Court of Appeal File No. M52287
Court File No. CV-21-656040-00CL

COURT OF APPEAL FOR ONTARIO

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

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(Motion for Leave to Appeal Confidentiality Order)

March 17, 2021

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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**

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Court of Appeal File No. M52287
Court File No. CV-21-656040-00CL

COURT OF APPEAL FOR ONTARIO

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

RESPONDING FACTUM OF THE MONITOR

PART I - OVERVIEW

1. Laurentian University of Sudbury ("**Laurentian**" or the "**Applicant**") sought and obtained an order from The Honourable Chief Justice Morawetz dated February 11, 2021 (the "**Sealing Order**") sealing Exhibits "EEE" and "FFF" (the "**Exhibits**") to the affidavit of Dr. Robert Haché, sworn January 30, 2021 (the "**Haché Affidavit**") that was filed in support of an initial order (the "**Initial Order**") for Laurentian to commence proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**").

2. The Sealing Order was first granted on an interim basis as part of the Initial Order dated February 1, 2021. Following the comeback hearing, Justice Morawetz issued an Amended and Restated Initial Order dated February 11, 2021, which continued the Sealing Order, and released reasons for continuing the Sealing Order in a Supplementary Endorsement dated February 26, 2021 (the "**Supplementary Endorsement**").

3. Laurentian University Faculty Association ("**LUFA**"), the Canadian Union of Public Employees ("**CUPE**"), and the Ontario Confederation of University Faculty Associations ("**OCUFA**", and collectively the "**Moving Parties**") now seek leave to appeal to set aside the

Sealing Order. Laurentian and the Court-appointed Monitor, Ernst & Young Inc. (the "**Monitor**"), oppose this motion.

4. Sealing orders are frequently granted in cases under the CCAA where the release of commercial information would undermine the efficacy of the proceedings or prejudice the position of stakeholders. This case is no different. The Chief Justice reviewed the Exhibits in detail, properly applied the leading test set out in *Sierra Club*[1] regarding the availability of sealing orders, and concluded that disclosure of the Exhibits "could undermine the restructuring efforts being undertaken by [Laurentian]" and impose "a serious risk to the future viability of [Laurentian]". As a result, the Chief Justice determined that the Sealing Order was necessary to prevent a serious risk to an important interest in the context of these CCAA proceedings and that the salutary effects of the Sealing Order outweighed the deleterious effects of disclosure.

5. As set out in greater detail below, there is nothing before this Honourable Court to justify appellate intervention with the CCAA Judge's carefully reasoned exercise of discretion, particularly in light of the Court's consistently high degree of deference to decisions of CCAA judges. The Moving Parties' motion materials largely ignore the reasons provided in the Supplementary Endorsement, repeat the same arguments that were rejected by the Chief Justice, and overlook the fundamental purpose and operation of the CCAA – to utilize an expeditious, efficient and economical procedure to avoid the devastating social and economic effects of commercial bankruptcies.

6. The proposed appeal is not *prima facie* meritorious nor is it of significance to the

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[1] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 ("***Sierra Club***"), Book of Authorities of the Monitor ("**BOA**"), Tab 1.

insolvency practice or in the overall context of the CCAA proceedings. Instead, granting leave will significantly hinder Laurentian's ability to restructure its affairs. For these and the additional reasons set out herein, the motion for leave to appeal ought to be dismissed.

PART II - FACTS

A. The Parties to this Motion

(i) Laurentian

7. Laurentian is a publicly-funded, bilingual and tricultural postsecondary institution in Sudbury, Ontario. It 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. It also has a strong graduate program, with approximately 1,098 total domestic and international graduate students enrolled during the 2020-21 academic year.[2]

8. Laurentian is consistently one of the largest employers in the Greater Sudbury area. As at December 30, 2020, Laurentian employed approximately 1,751 people, of which approximately 758 are full-time employees. Total salaries and benefits represent approximately $134 million on an annual basis).[3]

(ii) The Moving Parties

9. LUFA represents approximately 612 Laurentian employees.[4] LUFA and the Board of Governors of Laurentian are parties to a collective bargaining agreement, with an initial three-year term that expired on June 30, 2020 but automatically renewed and will continue to renew on a

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[2] Haché Affidavit, Motion Record, Tab 13, pp. 189-190, at paras. 39-41.
[3] Haché Affidavit, Motion Record, Tab 13, p. 213, at para 124.
[4] Haché Affidavit, Motion Record, Tab 13, p. 212, at paras. 121-122.

year-to-year basis until Laurentian or LUFA provides notice of an intention to terminate the agreement (which neither party has provided to date).[5]

10. As described in greater detail in the Haché Affidavit, since April 2020, Laurentian 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, as well as a two-day mediation in October 2020. Throughout the bargaining process, Laurentian advised LUFA of the significant financial challenges it is facing and has obviously continued to do so to date through these CCAA proceedings.[6]

11. CUPE represents over 300 Laurentian employees who fall into one of three locals: Local 895-04 (sessional instructors at Thorneloe University, a federated university in a federation with Laurentian); Local 894-05 (food service employees); and Local 5011 (teaching assistants).[7]

B. Background to the Sealing Order

12. On February 1, 2021, Laurentian applied for and was granted protection under the provisions of the CCAA by way of an initial order granted by the Chief Justice of the Ontario Superior Court of Justice (the "**Initial Order**"). The Initial Order provided for the appointment of Ernst & Young Inc. as the Monitor of the Applicant and approved a stay of proceedings for the initial 10-day period and certain Court-ordered super-priority charges. [8]

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[5] Haché Affidavit, Motion Record, Tab 13, p. 213, at para. 126.
[6] Haché Affidavit, Motion Record, Tab 13, pp. 213-216, at paras. 127-136.
[7] Haché Affidavit, Motion Record, Tab 13, p. 224, at para. 152.
[8] Endorsement of Chief Justice G.B. Morawetz, dated February 1, 2021 ("**Initial Order Endorsement**"), Motion Record, Tab 4; Initial Order, Motion Record, Tab 3.

13. In support of its application for the Initial Order, Laurentian filed the Haché Affidavit detailing the background and reasons for Laurentian's application. Laurentian asked the Court to seal the Exhibits, which contain letters between the Ministry of Colleges and Universities (the "**Ministry**") and Laurentian dated January 21, 2021 and January 25, 2021, respectively, on the basis that their disclosure may undermine Laurentian's ability to successfully restructure under the CCAA.

14. In assessing Laurentian's request to seal the Exhibits, Chief Justice Morawetz considered (a) section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (the "**CJA**"), which provides that the Court has the discretion to order any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record, and (b) the test set out in *Sierra Club*.[9]

15. Chief Justice Morawetz concluded that a sealing order in respect of the Exhibits was appropriate to be included in the Initial Order based, in part, on the following determination:[10]

> If the Confidential Exhibits are not sealed, the Applicant submits that 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.
> …
> I have reviewed the Confidential Exhibits and I accept the submissions of the Applicant and grant the sealing request.

16. On February 3, 2021, Laurentian served the full Application Record, including the Haché Affidavit, on the creditors of Laurentian as well as the counterparties to all of the contracts and

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[9] Initial Order Endorsement, Motion Record, Tab 4, p. 57, at paras. 60-61.
[10] *Ibid*, at paras. 63-64.

agreements entered into with Laurentian, together with a Notice of Motion in respect of the comeback hearing scheduled for February 10, 2021.

17. On February 4, 2021, the Monitor sent a Notice to Creditors providing information about these CCAA proceedings to all known creditors who have a claim against Laurentian of more than $1,000 and published the notice in the national Globe and Mail and Sudbury Star newspapers.[11]

18. The following day, on February 5, 2021, the Monitor, Laurentian and LUFA attended a case conference at which Chief Justice Morawetz appointed the Honourable Justice Sean F. Dunphy as the Court-appointed mediator for the purposes of conducting a confidential mediation among Laurentian's stakeholders. The mediation is ongoing.[12]

19. That same day, the Monitor posted a copy of the Applicant's motion record in respect of the comeback motion scheduled for February 10, 2021 on the Monitor's website.[13] No stakeholder, including any of the Moving Parties, sought to examine Dr. Haché on his affidavit or the communications between Laurentian and the Ministry prior to the comeback hearing.

20. On February 10, 2021, Laurentian and certain of its stakeholders and creditors attended the comeback hearing. No evidence was filed at the hearing other than the Haché Affidavit. During the hearing, the Moving Parties objected to the Sealing Order on the basis that the Haché Affidavit did not establish a sufficient basis to grant the Sealing Order. Laurentian and the Monitor opposed those submissions.[14]

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[11] First Report of the Monitor dated February 7, 2021 ("**First Monitor Report**"), Motion Record, Tab 12, p. 167.
[12] *Ibid*, at pp. 168-169; Endorsement of Chief Justice G.B. Morawetz dated February 5, 2021, Motion Record, Tab 6.
[13] First Monitor Report, Motion Record, Tab 12, p. 168.
[14] Endorsement of G.B. Morawetz dated February 12, 2011, Motion Record, Tab 9

21. By endorsement dated February 12, 2021, Chief Justice Morawetz upheld the Sealing Order on an interim basis and advised the parties that a supplementary endorsement would be issued in respect of the Sealing Order. The Initial Order was otherwise amended and restated to address other matters resulting from the comeback hearing (the "**Amended and Restated Initial Order**").[15]

C. The Supplementary Endorsement

22. On February 26, 2021, Chief Justice Morawetz issued the Supplementary Endorsement maintaining the Sealing Order until further order of the Court pursuant to paragraph 57 of the Amended and Restated Initial Order.[16]

23. As with the Initial Order, Chief Justice Morawetz considered section 137(2) of the *CJA* and applied the test set out in *Sierra Club*, namely that a sealing order should only be granted where:[17]

> (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 alternative 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.
>
> [14] The Supreme Court identified three important elements subsumed under the first branch of the above test. First, the risk in question must be real and substantial, in that the risk is well grounded in evidence and imposes a serious threat to the commercial interest in question. Second, a "commercial" interest must be an interest that goes beyond harm to the private commercial interests of a person or

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[15] *Ibid*; Amended and Restated Initial Order, Motion Record, Tab 7.
[16] Supplementary Endorsement, Motion Record, Tab 10.
[17] *Ibid*, at paras. 13-14.

> business. To qualify as an "important commercial interest", the interest must be one that can be expressed in terms of a public interest in confidentiality. Third, the phrase "reasonable alternative measures" requires the court to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

24. Applying this test, Chief Justice Morawetz concluded that the Sealing Order was necessary to protect an important interest in the context of these CCAA proceedings because no reasonable alternatives exist and that the salutary effects of the Sealing Order outweigh its deleterious effects.[18] In particular, Chief Justice Morawetz considered the Haché Affidavit and made the following findings of fact:

(a) Laurentian has been completely transparent with the Ministry regarding the financial challenges it faces (including providing details to the Ministry regarding its financial situation and the outcome if the efforts undertaken by Laurentian to resolve its concerns cannot achieve the required results);[19]

(b) There has been continuous communication between Laurentian and the Ministry with respect to the financial crisis currently facing Laurentian. As such, the Ministry is well aware that a real-time solution to the crisis must be found if Laurentian is to survive and continue operations beyond the current academic year;[20]

(c) The role, if any, the Ministry will play in the restructuring is uncertain at this time;[21]

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[18] *Ibid*, at paras. 21 and 24.
[19] *Ibid*, at para. 15(ii).
[20] *Ibid*, at para. 18.
[21] *Ibid*.

(d) It is speculative to conclude that the Exhibits contain information that is not helpful to Laurentian's position;[22]

(e) The risk in disclosing the Exhibits is real and substantial and imposes a serious risk to the future viability of Laurentian;[23]

(f) Disclosure of the Exhibits could be detrimental to any potential restructuring of Laurentian and undermine Laurentian's restructuring efforts;[24]

(g) In order to undertake all efforts to restructure Laurentian, it is necessary to maintain the confidentiality of the Exhibits;[25]

(h) The "commercial" interest related to the Exhibits transcends the direct commercial interests of Laurentian. The interest involves the entire Laurentian community, including its faculty, students, employees, third-party suppliers, and the City of Greater Sudbury and the surrounding areas;[26]

(i) There are no reasonable alternatives to a confidentiality order at this time, particularly given the ongoing mediation being conducted by Justice Dunphy;[27] and

(j) The salutary effects of the Sealing Order outweigh its deleterious effects which in this context, includes the public interest in accessing the exhibits. [28]

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[22] *Ibid*, at para. 19.
[23] *Ibid*.
[24] *Ibid*, at para. 20.
[25] *Ibid*.
[26] *Ibid*.
[27] *Ibid*, at paras. 21-22.
[28] *Ibid*, at para. 24.

25. Contrary to the assertion at paragraph 25 of the Moving Parties' factum (which was the same argument dismissed by the Chief Justice in the Court below), the Applicant has filed evidence in support of the confidentiality of the Exhibits, namely, the Haché Affidavit. The Haché Affidavit provided the evidentiary basis necessary for Chief Justice Morawetz to make the foregoing findings of fact and to apply them to and satisfy the *Sierra Club* test.

PART III - LAW AND ANALYSIS

D. Test for Leave to Appeal

26. This Court has said on a number of occasions that it will only grant leave to appeal "sparingly" in the context of CCAA proceedings, where there are "serious and arguable grounds that are of real and significant interest to the parties."[29]

27. The fact that, under section 13 of the CCAA, an appeal lies only with leave of an appellate court suggests that Parliament, mindful that CCAA cases often require quick decision making, intended that most decisions be made by the supervising judge. This supports the view that the decisions of supervising CCAA judges should be interfered with only in the clearest of cases.

28. This high degree of deference was recently affirmed by the Supreme Court of Canada in 9354-9186 *Québec inc. v. Callidus Capital Corp.* where the Court stated:[30]

> A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. Appellate courts must be careful not to substitute their own discretion in place

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[29] *Nortel Networks Corp., Re*, 2016 ONCA 332 ("**Nortel**"), at para. 34, BOA, Tab 2; *Essar Steel Algoma Inc., Re*, 2017 ONCA 478, at para. 19, BOA, Tab 3; *Re Stelco Inc.*, 2005 CarswellOnt 6818, 15 C.B.R. (5th) 307 (Ont. C.A.) at para. 15, BOA, Tab 4.

[30] 2020 SCC 10, at paras. 53-54 ("**Bluberi**"), BOA, Tab 5, citing *Canadian Metropolitan Properties Corp. v Libin Holdings Ltd.*, 2009 BCCA 40, at para 20., BOA, Tab 6.

> of the supervising judge's. [Internal citations omitted]…
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> This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 305 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:
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> > . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

29. In this case, the Chief Justice of the Ontario Superior Court has carriage of the Laurentian CCAA Proceedings. The Chief Justice is an experienced Commercial List Judge who has had carriage of a variety of restructuring proceedings and is well aware of the open court principle.

30. With this context, the four elements of the test for leave to appeal in a CCAA proceeding are as follows:[31]

(a) Whether the point on appeal is of significance to the practice;

(b) Whether the appeal will unduly hinder the progress of the action;

(c) Whether the appeal is prima facie meritorious or frivolous; and

(d) Whether the point is of significance to the action.

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[31] *Nortel*, at para 34, BOA, Tab 2.

31. Although the Moving Parties are unable to satisfy any one of these elements, our courts have held that these four elements are cumulative and that the failure to establish any one of them will result in the dismissal of the motion.[32]

E. The Proposed Appeal is not of Significance to the Practice

32. The first element of the test for leave to appeal is whether the proposed point on appeal is of significance to the insolvency practice. In this case, it is not.

33. The issues raised by the Moving Parties are not novel or controversial. Chief Justice Morawetz did not create any new legal theories or untested principles of law. Sealing Orders are regularly granted in Ontario cases under the CCAA where the release of commercial information might undermine the efficacy of the proceedings or prejudice the position of stakeholders. As noted by Justice Strathy in *Fairview Donut Inc.*, "it makes sense in such "real time" litigation that confidential information should be protected where its release would jeopardize the very purpose of the proceeding."[33]

34. Indeed, the primary reason that Chief Justice Morawetz granted the Sealing Order was because disclosure of the Exhibits could undermine Laurentian's restructuring efforts and jeopardize the very purpose of these CCAA proceedings.[34] The potential disclosure jeopardizes the time sensitive court ordered mediation sessions being supervised by Justice Dunphy, as well as the CCAA proceedings more generally.

35. While the Moving Parties argue that these "CCAA proceedings are the first time that a

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[32] *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665, at paras. 4 and 7, BOA, Tab 7.
[33] *Fairview Donut Inc. v TDL Group Corp.*, 2010 ONSC 789, at para 45, BOA, Tab 8.
[34] Supplementary Endorsement, Motion Record, Tab 10, pp. 114-115, at paras. 19-22.

publicly-funded university has utilized the CCAA to attempt to restructure" and that "an institution that is a recipient of and dependent upon significant public funding has entered into such proceedings", these facts were not relevant to the granting of the Sealing Order. In fact, at paragraphs 9 and 18 of the Supplementary Endorsement, Chief Justice Morawetz notes that the Ministry's position on the motion to seal the Exhibits was unknown, and that it is uncertain what role, if any, the Ministry will play in Laurentian's restructuring. In circumstances where the Ministry may not be involved in these CCAA proceedings at all and did not assert any position on the Sealing Order motion, its relationship with Laurentian or the fact that it provides public funds to Laurentian is inconsequential.

36. In their factum, the Moving Parties attempt to argue that the proposed point on appeal is significant to the practice because Chief Justice Morawetz based his decision to seal the Exhibits on his finding that they are relevant. Chief Justice Morawetz did not conclude that the Exhibits should be sealed because they are relevant. When reading the Supplementary Endorsement as a whole, it is far more likely that the Chief Justice sealed the Exhibits because their content would distract the parties from focusing on an expeditious and efficient restructuring of Laurentian.

37. In any event, the Moving Parties' submission that relevant documents should not be sealed is fundamentally flawed. Litigants only put documents before the Court because they are relevant. This is especially the case with confidential documents where litigants risk jeopardizing their confidentiality by placing those documents before the Court. In CCAA proceedings, relevant documents, such as transaction documents, are regularly sealed to avoid prejudicing the applicant and its stakeholders.

38. It is trite that the CCAA achieves its goals through a summary procedure for the

compromise or arrangement of creditors' claims against a debtor company.[35] It is not normal course civil litigation where the parties undertake an extensive discovery process and exchange affidavits of documents. The Moving Parties are not entitled to every relevant document in Laurentian's possession and it is simply incorrect for the Moving Parties to assert otherwise in the context of a CCAA proceeding.

F. The Proposed Appeal Will Unduly Hinder the Restructuring

39. The next element of the test for leave to appeal is whether the proposed appeal will unduly hinder the restructuring. The Moving Parties submit that as long as the Exhibits remain confidential, the possibility of a successful restructuring is hindered because a key piece of information is being withheld. This is incorrect and ignores the Chief Justice's findings in the Supplementary Endorsement.

40. It bears mentioning that the Moving Parties have not seen the Exhibits and do not know whether they contain "a key piece" of information as alleged. Their assertion is speculative.[36] By contrast, the Chief Justice reviewed the Haché Affidavit, including the Exhibits, in detail and concluded that the disclosure of the Exhibits could undermine Laurentian's restructuring efforts and that in order to undertake all efforts to restructure Laurentian, the Exhibits must remain sealed.

41. In context, the Moving Parties' submission amounts to a mere disagreement with the Chief Justice as to the impact that the Exhibits may have on the restructuring process. Given the high degree of deference afforded to CCAA judges on leave to appeal motions, the Moving Parties' argument ought to be afforded no weight.

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[35] *U.S. Steel Canada Inc.*, Re, 2016 ONCA 662 ("**US Steel**"), at para 49, BOA, Tab 9.
[36] Supplementary Endorsement, Motion Record, Tab 10, p. 114, at para. 19.

42. Furthermore, these CCAA Proceedings are being held on an extremely tight timeline in an attempt to arrive at a restructuring arrangement in principle before April 30, 2021 to attempt to salvage the future academic school year.[37] The Applicants, Monitor and various stakeholders are involved in numerous mediations and daily negotiations in seeking to achieve the goal of restructuring. Requiring these parties to address leave to appeal and potentially appeal proceedings with such limited resources and timelines is inconsistent with the objectives and spirit of the CCAA

G. The Proposed Appeal is Not *Prima Facie* Meritorious

43. The next element of the test for leave to appeal is whether the proposed appeal is *prima facie* meritorious. This is a threshold issue on a motion for leave to appeal and must be considered against the backdrop of the considerable deference afforded to the discretionary decisions of CCAA judges.

44. The merit of the proposed appeal is often the focus of leave to appeal motions. An appeal is *prima facie* meritorious if it raises an apparent error in law or an apparent palpable and overriding error of fact that has a realistic possibility of success.[38]

45. In this case, the proposed appeal is without merit and cannot succeed. The Chief Justice did not err in principal or law and did not make any findings of fact that constitute palpable and overriding errors.

(i) No Error in Principle or Law

46. The Chief Justice applied the proper legal test and principles to the issue of whether the Exhibits should be sealed. There was no error in law.

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[37] First Monitor Report, Motion Record, Tab 12, p. 172.
[38] *Re Ravelston Corp.*, 2007 ONCA 268, at para. 12, BOA, Tab 10.

47. The test set out in *Sierra Club* was appropriate for the Chief Justice to have considered in granting the Sealing Order. In *Sierra Club*, the Supreme Court of Canada identified two factors that a court must consider in assessing whether a sealing order is appropriate:[39]

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (a) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its 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.

48. The Chief Justice specifically cited this test at paragraph 13 of the Supplementary Endorsement and applied it to the facts in the following paragraphs.

49. With respect to the first branch of this test, this Court has affirmed that (a) the "risk" must be real and substantial; (b) a "commercial" interest must be an interest that goes beyond harm to the private commercial interests of a person or business; and (c) the phrase "reasonable alternative measures" requires the court to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.[40]

50. The Chief Justice properly considered the legal test, factual matrix, legal position of the parties and considerations relevant to the application before him, and made the following findings

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[39] *Sierra Club*, at para. 54, BOA, Tab 1.
[40] *GasTOPS Ltd. v Forsyth*, 2011 ONCA 186 ("***GasTOPS***"), at para 11, BOA, Tab 11.

in the Supplementary Endorsement:

(a) At paragraph 18, the Chief Justice identifies that the risk in disclosing the Exhibits is "real and substantial", could be detrimental to any potential restructuring of Laurentian, and imposes a serious risk to the future viability of Laurentian;

(b) At paragraph 20, the Chief Justice identifies that the "commercial" interest related to the Exhibits transcends the direct commercial interests of Laurentian and involves the "entire [Laurentian] community, including the faculty, students, employees, third party suppliers, and the City of Greater Sudbury and the surrounding area." In this regard, the Chief Justice finds that it is of "paramount importance" to all of these groups that all efforts to restructure Laurentian be explored and, therefore, it is necessary to maintain the confidentiality of the Exhibits; and

(c) At paragraph 21, the Chief Justice finds that there is no reasonable alternative to the Sealing Order given that the parties are involved in a mediation conducted by Justice Dunphy and that negotiations may be or will shortly be at a sensitive stage and that the mediation could be derailed by the release of the Exhibits.

51. With respect to the second branch of the *Sierra Club* test, the salutary effects must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which in turn is connected to the principle of open and accessible court proceedings.[41]

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[41] *GasTOPS*, at para 12, BOA, Tab 11.

52. The Moving Parties incorrectly submit that the Chief Justice failed to apply this balancing test contemplated by the second branch of the *Sierra Club* test and focused solely on the "important commercial interest" element of the first branch of the test. This is wrong. The Chief Justice did conduct this balancing exercise and expressly states at paragraph 24 of the Supplementary Endorsement that, based on the evidence, the salutary effects of the Sealing Order outweighed the deleterious effects which "includes the public interest in accessing the Exhibits."

53. It is settled law that the purpose of the CCAA is to avoid the "devastating social and economic effects of commercial bankruptcies" and "permits the debtor to continue to carry on business and allows the court to preserve the status quo while "attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all"."[42] There is obviously public interest in the CCAA being utilized in accordance with its purpose.

54. Given the Chief Justice's finding at paragraph 20 of the Supplementary Endorsement that it is of "paramount importance" to the entire Laurentian community that the restructuring be explored and that it could not do so if the Exhibits were not sealed, it is clear that his Honour considered the salutary effects of the restructuring process under the CCAA to have outweighed the public interest in accessing the Exhibits.

55. The Chief Justice was also not silent as to this balancing of interests. At paragraphs 63-64 of his Honour's endorsement at the Initial Order hearing (at which the Sealing Order was initially granted), the Chief Justice expressly found that Laurentian's stakeholders may react in such a way that jeopardizes the viability of the Applicant's restructuring and "**[a]s such**, the salutary effects

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[42] *US Steel*, at para 47, BOA, Tab 9.

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." This balancing exercise was clearly performed by the Chief Justice and his Honour properly applied the *Sierra Club* test. There was no error of law.

56. Finally, the Moving Parties argue in their motion materials that there was no evidentiary support for these conclusions. This is also wrong. This same argument was raised before the Chief Justice and dismissed. The Haché Affidavit specifically identifies that Laurentian was engaged in communications with the Ministry and other stakeholders regarding its financial affairs, disclosed Laurentian's financial position and the liquidity crisis it currently faces, and attached the Exhibits for the Chief Justice to review and consider after taking into consideration the interest of all stakeholders in the CCAA. Given the Chief Justice's uniquely positioned expertise in CCAA matters, after having read the Haché Affidavit and considering Laurentian's stakeholders, the Chief Justice determined, based on the only evidence before the Court, that the Sealing Order was appropriate.

(ii) The Moving Parties' Argument Regarding the Application of Sierra Club is Wrong and Inconsistent

57. The Moving Parties incorrectly submit that the Chief Justice erred by applying the *Sierra Club* test to withhold documents from the litigants in addition to the public more generally, because *Sierra Club* was a case concerning public access to court records only. CCAA judges routinely apply the *Sierra Club* test to restrict access to certain confidential documents from other stakeholders in CCAA proceedings.[43] This often occurs where court approval is sought of extraordinary agreements entered into by a debtor company that are outside of the ordinary course

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[43] For example, see *Essar Steel Algoma Inc., Re.*, 2015 ONSC 7656, at paras. 20-25, BOA, Tab 12.

of its business, and the disclosure of such information could be prejudicial to the applicant, the counterparty or certain of the applicant's stakeholders.

58. Furthermore, the Moving Parties' submission is fundamentally inconsistent. On the one hand, it asserts that the Chief Justice erred by failing to apply the balancing test required by the second branch of the *Sierra Club* test, but on the other hand, argues that the *Sierra Club* test is inapplicable in its entirety without offering any alternative test. Such a submission is devoid of merit, inconsistent with CCAA precedent, and ought to be dismissed.

H. The Proposed Appeal is not Significant to the Action

59. The final element of the test for leave to appeal is whether the proposed appeal raises issues of significance to the parties in the action.

60. Many decisions that an unsuccessful party sees fit to appeal are of significance to the CCAA proceeding and the parties thereto. However, as held by this Court in *Nortel*, this factor alone is insufficient to warrant granting leave because "to perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action."[44]

61. This is consistent with Justice Blair's decision in *Business Development Bank of Canada v Pine Tree Resorts Inc.*, where this Court noted that if this element were to prevail, there would be an appeal in almost every case.[45]

62. However, even if this element was dispositive on its own (which it is not), the Moving Parties have failed to establish that setting aside the Sealing Order is of particular significance to

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[44] *Nortel*, at para 95, BOA, Tab 2.
[45] *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282, at para 30, BOA, Tab 13.

this CCAA proceeding. The only evidence before the Court is the uncontroverted Haché Affidavit, which was sufficient for Chief Justice Morawetz to determine, after applying the *Sierra Club* test, that the Sealing Order was necessary to effect a restructuring of Laurentian through this proceeding.

63. The Moving Parties' primary argument is that the mediation is proceeding unfairly because Laurentian has a full record whereas the Moving Parties have an incomplete one. However, this is not unique. No negotiating field is perfectly flat, and this is almost always the case in a CCAA mediation where stakeholders are required to make decisions with the best information available to them. In any event, given the summary processes utilized in CCAA proceedings, Laurentian does not have access to all of the potentially relevant documents pertaining to the Moving Parties nor does it expect that the Moving Parties will undertake a discovery exercise to disclose all relevant documents prior to engaging in the CCAA mediation.

64. Furthermore, the Moving Parties' bald assertion that Laurentian may be breaching its duty to bargain in good faith by withholding relevant information about the positions of the Ontario Government during their collective bargaining is absurd and was not raised in the Court below. There is no evidence of any such breach or that Laurentian has not complied with its obligations to disclose whatever information is necessary to comply with its duties.

65. To the extent that the Moving Parties wanted to establish that Laurentian has breached (or will breach without disclosing the Exhibits) its duty to bargain in good faith as a basis to oppose the Sealing Order, they ought to have sought to cross-examine Dr. Haché and obtain whatever additional information they required to establish their case prior to the comeback hearing. Dr. Haché explains in his affidavit that, in addition to the Exhibits, he engaged in a number of

discussions with the Ministry to discuss a potential restructuring and Laurentian's financial situation[46], yet the Moving Parties did not take (and still have not taken) any steps to obtain the details of those discussions from Dr. Haché prior to opposing the Sealing Order or engaging in mediation. Although the Moving Parties now assert that they require the details of those discussions and the Exhibits to be able to mediate on a full evidentiary record, that is inconsistent with their past conduct and a leave motion is not the proper forum to be raising this issue for the first time without a proper evidentiary record.

PART IV - RELIEF SOUGHT

66. For all of the foregoing reasons, the Monitor requests that leave to appeal the Sealing Order be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of March, 2021.

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[46] Haché Affidavit, Motion Record, Tab 13, pp. 261-263, at paras. 284-290.

SCHEDULE "A" – LIST OF AUTHORITIES

1. *9354-9186 Québec inc. v. Callidus Capital Corp.*,2020 SCC 10
2. *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282
3. *Canadian Metropolitan Properties Corp. v Libin Holdings Ltd.*, 2009 BCCA 40
4. *Essar Steel Algoma Inc., Re.*, 2015 ONSC 7656
5. *Essar Steel Algoma Inc., Re*, 2017 ONCA 478
6. *Fairview Donut Inc. v TDL Group Corp.*, 2010 ONSC 789
7. *GasTOPS Ltd. v Forsyth*, 2011 ONCA 186
8. *Nortel Networks Corp., Re*, 2016 ONCA 332
9. *Re Ravelston Corp.*, 2007 ONCA 268
10. *Re Stelco Inc.*, 2005 CarswellOnt 6818, 15 C.B.R. (5th) 307 (Ont. C.A.)
11. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
12. *Statoil Canada Ltd. (Arrangement relatif à)*, 2012 QCCA 665
13. *U.S. Steel Canada Inc.*, Re, 2016 ONCA 662

SCHEDULE "B" – RELEVANT STATUTES

***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 of Appeal File No. M52287
Court File No. CV-21-656040-00CL

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

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