix I.

Comparative Analysis

Before drawing any conclusions from the market multiples of the Comparable Companies, it is necessary to complete a comparative analysis in which an assessment is made of Thorneloe's risk and return characteristics relative to the Comparable Companies. The analysis focuses on both quantitative considerations (which include financial performance and other quantifiable data) and qualitative considerations (which include any factors that are expected to impact future financial performance and investors’ interpretations of financial results).

We note that in comparing the last twelve months (“LTM”) figures of the Comparable Companies to Thorneloe's performance, we used Thorneloe’s normalized financials as per Appendix D. For the purpose of analysis of Thorneloe's risk and return characteristics relative to the Comparable Companies, Farber has performed its analyses on the U.S. listed publicly traded private universities and internationally listed publicly traded private universities.

Farber's review of Thorneloe's qualitative and quantitative factors relative to Comparable Companies indicated the following (Appendix H):

1. **Size -** Thorneloe is the smallest of the Comparables as measured by Enterprise Value, LTM revenue and LTM EBITDA
2. **Liquidity -** Thorneloe has the fourth lowest liquidity among the Comparables as measured by the current ratio
3. **Historical Growth -** Thorneloe has exhibited the lowest LTM revenue growth among the Comparable Companies
4. **Leverage -** Thorneloe has the lowest leverage among the Comparables as measured by total debt/equity %
5. **Profitability -** Thorneloe has exhibited the lowest LTM EBITDA margin among the Comparable Companies
6. **Determination of Market Multiples -** Debt-free market multiples for the Comparable Companies were derived by dividing the value of each company's Enterprise Value by LTM Revenue.

The derived market multiples vary reflecting differing investor sentiment towards each of the Comparable Companies, as well as the specific industry and general economic factors. The resulting multiples for the selected Comparable Companies (U.S. listed private universities and internationally listed private universities) were as follows (Appendix B):

	EV / LTM Revenue Multiples		
	U.S. Listed Private Universities	Internationally Listed Private Universities	U.S. and Internationally Listed Private Universities
Minimum	.46x	2.81x	.46x
Maximum	3.28X	7.94X	7.94X
Median	1.15x	4.21x	3.52x
Mean	1.51x	4.82x	3.50x

Farber's view is that a prospective purchaser of Thorneloe would select a LTM Revenue multiple that is between the minimum and the median of the Comparable Companies due to the following factors, among others:

a) Special consideration has been given to the multiples of U.S. listed private universities;

b) Thorneloe is the smallest in terms of revenue, EBITDA, and enterprise value among the Comparable Companies;

c) Thorneloe has the lowest LTM revenue growth among the Comparable Companies;

d) Thorneloe has fourth lowest liquidity as measured by the current ratio among the Comparable Companies; and

e) Thorneloe has the lowest leverage as measured by total debt to equity ratio among the Comparable Companies.

f) Thorneloe's operations are dependent on the continued partnership between Laurentian and Thorneloe

Based on the factors above, Farber's selected range of market multiples are as follows:

	EV/LTM Revenue
Low	1.25x
High	1.75x

Publicly Traded Comparable Companies Summary

The value indicators that have been computed using the Market Capitalization of Publicly Traded University Approach reflect Enterprise Value of Thorneloe. As set out in Appendix B, applying the appropriate EV/LTM Revenue multiples to the LTM Revenue yields an Operating Enterprise Value range for the University in the range of approximately $2.8 million to $3.9 million. ***Given that Thorneloe is winding down its operations and may enter into a formal insolvency process, Farber believes that the book value of equity is not an unreasonable measure of the University's value as of the Valuation Date.***
As set out in Appendix C, the book value of operating assets as of April 31, 2021 was approximately $4.3 million and the book value of operating liabilities as of April 31, 2021 was approximately $1.5 million.

To arrive at the book value of equity of Thorneloe, we subtracted the book value of operating liabilities of approximately $1.5 million from the book value of operating assets of approximately$4.3 million. ***As a result, Farber calculated the estimated fair market value of Thorneloe's on-going business operations to be approximately $2.8 million (Appendix C).***

Analysis of Approaches

As set out in Appendix A, there is a reasonable range of operating enterprise values implied by the valuation approaches employed ranging from a value of approximately $2.7 million to approximately $3.9 million, excluding the value of non-operating assets.

Furthermore, the implied operating enterprise value range determined using the market capitalization approach is corroborated by the implied operating enterprise value range of the University's ongoing business operations determined using the adjusted book value approach and thus Farber believes that neither approaches are unreasonable value measures of the University's operations on or about the Valuation Date.

Based on Farber's understanding, Thorneloe, at the Valuation Date, has a total of approximately$8.6 million total investment reported on the financial statements (Appendix G),

of which approximately $6.7 million is non-restricted, and can be used by Thorneloe for any purposes. The remaining $1.9 million are restricted and can only be used for certain specific purposes. For the purpose of this Valuation, the non-restricted portion of the investments ($6.7 million) are effectively treated as cash and cash equivalents, and are considered to be redundant assets/non-operating assets.

To the selected operating enterprise value range of approximately $2.8 million to $3.3 million, we added the total non-operating assets of approximately $6.7 million to arrive at the implied enterprise value. (Appendix A).

The resulting implied Enterprise Value range is between $9.5 million and $10 million. If Farber were asked to select a particular amount, it would select the mid-point of approximately $9.8 million.

SCHEDULE “A”
LIST OF AUTHORITIES

1. *Indu Craft v Bank of Baroda*, 47 F3d 490, 1995 US App LEXIS 2193.

2. *Jim's Hot Shot Serv v Continental W Ins Co*, 353 NW2d 279, 1984 ND LEXIS 333.

3. *Laurentian University of Sudbury*, 2021 ONSC 3272.

4. *Laurentian University v Sudbury University*, 2021 ONSC 3392.

3. *McLachlan v Canadian Imperial Bank of Commerce*, [1989] BCJ No 389, [1989] BCWLD 1106 (BCCA).

4. *Passarello v Passarello*, [1998] OJ No 2792, 1998 CarswellOnt 2983.

5. *Ronald Elwyn Lister Ltd v Dayton Tire Canada Ltd*, [1985] OJ No 2633, 52 OR (2d) 88 (ONCA).

6. *Target Canada Co, (Re)*, 2017 ONSC 2595.

LIST OF SECONDARY SOURCES

7. Ephraim Stulberg, "Adding up the Damage: Lost Profits vs. Business Value", *The Lawyer's Weekly* 34:35 (30 January 2015) (QL).

8. Farley J Cohen & Prem M Lobo, "Business value as a measure of loss in litigation contexts: Reflecting business 'reality' over hypothetical 'fantasy'" (2011) 30:1 Adv J 3.

9. Joe Gardemal, "Damages Measured by Lost Profits or Lost Business Value?" (21 November 2013), online (pdf): Alvarez & Marsal Holdings, LLC <www.alvarezandmarsal.com/printpdf/3866>.

SCHEDULE "B"
RELEVANT STATUTES

***Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36**

Disclaimer or resiliation of agreements

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

Court may prohibit disclaimer or resiliation

(2) Within 15 days after the day on which the company gives notice under subsection (1), *a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated*.

Court-ordered disclaimer or resiliation

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

Factors to be considered

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

(a) whether the monitor approved the proposed disclaimer or resiliation,

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement

Date of disclaimer or resiliation

(5) An agreement is disclaimed or resiliated

(a) if no application is made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1).

(b) if the court dismisses the application made under subsection (2), on the day that is 30 days after the day on which the company gives notice under subsection (1) or on any later day fixed by the court; or

(c) if the court orders that the agreement is disclaimed or resiliated under subsection (3), on the day that is 30 days after the day on which the company gives notice or on any later day fixed by the court.

Intellectual property

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Loss related to disclaimer or resiliation

(7) If an agreement is disclaimed or resiliated, a party to the agreement who suffers a loss in relation to the disclaimer or resiliation is considered to have a provable claim.

Reasons for disclaimer or resiliation

(8) A company shall, on request by a party to the agreement, provide in writing the reasons for the proposed disclaimer or resiliation within five days after the day on which the party requests them.

Exceptions

(9) This section does not apply in respect of

(a) an eligible financial contract

(b) a collective agreement

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

2005, c. 47, s. 131; 2007, c. 29, s. 108, c. 36, ss. 76, 112

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF
THORNELOE UNIVERSITY
(Appeal of decision of Claims Officer re loss of value claim, returnable November 18, 2022)

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