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

CASE CONFERENCE MEMORANDUM OF THORNELOE UNIVERSITY

(REQUESTING A DIRECTION FOR A MEDIATION AND TO SET A SCHEDULE, RETURNABLE OCTOBER 12, 2022)

1. This Memorandum is prepared for the case conference on October 12, 2022 in respect of the appeal by Thorneloe University ("**Thorneloe**") of the disallowance of its claim for loss of commercial value caused to it by Laurentian's disclaimer of the Federation Agreements it had with Thorneloe since 1961.[1]

2. As part of the CCAA Claims Process, Thorneloe submitted a claim for loss of commercial value based on Laurentian's sudden removal of Thorneloe courses and programs[2] from its curriculum immediately after the court upheld the disclaimer in its Endorsement of May 2, 2021.

3. The disclaimer was not simply of a commercial contract. The removal of all the courses caused a cessation of Thorneloe's main income stream of tuition and grants that was generated by

[1] Thorneloe has continued its on-line Theology program, which is not part of the Laurentian curriculum. Thorneloe also has made its student residence available to certain Laurentian students who requested accommodation in it, and also to house students in response to requests from Laurentian.
[2] Thorneloe had provided courses under three programs: Ancient Studies, Religious Studies and Women's Gender and Sexuality Studies.

those courses. Combined with the solicitation of the impacted Thorneloe students to enroll in Laurentian courses, these actions by Laurentian rendered Thorneloe unable to operate as a teaching university with faculty as it had done since the early 1960's, and removed any prospect for it to restructure itself. That consequence gives rise to a loss of value claim.

4. Thorneloe's claim for loss of commercial value is supported by the independent expert valuation report of Glen Bowman, C.B.V. (the "**Bowman Report**") who Thorneloe retained to provide a valuation.

5. The Monitor did not challenge the qualifications of Glen Bowman as an expert valuator, did not seek to cross-examine Mr. Bowman, nor did it prepare a responding expert report.

6. Nevertheless, the Monitor disallowed the claim in full. The disallowance was upheld by Claims Officer Niels Ortved following a claims hearing conducted in writing, without witnesses.

7. Thorneloe states the decision of the Claims Officer contains many errors, and has appealed to this court.

8. The case conference is to set a schedule for the hearing of the appeal. Thorneloe and the Monitor have agreed on the litigation schedule except for an inclusion for mediation. Thorneloe's proposed schedule is attached hereto as Schedule A.

9. Thorneloe requests again to have a mediation to try and resolve the disputed claim based on the Bowman Report before proceeding to a costlier appeal hearing and possible further appeals.

10. The Monitor has opposed a mediation. It wants only to litigate.

11. This is not the first time that Thorneloe has attempted to resolve the Bowman Report claim with the Monitor. On July 21, 2022, prior to the claims hearing, Thorneloe served an Offer to Settle and proposed a mediation. The Monitor rejected both.

12. To summarize the relevant chronology:

- February 1, 2021: the court granted Laurentian protection from its creditors under the CCAA.

- February 5, 2021: the court appointed Justice Sean Dunphy as the mediator in the CCAA proceeding to mediate an array of topics, including broadly under paragraph 3(f) of the court order: "***any other matters that are referred to the Court-Appointed Mediator*** by [Laurentian], the Monitor, ***the relevant stakeholders or this Court***;": There is ample authority for this Court to direct its Monitor to attend at a mediation.

- April 1, 2021: Laurentian gave notice of its disclaimer of the Federation Agreements to Thorneloe.[3]

- May 2, 2021: The court upholds the disclaimer.

- May 3, 2021: Laurentian removes all Thorneloe programs and courses from its curriculum and directs students enrolled in Thorneloe courses to enroll in Laurentian courses.

- Thorneloe ceases teaching and terminates its faculty and staff, paying severance pay. Thorneloe currently has only four employees.

- July 30, 2021: Thorneloe submits its Proof of Claim in accordance with the Claims Process Order. Thorneloe advises that it retained an independent expert to provide a report on the loss of its commercial value, which is being prepared.

- December 17, 2021: Thorneloe submits the Bowman Report that values Thorneloe's commercial loss claim caused by the disclaimer at $9.8M.

- May 25, 2022: Monitor delivers its Notice of Revision or Disallowance disallowing Thorneloe's loss of commercial value claim in the Bowman Report, as well as a claim for (compromised) costs incurred by Thorneloe to defend itself against the disclaimers.

- The Monitor allows Thorneloe's severance pay claim for $1,481,673.00 that it paid to its employees it had to terminate, and a claim for "separation" costs in the amount of $100,000 which were Thorneloe's costs to separate its operations and administration (such as internet, email, and other interconnected logistics) from Laurentian after the disclaimer.

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[3] Laurentian also disclaimed its Federation Agreements with the University of Sudbury.

- June 8, 2022: Thorneloe delivers its Notice of Dispute of the Disallowance.
- July 21, 2022: Thorneloe delivers an Offer to Settle to the Monitor for its claim based on Bowman Report claim, and the claim for the professional costs. Thorneloe also proposed a mediation with Dunphy, J.
- The Monitor dismissed Thorneloe's Offer to Settle and its proposal to mediate out of hand, and said it wished to proceed to a claims hearing.
- A claim hearing in writing proceeded on Thorneloe's Bowman Report claim and the costs claim. On September 8, 2022, the claims officer released his decision upholding the Monitor's disallowances of Thorneloe's Bowman Report claim and the costs claim.
- September 19, 2022: Thorneloe filed an appeal to this court appealing the disallowance of the Bowman Report only.

13. There are at least four reasons why the court should direct its Monitor to a mediation instead of only proceeding to an appeal hearing:

A. ***The Bowman Report supports a loss of commercial value claim – it is not a frivolous or unsupported claim.***

14. Thorneloe's loss of commercial value claim is supported by the report of a recognized independent valuation expert: Glenn Bowman. Mr. Bowman prepared a comprehensive and detailed valuation report. In accepting his expert evidence, courts in prior cases have recognized his expertise: "Glenn Bowman is an experienced chartered business valuator."[4] This is not a frivolous or unsupported claim.

15. In a study of expert valuation evidence published in *The Advocates Journal*, the authors identify the value the courts place on independent valuation reports:

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[4] *Passarello v Passarello*, [1998] OJ No 2792, 1998 CarswellOnt 2983 at para 97 (Ontario Court of Justice - Gen Division).

The relevance of expert valuation evidence

Our review of legal judgments makes it manifestly clear that expert valuation evidence is valued by courts (subject to such evidence being independent and credible). In cases where the amount of financial loss or business value is complex, involves a significant dollar amount or is disputed between the parties involved, courts tend to welcome the insights, analyses and evidence provided by valuation experts.

This view is echoed in many legal judgments, including *Alfano v. Piersanti*, in which the court notes that "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the Court." In *Alfano*, the court goes on to quote *Eastern Power Ltd. v. Ontario Electricity Financial Corp.* as follows:

> [T]he purpose of expert evidence is to assist the trier of fact to understand evidence outside of his or her range of experience so that a correct conclusion can be reached…

In *de Gobeo v. de Gobeo*, the court stated that it "wishe[d] to emphasize its dependence upon the work of experts."

A number of legal judgments acknowledged the usefulness of valuation evidence provided. For example, in *1230995 Ontario Inc v. Badger Daylighting Inc.,* the court noted that both valuation experts who testified at trial "testified in a straight forward manner and did their best to assist the Court."' Meanwhile, in *Adams v. Amex Bank of Canada*, the court noted that both valuation experts used the best available information and recognized data to quantify financial losses, and that the resulting approaches followed by both experts were, in each case, reasonable and reliable.[5]

B. ***<u>The assistance of a mediator is necessary for the parties</u>***

16. In paragraph 35 of its Amended Claims Procedure Order, the court orders its Monitor to "***attempt to resolve and settle*** any issue arising in the Proof of Claim or in respect of a claim."

17. Despite the credibility and expertise of the Bowman Report, and that the Monitor has not cross-examined him nor produced a responding report, the Monitor has rejected the claim outright. The parties are at an impasse.

18. In this dynamic, it is just and fair that the court direct its Monitor to attend a mediation of the parties to try to settle Thorneloe's claim.

[5] Prem M Lobo & Peter J Henein, "Credibility under scrutiny: A study of the weight placed on expert valuation and damages evidence in Canada court judgments" (2012) 31:8 Adv J 13 at 14.

C. ***A mediated resolution would save costs and time***

19. Stanley Kershman (prior to his appointment to the Bench) identified the importance and value of mediation in the insolvency context to save both costs and time. His comments are directly relevant for this case:

> Mediation is fast becoming the tool of choice for efficient, effective dispute resolution. An obvious advantage to incorporating mediation into the bankruptcy process is saving time and money used to prepare for court appearances.
>
> ….
>
> As well as quantifying many of the benefits, mediation also provides savings that can not be easily measured in tangible terms.
>
> The emotional wear and tear on the parties will be reduced.
>
> Mediation's non-combative approach to problem solving often eases the stress associated with the preparation for and anticipation of a court appearance which accompanies the stress of actually appearing in court.
>
> By recognizing the success of mediation, the proposed changes to the Bankruptcy and Insolvency Act have the potential to obtain faster, more appropriate and less expensive solutions to bankruptcy proceedings.[6]

20. This court has also recognized the value of a mediation. In *Nortel Networks Corporation (Re)*, the court held:

> 14 In my view, pending the release of a decision on the motion, the parties could benefit from the appointment of a mediator so that they can continue to make progress towards the ultimate resolution of Nortel matters. The parties have exhibited an ability to cooperate and have been extremely successful in realizing significant proceeds from the sale of Nortel assets globally. However, the creation of an asset pool is not ultimate resolution of Nortel matters. These proceedings can only be concluded with a distribution of proceeds to the various creditors of Nortel globally. These proceedings were commenced on January 14, 2009. Creditors have been waiting nearly two and one-half years for a meaningful distribution. ***A mediation will require that the parties continue a dialogue. It is possible that tangible, positive results will flow from such mediation.***
>
> 15 ***In order to assist the parties with their deliberations, I am directing that the parties engage in mediation*** pending my ruling. I understand that Judge Gross will be issuing a similar direction in the Chapter 11 Proceedings.[7] [emphasis added]

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[6] Stanley J Kershman, "Mediation offers creative bankruptcy solutions. Alternatives to litigation available for surplus income determination, discharges", *The Lawyer's Weekly* 16:48 (2 May 1997) (QL).
[7] 2011 ONSC 3805 at paras 14-15.

D. ***<u>A mediation would not delay or imperil Laurentian's CCAA Plan nor its implementation</u>***

21. Laurentian's CCAA Plan of Compromise has been approved by this Court. The bulk of its creditors, including Thorneloe, are to receive distributions over the course of subsequent years, as Laurentian embarks on a process to sell its land to the Ontario government.

22. A mediation of Thorneloe's loss of commercial value claim will have absolutely no impact on the Plan of Compromise, nor on the timing of payments to creditors.

October 9, 2022

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SCHEDULE "A"

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PROPOSED SCHEDULE

- Week of October 17: mediation, depending on mediator's availability – (two hours)
- October 21 – Delivery of Thorneloe's Factum
- October 28 – Delivery of the Monitor's Responding Factum
- November 2 – Delivery of Thorneloe's Reply Factum, if any
- Week of November 7: Depending on court availability – Motion Hearing (two hours)

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Applicant

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Proceeding commenced at Toronto

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