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

LEGAL BRIEF OF THE MONITOR
(Re Motion of Thorneloe University re Appeal of Claims Officer's Decision)

October 11, 2022

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LEGAL BRIEF OF THE MONITOR

PART I - OVERVIEW

1. The Monitor delivers this brief in connection with a request made by Thorneloe University ("**Thorneloe**" or the "**Appellant**") for a Court-ordered mandatory mediation of its appeal of the determination by Niels Ortved (the "**Claims Officer**") of a discrete component of Thorneloe's claim – its claim to loss of academic and commercial value.

2. The Monitor, in consultation with Laurentian University of Sudbury ("**Laurentian**"), and after applying consistent methodology in valuing all similarly situated claims, disallowed the Appellant's claim to loss of academic and commercial value. This disallowance was assented to by the "Inspector Group", a group comprised of the significant stakeholders of Laurentian. The Monitor held several conferences with Thorneloe and its advisors in efforts to achieve resolution of Thorneloe's claim. Despite these efforts, the parties were unable to consensually resolve the

disputed portions of Thorneloe's claim and it proceeded to adjudication with the Claims Officer. The Claims Officer upheld the Monitor's disallowance.

3. Nothing in the discussions held by the parties nor the decision of the Claims Officer leads the Monitor to believe that a mediation of Thorneloe's appeal will lead to a consensual settlement. Nor has Thorneloe identified any change in circumstance or other reason to expect that a mediation might be successful at this stage.

4. Mediation of an appeal is rare. Even rarer is Court-ordered *mandatory* mediation of an appeal. The Appellant has put forward no explanation as to why this case warrants the rare – and unprecedented in Ontario – remedy of a Court-ordered mandatory mediation at the appellate level.

5. The Orders granted in this proceeding similarly do not provide for mandatory mediation of a claim filed in the claims process. The Amended and Restated Claims Process Order (as defined below) provides a comprehensive and streamlined process for the resolution of claims filed against Laurentian, which process does not include mandatory mediation of any claim at the request of a creditor. The Amended and Restated Claims Process Order was approved by the Court, and stakeholders, including the Appellant, were given an opportunity to object or propose amendments to it.

6. Against this backdrop, a court-ordered mediation of Thorneloe's appeal is inappropriate, unlikely to be successful, and will only serve to increase costs to Laurentian's estate without any corresponding benefit.

7. For these reasons and the reasons that follow, the Court should deny Thorneloe's request for an Order directing a mediation of this appeal.

PART II - BACKGROUND

A. Relationship between Laurentian and the Former Federated Universities

8. On February 1, 2021, Laurentian sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") to permit it to restructure, financially and operationally, in order to emerge as a sustainable university for the benefit of all stakeholders.

9. Prior to the CCAA proceeding, Laurentian operated within a federated structure whereby it had certain contractual arrangements (collectively, the "**Federation Agreements**" and each a "**Federation Agreement**") with three independent universities: the Appellant, the University of Sudbury ("**UoS**") and Huntington University ("**Huntington**", and together with UoS and the Appellant, the "**Former Federated Universities**").[1]

10. Pursuant to the Federation Agreements with each of the Former Federated Universities, Laurentian's students were permitted to take elective courses and enrol in programs at the Appellant. Laurentian agreed to distribute to the Former Federated Universities a portion of the revenue received by Laurentian from the Province of Ontario in respect of students who enrolled in a program or took elective courses offered by one of the Former Federated Universities.[2]

11. When it sought CCAA protection, Laurentian, with the assistance of the Monitor, identified a number of areas in which a financial restructuring was required.[3] Laurentian also identified, at

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[1] *Laurentian University of Sudbury*, 2021 ONSC 3272 [*Thorneloe Disclaimer Endorsement*] at para. 3.
[2] *Ibid* at paras. 6-9.
[3] *Laurentian University of Sudbury*, 2021 ONSC 951 [*Mediator Appointment Endorsement*] at para. 1; *Thorneloe Disclaimer Endorsement*, *supra* note 1 at para. 48.

the outset of the CCAA proceeding, that it would be necessary to have a fundamental readjustment or realignment of its arrangements with the Former Federated Universities.[4]

12. No resolution with respect to such readjustment or realignment was reached within the mediation process (described below) and, on April 1, 2021, Laurentian disclaimed the Federation Agreements with an effective date of May 1, 2021, pursuant to s. 32 of the CCAA (the "**Disclaimer**").[5] Thorneloe and UoS each moved to have their respective Notices of Disclaimer invalidated pursuant to s. 32(2) of the CCAA.[6]

13. The motions by the Appellant and UoS were dismissed by the Court on May 2, 2021.[7] The Appellant's motion for leave to appeal was dismissed by the Ontario Court of Appeal on June 23, 2021.[8]

B. Appointment of a Mediator

14. On February 5, 2021, this Court granted an Order (the "**Mediator Appointment Order**") appointing the Honourable Justice Sean Dunphy as the Court-appointed mediator (the "**Court-Appointed Mediator**") to oversee negotiations with respect to various restructuring initiatives necessary for Laurentian to achieve financial sustainability, including the evaluation of the structure and sustainability of Laurentian's ongoing relationships with the Former Federated Universities, a restructuring of academic programs and reduction of employee headcount.[9]

15. The Mediation Objectives (as defined in the Mediator Appointment Order) include:

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[4] *Thorneloe Disclaimer Endorsement*, *supra* note 1 at para. 49.
[5] *Ibid* at para. 1.
[6] *Ibid* at paras. 1 and 3.
[7] *Ibid*; *Laurentian University v. Sudbury University*, 2021 ONSC 3392.
[8] *Laurentian University of Sudbury (Re)*, 2021 ONCA 448.
[9] *Mediator Appointment Endorsement*, *supra* note 3.

a) the review and restructuring of Laurentian's existing academic programs;

b) the review and restructuring of the faculty necessary to deliver Laurentian's restructuring academic programs;

c) a new collective agreement between Laurentian and its primary labour union, including resolving all outstanding grievances;

d) the review and restructuring of Laurentian's Federated Universities' model;

e) the framework for Laurentian's restructuring and future operations; and

f) any other matters that are referred to the Court-Appointed Mediator by the Applicant, the Monitor, the relevant stakeholders or the Court.

16. Given that Laurentian was experiencing severe financial challenges, significant concessions were required from Laurentian's stakeholders to allow Laurentian to achieve financial sustainability and continue operations. Laurentian's negotiations, and most importantly a resolution, with its primary labour union needed to be undertaken and completed by April 2021 to support Laurentian's objective of emerging as a sustainable postsecondary institution. The timeline was based, in part, on the need to have the changes to faculty and academic programs implemented in time for the Fall 2021 term.

17. The appointment of the Court-Appointed Mediator was critical to ensure that Laurentian and the other negotiating parties were able to reach a consensual resolution with respect to the changes that were needed in an extremely condensed time period. There was no contemplation by Laurentian or the Monitor that the Court-Appointed Mediator would have any continued

involvement after these critical restructuring initiatives were resolved and implemented. Nor was it ever contemplated that the Court-Appointed Mediator would have any role in resolving individual claims against Laurentian.

C. Claims Process

18. On May 31, 2021, the Court granted an Order approving a claims process to identify, determine and resolve claims of creditors of Laurentian (the "**Amended and Restated Claims Process Order**").[10] The Amended and Restated Claims Process Order contains a detailed description of the steps to be taken in resolution of the claims against Laurentian. It also provides for an "Inspector Group" with whom the Monitor must consult in respect of the acceptance, revision, disallowance, or settlement of claims greater than $5 million (the "**Material Claims**").[11]

19. On December 20, 2021, the Court granted an Order appointing three Claims Officers pursuant to the Amended and Restated Claims Process Order.[12]

20. On July 30, 2021, the Appellant filed a Proof of Claim with the Monitor in accordance with the Amended and Restated Claims Process Order asserting a claim (as amended, the "**Claim**") against Laurentian in the amount of approximately $16.6 million. The Appellant's Claim was comprised of various components and included the Appellant's alleged loss to academic and commercial value, in the amount of $11,470,624.[13]

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[10] *Laurentian University of Sudbury*, 2021 ONSC 3885 [*Claims Process Endorsement*].
[11] *Ibid* at paras. 47-51.
[12] *Laurentian University of Sudbury*, 2021 ONSC 8382.
[13] Decision of the Claims Officer, dated September 8, 2022, at paras. 4-5, Motion Record of Thorneloe University ("**MR**"), Tab 6, p. 277.

21. The principal component of the Appellant's Claim – its alleged loss of academic and commercial value – is based on the Appellant's contention that the Disclaimer directly caused it to lose its income sources, faculty and staff and cease to be able to operate as a teaching university. The Appellant contends that by losing all of its income-generating ability, it lost its commercial value.[14]

22. By letter dated December 17, 2021, the Appellant amended its Claim by reducing the loss to academic and commercial value portion of its Claim from $11,479,624 to $9,800,000.[15] In support of the loss to academic and commercial value portion of the Appellant's Claim, the letter included a valuation report (the "**Farber Report**") dated October 2021 prepared by Farber Corporate Finance Inc.[16] At the Monitor's request, the Appellant also provided its annual financial statements from 2018 to 2021.[17] According to the Farber Report, $9.8 million represents the value of the Appellant immediately prior to the Disclaimer of the Federation Agreement.[18]

23. On May 25, 2022, the Monitor issued a Notice of Revision or Disallowance ("**NORD**") in accordance with the Amended and Restated Claims Process Order. Pursuant to the NORD, the Monitor, among other things, disallowed in full the Appellant's Claim to loss of academic and commercial value.[19] The Monitor applied consistent methodology in valuing and revising similarly situated claims.

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[14] *Ibid* at para. 41, MR Tab 6, p. 285.
[15] *Ibid* at para. 5, MR Tab 6, p. 259.
[16] *Ibid* at para. 43, MR Tab 6, p. 285.
[17] *Ibid* at para. 48, MR Tab 6, p. 286.
[18] *Ibid*, MR Tab 6, p. 286.
[19] *Ibid* at para. 6, MR Tab 6, p. 259.

24. On June 8, 2022, the Appellant indicated its intention to dispute the Monitor's NORD by delivering a Dispute Notice to the Monitor.[20] In the Dispute Notice, the Appellant disputed, among other things, the Monitor's disallowance of the loss to academic and commercial value component of its Claim.[21]

25. Pursuant to the Amended and Restated Claims Process Order, having received a Dispute Notice, the Monitor was required to refer the Claim to a Claims Officer or the Court for determination if a resolution of the Claim could not be achieved.[22]

26. In an attempt to consensually resolve Thorneloe's Claim, the Monitor conducted settlement discussions with Thorneloe on several occasions and in writing. The parties were unable to reach a consensual resolution.

27. Accordingly, on August 9, 2022, the Monitor referred the Claim to Mr. Ortved, one of the Claims Officers, for resolution in accordance with the Amended and Restated Claims Process Order.

D. Claims Officer's Hearing

28. The hearing of the Appellant's disputed Claim took place before the Claims Officer in writing.[23] Both parties submitted evidence and Facta in accordance with a schedule agreed to by the Appellant, the Monitor and the Claims Officer.

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[20] *Ibid* at para. 7, MR Tab 6, p. 259.
[21] *Ibid*, MR Tab 6, p. 259.
[22] *Ibid* at para. 9, MR Tab 6, p. 259.
[23] *Ibid*, MR Tab 6, p. 259.

29. The Claims Officer released his decision on September 8, 2022 in which he upheld the Monitor's disallowance in full of the Appellant's Claim to loss of academic and commercial value.[24]

30. The Claims Officer did not accept the evidence proffered by the Appellant in support of its Claim.[25] The Claims Officer rejected the Farber Report, stating "I am not persuaded that the Farber Report is a reliable measure of Thorneloe's academic and commercial value prior to the Disclaimer".[26]

31. The Claims Officer also found that the Appellant had not been profitable prior to the Disclaimer and that the Appellant's financial results would not likely have improved in subsequent years had there been no Disclaimer.[27] In other words, the Claims Officer held that the expectation is continued future losses for the Appellant.[28]

32. The Claims Officer summarized his conclusion on the loss to academic and commercial value portion of the Appellant's Claim as follows[29]:

> In the result, is my conclusion that the Monitor has established, and the Claimant has not seriously contested, that Thorneloe was not profitable prior to the Disclaimer, nor that its results would have improved in subsequent years had there been no Disclaimer. Thus, the Claimant has not "proved" a compensable loss. I accept that this is the correct approach to the assessment of damages, not the measurement of alleged loss of commercial value as argued by the Claimant. Accordingly, taken together with my reservations concerning the conclusions of the Farber Report, Thorneloe's claim for loss of academic and commercial value is therefore denied.

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[24] *Ibid* at paras. 41-66, MR Tab 6, pp. 266-271.
[25] *Ibid* at paras. 59-69, MR Tab 6, pp. 270-272.
[26] *Ibid* at para. 61, MR Tab 6, p. 270.
[27] *Ibid* at para. 66, MR Tab 6, p. 271.
[28] *Ibid* at para. 62, MR Tab 6, p. 270.
[29] *Ibid* at para. 66, MR Tab 6, p. 271.

33. On September 19, 2022, the Appellant served a Notice of Appeal of the Claims Officer's denial of the loss to academic and commercial value portion of the Appellant's Claim. Pursuant to the Notice of Appeal, the Appellant also seeks an Order directing a mediation before the Court-Appointed Mediator, or another mediator, of the appeal.

PART III - LAW AND ANALYSIS

A. The Amended and Restated Claims Process Order Precludes Mediation

34. The purpose of claims processes is to streamline the resolution of the claims against a debtor in a time sensitive and cost-efficient manner.[30]

35. Consistent with this purpose, the Amended and Restated Claims Process Order is a comprehensive and detailed Order that sets out the process to identify, determine and resolve claims of Laurentian's creditors.[31]

36. The Amended and Restated Claims Process was prepared by Laurentian, in consultation with the Monitor, after careful deliberation.[32] The Amended and Restated Claims Process is both fair and reasonable to all stakeholders.[33] No stakeholder objected to the Amended and Restated Claims Process Order.[34]

37. The Amended and Restated Claims Process Order does not provide for a mediation process of individual claims. That was a deliberate choice. The claims process is intended to provide for the streamlined resolution of all claims, and that purpose would be entirely upended if all creditors

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[30] *Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215 at para. 40.
[31] *Claims Process Endorsement*, *supra* note 10 at paras. 15 and 32.
[32] Fourth Report of the Monitor dated May 27, 2021 at paras. 19, 71 and 72.
[33] *Ibid*; *Claims Process Endorsement*, *supra* note 10 at para. 32.
[34] *Claims Process Endorsement*, *supra* note 10.

could demand a mediation process for their individual claim. Similarly, it would also upset the reasonable expectations of Laurentian's general body of creditors if, despite the absence of any reference to mediation, the Appellant could compel Laurentian to, at this late stage, attend a mandatory mediation at the additional cost to Laurentian.

38. The Amended and Restated Claims Process Order requires the Monitor to attempt to resolve and settle the amount and status of the disputed claim, after receiving a Dispute Notice.[35] The Monitor has already engaged with the Appellant on several occasions both in discussions and in writing in an attempt to resolve the Claim in accordance with the Amended and Restated Claims Process Order. Despite the Monitor's good faith efforts, those resolution efforts were unsuccessful.

B. Mediation of an Appeal is Extraordinary and Inappropriate in this Case

39. There are few circumstances in which mediation of an appeal is appropriate. It is very rare for mediation at the appellate level to be successful because one party already has a judgment in its favour.[36]

40. Nonetheless, mediation of an appeal may be appropriate where the parties have a deep, ongoing relationship (such as in a family law matter) or where there is an appeal and cross-appeal of many issues and a global settlement of all issues is sought.[37] However, neither of these circumstances exist in the present case.

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[35] Amended and Restated Claims Process Order at para. 35.
[36] The Honourable Warren K. Winkler, Chief Justice of Ontario, *Access to Justice, Mediation: Panacea or Pariah?*, Online: https://www.ontariocourts.ca/coa/about-the-court/archives/access/.
[37] *Ibid*.

41. The Quebec Court of Appeal has introduced mediation at the appellate level, but participation is on a consent basis.[38] The Ontario Court of Appeal has only experimented with mediation of appeals and only on a very limited basis.[39]

42. The Monitor's disallowance of the Appellant's loss to academic and commercial value Claim was agreed to by Laurentian, approved by the Inspector Group and upheld by the Claims Officer. It is the only outstanding issue among the parties. The Monitor maintains that the appeal is without merit. Moreover, the Appellant has not suggested any change in circumstances, or otherwise provided any basis to think that a mediation would be productive or successful at this stage of the proceeding.

43. In light of these circumstances, and given that mediation would increase costs of the appeal, the Monitor respectfully submits that Court-ordered mandatory mediation of the appeal is inappropriate in this case.

44. Prior attempts to consensually resolve the Claim failed and there is no reason to believe further discussions would be helpful.

C. The Mediator Appointment Order Does Not Apply to the Appeal

45. At the outset of the CCAA proceeding, Laurentian was facing a significant liquidity crunch.[40] Difficult negotiations were required with multiple stakeholders in a condensed period of time before Laurentian ran out of operating funds.[41] As a result, Laurentian sought the Mediator

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[38] *Ibid*.
[39] *Ibid*.
[40] *Laurentian University of Sudbury*, 2021 ONSC 659 at para. 3.
[41] The Affidavit of Robert Haché sworn January 30, 2021 at para. 322.

Appointment Order to advance such negotiations and reach an outcome that resulted in a financially sustainable university.[42]

46. To that end, the mediation process was utilized to address and resolve, among other things, the restructuring of Laurentian's academic programs, the collective agreement between Laurentian and its primary labour union, and the Federated Universities model.[43]

47. Intensive mediations with the various stakeholders took place, including with the Former Federated Universities. Through the mediation process, the Appellant was given many opportunities to reach a consensual resolution with Laurentian.[44] The Appellant was aware that should a resolution not be reached during the mediation process, Laurentian would be issuing the Disclaimer.

48. The Mediator Appointment Order was intended to facilitate the efficient, out-of-court resolution of various restructuring initiatives, not resolve individual claims.

49. Accordingly, it would be a misuse of the role of the Court-Appointed Mediator and inconsistent with the purposes for which he was appointed to Order that he mediate the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of October, 2022.

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[42] *Ibid*.
[43] *Ibid* at para. 301.
[44] *Thorneloe Disclaimer Endorsement*, *supra* note 1 at para. 28.

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SCHEDULE "A" – LIST OF AUTHORITIES

Case Law

1. *Laurentian University of Sudbury,* 2021 ONSC 3272
2. *Laurentian University of Sudbury*, 2021 ONSC 951
3. *Laurentian University v. Sudbury University*, 2021 ONSC 3392
4. *Laurentian University of Sudbury (Re)*, 2021 ONCA 448
5. *Laurentian University of Sudbury*, 2021 ONSC 3885
6. *Laurentian University of Sudbury*, 2021 ONSC 8382
7. *Canwest Global Communications Corp. (Re)*, 2011 ONSC 2215
8. *Laurentian University of Sudbury*, 2021 ONSC 659

Legislation

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

Secondary Sources

1. The Honourable Warren K. Winkler, Chief Justice of Ontario, *Access to Justice, Mediation: Panacea or Pariah?*, Online: https://www.ontariocourts.ca/coa/about-the-court/archives/access/.

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