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

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W 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 RESPONDING PARTY, THE SPEAKER OF THE LEGISLATIVE ASSEMBLY OF ONTARIO
(STAY OF ENFORCEMENT OF SPEAKER'S WARRANTS)

January 12, 2022

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PART I – OVERVIEW AND SUMMARY OF FACTS

A. Overview

1. This motion turns on the separation of powers. The Legislative Assembly of Ontario ("Assembly"), in keeping with its role as the "grand inquest of the [Province]",[1] seeks information from Laurentian University of Sudbury ("Laurentian") so that the Auditor General of Ontario ("Auditor General") might complete a value-for-money audit requested by the Standing Committee on Public Accounts ("PAC"). This is an exercise of the Assembly's power to "send for persons, papers and things", an aspect of parliamentary privilege that is an ordinary and integral part of the legislative and deliberative process.

2. Laurentian, however, has refused to provide this information and comes to the judicial branch to stop the Assembly's process in its tracks. Such action lies outside the judicial role, in particular because the doctrine of parliamentary privilege protects the Assembly's fulfilment of its constitutional role from interference from the other branches of government.

3. The Assembly's power to "send for persons, papers and things" is a centuries-old parliamentary privilege. It continues to be necessary to the Assembly's constitutional role. This Court has no jurisdiction over the exercise of this aspect of privilege in this, or any other case. Indeed, in keeping with the fundamental tenets of democracy, accountability for the Assembly's exercise of its privilege rests with the electorate. As a result, this Court does not have jurisdiction to grant the relief sought on this motion. The motion should be dismissed.

B. Summary of Facts

4. For more than sixty years, Laurentian has provided post-secondary education in Northern Ontario. As of December 2020, 1,751 Sudburians (including part-time staff and student

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[1] *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 20 [*Vaid*], Speaker's Book of Authorities [SBOA], Tab 5.

employees), earned their living working at Laurentian.[2]

5. According to the Public Accounts of Ontario, from April 1, 2016 to March 31, 2021, Laurentian received $429,364,860 in funding from the provincial government.[3]

6. On February 1, 2021, Laurentian began proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").[4] As part of its restructuring, Laurentian announced on April 5, 2021 that it would lay off 100 faculty members and eliminate 35% of its undergraduate programs and 25% of its graduate programs.[5]

7. Roughly three weeks later, the Standing Committee on Public Accounts ("PAC") adopted a motion by the Member for Nickel Belt, one of Sudbury's two provincial electoral districts, requesting that the Auditor General of Ontario conduct a "value-for-money" audit of Laurentian, covering the period of 2010-2020,[6] as contemplated by section 17 of the *Auditor General Act*.[7]

8. The Assembly rose for its summer recess on June 14, 2021. It was scheduled to reconvene on September 13, 2021.[8] However, the Assembly was prorogued on September 12, 2021 and did not reconvene until October 4, 2021.[9]

9. After reconvening, PAC next met on October 6, 2021. At this meeting, PAC resolved to request specific material from Laurentian related to the value-for-money audit. That request was

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[2] Affidavit of Ephry Mudryk, sworn October 15, 2021 [Mudryk Aff] at Exh N, Motion Record of Laurentian University [MRLU], Tab 3 at p 195, Caselines A6328/A200.
[3] Mudryk Aff at Exh N, MLRU, Tab 3 at p 198, Caselines A6331/A203.
[4] Notice of Motion, December 15, 2021, at para 4, MRLU, Tab 1 at p 2, Caselines A6135/A7.
[5] Affidavit of Doreen Navarro, affirmed December 23, 2021 [Navarro Aff] at Exh A, Speaker's Responding Record [SRR] at p 7, Caselines B-1-3197/B-1-8.
[6] Navarro Aff at para 3, SRR at pp 1-2, Caselines B-1-3191/B-1-2 - B-1-3192/B-1-3.
[7] *Auditor General Act*, RSO 1990, c A.35, s 17.
[8] Navarro Aff at Exh C, SRR at p 26, Caselines B-1-3216/B-1-27.
[9] Navarro Aff at paras 4-5, SRR at p 2, Caselines B-1-3192/B-1-3 and at Exh D, SRR at pp 28-29, Caselines B-1-3218/B-1-29 - B-1-3219/B-1-30 and at Exh E, SRR at pp 31-32, Caselines B-1-3221/B-1-32 – B-1-3222/B-1-33.

communicated to the Chair of Laurentian's Board of Governors on the evening of October 15, 2021. Laurentian responded, via its counsel.

10. Correspondence between PAC and Laurentian (or its counsel) continued from October 22, 2021 to November 10, 2021. On October 22, 2021, PAC wrote to Laurentian and committed that "[t]he documents received by the Committee will not be exhibited publicly."[10] In response to Laurentian's counsel's representation that Laurentian could not meet the timelines in PAC's October 15, 2021 letter, PAC identified a subset of documents that could be easily produced within a week, while requesting the remainder of the documents three weeks hence.[11]

11. This exchange of correspondence did not resolve PAC's request for documents.

12. On November 18, 2021, PAC invited Laurentian's President and the Chair of its Board of Governors, as well as their respective counsel, to attend a closed session meeting of PAC on either November 24, 2021 or December 1, 2021 (the next two scheduled PAC meetings).[12]

13. Representatives of Laurentian, and their counsel, attended before PAC on December 1, 2021, in a closed session. This meeting did not resolve PAC's request for documents.

14. In light of Laurentian's failure to produce all of the documents requested despite the nearly eight weeks since PAC's initial request, at its next scheduled meeting (which was also the final meeting before the Winter recess), on December 6, 2021, PAC met to determine whether the Government and Opposition House Leaders would expedite a request from PAC for

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[10] Mudryk Aff at Exh G, MRLU, Tab 3 at p 134, Caselines A6267/A139.
[11] Mudryk Aff at Exh G, MRLU, Tab 3 at p 134, Caselines A6267/A139.
[12] Mudryk Aff at Exh K, MRLU, Tab 3 at p 177, Caselines A6310/A182. PAC is authorized to meet on Wednesdays from 9:00 a.m. to 10:15 a.m. and from 12:30 p.m. to 3:00 p.m, while the House is sitting, see: Ontario, Legislative Assembly, *Votes and Proceedings*, 42nd Parl, 1st Sess, No 13 (1 August 2018) at 3, SBOA, Tab 47.

Speaker's Warrants through the Assembly. The House Leaders stated willingness to do so. Subsequently, PAC approved its December 8, 2021 report, which summarized events since April 2021 and recommended that the Assembly command and compel production of the documents sought by February 1, 2022, more than 15 weeks after PAC's first request for documents from Laurentian.[13]

15. The Assembly, with full notice of Laurentian's concerns,[14] authorized the Speaker to issue his warrants on December 9, 2021. Laurentian commenced this motion for an interlocutory stay on December 15, 2021, but has yet to file any proceeding that will ultimately determine the validity of the Speaker's Warrants.

PART II – ISSUES

16. Laurentian's motion gives rise to the following two issues:

a. Does this Court have jurisdiction to grant an interlocutory stay?

b. If the Court has such jurisdiction, ought a stay be granted?

PART III – STATEMENT OF LAW AND AUTHORITIES

A. The Court does not have jurisdiction to stay the Speaker's Warrants

1. This Court has no jurisdiction in relation to matters covered by parliamentary privilege

17. Laurentian takes a cursory approach, grounded in circular logic, to this Court's jurisdiction to interfere with the December 9, 2021 Speaker's Warrants by issuing a stay. It casts this Court's jurisdiction broadly, calling upon the Latin maxim *ubi jus, ibi remedium* (where

[13] Navarro Aff at Exh H, SRR at p 51, Caselines B-1-3241/B-1-52.
[14] Mudryk Aff at Exh P, MRLU, Tab 3, at p 219, Caselines A6352/A224; Navarro Aff at Exh I, SRR at p 61, Caselines B-1-3251/B-1-62; Mudryk Aff at Exh Q, MRLU, Tab 3 at p 227, Caselines A6360/A232.

there is a right, there must be a remedy).[15] However, superior courts do not have jurisdiction over matters the Constitution has assigned to be determined in another forum. As the Supreme Court of Canada has recognized on multiple occasions, judicial remedies are not available against exercises of parliamentary privilege.[16] This is because review of matters protected by parliamentary privilege would negate the immunity that protects the Assembly's independence.[17]

18. As a general rule, "[i]nterlocutory injunctive relief will not normally be granted where there is no prospect for a specific remedy being granted at the trial."[18] While Laurentian evokes the distinction between the "scope" of a parliamentary privilege and its "exercise" in its brief submissions on jurisdiction,[19] these submissions fail to recognize that even an interlocutory stay of an in-scope exercise of the Assembly's privileges defeats the very rationale for the scope/exercise distinction. There is no basis to distinguish judicial review in the form of an interlocutory stay from judicial review in the form of a final order quashing the Speaker's Warrants. Either judicial remedy would nullify the immunity that parliamentary privilege affords to the Assembly. As such, this Court should not accept Laurentian's invitation to deal with jurisdictional issues as part of the first stage of the stay analysis. Contrary to the authorities cited by Laurentian, courts have dismissed proceedings at a preliminary stage due to a lack of jurisdiction resulting from parliamentary privilege.[20]

19. Accordingly, this Court must first grapple with the scope of the Assembly's privilege to

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[15] Laurentian Factum at para 27, Caselines A6399/A271.
[16] *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39 [*Chagnon*] at para 25, SBOA, Tab 7; *Vaid* at para 30, SBOA, Tab 5.
[17] *Chagnon* at para 24, SBOA, Tab 7.
[18] R. Sharpe, Injunctions and Specific Performance ¶ 2.570 (loose-leaf ed. release no. 29 November 2020), SBOA, Tab 48.
[19] Laurentian Factum at para 29, Caselines A6399/A271.
[20] *Marin v Office of the Ombudsman*, 2017 ONSC 1687 at paras 66-67, SBOA, Tab 22; *Duffy v. Senate of Canada,* 2018 ONSC 7523, SBOA, Tab 13, aff'd 2020 ONCA 536, SBOA, Tab 12.

"send for persons, papers and things" before it can exercise jurisdiction over compliance with the December 9, 2021 Speaker's Warrants. The concerns raised by Laurentian arising out of the Federal Court of Appeal's decision in *Newbould v Canada (Attorney General)* do not arise on this motion, as the Speaker recognizes that, as the party seeking to rely on the immunity provided by parliamentary privilege, he bears the onus of establishing its scope.[21] In any event, *Newbould* addressed a doctrine of judicial restraint, and not one of jurisdiction.

2. The limits on this Court's jurisdiction flow from the doctrine of the separation of powers

20. The separation of powers is a fundamental doctrine underlying Canada's system of constitutional democracy. As Karakatsanis J. held for a majority of the Supreme Court of Canada in *Ontario v Criminal Lawyers' Association of Ontario*:

> This Court has long recognized that our constitutional framework prescribes different roles for the executive, legislative and judicial branches. The content of these various constitutional roles has been shaped by the history and evolution of our constitutional order.
>
> Over several centuries of transformation and conflict, the English system evolved from one in which power was centralized in the Crown to one in which the powers of the state were exercised by way of distinct organs with separate functions. The development of separate executive, legislative and judicial functions has allowed for the evolution of certain core competencies in the various institutions vested with these functions. The legislative branch makes policy choices, adopts laws and holds the purse strings of government, as only it can authorize the spending of public funds. The executive implements and administers those policy choices and laws with the assistance of a professional public service. The judiciary maintains the rule of law, by interpreting and applying these laws through the independent and impartial adjudication of references and disputes, and protects the fundamental liberties and freedoms guaranteed under the *Charter*.
>
> All three branches have distinct institutional capacities and play critical and complementary roles in our constitutional democracy. However, each branch will be unable to fulfil its role if it is unduly interfered with by the others. In *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, McLachlin J. affirmed the importance of respecting the separate roles and institutional capacities of Canada's branches of government for our constitutional order, holding that "[i]t is

[21] *Vaid* at para 29(8), SBOA, Tab 5. See: Laurentian Factum at paras 35-37, Caselines A6402/A274-A6403/A275.

> 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".[22]

21. In *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, the Supreme Court of Canada went on to affirm the importance of parliamentary privilege as a doctrine that prevents undue interference from the executive or judicial branches:

> Several doctrines work to prevent undue interference, including the secrecy afforded judicial deliberations, and the recognition of the privileges, powers and immunities enjoyed by the Senate, the House of Commons and the legislative assemblies. These doctrines are a corollary to the separation of powers because they help to protect each branch's ability to perform its constitutionally-assigned functions.[23]

22. Parliamentary privilege is inherently tethered to the legislative branch's role in Canadian constitutional democracy. In *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, a majority of the Supreme Court of Canada held that "the inherent privileges of Canadian legislative bodies are a means to preserve their independence and promote the workings of representative democracy."[24] Parliamentary privilege does this by providing a protected space within which the legislative assembly can fulfill its constitutional role, as "[j]udicial review of the exercise of parliamentary privilege, even for *Charter* compliance, would effectively nullify the necessary immunity this doctrine is meant to afford the legislature".[25] The scope of this "protected space" is anchored to the legislative assembly's constitutional role, in order to ensure that any impacts on persons outside the legislative assembly do not go beyond what is necessary to the legislative assembly's constitutional role.[26]

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[22] 2013 SCC 43 at paras 27-29 [citations omitted, emphasis added] [*Criminal Lawyers' Association*], SBOA, Tab 27.
[23] 2020 SCC 20 at para 66 [citations omitted] [*Provincial Court Judges' Association*], SBOA, Tab 2.
[24] *Chagnon* at para 23, SBOA, Tab 7.
[25] *Chagnon* at para 24, SBOA, Tab 7.
[26] *Chagnon* at para 25, SBOA, Tab 7.

23. Given that it deals with one of the mainstays of the proper balance between the three distinct organs of government in Canada's constitutional democracy, any litigation concerning parliamentary privilege falls within the category of cases that the Supreme Court of Canada has characterized as calling "for special prudence to keep courts from overstepping the bounds of the judicial role."[27]

3. Laurentian's framing of parliamentary privilege is unduly narrow

24. Laurentian casts the Assembly's constitutional role narrowly, limiting it to debating legislation and holding the government to account.[28] However, this anemic view of the legislative branch's constitutional role entirely eschews the Assembly's deliberative role, as the "grand inquest of the [Province]", which the Supreme Court of Canada recognized as a third function of the legislative branch in *Vaid*.[29]

25. As noted by the Supreme Court of Canada in *Criminal Lawyers' Association*, in addition to enacting legislation and ensuring the executive branch is accountable to the electorate, the legislative branch "makes policy choices".[30] Given the significance of democracy as "a fundamental value in our constitutional law and political culture",[31] the Assembly's deliberative role encompasses more than simply debating legislative proposals from the government. The Supreme Court of Canada framed the legislative branch's deliberative role broadly in *Reference re Secession of Quebec*:

> […] we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by

[27] *Provincial Court Judges' Association* at para 64, SBOA, Tab 2.
[28] Laurentian Factum at para 61, Caselines A6410/A282.
[29] *Vaid* at para 20. See also *Vaid* at paras 41, 44, 46, 47, 62, 70 and 72, SBOA, Tab 5.
[30] *Criminal Lawyers' Association* at para 28, SBOA, Tab 27.
[31] [1998] 2 SCR 217 at para 61 [*Secession Reference*], SBOA, Tab 30.

> discussion and the interplay of ideas" (*Saumur v. City of Quebec*, *supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. […][32]

26. The legislative branch's deliberative role facilitates this "continuous process of discussion" by providing a space in the "marketplace of ideas" for elected representatives to bring their constituents' concerns to the fore. As articulated by the United Kingdom's Joint Committee on Parliamentary Privilege in its 2013-14 report (cited in *Chagnon*), parliamentary privilege "ensures that democratically-elected members of the House of Commons can voice their concerns and independently represent the interests of their constituents".[33] The Joint Committee placed a particular emphasis on the importance of parliamentary committees to this process, observing that "[c]ommittees have become a key area in which Parliament fulfills its historical role as the grand inquest of the nation."[34]

27. The Assembly's deliberative role and the power to "send for persons, papers and things" are intrinsically linked. In order to ensure that the "best solutions to public problems will rise to the top" through the deliberative process, the legislative branch requires access to complete and correct information, so that it has full knowledge of the conditions underlying its policy choices.

28. The facts giving rise to this motion are an apt demonstration of the Assembly's deliberative role.

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[32] *Secession Reference* at para 68 [emphasis added], SBOA, Tab 30.
[33] U.K., House of Lords, House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege: Report of Session 2013-14* (July 3, 2013) at p 7 [UK Joint Committee 2013-14 Report], SBOA, Tab 50, cited in *Chagnon* at para 22, SBOA, Tab 7. Note that while this excerpt refers to parliamentary privilege in the United Kingdom, the majority of the Supreme Court of Canada in *Chagnon* went on to state that parliamentary privilege in Canada serves the same purpose as in the United Kingdom (see *Chagnon* at para 23, SBOA, Tab 7).
[34] UK Joint Committee 2013-14 Report at p 19, SBOA, Tab 50. See also: *Gagliano v Canada (Attorney General)*, 2005 FC 576 at paras 81-83 [*Gagliano*] (re parliamentary committees' investigative function), SBOA, Tab 16.

29. Laurentian is a pillar of the community in Sudbury and Northern Ontario, providing access to higher education (falling within the Legislature's jurisdiction) in both Official Languages for Ontarians. It is also a major employer and a recipient of significant public funds.

30. Laurentian took the unprecedented step, as an institution in Ontario's "broader public sector",[35] of seeking creditor protection. This led to post-secondary education program reductions and layoffs that caused significant concerns in the community. It also raised larger questions of accountability in the broader public sector. PAC agreed to look into the matter by asking the Auditor General to conduct a "value-for-money" audit. Once the "value-for-money" audit was complete, PAC would be in a position to report its observations, opinions and recommendations regarding this unprecedented situation to the House.[36]

31. Active consideration of the issues of the day is a key aspect of the legislative assembly's deliberative role and ensures that the Assembly remains a forum in which the electorate's concerns may be expressed. It would defeat the purpose of parliamentary privilege for the Court to do as Laurentian suggests and constrain the necessity analysis to passing legislation and holding the government to account.

4. The power to "send for persons, papers and things" has been judicially recognized for nearly 200 years

32. Contrary to Laurentian's assertion that "the recognized categories of parliamentary privilege all involve internal matters",[37] the privilege claimed by the Assembly, "the power to

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[35] The *Broader Public Sector Accountability Act, 2010*, SO 2010, c 25 defines "every university in Ontario" as a "designated broader public sector organization" (s. 1 "designated broader public sector organization" at (c)).
[36] Ontario, Legislative Assembly, *Standing Orders of the Legislative Assembly of Ontario*, 42nd Parl, 2nd Sess, Standing Order 111(h): ("Standing Committee on Public Accounts which is empowered to review and report to the House its observations, opinions and recommendations on the Report of the Auditor General and the Public Accounts […]"), SBOA, Tab 46.
[37] Laurentian Factum at para 44, Caselines A6404/A276.

send for persons, papers and things", has deep and historic roots. This power has long been recognized by learned commentators.[38] The most recent edition of *House of Commons Procedure and Practice* notes that "Parliament has the ability to institute its own inquiries, to require the attendance of witnesses and to order the production of documents, rights which are fundamental to its proper functioning. These rights are as old as Parliament itself."[39]

33. In Canada, a version of this privilege has been recognized as early as 1830, when the Court of King's Bench of Upper Canada found, in *McNab v Bidwell and Baldwin* (per Sherwood J.) that there existed in the House of Assembly a "right of enquiry", as the House of Assembly could not "join in making laws for the good government of the King's subjects without obtaining the information requisite to form a correct opinion of the measures and alterations proper to be adopted. I think this is an inherent right essential to every legislature."[40]

34. This position was maintained post-Confederation, when the Court of Queen's Bench of Quebec, per Dorion C.J., restated the principle that the "right of enquiry" was incidental to responsible government:

> […] All the powers which were formerly exercised by the several branches of the Legislature of the late Province of Canada have by the Confederation Act been transferred to either the Dominion or the Local Parliaments. I do not see that the power of Colonial Legislatures to summon witnesses in order to conduct the enquiries required for a proper understanding of the several questions affecting legislation or the administration of public affairs was ever challenged. Responsible Government, which has been recognised in the Local as well as in the constitution of

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[38] See for e.g.: Alpheus Todd, *The Practice and Privileges of the Two Houses of Parliament: With an appendix of forms* (Toronto: Rogers & Thompson, 1840) at pp 314: "Select Committees are generally empowered by the order appointing them to send for persons and papers. If a Committee be appointed without this power, they may summon witnesses, but if they refuse to attend, authority must first be obtained from the House, before they can be compelled to come." SBOA, Tab 34.

[39] Canada, House of Commons, *House of Commons Procedure and Practice*, 3rd ed at Ch 3 (online) at "The Rights to Institute Inquiries, to Require the Attendance of Witnesses and to Order the Production of Documents", SBOA, Tab 38.

[40] *McNab v Bidwell and Baldwin* (1830), Upper Canada King's Bench Reports, 1829-1831, 144 at 156, [*McNab*], SBOA, Tab 23.

> the General Government would be a delusion if that power of enquiry was denied and the enquiry would be valueless without the power of summoning witnesses.[41]

35. The learned treatises on parliamentary privilege are unanimous in the view that the power to "send for persons, papers and things" is absolute. Laurentian asserts that "[p]arliamentary statements […] are not binding on this Court."[42] However, these authorities are persuasive in articulating the scope of parliamentary privilege, as is evident in the Supreme Court of Canada's heavy reliance on such treatises in its decisions in *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, *Vaid* and *Chagnon*.[43] In *Vaid* a unanimous Supreme Court of Canada held that "the courts will clearly give considerable deference to our own Parliament's view of the scope of autonomy it considers necessary to fulfill its functions."[44]

36. *House of Commons Procedure and Practice* notes that "[i]t is well established that Parliament has the right to order any and all documents to be laid before it which it believes are necessary for its information. … The power to call for persons, papers and records is absolute, but it is seldom exercised without consideration of the public interest."[45]

37. Maingot's text, *Parliamentary Privilege in Canada*, 2nd edition, notes that questions of relevance fall to be determined by the legislative assembly,[46] a view concurred in by Erskine May, which holds that "[b]oth Houses retain the right to be sole judge of the lawfulness of their

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[41] *Ex parte Dansereau* (1875), Cases on the BNA Act (Cartwright) 165 at 190 (QCQB – Appeal Side) [emphasis added], SBOA, Tab 15.
[42] Laurentian Factum at para 49, Caselines A6406/A278.
[43] See for instance: *New Brunswick Broadcasting Co v Nova Scotia (House of Assembly)*, [1993] 1 SCR 319 at 379-380 [*New Brunswick Broadcasting*], SBOA, Tab 26; *Vaid* at paras 21, 29 and 41-43, SBOA, Tab 5; *Chagnon* at paras 19, 22 and 54, SBOA, Tab 7.
[44] *Vaid* at para 40, SBOA, Tab 5.
[45] *House of Commons Procedure and Practice*, 3rd ed, Ch 3 (online) at "The Rights to Institute Inquiries, to Require the Attendance of Witnesses and to Order the Production of Documents", SBOA, Tab 38.
[46] Maingot, 2nd ed, at p 190, SBOA, Tab 40.

own proceedings, and to settle—or depart from—their own codes of procedure."[47] This is in keeping with the approach to parliamentary privilege outlined above, which precludes the judiciary from interfering with the exercise of a recognized privilege.

38. Accordingly, the Court has before it a privilege that, like the power to exclude strangers (at issue in *New Brunswick Broadcasting*), "has been upheld for many centuries, abroad and in Canada".[48] As the majority of the Supreme Court of Canada held in *New Brunswick Broadcasting*, such a historical pedigree "is some evidence that [the privilege] is generally regarded as essential to the proper functioning of a legislature patterned on the British model."[49] The next stage of the analysis is to consider whether that necessity continues in the contemporary context.

5. The necessity of the power to send for "persons, papers and things" continues in the contemporary context

39. In *Chagnon*, a majority of the Supreme Court of Canada ruled that "given its rationale, the necessity of a privilege must be assessed in the contemporary context. Even if a certain area has historically been considered subject to parliamentary privilege, it may only continue to be so if it remains necessary to the independent functioning of our legislative bodies today".[50] The Assembly bears the onus of establishing the continuing necessity of this privilege.[51]

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[47] Erskine May, 25th ed (online) at para 11.16, SBOA, Tab 37.
[48] *New Brunswick Broadcasting* at 387, SBOA, Tab 26.
[49] *New Brunswick Broadcasting* at 387, SBOA, Tab 26.
[50] *Chagnon* at para 31, SBOA, Tab 7.
[51] *Chagnon* at para 32, SBOA, Tab 7.

i. Laurentian improperly conflates the exercise and scope of the power to send for "persons, papers and things" in its necessity analysis

40. Contrary to Laurentian's position, the necessity test cannot be used to review the purpose for which Parliamentary privilege is exercised,[52] as any consideration of the Assembly's purpose requires consideration of the circumstances in which the privilege is exercised. This falls outside the judicial role in relation to privilege, as has been repeatedly stated by the Supreme Court of Canada in *New Brunswick Broadcasting*, *Vaid* and *Chagnon*. Laurentian attempts to justify its position with reference to the concurring reasons of McLachlin J. (as she then was) in *Harvey v New Brunswick*;[53] however, McLachlin J.'s concurring reasons expressly cast the courts as playing a "screening role" that addresses "whether a claimed privilege exists" and requires the courts to determine "whether the act falls within the scope of parliamentary privilege".[54]

41. Laurentian also encourages this Court to dissect the privilege at issue, in order to apply it to various categories of documents.[55] It seeks to justify dissecting the privilege with reference to *Vaid*'s and *Chagnon*'s analysis of claims of parliamentary privilege regarding the management of employees. This is not an appropriate or compelling comparison.

42. Contrary to the circumstances of this case, the privileges claimed by the House of Commons in *Vaid* and by the National Assembly of Quebec in *Chagnon* had not been historically recognized.[56] There is no reason to displace the approach in *New Brunswick Broadcasting*, adopted again in *Vaid* and in *Chagnon*, which considers the historically recognized privilege in the contemporary context. This approach is binding on this Court.

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[52] Laurentian Factum at para 60, Caselines A6410/A282.
[53] Laurentian Factum at para 60, Caselines A6410/A282.
[54] *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876 at para 71, SBOA, Tab 19.
[55] Laurentian Factum at para 59, Caselines A6410/A282.
[56] *Vaid* at para 70, SBOA, Tab 5; *Chagnon* at paras 51 and 56, SBOA, Tab 7.

43. The power to "send for persons, papers and things" can be readily understood on its face, unlike the vast privilege over "internal affairs" initially claimed in *Vaid*, which the Court identified as "a term of great elasticity".[57] The power to "send for persons, papers and things" is also unlike the privilege of "management of employees" claimed at the Supreme Court of Canada in *Vaid* and *Chagnon*, as those claims applied to a multitude of contexts with a wide range of implications for the legislative assembly's constitutional role.[58] The power to compel the attendance of witnesses or the production of documents is much more certain in scope: it grants the Assembly the ability to obtain the information that it requires in order to fulfill its constitutional role. Furthermore, unlike the privileges claimed in *Vaid* and *Chagnon*, which were claimed vicariously by the Speaker, the power to "send for persons, papers and things" requires an affirmative resolution of the entire Assembly before it has an impact on the interests of strangers.

44. Drilling down into the nature of the specific documents and asking whether each kind of document is necessary to the Assembly's function, as Laurentian proposes, would be a radical departure from Canada's parliamentary privilege jurisprudence. This approach moves beyond ascertaining the scope of the privilege, which is permitted, to evaluating the appropriateness of the privilege's exercise, which is not. Thus, instead of asking whether it remains necessary for the Assembly to obtain information, including through compulsion, so it can fulfill its legislative and deliberative functions, Laurentian asks this Court to examine whether the kind of information sought by the Assembly in this case is in fact required. This distorted test places the judicial branch in the constitutionally impermissible position of determining not whether

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[57] *Vaid* at para 50, SBOA, Tab 5.
[58] *Vaid* at para 72, SBOA, Tab 5; *Chagnon* at para 37, SBOA, Tab 7.

privilege exists, but of supervising its exercise. This trenches on the very separation of powers that underlies the constitutional doctrine of parliamentary privilege. Laurentian's approach could be extended to assess the kinds of "free speech" required to fearlessly hold the executive to account, which would be clearly inappropriate. The Court's analysis must remain at the level of whether it is necessary for the legislative assembly to be able to obtain outside information, and cannot consider the nature of the outside information itself.

ii. The Assembly's ability to make informed policy choices is as important in 2022 as it was in 1830

45. The "right of enquiry" from which the power to "send for persons, papers and things" flows remains as fundamental to the Assembly's independent functioning in Ontario in 2022 as it was to the House of Assembly's functioning in Upper Canada in 1830. Making policy decisions on the basis of correct and complete information continues to be vital to the Assembly's legislative and deliberative role. As compared to 1830, the Assembly faces a multitude of public policy concerns of vastly increased complexity, and must respond to those concerns in a way that reflects and meets the needs of the diversity of Ontario's populace. In this context, full access to information outside of the legislature, including that which is outside of "government", is vital to the Assembly's ability to make policy choices in a manner that meets the needs of the electorate. This is the very essence of self-government.

46. Indeed, the nature of the legislative and deliberative function, which must extend to considering circumstances that might require a legislative response, is functionally unchanged from earlier times.

47. The United Kingdom Parliament's Joint Committee on Privilege, a source recognized as authoritative by the Supreme Court of Canada in both *Vaid* and *Chagnon*, has also repeatedly

held that the power to "send for persons papers and things" is necessary in the contemporary context. It recognized this necessity in 1999, in the following terms:

> The right to institute inquiries and require the attendance of witnesses and production of documents ('to send for persons, papers, and records') is part of the law and custom of Parliament. At least since Elizabethan times committees have been examining matters where witnesses were required to appear. Although committee inquiries concentrate on the scrutiny of government, and (in the case of the Commons particularly) on ensuring the proper and effective use of public money, investigations into other matters of public interest have always been an important element of select committee work.[59] [emphasis added]

48. This conclusion is in line with the only recent Canadian jurisprudence on the subject. In *Canada (Attorney General) v MacPhee*, Cheverie J., of the Prince Edward Island Supreme Court – Trial Division, held that "[i]t is difficult to imagine how the legislative assembly could properly conduct an inquiry within its constitutional jurisdiction without the power to summon witnesses and require the production of records and documents."[60] Accordingly, much like the power to exclude strangers considered in *New Brunswick Broadcasting*, the power to "send for persons, papers and things" "is as necessary to modern Canadian democracy as it has been to democracies here and elsewhere in past centuries."[61]

6. Solicitor-client privilege and class privileges do not limit the Assembly's power to "send for persons, papers and things"

49. Laurentian alleges that the compulsion of documents covered by a class privilege falls outside the scope of parliamentary privilege. In so asserting, Laurentian argues that this

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[59] U.K., House of Lords, House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege: First Report* (20 March 1999) at para 234, SBOA, Tab 49.
[60] *Canada (Attorney General) v MacPhee*, 2003 PESCTD 6 at para 24 [*MacPhee*], SBOA, Tab 3.
[61] *New Brunswick Broadcasting* at 387, SBOA, Tab 26. For a further example of a use of this power in recent years, see: Nova Scotia, House of Assembly, Committee on Resources, *Hansard*, 60th Gen. Ass., 2nd Sess, (16 September 2008), in which the Assistant Commissioner for the Maritimes Region of the Canadian Coast Guard attended to give evidence before the Nova Scotia House of Assembly's Committee on Resources after being compelled to do so pursuant to a Speaker's Warrant, SBOA, Tab 42.

exception is required in order to "reconcile the *Charter* rights to privacy and freedom from search and seizure with parliamentary power".[62] Laurentian evokes sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") in this regard, focusing on the impact on the *Charter* rights involved.

50. However, the *Chagnon* analysis focuses on the purpose of the privilege, rather than on the impact on *Charter rights*. While neither *Charter* rights nor parliamentary privilege may prevail over one another, the Supreme Court of Canada clearly directed that the analysis "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."[63]

i. Section 8 of the Charter

51. As Laurentian notes, "[a] legal requirement to produce documents is a seizure under s. 8 of the *Charter*."[64] Laurentian attempts to highlight the privilege inhering in some of the documents sought by the Assembly as justifying a narrower scope for the power to "send for persons, papers and things". However, as a matter of general law, section 8 of the *Charter* protects both privileged and non-privileged documents, such that arguments aiming to reconcile parliamentary privilege and section 8 of the *Charter* could never focus on the privileged nature of documents alone. In addition to Supreme Court of Canada jurisprudence, this is another reason the reconciliation of parliamentary privilege with the *Charter* must occur through the lens of parliamentary privilege's purpose, rather than the consequence of its exercise in any particular case.

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[62] Laurentian Factum at para 56, Caselines A6408/A280.
[63] *Chagnon* at para 28 [emphasis added], SBOA, Tab 7.
[64] Laurentian Factum at para 48, Caselines A6406/A278.

52. Instead, recognizing that a legislative assembly needs to be able to compel information from "strangers" in order to fulfill its legislative and deliberative function, the proper focus is on the purpose of both the parliamentary privilege involved and the purpose of the *Charter* right in question, and how those two elements of the Constitution may find conceptual alignment. When reconciling the power to "send for persons, papers and things" with the values underlying section 8 of the *Charter*, it is important to recall that s. 8 does not erect walls behind which the State cannot reach. As the Supreme Court of Canada outlined in *Goodwin v British Columbia (Superintendent of Motor Vehicles)*:

> The protection s. 8 provides for an individual's privacy – personal, territorial and informational – is essential not only to human dignity, but also to the functioning of our democratic society. At the same time, s. 8 permits *reasonable* searches and seizures in recognition that the state's legitimate interest in advancing its goals or enforcing its laws will sometimes require a degree of intrusion into the private sphere. The tension articulated in *Hunter* between the competing individual and state interests, and the adequacy of the safeguards provided, remain foundational to this analysis.[65]

53. The very nature of the power to "send for persons, papers and things" is to enable the legislative branch of the state to engage in informed deliberations on the issues of the day by providing the Assembly with the information required. What is more, the form of the power to "send for persons papers and things" (which is manifested by the Speaker issuing his Warrants on authorization from a public vote in the legislative assembly) provides safeguards by ensuring that the process of calling for materials from private citizens occurs in full view of the electorate, to whom accountability for all exercises of parliamentary privilege ultimately lies.[66]

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[65] *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46 at para 55 [emphasis in original], SBOA, Tab 17.
[66] *Chagnon* at para 24, SBOA, Tab 7.

54. Accordingly, there is no inconsistency between a parliamentary privilege that permits the Assembly to compel information to allow it to perform functions at the core of our constitutional democracy, via an orderly process that occurs in public view, and a *Charter* right that affords citizens a zone of privacy, subject to the state's ability to make reasonable incursions into that zone in order to meet the state's legitimate interests.

ii. Section 7 of the Charter

55. Laurentian's standing to assert arguments related to solicitor-client privilege based on section 7 of the *Charter* is unclear. Laurentian is a statutory corporation, incorporated under *An Act to incorporate Laurentian University of Sudbury*, SO 1960, c 151. As such, it does not hold section 7 *Charter* rights.[67] While it may be advancing *Charter*-based arguments on behalf of its former Chair of the Board of Governors and its President, neither Mr. Lacroix or Mr. Haché are the "client" in whom the privilege inheres.

56. Furthermore, information-gathering by the Assembly to support its deliberative function falls outside of section 7 of the *Charter*'s purpose. As Lamer C.J. held for a majority of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services v G (J)*, "the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system and its administration."[68] As Binnie and LeBel JJ. recognized in *Chaoulli*, "[i]t will likely be a rare case where s. 7 will apply in circumstances entirely unrelated to adjudicative or administrative proceedings."[69]

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[67] *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 SCR 927 at 1002-1003, SBOA, Tab 20.
[68] *New Brunswick (Min. of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 65, SBOA, Tab 25.
[69] *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 196, SBOA, Tab 8.

57. Even if the purpose of section 7 of the *Charter* could be engaged by the Assembly's exercise of the power to "send for persons, papers and things", which the Assembly does not concede, it is possible to reconcile concerns that arise regarding demands for solicitor-client privileged information and parliamentary privilege, given that both parliamentary privilege and intrusions by the state into solicitor-client privileged areas are governed by principles based in necessity.

58. Solicitor-client privilege can accommodate exceptions based on the social values at play. As Cory J. recognized in *Smith v Jones*, writing for a majority of the Supreme Court of Canada, while the protection afforded by solicitor-client privilege is a policy decision based on the importance of solicitor-client privilege to our legal system, "[i]n certain circumstances, however, other societal values must prevail."[70]

59. The Assembly's ability to obtain the information it requires in order to legislate is an "other societal value", with deep roots in our constitutional order, which must prevail over solicitor-client privilege. Establishing solicitor-client communications as an "inquiry-free zone" would impede the Assembly's ability to fulfill its constitutional purpose where it required such protected communications in order to inform its deliberations and legislative activities. This would run contrary to the teachings of the Supreme Court of Canada by effectively making parliamentary privilege subordinate to solicitor-client privilege and the *Charter* rights Laurentian invokes.

60. On the other hand, recognizing parliamentary privilege as an "other societal value" that prevails over solicitor-client privilege is consistent with the reconciling exercise mandated in

[70] *Smith v Jones*, [1999] 1 SCR 455 at 477 [emphasis added], SBOA, Tab 33.

Chagnon, as the scope of parliamentary privilege and exceptions to solicitor-client privilege are both governed by necessity. Both tests also eschew "case-by-case" weighing by the judiciary.

61. Indeed, taking the most recent authority cited by Laurentian, *Alberta (Information and Privacy Commissioner) v University of Calgary*, Côté J. held, for a majority of the Supreme Court of Canada, that:

> This Court has repeatedly affirmed that, as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary. Within the evidentiary context of criminal proceedings, for example, the substantive nature of solicitor-client privilege has been interpreted as meaning the privilege only yields in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. These limited categories, which will only be satisfied in rare circumstances, include the accused's right to make full answer and defence and where public safety is at stake.[71]

62. Recognizing parliamentary privilege as an "important societal value" that prevails over solicitor-client privilege does not mean that the important principles underpinning solicitor-client privilege lose all relevance when the Assembly compels production of privileged documents. What it means, however, is that it is for the Assembly itself to determine what steps are appropriate to protect the documents in question.[72] PAC has conducted precisely this type of diligence in this case, and from the early days of its communication with Laurentian undertook not to publicly exhibit documents protected by solicitor-client privilege.[73] Should PAC or the

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[71] *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 43 [emphasis added], SBOA, Tab 1.

[72] Canada, Parliament, Senate, Standing Committee on Rules, Procedures and the Rights of Parliament, *A Matter of Privilege: A Discussion Paper on Canadian Parliamentary Privilege in the 21st Century*, 41st Parl, 2nd Sess, No 7 (2 June 2015) (Chair: Hon. Vernon White) at 36 and 63, SBOA, Tab 36; Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 40th Parl, 1st Sess, No 79 (13 September 2012) at 3607 (Hon D Levac), SBOA, Tab 44; Canada, Parliament, House of Commons, *House of Commons Debates*, 40th Parl, 3rd Sess, Vol 145, No 034 (27 April 2010) at 2043-2044 (Hon P Milliken), SBOA, Tab 35.

[73] Mudryk Aff at Exh G, MRLU, Tab 3 at p 134, Caselines A6267/A139.

Assembly give insufficient protections to these or any other sensitive documents in its possession, it is for the electorate, not the courts, to pass judgment on their conduct.

iii. Other class privileges

63. Laurentian also evokes litigation privilege and settlement privilege in its factum, stating that they are class privileges that do not accommodate a balancing of interests.[74] However, unlike solicitor-client privilege, neither litigation privilege nor settlement privilege have a constitutional dimension. As a result, no balancing is required, and these zones of privacy in litigation, established at common law,[75] must yield to parliamentary privilege.

64. Laurentian's submission once again reverses the analysis laid out by the Supreme Court of Canada in *Chagnon*. The sole question properly before this Court is whether the privilege claimed by the Assembly is necessary to its deliberative and legislative functions, not whether the competing outside interests outweigh the Assembly's interests in the documents. The Assembly's fulfilment of its constitutional role cannot be frustrated or stymied by the application of common law rules of evidence designed to allow litigants before the judicial branch the space required to resolve private disputes.

7. Court orders do not limit the Assembly's power to "send for persons, papers and things"

65. As a corollary of the necessity doctrine, the power to "send for persons, papers and things" is intricately related to the privileges over "proceedings in Parliament" and "freedom of speech". Requests for "persons, papers and things" will only arise to the extent they are driven by "proceedings in Parliament", and the information provided, once returned, will illuminate

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[74] Laurentian Factum at para 47, Caselines 6406/A278.
[75] *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52 at paras 20-23, SBOA, Tab 21; *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37 at paras 12-13, SBOA, Tab 32.

members' ability to contribute to debate. Given that the power to "send for persons, papers and things" is ancillary to the privilege over proceedings in Parliament, the judicial branch cannot, through its orders, limit the information that the Assembly may obtain, just as these orders cannot limit the topics that the Assembly may debate.

66. For example, in 1994, in New Zealand, the House of Representatives received documents from one of its Members, despite those documents having been subject to injunctions prohibiting their publication. The House's determination, supported by advice from the Solicitor-General, the Clerk of the House and the President of the Law Commission, was that the House's privileges, in that case as set out in article 9 of the *Bill of Rights* of 1688, were "sufficiently wide to enable this House to manage its own affairs as it sees fit, notwithstanding any court injunctions or any other court action that may be extant."[76]

67. While Laurentian has invoked the *sub judice* rule to resist producing the documents the Assembly seeks,[77] as Dean Sossin (as he then was) has recognized "[u]nlike the common law *sub judice* doctrine, which is enforced through the court's contempt power, the *sub judice* convention as a Parliamentary rule is governed through the Speaker's office."[78] In Ontario, the convention is guided by Standing Order 25(g), which limits the application of the convention in debate to situations "where it is shown to the satisfaction of the Speaker that further reference would create a real and substantial danger or prejudice to the proceeding."[79] However, this Court

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[76] New Zealand, House of Representatives, *Parliamentary Debates (Hansard)*, 44th Parl, 1st Sess, Vol 540 (8 June 1994) at 5 (SBOA pagination), SBOA, Tab 41.
[77] Laurentian Factum at para 3, Caselines 6388/A260; Mudryk Aff at Exh P, MRLU, Tab 3 at pp 221-222, Caselines A6354/A226-A6355/A227.
[78] Lorne Sossin and Valerie Crystal, A Comment on "No Comment": The Sub Judice Rule and the Accountability of Public Officials in the 21st Century, 2013 36-2 *Dalhousie Law Journal* 535 at 551, SBOA, Tab 39.
[79] Ontario, Legislative Assembly, *Standing Orders of the Legislative Assembly of Ontario*, 42nd Parl, 2nd Sess, Standing Order 25(g), SBOA, Tab 46.

does not have the jurisdiction to review the Speaker's application of the *sub judice* rule. The Court of Appeal has held that "[t]he Standing Orders are protected by parliamentary privilege and neither the courts nor any quasi-judicial body have the right to inquire into their contents or to question whether a particular part of the Standing Orders […] is necessary or indeed lawful."[80]

68. The very purpose of the separation of powers doctrine is to allow each branch to fulfill its constitutional role. Allowing court orders to curtail a legislative assembly's ability to gather information to fulfill its constitutional mandate would have the effect of allowing the judicial branch to restrict the topics that the legislative branch could consider, which would "upset the balance of roles, responsibilities and capacities that has evolved in our system of governance over the course of centuries."[81]

69. Finally, the spectre Laurentian raises of litigants being prosecuted for contempt of court for complying with a parliamentary order to provide papers contrary to a court order is baseless. Indeed, individuals providing information to the Assembly, whether by appearing before committees or providing documentation to them, benefit from immunity under parliamentary privilege[82] and under section 36 of the *Legislative Assembly Act*, which specifies that "[n]o person is liable in damages or otherwise for any act done under the authority of the Assembly and within its legal power or under or by virtual of a warrant issued under such authority […]."[83]

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[80] *Ontario (Speaker of the Legislative Assembly) v Ontario (Human Rights Commission* (2001) 54 OR (3d) 595 at para 23 (CA), SBOA, Tab 28.
[81] *Criminal Lawyers' Association* at para 30, SBOA, Tab 27.
[82] *Gagliano* at para 83, SBOA, Tab 16; *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v Canada (Commissioner, Royal Canadian Mounted Police)*, 2007 FC 564 at para 63, SBOA, Tab 4.
[83] *Legislative Assembly Act*, RSO 1990, c. L.10, s 36.

8. There are no federalism grounds providing this Court with jurisdiction to stay the Speaker's Warrants

70. Laurentian submits that the mere presence of a federal statute in the landscape of the litigation renders the Assembly's privileges meaningless. Indeed, this submission ignores the trend in federalism jurisprudence to eschew watertight compartments and "acknowledges that it would often be impossible for one order of government to fulfill its constitutional mandates without affecting matters that fall within the other order's legislative authority."[84]. It also ignores that, as an institution of higher learning funded in large part by the provincial government, Laurentian is unquestionably an actor on the provincial scene. The fact that it has elected to avail itself of a federal statute to respond to its financial difficulties does not remove the Assembly's jurisdiction or provide Laurentian with a haven or a shield from the Assembly's legitimate scrutiny.

71. The *MacPhee* case, in which a committee of the Prince Edward Island Legislative Assembly was conducting an inquiry into a potato wart crisis then affecting the province's economy, dealt with similar concerns. The Committee sought to compel evidence from the Canadian Food Inspection Agency, which resisted on the basis that the committee had no jurisdiction to inquire into the operation of a federal agency. The Court found that this concern was premature at the stage of sending for the witness or document as, "just because the witnesses sought to be summoned happen to be employees of a federal agency does not necessarily mean the Committee is conducting an inquiry into that federal agency.[85]

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[84] *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 86 [citations omitted], SBOA, Tab 10.
[85] *MacPhee* at paras 15 and 33-37, SBOA, Tab 3.

72. This approach is also consistent with recent Supreme Court of Canada authority regarding the interaction between the federal bankruptcy power and provincial jurisdiction. In *Orphan Well Association v Grant Thornton*, a majority of the Supreme Court of Canada concluded that federal insolvency legislation does not oust provincial jurisdiction unless there is an operational conflict between federal and provincial laws, or the provincial law frustrates the purpose of the federal law.[86] However, it is difficult to see how either doctrine applies, as the Assembly is not asserting any claims against Laurentian, nor is it in any way interfering with Laurentian's ability to seek relief from the Court from its creditors. The Assembly does not have, and does not seek, any standing in the *CCAA* proceedings, which is a process separate and apart from PAC's request for a value-for-money audit by the Auditor General. To the extent the applicability of the power to "send for persons, papers and things" interferes with any part of the process, this addresses judicial confidentiality orders, which are ancillary to the *CCAA*'s purpose and, as addressed above, cannot limit the Assembly's ability to exercise its legislative and deliberative functions.

73. In any event, the Assembly's position is that division of powers doctrines have no role to play in matters of parliamentary privilege. The Assembly's privileges are not granted by section 92 of the *Constitution Act, 1867*, but are instead grounded in that constitutional statute's preamble.[87] In that regard, the Assembly's privileges have a constitutional status that is equal to that of the House of Commons' and Senate's (indeed, as each of the House's and Senate's privileges have equal status as regards the other), such that the doctrines of paramountcy and interjurisdictional immunity are neither necessary nor applicable.

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[86] *Orphan Well Association v Grant Thornton*, 2019 SCC 5 at para 65, SBOA, Tab 29.
[87] *Chagnon* at para 23, SBOA, Tab 7.

9. The Assembly has not limited its privileges by enacting the Auditor General Act

74. Citing Rowe J.'s concurring reasons in *Chagnon*,[88] Laurentian suggests that by enacting the *Auditor General Act*, the Assembly has abrogated its privileges in relation to the examination of the expenditure of public funds in Ontario. However, this is contrary to Court of Appeal's more recent unanimous decision in *R v Duffy*, holding that:

> [e]ven if parliamentary privilege can be waived -- which I believe need not be decided in this case – I would conclude that because of the institutional and constitutional character of parliamentary privilege, any waiver would require an express statement, either in legislation or possibly in a parliamentary resolution, that clearly and unambiguously waives the privilege.[89]

75. On either model, it is important to recognize that the Auditor General was originally an executive function.[90] After decades of evolution, the executive's audit function grew into an accountability function.[91] It was due to this transformation that the Auditor General became an Officer of the Assembly.[92] The Assembly did not sacrifice any part of its hard-won privileges by lending its institutional support to the audit function's existing accountability mechanisms.

76. The existence in the *Auditor General Act* of a legislative mechanism by which PAC can seek the Auditor General's assistance in fulfilling its mandate does not foreclose the Assembly from relying on its inherent privileges to ensure that its committee is able to fulfill its function when a legislated tool proves inefficient.

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[88] Laurentian Factum at para 82, Caselines A6419/A291, citing *Chagnon* at paras 59 and 66, per Rowe J (writing for himself only). The majority in *Chagnon* addressed the claim of privilege without recourse to the National Assembly's governing legislation (see para 46), SBOA, Tab 7.
[89] *Duffy v Canada (Senate)*, 2020 ONCA 536 at para 122, per Jamal J.A. (as he then was), SBOA, Tab 12.
[90] Navarro Aff at Exh L, SRR at p 70-71, Caselines B-1-3260/B-1-71 – B-1-3261/B-1-72.
[91] Navarro Aff at Exh L, SRR at p 72-76, Caselines B-1-3262/B-1-73 – B-1-3266/B-1-77.
[92] Navarro Aff at Exh L, SRR at p 76-79, Caselines B-1-3266/B-1-77 – B-1-3269/B-1-80.

77. As was held in *Vaid*, the impact of legislation on parliamentary privilege falls to be interpreted in a purposive way. There is nothing in the *Auditor General Act*'s purpose that suggests any limitation of the Assembly's power to "send for persons, papers and things." In particular, the *Auditor General Act* does not preclude any actions that PAC may take once it receives the sought-after documents. While the *Auditor General Act* specifies that the Auditor General's working papers will not be laid before PAC, this is a one-way provision. There are no impediments to PAC sharing whatever information it chooses with the Auditor General.

10. Conclusion

78. Laurentian urges this Court to impugn the Assembly's motives, and to find that "[t]he Court cannot assume that the Assembly will act responsibly on this or any other occasion."[93] This is a breathtaking and anti-democratic statement that this Court should eschew. It flies in the face of the "special prudence" that the Supreme Court of Canada has recognized the judicial branch must show in cases involving the separation of powers.[94]

79. Laurentian also raises a number of "intolerable situations" that it says would flow from recognizing the full scope of the Assembly's power to "send for persons, papers and things". In this regard, Laurentian arguments are similar to those put before one of this Court's predecessors in 1830 in *McNab v Bidwell*. This Court should dispose of those concerns as did Chief Justice Robinson, nearly two hundred years ago:

> Arguments were very ingeniously raised upon the possible abuses that might follow the recognition of the power exercised in this case by the Assembly, and some of them certainly were formidable in appearance at least; but every objection of this nature would equally be against the House of Commons. […] The true point of view in which to regard the question is that these powers are required by the House in

[93] Laurentian Factum at para 63, Caselines A6411/A283.
[94] *Provincial Court Judges' Association* at para 64, SBOA, Tab 2.

> order to enable them to promote the welfare of their constituents; we are bound to suppose that they will use them with discretion and for good ends; and if we had the power we should have no right to withhold them on the assumption that they desire to pervert the objects of their constitution.[95]

80. This approach is entirely consistent with the Supreme Court of Canada's holding in *Chagnon* that "while legislative assemblies are not accountable to the courts for the ways in which they exercise their parliamentary privileges, they remain accountable to the electorate."[96]

B. If the Court does have jurisdiction, the motion for a stay should nonetheless be dismissed

81. Should the Court determine that it has jurisdiction to consider a stay, that consideration should nonetheless be guided by the prudence that is the hallmark of all litigation that risks trenching on the separation of powers. This is particularly so in the present context, in which Laurentian has yet to bring any underlying proceeding to determine the validity of the Speaker's Warrants. Laurentian is effectively seeking a stay "at large".

82. Furthermore, the timing of this litigation calls for particular attention on the Court's part to the consequences of granting a stay. Pursuant to the *Election Act*, the Assembly must be dissolved no later than May 4, 2022.[97] If the stay is of sufficiently long duration, Laurentian will have been able to evade the Assembly's scrutiny, without ever having had to meet its onus of quashing the Speaker's Warrants on their merits.

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[95] *McNab* at 155, per Robinson C.J., SBOA, Tab 23.
[96] *Chagnon* at para 24, SBOA, Tab 7.
[97] *Election Act*, RSO 1990, c E.6, ss 9 and 9.1,

1. Assuming that the Court finds it has jurisdiction, there is no serious question to be tried

83. There is no serious question to be tried.[98] Laurentian's intended, but as yet unmoved, motion to quash the Speaker's Warrants will address an aspect of the Assembly's parliamentary privileges that is a matter of well-settled law.

84. The Supreme Court held in *RJR MacDonald* that the analysis should proceed once the motion judge is "satisfied that the application is neither vexatious nor frivolous".[99] An application seeking relief in this clearly privileged area is, however, just that. While the issues are serious in terms of their importance to our constitutional democracy, they are not issues to be resolved by the judiciary. There is no real question requiring the Court's assistance. The answer in this case is obvious, as it flows from the powers of the Assembly, which date back centuries and clearly continue into the present context. As such, there is no serious argument to be made against the Assembly's privilege.

2. Laurentian will not suffer irreparable harm

85. The burden is on Laurentian to "adduce clear and non-speculative evidence that irreparable harm will be suffered if the [stay] is refused".[100]

86. Laurentian's submissions give rise to concerns regarding the possibility of it being held in contempt for breaching confidentiality orders made in the *CCAA* process. However, as noted above, Laurentian will benefit from immunity for any of its documents laid before PAC in

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[98] The Speaker does not concede that the "strong *prima facie* test" standard has no application in this matter, given that Laurentian has not brought any underlying proceeding to challenge the Speaker's Warrants. However, the Speaker's position is that there no serious question to be tried, such that these submissions do not address the "strong *prima facie* test".
[99] *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 337 [*RJR*], SBOA, Tab 31.
[100] *Delta Power Equipment Ltd v Kubota Canada Ltd*, 2018 ONSC 3595 at para 24, SBOA, Tab 9.

response to the Assembly's exercise of its power to "send for persons, papers and things."

87. What irreparable harm will Laurentian suffer? PAC has asked the Auditor General to conduct a "value-for-money" audit, which, even if it could be characterized as harmful to Laurentian, is unlikely to be completed before Laurentian's motion will be heard or determined. PAC has no power to assign fault or determine civil or criminal liability, PAC is not a party to the *CCAA* proceedings, nor is PAC able to interfere with the progress and outcome of those proceedings. Indeed, Laurentian's submissions focus on the "irreparable" nature of disclosure of its information to PAC, but do not substantiate how this disclosure will cause harm. As this Court has held, "[b]ald allegations or general beliefs or concerns, without factual underpinning establishing a reasonable likelihood of irreparable harm [do] not satisfy the requirement."[101] This requirement holds even in cases where confidential information is at stake.[102]

88. A somewhat analogous issue arose before the Federal Court of Appeal in *eBay Canada Limited v. Canada (National Revenue)*. This case involved an order that eBay provide the Minister of National Revenue with information about third parties. eBay sought an injunction or stay of that order pending an appeal. The case turned on the issue of irreparable harm:

> It is argued for eBay Canada that once information about PowerSellers is disclosed to the Minister, it cannot be undisclosed. I agree that the disclosure of information is an act that cannot be reversed. […]
>
> However, the relevant question is whether eBay Canada would suffer irreparable harm from the disclosure, which first requires a determination that there will be some harm. The answer to that question depends on what the Minister is likely to do with the information if it is disclosed.[…]
>
> The record contains no evidence that any steps the Minister may take to verify the PowerSellers' compliance with the *Income Tax Act*, or to assess any PowerSellers

[101] *Dilico Anishinabek Family Care v Her Majesty the Queen*, 2020 ONSC 892 at para 35, SBOA, Tab 11.
[102] *Canadian Transit Co v Girdhar*, 2001 CanLII 28352 at para 24 (ON SC), SBOA, Tab 6.

> who may not have complied, will cause any harm to eBay Canada, much less harm that is irreparable.[103]

89. The same question arises in this case. What is PAC likely to do with the information it has obtained pursuant to the warrant? The answer requires no conjecture. PAC will provide the information to the Auditor General, so that she can continue with the value-for-money audit PAC requested. There is no evidence before the Court that the use of the information by the Auditor General to better inform the Assembly will cause any harm to Laurentian. Nor will it cause any harm to any third parties whose information is implicated.

90. While Laurentian engages in a speculative exercise to impugn the Assembly's ability to preserve the confidentiality of records, raising fears of "media leaks",[104] such unauthorized disclosure of the Assembly's confidential information would constitute a breach of the Assembly's privileges, whether made by a Member or a non-Member.[105]

3. The balance of convenience favours the Assembly's deliberative role

95. The third test to be applied in an application for interlocutory relief was described by the Supreme Court of Canada in *RJR MacDonald*:[106]

> a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

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[103] *eBay Canada Limited v Canada (National Revenue)*, 2008 FCA 141 at paras 29, 35 and 36, SBOA, Tab 14.
[104] Laurentian Factum at para 89, Caselines A6421/A293.
[105] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 40th Parl, 2nd Sess, No 117 (25 March 2014) at 6083 (Hon D Levac), SBOA, Tab 45; Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39th Parl, 2nd Sess, No 36 (20 May 2010) at 1719-1720 (Hon S Peters); SBOA, Tab 43.
[106] *RJR MacDonald* at 342, SBOA, Tab 31.

96. While past jurisprudence regarding stays in constitutional cases address requests to stay the effect of legislation (rather than exercises of parliamentary privilege), similar principles apply. As the Court of Queen's Bench of Alberta recently held, there is a heavy burden on "private applicants who allege that public authorities are not respecting the public interest".[107] As the Supreme Court of Canada held in *RJR MacDonald*:

> since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large […] it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought."[108]

Furthermore, in *Harper v Canada (Attorney General)*, the Supreme Court of Canada held that "[t]he assumption of the public interest in enforcing the law weighs heavily in the balance" and that "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed."[109]

97. The heavy onus on the applicant to convince the Court at the balance of convenience stage that public interest benefits will flow from granting the stay does not apply solely in challenges to legislation. Rather, as was held in *RJR*, it is broadly applicable and "will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility."[110]

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[107] *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24 at para 58, SBOA, Tab 24.
[108] *RJR* at 344-345, SBOA, Tab 31.
[109] *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9, SBOA, Tab 18.
[110] RJR at 346, SBOA, Tab 31.

98. The Speaker's Warrants are the expression of the democratic will of Ontario's elected representatives, whose sole purpose is to promote and protect the public interest by making policy choices, deliberating on laws and holding the executive to account. The Speaker's Warrants were issued in order to assist the Assembly in gaining access to information in order to permit it to fulfill that mandate. As such, there is a heavy presumption that the public interest lies in favour of their being carried out.

99. Laurentian makes no reference to the public interest in its balance of convenience analysis, stating simply that it would suffer harm if the information is disclosed, while the Assembly would suffer none. Given Laurentian's complete lack of submissions regarding the public interest, and given that the Speaker's Warrants were undertaken pursuant to the Assembly's duty to promote and protect the public interest, the balance of convenience test is not met and Laurentian's motion for a stay should be dismissed.

PART IV – ORDER REQUESTED

100. The Speaker respectfully requests that the Court dismiss this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2022.

David P. Taylor
M. Alyssa Holland

Counsel for the Responding Party,
The Speaker of the Legislative Assembly
of Ontario

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53
2. *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2020 SCC 20
3. *Canada (Attorney General) v MacPhee*, 2003 PESCTD 6
4. *Canada (Deputy Commissioner, Royal Canadian Mounted Police) v Canada (Commissioner, Royal Canadian Mounted Police)*, 2007 FC 564
5. *Canada (House of Commons) v Vaid*, 2005 SCC 30
6. *Canada Transit Co v Girdhar*, 2001 CanLII 28352 (ON SC)
7. *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39
8. *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35
9. *Delta Power Equipment Ltd v Kubota Canada Ltd*, 2018 ONSC 3595
10. *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58
11. *Dilico Anishnabek Family Care v Her Majesty the Queen*, 2020 ONSC 892
12. *Duffy v Canada (Senate)*, 2020 ONCA 536
13. *Duffy v Senate of Canada*, 2018 ONSC 7523
14. *eBay Canada Limited v Canada (National Revenue)*, 2008 FCA 141
15. *Ex parte Dansereau* (1875), Cases on the BNA Act (Cartwright) 165
16. *Gagliano v Canada (Attorney General)*, 2005 FC 576
17. *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46
18. *Harper v Canada (Attorney General)*, 2000 SCC 57
19. *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876
20. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927
21. *Lizotte v Aviva Insurance Company of Canada*, 2016 SCC 52
22. *Marin v Office of the Ombudsman*, 2017 ONSC 1687

23. *McNab v Bidwell and Baldwin* (1830), UCKB Reports, 1829-1831, 144

24. *Moms Stop the Harm Society v Alberta*, 2022 ABQB 24

25. *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46

26. *New Brunswick Broadcasting Co v Nova Scotia (House of Assembly)*, [1993] 1 SCR 319

27. *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43

28. *Ontario (Speaker of the Legislative Assembly) v Ontario (Human Rights Commission)* (2001), 54 OR (3d) 595 (CA)

29. *Orphan Well Association v Grant Thornton*, 2019 SCC 5

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

31. *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311

32. *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37

33. *Smith v Jones*, [1999] 1 SCR 455

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

Auditor General Act, RSO 1990, c A.35, s 17

Special Assignments

17 The Auditor General shall perform such special assignments as may be required by the Assembly, the standing Public Accounts Committee of the Assembly, by resolution of the committee, or by a minister of the Crown in right of Ontario but such special assignments shall not take precedence over the other duties of the Auditor General under this Act and the Auditor General may decline an assignment by a minister of the Crown that, in the opinion of the Auditor General, might conflict with the other duties of the Auditor General.

Broader Public Sector Accountability Act, 2010, SO 2010, c 25

1 (1) In this Act,

"designated broader public sector organization" means,

(c) every university in Ontario and every college of applied arts and technology and post-secondary institution in Ontario whether or not affiliated with a university, the enrolments of which are counted for purposes of calculating annual operating grants and entitlements,

Election Act, RSO 1990, c E.6, ss 9 and 9.1

Powers of Lieutenant Governor

9 (1) Nothing in this section affects the powers of the Lieutenant Governor, including the power to dissolve the Legislature, by proclamation in Her Majesty's name, when the Lieutenant Governor sees fit.

First Thursday in June

(2) Subject to the powers of the Lieutenant Governor referred to in subsection (1), general elections shall be held on the first Thursday in June in the fourth calendar year following polling day in the most recent general election.

Dates for writs, close of nominations and polling day

Application to all elections

9.1 (1) This section applies to all elections.

Powers of Lieutenant Governor in Council

(2) When an election is to be held, the Lieutenant Governor in Council may,

(a) order that the writ or writs for the election by issued; and

(b) appoint and proclaim a day,

(i) for the close of nominations and the grant of a poll where required, and

(ii) as polling day,

Date of writ

(3) A writ for an election shall be dated on a Wednesday.

Day for close of nominations and grant of poll

(4) The day for the close of nominations and the grant of a poll where required shall be,

(a) in the case of a general election under subsection 9(2), the second Thursday after the date of the writ;

(b) in any other case, the third Thursday after the date of the writ.

Polling day

(5) Polling day shall be the fifth Thursday after the date of the writ.

[…]

***Legislative Assembly Act*, RSO 1990, c L.10, s 36**

Protection of persons acting under authority

36 No person is liable in damages or otherwise for any act done under the authority of the Assembly and within its legal power or under or by virtue of a warrant issued under such authority, and every such warrant may command the aid and assistance of all sheriffs, bailiffs, constables and others, and every refusal or failure to give such aid or assistance when required is a contravention of this Act.

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 COMPROMISEOR ARRANGEMENT OF
LAURENTIAN UNIVERSITY OF SUDBURY

Court File No. CV-21-00656040-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

FACTUM OF THE RESPONDING PARTY, THE SPEAKER OF THE LEGISLATIVE ASSEMBLY OF ONTARIO
(STAY OF ENFORCEMENT OF SPEAKER'S WARRANTS)

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