Court File No. CV-21-656040-00CL

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **LAURENTIAN UNIVERSITY OF SUDBURY**

FACTUM OF THE MOVING PARTY
(STAY OF ENFORCEMENT OF SPEAKER'S WARRANT)

January 5, 2022

THORNTON GROUT FINNIGAN LLP
3200 - 100 Wellington Street West
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D.J. Miller (LSO# 34393P)
Email: djmiller@tgf.ca

Mitchell W. Grossell (LSO# 69993I)
Email: mgrossell@tgf.ca

Andrew Hanrahan (LSO# 78003K)
Email: ahanrahan@tgf.ca

Derek Harland (LSO# 79504N)
Email: dharland@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Insolvency counsel for Laurentian University

STOCKWOODS LLP
TD North Tower
77 King Street West, Suite 4130
Toronto-Dominion Centre
Toronto, ON M5K 1H1

Brian Gover (LSO# 22734B)
Email: briang@stockwoods.ca

Fredrick Schumann (LSO#59377L)
Email: fredricks@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

Regulatory counsel for Laurentian University

TO: **THE ATTACHED SERVICE LIST**

AND TO: **CONWAY BAXTER WILSON LLP/s.r.l.**
400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

David Conway
Tel: 613-691-0368
Fax: 613-688-0271
Email: dtaylor@conwaylitigation.ca

Counsel for the Speaker of the Legislative Assembly of Ontario

AND TO: **MINISTRY OF THE ATTORNEY GENERAL**
Constitutional Law Br., 4th Floor
720 Bay Street
Toronto, ON M7A 2S9

Joshua Hunter
Tel: 416-908-7465
Fax: 416-326-4015
Email: joshua.hunter@ontario.ca

AND TO: **DEPARTMENT OF JUSTICE CANADA**
Suite 3400, Exchange Tower
Box 36, First Canadian Place
Toronto, Ontario M5X 1K6

Jon Bricker
Tel: 416-973-7171
Fax: 416-973-0809
Email: jon.bricker@justice.gc.ca

AND TO: **GOWLING WLG (CANADA) LLP**
Barristers and Solicitors
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, ON M5X 1G5

Richard Dearden (LSO#: 19087H)
Tel: 613-786-0135
Email: richard.dearden@gowling.com

Heather Fisher (LSO#: 75006L)
Tel: 416-369-7202
Email: heather.fisher@gowling.com

Sarah Boucaud (LSO#: 76517I)
Tel: 613-786-0049
Email: sarah.boucaud@gowling.com

Tel: 416-862-7525
Fax: 416-862-7661

Lawyers for the Auditor General of Ontario

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PART I - INTRODUCTION

1. The Auditor General of Ontario and the Standing Committee on Public Accounts of the Ontario Legislative Assembly are trying to force Laurentian University to disclose information about ongoing life-or-death litigation under the *Companies' Creditors Arrangement Act* that is privileged, or protected by court orders, or both. That disclosure will undermine the integrity of this, and future, restructuring proceedings. Parties to a *CCAA* proceeding need a guarantee of confidentiality to be advised and represented, and to negotiate with other stakeholders.

2. Having changed her mind twice about whether she even needed privileged information, the Auditor General asked this Court to determine whether she was legally permitted to access it. Days later, however, she began secretly working with the Committee to circumvent that very process. While her application was pending – even while this Court had its decision under reserve – the Committee was making her demands their own. The Committee's intention is to give her the information produced, regardless of this Court's ruling on whether she has the right to access it.

3. On the last day of 2021's legislative calendar, despite concerns relating to the *sub judice* rule, the Legislative Assembly of Ontario adopted the Committee's report and had Speaker's warrants issued to obtain the information. Because of the irreversible and potentially dire consequences of producing the information, the warrants should be stayed pending a judicial determination of whether they fall within the scope of an applicable parliamentary privilege.

4. The privileges of legislative assemblies are important in our democracy. However, because the exercises of those privileges are unreviewable within their scope, that scope is strictly limited by the test of *necessity*. Under that test, the scope of parliamentary privilege must be "strictly anchored to its rationale", extending "only so far as is necessary to protect the legislators in the

discharge of their legislative and deliberative functions, and the assembly's work in holding the government to account for the conduct of the country's business." Otherwise, parliamentary privilege "would unjustifiably trump other parts of the Constitution."[1]

5. In the hearing on the merits, the Assembly will have to prove that the claimed scope of the privilege is "absolutely necessary for the due execution of its power."[2] There is, at the very least, a serious question to be tried as to whether the Assembly's constitutional functions require an absolute and unreviewable power to access privileged information of people and entities that are not part of government, or if those functions extend to forcing a person or entity to violate a court order made pursuant to the *CCAA*, a federal statute. No Canadian court has held that parliamentary privilege extends that far. There is also a serious question as to whether the *Auditor General Act*, not parliamentary privilege, governs.

6. Laurentian respectfully requests that this Court stay the enforcement of the Speaker's warrants until their legality is finally determined.

PART II - SUMMARY OF FACTS

7. On February 1, 2021, Laurentian University commenced a comprehensive restructuring proceeding under the *CCAA*. An initial order was made, which included a sealing order applying to two exhibits to the applicant's affidavit (the "**Sealed Exhibits**").[3] Chief Justice Morawetz found: "the disclosure of the Exhibits, at this time, could be detrimental to any potential

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[1] *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 SCR 687 at paras 25, 27, and 28.
[2] *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at p343 per Lamer CJ; at p380 per McLachlin J (as she then was).
[3] *Laurentian University of Sudbury (Re)*, 2021 ONSC 659. The sealing order was later maintained (*Laurentian University of Sudbury (Re)*, 2021 ONSC 1453), and leave to appeal it was refused by the Court of Appeal for Ontario (*Laurentian University of Sudbury (Re)*, 2021 ONCA 199).

restructuring of [Laurentian] … the risk in disclosing the exhibits is real and substantial and imposes a serious risk to the future viability of [Laurentian]."[4]

8. On February 5, a further order was made in the *CCAA* proceeding creating a mediation process with the Honourable Justice Sean Dunphy as judicial mediator.[5] The mediation order imposed a "Confidentiality Protocol" on "the entirety of the Mediation Process or anything reasonably incidental to the Mediation Process."

9. On April 28, the Standing Committee on Public Accounts of the Ontario Legislative Assembly (the "**Committee**") met and asked the Auditor General of Ontario to conduct a value-for-money audit of the operations of Laurentian for the period 2010 to 2020. Hence, the Committee recognized that it was *not* conducting its own inquiry but was asking the Auditor General to conduct an audit and report to it, subject to the scheme and limits of the *Auditor General Act*.

10. In her audit, the Auditor General demanded from Laurentian (a) privileged information and (b) information covered by the Mediation Order and the sealing order. An initial disagreement arose in the summer of 2021. The Auditor General served a summons on Laurentian's President, which she withdrew after a case conference before Chief Justice Morawetz. She and her staff threatened Laurentian with obstruction charges.[6] Then, on August 15, her then-lawyer formally stated that she had "decided not to legally pursue the production of privileged documents."[7]

11. A few weeks later, however, the Auditor General sought to resile from her position and once again demanded privileged information and documents from Laurentian. On September 3,

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[4] *Laurentian University of Sudbury (Re)*, 2021 ONSC 1453, *supra* at para 19.
[5] Motion Record of Laurentian University ("**MR**") tab 3A, Caselines A6129/A1.
[6] MR tab 2G, p51, Caselines, A6184/A56; MR tab 2H, p53, Caselines A6186/A58.
[7] MR tab 2I, p56, Caselines A6189/A61.

Laurentian offered to provide access to emails and server drives by applying search terms provided by the Auditor General, but she later described this offer as "unacceptable."[8] In late September, she commenced a court application for a determination of whether audit subjects were required to give her privileged information, and whether she had the right to obtain privileged information, under s. 10 of the *Auditor General Act*.

12. On September 27, the parties presented a joint memorandum to Chief Justice Morawetz in which they agreed on how the Auditor General's application would proceed. The agreed issues to be put before the court were "whether s. 10 of the *Auditor General Act* (a) requires an auditee to give privileged information to the Auditor General and (b) provides the Auditor General a right of access to an auditee's privileged information." Laurentian reserved its rights "to seek, after the Application is decided, any relief in relation to a request by the Auditor General for privileged documents." The joint memorandum set a schedule and was endorsed by Chief Justice Morawetz.[9]

13. Despite this agreement, and while her application was pending, on October 6, the Auditor General met with the Committee *in camera* for approximately two and a half hours.[10] During that meeting, the Committee decided to make a list of requests for documents and information of Laurentian, expressly including privileged information. While there is apparently no transcript or recording of the meeting, the Auditor General evidently told the Committee that she was not obtaining certain documents and information, and the Committee resolved to get them for her:

[8] MR tab 3N, p202, Caselines A6335/A207.
[9] MR tab 2N, pp70-71, Caselines A6203/A75-A76.
[10] MR tab 3B, p91, Caselines, A6224/A96.

(a) Several of the requests closely correspond. For instance, the Auditor General had requested emails with kpmg.ca and sudburylaw.com in August, and the Committee made the same request in October.[11]

(b) In response to several requests from the Auditor General in August 2021, Laurentian staff had preserved electronic data without producing it.[12] In the Committee's second letter, it sought the very same preserved data, saying that it understood from "discussion with the Auditor General" that the data had been collected already.[13]

(c) The Committee Chair stated: "On October 6, 2021, the Auditor General updated the committee on the restrictions imposed by the university on her office's work."[14] Similarly, the Auditor General stated: "In October 2021, we communicated the restrictions Laurentian was placing on our work to the Standing Committee on Public Accounts."[15]

(d) A Committee member, Michael Parsa MPP, stated: "By October 6, the committee decided that if there was to be any hope of this audit being completed, the committee would have to directly demand the delivery of documents from Laurentian University."[16]

14. Laurentian had no notice that the Auditor General was reporting to the Committee, and no opportunity to participate or respond. Then, the Committee concealed its decision from Laurentian for nine days until it was delivered, late in the evening of October 15, only hours *after* Laurentian had served its responding material in the Auditor General's application, in accordance with the litigation timetable agreed to and endorsed by Chief Justice Morawetz.[17] The inescapable inference

[11] MR tab 2F, p49: "Any and all communications (including archives) with the following domains: kpmg.ca, sudburylaw.com." MR tab 3D, p122: "Any and all email communications, including archives, from January 1, 2010 to present with the following domains: kpmg.ca, kpmg.com, sudburylaw.com."
[12] See cross-examination of B. Lysyk, p89 line 21 to p90 line 25.
[13] MR tab 3G, p134, Caselines A6267/A139. The list of requests corresponding to the preserved data is at p136-137, Caselines A6269/A141; A6270/A142.
[14] MR tab 3O, p208, Caselines A6341/A213.
[15] MR tab 3N, p196, Caselines A6329/A201.
[16] MR tab 3O pp208-209, Caselines A6341/A213; A6342/A214.
[17] MR tabs 3D and 3E, pp118 and 127, Caselines A6251/A123; A6260/A132.

is that the Committee and Auditor General coordinated their action so that the request was delivered only just after Laurentian had responded to the Auditor General's application.

15. The Committee's letter expressly called for the production to include "privileged information." Among other things, the Committee demanded:

(a) All Laurentian's in-camera Board packages from 2010 to present;[18]

(b) The complete emails of its President (Dr Robert Haché), its former (until July 2021) General Counsel (Sara Kunto), its current Interim General Counsel (Céleste Boyer), the Chair of its Board of Governors (Claude Lacroix), and representatives of Laurentian's unions and Senate Subcommittee who participated in the CCAA mediation;[19]

(c) "Any and all correspondence with Lenczner Slaght LLP, Stockwoods LLP Barristers, Thornton Grout Finnigan LLP and related personnel (including … all documents, memos … reports, legal opinions) from January 1, 2010 to present";[20] and

(d) "All documentation provided by Laurentian University to Ernst & Young (EY) as financial advisor and subsequently monitor, and documentation provided by E&Y to Laurentian University from January 1, 2010 to present … Documentation and correspondence for the period of engagement prior to the date of the *CCAA* filing and after the *CCAA* filing; Reports and draft reports; Meeting minutes."[21]

[18] MR tab 3D, p120, Caselines A6253/A125.
[19] MR tab 3D, p120-121, Caselines A6253/A125; A6254/A126. Fabrice Colin and Tom Fenske were the representatives of the Laurentian University Faculty Association and Laurentian University Staff Union, and Malek Abou-Rabia, Éric Gauthier, Jay Patel, Brent Roe, Amanda Schweinbenz, and Jennifer Straub represented the Senate Subcommittee.
[20] MR tab 3D, p123, Caselines A6256/A128.
[21] MR tab 3D, p124, Caselines, A6257/A129.

16. The requests, if fulfilled, would result in the disclosure of (a) privileged information, including privileged information about the *CCAA* proceeding; (b) information the disclosure of which is prohibited by the Mediation Order; and (c) the Sealed Exhibits.

17. Correspondence ensued in which Laurentian explained the issues with the requests and enclosed a copy of the Mediation Order.[22] The Committee responded that the documents, if produced, would not be "exhibited publicly" (October 22 letter), and insisted on full production. Finally, the Committee "invited" (under threat of a Speaker's warrant) Laurentian's President and the Chair of its Board of Governors to appear before it.[23] The appearance was scheduled for December 1 at 12:30 p.m.[24] Meanwhile, Laurentian began in November to send to the Commitee documents that did not implicate privilege issues or *CCAA* confidentiality.[25]

18. At 11:16 a.m. on December 1, less than one hour before the appearance began and without notice to Laurentian, the Auditor General publicly released an "Update on the Special Audit of Laurentian University."[26] Laurentian had no opportunity to review or comment on a draft of this report before it was released, despite the Auditor General's repeated claims that she always works "cooperatively" and allows audit subjects such an opportunity.[27] The report stated:

> This Annual Report shows that those who have provided information for these audits understand the critical role of accountability and transparency. It is

[22] MR tabs 3F, p129 (October 19 – Laurentian), Caselines A6262/A134; MR tab 3G, p134 (October 22 – Committee), Caselines, A6267/A139; MR tab 3H, p139 (October 29 – Laurentian), Caselines A6272/A144; MR tab 3I, p142 (November 3 – Committee), Caselines A6275/A147; MR tab 3J, p145 (November 10 – Laurentian), Caselines A6278/A150.
[23] MR tab 3K, p176, Caselines, A6309/A181.
[24] MR tab 3L, p179, Caselines, A6312/A184.
[25] See MR tab 3O, p216, statement by the Clerk of the Committee: "November 17 was the day that the university first began to produce documents to the committee." Caselines, A6349/A221.
[26] MR tab 3M, p181, Caselines A6314/A186.
[27] See cross-examination of B. Lysyk, p31 line 20 to p32 line 1; p52 line 19 to p53 line 16.

> disappointing and unfortunate that this is not understood by those governing Laurentian University, a broader public sector organization.[28] …
>
> Unfortunately, our Office has been denied access by Laurentian to information we consider absolutely necessary for the conduct of our audit work to be able to fully satisfy the Committee's motion. … Such a pervasive restriction of our audit work is unprecedented.
>
> Further, Laurentian put in place communication and documentation protocols that discourage university staff from speaking freely with us or providing our Office with unfettered access to information without fear of reprimand. These protocols have created a culture of fear surrounding interactions with our Office.[29]

19. At the appearance before the Committee on December 1, both the Auditor General, and her counsel, Richard Dearden, were present.

20. On December 6, this Court heard the Auditor General's application, and reserved its decision. Two days later, on December 8, the Committee met again. Laurentian received no notice of this meeting. Present were the Honourable Paul Calandra, Government House Leader, and the Official Opposition Whip, John Vanthof MPP. The Committee had called them on "short notice." It asked them to allow it to report to the House and to request a Speaker's warrant for the documents it had requested from Laurentian. Comments at the meeting made clear that the Committee wanted the documents *not* for any study or other business of its own, but to hand them over to the Auditor General for her audit:

- The Chair of the Committee, Mr. Taras Natyshak MPP, stated: "… the issue that we're dealing with pertains to Laurentian University and the production of documents **through this committee**, and the inability for this committee **and the Auditor General to recover those documents and to have Laurentian be compelled to do so, after various attempts.**"[30]

- Mr. Michael Parsa MPP stated: "Dr. Robert Haché, Laurentian's president and vice-chancellor, and Mr. Claude Lacroix, chair of the board of governors, have

[28] MR tab 3N, p192. Caselines A6325/A197.
[29] MR tab 3N, pp195-196, Caselines, A6328-A200; A6329/A201.
[30] MR tab 3O, pp207-208, Caselines, A6340-A212; A6341/A213.

continually resisted this committee's demand for documents to audit the university's finances."[31]

- Mr. Parsa stated: "By October 6, the committee decided that **if there was to be any hope of this audit being completed**, the committee would have to directly demand the delivery of documents from Laurentian University."[32]

- Ms. France Gélinas MPP stated: "**Once the auditor has access to the information and emails and papers that she needs to do her work**, we can assure everyone that … there has never been a breach of confidentiality. **Every auditor has gained access to solicitor-client privilege. They gain access to litigation privilege, to so many privileges—I don't even know what those words mean but I hear them lots**. … But at the same time, they tell us the story of what happened. They tell us what needs to change. And they make recommendations so that the initial goal of having this independent third party look at Laurentian can tell us where did they go wrong. What can we do so it doesn't happen to another university, and how do we rebuild from there? **That was the impetus behind the ask and it is just as important today as it was back in April**."[33]

- Ms. Gélinas stated: "**We need this independent third party** to shed light. **I don't know why they're giving the auditor such a hard time to let her do her work, but it has to be done.**"[34]

- Ms. Gélinas stated: "I want you to understand how important it is to get this done, to have the motion tabled in the House, discussed, if it needs to, **and agreed upon so that our Speaker can issue this warrant and the auditor can gain access to the documents she needs to bring peace back to my community**."[35]

- Mr. Jamie West MPP stated: "I am concerned about Laurentian's behaviour **and the response to the Auditor General**. I'm concerned not just because of Laurentian University, but **I'm concerned about setting a precedent for future Auditor General requests**, setting a precedent for the authority of this committee, setting a precedent for the authority of the Legislative Assembly of Ontario, because, rest assured, **there are lawyers watching this and wondering, 'Maybe this is the route that I should take if I'm ever asked for an audit by the Auditor General.'** And so … **I want to join the call to issue a warrant for the documents that the Auditor General has requested**."

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[31] MR tab 3O, p208, Caselines A6341/A213.
[32] MR tab 3O, pp208-209, Caselines A6341/A213; A6342/A214.
[33] MR tab 3O, p212, Caselines A6345/A217.
[34] MR tab 3O, p212, Caselines A6345/A217.
[35] MR tab 3O, p212, Caselines A6345/A217.

21. Also at the meeting, the Auditor General incorrectly claimed that she was only seeking documents *until, but not after,* the date of the *CCAA* filing (February 1, 2021).[36] In fact, she has sought documents up to the present day.[37] The Committee also misinformed its guests by telling them that the Committee had requested documents from the University in April 2021 (which was when it had asked the *Auditor General* to perform an audit) and that the first set of documents was delivered on November 17. In fact, the University had been producing documents to the Auditor General soon after she formally commenced her audit, and the Committee's request (resulting in the November 17 production) had only been made on October 15.[38]

22. That afternoon, Chief Justice Morawetz held an urgent case conference at which the Auditor General appeared in person with her counsel. The Chief Justice raised the *sub judice* rule. That evening, the University's counsel wrote a letter to the Speaker of the Legislative Assembly, among others, and copying the Auditor General's counsel Richard Dearden, conveying those concerns and asking the House not to take further steps until the Auditor General's application had been decided.[39]

23. Nobody from the Assembly, or otherwise, replied to Laurentian's letter. However, the next day, unbeknownst to Laurentian, Mr Dearden sent a letter to the Chair of the Committee. It claims to "reply" to the December 8 letter, but was not copied to Laurentian's counsel.[40]

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[36] Hansard, MR tab 3O, p215: "Our audit would be looking at, as the committee requested, the process leading up to filing of the CCAA process, all the way to the filing in February. So, not after but up until that point."
[37] Cross-examination of Bonnie Lysyk, p24 lines 6 to 23.
[38] MR tab 3O, p215-216, Caselines A6348/A220; A6349/A221.
[39] MR tab 3P, p219, Caselines A6352-A224.
[40] Responding Record of the Speaker ("**RR**") tab I, p61.

24. Later on December 9, the Committee reported to the Assembly and sought a Speaker's warrant. The Government House leader issued the following threat:

> We are considering one thing and one thing only: the fundamental rights of Parliament. **Even as recently as last night, Laurentian University and its counsel continue to challenge this Parliament's authority and to conflate the process with the ongoing matters before the Superior Court** …
>
> **To Dr. Haché, Mr. Lacroix, Laurentian University and counsel representing Laurentian University, I say**: Dissuade yourselves immediately of any impression that this Parliament will surrender to your tactics. …
>
> This House will assert its rights now and forever, for as long as this place stands, for as long as needed to protect our democracy. We will not relent. …
>
> Mr. Speaker, you know this House has many tools still at its disposal, including significant punitive measures, **which we will not hesitate to use if the order of this House is treated with the same disregard that other orders of the public accounts committee have been. My advice to Laurentian is this: End these reckless games. Submit to Parliament's authority. Submit to parliamentary oversight. Submit the documents that we demand**.[41]

25. The House approved the Committee's report and the Speaker issued two warrants, one for Laurentian's president, and the other for the then-Chair of its Board of Governors.[42] The warrants required Laurentian to produce all documents from the Committee's requests, by delivering them to the Clerk of the Committee, and to do so by February 1, 2021. They also stated: "IF YOU DISOBEY THIS WARRANT, you may be subject to punishment, including imprisonment."

PART III - STATEMENT OF ISSUES, LAW AND AUTHORITIES

26. This motion presents two issues:

(a) Does the Court have jurisdiction to grant an interlocutory stay of the enforcement of a Speaker's warrant?

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[41] MR tab 3Q, p227-228, Caselines A6360/A232; A6361/A233.
[42] MR tab 3R, pp233-234, Caselines, A6366/A238.

(b) Should a stay be granted?

A. The Court has jurisdiction to grant a stay

(i) The Court has jurisdiction to grant relief against enforcement of a Speaker's warrant

27. At common law, "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so."[43] This principle reflects "the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy."[44]

28. The Speaker's warrants seek to compel Laurentian to disclose information that is protected by solicitor-client, litigation, and settlement privilege, and information that is confidential or sealed under a court order. Non-compliance with the warrants would be punishable by arrest and imprisonment. As a matter of ordinary law, these actions would be illegal without valid authority, and the courts could grant relief, including by way of an injunction or stay of execution.

29. The asserted legal authority is the Assembly's "constitutionally protected parliamentary privileges, including the right to institute inquiries and to require production of documents."[45] Parliamentary privilege is an *exemption* from the ordinary law.[46] Courts determine whether a category of parliamentary privilege exists and delimit its scope; actions *within* the scope of the privilege are not subject to judicial review.[47] If the claimed privilege does not cover the Speaker's warrants, the ordinary law will operate, and the court will grant relief. "The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of

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[43] *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585 at para 43.
[44] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 25.
[45] MR tab 3R, p233, Caselines A6366-A238.
[46] *Chagnon*, *supra* at para 19.
[47] *Chagnon*, *supra* at para 32; *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 at para 40; *New Brunswick Broadcasting*, *supra* at p350: "The general rule is that courts will inquire into the existence and extent (or scope) of privilege, but not its exercise."

conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege."[48]

(ii) The Court has jurisdiction to grant an interlocutory stay

30. The next question is whether this Court has jurisdiction to grant *interlocutory* relief, i.e. before it has finally determined the scope of the claimed privilege. Jurisdiction to stay the enforcement of a Speaker's warrant has several potential sources:

(a) Subsection 101(1) of the *Courts of Justice Act* empowers the Superior Court to grant "an interlocutory injunction or mandatory order … by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so."

(b) Subsection 24(1) of the *Charter* provides that "Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." The available remedies include an interlocutory stay or injunction.[49]

(c) Finally, s. 11 of the *CCAA* provides that "[I]f an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may … make any order that it considers appropriate in the circumstances."

31. Since the Court has jurisdiction to determine the scope of parliamentary privilege and whether the Speaker's warrants fall within that scope, it must also have the jurisdiction to grant interlocutory remedies to preserve the rights of the parties pending its determination:

> Courts having a competence to make an order in the first instance have long been found competent to make such additional orders or to impose terms or conditions

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[48] *Vaid*, *supra* at para 29(11).

[49] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 at p332: "Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter*. A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights."

> in order to make the primary order effective. Similarly **courts with jurisdiction to undertake a particular *lis* have had the authority to maintain the status quo in the interim pending disposition of all claims arising even though the preservation order, viewed independently, may be beyond the jurisdiction of the court**.[50]

32. The interlocutory stay or injunction is critical to the Court's role as a safeguard of individual rights against government power. It cannot be evaded simply because the alleged constitutional issue has not yet been determined. As the Supreme Court wrote in *RJR MacDonald*:

> [T]he *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.[51]

33. Here, it is quick state action, rather than delay, against which interlocutory relief must guard. Justice McLachlin (as she then was) wrote in *Harvey* that "to prevent abuses cloaked in the guise of privilege from trumping legitimate *Charter* interests, the courts must inquire into the legitimacy of a claim of parliamentary privilege."[52] Courts would be unable to prevent such abuses, and their inquiries into claims of privilege would become academic, if they could not grant interlocutory stays. The Assembly, simply by taking quick action, could evade judicial review. Indeed, that danger arises here, in the Assembly's unilateral February 1 deadline.

34. The Assembly may argue that the scope of parliamentary privilege is a threshold question that must be answered in Laurentian's favour *before* the Court has jurisdiction to grant any relief, including interlocutory relief. However, this is incorrect. Where a case presents a threshold

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[50] *Canada (Attorney General) v Law Society of British Columbia*, [1982] 2 SCR 307 at p330.
[51] *RJR-MacDonald*, supra at pp333-334.
[52] *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at para 71.

question, courts answer it as part of the three-part *RJR MacDonald* test (under "serious question to be tried"), rather than treating it as a threshold issue to be answered before they reach that test.

35. In *Newbould v Canada*,[53] the moving party sought judicial review of a decision of the Canadian Judicial Council and moved for an interlocutory stay. The Council asserted that judicial review was premature because the administrative process had not run its course. On the stay motion, it argued that prematurity was a "threshold issue that must be resolved before addressing whether a stay… is warranted".[54] The Federal Court accepted this argument, but the Federal Court of Appeal rejected it and allowed the appeal:

> **The insertion of a decision on the merits of the underlying application before consideration of the tri-partite test for granting a stay or an injunction pre-empts the question of whether there is a serious issue** … It forces applicants who need only meet a low threshold under the serious issue branch of the tri-partite test to satisfy the more demanding test of showing extraordinary circumstances as a condition of being heard on their application for a stay.[55]

36. Here, the same reasoning applies. The scope of parliamentary privilege, and whether the Speaker's warrants fall within that scope, are the issues on the merits. They should be analyzed as part of the three-part *RJR MacDonald* test, through the lens of "serious question to be tried." It would pre-empt that test if the Court first required Laurentian to positively establish jurisdiction.

37. Supporting the analysis in *Newbould* are the numerous decisions of courts of appeal where a ground of appeal relates to the jurisdiction of the court below, and the appellant seeks an

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[53] *Newbould v Canada (Attorney General)*, 2017 FCA 106 ("*Newbould Fed CA*").
[54] *Newbould v Canada (Attorney General)*, 2017 FC 326 at para 11.
[55] *Newbould Fed CA*, *supra* at para 22.

interlocutory stay. In such motions, the court addresses the strength of the jurisdictional issue through the lens of a "serious question to be tried", not as a threshold issue.[56]

B. The test for a stay

38. To obtain a stay, courts consider three matters:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.[57]

39. The threshold of a "serious question to be tried" is "a low one." It means a "preliminary assessment of the merits of the case", because "a prolonged examination of the merits is generally neither necessary nor desirable." It will be satisfied where the case is "neither frivolous nor vexatious", even if the motion judge "is of the opinion that the plaintiff is unlikely to succeed at trial."[58] It is particularly important in constitutional cases, where "the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim."[59]

40. Laurentian reserves its right to file a short reply factum if another party submits that the test on the merits-based branch is something different than "serious question to be tried."

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[56] E,g, *Yaiguaje v Chevron Corporation*, 2014 ONCA 40 at para 7; *Stuart Budd & Sons Limited v IFS Vehicle Distributors*, 2014 ONCA 546 at para 24; *H.E. v M.M.*, 2015 ONCA 244 at para 4.
[57] *RJR-MacDonald, supra* at p334.
[58] *RJR-MacDonald, supra* at pp337-338.
[59] *RJR-MacDonald, supra* at p337.

C. There are at least three serious questions to be tried

41. There are three serious questions to be tried with respect to the scope of the claimed privilege, "the right to institute inquiries and to require documents":[60]

(a) Whether the claimed privilege extends to documents protected by a class privilege of a person or entity that is not part of government;

(b) Whether the claimed privilege extends to information the disclosure of which is prohibited by a court order made pursuant to the *CCAA*; and

(c) Whether parliamentary privilege may be used by the Committee to obtain documents directly for the purpose of an audit of a public entity covered by the *Auditor General Act*.

42. First, one must distinguish cases where the exercise of parliamentary privilege has an impact on the rights of persons outside the Assembly from those that are purely internal.

43. Parliamentary privilege, at its heart, is an *internal* concept: "what is said or done **within the walls** of Parliament cannot be inquired into in a court of law."[61] It means that "jurisdiction of the Houses **over their own members**, their right to impose discipline **within their walls**, is absolute and exclusive."[62]

44. Indeed, the recognized categories of parliamentary privilege all involve internal matters. These are freedom of speech, control over "debates and proceedings in Parliament", the power to exclude strangers, and disciplinary authority over members and non-members who interfere with the discharge of parliamentary duties.[63] The leading Canadian cases on parliamentary privilege all

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[60] See MR tab 3R, p233 (Speaker's warrant), Caselines A6366-A238.
[61] *New Brunswick Broadcasting*, supra at p342.
[62] *Ibid* at p342.
[63] *Vaid*, *supra* at para 10.

involve internal matters: the management of parliamentary employees (*Vaid* and *Chagnon*), discipline of members (*Harvey* and *Duffy*), and media filming in the legislative chamber (*New Brunswick Broadcasting*).

45. This case falls into a very different category: the Assembly is reaching outside of its walls to compel a third party to do something that it would ordinarily have the right (indeed, the *constitutional* right) not to do. Lamer CJ's words in *New Brunswick Broadcasting* apply: "[C]ourts are apt to look more closely at cases in which claims to privilege have an impact on persons outside the Assembly than at those which involve matters entirely internal to the Assembly."[64] Skepticism is in order when a parliamentary assembly claims that its constitutional duties require the unreviewable power to invade the legal rights of others.

(i) Parliamentary privilege does not extend to documents protected by a class privilege of an entity that is not part of government

46. Solicitor-client privilege is "fundamental to the proper functioning of our legal system" and a "cornerstone of access to justice"; it is a substantive rule of law, "a civil right of supreme importance", and a principle of fundamental justice.[65] "All information protected by the solicitor-client privilege is out of reach for the state. … [A]ny privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice."[66]

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[64] *New Brunswick Broadcasting*, supra at p350; quoted in *Vaid*, *supra* at para 29(12).
[65] *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 SCR 336 at para 5, para 28 and para 83 ; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555 at para 34 and para 41; *Canada (National Revenue) v Thompson*, 2016 SCC 21, [2016] 1 SCR 381 at para 17.
[66] *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61, [2002] 3 SCR 209 at para 24.

47. Litigation privilege and settlement privilege, like solicitor-client privilege, are class privileges, not case-by-case privileges. They "entail a presumption of immunity from disclosure once the conditions for [their] application have been met," not a balancing of interests.[67]

48. Solicitor-client privilege is constitutionally protected. A legal requirement to produce documents is a seizure under s. 8 of the *Charter*.[68] It will also engage s. 7 of the *Charter* if there is a penalty of imprisonment.[69] If the requirement intrudes on privilege more than is "absolutely necessary", it violates ss. 7 and 8, and cannot be justified under s. 1.[70]

49. No Canadian court has held that a parliamentary assembly can compel the production of privileged information. Parliamentary statements to that effect are not binding on this Court.

50. What is more, the parliamentary authorities concern the compulsion of documents *from the government*. In Canada's constitutional system, the "government" (meaning the executive branch) is "responsible" to the legislature. So, one of a parliamentary assembly's constitutional functions, and a central purpose of parliamentary privilege, is to hold the executive branch to account.[71] Further, the executive branch does not have *Charter* rights. So, for instance, the Honourable Peter Milliken stated in 2010 in relation to the "Afghan detainees" affair:

> [A]ccepting an unconditional authority of the **executive** to censor the information provided to Parliament would in fact jeopardize the very **separation of powers** that is purported to lie at the heart of our parliamentary system and **the independence of its constituent parts**.[72]

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[67] *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 SCR 521 at paras 33-34 and para 39.
[68] *Chambre des notaires*, *supra* at paras 6 and 27.
[69] *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401 at para 71.
[70] *Chambre des notaires*, *supra* at para 38, para 81 and para 91. Also *Federation of Law Societies*, *supra* at para 44.
[71] *Chagnon*, *supra* at para 21: "Legislative privileges also allow legislative bodies to fearlessly hold the executive branch of government to account."
[72] Ruling of the Honourable Peter Milliken, Speaker of the House of Commons, April 27, 2010, Hansard pp2039-2045; quoted passage at p2043, BOA Tab 1.

In Ontario, the Honourable Dave Levac stated in 2012 relation to the "gas plants" affair:

> If the House and its committees do not enjoy [the right to order production of documents], then **the accountability, scrutiny and financial functions of Parliament** – which go to the core of our system of **responsible government** – would be compromised."[73] (p3607)

51. However, where the assembly seeks privileged documents from *outside* of government, the calculus must be very different. While universities and other broader public sector entities receive *funding* from the government, they are not *part of* the provincial government. Laurentian, for instance, is funded by and reports to the Ministry of Colleges and Universities, the Minister of which is responsible to the Legislature, but Laurentian is not responsible to the Legislature. Unlike colleges, universities are not included in Ontario's Public Accounts.[74] The independence of universities is a key aspect of academic freedom.

52. To hold that parliamentary privilege covers a certain area has "very significant legal consequences for non-members who claim to be injured by parliamentary conduct."[75] "It creates a sphere of decision-making immune from judicial oversight for compliance with the *Charter* [and] may also impede persons who are not members of the legislature from accessing recourses available under ordinary law."[76] So, it is critically important that the scope of parliamentary privilege be extended only so far as is necessary.

53. The necessity test requires that the scope of privilege must be "tethered to its purposes" and "strictly anchored to its rationale"; it must be "delimited by the purposes it serves", extending

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[73] Ruling of the Honourable Dave Levac, Speaker of the Legislative Assembly of Ontario, September 13, 2012, Hansard pp3606-3608; quoted passage at p3607, BOA Tab 2.
[74] Available online: https://files.ontario.ca/tbs-2020-21-annual-report-and-consolidated-financial-statements-en.pdf.
[75] *Vaid*, *supra* at para 30.
[76] *Chagnon*, *supra* at para 25.

"only so far as is necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business." Otherwise, it would "unjustifiably trump other parts of the Constitution."[77]

54. Unlike parliamentary privilege at the federal level, which is constitutionally entrenched by s. 18 of the *Constitution Act, 1867*, privilege of the provincial legislative assemblies must *always* meet the necessity test. The "historical roots of the claim" are not definitive: the court must "determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today."[78]

55. Where a claimed parliamentary privilege conflicts with another constitutional norm, the necessity test seeks to reconcile them by delimiting the privilege's scope to only what is necessary:

> Where the privilege that is claimed could undermine the *Charter* rights of people who are not members of the legislative assembly, a purposive approach helps to reconcile parliamentary privilege with the *Charter*. Neither the *Charter* nor parliamentary privilege "prevails over the other" … They "enjo[y] the same constitutional weight and status." Accordingly, when conflicts between the *Charter* and parliamentary privilege arise, "the proper approach is not to resolve the conflict by subordinating one principle to the other, but rather to attempt to reconcile them" … **A purposive approach to parliamentary privilege recognizes the *Charter* implications of parliamentary privilege. It strives to reconcile privilege and the *Charter* by ensuring that the privilege is only as broad as is necessary for the proper functioning of our constitutional democracy**.[79]

56. Here, the necessity test can reconcile the *Charter* rights to privacy and freedom from search and seizure with parliamentary power: the latter does not extend to compelling the production of

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[77] *Chagnon*, *supra* at paras 24-26.
[78] *Vaid*, *supra* at subpara 29(6); *Chagnon*, *supra* at para 31.
[79] *Chagnon*, *supra* at para 28. See also *Chagnon* at para 42.

privileged information from an entity that is not a part of government. Such an extension of parliamentary privilege is not "absolutely necessary" to the Assembly's constitutional duties.

57. Necessity means that the matter at issue is "so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body … that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency."[80] The sphere of activity "must be more than merely connected to the legislative assembly's functions"; it is not sufficient that the assembly has historically exercised the *power* to do the act in question; the *immunity* from the ordinary law and from judicial review must also be necessary.[81]

58. In applying the necessity test, courts do not allow too broad a framing of the "matter." In *Vaid*, Justice Binnie rejected Parliament's framing, "internal affairs", pointing out "the danger of dealing with a claim of privilege at too high a level of generality."[82] Even the framing "hiring, management and dismissal of House employees" was too broad. In Justice Binnie's words: "I have no doubt that privilege attaches to the House's relations with *some* of its employees, but the appellants have insisted on the broadest possible coverage without leading any evidence to justify such a sweeping immunity, or a lesser immunity, or indeed any evidence of necessity at all."[83] Similarly, in *Chagnon*, the majority held that the scope of a claimed category of privilege could be parsed in various ways:

> The present case highlights the difficulty with trying to recognize a category of privilege that includes **all aspects of the management** of a group of employees and decisions with regards to **all functions these employees perform**. The

[80] *Vaid*, *supra* at para 46.
[81] *Chagnon*, *supra* at para 30 and para 43; *Vaid*, *supra* at para 56.
[82] *Vaid*, *supra* at para 51.
[83] *Vaid*, *supra* at para 75.

> requirements of the necessity test may be more easily fulfilled where the scope of autonomy that is claimed pertains to control and oversight over **certain functions** performed by **some** parliamentary employees, or **certain aspects** of their employment relationship.[84]

59. Similarly, here, there is no need to frame the "matter" as broadly as "the right to institute inquiries and require production of documents." Not all documents are the same. Documents that are subject to a class privilege (or are protected from disclosure by a court order made under a federal statute, as addressed below) are qualitatively different from other documents. These different classes should be assessed individually under the necessity test.

60. There is also nothing wrong with the necessity test considering the purpose for which the privilege is exercised. In *Harvey*, the Supreme Court of Canada held:

> **[Section 3 of the *Charter*] still operates to prevent citizens from being disqualified from holding office on grounds which fall outside the rules by which Parliament and the legislatures conduct their business; race and gender would be examples of grounds falling into this category**. … **To prevent abuses cloaked in the guise of privilege from trumping legitimate *Charter* interests, the courts must inquire into the legitimacy of a claim of parliamentary privilege**. … [T]he courts may properly question whether a claimed privilege exists. **This screening role means that where it is alleged that a person has been expelled or disqualified on invalid grounds**, the courts must determine whether the act falls within the scope of parliamentary privilege.[85]

61. The Assembly's constitutional role does not require immunity from the ordinary law of privilege. If the Assembly's demands were subject to the ordinary law of privilege, its ability to perform its constitutional role would be undiminished. In general, privileged information is "out of reach for the state."[86] The two functions of a legislative assembly are to debate legislation and to hold the government to account. Non-privileged information will provide a sufficient basis to

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[84] *Chagnon*, *supra* at para 37.
[85] *Harvey*, *supra* at paras 70-71.
[86] *Lavallee*, *supra* at para 24

legislate, and privileged information of the government will additionally provide a sufficient basis to hold the government to account.

62. If the contrary were true, intolerable situations could arise. The Assembly could summons a criminal defence lawyer during a high-profile trial and compel them to disclose any confessions by their client. It could compel the police to disclose the identity of confidential informants, putting their lives at risk. The Assembly claims an absolute right to act in such a manner and asserts that the courts could do nothing to intervene.

63. The Assembly may answer that it will act responsibly and that there is no need to be concerned by such a scenario. This submission would be belied by the facts of this case. Here, the irresponsibility of the Assembly's actions is breathtaking. The Assembly has commanded the production of *all* privileged communications, including pertaining to an ongoing insolvency proceeding before this Court, and to the litigation with the Auditor General. Its only evident interest is in obedience as an end in itself. The Committee has no legislative interest in the documents. It shows no shred of concern to respect privilege, or about the consequences of its actions. Its interest is to ensure that the Auditor General receives all conceivable information regardless of whether her statute authorizes it. Some of its members regard the *CCAA* proceeding as illegitimate and wish to second-guess it.[87] A prominent member of the Committee admitted, with apparent pride, that she doesn't know what "solicitor-client privilege", "litigation privilege"

[87] See paragraph 73 below.

and "settlement privilege" mean.[88] The Court cannot assume that the Assembly will act responsibly on this or any other occasion.

64. There is a serious question to be tried as to whether the scope of parliamentary privilege extends to the compulsion of privileged information from outside of government.

(ii) Parliamentary privilege does not extend to compelling information where a court order made under the CCAA prohibits its disclosure

65. The Speaker's warrants seek to compel disclosure of information prohibited by, and documents sealed by, court orders. Since the courts are unable to review the *exercise* of parliamentary privilege, the question must be resolved at the level of scope, and so it is stark. Does a *CCAA* supervising judge have *any* ability to protect information about a *CCAA* process against parliamentary demands? Or does the Assembly have the absolute and unreviewable right to access all such information (and, as a body that controls its proceedings, to use or publicize it)?

66. The Assembly's apparent position, that parliamentary privilege entitles it to compel *any information or documents from anyone*, would lead to alarming results. It could compel the federal Cabinet to disclose its deliberations. It could compel a sitting judge to produce their bench notes, or to testify about why they made a certain decision, under threat of arrest and imprisonment. It could compel courthouse staff to provide documents subject to a sealing order.

67. Whatever may be covered by the claimed parliamentary privilege to institute inquiries and require documents, it cannot extend so far. The "necessity" test helps reconcile parliamentary power with other constitutional norms and delimits the scope of parliamentary privilege to what is

[88] MPP France Gélinas: "Every auditor has gained access to solicitor-client privilege. They gain access to litigation privilege, to so many privileges—I don't even know what those words mean but I hear them lots." MR tab 3O, p212, Caselines A6345/A217.

truly necessary. Under that test, the court asks if provincial legislative assemblies require information and documents the disclosure of which is prohibited by a court order under the *CCAA*. The Assembly has the onus to prove necessity, and, as outlined above, it is a stringent test.

68. Provincial parliamentary privilege is not a one-way street or an end in itself. It is part of a constitutional system. Just as "a purposive approach to parliamentary privilege recognizes the *Charter* implications of parliamentary privilege," it recognizes the implications for other constitutional norms. If a provincial legislative assembly could order someone to violate a court order made pursuant to a federal statute, it would simultaneously undermine the *separation* of powers (i.e. the relationship between the branches of government, including the courts) and the *division* of powers (i.e. federalism).

69. **Separation of powers**: Parliamentary privilege is "**one of the ways** in which the fundamental constitutional separation of powers is respected … It is a wise principle that **the courts and Parliament strive to respect each other's role** in the conduct of public affairs."[89] As then-Justice McLachlin wrote in *New Brunswick Broadcasting*:

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. **It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other**.[90]

70. **Division of powers**: Federalism is an unwritten principle of our Constitution.[91] Constitutional doctrines such as paramountcy and interjurisdictional immunity help it work by

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[89] *Vaid*, *supra* at paras 20-21.
[90] *New Brunswick Broadcasting*, *supra* at p389 per McLachlin J (as she then was).
[91] See *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 55 et seq.

preventing provincial laws from interfering with the operation of federal heads of power.[92] Similarly, federalism should also inform the necessity test. Parliamentary privilege would become unworkable if the federal House of Commons could invade provincial jurisdiction, or if a provincial legislative assembly could invade federal jurisdiction.

71. As such, a provincial legislative assembly has no need for an absolute and unreviewable power to force a person to disclose information that is prohibited by a court order made under the *CCAA*. The *CCAA*, as a federal statute, was passed by the federal Parliament pursuant to the federal legislative power under s. 91(21) of the *Constitution Act, 1867* over bankruptcy and insolvency. The Ontario Legislative Assembly can have no legitimate concern with intruding into that sphere of activity and, in essence, second-guessing or overriding the federal Parliament's policy choices.

72. Here, the *CCAA* is one of three federal insolvency statutes. "One of the principal means through which it achieves its objectives is by carving out a unique supervisory role for judges."[93] It gives the supervising judge "broad discretion" to make "a variety of orders that respond to the circumstances of each case" (including confidentiality orders and sealing orders).[94] The "anchor of this discretionary authority is s. 11", which empowers the court to make orders "that it considers appropriate in the circumstances."[95] Allowing a provincial legislature to override those orders would nullify a critical aspect of the *CCAA*, and render illusory the federal power.

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[92] See *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536.
[93] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 ("***Bluberi***") at para 47.
[94] *Bluberi*, *supra* at para 48.
[95] *Bluberi*, supra at para 48.

73. Here, the Assembly seems determined *not* to respect the judiciary and the federal Parliament. Indeed, the aim is apparently to second-guess the *CCAA* process itself, with the Committee suggesting that the *CCAA* filing, and ensuing orders, are illegitimate:

> (a) The Assembly's motion record includes an April 9, 2021 news article about the cuts at Laurentian resulting from the *CCAA* mediation.[96] The article reports complaints about the "high degree of secrecy" in the *CCAA* process, including from the president of LUSU about the "confidentiality order … from the Chief Justice of Ontario [*sic*]."
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> (b) On April 28, the Committee asked the Auditor General to perform an audit. France Gélinas MPP stated: "[Laurentian] went into [the *CCAA*] process to pay their creditors. The problem is that many people in Sudbury, Nickel Belt and the northeast are very suspicious of the *CCAA* process, because all the decisions are made behind closed doors."[97] Jamie West MPP stated: "[T]he entire community has been shut out from the whole process and does not know what's going on in the process. They've entered in this secretive *CCAA* creditor agreement that has isolated everyone around."[98] He complained about the programs cut during the *CCAA* process.[99]
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> (c) On December 8, the Committee asked for a Speaker's warrant. Jamie West MPP stated: "[I]f Sudburians were aware of the financial crisis of Laurentian University, we would have come together and we would have created another success story. However, that's not what happened and, as we all know here, the *CCAA* route was chosen. That process started last year. … 200 people lost their jobs; 200 people lost their careers. The *CCAA* process continues along today, and Sudburians are now concerned that Laurentian will be forced to sell off their green space."[100]

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[96] RR tab A.
[97] RR tab B, p20.
[98] RR tab B, p21.
[99] RR tab B, p21.
[100] RR tab B, p43.

74. A provincial assembly's legitimate constitutional functions do not require it to have absolute and unlimited power to second-guess and override court orders and the legislative choices of the federal Parliament. Doing so cannot properly advance the assembly's role in making provincial laws or holding the executive branch of *that* province to account.

75. If the Assembly is concerned about how Laurentian used government funding, and how to prevent similar situations arising in the future, it will have ample access to the University's information. It will also have access to information from the Ministry of Colleges and University relating to its funding and oversight of Laurentian. The underlying facts will all be disclosed; only privileged communications or information protected by a *CCAA* court order will be protected. This will provide a sufficient basis for the Assembly's proper consideration of those issues. An absolute and unreviewable power to override *CCAA* confidentiality and sealing orders is not necessary.

(iii) The Assembly cannot resort to parliamentary privilege to obtain documents for an audit under the Auditor General Act

76. There is a serious question to be tried as to whether the Assembly can resort to parliamentary privilege to obtain documents for the purpose of an audit by the Auditor General.

77. The Speaker's warrants call for production to the Committee. The Committee's mandate, as set out in the Standing Orders of the Assembly, is to "review and report to the House its observations, opinions and recommendations on the Report of the Auditor General and the Public Accounts."[101] It is critically important to observe that the Committee does not perform audits itself, nor does it gather information for audits. Since universities are not included in Ontario's Public

[101] Standing Orders, 13(h), available online at https://www.ola.org/en/legislative-business/standing-orders.

Accounts, the Committee's only relevant function in relation to Laurentian is to review and report to the House its observations *on the reports of the Auditor General*.

78. The Legislature has limited the role of the Assembly by creating a statutory scheme under which the Auditor General, not the Committee or the Assembly itself, conducts audits. The provisions of the *Auditor General Act* demonstrate a legislative intent to have audits conducted by a qualified and independent *third party*, who is nevertheless an "officer of the Assembly":

- Section 2 creates the office of the Auditor General and provides that she is an *officer* of the Assembly.
- Section 5.5 provides that the Auditor General cannot be a *member* of the Assembly.
- Section 8 provides that the *Auditor General* must be licensed under the *Public Accounting Act, 2004*.

79. In 2004, the Auditor General's mandate was extended outside government to encompass the broader public sector (including universities). At the same time, her powers to conduct audits and gather information were further entrenched:

- Section 9.1 provides that "the Auditor General may conduct a special audit of a grant recipient with respect to a reviewable grant received by the grant recipient."
- Section 10 provides for the Auditor General's rights to obtain information from grant recipients.
- Section 11 provides for the Auditor General's ability to examine persons under oath and to compel attendance by way of a summons and provides that s. 33 of the *Public Inquiries Act, 2009* applies to such examinations.
- Section 11.2 prohibits the obstruction of the Auditor General and creates the offence of obstruction.

80. Finally, the scheme of the Act also shows that the intent of the Legislature is not to allow the Committee or the Assembly itself any access to the raw material for the audits – the Auditor

General's working papers, gathered under ss. 10 and 11. The Committee's function is limited to reviewing the Auditor General's reports. Indeed, it is prohibited from seeing her working papers, and she is prohibited from disclosing information to them except in the form of her report:

- Section 12 requires the *Auditor General* to report to the Assembly.

- Section 16 requires the Auditor General to attend at the meetings of the Committee at its request, "in order (a) to assist the committee in planning the agenda for review by the committee of the Public Accounts and the annual report of the Auditor General; and (b) **to assist the committee during its *review* of** the Public Accounts and **the annual report of the Auditor General, and the Auditor General shall examine into and report on any matter referred to him or her in respect of the Public Accounts by a resolution of the committee**."

- Section 17 allows the Assembly or the Committee to give the Auditor General special assignments.

- Section 19 provides that the Auditor General's *working papers* shall not be laid before the Assembly or any committee thereof [which includes the Committee].

- Section 27.1 provides that the Auditor General and her staff **must preserve secrecy with respect to all matters that come to their attention in the course of their duties**, except as may be required in connection with the administration of the Act. It also provides that they shall not disclose any information disclosed under s. 10 that is subject to privilege without the consent of each privilege holder.

81. In short, the Legislature has passed a law setting out how the function of auditing public entities will be carried out. It has created a legal structure under which the Auditor General performs audits and gathers information for the purpose of doing so, and reports to the Committee *without* making the gathered information directly available to the Committee. The Legislature also set down rules for the Auditor General's access to information. First, the summons power in s. 11 expressly disallows her access to privileged information, and the Auditor General has so conceded. Second, s. 10 governs an audit subject's duty to disclose, and her right to receive, information

relevant to an audit. Its boundaries are the subject of a pending application in this Court. However, whatever the outcome of that application, it is beyond question that the Legislature intended ss. 10 and 11 to govern the Auditor General's access to information.

82. When a legislative body subjects an aspect of parliamentary privilege to the operation of a statute, it is the provisions of the statute that govern. While the relevant statutory provisions remain operative, a legislative body cannot reassert privilege to do an end-run around an enactment whose very purpose is to govern the legislature's operations.[102] The fundamental purpose of parliamentary privilege is to protect against outside interference that is unwarranted and intrusive, or that would impede the assembly in controlling its debates or proceedings. Expecting a legislature to comply with its own enactments cannot interfere, intrude, or impede.[103]

83. A statute does not have to use express language to limit parliamentary privilege. Rather, the relationship between statute and privilege is determined through ordinary principles of statutory interpretation.[104] In any event, the *Auditor General Act* expressly sets out the intended relationship between the Committee and the Auditor General, and the respective functions of each. This relationship is reinforced by the Assembly's own Standing Orders. In that relationship, the Auditor General conducts audits and has specified legal powers to obtain information. The Committee considers her reports but is prohibited from accessing her working papers. It would violate that statutory scheme if the Committee could use parliamentary privilege to obtain information for the Auditor General. That could allow the Auditor General access to information

[102] *Chagnon*, *supra* at para 59.
[103] *Chagnon*, *supra* at para 66.
[104] *Vaid*, *supra* at para 80; *Chagnon*, *supra* at para 67.

that ss. 10 and 11 do not allow. It would also allow the Committee access to the Auditor General's working papers.

84. One must distinguish between the Assembly and the Legislature. The Assembly enjoys parliamentary privilege, but the Legislature (the Assembly together with the Lieutenant-Governor) that is the law-making body.[105] To paraphrase Chief Justice Lamer in *New Brunswick Broadcasting*, the Assembly is not supreme; only the Legislature is supreme.[106] The *Assembly* cannot employ parliamentary privilege to evade compliance, and to help the Auditor General to evade compliance, with a law passed by the *Legislature* to govern the auditing function.

85. What is more, the provisions of the Standing Order and *Auditor General Act* demonstrate, if there were any remaining doubt, that an absolute and unreviewable authority to compel the production of documents for audits is *not* necessary for the Assembly to perform its constitutional role. The Legislature has indicated that the auditing function can be performed (a) by the Auditor General and (b) with the powers to obtain information in ss. 10 and 11.

86. There is a serious question to be tried as to whether parliamentary privilege allows the Assembly to obtain documents for the purpose of an audit by the Auditor General.

D. Laurentian will suffer irreparable harm if a stay is not granted

87. Irreparable harm is "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."[107]

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[105] *New Brunswick Broadcasting, supra* at pp341-342 per Lamer CJ. See also s. 69 of the *Constitution Act 1867*: "There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of Ontario."
[106] *New Brunswick Broadcasting, supra* at p349: "the House of Commons is [not] supreme … only Parliament is supreme."
[107] *RJR-MacDonald, supra* at p341.

88. The forced disclosure of information constitutes irreparable harm. It is a wrong in itself, which cannot be undone or compensated by money damages. Once disclosure has been made, the right of further judicial review becomes academic. Disclosure may also cause other harm.[108]

89. Here, while the Assembly has stated that it does not intend to publicly table documents from Laurentian, that statement is not legally binding. The statement is also carefully calibrated to apply only to the public exhibition of the documents, not to the disclosure of their contents, such as by media leaks, by statements in the Committee's proceedings or report, or by statements in the Assembly, all of which would leave Laurentian with no remedy. We do know that the Committee is intent on disclosing the documents to at least one other – the Auditor General.

90. If the documents were disclosed to the Committee, the harm to Laurentian would be irreparable and great. Disclosing Laurentian's privileged communications would betray the confidence it placed in its lawyers and undermine their ongoing relationships. Laurentian and its lawyers would be reluctant to communicate, knowing that their communications were subject to production. Similarly, disclosing the communications associated with the *CCAA* mediation would betray the understanding of all parties that those communications could never be disclosed, and chill future *CCAA* negotiations, on which the success of the restructuring depends.

E. The balance of convenience favours granting a stay

91. The balance of convenience favours granting a stay. Laurentian would suffer irreparable harm if the information is disclosed, but the Assembly would not suffer any harm if the disclosure

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[108] See *Nova Scotia v O'Connor*, 2001 NSCA 47 at paras 14-17 and para 20 per Cromwell JA (as he then was) adopted by Brown JA of the Court of Appeal for Ontario in *Ting (Re)*, 2019 ONCA 768 at paras 27-29.

of any information only occurs if, and when, the final judicial determination of whether disclosure is warranted.

PART IV - ORDER REQUESTED

92. The Respondent respectfully requests that the Court stay the enforcement of the Speaker's warrants pending determination of whether they fall within the scope of parliamentary privilege.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of January, 2022.

Brian Gover

Fredrick R. Schumann

STOCKWOODS LLP
Barristers
Toronto-Dominion Centre
TD North Tower, Box 140
77 King Street West, Suite 4130
Toronto ON M5K 1H1

Brian Gover (22734B)
Tel: 416-593-2489
briang@stockwoods.ca

Fredrick R. Schumann (59377L)
Tel: 416-593-2490
fredricks@stockwoods.ca

Tel: 416-593-7200
Fax: 416-593-9345

Counsel for the Moving Party, Laurentian University of Sudbury

SCHEDULE "A" - LIST OF AUTHORITIES

1. *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 SCR 687
2. *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319
3. *Laurentian University of Sudbury (Re)*, 2021 ONSC 659
4. *Laurentian University of Sudbury (Re)*, 2021 ONSC 1453
5. *Laurentian University of Sudbury (Re)*, 2021 ONCA 199
6. *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585
7. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3
8. *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667
9. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311
10. *Canada (Attorney General) v Law Society of British Columbia*, [1982] 2 SCR 307
11. *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876
12. *Newbould v Canada (Attorney General)*, 2017 FCA 106
13. *Newbould v Canada (Attorney General)*, 2017 FC 326
14. *Yaiguaje v Chevron Corporation*, 2014 ONCA 40
15. *Stuart Budd & Sons Limited v IFS Vehicle Distributors*, 2014 ONCA 546
16. *H.E. v M.M.*, 2015 ONCA 244
17. *Canada (Attorney General) v Chambre des notaires du Québec*, 2016 SCC 20, [2016] 1 SCR 336
18. *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555
19. *Canada (National Revenue) v Thompson*, 2016 SCC 21, [2016] 1 SCR 381

20. *Lavallee, Rackel & Heintz v Canada (Attorney General)*, 2002 SCC 61, [2002] 3 SCR 209

21. *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 SCR 521

22. *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 SCR 401

23. *Reference re Secession of Quebec*, [1998] 2 SCR 217

24. *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 SCR 536

25. *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10

26. *Nova Scotia v O'Connor*, 2001 NSCA 47

27. *Ting (Re)*, 2019 ONCA 768

SCHEDULE "B" – TEXT OF STATUTES, REGULATIONS & BY - LAWS

The Constitution Act, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Life, liberty and security of person

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8 Everyone has the right to be secure against unreasonable search or seizure.

Enforcement of guaranteed rights and freedoms

24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Application of Charter

32 (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Auditor General Act, RSO 1990, c A-35 (as amended)

Duty to furnish information

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.

Access to records

(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 necessary to perform his or her duties under this Act.

No waiver of privilege

(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.

Power to examine on oath

11 (1) The Auditor General may examine any person on oath on any matter pertinent to an audit or examination under this Act. 2004, c. 17, s. 13.

Application of *Public Inquiries Act, 2009*

(2) Section 33 of the *Public Inquiries Act, 2009* applies to the examination by the Auditor General.

***Public Inquiries Act, 2009*, SO 2009, c 33, Sch 6**

Definition

33 (1) In this section,

"inquiry" includes a determination, examination, hearing, inquiry, investigation, review or other activity to which this section is applicable. 2009, c. 33, Sched. 6, s. 33 (1).

Standard procedure

(2) This section applies where another Act or a regulation confers on a person or body the power to conduct an inquiry in accordance with this section or certain provisions of this section. 2009, c. 33, Sched. 6, s. 33 (2).

Power to summon witnesses, papers, etc.

(3) The person or body conducting the inquiry may require any person by summons,

(a) to give evidence on oath or affirmation at the inquiry; or

(b) to produce in evidence at the inquiry such documents and things as the person or body conducting the inquiry may specify,

relevant to the subject matter of the inquiry and not inadmissible in evidence under subsection (13).

Privilege

(13) Nothing is admissible in evidence at an inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

***Courts of Justice Act*, RSO 1990, c C.43**

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

***Companies' Creditors Arrangement Act*, RSC 1985, c C-36**

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

***Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.)**

18 The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

69 There shall be a Legislature for Ontario consisting of the Lieutenant Governor and of One House, styled the Legislative Assembly of Ontario.

91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, …

21. Bankruptcy and Insolvency.

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

Act binding on Her Majesty

40 This Act is binding on Her Majesty in right of Canada or a province.

- 2005, c. 47, s. 131

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C.. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **LAURENTIAN UNIVERSITY OF SUDBURY**

Court File No. CV-21-656040-00CL

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

FACTUM OF THE MOVING PARTY, LAURENTIAN UNIVERSITY OF SUDBURY

THORNTON GROUT FINNIGAN LLP
3200 – 100 Wellington Street West
TD West Tower, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D.J. Miller (LSO# 34393P)
Email: djmiller@tgf.ca

Mitchell W. Grossell (LSO# 69993I)
Email: mgrossell@tgf.ca

Andrew Hanrahan (LSO# 78003K)
Email: ahanrahan@tgf.ca

Derek Harland (LSO# 79504N)
Email: dharland@tgf.ca

Tel: 416-304-1616
Fax: 416-304-1313

Co-Counsel for Laurentian University