CITATION: Laurentian University of Sudbury, 2021 ONSC 3885
COURT FILE NO.: CV-21-00656040-00CL
DATE: 2021-05-31

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor Ernst & Young Inc

Vern W. DaRe, for the DIP Lender

Aryo Shalviri and Jules Monteyne, for the Royal Bank of Canada

Stuart Brotman and Dylan Chochla, for the Toronto Dominion Bank

George Benchetrit, for the Bank of Montreal

Peter J. Osborne, for the Board of Governors

Joseph Bellissimo and Natalie Levine, for Huntington University

Andrew Hatnay, Demetrios Yiokaris, for Thorneloe University

Alex MacFarlane and Lydia Wakulowsky, for Northern Ontario School of Medicine

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General Association

Guneev Bhinder, for the Canada Foundation for Innovation

André Claude, for the University of Sudbury

Tracey Henry, for Laurentian University Staff Union (LUSU)

Charlie Sinclair, Counsel for Laurentian University Faculty Association (LUFA)

HEARD: May 28, 2021

ENDORSEMENT

[1] Laurentian University ("Laurentian" or the "Applicant") brings this motion seeking the following two orders:

(a) an Order appointing Mr. Louis (Lou) Pagnutti as Chief Redevelopment Officer ("CRO") of Laurentian and approving the terms of his engagement; and

(b) an Order approving the claims process proposed by the Applicant and the Monitor to identify the universe of potential claims that may exist against the Applicant, in order to allow the Applicant and the Monitor to address such claims in contemplation and formulation of a Plan of Compromise or Arrangement (the "Plan").

[2] The Applicant also requests an amendment to para. 36 of the Amended and Restated Initial Order to increase the maximum amount of fees and disbursements of the Board of Governors' (the "Board") independent counsel ("Board Counsel") that is permitted to be paid by the Applicant from $250,000, plus HST, to a maximum amount of $500,000, plus HST.

[3] The evidentiary basis for the requested relief is set out in the affidavit of Dr. Robert Haché, sworn May 21, 2021, and in the Fourth Report of the Monitor dated May 27, 2021.

Appointment of CRO

[4] The Applicant is of the view that the appointment of the CRO will minimize the disruption to the operations of the Applicant. The CRO will provide strategic guidance in assisting with the Applicant's restructuring and will also support the Applicant's senior leadership team, including the President and Vice-Chancellor.

[5] The Applicant is of the view that the CRO will provide a fresh perspective and assist the Applicant in moving to a financially sustainable and successful future.

[6] A proposed engagement letter indicates that the compensation to the CRO is at an hourly rate of $650 per hour (up to a maximum of 80 hours each month). There is no additional "success fee" component to the CRO's compensation.

[7] The Monitor has reviewed the proposed fees and disbursements set out in the CRO Engagement Letter and believes them to be fair and reasonable in the circumstances.

[8] The proposed appointment of the CRO is supported by the Laurentian University Faculty Association, Laurentian University Staff Union, the Board and the DIP Lender.

[9] The Monitor is also in support of the appointment of Mr. Pagnutti.

[10] The appointment of Mr. Pagnutti was opposed by University of Sudbury ("U Sudbury"). Counsel to U Sudbury indicated that there was a degree of disappointment that his client was not consulted with respect to the appointment of the CRO. He suggested that there should be further consultations and an opportunity provided to consider other individuals for the position, taking into account the bilingual and tricultural nature of Laurentian.

[11] I am not persuaded by the arguments put forth by U Sudbury. The Notice of Disclaimer with respect to U Sudbury is now final. In effect, U Sudbury is not part of the going forward plan of Laurentian. Consequently, the participation of U Sudbury in Phase 2 of the restructuring will be severely limited. The support for the appointment of Mr. Pagnutti is widespread and, in my view, this appointment should take effect as soon as possible.

[12] I am satisfied that the arrangements set out in the CRO Engagement Letter are fair and reasonable in the circumstances and an Order will issue appointing Mr. Pagnutti as CRO of Laurentian and approving the terms of his engagement.

Increase of Fees to Board Counsel

[13] The request to increase the maximum amount of fees and disbursements of Board Counsel is not opposed. I accept that Board Counsel has been busy throughout the CCAA proceeding to address and advise on issues relevant to the Board. As the proposed claims process commences, it is expected that the Board will continue to require the advice of Board Counsel, necessitating an increase of the fees incurred by Board Counsel.

[14] In my view, it is appropriate that para. 36 of the Amended and Restated Initial Order be amended to increase the maximum amount of fees and disbursements of Board Counsel that is permitted to be paid by the Applicant from $250,000, plus HST, to a maximum amount of $500,000.

Claims Process

[15] The Applicant seeks approval to undertake a process to identify, determine and resolve certain claims of its creditors (the "Claims Process"). The Claims Process will be conducted in order to identify and determine for voting and/or distribution purposes the potential universe of claims that may exist against Laurentian, to allow Laurentian to deal with such claims and formulate a Plan.

[16] The Applicant contends that the proposal is a fair, efficient, and reasonable process for the determination and resolution of all claims against the Applicant and its Directors and Officers.

[17] The Claims Process has been prepared by the Applicant, in consultation with the Monitor.

[18] The Monitor supports the proposed Claims Process Order.

[19] The DIP Lender, LUFA and LUSU are supportive of the Claims Process Order.

[20] In the Fourth Report, the Monitor states that the Applicant and the Monitor provided a draft of the Claims Process Order to the Toronto Dominion Bank, ("TD Bank"), Royal Bank of Canada and Bank of Montreal (collectively, the "Pre-filing Lenders"). The Pre-Filing Lenders are collectively owed in the range of $130 million.

[21] The Monitor also reports that the Applicant and the Monitor have engaged in multiple discussions with the Pre-filing Lenders in respect of the Claims Process and that the Monitor has agreed to provide weekly updates to the Pre-filing Lenders with respect to claims received and the status of the Monitor's review of claims.

[22] TD Bank has proposed an amendment to the Claims Process Order. TD Bank proposes that the Monitor shall consult with the Pre-filing Lenders and any other stakeholders as the Monitor deems appropriate (the "Consultation Parties") with respect to each claim in excess of $5 million which the Monitor proposes to accept and to provide the Consultation Parties with not less than 10 days' prior written notice of the intent to accept such claim. Any Consultation Party who objects to the acceptance of such claim by the Monitor may then apply to the court within 10 days for a review of the proposed acceptance.

[23] The Monitor has noted a number of areas of concern with respect to the TD Bank proposal:

(a) The proposed amendment will lead to confusion.

(b) The proposal effectively removes the role of a Claims Officer for any claim over $5 million. If any Consultation Party opposes the Monitor's acceptance of a claim over $5 million, the result is that the claim will be directly referred to the court for determination rather than a Claims Officer. The result will be increased litigation and increased cost versus the expeditious summary process that is typical in a CCAA claims process.

(c) The proposal eliminates the ability of the Monitor to negotiate and settle claims in the ordinary course.

(d) If the settlement of a claim is opposed and the Monitor's assessment of the claim is required to be justified in court, the Monitor will either have to disclose its assessment of its strengths and weaknesses of the claim and the litigation risk associated with the claim or a cumbersome process will need to be developed where the Monitor can share its assessment with the court under seal.

(e) The Monitor is not in a position to determine which stakeholders should be Consultation Parties.

(f) In the event that a material number of claims over $5 million are opposed by any one of the Consultation Parties, the process to obtain a determination

of such claims could result in significant delay to the resolution of such claims.

(g) The above factors are likely to make the Claims Process more expensive and inefficient.

[24] TD Bank supports the making of a Claims Process Order at this time but submits that, in the circumstances, the process should contemplate disclosure and consultation by the Monitor with the Pre-filing Lenders.

[25] TD Bank submits that Laurentian and the Monitor have acknowledged that material claims will be submitted, some of which claims are unliquidated and/or contingent and may be subject to a bona fide dispute - both with respect to liability and quantum. The consensual resolution of such claims will bear directly on the likelihood of success of any Plan.

[26] TD Bank further submits that its proposed change is reasonable and appropriate in the circumstances and will create a fair and transparent process which furthers the remedial objectives of the CCAA. Further, this proposal does not give a consent or veto right to any creditor with respect to acceptance or compromise of any claim.

[27] Based upon information available to TD Bank at the time its factum was issued, the total quantum of claims is unknown but can reasonably be expected to include: (a) the claims of the Pre-filing Lenders; (b) claims of current and former employees; (c) claims of the federated universities arising from the termination and disclaimer of their agreements with Laurentian; (d) potential claims arising from the pension-related claim; and (e) claims of other creditors with pre-filing and restructuring claims.

[28] TD Bank anticipates many of these claims will be for significant amounts, will be complex, and will engage multiple legal and valuation issues. The acceptance or settlement of these claims will bear directly on the entitlements of the creditors under and in respect of any Plan.

[29] TD Bank submits that the transparency and consultation that it seeks to import into the Claims Process will enhance the likelihood of a viable Plan.

Analysis

[30] The broad remedial objectives of the CCAA are to facilitate a restructuring rather than a liquidation of assets. The objective of a restructuring will most likely be achieved where stakeholders are treated as advantageously and fairly as the circumstances permit (see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 at paras. 15-19, 56-66 and 70 ("*Century Services*")).

[31] A claims process is an essential component of any plan and it is necessary and appropriate that the claims process furthers the remedial objective of the CCAA (*Timminco Limited, Re*, 2014 ONSC 3393 at para. 41).

[32] A claims process order must be carefully drafted so as to ensure that the process by which claims are determined is both fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims (*Steels Industrial Products Ltd. (Re)*, 2012 BCSC 1501 at para. 38 ("*Steels*")).

[33] TD Bank submits that its proposal is consistent with the entitlements of creditors under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") to review proofs of claim filed by others and to seek an order from the court expunging or reducing a proof of claim accepted by a trustee. TD Bank points out that such entitlements are available to creditors under the BIA in both bankruptcy and commercial proposal proceedings and to the extent possible, aspects of insolvency law that are common to the BIA and CCAA should be harmonized. The examples provided by TD Bank are BIA, ss. 26, 37, 66, 126 and 135(5); see also *Century Services* at para. 24.

[34] TD Bank references the following cases as examples where the disclosure and involvement of certain parties has been incorporated into the claims process. These cases are *Crystallex International Corp., Re*, 2012 ONSC 6812; *Target Canada Co*. (11 June 2015), Toronto, CV-15-10832-00CL (Ont. S.C.) at para. 30; *Carillion Canada Holdings Inc.* (6 July 2018), Toronto, CV-18-590812-00CL (Ont. S.C.); and *Steels* at para. 13.

[35] TD Bank acknowledges there are no set rules in the CCAA which govern the Claims Process. I agree with this statement.

[36] The facts underlining each of the cases relied upon by TD Bank needs to be taken into account. *Crystallex* had been a bitterly fought proceeding extending nearly 10 years. *Target Canada* was a liquidation proceeding from the outset. *Carillion* was also a liquidating CCAA process, as was *Steels.* Suffice to say, there are considerable differences in how a supervising judge will approach a liquidating CCAA in contrast to a CCAA proceeding leading to an operational restructuring. For this reason, the cases referred to by TD Bank are of limited assistance.

[37] In an operational restructuring, it is necessary to consider the timelines. From the outset, Laurentian has proceeded on the basis that it intends to remain in operation. Laurentian has stressed that it is essential that these proceedings be completed as soon as possible. The proceedings cannot be completed without the Claims Process being finalized. I am concerned that the TD Bank proposals could delay the Claims Process from being completed on a timely basis.

[38] The proposal to establish Consultation Parties is problematic. Under the TD Bank proposal, the Pre-filing Lenders are involved in the consultation process as are such other stakeholders as the Monitor deems appropriate. The TD Bank proposal affects claims in excess of $5 million. In the context of this proceeding, a $5 million claim is a significant claim. I am hard-pressed to think of a situation where such a claimant would not be deemed an appropriate Consultation Party. I am given to understand that there might be in the range of 15 or so claims over $5 million. If each claimant or a substantial majority of these claimants is deemed to be a Consultation Party, the sheer size of the group would impede its mandate and progress. The process will cease to be efficient and effective in resolving issues.

[39] I am mindful of the submission made by counsel to TD Bank that it is important to move quickly – but not to rush. This requires a balancing of competing interests, to ensure that the process remains fair to all.

[40] I have been persuaded that the Pre-filing Lenders should have some involvement in this process. However, the TD Bank proposal runs the risk of being convoluted and cumbersome to the extent that the Claims Process may not be completed on a timely basis. A middle ground must be found.

[41] The fact that there are no set rules to govern the claims process leads, in some cases, to a bespoke claims process. This situation calls for a bespoke process.

[42] Counsel to TD Bank made reference to the claim process in the BIA. One such provision, which was not referenced in argument, is set out in s. 30(1)(i) of the BIA:

> **Powers exercisable by a trustee with permission of inspectors**
> **30 (1)** The trustee may, with the permission of the inspectors, do all or any of the following things:
>
> (i) compromise any claim made by or against the estate.

[43] This section has two components. The first relates to the involvement of inspectors. The role of an inspector in the BIA is defined in ss. 116-120. The second relates to the compromise of claims against the estate. The trustee may, with the permission of the inspectors, compromise such claims.

[44] It is also noteworthy to reference BIA s. 119(2):

> **Decisions of inspectors subject to review by court**
> **119 (2)** The decisions and actions of the inspectors are subject to review by the court at the instance of the trustee or any interested person and the court may revoke or vary any act or decision of the inspectors and it may give such directions, permission or authority as it deems proper in substitution thereof or may refer any matter back to the inspectors for reconsideration.

[45] In my view, the concerns expressed by TD Bank can be addressed by incorporating certain provisions similar to those dealing with inspectors in the BIA and modifying same to address the circumstances of this case.

[46] An inspector can play a critical role. In *Re Bryant Isard & Co*. (1923), 4 C.B.R. 41 at para. 24 (Ont. S.C.), Fisher J. summed up the position of inspectors in these words: "Inspectors stand in a fiduciary relation to the general body of creditors and should perform their duties impartially and in the interests of the creditors who appoint them. They should see that the trustee acts in accordance with the *Bankruptcy Act*, and if it is brought to their notice he has not done so, they should discipline him and, if necessary, take steps to have him removed."

[47] In these circumstances, I have concluded that the Claims Process procedure proposed by the Applicant should be modified so as to provide for the appointment of up to four "inspectors". Two of the inspectors are to be representatives of the Pre-filing Lenders with the remaining two "inspectors" being drawn from the group of creditors who file claims in excess of $5 million (a "Material Claim"). The selection of the inspectors is to be made by the Monitor, in consultation with the Applicant, the Pre-filing Lenders and the known creditors with Material Claims

[48] The Monitor shall inform the "Inspector Group" that they are to act in the best interests of all creditors and that they stand in a fiduciary relationship to all creditors and should perform their duties impartially.

[49] Compensation for the "Inspector Group" is to be calculated using the structure provided for in R. 135 of the Bankruptcy and Insolvency General Rules.

[50] The Claims Process provision is to be modified so as to provide that the Monitor shall consult with the "Inspector Group" in respect of the acceptance or settlement of Material Claims. The Monitor is authorized to compromise any Material Claim – provided it has received permission from three members of the "Inspector Group".

[51] In the event that the Monitor does not receive authorization to compromise the material claim, the Monitor or any member of the "Inspector" group may apply to court within 10 days for review of the proposed acceptance.

[52] The foregoing process is intended to ensure that the concerns of the Pre-filing Lenders are addressed, without unduly paralyzing the Claims Process that has been put forth by the Applicant with the support of the Monitor.

[53] The Applicant and the Monitor are directed to modify the Claims Process Order to take into account these reasons. The modifications are solely to affect the assessment of Material Claims. The other aspects of the Claims Process proposed by the Applicant are approved. If more detailed directions are required, a case conference may be scheduled.

Chief Justice G.B. Morawetz

Date: May 31, 2021