

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

AUDITOR GENERAL OF ONTARIO

Applicant

and

LAURENTIAN UNIVERSITY OF SUDBURY

Respondent

**FACTUM OF THE AUDITOR GENERAL OF ONTARIO
(Statutory Interpretation of section 10 of the *Auditor General Act*)**

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PART I – OVERVIEW

1. The Standing Committee on Public Accounts passed a motion requesting that the Auditor General of Ontario conduct a value-for-money audit on the operations of Laurentian University of Sudbury¹ between 2010 to 2020. Laurentian University is a grant recipient that has received annual grants of tens of millions of dollars from the Government of Ontario.

2. This Application seeks a statutory interpretation of section 10 of the *Auditor General Act*. Specifically, whether section 10 confers on the Auditor General the authority to obtain privileged information and documents from a grant recipient.

3. A grant recipient has a mandatory duty and obligation under subsection 10(1) of the *Auditor General Act* to give the Auditor General the information the Auditor General believes is necessary to conduct a value-for-money audit. However, a grant recipient's disclosure made under subsection 10(1) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege (subsection 10(3)).

4. Subsection 10(2) of the *Auditor General Act* entitles the Auditor General to have free access to all records belonging to or used by a grant recipient that the Auditor General believes to be necessary to conduct a value-for-money audit. However, a grant recipient's disclosure made under subsection 10(2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege (subsection 10(3)).

¹ "Laurentian University"; Affidavit of Bonnie Lysyk sworn on September 28, 2021, para 6, Exhibit "A", Application Record, pages 30-37.

5. In 2004, the Legislative Assembly of Ontario² repealed section 10 of the *Audit Act* and replaced it with subsections 10(1), 10(2) and 10(3) of the *Auditor General Act*.

6. The Legislature's 2004 amendments added two new provisions that explicitly addressed information and documents subject to solicitor-client privilege, litigation privilege and settlement privilege, viz., subsection 10(3) (no waiver of the privileges) and subsection 27.1(3) (secrecy of the privileged disclosures made under section 10).

7. The subsection 10(3) "no waiver of privilege" safeguard is inextricably linked to the disclosures made to the Auditor General under subsections 10(1) and 10(2). The Legislature clearly intended that the disclosures made under subsections 10(1) and 10(2) include information and documents subject to solicitor-client privilege, litigation privilege and settlement privilege by directly safeguarding those disclosures through subsection 10(3). Further, subsection 10(3) would be meaningless and redundant in relation to the disclosures made to the Auditor General under subsections 10(1) and 10(2) if those mandatory disclosures did not include privileged documents because the subsection 10(3) "no waiver of privilege" safeguard only applies to disclosures made to the Auditor General under subsections 10(1) and 10(2).

8. The subsection 27.1(3) safeguard requiring the Auditor General to maintain the secrecy of the information and documents disclosed under section 10 that are subject to solicitor-client privilege, litigation privilege or settlement privilege unambiguously demonstrates that the mandatory disclosures made by a grant recipient under subsections 10(1) and 10(2) include privileged information and documents.

² "Legislature".

9. The Auditor General and employees of the Office of the Auditor General³ are prohibited by subsection 27.1(3) of the *Auditor General Act* from disclosing any information or document disclosed under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege, unless the holder of the privilege consents. The Legislature clearly intended that the mandatory disclosures made by a grant recipient under subsections 10(1) and 10(2) include privileged information and documents because subsection 27.1(3) unambiguously says so - “any information or document disclosed to the Auditor General under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege” must be kept secret.

10. An *indicia* of legislative intent to pierce a privilege is whether the Legislature put in place safeguards to ensure privileged documents are not disclosed in a manner that compromises the privilege. That is exactly what the Legislature’s 2004 amendments did by adding two safeguards into the *Auditor General Act*, viz., subsection 10(3) (no waiver of the privileges) and subsection 27.1(3) (secrecy of the privileged disclosures made under section 10).

11. Section 10 of the *Auditor General Act* confers on the Auditor General a right to have free access to a grant recipient’s privileged information and documents and imposes a duty and obligation on a grant recipient to give the Auditor General its privileged information and documents.

³ Also referred to as the “OAGO”.

PART II – FACTS

12. The Auditor General of Ontario is an Officer of the Legislative Assembly of Ontario.⁴ The Office of the Auditor General is an independent, non-partisan Office of the Legislative Assembly of Ontario that serves the Members of Provincial Parliament and the people of Ontario.⁵

13. One of the roles of the Auditor General is to hold Public Sector and Broader Public Sector organizations (such as universities) accountable for financial responsibility and transparency.⁶

14. On April 28, 2021, the Standing Committee on Public Accounts passed a motion requesting that the Auditor General conduct a value-for-money audit on the operations of Laurentian University between 2010 to 2020. Value-for-money audits are a key part of the Auditor General's mandate.⁷

15. Laurentian University has consistently denied the Auditor General access to its privileged information and records.⁸ The President and Vice-Chancellor (Dr. Robert Haché) set out Laurentian University's interpretation of section 10 of the *Auditor General Act* in an email sent to the Assistant Auditor General:⁹

“... the Auditor General does not have the right to access privileged information. The *Auditor General Act* allows, but does not require, an entity under audit to disclose privileged information to the Auditor General. The Act provides that, if such disclosure occurs, it is not a waiver of privilege, but, again, does not entitle the Auditor General to

⁴ Affidavit of Bonnie Lysyk sworn on September 28, 2021, para 3, Application Record, page 21.

⁵ Affidavit of Bonnie Lysyk sworn on September 28, 2021, para 4, Application Record, page 22.

⁶ Affidavit of Bonnie Lysyk sworn on September 28, 2021, para 5, Application Record, page 22.

⁷ Transcript of the cross-examination of Bonnie Lysyk, October 28, 2021, Q.13, p.6.

⁸ Affidavit of Bonnie Lysyk sworn on September 28, 2021, para 12, Application Record, page 23.

⁹ Affidavit of Bonnie Lysyk sworn on September 28, 2021, para 12, Application Record, page 23; Exhibit “F”, pages 74-75.

such disclosure. Of course, the University may choose to disclose privileged information to the Auditor General, but that decision is the University's to make.”

16. The Auditor General communicated very clearly to Laurentian University that draft reports are discussed with auditees and the OAGO respects privilege.¹⁰

17. The review of the draft report is an opportunity for the auditee to tell the OAGO whether anything is privileged.¹¹ If there is no waiver of privilege, privileged information is not included in the report.¹² The OAGO respects the issue of privilege, handles it appropriately and works closely with the auditee. The OAGO gets a sign off in a letter of representation from the auditee.¹³ The OAGO has never had a letter of representation not signed.¹⁴

18. Laurentian University has created a culture of fear to talk to the OAGO.¹⁵ The Office of the Auditor General is working to make things better for the people of Ontario. The Laurentian University situation is important to everybody. The value-for-money audit is not to impede Laurentian University, it is to help the University.¹⁶ As well, as stated by MPP Toby Barrett before the Standing Committee on Public Accounts, “we also want to look forward and we want to ensure that something like this doesn't happen in another academic institution elsewhere.”¹⁷

¹⁰ Transcript of the cross-examination of Bonnie Lysyk, October 28, 2021, Q. 97, p.31.

¹¹ Transcript of the cross-examination of Bonnie Lysyk, October 28, 2021, Q.184, p.56.

¹² Transcript of the cross-examination of Bonnie Lysyk, October 28, 2021, Q. 185, p. 57

¹³ Transcript of the cross-examination of Bonnie Lysyk, October 28, 2021, Q. 169, p. 53.

¹⁴ Transcript of the cross-examination of Bonnie Lysyk, October 28, 2021, Q. 332, p.104.

¹⁵ Transcript of the cross-examination of Bonnie Lysyk, October 28, 2021, Q. 311, p. 94.

¹⁶ Transcript of the cross-examination of Bonnie Lysyk, October 28, 2021, Q. 148, p.46

¹⁷ Affidavit of Bonnie Lysyk sworn on September 28, 2021, Exhibit “A”, Application Record, page 37.

PART III – ISSUES

19. This Application seeks a statutory interpretation of section 10 of the *Auditor General Act*.¹⁸ The only issue is whether section 10 confers on the Auditor General of Ontario the authority to obtain privileged information and documents from a grant recipient.

It is submitted that sections 10 and 27.1 of the *Auditor General Act* expressly, clearly and unambiguously confer on the Auditor General the authority to obtain privileged information and documents from a grant recipient and a Broader Public Sector organization such as Laurentian University.

¹⁸ The parties' joint Memorandum to Chief Justice Morawetz dated September 27, 2021 stated at paragraph 2: "The only issue that will be raised in the Application is the statutory interpretation of s.10 of the *Auditor General Act*".

PART IV – LAW AND ARGUMENT

A. SECTION 10 OF THE AUDITOR GENERAL ACT CONFERS ON THE AUDITOR GENERAL THE AUTHORITY TO OBTAIN PRIVILEGED INFORMATION AND DOCUMENTS FROM A GRANT RECIPIENT

(a) Introduction

20. Legislatures can pierce solicitor-client privilege by statute. However, the language of the provision must be explicit and evince a clear and unambiguous intent to do so.¹⁹ Solicitor-client privilege cannot be set aside by inference.²⁰

21. Express words are necessary to pierce solicitor-client privilege and open-textured language will not be read to include solicitor-client documents.²¹

22. A Legislature does not necessarily have to use the term “solicitor-client privilege” in order to abrogate the privilege. An abrogation of the privilege can be clear, explicit and unequivocal where the Legislature uses another expression that can be interpreted as referring unambiguously to the privilege.²²

23. In the end, the effect of any statutory provision will depend on how clearly a legislative intention to affect the privilege is expressed.²³

24. The Saskatchewan Court of Appeal held that the reference to “any privilege available at law” is clear and doubtless embraces solicitor-client privilege. In this regard, Saskatchewan’s *The Local Authority Freedom of Information and Protection of Privacy*

¹⁹ *Alberta (Information and Privacy Commissioner) v University of Calgary*, [2016 SCC 53](#), per Côté J. at para 71 [*University of Calgary*], Applicant’s Book of Authorities (“BOA”) at Tab 1.

²⁰ *Ibid* at paras 2, 28.

²¹ *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, [2008 SCC 44](#) at para 11 [*Blood Tribe*], BOA at Tab 2.

²² *Lizotte v Aviva Insurance Company of Canada*, [2016 SCC 52](#) at para 61, BOA at Tab 3.

²³ *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, [2018 SKCA 34](#) at paras 31, 34 [*University of Saskatchewan*], BOA at Tab 4.

Act is very different than Alberta's *Freedom of Information and Protection of Privacy Act* considered by the Supreme Court of Canada in *University of Calgary*.²⁴

(b) The 2004 Amendments To The *Audit Act*

25. In 2004, the Legislature repealed section 10 of the *Audit Act* and replaced it with subsections 10(1), 10(2), and 10(3) of the *Auditor General Act*.

26. The Legislature added two new provisions to the *Auditor General Act* that explicitly address information and documents subject to solicitor-client privilege, litigation privilege and settlement privilege, viz., subsection 10(3) (no waiver of the privileges) and subsection 27.1(3) (secrecy of the privileged disclosures made under section 10).

27. The 2004 amendments also added into subsection 10(2) that the Auditor General "is entitled to have free access" to *inter alia* an auditee's files and all other papers, things or property (compared to "the Auditor shall be given access" accorded by former section 10 of the *Audit Act*).

28. Sections 10 and 27.1 are not general open-textured provisions. The Legislature turned its mind to the specific issues of solicitor-client privilege, litigation privilege and settlement privilege and was alive to the significance of those privileges when it amended the *Audit Act* in 2004 by enacting new subsections 10(3) and 27.1(3) and entitling the Auditor General to have free access to *inter alia* an auditee's files and all other papers, things or property.

²⁴ *Ibid*, at paras 37-38, BOA at Tab 4.

(c) The Disclosures Made Under Subsection 10(1) And 10(2) Do Not Constitute A Waiver Of Solicitor-Client Privilege, Litigation Privilege And Settlement Privilege

29. Section 10 of the *Auditor General Act* must be read in its entire context, in its grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.²⁵ In *Canada (Minister of Citizenship) v Vavilov*²⁶ the modern approach to statutory interpretation was summarized as requiring consideration of the “text, context and purpose of the legislation”.

30. Subsection 10(1) of the *Auditor General Act* requires that a grant recipient “shall give the Auditor General” the information that the Auditor General believes is necessary to perform the audit:

Duty to furnish information

Every ministry of the public service, every agency of the Crown, every Crown controlled corporation and every grant recipient shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act.

Obligation de fournir des renseignements

Les ministères de la fonction publique, les organismes de la Couronne, les sociétés contrôlées par la Couronne et les bénéficiaires de subventions donnent au vérificateur général les renseignements concernant leurs pouvoirs, leurs fonctions, leurs activités, leur structure, leurs opérations financières et leur mode de fonctionnement que celui-ci estime nécessaires pour exercer les fonctions que lui attribue la présente loi.

²⁵ *Canada (Attorney General) v Thouin*, [2017 SCC 46](#) at para 26, BOA at Tab 5; *1704604 Ontario Ltd v Pointes Protection Association*, [2020 SCC 22](#) at para 6, BOA at Tab 6.

²⁶ *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#) at para 118, BOA at Tab 7.

31. A grant recipient's mandatory duty and obligation to give information to the Auditor General is followed by subsection 10(2) which provides that the Auditor General is "entitled to have free access" to *inter alia* an auditee's files and all other papers, things or property belonging to or used by a grant recipient:

Access to records

The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by a ministry, agency of the Crown, Crown controlled corporation or grant recipient, as the case may be, that the Auditor General believes to be necessary to perform his or her duties under this Act.

Accès aux dossiers

Le vérificateur général a le droit d'avoir libre accès à tous les livres, comptes, registres financiers, fichiers informatiques, rapports, dossiers ainsi qu'à tout autre document, objet ou bien qui appartiennent aux ministères, aux organismes de la Couronne, aux sociétés contrôlées par la Couronne ou aux bénéficiaires de subventions, selon le cas, ou qu'ils utilisent, et que le vérificateur général estime nécessaires pour exercer les fonctions que lui attribue la présente loi.

32. Subsection 10(3) directly safeguards the mandatory disclosures made to the Auditor General under subsections 10(1) and 10(2) by providing that those disclosures do not constitute a waiver of privilege:

No waiver of privilege

A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege.

Non une renonciation à un privilège

Une divulgation faite au vérificateur général en application du paragraphe (1) ou (2) ne constitue pas une renonciation au privilège

du secret professionnel de l'avocat, au privilège lié au litige ou au privilège à l'égard des négociations en vue d'un règlement.

33. The “no waiver of privilege” safeguard provided by subsection 10(3) is inextricably linked to the disclosures made to the Auditor General under subsections 10(1) and 10(2). The Legislature clearly intended that disclosures made under subsections 10(1) and 10(2) include information and documents subject to solicitor-client privilege, litigation privilege and settlement privilege by directly safeguarding those disclosures through subsection 10(3).

34. The disclosures made to the Auditor General under subsections 10(1) and 10(2) are mandatory, not voluntary choices that lie in the hands of a grant recipient. Contrary to Laurentian University President Haché's interpretation of section 10, an auditee is not provided a choice by section 10 to consent to the disclosure of privileged documents. Had the Legislature intended to require a grant recipient's consent for the disclosures made under subsections 10(1) and 10(2), the Legislature would have expressly said so as it did in subsection 27.1(3) (“... unless the person has the consent of each holder of the privilege”).

35. An interpretation that the disclosures made under subsections 10(1) and 10(2) do not include a grant recipient's privileged information and documents would be absurd because subsection 10(3) speaks directly to the privileges attaching to those disclosures (“A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of the solicitor-client privilege, litigation privilege or settlement privilege”).

36. Further, every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. This presumption against tautology means that Courts should avoid adopting an interpretation that renders any portion of a statute meaningless or redundant.²⁷ Subsection 10(3) would be rendered meaningless and redundant in relation to the disclosures made to the Auditor General under subsections 10(1) and 10(2) if those mandatory disclosures did not include privileged documents because the subsection 10(3) “no waiver of privilege” safeguard only applies to disclosures made to the Auditor General under subsections 10(1) and 10(2).

(d) The Auditor General Must Preserve The Secrecy Of Any Document Disclosed Under Section 10 That Is Subject To Solicitor-Client Privilege, Litigation Privilege Or Settlement Privilege - Subsection 27.1 (3)

37. Subsection 27(2) of the former *Audit Act* imposed a secrecy obligation on the Provincial Auditor, but in stark contrast to subsection 27.1(3) of the *Auditor General Act*, subsection 27(2) of the *Audit Act* did not include any reference to solicitor-client privilege, litigation privilege or settlement privilege. Subsection 27(2) of the *Audit Act* provided:

Information confidential

The Auditor, the Assistant Auditor and each person employed in the Office of the Auditor or appointed to assist the Auditor for a limited period of time or in respect of a particular matter shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her employment or duties under this Act and shall not communicate any such matters to any person, except as may be required in connection with the administration of this Act or

²⁷ *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, [2006 SCC 20](#) at para 45, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 159, BOA at Tab 8.

any proceedings under this Act or under the *Criminal Code* (Canada).

38. The Legislature clearly intended that the disclosures made to the Auditor General under section 10 of the *Auditor General Act* include privileged information and documents because subsection 27.1(3) unambiguously says so:

Duty of Confidentiality

A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.

Obligation de garder le secret

La personne tenue au secret en application du paragraphe (1) ne doit divulguer aucun renseignement ni document divulgué au vérificateur général en application de l'article 10 qui est assujéti au privilège du secret professionnel de l'avocat, au privilège lié au litige ou au privilège à l'égard des négociations en vue d'un règlement, sauf si la personne a obtenu le consentement de chaque titulaire du privilège.

39. The Legislature imposed a secrecy obligation on the Auditor General and the OAGO staff over information and documents disclosed under section 10 that are subject to solicitor-client privilege, litigation privilege or settlement privilege because the disclosures under subsections 10(1) and 10(2) include a grant recipient's privileged information and documents. An interpretation that disclosures under subsections 10(1) and 10(2) do not include privileged information and documents flies in the face of the express words in subsection 27.1(3) that mandate secrecy over information and documents "disclosed to the Auditor General under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege".

(e) The Legislature Added Two Safeguards To Ensure Privileged Information And Documents Are Not Disclosed In A Manner That Compromises The Privileges

40. An *indicia* of legislative intent to pierce solicitor-client privilege is whether the Legislature put in place safeguards to ensure that privileged documents are not disclosed in a manner that compromises the substantive right. The Supreme Court of Canada held in *University of Calgary*:²⁸

...given its fundamental importance, one would expect that if the legislature had intended to set aside solicitor-client privilege, it would have legislated certain safeguards to ensure that solicitor-client privileged documents are not disclosed in a manner that compromises the substantive right. In addition, there is no provision in *FOIPP* addressing whether disclosure of solicitor-client privileged documents to the Commissioner constitutes a waiver of privilege with respect to any other person. The absence from *FOIPP* of any guidance on when and to what extent solicitor-client privilege may be set aside suggests that the legislature did not intend to pierce the privilege.

41. Unlike the legislation in issue in *University of Calgary*, the *Auditor General Act* contains two safeguards that ensure that privileged documents are not disclosed in a manner that compromises the privileges. Subsection 10(3) ensures that privileged information and documents disclosed to the Auditor General under section 10 does not constitute a waiver of privilege. Subsection 27.1(3) ensures that the Auditor General and the OAGO maintain the secrecy of privileged documents disclosed under section 10 of the *Auditor General Act*. These safeguards demonstrate that the Legislature intended to pierce the privileges.

²⁸ *University of Calgary*, [supra](#) note 19 at para 58, BOA at Tab 1.

B. THE LEGISLATIVE EVOLUTION OF SECTION 10 OF THE AUDITOR GENERAL ACT

42. The legislative evolution of section 10 of the *Auditor General Act* demonstrates a clear legislative intent to abrogate solicitor-client privilege, litigation privilege and settlement privilege for the purposes of the mandatory disclosures made to the Auditor General under subsections 10(1) and 10(2).

43. The precursor to section 10 of the *Auditor General Act* was introduced in 1950 by Bill 90, *The Audit Act, 1950*, SO 1950, c 5, section 9:

Every department of the public service shall furnish the Auditor with such information regarding its powers, duties, activities, organization, financial transactions and methods of business as he may from time to time require, and the Auditor shall have access to all books, accounts, financial records, reports, files and all other papers, things or property belonging to or in use by the department and necessary to facilitate the audit and shall be afforded every facility for verifying transactions with the balances or securities held by depositaries, fiscal agents and custodians.

44. In the 1960s, section 7 of *The Audit Act*, RSO 1960, c 27 read:

Every department of the public service shall furnish the Auditor with such information regarding its powers, duties, activities, organization, financial transactions and methods of business as he from time to time requires, and the Auditor shall have access to all books, accounts, financial records, reports, files and all other papers, things or property belonging to or in use by the department and necessary to facilitate the audit and shall be afforded every facility for verifying transactions with the balances or securities held by depositaries, fiscal agents or custodians.

45. In the 1970s, section 7 of *The Audit Act*, RSO 1970, c 36 read:

Every department of the public service shall furnish the Auditor with such information regarding its powers, duties, activities, organization, financial transactions and methods of business as he from time to time requires, and the Auditor shall be given access to all books, accounts, financial records, reports, files and all other papers, things or property belonging to or in use by the department and necessary to facilitate the audit and shall be afforded every facility for verifying transactions with the balances or securities held by depositaries, fiscal agents or custodians.

46. The wording of section 10 as it existed immediately prior to the 2004 amendments to the *Audit Act*, was introduced in 1977 by Bill 43 (*An Act to revise the Audit Act*, SO 1977, c 61). Section 10 of *The Audit Act*, 1977 read:

Every ministry of the public service, every agency of the Crown and every Crown controlled corporation shall furnish the Auditor with such information regarding its powers, duties, activities, organization, financial transactions and methods of business as the Auditor from time to time requires, and the Auditor shall be given access to all books, accounts, financial records, reports, files and all other papers, things or property belonging to or in use by the ministry, agency of the Crown or Crown controlled corporation and necessary to the performance of the duties of the Auditor under this Act.

47. In 2004, the Legislature amended the *Audit Act* by way of Bill 18 (*Audit Statute Law Amendment Act, 2004*, SO 2004, c 17) and renamed the *Audit Act* the *Auditor General Act*. Bill 18 received Royal Assent on November 30, 2004.

48. Bill 18 added section 9.1 of the *Auditor General Act*, authorizing the Auditor General to conduct special audits of grant recipients.

49. Bill 18 repealed section 10 of the *Audit Act*, RSO 1990, c A 35 and replaced it with the subsections 10(1), 10(2) and 10(3) of the *Auditor General Act*.

50. Bill 18 added a new subsection 10(3) into the Act: “A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege”.

51. Bill 18 added a new subsection 27.1(3) into the Act:

A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.

52. Bill 18 added into subsection 10(2) that the Auditor General “is entitled to have free” access to *inter alia* an auditee’s files and all other papers, things or property.

53. The 2004 amendments to the *Audit Act* explicitly dealt with an auditee’s mandatory disclosure to the Auditor General of information or documents subject to solicitor-client privilege, litigation privilege or settlement privilege and demonstrate that the Legislature intended to pierce a grant recipient’s privileges.

C. LEGISLATIVE HISTORY - HANSARD DEBATES (BILL 18)

54. The Court can consider Hansard debates to ascertain the background and purpose of legislation. In *Canadian National Railway v Canada (Attorney General)*²⁹ the Supreme Court of Canada addressed the use of Hansard evidence as follows:

“This Court has observed that, while Hansard evidence is admitted as relevant to the background and purpose of the legislation, courts must remain mindful of the limited reliability and weight of such evidence...Hansard references may be relied on as evidence of the background and purpose of the legislation or, in some cases, as direct evidence of purpose...Here, Hansard is advanced as evidence of legislative intent. However, such references will not be helpful in

²⁹ *Canadian National Railway Co v Canada (Attorney General)*, [2014 SCC 40](#) at para 47, BOA at Tab 9.

interpreting the words of a legislative provision where the references are themselves ambiguous...”

55. The Federal Court of Appeal considered testimony before the Standing Committee on Public Accounts and held that its interpretation of a provision in the *Privacy Act* was consistent with testimony by the Privacy Commissioner before the Standing Committee on Public Accounts.³⁰

56. The debates leading up to the enactment of the 2004 amendments to the *Audit Act* show that the Legislature intended to bestow on the Auditor General robust audit powers regarding value-for-money audits of universities.

57. On December 9, 2003, the Minister of Finance (the Honourable Greg Sorbara) introduced Bill 18’s amendments to the *Audit Act*.³¹

The amendments I am introducing today would give the Provincial Auditor the expanded power to conduct full-scope value-for-money audits of the so-called SUCH sector – that is, school boards, universities, colleges and hospitals – and also all crown-controlled corporations and their related subsidiaries. These value-for-money audits will report whether money was expended with due regard to economy and efficiency and whether procedures were established to measure and report on the effectiveness of those programs. They will go a long way to ensure that the people of Ontario get the value they deserve from the money they invest in these public services. Organizations subject to this expanded mandate will be required to provide the Provincial Auditor with information and access to their books and records.

³⁰ *Canada (Information Commissioner) v Canada (Minister of Citizenship and Immigration)*, [2002 FCA 270](#) at paras 24, 36 [*Minister of Citizenship and Immigration*], BOA at Tab 10.

³¹ Hansard, 38th Parl., 1st sess., No. 12A at 541; emphasis added; Affidavit of Bonnie Lysyk sworn on September 28, 2021, para 18, Application Record, page 25; Exhibit “H”, pp. 84-87.

58. On April 19, 2004, Member of Provincial Parliament Mike Colle made the following statement about Bill 18³²:

...Just to give you an example of how thorough this is, for instance, the Provincial Auditor under this act will have free access to records, all books, accounts, financial records, electronic data, processing records, reports, files, all papers and things on property belonging to or used by a ministry, an agency of the crown, a crown-controlled corporation or grant recipient. So the auditor will have unfettered access to all papers, books and documents.

59. On May 17, 2004, Member of Parliament David Zimmer made the following statements about Bill 18:³³

...Section 10 is entitled “Duty to furnish information,” and this is critical: “Every ministry of the public service, every agency of the Crown, every Crown controlled corporation and every grant recipient shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act.” That is a powerful tool.

Subsection 10(2), “Access to records,” another hand-in-hand powerful tool along with the duty to furnish information: “The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records ... files and all other papers, things or property belonging to or used by a ministry, agency of the Crown, Crown controlled corporation or grant recipient”—that’s the transfer payments— “as the case may be,” and any other information “that the Auditor General believes to be necessary to perform” his duties. Another very important tool...

³² Hansard, 38th Parl., 1st sess., No. 33 at 1548; emphasis added; Affidavit of Bonnie Lysyk sworn on September 28, 2021, para 19, Application Record, page 25; Exhibit “I”, pp. 88-107.

³³ Hansard, 38th Parl., 1st sess., No. 49 at 2311; emphasis added; Affidavit of Bonnie Lysyk sworn on September 28, 2021, para 20, Application Record, pages 25-26; Exhibit “J”, pp. 108-129.

These are powerful tools to enable the Auditor General under Bill 18 to root out financial mismanagement and to hold all of us here in this Legislature from all parties, and hold the government, accountable to the taxpayers of Ontario. That's why I am proud to support Bill 18.

D. EXTRINSIC AIDS

60. Extrinsic evidence is admissible to show the background against which the legislation was enacted but is not receivable as an aid to the construction of the statute.³⁴ A question to ask is whether the documents in issue “have an institutional quality such that they could represent the government’s position concerning the legislation at issue. If not, such documents are not relevant”.³⁵

61. The Federal Court of Appeal referred to a Treasury Board Manual as a non-binding aid to interpreting the *Privacy Act*.³⁶

This conclusion is also consistent with the administrative interpretation of the *Privacy Act* given in a Treasury Board Manual. I appreciate that the Manual is at best an aid to the interpretation of the *Privacy Act*, that it represents only the opinion of the Treasury Board or the officials and that they are not binding on government institutions and even less so on the courts.... Yet, the convergent views of the main and competing actors involved in this type of dispute, i.e. the Treasury Board, the Information Commissioner and the Privacy Commissioner, may offer "persuasive opinion on the purpose or meaning of legislation"....

62. Set out below are extrinsic aids regarding the Auditor General’s right of access to an auditee’s privileged information or documents.

³⁴ *Ahamed v Canada*, [2020 FCA 213](#) at para 29, citing *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 at 318, BOA at Tab 11.

³⁵ *Ibid* at para 31, BOA at Tab 11.

³⁶ *Minister of Citizenship and Immigration*, [supra](#) note 29 at para 37 (emphasis added), BOA at Tab 7.

(a) The Interim Protocol On Access By The Office Of The Provincial Auditor of Ontario To Privileged Documents (July 2003)

63. The *Interim Protocol on Access by the Office of the Provincial Auditor of Ontario to Privileged Documents* (dated July 25, 2003) was signed by the Provincial Auditor and Deputy Attorney General.³⁷

The purpose of this Protocol is to enable the OPA [Office of the Provincial Auditor] to have access to all documents subject to solicitor-client privilege, litigation privilege or settlement privilege (the "privileged documents") required by the Provincial Auditor to perform his or her duties under the *Audit Act* and to recognize the government's interest in maintaining confidentiality and preserving the privilege in those documents. The Protocol is intended to accomplish this purpose in a consistent way across government.

(b) 2003 Handbook For Interaction With The Office Of The Provincial Auditor Of Ontario (November 2003)

64. The *2003 Handbook for Interaction with the Office of the Provincial Auditor of Ontario* (November 2003) stated that privileged documents are to be provided to the Auditor General.³⁸

The PA [Provincial Auditor] has broad statutory authority under the *Audit Act* to require the disclosure of information relating to public expenditures and revenues as needed to fulfill his responsibilities under the Act....

... As well, certain other documents may be subject to solicitor-client, litigation or settlement privilege. Such "privileged documents" are to be provided to the OPA [Office of the Provincial Auditor] under the terms of a protocol between the OPA and the Ministry of the Attorney General (MAG) concerning access by the OPA to privileged documents. The protocol enables the OPA to have access to all documents required by the Provincial Auditor to perform his duties

³⁷ Affidavit of Bonnie Lysyk, sworn on September 28, 2021, para 21, Application Record, p. 27; Exhibit "K", pp. 130-134.

³⁸ Affidavit of Bonnie Lysyk, sworn on September 28, 2021, para 22, Application Record, p. 27; Exhibit "L", pp. 135-153.

under the *Audit Act* while preserving the government's privilege in those documents.

(c) 2006 Handbook For Interaction With The Auditor General of Ontario

65. The Ontario Internal Audit Division's 2006 *Handbook for Interaction with the Auditor General of Ontario* states that privileged documents must be provided to the Auditor General:³⁹

Certain documents, while they must be provided to the Auditor General may be subject to Common Law privileges (e.g. solicitor-client, litigation, settlement and/or Crown (Cabinet)). ...

Prior to the amendments to the Auditor General's enabling legislation in 2004, the Auditor General's access to privileged documents (solicitor-client, litigation and settlement) was governed by a protocol between the Auditor General (previously the Provincial Auditor) and the Ministry of the Attorney General. The Protocol confirmed the Auditor General's right to access to privileged information but more importantly it confirmed that the disclosure to the Auditor General does not constitute a waiver of the privilege by the privilege holder and it stated conditions for the treatment of this information by the Auditor General.

The amendment to the Act, (s. 10 (3)) "A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege" gave legal status to the privilege holder's right to maintain privilege and confirmed that disclosure to the Auditor General does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege. The amendment also clarified the Auditor General's responsibility of preserving the confidentiality of privileged information, therefore, employees of the Office of the Auditor General, (s. 27.1 (3)) "shall not disclose any information or document disclosed to the Auditor General under section 10 that is subject to solicitor – client-privilege, litigation privilege or settlement privilege unless the person has the consent of the holder of the privilege."

³⁹ Affidavit of Bonnie Lysyk, sworn on September 28, 2021, para 23, Application Record, p. 27; Exhibit "M", pp. 154-198; emphasis added.

(d) The Ontario Public Sector Guide For Interaction With The Office Of The Auditor General: Value-For-Money Audits

66. In April 2019, Auditor General Bonnie Lysyk co-signed the *Ontario Public Sector Guide for Interaction with the Office of the Auditor General of Ontario: Value-For-Money Audits* along with Steven Davidson (Secretary of the Cabinet, Head of the Ontario Public Service).⁴⁰

67. Laurentian University President Haché admitted in a letter to the Auditor General dated August 31, 2021 that the *OPS Guide* contemplated that the Ontario government will provide privileged documents to the Auditor General:⁴¹

“In any event, the document you enclosed with your letter [the *OPS Guide*] does not change the position. It is a guide prepared by the Secretary of the Cabinet for the Ontario Public Service. While it does contemplate that the Ontario Government will provide privileged documents to the Auditor General, that is not the case for entities outside government. Nothing in the document contemplates that grant recipients such as the University will provide privileged documents to the Auditor General.”

President Haché’s position that the *OPS Guide* does not apply to Laurentian University is incorrect. The *OPS Guide* is 100% applicable to Laurentian University in that it is a Broader Public Sector organization as defined by the *Broader Public Sector Accountability Act* and Laurentian University is also a grant recipient.⁴²

68. The Introduction to the *OPS Guide* states that it outlines the guiding principles, protocols and responsibilities of the OAGO and auditees during a value-for-money

⁴⁰ Affidavit of Bonnie Lysyk, sworn on September 28, 2021, para 9, Application Record, p. 22; Exhibit “C”, pp. 40-68.

⁴¹ August 31, 2021 letter from President Haché to Bonnie Lysyk; emphasis added; Affidavit of Bonnie Lysyk, sworn on September 28, 2021, para 10, Application Record, p. 23; Exhibit “E”, pp.71-73.

⁴² Transcript of the cross-examination of Bonnie Lysyk, October 28, 2021, Q.122, pp. 39-40; Letter dated September 8, 2021 from the Auditor General to President Haché, Responding Application Record, p. 41, Exhibit “M” to the affidavit of Ephry Mudryk.

audit. For the purposes of the *OPS Guide*, government ministries and organizations in the Broader Public Sector such as universities are referred to as the audited entity or auditee.

69. The *OPS Guide* addressed the disclosure of privileged information to the Office of the Auditor General as follows:⁴³

“Solicitor-client privilege, litigation privilege or settlement privilege are specifically referred to in subsections 10(3) and 27.1(3) of the *Auditor General Act*. These provisions ensure that the disclosure of privileged information to the OAGO does not result in the loss of the privilege and prohibit the OAGO from disclosing privileged information without the consent of the holder of the privilege...”

For the OAGO’s audits of an agency of the Crown, Crown-controlled Corporation or grant recipient, the auditee’s legal counsel should provide the necessary assistance in dealing with the OAGO’s request for information and documents subject to solicitor-client privilege, litigation privilege and settlement privilege. If the OAGO has any issues regarding privilege claims or their use of privileged information, the OAGO will raise them with the auditee. If the auditee has any questions concerning the OAGO’s access to privileged documents, they should raise them with their Legal Directors or legal counsel.

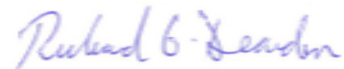
70. These extrinsic aids provide support for the interpretation that section 10 of the *Auditor General Act* confers on the Auditor General the authority to obtain privileged information and documents from a grant recipient and a Broader Public Sector organization such as Laurentian University.

⁴³ Affidavit of Bonnie Lysyk, sworn on September 28, 2021, para 9, Application Record, p. 22; Exhibit “C”, pp. 40-68.

PART V - RELIEF SOUGHT

71. The Auditor General of Ontario requests a Declaration that:

- (1) every grant recipient is required to give the Auditor General the information and records described in subsection 10(1) of the *Auditor General Act*, including information and records that are subject to solicitor-client privilege, litigation privilege or settlement privilege; and
- (2) the Auditor General has a right to free and unfettered access to the information and records described in subsection 10(2) of the *Auditor General Act* that are subject to solicitor-client privilege, litigation privilege or settlement privilege.



Date: November 12, 2021

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53
2. *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44
3. *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52
4. *University of Saskatchewan v Saskatchewan (Information and Privacy Commissioner)*, 2018 SKCA 34
5. *Canada (Attorney General) v Thouin*, 2017 SCC 46
6. *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22
7. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
8. *Placer Dome Canada Ltd v Ontario (Minister of Finance)*, 2006 SCC 20
9. *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40
10. *Canada (Information Commissioner) v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270
11. *Ahamed v Canada*, 2020 FCA 213

SCHEDULE "B"

RELEVANT STATUTES

1. *Auditor General Act*, RSO 1990, c A 35
2. *Audit Act*, RSO 1990, c A 35
3. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 14.05(3).

RELEVANT SECTIONS

***Auditor General Act*, RSO 1990, c A 35, ss 10, 27.1.**

<p>Duty to furnish information</p> <p>10(1) Every ministry of the public service, every agency of the Crown, every Crown controlled corporation and every grant recipient shall give the Auditor General the information regarding its powers, duties, activities, organization, financial transactions and methods of business that the Auditor General believes to be necessary to perform his or her duties under this Act. 2004, c. 17, s. 13.</p>	<p>Obligation de fournir des renseignements</p> <p>10(1) Les ministères de la fonction publique, les organismes de la Couronne, les sociétés contrôlées par la Couronne et les bénéficiaires de subventions donnent au vérificateur général les renseignements concernant leurs pouvoirs, leurs fonctions, leurs activités, leur structure, leurs opérations financières et leur mode de fonctionnement que celui-ci estime nécessaires pour exercer les fonctions que lui attribue la présente loi. 2004, chap. 17, art. 13.</p>
<p>Access to records</p> <p>10(2) The Auditor General is entitled to have free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things or property belonging to or used by a ministry, agency of the Crown, Crown controlled corporation or grant recipient, as the case may be, that the Auditor General believes to be</p>	<p>Accès aux dossiers</p> <p>10(2) Le vérificateur général a le droit d'avoir libre accès à tous les livres, comptes, registres financiers, fichiers informatiques, rapports, dossiers ainsi qu'à tout autre document, objet ou bien qui appartiennent aux ministères, aux organismes de la Couronne, aux sociétés contrôlées par la Couronne ou aux bénéficiaires de subventions, selon le cas, ou qu'ils utilisent, et que le vérificateur général estime nécessaires pour exercer</p>

necessary to perform his or her duties under this Act. 2004, c. 17, s. 13.	les fonctions que lui attribue la présente loi. 2004, chap. 17, art. 13.
No waiver of privilege 10(3) A disclosure to the Auditor General under subsection (1) or (2) does not constitute a waiver of solicitor-client privilege, litigation privilege or settlement privilege. 2004, c. 17, s. 13.	Non une renonciation à un privilège 10(3) Une divulgation faite au vérificateur général en application du paragraphe (1) ou (2) ne constitue pas une renonciation au privilège du secret professionnel de l'avocat, au privilège lié au litige ou au privilège à l'égard des négociations en vue d'un règlement. 2004, chap. 17, art. 13.
Duty of confidentiality 27.1(1) The Auditor General, the Deputy Auditor General, the Advertising Commissioner, the Commissioner of the Environment appointed under section 50 of the Environmental Bill of Rights, 1993, each employee of the Office of the Auditor General and any person appointed to assist the Auditor General for a limited period of time or in respect of a particular matter shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her employment or duties under this Act. 2004, c. 17, s. 28; 2004, c. 20, s. 13 (7); 2018, c. 17, Sched. 3, s. 5.	Obligation de garder le secret 27.1(1) Le vérificateur général, le sous-vérificateur général, le commissaire à la publicité, le commissaire à l'environnement nommé en vertu de l'article 50 de la Charte des droits environnementaux de 1993, les employés du Bureau du vérificateur général ainsi que les personnes nommées pour aider le vérificateur général pendant une période limitée ou à l'égard d'une question particulière sont tenus de garder le secret sur toutes les questions dont ils prennent connaissance dans le cadre de leur emploi ou dans l'exercice des fonctions que leur attribue la présente loi. 2004, chap. 17, art. 28; 2004, chap. 20, par. 13 (7); 2018, chap. 17, annexe 3, art. 5.
Same 27.1(2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate to another person any matter described in subsection (1) except as may be required in connection with the administration of this Act or any proceedings under this Act or under the Criminal Code (Canada). 2004, c. 17, s. 28.	Idem 27.1(2) Sous réserve du paragraphe (3), les personnes tenues au secret en application du paragraphe (1) ne doivent communiquer à aucune autre personne une question visée à ce paragraphe, sauf dans la mesure exigée pour l'application de la présente loi ou dans le cadre d'une instance introduite en vertu de celle-ci ou du Code criminel (Canada). 2004, chap. 17, art. 28.

<p>Same</p> <p>27.1(3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 10 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege. 2004, c. 17, s. 28.</p>	<p>Idem</p> <p>27.1(3) La personne tenue au secret en application du paragraphe (1) ne doit divulguer aucun renseignement ni document divulgué au vérificateur général en application de l'article 10 qui est assujetti au privilège du secret professionnel de l'avocat, au privilège lié au litige ou au privilège à l'égard des négociations en vue d'un règlement, sauf si la personne a obtenu le consentement de chaque titulaire du privilège. 2004, chap. 17, art. 28.</p>
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Audit Act, RSO 1990, c A 35, ss 10, 27(2).

<p>Information and access to records</p> <p>10. Every ministry of the public service, every agency of the Crown and every Crown controlled corporation shall furnish the Auditor with such information regarding its powers, duties, activities, organization, financial transactions and methods of business as the Auditor from time to time requires, and the Auditor shall be given access to all books, accounts, financial records, reports, files and all other papers, things or property belonging to or in use by the ministry, agency of the Crown or Crown controlled corporation and necessary to the performance of the duties of the Auditor under this Act. R.S.O. 1990, c. A.35, s. 10.</p>	<p>Renseignements à fournir au Vérificateur</p> <p>10. Les ministères de la fonction publique, les organismes de la Couronne et les sociétés contrôlées par la Couronne fournissent au Vérificateur les renseignements que demande celui-ci concernant leurs fonctions, leurs activités, leur structure, leurs opérations financières et leur mode de fonctionnement; le Vérificateur a aussi accès à tous les comptes, registres, états financiers, livres comptables, rapports, dossiers ainsi qu'à tout autre document, objet ou bien qui leur appartiennent ou sont utilisés par eux et dont il a besoin pour exercer ses fonctions aux termes de la présente loi. L.R.O. 1990, chap. A.35, art. 10.</p>
<p>Information confidential</p> <p>27(2) The Auditor, the Assistant Auditor and each person employed in the Office of the Auditor or appointed to assist the Auditor for a limited period of time or in respect of a particular matter shall preserve secrecy with respect to all</p>	<p>Discretion</p> <p>27(2) Le Vérificateur, le Vérificateur adjoint, les employés du Bureau du Vérificateur ainsi que les personnes nommées pour aider le Vérificateur pendant une période limitée ou à l'égard d'un travail particulier sont tenus de garder</p>

<p>matters that come to his or her knowledge in the course of his or her employment or duties under this Act and shall not communicate any such matters to any person, except as may be required in connection with the administration of this Act or any proceedings under this Act or under the Criminal Code (Canada). R.S.O. 1990, c. A.35, s. 27 (2).</p>	<p>le secret sur toute question dont ils prennent connaissance dans l'exercice de leurs fonctions en vertu de la présente loi. Ils ne peuvent communiquer aucun renseignement ainsi obtenu sauf dans la mesure où ils sont tenus de le faire dans le cadre de l'application de la présente loi ou dans une instance engagée en vertu de la présente loi ou du Code criminel (Canada). L.R.O. 1990, chap. A.35, par. 27 (2).</p>
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Rules of Civil Procedure, RRO 1990, Reg 194, r 14.05(3).

Application under Rules	Requête présentée en vertu des règles
<p>(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,</p> <p>...</p> <p>(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;</p> <p>...</p> <p>(h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3; O. Reg. 537/18, s. 2.</p>	<p>(3) Une instance peut être intentée par requête si les présentes règles l'autorisent ou si elle vise à obtenir une des mesures de redressement suivantes :</p> <p>...</p> <p>d) une décision sur des droits qui dépendent de l'interprétation d'un acte scellé, d'un testament, d'un contrat ou d'un autre acte, d'une loi, d'un décret, d'un règlement, d'une résolution ou d'un règlement municipal;</p> <p>...</p> <p>h) une mesure relative à une question qui n'est pas susceptible de donner lieu à une contestation des faits pertinents nécessitant la tenue d'une instruction. R.R.O. 1990, Règl. 194, par. 14.05 (3); Règl. de l'Ont. 396/91, art. 3; Règl. de l'Ont. 537/18, art. 2.</p>

AUDITOR GENERAL OF ONTARIO
Applicant

-and- LAURENTIAN UNIVERSITY
Respondent

Court File No. CV-21-00669471-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT
TORONTO

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