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**

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

January 14, 2022

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TABLE OF CONTENTS

Page No.

A. Laurentian has otherwise cooperated with the Standing Committee's requests

1. The Assembly submits (factum, para 2) that Laurentian "comes to the judicial branch to stop the Assembly's process in its tracks." This is incorrect: in fact, Laurentian has been cooperating with the Assembly's requests, subject to the issues that are before this Court. It has produced, in total, around 10 gigabytes of data to the Standing Committee so far.

B. The "serious question to be tried" test applies

2. The Attorney General of Ontario claims that the "strong *prima facie* case" threshold should apply at the first stage of the *RJR-MacDonald* test. They rely on the first of two exceptions to the "serious question to be tried" test:

> The first arises when the result of the interlocutory motion will in effect amount to **a final determination of the action**. This will be the case either when the right which the **applicant** seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.[1]

3. *RJR-MacDonald* endorsed cases where the first exception was applied to motions about participation in the leaders' debate to occur in a few days, or about access to an abortion during the "advanced state" or a pregnancy.[2] Recently, this exception has been applied in a case about the number of wards in an impending municipal election.[3] All these decisions concerned an impending event where waiting until a full hearing would have determined the outcome. "In cases where, as a practical matter, the rights of the parties will be determined by the outcome of the stay motion", it is appropriate to call on the moving party to show "a strong likelihood" of success.[4]

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[1] *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 at p338.
[2] *RJR*, *supra* at pp338-339.
[3] *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761 at para 10.
[4] *Toronto*, *supra* at para 10.

4. This exception does not apply here. If this matter cannot be finally heard and determined before the Assembly dissolves, nothing about the dissolution will amount to a "final determination" of the parties' rights. The Attorney General's argument, which focuses entirely on whether *this* Assembly will be dissolved and whether *these* Speaker's warrants will expire, elevates form over substance. The *issue* will not become moot. That issue is the ability of the Assembly to compel the documents and information from the University by way of a Speaker's warrant, and give them to the Auditor General to use in her audit. Nothing about that issue will become moot if the Assembly is dissolved.

5. Unlike a leader's debate, a pregnancy, or the number of wards in an imminent municipal election, the issue here can be renewed in exactly the same form after a hearing on the merits (if the Assembly is successful in that hearing), whether before or after the provincial election. While *these* Speaker's warrants will expire with the dissolution of the Legislature, the Attorney General of Ontario concedes that that would *not* prevent a future Assembly from issuing new warrants.[5]

6. For its part, the Assembly now concedes that the *only* intention of the Committee is to pass the documents to the Auditor General.[6] In other words, the Assembly and Committee have no need *of their own* for the documents: neither is engaged in any legislative or deliberative business for which it needs the documents. The dissolution of this Assembly will have no impact on the Auditor General's audit, which is ongoing and will continue regardless of the dissolution. Finally, there is nothing sacred about *this* Assembly: the turnover of legislative assemblies is an intrinsic part of

[5] Factum of the Attorney General, paragraph 23: "The fact that the Warrants could potentially be renewed once a new Committee is formed by a differently-constituted Assembly after the election…"
[6] Factum of the Assembly, paragraph 1 ("…so that the Auditor General of Ontario … might complete a value-for-money audit"); paragraph 89 ("PAC will provide the information to the Auditor General, so that she can continue with the value-for-money audit PAC requested.")

the democratic process, yet the business of the Auditor General will continue. The next Assembly will be able to consider the Auditor General's report, based on whatever information she properly has access to at that time, and may take whatever steps it decides are appropriate, within its constitutional authority. There is nothing inappropriate or prejudicial about the change of Legislative Assemblies, and the new Assembly deciding how to proceed. Indeed, that is the essence of parliamentary democracy.

7. Accordingly, the "serious question to be tried" test is the appropriate one to apply.

8. Alternatively, however, Laurentian submits that the third ground in its factum would surmount the "strong *prima facie* case" threshold, if it applied. The third ground asserts that the Assembly cannot use parliamentary privilege obtain information for the Auditor General because of her powers in the *Auditor General Act*.[7] A "strong *prima facie* case" is one that has a "strong and clear chance of success", a "significant prospect of success", or a "strong likelihood" of ultimate success.[8]

9. The submission that the Assembly cannot use parliamentary privilege to circumvent the *Auditor General Act* has "strong likelihood" of ultimate success. The *Auditor General Act* directly governs the relationship between the Assembly and the Auditor General, an "officer of the Assembly." (s. 2(1)) Why, one asks, did the Assembly in 2004 bother amending the *Auditor General Act* to add ss. 10 and 11, if it could use a Speaker's warrant to obtain for the Auditor General any information she wanted, whether or not it fell within the confines of ss. 10 and 11? Why does the Auditor General legitimately need access to information that the *Auditor General*

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[7] *Auditor General of Ontario v Laurentian University of Sudbury*, 2022 ONSC 109.
[8] *R v Canadian Broadcasting Corporation*, 2018 SCC 5, [2018] 1 SCR 196 at para 17.

Act does not allow her? Why did the Assembly create the offence of obstructing the Auditor General, if it could make the same demands itself and punish the audit subject for contempt of the Assembly? Why did it restrict the role of the Standing Committee to considering the Auditor General's reports, and prohibit it from accessing the Auditor General's working papers, if it intended for the Standing Committee to have direct access to all the underlying documents itself? The factums of the Auditor General, Assembly, and Attorney General of Ontario collectively fail to even attempt an answer to those central questions.

10. The other two grounds, that the scope of parliamentary privilege does not allow an assembly to obtain information protected by a class privilege of an entity outside government, or that is prohibited from disclosure by a court order made under a federal statute, are novel. For each, no court authority exists directly on point, one way or the other. So, it cannot fairly be said that they pass the demanding "strong *prima facie* case" threshold. While they still present serious questions to be tried, and it would be unfair to *deny* a stay simply because the grounds are novel, the court could grant a stay purely because of the third ground.

C. Section 35 of the *Legislative Assembly Act*

11. Section 35 provides that the Assembly may "at all times command and compel … the production of such papers and things, as the Assembly or committee considers necessary for any of its proceedings or deliberations." The Attorney General of Ontario suggests that s. 35 is "a complete answer to any suggestion that the Assembly lacks the inherent power to decide for itself

what information it needs to do its work."[9] He alleges that the Assembly's privileges were *expanded* by s. 35.[10] This contention, in itself, raises several serious questions to be tried.

12. **First**, provincial parliamentary privilege *cannot* be expanded by legislation. Its scope is limited to what the "stringent"[11] necessity test allows. Provincial and federal parliamentary privileges have "different constitutional underpinnings."[12] At the federal level, s. 18 of the *Constitution Act 1867* provides that the privileges of the House of Commons and Senate "shall be such as are from time to time defined by Act of the Parliament of Canada," as long as they do not exceed those enjoyed by the United Kingdom House of Commons at that time. There is no corresponding provision for the provincial legislatures. Accordingly, "inherent parliamentary privileges at the provincial level must *always* meet the necessity test."[13]

13. **Second**, even if s. 35 did expand the Assembly's parliamentary privilege, its terms do not apply to legally privileged information. It is a *general* production power that does not expressly refer to privilege, let alone purport to abrogate it. "Open-textured language governing production of documents will be read not to include solicitor-client documents."[14]

14. The Attorney General submits that s. 35 forms part of the constitution of Ontario.[15] Whether constitutional or not, it will be interpreted *not* to include solicitor-client documents.

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[9] Factum of the Attorney General, paragraph 27.
[10] Factum of the Attorney General, paragraphs 45-48.
[11] *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 SCR 687 at para 42.
[12] *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 at para 29.
[13] See *Duffy v Canada (Senate)*, 2020 ONCA 536 at paras 98-102.
[14] *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR 574 at para 11; *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555 at paras 28-29.
[15] Factum of the Attorney General, paragraph 27.

"Solicitor-client privilege cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal."[16]

15. **Third**, the existence of s. 35 and the fact that it does not abrogate privilege are significant to the determination of the scope of the Assembly's inherent parliamentary privilege. The *Legislative Assembly Act* is the Assembly's organizing statute. In s. 35(1), the Legislature chose to provide for the Assembly's powers to obtain documents and information. In s. 35(2), the statute provides that the way the Assembly exercises that power is by issuing a Speaker's warrant. In its initial request to Laurentian, the Committee expressly relied on s. 35.[17]

16. Again, recall that s. 35 was enacted by the Legislature, not the Assembly. The Legislature is the law-making body, and it consists of the Assembly sitting with the Lieutenant Governor. The Legislature passed the *Legislative Assembly Act* to govern the Assembly. The Assembly issued the Speaker's warrants, but it does not itself have the power to pass, repeal, or amend legislation, including the *Legislative Assembly Act*.

17. As Justice Rowe wrote in *Chagnon*, there is no presumption that statute law does not displace parliamentary privilege. "The relationship between statute and privilege is determined through ordinary principles of statutory interpretation"; the common law rule in *Duke of Newcastle* is "out of step with modern principles of statutory interpretation accepted in Canada."[18]

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[16] *University of Calgary*, *supra* at para 2.
[17] Letter from Taras Natyshak to Robert Haché et al, October 15, 2021: "Pursuant to s. 35(1) of the Legislative Assembly Act and Standing Order 113(b) the Committee has the legal and parliamentary authority to command the production of papers or things the Committee considers necessary for its work." Motion Record, tab 3D, p118, Caselines A123.
[18] *Chagnon*, *supra* at para 67.

18. The fact that the Legislature passed s. 35 *without abrogating legal privilege* suggests that it is *not* necessary for the Assembly to have the power to obtain information that is covered by a legal privilege. "Expecting a legislature to comply with its own legislation cannot be regarded as an intrusion on the legislature's privilege. It is not an impediment to the functioning of a legislature for it to comply with its own enactments."[19]

19. To sum up, s. 35 cannot expand the Assembly's inherent parliamentary privilege; it does not abrogate legal privilege; and, as a provision of the Assembly's organizing statute, it shows that the power to obtain legally privileged information is not necessary to the Assembly's functioning.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of January, 2022.

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[19] *Chagnon*, *supra* at para 66.

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SCHEDULE "A" - LIST OF AUTHORITIES

1. *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311
2. *Toronto (City) v Ontario (Attorney General)*, 2018 ONCA 761
3. *R v Canadian Broadcasting Corporation*, 2018 SCC 5, [2018] 1 SCR 196
4. *Chagnon v Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 SCR 687
5. *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667
6. *Duffy v Canada (Senate)*, 2020 ONCA 536
7. *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44, [2008] 2 SCR 574
8. *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53, [2016] 2 SCR 555

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

Legislative Assembly Act, RSO 1990, c L.10

Power to compel attendance of witnesses, etc.

35 (1) The Assembly may at all times command and compel the attendance before the Assembly or a committee thereof of such persons, and the production of such papers and things, as the Assembly or committee considers necessary for any of its proceedings or deliberations. R.S.O. 1990, c. L.10, s. 35 (1).

Speaker's warrant for attendance, etc.

(2) When the Assembly requires the attendance of a person before the Assembly or a committee thereof, the Speaker may issue a warrant directed to the person named in the order of the Assembly requiring the person's attendance before the Assembly or committee and the production of the papers and things as ordered. R.S.O. 1990, c. L.10, s. 35 (2).

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Proceeding commenced at TORONTO

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