COURT OF APPEAL FOR ONTARIO

CITATION: Laurentian University of Sudbury (Re), 2021 ONCA 448
DATE: 20210623
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Hoy, Pepall and Zarnett JJ.A.

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

Andrew J. Hatnay, Demetrios Yiokaris, and Sydney Edmonds, for the moving party, Thorneloe University

D.J. Miller, Scott McGrath and Derek Harland, for the responding party, Laurentian University of Sudbury

Vern W. DaRe, for the responding party, Firm Capital Mortgage Fund Inc.

Heard: in writing

Motion for leave to appeal from the order of Chief Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated May 2, 2021, with reasons reported at 2021 ONSC 3272 and 2021 ONSC 3545.

REASONS FOR DECISION

[1] Laurentian University of Sudbury ("Laurentian") is a publicly funded, bilingual and tricultural post-secondary institution, serving domestic and international undergraduate and graduate students.

[2] On February 1, 2021, it sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), to permit

it to restructure, financially and operationally, in order to emerge as a sustainable university for the benefit of all stakeholders.

[3] When it sought CCAA protection, Laurentian, with the assistance of the Monitor, identified a number of areas in which a financial restructuring was required. These included a downsizing of the number of programs being offered by Laurentian, and new, sustainable collective agreements with the association and the union representing Laurentian faculty and staff. Laurentian also identified, at the outset of the CCAA proceeding, that it would be necessary to have a fundamental readjustment or realignment of its arrangements with the three Federated Universities: Thorneloe University ("Thorneloe"), Huntington University ("Huntington") and University of Sudbury ("USudbury").

[4] A court-ordered mediation facilitated Laurentian reaching agreements with parties to the collective agreements; however, Laurentian was not successful in reaching what it considered to be the required readjustments with the Federated Universities.

[5] On April 1, 2021, Laurentian sent notices of disclaimer of the agreements later described in these reasons to the Federated Universities. The Monitor approved the disclaimer notices.

[6] Thorneloe brought a motion pursuant to s. 32(2) of the CCAA challenging its disclaimer notice. (USudbury brought a similar motion, which was heard by a different judge.) Thorneloe and USudbury also brought a joint cross-motion,

seeking an order to amend the Loan Amendment Agreement dated April 20, 2021 ("DIP Amendment Agreement") by deleting the condition that further financing and the extension of the DIP loan maturity date was conditional on disclaimer of agreements with the Federated Universities.

[7] The CCAA judge dismissed Thorneloe's motion and the cross-motion. Thorneloe now seeks leave to appeal both decisions. At the heart of its submissions is its contention that allowing the disclaimer will result in Thorneloe's insolvency and yet provide only *de minimis* financial benefit to Laurentian, and that the motive for the disclaimer is the elimination of competition, which is inconsistent with the duty to act in good faith.

[8] Thorneloe also seeks leave to admit fresh evidence consisting of an affidavit of its President. No opposition was taken by the responding parties to the fresh evidence and, in the circumstances, leave to admit the fresh evidence is granted.

[9] For the reasons that follow, we dismiss Thorneloe's leave motion.

A. BACKGROUND

Relationship between Laurentian and Federated Universities

[10] In 1960, Thorneloe, Huntington and USudbury were established by the Anglican, United and Roman Catholic churches, respectively. As religiously affiliated institutions, they were not eligible for government funding.

[11] The Province of Ontario passed *An Act to Incorporate Laurentian University of Sudbury*, S.O. 1960, c. 151, and Laurentian was established.

[12] In September 1960, Laurentian entered into Federation Agreements with Huntington and USudbury. Two years later, Thorneloe also entered into a federation agreement with Laurentian ("1962 Federation Agreement").

[13] In its Third Report, dated April 26, 2021, the Monitor described the relationship that existed between the Federated Universities and Laurentian prior to the disclaimers:

> The Federated Universities do not admit or register their own students, nor do they grant their own degrees (with the exception of Theology at Huntington and Thorneloe). All Federated University programs and courses are offered through [Laurentian], and all students apply to [Laurentian]. Students who enroll in a program at [Laurentian] may take elective courses at any or all of the three Federated Universities as well as [Laurentian], which are all physically located on [Laurentian's] campus. Students enrolled in programs, courses, majors and minors that are administered by the Federated Universities are students of [Laurentian] and these courses are credited towards a degree from [Laurentian], which has the sole authority to confer degrees upon students (with the exception of Theology at Huntington and Thorneloe).
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> [A]s all students are students of [Laurentian] regardless of whether they are enrolled in programs or take courses at one of the Federated Universities, the Federated Universities do not directly bill or collect tuition.

[14] The Monitor's Third Report also described the financial arrangements between Laurentian and the Federated Universities under Financial Distribution Notices sent by Laurentian to each of the Federated Universities in May 2019, amending the Proposed Grant Distribution and Service Fees agreement between Laurentian, USudbury, Thorneloe, and Huntington, dated November 10, 1993:

> … [Laurentian] and the Federated Universities have certain financial agreements in place pursuant to which [Laurentian] receives, allocates and distributes a portion of [Laurentian's] revenue to the Federated Universities in accordance with a funding formula (the "**Federated Funding Formula**"). Through this Federated Funding Formula, [Laurentian] compensates the Federated Universities for delivering programs and services to [Laurentian] students. The key terms of the Federated Funding Formula include the following:
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> a. A portion of provincial grants received by [Laurentian] are distributed to the Federated Universities based on the proportion of students enrolled in the Federated Universities' programs;
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> b. A portion of tuition fees received by [Laurentian] are distributed to the Federated Universities based upon student enrolment in courses offered through the Federated Universities; and
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> c. An offsetting charge for service fees charged by [Laurentian] to the Federated Universities in exchange for [Laurentian] providing certain support services to the Federated Universities (calculated as 15% of grant and tuition revenues distributed to the Federated Universities). [Bold in original.]

CCAA Proceeding

[15] Under the Amended and Restated Initial Order dated February 11, 2021, the CCAA judge approved a debtor-in-possession ("DIP") interim financing agreement in the principal amount of $25 million.

[16] After the commencement of the CCAA proceeding, Laurentian participated in a mediation with some stakeholders. As a result of mediation, Laurentian entered into term sheets for new agreements with both the Laurentian University Faculty Association and the Laurentian University Staff Union, which have been approved by the CCAA judge. The new agreements are expected to generate an estimated annual savings of approximately $30.3 million, growing to $33.5 million over the next few years.

[17] Laurentian delivered disclaimer notices to each of the Federated Universities on April 1, 2021. The notices disclaim the Federation Agreements and Financial Distribution Notices with each of the Federated Universities.

[18] Huntington accepted its disclaimer and entered into the Huntington Transition Agreement with Laurentian. Among other things, it was agreed that Huntington would no longer deliver courses or programs as credit toward Laurentian degrees and Laurentian would no longer transfer funding to Huntington. The Huntington Transition Agreement contained a "most favoured nation" clause, whereby if Thorneloe or USudbury are permitted to continue to receive funding from Laurentian to teach courses or programs, Huntington will be similarly entitled.

[19] USudbury announced on March 12, 2021 that it would change to a francophone-only university. USudbury's motion to oppose its disclaimer was dismissed by Gilmore J.: see *Laurentian University of Sudbury v. University of Sudbury*, 2021 ONSC 3392. USudbury is not seeking leave to appeal that decision.

[20] On April 20, 2021, Laurentian and the DIP Lender, Firm Capital Mortgage Fund Inc., entered into a DIP Loan Amendment Agreement, which made the advance of an additional $10 million in DIP financing to Laurentian and the extension of the DIP loan maturity date subject to several conditions, including the following:

> The Disclaimers of the Borrower's Federation Agreements and Financial Distribution Notices with each of Huntington University, Thorneloe University and the University of Sudbury (collectively, the Federated Universities") issued on April 1, 2021 shall become effective, binding and final on May 1, 2021.

[21] On April 21, 2021, the CCAA judge directed that "[i]f Thorneloe or USudbury have questions in respect of the DIP Loan, they can be directed to the Monitor": 2021 ONSC 2983, at para. 5.

[22] In its Third Report, the Monitor stated that the notices of disclaimer would enhance the prospects of a viable compromise and that, without them, Laurentian was unlikely to be able to complete a viable plan.

Decision Below

[23] Thorneloe applied for an order that the 1962 Federation Agreement, and the 2019 Financial Distribution Notice between Laurentian and Thorneloe, not be disclaimed.

[24] Under s. 32(1), the debtor company may, on notice to the other parties to an agreement and the monitor, disclaim an agreement to which the company is a party on the day on which CCAA proceedings commence. The monitor must approve the proposed disclaimer (otherwise, the debtor is required to make an application to the court for an order that the agreement be disclaimed). The counterparty has 15 days after notice is given under s. 32(1) to make an application to the court for an order that the agreement not be disclaimed. Section 32(4) describes the factors to be considered by the court in deciding whether to make the order:

> (4) In deciding whether to make the order, the court is to consider, among other things,
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> (a) whether the monitor approved the proposed disclaimer or resiliation;
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> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
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> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[25] The CCAA judge noted that s. 32(4) requires a balancing of interests. In his words, the court's discretion is exercised "by weighing the competing interests and

prejudice to the parties and assessing whether the disclaimer … is fair and reasonable." After engaging in that balancing exercise, he concluded that the better choice, or, to put it another way, the least undesirable choice, was to uphold the notice of disclaimer.

[26] In reaching that conclusion, he considered, among other things, the three itemized s. 32(4) factors. He took into account the fact the Monitor approved the disclaimer and that the Monitor's reasons for approving the disclaimer "reflect[ed] a proper balancing of the competing interests of Laurentian and all stakeholders, including Thorneloe." Among other things, the Monitor noted in its Third Report that Laurentian has limited opportunities to increase its revenues and that even though some net savings have been achieved that are significant and address Laurentian's operational deficit, they are unlikely to be sufficient to cover other items, including the repayment of the DIP Facility and the payment of distributions to creditors pursuant to a plan of compromise or arrangement. The Monitor concluded that the additional savings to Laurentian that would result from the disclaimers were "required for (Laurentian) to have a reasonable opportunity to put forward a viable plan of compromise or arrangement and effect a successful restructuring", and that despite the hardship to the Federated Universities that it would cause, the disclaimers were necessary.

[27] The CCAA judge noted that Laurentian had identified that if the disclaimers involving Thorneloe and USudbury were upheld, together with the Huntington

Transition Agreement, it would result in $7.7 million of additional funds remaining with Laurentian on an annual basis. That represented “a real source of annual financial relief for Laurentian”. He addressed Thorneloe’s argument that its relationship with Laurentian has only a minor financial impact on Laurentian:

> Thorneloe counters by indicating that it is only one of three Federated Universities; the $7.7 million figure cannot be attributed, in total, to Thorneloe. At first glance, this is an attractive and persuasive argument. It does not, however, take into account that Huntington, in negotiating its settlement with Laurentian, has included what is known colloquially as a "most favoured nation" clause. Quite simply, if Thorneloe is able to negotiate a better alternative than the agreement negotiated by Huntington, Huntington is in a position to reopen negotiations with Laurentian to obtain similar treatment. Therefore, it seems to me that although there are three Federated Universities involved, their positions are interlinked and interrelated to such a degree that the $7.7 million calculation is relevant to take into account on this motion.
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> The Notices of Disclaimer are, in my view, central to the Applicant's restructuring. The Disclaimer will result in millions of dollars of additional tuition and grant revenue remaining within Laurentian. As noted in both the affidavit of Dr. Haché and the Monitor's Report, each time a Laurentian student takes an elective course offered through Thorneloe, revenue associated with that course is transferred from Laurentian to Thorneloe. Because the Applicant has the capacity to independently offer students the vast majority of all necessary programs and electives within its existing cost structure, each course taken by a Laurentian student through Thorneloe represents lost revenue for Laurentian.

[28] The CCAA judge also took into account the position of the DIP Lender, which Thorneloe challenged on a number of grounds. In his view, there was no basis to

question the legitimacy of the DIP Lender or the conditions it put forward. The DIP Lender was entitled to take into account commercial reality in assessing its options. The DIP Lender was approved in February 2021, after a competitive process, with no party objecting and no appeals being filed.

[29] As for Thorneloe's objection to the reluctance of the DIP Lender to be cross-examined (which Thorneloe renews before this court), he noted that no affidavit had been filed by a representative of the DIP Lender and that there was no evidence that the DIP Lender had any ulterior motive in negotiating the condition to extend additional financing and extend the term.[1]

[30] The CCAA judge rejected Thorneloe's argument that Laurentian acted in bad faith, contrary to s. 18.6 of the CCAA.

[31] The CCAA judge found that the disclaimer would enhance the prospects of a viable restructuring and also noted the significant compromise and hardship experienced by other stakeholders.

[32] Lastly, he considered the third itemized factor (whether the disclaimer would likely cause significant financial hardship to a party to the agreement). He recognized the significant financial impact of the disclaimer on Thorneloe, acknowledging that it could lead to the cessation of its operations. However, if the

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[1] In its reply factum on the leave motion, Thorneloe argues that r. 39.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, would have been available to elicit information from the DIP Lender. It is unclear whether Thorneloe pursued that procedural route. That said, and in any event, it was reasonable for the CCAA judge to propose that written questions be posed to the Monitor.

disclaimer was not effective, it could lead to an unraveling of Laurentian's restructuring and the collapse of Laurentian, which would have a significant impact on all faculty, students, the greater community and Thorneloe. In other words, it could lead to the collapse of not just Laurentian but of Thorneloe as well. At the end of the day, the least undesirable choice was to uphold the notice of disclaimer.

[33] In separate reasons, he also concluded that the criteria for approving the DIP Amendment Agreement were met. In reaching that conclusion, he adopted his earlier reasons for rejecting Thorneloe's arguments relating to the DIP financing.

B. ANALYSIS

Leave Test

[34] Section 13 of the CCAA provides that any person dissatisfied with an order or a decision made under the CCAA may appeal from the order or decision with leave. Leave to appeal in CCAA proceedings is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. As this court recently explained in *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, at paras. 20-22, this cautious approach is a function of several factors:

> First, a high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings, who are "steeped in the intricacies of the *CCAA* proceedings they oversee". Appellate intervention is justified only where the "supervising judge erred in principle or exercised their discretion unreasonably":

> *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, 78 C.B.R. (6th) 1, at paras. 53 to 54.
>
> Second, CCAA proceedings are dynamic. It is often "inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests": *Edgewater Casino Inc. (Re)*, 2009 BCCA 40, 51 C.B.R. (5th) 1, at para 20.
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> Third, CCAA restructurings can be time sensitive. The existence of, and delay involved in, an appeal can be counterproductive to a successful restructuring.

[35] In addressing whether leave should be granted, the court will consider four factors, specifically whether:

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

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

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

See: *Nortel Networks Corp. (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

Leave is Not Warranted

[36] As we will explain, we refuse to grant leave because the proposed appeal is not *prima facie* meritorious, it is not of significance to the practice and granting leave would unduly hinder the progress of the action. While we agree that the proposed appeal is of significance to the action, that factor alone is not a sufficient basis on which to grant leave.

Leave not Prima Facie Meritorious

[37] Thorneloe proposes that five questions be answered should leave be granted:

1. Can the CCAA, a statute whose purpose is to *prevent* bankruptcies, be used by a debtor to eliminate competition and *cause* the bankruptcy of another solvent entity (in this case, another university)?

2. Should section 32 of the CCAA be interpreted so broadly that it allows the disclaimer of an agreement that will result in the bankruptcy of the counter-party, for the purpose of eliminating competition, *and* where the potential financial gain to the debtor is both uncertain and immaterial?

3. What inferences should be drawn by the CCAA court where a DIP lender demands the disclaimer of an agreement that will cause the bankruptcy of the counter-party or else it will refuse to extend a loan maturity date and advance further funds, yet the DIP lender refuses to attend an oral examination and refuses to produce documents and answer questions as to why it demands the disclaimer?

4. What is the role of the CCAA Court when confronted with a transaction condition that calls for the disclaimer of an agreement which the debtor admits is motivated to eliminate competition, and then presented as a threat that if the CCAA Court does not uphold the disclaimer, the debtor may not be able to restructure?

5. What are the factors applicable on persons to act in good faith under section 18.6 of the CCAA, and in particular where Laurentian and/or the DIP lender seek to close down Thorneloe for the admitted motive of eliminating Thorneloe as a competitor? [Italics in original.]

[38] We are not satisfied that the proposed appeal, challenging the CCAA judge's discretionary decision to approve the disclaimer and to refuse to delete the condition in the DIP Amendment Agreement, is *prima facie* meritorious. In reaching that conclusion we are cognizant that factual findings are owed considerable deference as are discretionary decisions, absent an extricable legal error. Each of

Thorneloe's proposed questions has embedded in it factual assertions that run contrary to the CCAA judge's factual findings and each challenges the way he exercised his discretion.

[39] For example, Thorneloe's first two proposed appeal questions, about whether a disclaimer can be used if its effect is to eliminate competition and cause the bankruptcy of a solvent party, do not raise an extricable legal point, given the CCAA judge's findings.

[40] On those findings, Laurentian and Thorneloe were not truly competitors. They were working in a federated arrangement. Thorneloe's course offerings could only be taken up by Laurentian students, and they could "compete" with course offerings of Laurentian, only because the parties had entered into the federated arrangement. Contrary to Thorneloe's assertion, there was no admission by Laurentian that its motive was to eliminate Thorneloe as the competition. The evidence of Laurentian's President, Dr. Haché, was simply that Laurentian had the capacity itself and the need to provide the courses that the Federated Universities were providing to Laurentian students.

[41] Moreover, Laurentian is insolvent and the CCAA judge found that if Laurentian collapses, Thorneloe will collapse. Thorneloe could only be an ongoing solvent entity if Laurentian could successfully restructure while keeping the agreements with Thorneloe in place. But that option was not available, as the

CCAA judge accepted the Monitor's view that the disclaimer of the agreements was necessary for a viable restructuring of Laurentian to occur.

[42] As for Thorneloe's other proposed appeal questions, the CCAA judge engaged in a serious and carefully considered exercise that required him to balance the proposed disclaimer for Laurentian against the detrimental impact on Thorneloe. He clearly explained what factors he was taking into account in making a determination under s. 32 and how he weighed competing considerations. He recognized the serious financial impact that approving the disclaimer could have on Thorneloe. He addressed Thorneloe's argument, which is repeated before this court, that the financial impact of not disclaiming the Thorneloe agreements, would be minimal for Laurentian and explained why he disagreed. He also considered and rejected allegations of bad faith. As the CCAA judge supervising the proceeding, he was aware of the bigger picture, including the savings that had already been achieved by Laurentian through the CCAA process. He addressed Thorneloe's arguments relating to the DIP Lender and found that there was no need to question its legitimacy or the conditions it put forward.

[43] Fundamentally, he found that the disclaimer would enhance the prospects of a viable plan of compromise or arrangement, while disallowing it could lead to the inability of Laurentian to restructure and to Laurentian's collapse, which would also entail the collapse of Thorneloe. The CCAA judge expressed the choice succinctly and accurately—it was between allowing the disclaimer, recognizing the

hardship it would cause Thorneloe, and disallowing the disclaimer, recognizing the hardship it could cause Laurentian and Thorneloe. In our view, the choice he made cannot be faulted. We would also observe that this conclusion was available in the absence of any consideration of the position of the DIP Lender.

[44] In conclusion, while we recognize the serious financial implications of the disclaimer for Thorneloe, we are simply not persuaded that there is an arguable basis for interfering with the CCAA judge's factual findings or legal conclusions.

Significance to the Action

[45] We accept that the proposed appeal is of significance to the action given the significant implications of the disclaimer for Thorneloe and for Laurentian. However, the significance of the proposed appeal to the action is insufficient to justify leave. This court's comment in *Nortel*, at para. 95, is apt:

> …[S]tanding alone, this factor is insufficient to warrant granting leave to appeal. To perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action.

No Significance to the Practice

[46] We are not satisfied that the proposed appeal is of significance to the practice as the issues raised turn on the application of the law to the particular facts of the case.

Appeal Would Hinder Progress of the Action

[47] In our view, there is a risk that an appeal would be a distraction from the real-time restructuring efforts. Laurentian and the DIP Lender also raise legitimate concerns that attempting to “unscramble the egg” through an appeal would unduly hinder the progress of the CCAA proceeding.

C. DISPOSITION

[48] Leave to admit the fresh evidence is granted and leave to appeal is refused. In the circumstances, there shall be no order for costs.