Court of Appeal File No. M52287

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 ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

FACTUM OF THE RESPONDING PARTY, LAURENTIAN UNIVERSITY OF SUDBURY
(Motion for Leave to Appeal Confidentiality Order)

March 17, 2021

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ONTARIO
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PART I - OVERVIEW STATEMENT

1. The moving parties seek leave to appeal from an order of Chief Justice Morawetz, the supervising judge of the application brought by Laurentian University of Sudbury ("**Laurentian**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**"). In his order, Morawetz C.J. ordered that two letters between Laurentian and the Ministry of Colleges and Universities (the "**Ministry**") be sealed pending further order of the court.

2. The moving parties cannot satisfy the test for leave to appeal. Leave to appeal from the order of a CCAA judge will only be granted sparingly. The decision below was a highly discretionary decision. Morawetz C.J. applied the correct test for a sealing order, and gave cogent, fact-specific reasons for why it was appropriate to grant the sealing order in this case.

3. This motion for leave to appeal should be dismissed so that Laurentian can return its focus solely to the CCAA proceeding, with the intense time pressures that exist to work out a judicially-mediated resolution of several key issues before April 30, 2021. Failure to do so would be catastrophic to Laurentian and all of its stakeholders.

PART II - STATEMENT OF THE FACTS

4. Pursuant to the direction of Justice Hoy at a case conference heard on March 12, 2021, the parties are filing their factums on the motion for leave to appeal with the expectation that they will also be used on the appeal should leave be granted, as supplemented by 10-page supplementary submissions, if necessary.

Laurentian and its Critical Financial Situation

5. Laurentian is a publicly funded, bilingual and tricultural postsecondary institution in Sudbury, Ontario. Since inception, Laurentian has provided higher education to the community of Sudbury and Northern Ontario at large and is an integral part of the economic fabric of the Northern Ontario community.[1]

6. As a result of many years of recurring operational deficits in the millions of dollars, and notwithstanding Laurentian's recent efforts to improve its financial stability, Laurentian is insolvent.[2]

7. Laurentian has sought the protection of the Court under the CCAA so that it can financially and operationally restructure itself in order to emerge as a financially sustainable university for the benefit of all of its stakeholders. Laurentian first appeared before the Court seeking this protection on an *ex parte* basis on February 1, 2021.[3]

8. Laurentian's application for relief was supported by a 110-page, 360-paragraph affidavit from Dr. Robert Haché. Dr. Haché is the President and Vice-Chancellor of Laurentian and a member of its Board of Governors (the "**Board**").[4]

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[1] Endorsement of Morawetz C.J. dated February 1, 2021 (the "**February 1 Endorsement**") at para. 2, Motion Record of OCUFA ("**MR**"), Tab 4, p. 48.
[2] February 1 Endorsement at para. 3, MR, Tab 4, p. 52.
[3] February 1 Endorsement at para. 4, MR, Tab 4, p. 48.
[4] Affidavit of Dr. Robert Haché sworn January 30, 2021 [*Haché Affidavit*] at para. 1, MR, Tab 13, p. 179.

9. Absent the relief granted in the CCAA proceeding, Laurentian would have run out of cash to meet payroll in February.[5]

10. Laurentian has a number of structural issues that are causing financial challenges and that need to be resolved to ensure long-term stability, including, among other factors:

(a) The terms of its collective agreement with its faculty are above market in several respects, and that issue is exacerbated by the tenuous labour relationship between Laurentian and the Laurentian University Faculty Association ("**LUFA**")[6];

(b) Operationally, the structure of the academic programming offered by Laurentian and the distribution of enrollment among the programs offered is flawed and must be addressed[7]; and

(c) With its current cost structure, it costs more for Laurentian to educate each student than the average for all Ontario universities by approximately $2,000 per student, per year.[8]

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

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[5] Report of the Proposed Monitor dated January 30, 2021 at para. 165, MR, Tab 11, p. 146.
[6] *Haché Affidavit* at para. 138, MR, Tab 13, pgs. 217-219.
[7] *Haché Affidavit* at paras. 12-13, MR, Tab 13, pgs. 182-183.
[8] This figure includes the Federated Universities, as described in the *Haché Affidavit*; *Haché Affidavit* at para. 16, MR, Tab 13, p. 184.

The Confidential Letters

12. In his affidavit in a section entitled "Discussions with the Provincial Government", Dr. Haché described the communications that had taken place between Laurentian and the Ministry, which is the lead ministry for the Provincial Government in this matter. Dr. Haché described how Laurentian had been "completely transparent with the Ministry regarding the financial challenges" that Laurentian faces and the outcome that would result if the efforts undertaken by Laurentian could not achieve the required results.[9]

13. Dr. Haché stated that he had been in frequent communication in the weeks and days leading up to the application, and that Laurentian's external advisors had joined the discussions with the Ministry beginning in December 2020.[10]

14. Dr. Haché attached two letters to his affidavit in this section. First, he attached Confidential Exhibit "EEE", a letter from the Ministry to Laurentian dated January 21, 2021, and second, he attached Confidential Exhibit "FFF", a responding letter from Laurentian to the Ministry dated January 25, 2021. It is these two letters (the "**Confidential Letters**") that are the subject of this motion for leave to appeal.[11]

15. In its Notice of Application below, Laurentian sought, "a sealing order in respect of Confidential Exhibits "EEE" and "FFF" to the Affidavit of Robert Haché sworn January 30, 2021."[12]

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[9] *Haché Affidavit* at paras. 284-291, MR, Tab 13, pgs. 262-263.
[10] *Ibid*.
[11] February 1 Endorsement at para. 62, MR, Tab 4, p. 57.
[12] *Ibid*.

16. Jurisdiction to grant a sealing order in CCAA proceedings comes from two sources. First, s. 137(2) of the *Courts of Justice Act*[13] grants the court with the power to "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 exercising discretion pursuant to this section, courts must consider the test laid out by the Supreme Court of Canada in *Sierra Club*.[14]

17. CCAA judges also have broad jurisdiction pursuant to s. 11 of the CCAA, which grants the power to "make any order that [the court] considers appropriate in the circumstances." In exercising this broad jurisdiction, CCAA judges must consider and balance the interests of the various stakeholders in a CCAA proceeding, but will be granted deference as they determine what is "appropriate in the circumstances."[15]

The Initial Order

18. Morawetz C.J. granted Laurentian's application and issued an Initial Order dated February 1, 2021 (the "**Initial Order**").[16]

19. In his reasons for granting that order, Morawetz C.J. reached the following conclusions:

    (a) Laurentian is plainly insolvent and faces a severe liquidity crisis;[17]

    (b) The CCAA applies to Laurentian notwithstanding its status as a not-for-profit, non-share capital corporation;[18] and

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[13] R.S.O. 1990, c. C.43.
[14] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*], Book of Authorities of the Responding Party, Laurentian University of Sudbury ("**LU BoA**"), Tab 1.
[15] R.S.C., 1985, c. C-36, s. 11 [*CCAA*].
[16] Initial Order dated February 1, 2021 (the "**Initial Order**"), MR, Tab 3.
[17] February 1 Endorsement at para. 33, MR, Tab 13, p. 52.
[18] February 1 Endorsement at para. 29, MR, Tab 13, p. 51.

(c) A stay of proceedings against Laurentian was necessary to give it the breathing room necessary to financially and operationally restructure itself, as doing so furthered the primary purpose of the CCAA, being the successful restructuring of an insolvent company.[19]

20. Morawetz C.J. also addressed the request for the sealing order at paragraphs 60-64 of his endorsement. After citing s. 137 of the *Courts of Justice Act* and the *Sierra Club* test, Morawetz C.J. held that the Confidential Letters should be sealed, reasoning:[20]

> 62. …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.
>
> 63. 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.
>
> 64. I have reviewed the Confidential Exhibits and I accept the submissions of the Applicant and grant the sealing request.

21. Accordingly, the Initial Order contained the following sealing provision:[21]

> **SEALING PROVISION**
>
> 44. **THIS COURT ORDERS** that Confidential Exhibits **"EEE"** and **"FFF"** of the Haché Affidavit are hereby sealed pending further order of the Court, and shall not form part of the public record.

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[19] February 1 Endorsement at paras. 35-43, MR, Tab 13, pgs. 52-54.
[20] February 1 Endorsement at paras. 61-62, MR, Tab 13, p. 57.
[21] Initial Order at para. 44, MR, Tab 3, p. 44.

22. As is standard in CCAA proceedings, the Initial Order provided that a comeback hearing would be heard on notice so that interested parties could challenge any provisions of the Initial Order, if desired. Morawetz C.J. ordered that the comeback hearing was to be held on February 10, 2021 (the "**Comeback Hearing**").[22]

The Mediator Appointment Order

23. Prior to the Comeback Hearing, given the urgency with which the key restructuring milestones had to be achieved prior to April 30, 2021, there was a second appearance before Morawetz C.J. on February 5, 2021. Counsel for the Laurentian University Faculty Association (defined above as "LUFA") appeared at that hearing, together with Laurentian and the Monitor.

24. At this appearance, Morawetz C.J. appointed the Honourable Justice Sean F. Dunphy as the Court-Appointed Mediator. All parties present supported the appointment of Dunphy J. as mediator, and all agreed to the form of order for such appointment (the "**Mediator Appointment Order**").[23]

25. The Mediator Appointment Order sets out the "**Mediation Objectives**", which must be accomplished by April 30, 2021 for Laurentian to have a chance to successfully restructure:[24] (a) the review and restructuring of Laurentian's existing academic programs [a matter involving the Senate of Laurentian]; (b) the review and restructuring of the faculty necessary to deliver Laurentian's restructured academic programs; (c) a new collective

[22] February 1 Endorsement at para. 71, MR, Tab 4, p. 58.
[23] Mediator Appointment Order dated February 5, 2021, MR, Tab 5.
[24] Mediator Appointment Order, MR, Tab 5, p. 61.

agreement between Laurentian and LUFA, including resolving all outstanding grievances [of which there are more than 100]; (d) the review and restructuring of Laurentian's Federated Universities' model [involving three separate federated universities]; (e) the framework for Laurentian's restructuring and future operations [a restructuring of the entire university's operations]; and (f) any other matters that may be referred to the Mediator.

26. In order to try to accomplish the Mediation Objectives, arrangements were made to relieve Dunphy J. from all other judicial responsibilities until April 30 so that he could be fully devoted to working with Laurentian and the other mediation parties in this proceeding.

27. With respect to the intense timeframe for the mediation, Morawetz C.J. held that: "It is both necessary and important that the Applicant should focus on its proposed restructuring. If this restructuring is to be successful, it will have to be largely completed by the end of April, 2021."[25]

The Comeback Hearing

28. The Comeback Hearing proceeded on February 10, 2021.

29. Other than the First Report of the Monitor dated February 7, 2021, no party filed any additional materials for the Comeback Hearing, nor did any party cross-examine Dr. Haché on his affidavit.[26] Therefore the record before Morawetz C.J. at the Comeback Hearing

[25] Endorsement of Morawetz C.J. dated February 12, 2021 (the "**February 12 Endorsement**") at para. 59, MR, Tab 9, pgs. 105-106.
[26] February 12 Endorsement at para. 39, MR, Tab 9, p. 103. Some parties reserved the right to cross-examine Dr. Haché at a later date, although the question of whether they have this right was reserved to a later time should the need arise, as per February 12 Endorsement at para 43, MR, Tab 9.

was identical to the record before him when he granted the Initial Order (consisting of Laurentian's Application Record and the Monitor's Pre-Filing Report), other than the Monitor's First Report.

30. Each of the parties that now seek leave to appeal from the sealing order were represented by counsel at the Comeback Hearing and made submissions.

31. Morawetz C.J. recorded the oral submissions made to him regarding the sealing order as follows:[27]

> 42. Counsel also raised concerns with respect to the Sealing Order which formed part of the Initial Order. Counsel submitted that the relevant portions of the Haché Affidavit (paragraphs 284-291) did not establish the basis for a Sealing Order. This submission was echoed by a number of other counsel, including for the Ontario Confederation of University Faculty Associations, the Northern Ontario School of Medicine, the Laurentian University Staff Union, and CUPE.

32. In his February 12, 2021 endorsement, Morawetz C.J. wrote that he would take additional time to consider the challenges to the sealing order.[28] He directed that the sealing order would remain in effect pending a supplementary endorsement addressing the issue. The Amended and Restated Initial Order issued February 11, 2021 therefore maintained the sealing order from the Initial Order, although it had been renumbered as paragraph 57.[29]

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[27] February 12 Endorsement at para. 42, MR, Tab 9, p. 104.
[28] February 12 Endorsement at para. 84, MR, Tab 9, p. 109.
[29] Amended and Restated Initial Order dated February 11, 2021 at para. 57, MR, Tab 8, p. 89.

The Supplementary Endorsement

33. Morawetz C.J. released his supplementary endorsement addressing only the sealing order provision on February 26, 2021 (the "**Supplementary Endorsement**"). In it, he again referred to the challenges that had been made to the sealing order in oral submissions:[30]

> 7. The essence of the submissions in opposition to the Sealing Order was to the effect that there was no evidence that would suggest that the Sealing Order is necessary to protect a valid commercial interest. Therefore, there was no evidentiary basis on which to grant the Sealing Order.
>
> 8. Mr. Gold, on behalf of OCUFA, took the position that the Sealing Order is not justified and is speculative in nature and it would be a dangerous precedent to seal the documents, just on the basis that they are not helpful to [Laurentian's] position.

34. Morawetz C.J. noted that he had "reviewed the Exhibits in detail." He found that "the disclosure of the Exhibits, at this time, could be detrimental to any potential restructuring of Laurentian. As such, the risk in disclosing the Exhibits is real and substantial and imposes a serious risk to the future viability of Laurentian."[31]

35. In response to the submission of the Ontario Confederation of University Faculty Association ("**OCUFA**") that it would set a dangerous precedent to seal documents just because (in OCUFA's speculative and unsubstantiated view) they are "not helpful to Laurentian's position", Morawetz C.J. found that "it is speculative to conclude that the Exhibits contain information that is not helpful to Laurentian's position."[32]

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[30] Supplementary Endorsement at paras. 7-8, MR, Tab 10, p. 113.
[31] Supplementary Endorsement at para. 19, MR, Tab 10, p. 114.
[32] Supplementary Endorsement at para. 19, MR, Tab 10, p. 114.

36. Morawetz C.J. expressed his view that disclosure of the Confidential Letters could undermine the entirety of the CCAA proceedings:[33]

> It is of paramount importance to all of these groups that all efforts to restructure [Laurentian] be explored. In order to do so, it is necessary to maintain the confidentiality of the Exhibits. The disclosure of the Exhibits, at this time, could undermine the restructuring efforts being undertaken by [Laurentian].

The Moving Parties

37. The challenge to the sealing order of Morawetz C.J. is being led by OCUFA. OCUFA is supported in its motion for leave to appeal by LUFA and the Canadian Union of Public Employees ("**CUPE**", and together with OCUFA and LUFA, the "**Moving Parties**").

38. OCUFA has no direct stake in the matters at issue in the CCAA proceeding and is not a creditor of Laurentian. CUPE represents approximately 305 graduate teaching assistants who have a collective agreement with Laurentian. Laurentian has not sought a renegotiation of its collective agreement with CUPE and CUPE is not a party to the judicial mediation in these proceedings.[34]

39. LUFA and Laurentian are parties to a collective agreement with a three-year term that expired on June 30, 2020. Laurentian and LUFA have been engaged in bargaining with respect to a new collective bargaining agreement, and that is a key aspect of the future sustainability of Laurentian to be addressed in mediation, in accordance with the Mediator Appointment Order.[35]

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[33] Supplementary Endorsement at para. 20, MR, Tab 10, pgs. 114-115.
[34] *Haché Affidavit* at paras. 152-153, MR, Tab 13, p. 224.
[35] *Haché Affidavit* at paras. 126-127, 325, MR, Tab 13, pgs. 213-214, 277.

PART III - THE RESPONDING PARTY'S POSITION ON THE ISSUES

The Framework for Granting Leave to Appeal in this Case

40. Section 13 of the CCAA requires any person dissatisfied with an order or decision made under that statute to obtain leave to appeal:[36]

> **Leave to appeal**
>
> 13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

41. To further the goal of enabling an insolvent company to take the necessary steps to deal with creditors in order to continue to carry on business, CCAA proceedings seek to resolve matters and finalize the debtor's affairs without undue delay. The requirement for leave to appeal similarly reinforces the finality of orders made under a CCAA proceeding and prevents continuing litigation where there are no serious and arguable grounds of significance to the parties.[37]

42. There is a clear intention of Parliament to restrict appeal rights having regard to the nature and object of CCAA proceedings. An appeal court should be cautious about intervening in the CCAA process, especially at an early stage.[38]

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[36] *CCAA*, s. 13.
[37] *Hurricane Hydrocarbons Ltd. v. Komarnicki*, 2007 ABCA 361 at para. 14, LU BoA, Tab 2, as cited in *Essar Steel Algoma Inc., Re*, 2016 ONCA 138 at para. 20, LU BoA, Tab 3.
[38] *Algoma Steel Inc., Re*, 2001 CanLII 5433 (Ont. C.A.) at para. 8, LU BoA, Tab 4; *Newfoundland and Labrador c. AbitibiBowater*, 2010 QCCA 965 at para. 26, LU BoA, Tab 5.

43. Leave to appeal is to be granted sparingly in CCAA proceedings. This is because of the "real time" dynamic of CCAA matters and the discretionary character underlying many of the orders made by supervising judges in such proceedings. A high degree of deference is to be accorded to a supervising judge's decisions, and appellate courts will not exercise their own discretion in place of that already exercised by the court below.[39]

44. In considering whether to grant leave, the court will consider whether:[40]

(a) The proposed appeal is *prima facie* meritorious or frivolous;

(b) The point on the proposed appeal is of significance to the practice;

(c) The point on the proposed appeal is of significance to the proceeding; and

(d) Whether the proposed appeal will unduly hinder the progress of the action.

45. In assessing these factors, consideration should also be given to the standard of review. Having regard to the commercial nature of the insolvency proceedings which often require quick decisions, and to the intimate knowledge of a supervising judge in overseeing a CCAA proceeding, appellate courts have expressed a reluctance to interfere, except in clear cases.[41]

46. None of the four factors weigh in favour of the Moving Parties in this case.

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[39] *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 at para. 20, LU BoA, Tab 6; *Essar Steel Algoma Inc., Re*, 2017 ONCA 478 at para. 19, LU BoA, Tab 7.
[40] *Nortel Networks Corp. Re*, 2016 ONCA 332 at para. 34, LU BoA, Tab 8.
[41] *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266 at para. 14, LU BoA, Tab 9.

(a) The proposed appeal is not *prima facie* meritorious

47. In its factum, OCUFA has put forward four bases on which it argues that Morawetz C.J. committed errors of law in granting the sealing order: (i) failure to apply the balancing test set out in *Sierra Club*; (ii) *Sierra Club* was not a case where the litigants' access to confidential documents was restricted; (iii) the order was granted without evidentiary support; and (iv) there was no free-standing commercial interest and the commercial interest identified was overly restrictive in its application.

48. None of these grounds are *prima facie* meritorious, as addressed below.

(i) Application of the Sierra Club balancing test

49. OCUFA baldly states that Morawetz C.J. "did not apply the balancing test set out in *Sierra Club*."[42] This is plainly wrong.

50. Morawetz C.J. set out the two-part test to be applied as per *Sierra Club* at paragraph 13 of his Supplementary Endorsement, including whether:[43]

> (b) 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.

51. Morawetz C.J. applied this branch of the test at paragraph 24 of his Supplementary Endorsement, finding:[44]

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[42] Factum of the Moving Parties dated March 15, 2021 ("**Moving Parties' Factum**") at para. 40.
[43] Supplementary Endorsement at para. 13, MR, Tab 10, p. 113.
[44] Supplementary Endorsement at para. 24, MR, Tab 10, p. 115.

> 24. I am also satisfied, based on the evidence, that the salutary effects of the Sealing Order outweigh its deleterious effects, which in this context, includes the public interest in accessing the Exhibits. Thus, the second branch of the test is satisfied.

52. OCUFA is critical of Morawetz C.J. for not specifically adverting to the impact his ruling would have on the freedom of expression. This criticism is surprising, given that OCUFA filed no written materials on the Comeback Hearing, and that in oral argument it focused its opposition on two points: that the sealing order was not necessary to protect a valid commercial interest; and that it would set a dangerous precedent to seal the documents on the assumed and unsupported basis that they "are not helpful to [Laurentian's] position".[45]

53. Morawetz C.J. framed his reasons for decision in a way that explained to OCUFA, and those parties who supported its submissions, why its arguments were not persuasive. Even then, Morawetz C.J. did not ignore the second branch of the *Sierra Club* test, and expressly noted that this balancing test required a consideration of the freedom of expression.[46]

54. OCUFA seems to suggest that the failure to specifically refer to the *Charter* right of freedom of expression somehow creates an automatic need to reverse the decision below. This submission is in error for at least three reasons:

(a) Morawetz C.J. did refer to the right to freedom of expression, as it is included in the very test from *Sierra Club* that he replicated in his reasons. Morawetz C.J. then noted that he had applied that balancing test and considered the salutary effects and

[45] Supplementary Endorsement at paras. 7-8, MR, Tab 10, p. 113.
[46] Supplementary Endorsement at para. 13, MR, Tab 10, p. 113.

the deleterious effects of the order.[47] It is plainly wrong to state that this *Charter* right was not considered by Morawetz C.J.

(b) The decision cited by OCUFA in support of its argument, *Canadian Broadcasting Corporation v Ferrier*,[48] was very different from this case. *Ferrier* involved the death of an Indigenous man and allegations that members of the Thunder Bay Police Service were guilty of misconduct in relation to their investigation of his death. A decision maker at the Thunder Bay Police Service Board ordered that a hearing before the Board would be closed to the public. It was in this context that this Court quashed the decision ordering a closed hearing and required a reconsideration that would pay adequate attention to the s. 2(b) *Charter* right to freedom of expression. The case did not involve a sealing order at all, did not involve an insolvency, was a review from a tribunal decision, and involved shutting out the public from the entire proceeding. It is not applicable to the current case.

(c) Perhaps more helpful is the decision of Justice C. Campbell in *Hollinger Inc. (Re)*.[49] That dispute concerned the proposed time-limited sealing order of terms of two settlements reached in the context of a CCAA proceeding. Campbell J. granted the sealing order, and his decision was upheld on appeal to this Court. Neither court referred to the s. 2(b) *Charter* right of freedom of expression, other than stating the consideration of that right as part of the *Sierra Club* test, as Morawetz C.J. did in this case.

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[47] Supplementary Endorsement at para. 24, MR, Tab 10, p. 115.
[48] 2019 ONCA 1025 [*Ferrier*], LU BoA, Tab 10.
[49] 2011 ONSC 1205 [*Hollinger*], LU BoA, Tab 11; aff'd 2011 ONCA 579; leave to appeal ref'd 2012 CanLII 23665 (S.C.C.)., LU BoA, Tab 12.

55. OCUFA argues this point as if Morawetz C.J. had ordered that the CCAA proceeding was closed to the public in its entirety, trumpeting the importance of public access to the courts. Its arguments are wholly misplaced given the limited scope of the sealing order made below.

(ii) Sealing documents from the litigants themselves

56. OCUFA devotes a single paragraph in its factum to this argument.[50] It argues that in *Sierra Club* it was the public's access to certain documents that was being restricted, but the parties to the legal proceeding had full access to them. It argues that this somehow creates an error in the decision below, where access was restricted to "litigants themselves without consideration of the controlling factors set out by the Supreme Court of Canada in *Sierra Club*."[51]

57. It is indisputable that Morawetz C.J. set out the correct test from *Sierra Club* and referred to the "controlling factors" from that decision. To the extent that the point being made is that the Sealing Order restricted access to documents to litigants themselves, this is not a legal error. Many cases have relied on the *Sierra Club* test to restrict access to documents to litigants, often in situations concerning negotiations and/or settlements, such as the *Hollinger* case referred to above.[52]

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[50] Moving Parties' Factum at para. 45.
[51] Moving Parties' Factum at para. 45.
[52] See e.g. *Crystallex International Corp., Re*, 2019 ONSC 408 [Comm List],], LU BoA, Tab 13; *Middelkamp v Fraser Valley Real Estate Board*, 1992 CarswellBC 267 (C.A.), LU BoA, Tab 14.

(iii) Evidentiary support for the sealing order

58. OCUFA argues that Laurentian's claims of confidentiality were made in argument and without any evidentiary support at all.[53] OCUFA's argument completely ignores the context of this proceeding, and is the same argument that it made to Morawetz C.J., which he rejected.

59. Dr. Haché provided extensive evidence of the interests and stakeholders involved in this proceeding, and the context for the Confidential Letters. Morawetz C.J. summarized the evidence from Dr. Haché relevant to his determination of the sealing order at paragraph 15 of his Supplementary Endorsement.[54]

60. The harm to commercial interest identified by Laurentian was the risk that disclosure of the Confidential Letters would negatively impact the CCAA proceeding itself, and the ability of the university to restructure at all.

61. Morawetz C.J. was in the best position to review the Confidential Letters and determine whether their disclosure could be detrimental to the restructuring efforts. It was for Dr. Haché to provide evidence of the context of the exchange of the Confidential Letters, the goals of the CCAA process, and the various interests that are at stake. He did so. It would not have been appropriate for Dr. Haché to then give opinion evidence on what the impact of disclosure of the Confidential Letters would be to the restructuring proceedings. The CCAA supervising judge was within his jurisdiction and was entitled to take that evidence and consider what impact on the CCAA proceeding itself the disclosure of the Confidential

[53] Moving Parties' Factum at para. 46.
[54] Supplementary Endorsement at para. 15, MR, Tab 10, p. 114.

Letters would have. Morawetz C.J. did so, reviewing the Confidential Letters carefully and exercising his discretion to seal them, concluding that their disclosure at this time could undermine the restructuring efforts in their entirety.[55]

(iv) Identification of the commercial interest

62. Morawetz C.J. correctly set out the *Sierra Club* test, and noted that a "commercial" interest must be an interest that goes beyond harm to the private commercial interests of a person or business, and must be one that can be expressed in terms of a public interest in confidentiality.

63. In applying this test, Morawetz C.J. found:[56]

> … it seems to me that the "commercial" interest related to the Exhibits transcends the direct commercial interests of [Laurentian]. It involves the entire [Laurentian] community, including the faculty, students, employees, third-party suppliers, and the City of Greater Sudbury and the surrounding area. It is of paramount importance to all of these groups that all efforts to restructure [Laurentian] be explored. In order to do so, it is necessary to maintain the confidentiality of the Exhibits. The disclosure of the Exhibits, at this time, could undermine the restructuring efforts being undertaken by [Laurentian].

64. OCUFA criticizes Morawetz C.J. by arguing that he "selectively connected [the requirement to connect "commercial interest" to wider interests (and not merely private interests)] to interests of Laurentian within the mediation, and Sudbury outside the mediation, but did not include the interests of the bargaining parties inside the mediation or interests of parties in knowing the position" of the government.[57]

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[55] Supplementary Endorsement at para. 20, MR, Tab 10, pgs. 114-115.
[56] Supplementary Endorsement at para. 20, MR, Tab 10, pgs. 114-115.
[57] Moving Parties' Factum at para. 49.

65. This criticism is meritless.

66. Morawetz C.J. *did* include the faculty's interests in his considerations, explicitly naming the faculty as one of the stakeholders in the restructuring.[58] His Honour did not limit his considerations only to Laurentian's interests in the mediation.

67. In the end, the decision below involved a very high degree of discretion. Morawetz C.J. applied the correct legal test and it was his considered opinion that disclosure of the Confidential Letters at this time could jeopardize the entire CCAA restructuring effort. It is not for this Court to re-weigh the relevant considerations and second-guess Morawetz C.J.'s exercise of discretion.

68. For all of these reasons, the appeal is not *prima facie* meritorious.

(b) The points on the proposed appeal are not of significance to the practice

69. The decision below was highly fact-dependent and discretionary. It is very unlikely to be of significance or precedential value for other proceedings.

70. The premise underlying OCUFA's argument on this point – that it was denied access to documents it was otherwise entitled to because of their relevance – is faulty in multiple ways.

71. First, it must be remembered what the Confidential Letters are, and why they were included as exhibits on the application at all. They are private correspondence between Laurentian and the Ministry, exchanged in the ten days leading to the CCAA proceeding, that were

[58] Supplementary Endorsement at para. 5, MR, Tab 10, p. 112.

part of a course of communications that included "full transparency" from Laurentian to the Ministry.

72. Because the initial attendance in a CCAA proceeding is brought on an *ex parte* basis, the duty of full and frank disclosure compelled Laurentian to ensure that the supervising judge was aware of these communications. Other than references to the Confidential Letters as part of the discussions about the sealing order, Morawetz C.J. did not discuss them in his endorsements, and they were not specifically relied upon by him to grant any of the relief in the Initial Order.

73. There is no mechanism or process for any automatic exchange of documents between parties in a CCAA proceeding. This is not a standard civil action which would include an exchange of all relevant documents.

74. The supervising judge prevented disclosure of the Confidential Letters to give the parties the best opportunity to negotiate an outcome that will allow the university to continue in operation. The Moving Parties know of the existence of the Confidential Letters only because Laurentian was forthright with the Court. They never had a right to these communications to which they were not a party, and have lost nothing by virtue of the discretionary order below.

(c) The point on appeal is not of significance to this CCAA proceeding

75. Neither OCUFA nor CUPE are parties to the mediation. OCUFA is not even a creditor of Laurentian. While it may be true that they would like to know what is in the Confidential Letters, their contents are not of significance to those parties for this CCAA proceeding.

76. LUFA argues that not having access to the Confidential Letters creates an "uneven playing field" for the mediation.[59] That assertion is unfounded and disputed. Laurentian will know the content of its own correspondence with the Ministry, and LUFA will not. Laurentian's main objective in commencing a CCAA proceeding is to provide all stakeholders with the best opportunity for a successful restructuring, involving continuing operations of the university. There is nothing unfair or uneven about this. Laurentian will not have any correspondence that LUFA has exchanged with other stakeholders, including the benefit of any discussions that the Moving Parties may have had with the Ministry, for example.

77. The fact that Laurentian has exchanged communications with the Ministry and that LUFA does not know what was said is not prejudicial to LUFA. While it may like to know what has been communicated, that does not mean that it is entitled to the Confidential Letters.

78. The invocation of s. 2(d) of the *Charter* and the bald accusation of a potential violation of the duty to negotiate in good faith were not raised before Morawetz C.J. by the Moving Parties at the Comeback Hearing and should not be permitted in this Court. In any event, non-disclosure of the Confidential Letters at this time does not constitute a violation of the Moving Parties' rights as claimed.

(d) The appeal would unduly hinder the progress of the action

79. Justice Dunphy was appointed as Mediator by the Court and is devoted full-time to the mediation in this CCAA proceeding. Mediation sessions are taking place daily. Laurentian is in an urgent and financially dire situation and, with its advisors, needs to devote all of its

[59] Moving Parties' Factum at para. 33.

time and energy to the mediation sessions if it is to have the best opportunity for a restructuring.

80. If leave to appeal is granted, every minute devoted to an appeal is a minute lost to the CCAA process and mediation that will ultimately determine whether Laurentian's restructuring efforts will be successful.

81. The importance of keeping the parties focused on negotiations was acknowledged several times by Morawetz C.J., including by refusing OCUFA's suggestion that the stay of proceedings only be extended until February 26, 2021. Morawetz C.J. instead ordered the stay of proceedings extend to April 30, 2021, so that Laurentian and the Monitor do not have to divert precious resources away from the intensive mediation process in order to even attend in Court to seek a stay extension order.[60]

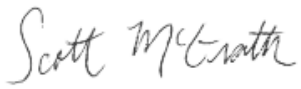
82. For all of these reasons, the Moving Parties have not satisfied the test for leave to appeal from a discretionary decision of a CCAA supervising judge, and their motion should be dismissed.

[60] February 12 Endorsement at para. 59, MR, Tab 8, pgs. 105-106.

PART IV - ORDER SOUGHT

83. Laurentian seeks an order dismissing the motion for leave to appeal, with costs.

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



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.
2. *Hurricane Hydrocarbons Ltd. v. Komarnicki*, 2007 ABCA 361.
3. *Essar Steel Algoma Inc., Re*, 2016 ONCA 138.
4. *Algoma Steel Inc., Re*, 2001 CanLII 5433 (Ont. C.A.).
5. *Newfoundland and Labrador c. AbitibiBowater*, 2010 QCCA 965.
6. *New Skeena Forest Products Inc., Re*, 2005 BCCA 192.
7. *Essar Steel Algoma Inc., Re*, 2017 ONCA 478.
8. *Nortel Networks Corp. Re*, 2016 ONCA 332.
9. *Calpine Canada Energy Ltd., Re*, 2007 ABCA 266.
10. *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025.
11. *Hollinger Inc., Re*, 2011 ONSC 1205.
12. *Hollinger Inc., Re*, 2011 ONCA 579.
13. *Crystallex International Corp., Re*, 2019 ONSC 408.
14. *Middelkamp v Fraser Valley Real Estate Board*, 1992 CarswellBC 267 (C.A.).

SCHEDULE "B"
RELEVANT STATUTES

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

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.

Leave to appeal

13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

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

Sealing documents

37(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 OF APPEAL FOR ONTARIO

FACTUM OF THE RESPONDING PARTY, LAURENTIAN UNIVERSITY OF SUDBURY

(Motion for Leave to Appeal Confidentiality Order)

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