Court File No. _____

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 ARRANGEMENTOF **LAURENTIAN UNIVERSITY OF SUDBURY**

Applicant

FACTUM OF THE APPLICANT

January 30, 2021

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PART I - OVERVIEW

1. Laurentian University of Sudbury ("**LU**" or the "**Applicant**") seeks certain relief pursuant to an order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"),[1] substantially in the form of the draft order attached to the Application Record at Tab 4. LU intends to seek certain additional relief at the Comeback Hearing, upon notice to affected parties, pursuant to a more fulsome order (the "**Amended and Restated Initial Order**"), substantially in the form of the draft order attached to the Application Record at Tab 6. This factum is being filed in respect of both the relief sought in the Initial Order and the relief to be sought at the Comeback Hearing in the Amended and Restated Initial Order.

2. LU is a publicly-funded, bilingual and tricultural postsecondary institution in Sudbury, Ontario. Since inception, LU has provided quality higher education to the community of

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

Sudbury and Northern Ontario at large and is an integral part of the economic fabric of the Northern Ontario community.

3. As a result of many years of recurring operational deficits in the millions of dollars, and notwithstanding LU's recent efforts to improve its financial stability, LU is experiencing a liquidity crisis and is insolvent.

4. LU requires the protection of the Court and the relief available under the CCAA so that it can financially and operationally restructure itself in order to emerge as a sustainable, financially sustainable university for the benefit of all its stakeholders.

PART II - FACTS

5. The facts with respect to this application are briefly summarized below and more fully set out in the Affidavit of Dr. Robert Haché sworn January 30, 2021 filed in support of this CCAA application (the "**Haché Affidavit**").[2]

A. Overview of the Applicant

i. Background and Corporate Structure

6. LU is a non-share capital corporation that was incorporated pursuant to *An Act to Incorporate Laurentian University of Sudbury*, S.O. 1960, c. 151 C. 154 (the "**Act**") and is a registered charity pursuant to the *Income Tax Act*, R.S.C. 1985, c. 1.[3]

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[2] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Haché Affidavit. All references to currency in this factum are to Canadian dollars, unless otherwise noted.
[3] *Haché Affidavit* at paras. 21-23.

7. The governance structure of LU is bi-cameral. The Board of Governors (the "**Board**"), the President, and the Vice-Chancellor generally have powers over the operational and financial management of LU, whereas the Senate of LU (the "**Senate**") is responsible for the academic policy of LU.[4]

ii. Academic Programming

8. LU primarily focuses on undergraduate programming, with approximately 8,200 total domestic and international undergraduate students (approximately 6,250 full-time equivalents) enrolled in the 2020-21 academic year. LU has five undergraduate faculties, each of which offer programs in both English and French, and students can choose from 132 undergraduate programs to enroll in.[5]

9. LU also has a strong graduate program, with approximately 1,098 total domestic and international graduate students enrolled during the 2020-21 academic year. LU offers 43 Masters and PhD programs in a variety of disciplines.[6]

iii. The Federated Universities

10. LU has a federated school structure whereby it has formal affiliations with several independent universities under the overall LU umbrella: the University of Sudbury, the University of Thorneloe, and Huntington University. For all intents and purposes, the Federated Universities are integrated into LU, however, each of the Federated Universities are separate legal entities and are governed by Boards that are independent of LU.[7]

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[4] *Haché Affidavit* at para 97.
[5] *Haché Affidavit* at paras. 33-36.
[6] *Haché Affidavit* at paras. 39-41.
[7] *Haché Affidavit* at para 61.

iv. LU Employees and Unions

11. LU is consistently one of the largest employers in the Greater Sudbury area. As at December 30, 2020 LU employed approximately 1,751 people, of which approximately 758 are full-time employees. Total salaries and benefits represent the single largest expense item for LU on an annual basis (approximately $134 million of $201 million in total expenses during fiscal year 2019-20).[8]

12. Approximately 612 LU employees are represented by the Laurentian University Faculty Association ("**LUFA**"). Approximately 268 non-faculty staff are represented by the Laurentian University Staff Union ("**LUSU**").[9]

v. Collective Bargaining Agreements and Negotiations

LUFA

13. LUFA and the Board of LU are parties to a Collective Agreement (the "**LUFA CA**"), with a three-year term that expired on June 30, 2020. Pursuant to the provisions of the LUFA CA, the agreement automatically continues year-to-year unless notice is provided that either LUFA or LU intends to terminate or amend the LUFA CA. In February 2020, LUFA provided LU with a notice to bargain. Pursuant to Article 13.15.3 of the LUFA CA, the agreement automatically remains in force during any period of negotiation.[10]

14. As described in greater detail in the Haché Affidavit, since April 2020, LU and LUFA have been engaged in bargaining with respect to a new collective bargaining agreement. During that time, the parties have engaged in several extensive, multiple-day bargaining sessions,

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[8] *Haché Affidavit* at para 124.
[9] *Haché Affidavit* at paras. 121-122.
[10] *Haché Affidavit* at para. 126.

as well as a two-day mediation in October 2020. Throughout the bargaining process, LU advised LUFA of the significant financial challenges facing LU.[11]

LUSU

15. On July 1, 2018, LUSU and LU entered into a Collective Agreement that was set to expire on June 30, 2021 (the "**LUSU CA**"). Over the past two years, LUSU executives and their members have engaged in dialogue with LU to address some of the issues facing LU, which resulted in the institution of certain improvements for LU, including cost reduction efforts and flexibility measures.[12]

vi. LU's Defined Benefit Pension Plan

16. LU is the administrator of three types of plans for its employees including, as particularly relevant on this Application, a Primary Retirement Plan for Laurentian University and its Federated and Affiliated Universities (the "**Pension Plan**"). The Pension Plan has a going concern deficiency of approximately $4.5 million and, as a result, the plan actuary concluded in January 2020 that LU must make an annual special payment contribution of $505,000, payable in monthly instalments of approximately $42,083 (the "**Special Payments**").[13]

[11] *Haché Affidavit* at paras. 127-136.
[12] *Haché Affidavit* at para. 151.
[13] *Haché Affidavit* at para. 158.

B. Assets and Liabilities

17. As at April 30, 2020,[14] LU had assets with a book value totaling approximately $358 million, of which approximately $33 million is comprised of current assets such as cash and short-term investments, accounts receivable, and other current assets. The remaining assets of LU consist primarily of investments in LU's segregated endowment fund ($53 million) and capital assets ($272 million), comprising LU's land and buildings.[15]

18. As at April 30, 2020, LU had liabilities with a book value totaling approximately $322 million, comprised of: (i) approximately $43 million of current liabilities; (ii) approximately $168 million of deferred contributions; and (iii) approximately $110 million in long-term liabilities.[16]

C. LU's Liquidity Crisis and Insolvency

19. LU has experienced recurring operational deficits in the millions of dollars each year for a significant period of time. These operational deficits have led to the accumulated deficit in the operational fund of LU increasing from approximately $8.2 million in FY 2014-15 to approximately $20 million per year in FY 2019-20. In the current 2020-21 fiscal year, LU projects a further operational deficit of $5.6 million.[17]

20. In the years preceding this application, LU took a number of steps to try to improve its financial situation, including:

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[14] LU does not prepare interim quarterly financial statements and the audited annual financial statements for the year ended April 30, 2020, which are attached to the Haché Affidavit, are the most recent available financial statements in the last twelve months.
[15] *Haché Affidavit* at para. 204.
[16] *Haché Affidavit* at para. 212.
[17] *Haché Affidavit* at para. 9.

(a) Reducing its non-faculty workforce from 429 to 409 and faculty workforce from 358 to 344;

(b) Deferring the hiring of faculty and non-faculty positions;

(c) Negotiating with LUSU to forego their employee salary increases;

(d) Approving a pay freeze and reducing the salaries of its non-unionized employees, including managerial employees;

(e) Approving a pay freeze and reducing the salaries of all members of the Internal Team; and

(f) Re-negotiating the funding model with the Federated Universities.

21. Nonetheless, these efforts were not enough. LU is insolvent and absent the relief sought in the Initial Order, will run out of cash to meet payroll in February.

22. LU has a number of structural issues that are causing financial challenges and that need to be resolved to ensure long-term stability, including:

(a) The terms of the LUFA CA are above market in several respects, and that issue is exacerbated by the tenuous labour relationship between LU and LUFA[18];

(b) Operationally, the structure of the academic programming offered by LU and the distribution of enrollment among the programs offered is flawed and must be addressed[19]; and

[18] *Haché Affidavit* at para. 138.
[19] *Haché Affidavit* at paras. 12-13.

(c) With its current cost structure, it costs more for LU and the Federated Universities to educate each student than the average for all Ontario universities by approximately $2,000 per student, per year.[20]

23. Put simply, the financial challenges that LU faces are significant and, absent fundamental change, LU's short-term and long-term financial and operational sustainability are at risk.

D. Objective of CCAA Filing

24. As part of its restructuring strategy, LU intends to implement long-term financial stability initiatives including, among other things:[21]

(a) A review of the breadth of academic programs offered at LU and their enrollment levels;

(b) A re-evaluation of the Federated Universities model;

(c) Negotiations with LU's unions regarding what LU must look like in the future and ensuring that a restructured LU can be aligned with collective agreements that will facilitate its future sustainability;

(d) Identification of opportunities for future revenue generation;

(e) Refinement of the student experience at LU to continue providing a top-notch education; and

(f) Consideration of options for addressing current and long-term indebtedness.

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[20] *Haché Affidavit* at para. 16.
[21] *Haché Affidavit* at para. 292.

25. With the benefit of the protection and flexibility afforded by the CCAA, LU intends to stabilize its financial situation, restructure its program offerings for the future, and optimally position LU to continue providing a first-class education for its students.

PART III - THE LAW AND ANALYSIS

26. This Application raises seven issues to be determined:

(a) Whether this Court should grant protection to the Applicant under the CCAA;

(b) Whether this Court should grant the requested stay of proceedings to the Applicant;

(i) Is the stay just and appropriate?

(ii) Should a limited stay be extended to the Non-Applicant Stay Party?

(iii) Should compliance with any information requests made to the Applicant under the *Freedom of Information and Protection of Privacy Act* ("**FIPPA**") be stayed?

(iv) Should this Court permit the continued flow-through of cash from the Applicant to certain parties in the ordinary course, due their interrelated nature?

(c) Whether this Court should authorize the Applicant to terminate the employment of its employees as it deems appropriate;

(d) Whether it is appropriate for the Court to appoint an experienced and neutral party as the Court-Appointed Mediator;

(e) Whether the Pension Plan Special Payments should be stayed;

(f) Whether this Court should grant the CCAA Charges; and

(g) Whether this Court should grant a sealing order in respect of Confidential Exhibits "EEE" and "FFF" to the Haché Affidavit.

A. This Court should grant protection to the Applicant under the CCAA.

27. The CCAA applies to a "debtor company" whose liabilities exceed $5 million. A "debtor company" is defined, *inter alia*¸ as a "company" that is "insolvent" or that has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.[22]

i. The Applicant is a "company" under the CCAA

28. The CCAA defines "company" to include, among other things, a company incorporated by or under an Act of the legislature of a province.[23]

29. The Applicant is incorporated under an act of the legislature of the Province of Ontario, *An Act to Incorporate Laurentian University of Sudbury*, (the "**Act**")[24], and therefore is a "company" for the purposes of the CCAA.[25] Further, as a not-for-profit, non-share capital corporation, the Applicant falls under the *Corporations Act* (Ontario).[26]

30. The Applicant's status as a not-for-profit, non-share capital corporation does not impact the applicability of the CCAA to the Applicant. There have been several CCAA proceedings commenced in respect of not-for-profit corporations, such as *Canadian Red Cross Society*[27] and *The Land Conservancy of British Columbia*.[28]

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[22] CCAA, s. 2(1), and s. 3(1); R.S.C. 1985, c. B-3, s. 2 ("**BIA**").
[23] CCAA, s. 2(1).
[24] *Haché Affidavit* at Exhibit "A".
[25] S.O. 1960, c. 151 C. 154.
[26] R.S.O. 1990, c. C.38.
[27] *Canadian Red Cross Society*, 2000 CarswellOnt 3269 (Ont. S.C.).
[28] *TLC, The Land Conservancy of British Columbia, Re*, 2014 BCSC 97 at paras. 14-18.

ii. The Applicant is insolvent

31. The insolvency of a debtor is assessed at the time of the filing of the CCAA application. While the CCAA does not define "insolvent", the definition of "insolvent person" under the BIA is commonly referenced by the Court in assessing whether an applicant is a debtor company in the context of the CCAA.[29] The BIA defines "insolvent person" as follows:[30]

> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (i) who is for any reason unable to meet his obligations as they generally become due,
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> (ii) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (iii) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

32. The tests for "insolvent person" under the BIA are disjunctive. A company satisfying either (i), (ii) or (iii) of the test is considered insolvent for the purposes of the CCAA.[31]

33. In addition to the foregoing tests, in *Stelco*, Justice Farley held that a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[32] In other words, a corporation is insolvent if there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity crisis that will

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[29] *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (S.C. [Commercial List]) at paras. 21-22 [***Stelco***].
[30] BIA, s. 2.
[31] *Stelco*, *supra* note 9 at para. 28.
[32] *Stelco*, *supra* note 9 at para. 26.

result in the debtor company not being able to pay its debts as they become due without the benefit of a stay of proceedings.[33]

34. The Applicant is plainly insolvent and faces a severe liquidity crisis.

35. The Applicant respectfully submits that it is a "debtor company" to which the CCAA applies.

iii. The CCAA Proceeding has been duly authorized

36. The filing of this CCAA proceeding, which was approved by a resolution of the Applicant's Board of Governors (the "**Board**"), was duly authorized.

37. As mandated in the Act, the Applicant has a bi-cameral governance structure pursuant to which the Board is responsible for the operational and financial management of LU and the Senate of LU is responsible for academic policy.

38. On a plain reading of the Act, the power and authority to decide whether the Applicant may take steps to restructure, including commencing a proceeding under the CCAA, lies solely with the Board. As relevant here, Section 8 of the Act authorizes the Board to commence proceedings and further provides that all proceedings by or against the Applicant may be had and taken in the name of "Laurentian University of Sudbury". Further, Section 18(1) of the Act provides that all powers over, in respect of, or in relation to the government, financial management, and control of the Applicant and its officers, servants and agents, property, revenues, expenditures, business, and affairs are vested in the Board.

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[33] *Stelco*, *supra* note 9 at para. 26. The *Stelco* test has been consistently applied in subsequent CCAA proceedings, including recently by this Court in *Target Canada Co.*, 2015 ONSC 303, at paras. 26-27.

39. Accordingly, the Board had the requisite authority to authorize the commencement of this CCAA proceeding.

B. It is appropriate to grant the requested stay of proceedings.

i. Granting the stay is just and appropriate

40. Pursuant to section 11.02(1) of the CCAA, a Court may grant an order staying all proceedings in respect of a debtor company for a period of not more than ten days, provided that the Court is satisfied that circumstances exist to make the order appropriate.

41. Exercising discretionary authority to grant a stay pursuant to the CCAA must be informed by the purpose behind the CCAA, which should be broadly and liberally interpreted.[34] The purpose of the CCAA is to, amongst other things, maintain the *status quo* for the debtor company for a period while it consults with its stakeholders with a view to continuing operations for the benefit of both the debtor company and its stakeholders.[35] The Supreme Court of Canada has held that when exercising judicial discretion under the CCAA, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors and, in certain cases, the broader public interest. The exercise of that discretion is appropriate in the present case.

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[34] *Re Stelco Inc.*, 2005 CarswellOnt 1188 (C.A.) at para. 44; *Nortel Networks Corporation (Re)*, 2009 CarswellOnt 4467 (S.C. [Commercial List]) at paras. 31 and 47 [***Nortel***]; *Sino-Forest Corporation (Re)*, 2012 ONSC 2063 at para. 40.

[35] *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 60.

42. In *Nortel*, Justice Morawetz (as he then was) held that the CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives, including the preservation of the going concern for the benefit of all stakeholders.[36]

43. It is just and appropriate for this Court to grant a stay of proceedings in respect of the Applicant, which has acted with due diligence and in good faith. The Applicant requires a stay of proceedings in order to provide it with the breathing room necessary to financially and operationally restructure itself in order to emerge as a sustainable and long-term financially viable university to continue providing quality post-secondary education in Northern Ontario. The commencement of a CCAA proceeding to address the significant issues the Applicant faces represents the only realistic path forward for the Applicant at this time. An inability to restructure in a coordinated, court-supervised manner would be potentially disastrous for many stakeholders of the Applicant, including the students and employees of the Applicant and the geographic region in which the Applicant operates.

44. Without the benefit of the stay of proceedings and the protections of the CCAA, the significant changes required by the Applicant to effect its financial and operational restructuring plan will take too long, may not be achievable, and the Applicant simply does not have the available liquidity that would be required to do so.

45. Consistent with the language of the Model Order and existing jurisprudence, the Proposed Initial Order provides for a stay of proceedings in favour of the Applicant's current and future directors and officers who may subsequently be appointed. The stay in favour of the

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[36] *Nortel*, *supra* at para 47.

current and future directors and officers is critical to retain the involvement of the Board and key officers who have knowledge that will assist the Applicant in negotiating with stakeholders and implementing a restructuring plan. Furthermore, the stay of proceedings will benefit the Applicant due to the contractual indemnity that exists in favour of the Board by the Applicant. Litigation against the Board that the Applicant has indemnified will create a costly distraction and limit the Applicant's ability to successfully restructure, frustrating the objectives of this CCAA proceeding.

ii. A Limited Stay Should be Extended to the Non-Applicant Stay Party.

46. The Applicant seeks a limited stay in respect of the Non-Applicant Stay Party in the Proposed Initial Order. The stay in respect of the Non-Applicant Stay Party is limited to preventing any person from: (i) commencing proceedings against the Non-Applicant Stay Party, (ii) terminating, repudiating, making any demand or otherwise altering any contractual relationships with the Non-Applicant Stay Party or enforcing any rights or remedies, or (iii) discontinuing or ceasing to perform any obligations under any contractual agreements with the Non-Applicant Stay Party, resulting from the commencement of this CCAA proceeding by the Applicant, the stay of proceedings granted to the Applicant and any default or cross-default arising due to the foregoing.

47. CCAA courts have, on numerous occasions, extended the initial stay of proceedings to non-applicants.[37] The Court's authority to grant such an order is derived from its broad jurisdiction under ss. 11 and 11.02(1) of the CCAA to make an initial order on "any terms

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[37] For example, *Sino-Forest Corporation (Re)*, 2012 ONSC 2063; *Canwest Global Communications Corp, Re*, 2009 CarswellOnt 6184 (Ont. S.C. [Commercial List]) [***Canwest***]; *Cinram International Inc (Re)*, 2012 ONSC 3767 [***Cinram***].

that [the Court] may impose." It is well-established that it is appropriate for the Court to extend the protection of the stay of proceedings to third party entities where such parties are integrally and closely interrelated to the debtor companies' business or where doing so furthers the primary purpose of the CCAA, being the successful restructuring of an insolvent company.[38]

48. In particular, where the business operations of a group of entities are inextricably intertwined, such as where there are agreements among the entities, guarantees provided by certain entities in the group in respect of the obligations of other entities in the group or shared cash management systems, courts have found it necessary and appropriate to extend a stay in respect of non-applicant parties.[39]

49. In the present circumstances, the Applicant has provided a written guarantee in respect of a credit facility obtained by the Non-Applicant Stay Party. If counterparties were to exercise remedies due to the Applicant's insolvency, it would disrupt the Non-Applicant Stay Party and have financial implications for the Applicant.[40]

50. Avoiding disruption to the Non-Applicant Stay Party is particularly critical given the Applicant's status as an operating university and its overarching aim in this CCAA proceeding to avoid or minimize any disruption to students resulting from the commencement of this proceeding. In furtherance of this objective, the Non-Applicant Stay Party will be essential to ensuring students are given all of the information and resources

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[38] *Cinram, ibid* at paras. 61-65.
[39] *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461 at paras. 20-21; *Cinram, ibid* at paras. 61-65.
[40] *Haché Affidavit* at paras. 311-312.

they need to stay informed. The Non-Applicant Stay Party will play a crucial role in maintaining an open dialogue between the Applicant and the interests/concerns of all students.

51. Further, the Non-Applicant Stay Party plays a critically important part in providing services for students including advocating on behalf of the interests of all students, administering health and dental benefits, campus safety programs such as the Laurentian University Campus Emergency Response Team and the operation of food banks for students in need, all of which it must be in a position to maintain during this CCAA proceeding.

52. Extending a limited stay of proceedings to the Non-Applicant Stay Party will allow it to continue fulfilling its intended role and providing the myriad of other key services it provides to the Applicant's students.

iii. Requests under the *Freedom of Information and Protection of Privacy Act* should be stayed and suspended

53. The Applicant requests that the Amended and Restated Initial Order provide that information requests made under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("**FIPPA**") be stayed and suspended following the date of the Initial Order. The Applicant expects to receive a high volume of FIPPA requests during this CCAA proceeding and the limited resources of the Applicant cannot be diverted from its restructuring efforts without causing substantial disruption.

54. FIPPA's statutory purpose – granting access to information – will be fulfilled by the requirements of transparency and full disclosure under the CCAA. The Monitor will be able to efficiently respond to information requests and will facilitate information-sharing

through its website and its obligation to report to the Court. The Monitor's role as an officer of the Court, together with the supervisory function of the Court itself, will, during the period in which the CCAA proceeding is continuing, provide an alternate means through which information can be obtained.

55. The recent decision in *1077 Holdings Co-Operative (Re)*[41] confirms the jurisdiction of a CCAA Court to stay information requests. In that decision, the CCAA debtor (Mountain Equipment Co-operative or "**MEC**") sought the Court's direction regarding a request from two of its members to disclose MEC's members list, which contained the personal information of all of MEC's members.

56. The Court held that s. 11 of the CCAA and the stay provisions prevent "…actions being taken against a debtor unless authorized by this Court, with the aim of providing for an orderly restructuring and preventing actions which might hamper the conduct of this proceeding".[42] After reviewing the stay provision in the Amended and Restated Initial Order in that case (substantively similar to the proposed stay provision in this case), the Court concluded that the information requests could be characterized as individuals seeking to exercise their rights against the debtor company, which is caught by the stay provision.[43] Therefore, the information requests were denied.

57. Further, Section 11.1(2) of the CCAA, which provides that the stay provisions of s. 11 do not affect a regulatory body's investigation in respect of the debtor company or an action,

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[41] 2021 BCSC 42.
[42] *Ibid* at para. 59.
[43] *Ibid* at paras. 60-62.

suit or proceeding that is taken in respect of the company by or before the regulatory body, plainly does not apply to a stay of FIPPA requests. Although the Information and Privacy Commissioner that oversees FIPPA requests may be a regulatory body, information requests made under the FIPPA are not an "investigation in respect of the debtor company" or a "proceeding taken in respect of the company". Staying the obligation to respond to information requests does not affect any investigation or proceeding in respect of the Applicant.

58. Even if s. 11.1(2) were applicable – which it is not – the Applicant requests this Court order that the s. 11.1(3) exemption apply to all information requests made under the FIPPA. Section 11.1(3) provides:

> On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion
>
> (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
>
> (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

59. If the Applicant is obligated to respond to voluminous information requests, it would unduly burden the Applicant by forcing it to expend considerable time and resources in responding to same. An order staying such requests would not be contrary to the public interest of the regulatory body affected, as disclosure of information will still be publicly available through the Monitor's website, the Applicant's own website, and through the court materials that are filed. These resources will be publicly available and equally accessible to any stakeholder or interested person.

iv. The Continued Flow-Through of Cash from the Applicant to Certain Parties is Required Due to their Interrelated Nature

60. The Proposed Initial Order will allow the Applicant to continue to make certain pre-filing and post-filing payments, including express authorization to:

(a) pay all outstanding amounts owing in respect of the current 2020-21 academic year and future amounts owing in respect of rebates, refunds or other amounts that are owing or may be owed to students (directly, or to the student associations of the Applicant on behalf of students), in each case, subject to the policies and procedures of the Applicant; and

(b) pay all outstanding amounts owing in respect of the current 2020-21 academic year and future amounts payable to students in respect of student scholarship, bursary or grants.

61. The Applicant intends on operating in the ordinary course during this CCAA proceeding and minimizing the disruption to students as much as possible. To facilitate this, the Applicant must be able to process certain rebates owing to students and continue to provide students with scholarship and bursary money that is critical to their ongoing studies. Some students must pay tuition prior to the receipt of funding from the Ontario Student Assistance Program (OSAP). Upon receipt of OSAP funding, the Applicant reimburses the students who receive such funding. In many instances, scholarship, bursary and grant money has been committed and is critical to students in need of financial aid to fund their education.

62. If the Applicant is unable to continue to process such payments, vulnerable students may be irreparably harmed. Many of these students are younger than 19 years of age, and

therefore particularly vulnerable. In addition, a change to the manner in which these financial aspects are addressed by the Applicant with their students could create immediate emergencies and disruption to their ability to continue their studies.

C. This Court Should Authorize the Termination of Employees as the Applicant Deems Appropriate

i. Relief is Consistent with Model Initial Order and Jurisprudence

63. To emerge as a financially-sustainable restructured university, the Applicant will need to terminate certain employees, including faculty, to bring costs to a sustainable level. Without this step being undertaken, the university will not have a financially sustainable cost structure. These terminations will be based on the demands of students as reflected in their historic and current utilization of program and course offerings.

64. The proposed Amended and Restated Initial Order provides that the Applicant may terminate the employment of such of its employees as it deems appropriate. This provision has become fundamental to CCAA proceedings and is broadly worded to facilitate a successful restructuring.[44] It is often relied upon to terminate both unionized and non-unionized employees under the CCAA to permit the debtor company the flexibility it requires to facilitate a successful restructuring.

65. In *Windsor Machine & Stamping Ltd., Re*, Justice Morawetz (as he then was), granted an initial order authorizing the debtor company to terminate the employment of such of its employees as it deems appropriate, subject to any applicable seniority provisions in any

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[44] This provision has been included in initial orders since at least 2009. See, for example, the Initial Order granted in the 2009 CCAA proceeding of Canwest Global Communications Corp. *et al*, which provides the debtor with the right to terminate or lay off its employees as it deems appropriate at paragraph 12(b).

applicable collective agreement, on such terms that may be agreed upon between the debtor company and such employee, or failing such agreement, to deal with the consequences thereof in a plan of arrangement.[45] Ultimately, 47 union employees were terminated pursuant to this provision.[46]

66. A similar initial order was granted by Justice Schrager in *Aveos Fleet Performance Inc*., where numerous unionized employees were terminated and a claims process was undertaken for these employees to claim for termination and severance pay.[47]

67. The Applicant acknowledges the challenges that will be faced in this aspect of the restructuring, including as it relates to tenure. Faculty at a university are highly specialized in their field of study and are not able to be moved within programs outside their area of expertise.

ii. The Applicant is not Altering any Collective Agreement

68. As described above, the Applicant and LUFA entered into the LUFA CA on July 1, 2017, which initial term expired on June 30, 2020 but remains in force during any negotiating period.

69. The relief sought by the Applicant will not substantively alter the LUFA CA. Indeed, the LUFA CA does not prevent employees from being terminated and, in fact, specifically

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[45] *Windsor Machine & Stamping Ltd., Re*, Amended and Restated Initial Order dated September 2, 2008 at paras. 7 and 11(d).
[46] *Windsor Machine & Stamping Ltd., Re*, 2009 CarswellOnt 4471 (Ont. S.C. [Commercial List]) at para. 23.
[47] *Aveos Fleet Performance Inc*., Initial Order dated March 19, 2012 at para. 32(d); *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)* [2013] QCCS 5924 at paras. 9-18.

allows that they may be terminated in certain circumstances, which include redundancy[48] and financial exigency.[49]

70. The conditions for termination under the LUFA CA already exist. First, as to financial exigency: LU is insolvent and has been for some time, as detailed above. Second, there are *bona fide* academic reasons, including insufficient student demand to accommodate all current faculty members, to justify terminations for redundancy.

71. However, following the LUFA CA's designated processes to terminate faculty is not feasible given the urgency of the Applicant's financial position. As fully described in the Haché Affidavit, the redundancy and financial exigency provisions in the LUFA CA create a cumbersome and lengthy process to evaluate whether a state of redundancy exists, whether there is financial exigency, and the scope of the budgetary cuts required.

72. The Applicant does not have access to cash to meet its obligations while that process would be undertaken. As part of the CCAA proceeding, the process must be expedited or the Applicant will run out of cash to make payroll for any employees. The Applicant's prospects of a successful restructuring will be handicapped if these provisions and their corresponding timelines are followed because it involves a protracted timeline for resolution and is incompatible with the Applicant's long-term faculty requirements and need for an overall academic restructuring.

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[48] LUFA CA, Article 10.10, Haché Affidavit at Exhibit T.
[49] LUFA CA, Article 10.15, Haché Affidavit at Exhibit T.

73. In short, the relief sought by the Applicant is substantively consistent with the terms of the LUFA CA. This Court has the jurisdiction to make a finding that the Applicant is insolvent pursuant to federal insolvency legislation which occupies the field on that issue (in this case, the CCAA). This finding of insolvency is substantively and effectively equivalent to a determination pursuant to the financial exigency provisions of the LUFA CA and, as described above, the termination of faculty members is permitted when a determination of financial exigency is made.

74. Further, nothing in the requested relief is inconsistent with section 33 of the CCAA. Since the enactment of section 33 to the CCAA, the Courts have adopted a flexible approach to its interpretation. In *White Birch Paper Holding Company, Re*, the Court considered section 33 of the CCAA and held (emphasis added):

> The Union relies on the various testimonies provided before the Parliamentary Committee to suggest that collective agreements are now raised to the rank of absolute contracts which are completely outside the restructuring process and the CCAA unless the Union and the employer agree otherwise. **That, however, would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the Union with a veto with regard to the restructuring process.**[50]

75. In balancing the interests of the union with the successful restructuring of the debtor company, the Court re-affirmed the importance of the CCAA as a legislative tool to assist distressed companies (emphasis added):

> **The Union is wrong in thinking that the collective agreement is outside the scope of the CCAA and that only an agreement may alter its terms and conditions**… The CCAA has to be taken as a whole, and its provisions must be construed within the general context of the purposes of this Act. Its purpose is, in fact, to enable distressed companies to avoid the pressure of their contractual

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[50] *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 2590 at para. 35.

> obligations, to have a period of respite during which they will be able to propose a restructuring plan, shielded from their creditors, and hope to start again on a new footing. **If the debtor company is nevertheless required to fulfill all its obligations, it is tantamount to saying that the CCAA does nothing. Choices – sometimes difficult ones – must therefore be made, and all stakeholders interested in having the company survive and not be forced to close down must then compromise their rights.**[51]

76. Similarly in this case, if the Applicant is not permitted to terminate employees in accordance with the standard provision contained in the Model Initial Order, this would effectively paralyze the Applicant with respect to reducing its costs and would provide LUFA with a veto over the restructuring process.

77. The balance of convenience favours granting the relief sought by the Applicant. Faculty members who may be terminated are highly educated with specialized, transferable skills and knowledge. Their prospects for future employment are strong. Any prejudice suffered by the terminated faculty members is greatly outweighed by the salutary effects gained by the Applicant reducing its costs for the benefit of all stakeholders. If the Applicant cannot cut costs in a timely manner, the probability of a successful restructuring is jeopardized and the shutdown of the university becomes a possibility, which would entail the loss of thousands of jobs provided by the Applicant. This would be devastating to the livelihoods of hundreds of non-faculty employees, many of whom would not have the same prospects for future employment as terminated faculty.

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[51] *Ibid* at paras. 51-52.

iii. The Act Grants the Board the Jurisdiction to Terminate Faculty

78. Management of the university is within the jurisdiction of the Board. Further, pursuant to section 18(b) of the Act, the Board has the sole jurisdiction to terminate faculty. Section 18(b) of the Act provides that, upon the recommendation of the President, the Board has the power to "appoint and dismiss…the professors and other members of the teaching staff of the University…".

D. This Court Should Appoint a Neutral Third-Party as the Court-Appointed Mediator

79. The Applicant requests the urgent appointment of a neutral third-party as an officer of the Court to serve as mediator (the "**Court-Appointed Mediator**"). It is critical to the success of the Applicant's restructuring initiatives that a mediator be appointed to assist with: (i) negotiations related to the review and restructuring of the academic programs of the Applicant, together with the Senate; and (ii) the collective agreement between the Applicant and LUFA, among other issues that may arise during the course of the CCAA proceedings.

80. The Applicant proposes that the Court-Appointed Mediator's role not be limited to the above mandates, but rather the Court-Appointed Mediator be appointed to assist the Applicant with resolving any other issues which cannot be amicably resolved with its stakeholders.

81. This Court's jurisdiction to appoint the Court-Appointed Mediator derives from the Court's power to make any order that is considered appropriate under section 11 of the CCAA.

82. This Court recently appointed the Honourable Warren K. Winkler Q.C. as court-appointed mediator in the CCAA proceedings of JTI-MacDonald Corp., Imperial Tobacco Company Ltd. and Imperial Tobacco Canada Ltd., and Rothmans, Benson & Hedges Inc.[52]

83. The following factors can, and the Applicant submits should, inform the Court's exercise of discretion to appoint the Court-Appointed Mediator in this proceeding:

(a) Efficiency: The Court-Appointed Mediator would provide efficient and effective assistance with the resolution of the critical issues that the Applicant must address in this proceeding, thereby facilitating the administration of the proceedings and freeing up the judicial time of this Court. This in turn benefits all stakeholders of the Applicant who have an interest in an efficient, fair resolution of this proceeding.

(b) Expertise: The Court-Appointed Mediator would be someone with experience in resolving high-profile and complex disputes in particularly contentious circumstances. All of the Applicant's stakeholders will benefit from the Court-Appointed Mediator's expertise and assistance in arriving at mutually beneficial outcomes.

(c) Bargaining with LUFA has Stalled: The Applicant has bargained with LUFA in good faith, but negotiations have stalled and there is no indication that LUFA would be prepared to consider providing the type of concessions required by the Applicant to achieve financial stability. The Court-Appointed Mediator will be a neutral, independent third party who will assist the Applicant and LUFA with the exchange

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[52] *JTI-MacDonald Corp., Re*, Amended and Restated Initial Order dated April 5, 2019 at paras. 41-46; *Imperial Tobacco Company Ltd., and Imperial Tobacco Canada Ltd.*, Amended and Restated Initial Order dated April 5, 2019 at paras. 39-44; *Rothmans, Benson & Hedges Inc., Re*, Amended and Restated Initial Order dated April 5, 2019 at paras. 40-45.

of information, reconcile their positions and assist in determining if a successful restructuring is possible.

(d) Urgency: As fully described in the Haché Affidavit, there are extreme time sensitivities associated with this proceeding. The Applicant's negotiations, and most importantly a resolution, with LUFA need to be undertaken and completed by April 2021 to support the Applicant's objective of emerging as a sustainable postsecondary institution. That timeline is required based on the available DIP financing and the necessity to have the changes to faculty and academic programs implemented in time for the Fall 2021 term. It is also necessary to demonstrate to incoming first-year students that the Applicant is well-positioned for future success and should continue to be a high school graduate's first choice destination. The Court-Appointed Mediator will have the flexibility to adapt a process and timeline to achieve a timely resolution that fits within the parameters of the future sustainability of the Applicant.

84. The Proposed Monitor supports the appointment of the Court-Appointed Mediator on an urgent timeline.

E. The Pension Plan Special Payments Should be Stayed

85. The Applicant requests that the Amended and Restated Initial Order stay any outstanding pre-filing or post-filing Special Payments to the Pension Plan.

86. Special payments made to pay down pension plan solvency deficits are commonly stayed in CCAA proceedings where the Applicant does not have the cash to make such payments

and the deferral is required to facilitate a successful restructuring.[53] Courts have held that employees are not prejudiced by the suspension of special payments if a suspension improves the odds of a successful restructuring and a failed restructuring would result in bankruptcy.[54]

87. In these circumstances, it is appropriate for this Court to stay payment of the Special Payments, which will assist the Applicant with its severe liquidity crisis and maximize the probability that a successful restructuring can be negotiated and effected. This stay is limited to the Special Payments and does not apply to the Applicant's regular (ordinary course) contributions to the Primary Plan.

F. The CCAA Charges Should be Granted.

i. The Administration Charge Should be Approved

88. The Applicant requests that this Court grant a super-priority Administration Charge on the Property (as defined in the proposed form of the Initial Order) in favour of the Proposed Monitor, counsel to the Proposed Monitor, the Applicant's counsel and advisors, and independent counsel to the Board. At the initial hearing the Administration Charge will be requested in the amount of $400,000, and the Applicant will seek to increase it to $1.25 million pursuant to a proposed Amended and Restated Initial Order on the Comeback Hearing. Section 11.52 of the CCAA provides the Court with statutory jurisdiction to grant the Administration Charge.

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[53] *Collins & Aikman Automotive Canada Inc., Re*, 2007 CarswellOnt 7014 (Ont. S.C.); *Fraser Papers Inc., Re,* 2009 CarswellOnt 4469 (Ont. S.C. [Commercial List]); *AbitibiBowater inc., re*, 2009 QCCS 2028; *Timminco Ltd., Re*, 2012 ONSC 506 [Commercial List] [***Timminco***].
[54] *Timminco*, *ibid* at para. 59.

89. In *Canwest Publishing*, Justice Pepall considered section 11.52 of the CCAA and identified the following non-exhaustive list of factors the Court may consider when granting an administration charge:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the monitor.[55]

90. The Administration Charge is warranted, necessary, and appropriate in the circumstances, given that:

(a) the proposed restructuring will require the extensive involvement of the professional advisors subject to the Administration Charge;

(b) the professionals subject to the Administration Charge have contributed, and will continue to contribute, to the restructuring of the Applicant;

(c) there is no unwarranted duplication of roles so the professional fees associated with these proceedings will be minimized;

(d) the Administration Charge will rank in priority to the DIP Charge and the Directors' Charge; and

(e) the Proposed Monitor believes that the proposed quantum of the Administration Charge is reasonable.

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[55] *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 at para. 54; *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037 at para 58.

91. Further, the Applicant has limited the quantum of the Administration Charge that it seeks approval of to what is reasonably necessary for the first ten days of the CCAA proceedings, to be increased thereafter on the comeback hearing, based on forecasted costs in the Cash Flow Forecast for the professionals covered under the Administration Charge.

ii. The DIP Financing and DIP Charge Should be Approved

92. The Applicant seeks approval at the comeback hearing pursuant to the Amended and Restated Initial Order of the debtor-in-possession financing facility (the "**DIP Facility**") between the Applicant, as borrower, and Firm Capital Corporation ("**FCC**") as lender, as further described in the Term Sheet between LU and FCC dated January 29, 2021 (the "**DIP Term Sheet**") attached as **Exhibit** "**A**" to the Haché Affidavit. FCC has indicated that, subsequent to execution of the DIP Term Sheet, it will assign its interest to Firm Capital Mortgage Fund Inc. (the "**DIP Lender**"). The DIP Lender has requested a definitive DIP loan agreement to formally document the terms and conditions of the DIP Facility. Prior to the comeback hearing, the Applicant and the DIP Lender will negotiate and finalize the DIP loan agreement.

93. The Applicant also seeks a super-priority charge on the Property in the amount of $25,000,000 subject to the terms of the DIP Term Sheet (the "**DIP Charge**"). The DIP Charge is proposed to rank behind the Administration Charge (up to a maximum amount of $1,250,000) and the Directors' Charge (up to a maximum amount of $2,000,000), but ahead of all other interests in the Property of the Applicant save and except properly perfected purchase money security interests on specific equipment.

94. The Applicant is facing a liquidity crisis. The Cash Flow Forecast demonstrates that, absent additional financing, the Applicant will require additional cash shortly after the date of the Comeback Hearing, on or about February 10, 2021. The next payroll of the Applicant is payable on February 25, 2021 and covers the period to February 28, 2021. The Applicant requires debtor-in-possession financing to pay operating expenses and begin to implement its restructuring strategy for the benefit of all of the Applicant's stakeholders.

95. Given that reality, and as described in more detail in the Haché Affidavit, the Applicant canvassed the market for interim financing and evaluated competing offers. Following a competitive process involving multiple potential lenders, the Applicant secured the DIP Facility from FCC pursuant to the DIP Term Sheet. The Haché Affidavit and the Proposed Monitor's Pre-Filing Report contains a detailed description of the DIP Term Sheet's relevant terms.

96. In short, pursuant to the DIP Term Sheet, the DIP Lender agreed to loan a maximum principal amount of $25,000,000 to the Applicant, subject to the terms and conditions prescribed in the DIP Term Sheet. The Applicant's access to the DIP Facility is conditional upon the provision of an order of this Court, among other things, approving the DIP Term Sheet and the DIP Facility and granting the DIP Charge. The relief sought will be pursuant to the Amended and Restated Initial Order sought at the Comeback Hearing, on notice to other parties.

97. Section 11.2 of the CCAA provides the Court with the express statutory authority to approve the DIP Facility Agreement and the DIP Charge. Section 11.2(2) further provides

the Court with the express statutory authority to order that the DIP Charge rank in priority over the claim of any secured creditor of the company.

98. Section 11.2(4) sets out the following factors to be considered by the Court in deciding whether to grant a super-priority charge in respect of DIP Financing:

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report.[56]

99. Based on the following factors, the DIP Term Sheet and the DIP Charge should be approved on the Comeback Hearing as:

(a) the notice requirements under 11.2(1) have been met;

(b) the Applicant has immediate liquidity needs and, given its current financial circumstances, the Applicant cannot obtain alternative financing outside of these CCAA proceedings;

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[56] CCAA, section 11.2(4).

(c) the terms of the DIP Term Sheet were subject to, and a result of, a competitive process and intensive arms-length negotiations;

(d) the Applicant, in consultation with the Proposed Monitor, has established a restructuring plan to ensure that costs can be reduced to the greatest extent reasonably possible during these CCAA proceedings;

(e) the DIP Facility is necessary in order for the Applicant to implement its restructuring plan, which will preserve its ability to operate as a postsecondary institution for the benefit of all its stakeholders;

(f) without the DIP Facility, the Applicant will not be able to continue operating;

(g) the quantum of the DIP Facility is reasonable and appropriate having regard to the Cash Flow Forecast; and

(h) the Proposed Monitor is of the view that the DIP Term Sheet and DIP Charge are appropriate and limited to what is reasonably necessary in the circumstances.

iii. The Directors' Charge Should be Approved

100. The Applicant requests that this Court grant a priority charge in favour of the Applicant's current and future directors and officers in the amount of $2 million (the "**Directors' Charge**"). The Applicant will seek to increase the Directors' Charge at the comeback hearing to $5 million, $3 million of which will rank subordinate to the DIP Charge. The Directors' Charge protects the current and future directors and officers against obligations and liabilities they may incur as directors and officers of the Applicant after the commencement of the CCAA proceedings, except to the extent that any such claims or the obligation or liability is incurred as a result of the director's or officer's gross negligence or wilful misconduct.

101. The Applicant has certain insurance policies in place (as defined in the Haché Affidavit); however, the Applicant is concerned that the directors and officers may be unwilling to continue in their roles with the Applicant absent the Court granting the Directors' Charge. The Directors' Charge will only be available to the extent that any claim or liability is not covered by any applicable D&O insurance and in the event that the Applicant's D&O insurance does not respond to claims against the directors and officers.

102. Section 11.51 of the CCAA provides the Court with the express statutory jurisdiction to grant the Directors' Charge in an amount the Court considers appropriate, provided notice is given to the secured creditors who are likely to be affected by it.[57]

103. In approving a similar charge in *Canwest*, Justice Pepall applied section 11.51 of the CCAA and noted the Court must be satisfied with the amount of the charge and that it is limited to obligations the directors and officers may incur after the commencement of the proceedings, so long as adequate insurance cannot be obtained at a reasonable cost.[58]

104. In *Jaguar Mining Inc., Re*, Justice Morawetz (as he then was) stated that, in order to grant a Directors' Charge, the Court must be satisfied of the following factors:[59]

(a) notice has been given to the secured creditors likely to be affected by the charge;

(b) the amount is appropriate;

(c) the applicant could not obtain adequate indemnification insurance for the directors at a reasonable cost; and

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[57] CCAA, section 11.51.
[58] *Canwest*, *supra* note 17 at paras. 46 and 48.
[59] *Jaguar Mining Inc., Re*, 2014 ONSC 494 at para. 45.

(d) the charge does not apply in respect of any obligation incurred by a director as a result of the director's gross negligence or wilful misconduct.

105. With respect to the Applicant, the Directors' Charge is reasonable in the circumstances because: (i) the Applicant will benefit from the active and committed involvement of the directors and officers, who have considerable institutional knowledge and valuable experience and whose continued participation will help facilitate an effective restructuring, (ii) the Applicant cannot be certain whether the existing insurance will be applicable or respond to any claims made, and the Applicant does not have sufficient funds available to satisfy any given indemnity should its directors and officers need to call upon such indemnities, (iii) the Directors' Charge does not secure obligations incurred by a director as a result of the directors' gross negligence or wilful misconduct, and (iv) the Proposed Monitor is of the view that the Directors' Charge is reasonable and appropriate in the circumstances.

iv. The CCAA Charges Should Prime the Liens

106. As part of the Amended and Restated Initial Order, the Applicant requests that the Administration Charge, Directors' Charge, and DIP Charge (collectively, the "**CCAA Charges**") take priority over lien claimants. The only secured creditors that will be affected by the CCAA Charges are the lien claimants who have construction liens registered on title against lands owned by LU (the "**Lien Claimants**"). The aggregate amount of the liens is approximately $6.179 million.

107. This relief is required by the DIP Lender pursuant to the terms of the DIP Agreement. Without priority over the liens, the DIP Lender will not advance the funds required by the

Applicant to carry out this restructuring process. This would jeopardize the success of the CCAA proceeding.

108. The CCAA authorizes the CCAA Charges to take priority over the Lien Claimants. Secured creditors are defined under s. 2(1) of the CCAA to include the holder of a lien against any property of the debtor and the CCAA permits granting priority of the CCAA Charges over any secured creditor. Indeed, this relief is consistent with paragraph 40 of the Model Initial Order and is routinely granted in CCAA proceedings.

109. Further, each of the Lien Claimants will be given adequate notice prior to the comeback hearing, satisfying the obligation to give notice to any secured creditor likely to be affected by the granting of the CCAA Charges pursuant to ss. 11.2(1), 11.51(1) and 11.52(1) of the CCAA.

G. The Confidential Exhibits Should be Sealed.

110. Pursuant to the *Courts of Justice Act* (Ontario), this Court has the discretion to order that any document filed in a civil proceeding be treated as "confidential", sealed and not form part of the public record."[60]

111. In *Sierra Club of Canada v. Canada (Minister of Finance)*, Justice Iacobucci set out that a sealing order should only be granted when:

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[60] *Courts of Justice Act*, R.S.O. 1990, c C.43, s. 137(2). See also *Target Canada Corp (Re)*, 2015 ONSC 1487 at paras. 28 – 30.

(a) such an order is necessary in order to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternatives measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh the deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[61]

112. The Applicant respectfully requests that, in the Initial Order, this Court seal Confidential Exhibits "FFF" and "GGG" to the Haché Affidavit. These documents relate to correspondence between the Applicant and the Ministry of Colleges and Universities (the "**Ministry**"). The documents contain information with respect to the Applicant and certain stakeholders of the Applicant, including various rights or positions that stakeholders of the Applicant may take either inside or outside of a CCAA proceeding, which could jeopardize the Applicant's efforts to restructure.

113. If the Confidential Exhibits are not sealed, stakeholders may react in such a way that jeopardizes the viability of the Applicant's restructuring. As such, the salutary effects of the sealing order, which provides the Applicant with the best possible chance to effect a restructuring, far outweigh the deleterious effects of not disclosing the correspondence between the Applicant and the Ministry.

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[61] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 53.

H. The Relief Sought is Reasonably Necessary.

114. Pursuant to s. 11.001, the relief sought on an initial application is to be limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during the initial stay period.[62]

115. The stated purpose of s. 11.001 is to "limit the decisions that can be taken at the outset of a CCAA proceeding to measures necessary to avoid the immediate liquidation of an insolvent company, thereby improving participation of all players."[63]

116. The Applicant has limited the relief sought on this initial Application to only the relief that is reasonably necessary in the circumstances for its continued operation. After using the initial stay period to stabilize its operations, the Applicant intends to return to this Court to request further relief. For the sake of cost efficiency, and to provide all stakeholders with time to consider the Applicant's position on the various relief sought and to be sought at the comeback hearing, this Factum is filed at the outset of the proceeding to address all relief. Accordingly, the Applicant submits that the relief sought on this initial Application is in accordance with s. 11.001 of the CCAA and should be granted.

PART IV - RELIEF REQUESTED

117. For all of the foregoing reasons, the Applicant requests an Order substantially in the form of the draft Initial Order.

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[62] CCAA, s. 11.001, 11.02(1) and (3).
[63] *Lydian International Limited (Re)*, 2019 ONSC 7473 at paras. 22-26, citing Government of Canada (Press Release), "Insolvency reforms to come into force" (4 September 2019), online: <perma.cc/8SLT-ZADL>.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of January, 2021.

Thornton Grout Finnigan LLP

Thornton Grout Finnigan LLP

Counsel for the Applicant

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Canadian Red Cross Society*, 2000 CarswellOnt 3269 (Ont. S.C.).
2. *TLC, The Land Conservancy of British Columbia, Re*, 2014 BCSC 97 at paras. 14-18.
3. *Stelco Inc. (Re)*, 2004 CarswellOnt 1211 (S.C. [Commercial List]) at paras. 21-22.
4. *Target Canada Co.*, 2015 ONSC 303.
5. *Re Stelco Inc.*, 2005 CarswellOnt 1188 (C.A.).
6. *Nortel Networks Corporation (Re)*, 2009 CarswellOnt 4467 (S.C. [Commercial List]).
7. *Sino-Forest Corporation (Re)*, 2012 ONSC 2063.
8. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 60.
9. *Sino-Forest Corporation (Re)*, 2012 ONSC 2063.
10. *Canwest Global Communications Corp, Re*, 2009 CarswellOnt 6184.
11. *Cinram International Inc (Re)*, 2012 ONSC 3767.
12. *Tamerlane Ventures Inc., Re*, 2013 ONSC 5461.
13. *1077 Holdings Co-Operative (Re)*, 2021 BCSC 42.
14. Initial Order granted in the 2009 CCAA proceeding of Canwest Global Communications Corp.
15. *Windsor Machine & Stamping Ltd., Re*, Amended and Restated Initial Order dated September 2, 2008.
16. *Windsor Machine & Stamping Ltd., Re*, 2009 CarswellOnt 4471 (Ont. S.C. [Commercial List]).
17. *Aveos Fleet Performance Inc.*, Initial Order dated March 19, 2012.
18. *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)* [2013] QCCS 5924.
19. *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 2590.
20. *JTI-MacDonald Corp., Re*, Amended and Restated Initial Order dated April 5, 2019.
21. *Imperial Tobacco Company Ltd., and Imperial Tobacco Canada Ltd.*, Amended and Restated Initial Order dated April 5, 2019.
22. *Rothmans, Benson & Hedges Inc., Re*, Amended and Restated Initial Order dated April 5, 2019.
23. *Collins & Aikman Automotive Canada Inc., Re*, 2007 CarswellOnt 7014 (Ont. S.C.).
24. *Fraser Papers Inc., Re*, 2009 CarswellOnt 4469 (Ont. S.C. [Commercial List]).
25. *AbitibiBowater inc., re*, 2009 QCCS 2028.
26. *Timminco Ltd., Re*, 2012 ONSC 506 [Commercial List].
27. *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222.
28. *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037.
29. *Jaguar Mining Inc., Re*, 2014 ONSC 494.
30. *Target Canada Corp (Re)*, 2015 ONSC 1487.
31. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.
32. *Lydian International Limited (Re)*, 2019 ONSC 7473.

SCHEDULE "B" – RELEVANT STATUTES

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3**

Section 2

Definitions

In this Act,

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

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

Section 2

Definitions

company means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

debtor company means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent.

Section 3

Application

(1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Section 10

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Section 11

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Stays, etc. – initial application

11.02(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. – other than initial application

11.02(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

11.02(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Meaning of regulatory body

11.1 (1) In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

> (a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and
>
> (b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

Interim financing

11.2(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

11.2(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

11.2(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

11.2(4) In deciding whether to make an order, the court is to consider, among other things,

> (a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Security or charge relating to director's indemnification

11.51(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

11.51(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

11.51(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

11.51(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

Court may order security or charge to cover certain costs

11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

11.52(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Section 33

Collective agreement

33(1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

***Courts of Justice Act*, R.S.O. 1990, c. C.43**

Section 137

Sealing documents

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **LAURENTIAN UNIVERSITY OF SUDBURY**

Court File No. 21-CV-_____

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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