CITATION: Laurentian University v. Sudbury University, 2021 ONSC 3392
COURT FILE NO.: CV-21-656040-00CL
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SUPERIOR COURT OF JUSTICE – ONTARIO

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

RE: Laurentian University of Sudbury, Applicant/Responding Party

AND:

University of Sudbury, Moving Party

BEFORE: C. Gilmore, J.

COUNSEL: *D.J. Miller, Mitchell Grossell, Andrew Hanrahan* and *Derek Harland*, Counsel for the Applicant/Responding Party

Ashley Taylor, Elizabeth Pillon and *Ben Muller* for the Court-appointed Monitor, Ernst & Young

Vern W. DaRe for the DIP Lender

André Claude and *Ronald W. Caza* for University of Sudbury Counsel for the Moving Parties

HEARD: April 30, 2021

ENDORSEMENT

OVERVIEW

[1] Laurentian University ("LU") experienced a financial crisis and sought protection under *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36, ("CCAA") on February 1, 2021. The CCAA protection included a stay of proceedings to February 10, 2021. The stay was subsequently extended to April 30, 2021. On April 29, 2021, the stay was extended to May 2, 2021 at 11:00 p.m. On May 2, 2021, the stay was extended to August 31, 2021.

[2] Since February 1, 2021, LU has undergone an overhaul of its entire financial and operational structure in order to create a sustainable operational future for the delivery of academic services. One component of the restructuring involved LU terminating its relationship with its three Federated Universities: the University of Sudbury ("SU"), Thornloe University ("Thornloe") and Huntington University ("Huntington") (together "the Federated Universities"). On April 1,

2021, LU issued a Notice of Disclaimer ("the Disclaimer") pursuant to s. 32 of the CCAA, in order to disclaim certain contracts between LU and the Federated Universities and in furtherance of the termination of the relationship with the Federated Universities.

[3] Huntington has come to an agreement with LU as to how to dissolve its partnership. Both Thornloe and SU proceeded with their motions to set aside the Disclaimer. Thornloe's motion was heard on April 29, 2021 by Chief Justice Morawetz. He extended the stay to May 2, 2021 at 11:00 p.m. and subsequently to August 31, 2021. I heard SU's motion on April 30, 2021. On May 2, 2021, Justice Morawetz and I released a brief endorsement dismissing both motions. In those endorsements it was indicated that detailed reasons for the dismissals would follow. These are the reasons on the dismissal of SU's motion.

BACKGROUND FACTS

[4] LU has been experiencing financial problems for many years. The crisis peaked in the spring of 2020 when LU's liabilities reached $322M. In August 2020, LU retained Ernst & Young to assist with its financial restructuring. On February 1, 2021, LU sought CCAA protection.

[5] LU sought and received Court approval for DIP financing of $25M. After Thornloe and SU filed their motions opposing the Disclaimer, LU filed a motion for an extension of the stay to April 30, 2021. LU sought additional DIP funding of $12M. The DIP lender agreed to provide additional funding of $10M; however, the Disclaimer of the agreements with Federated Universities was a pre-condition of the second advance.

[6] Under CCAA protection, LU's Senate passed a resolution in April 2021 approving its academic restructuring. This included the closure of 38 English-language and 27 French-language undergraduate programs and 11 graduate programs (4 in French and 7 in English) as they were identified as unsustainable.

[7] On April 7, 2021, LU signed agreements with its labour partners which included terminations, declarations that 116 positions were redundant, salary decreases and unpaid furlough days.

[8] LU operates within a federated structure whereby it has contracts with the three Federated Universities. Each of Thornloe, Huntington and SU is a separate legal entity with its own Board of Governors. Programs for all of the Federated Universities are offered through LU and receive credits towards a degree that is granted by LU. As of the Fall 2020 academic term, there were 69.6 full-time equivalent students at SU.

[9] LU entered into its Federation Agreement with SU on September 10, 1960. The Federation Agreements are substantially similar and include the following important terms:

a. Each of the Federated Universities agreed to suspend its degree-conferring powers (with certain limited exceptions) in favour of LU;

b. LU agreed to distribute to each Federated University a portion of the revenue it received for each student as reflected in the Financial Distribution Notice;

c. LU reserved certain land on its campus for the Federated Universities and the allocation was completed pursuant to indentures.

[10] Each of the Federation Agreements contains the following aspirational statement:

> Both Laurentian University and [Sudbury University] declare and express the firm hope and conviction that the relationship between the Universities established by this agreement will be a permanent one … and to build a great institution of learning which shall forever be bilingual and non-denominational in its character.

[11] Each of the Federated Universities leases land from LU on which they have constructed their own buildings. The lease terms are for 99 years from September 1, 1963 with the possibility of further renewal. The indentures are not the subject of the Disclaimer.

[12] SU has two buildings on the LU campus; a main building for administration and a residence. The buildings were constructed at a cost of $5M

[13] Pursuant to the Financial Distribution Notices, LU transfers to each of the Federated Universities a portion of the revenue it receives from the provincial government. The Financial Distribution Notices also provide that LU is permitted to assess a 15% administrative service fee ("the service fee") on grant and tuition revenue received. The net amount is then passed on to the Federated Universities. The service fee relates to LU's provision of central computing services, administration of pension and employee benefits, security and student support services.

[14] In 2020, LU transferred $7.7M to the Federated Universities, net of the service fee. According to the Monitor, LU requires this amount as part of its restructuring plan. That is, LU seeks to have the former students of LU, Thornloe and Huntington as part of its student body so that it is no longer required to transfer that revenue to the Federated Universities.

[15] Discussions with the Federated Universities about LU's financial crisis began in June 2020. According to the evidence of Dr. Robert Haché, the President and Vice-Chancellor of LU, he informed the Federated Universities from the start of negotiations that all options were on the table including ending the existing agreements with the Federated Universities.

THE ISSUES

Issue #1 - Discretion under the CCAA and the Duty of Good Faith

[16] Where a party seeks an order disallowing a Notice of Disclaimer, s. 32(4) of the CCAA requires the Court to consider the following list of non-exhaustive factors when deciding whether or not to permit or reject the disclaimer of an agreement:

a. First, whether the Monitor approved the proposed Disclaimer;

b. Second, whether the Disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

c. Third, whether the Disclaimer would likely cause significant financial hardship to a party to the agreement.

[17] Other relevant provisions in the CCAA include a requirement to act in good faith pursuant to s. 18.6:

> 18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

[18] Further, relief granted under the CCAA is limited to what is "reasonably necessary for the continued operations of the debtor company" as per section 11.001:

> Relief reasonably necessary
>
> 11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

[19] SU argues that the duty of good faith in s.18.6 extends to Disclaimer Notices. SU relies on *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, a recent decision of the Supreme Court of Canada. The Court reiterated, at para. 49, that "the discretionary authority conferred by the CCAA…is not boundless" and that the Applicant (in this case LU) bears the burden of demonstrating that the order it seeks is appropriate in the circumstances, and that it has acted in good and with due diligence.

[20] The Court in *Callidus* goes on to explore the fairness element required in CCAA proceedings and that the Court must exercise its discretion to control the process if a party is acting in a manner that runs counter to the objectives of the CCAA or is acting for an "improper purpose": at para. 70.

[21] In the *Re Dallas/North Group Inc.* (2001), 148 OAC 288 (C.A.), the Court was critical of certain non-parties who brought bankruptcy proceedings against two debtors for an improper purpose. The Court was clear that the bankruptcy process cannot be used for such a collateral purpose.

[22] SU argues that LU has acted in bad faith by attempting to disclaim the Federation Agreement. Specifically, SU alleges that LU seeks to use the CCAA restructuring process for a collateral and improper purpose by effectively destroying a competitor. This is an abuse of process.

[23] In support of its position, SU referred to the case of *Dimples Diapers Inc. v. Paperboard Industries Corp.*, 1992 CarswellOnt 192 (Gen. Div.), at para 34, the Court quotes L. W. Houlden and C. H. Morawetz, *Bankruptcy Law of Canada*, 3rd. (Toronto: Carswell, 1989) at p. 2-45:

> When the effect of an agreement between the petitioning creditor and some non-creditors was to embroil the petitioning creditor in an improper objective of the purchasers of a business who as non-creditors had no status in the bankruptcy proceedings and were intermeddling in it, and the objective was to bring about the bankruptcy of the debtors, held — the whole proceeding was tainted and the petition must be dismissed: *Re Pappy's Good Eats Ltd*. (1985), 56 C.B.R. (N.S.) 304 (Ont. S.C.).

[24] SU submits that it is false to say that students of SU are all students of LU. They are students of the Federation. The fact that they enrol and receive their diplomas through LU is only because of the agreed upon structure of the Federation. SU has existed as an independent entity since 1910 and is on the same level as LU.

[25] SU claims that LU is attempting to use the CCAA for an illegitimate purpose. Using the bankruptcy system for an illegitimate purpose has been met with disapproval. In *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.), the Court held that the CCAA should not be used by a debtor company for any purpose other than a "legitimate reorganization" and not for an "improper purpose": at para. 84.

[26] At its most basic level, the disclaimer or termination of a contract must be "fair, appropriate, reasonable, and must have been issued after good faith negotiations": *Re Allarco Entertainment Inc.*, 2009 ABQB 503, at para. 59. SU argues that LU could have but did not attempt alternate solutions, such as a renegotiation of its service fee with LU. It did not enter into the required good faith negotiations with SU.

[27] Further, the financial arguments advanced by LU in support of the disclaimer are not borne out. The expectation was that LU would charge a service fee sufficient to cover its administrative costs resulting in no net cost for LU for administering the enrolment of SU students. Terminating such a "net net" arrangement is contrary to LU's obligation to act in the best interest of the Federated Universities.

[28] Dr. Haché did not agree that there was no cost to LU for the administration of SU's students. His evidence on cross-examination was that having students take courses at SU resulted in a loss of potential revenue to LU. SU's position was that LU had provided no research or modeling to justify or confirm that this was the case. LU has already saved $30M with its restructuring. Destroying the Federated Universities over unproven revenues of $7M does not justify the resulting devastation to SU.

Analysis

[29] I do not agree that LU has sought a Disclaimer of the Federation Agreements for a collateral, improper or illegitimate purpose. This is not a matter of putting a competitor out of

business, it is simply a matter of putting an end to an unsustainable financial model within the context of difficult and urgent circumstances.

[30] It is important to review several facts which go to the core of this Disclaimer:

a. All of the students who attend SU are LU students;

b. SU currently has the equivalent of 108 students whereas LU has 9,000 students.

c. The Federation Agreements can be legitimately disclaimed pursuant to s. 32 of the CCAA.

d. The Disclaimer is approved by the Monitor. This recommendation is given significant weight under the statute.

e. Disallowing the Disclaimer would seriously diminish the prospects of a viable plan to be put to creditors. That is, a plan which includes funds that continue to flow away from LU is not viable.

f. Without the Disclaimer proceeding, the DIP lender will not make the additional $10M advance which would remove the ability of LU to file a proposal.

g. LU has been able to achieve significant costs savings, but this only places them at a break even point and without resources to pay its creditors.

h. The Federation Agreements contain only an aspirational clause with respect to their permanency.

i. There is nothing in the business plan which would preclude SU from independently providing religious or francophone-based offerings. It would simply no longer be possible to obtain an LU degree there.

j. In 2019, LU did try a new arrangement, with respect to its service fees, with the Federated Universities. Unfortunately, that was insufficient to overcome its financial distress.

k. With respect to its duty to consult SU, LU attempted negotiations with the Federated Universities as far back as the spring of 2020. The negotiations were only partially successful. As LU is now under the supervision of a Monitor in a Court proceeding, such negotiations are still available through the Court-appointed mediator who has worked hard and achieved good results with Huntington and the various employment stakeholders.

l. I reject the submission by SU that the Disclaimer came “out of the blue.” As indicated by Dr. Haché, the concept of a termination of the Federation has always been on the table since LU’s financial situation turned to crisis mode. As early as his affidavit of January 30, 2021, Dr. Haché deposed:

> The Laurentian 2.0 framework seeks to accomplish the foregoing through:
>
> (a) Restructuring the Academic Model by streamlining academic programming and delivery through the reduction of number of programs, restructuring academic supports and **terminating the agreements and relationship with the Federated Universities** [Emphasis added];…

m. I do not find that LU has a legal duty to act in the interests of the Federation. LU's most significant duty at this time is to its creditors. As mentioned above, LU engaged in two months of intensive mediation with all of its stakeholders. It achieved positive results with Huntington and its unions. I agree with counsel for LU that failing to achieve a resolution with Thornloe and SU does not mean that LU was not making good faith attempts at resolution.

[31] SU provided a significant amount of case law to the Court. Unfortunately, none of it related to bad faith or an improper purpose in the context of Disclaimer Notice under s. 34 of the CCAA.

[32] Further, and contrary to SU's assertions, Dr. Haché's evidence was that LU has evolving modeling which includes the ending of the Federations Agreements.

[33] In summary, I find that the Disclaimer meets the requirements of s. 34(2) (a) and (b) in that the Monitor has approved the Disclaimer and that without the additional revenue from SU and the other Federated Universities, LU will not be able to put forward a viable plan for its creditors and will jeopardize further necessary DIP funding.

Issue #2 – Financial Hardship to SU and the DIP Lender Issue

[34] SU submits that termination of its employees will cost $4M and that the cost of maintaining its buildings is $400,000 per year. Without student tuition revenue it has no resources to pay these amounts.

[35] Mr. Pierre Riopel is the Chair of the Board of Regents of SU. In his cross-examination on April 24, 2021, he was asked about the $4M cost relating to employee terminations. He was frank in conceding he had no idea where that number came from but advised it was a collaboration with a lawyer, human resources and university staff.

[36] An undertaking was given to provide an analysis of that number. The answer to the undertaking is set out below:

> The $4M figure is a combination of statutory notice costs and severance payable to USudbury employees pursuant to the *Employment Standards Act*, worth approximately $800,000. The balance of the figure is a rounded liability estimate for additional compensation claimed by employees which may be owed pursuant to collective bargaining agreements as a result of permanent loss of employment.

[37] With respect to the $400,000 annual amount to maintain the SU buildings, Mr. Riopel also had no personal information as to how that number was arrived at, other than by university administrative staff. An undertaking was given to provide an explanation of those costs. The answer to the undertaking is set out below:

> The $400,000 figure is comprised of an estimate of the annual costs for building maintenance and repairs, including a figure for minimal staff salaries and benefits. This figure is based on USudbury not delivering any courses to Laurentian students, meaning no student and faculty and no operation of the residences.

[38] I find that the answers to the undertakings do not provide any form of reliable financial analysis as to the actual amounts for which SU submits it will be liable. They appear to be estimates only.

[39] There is no doubt that SU will suffer financial consequences as a result of the Disclaimer. However, the evidence provided by SU is insufficient to meet the threshold of a "significant financial consequence" required to disallow a disclaimer under the CCAA. Further, any financial consequences suffered by SU must be balanced with the overall financial considerations in the restructuring which go far beyond SU's speculations of insolvency.

[40] SU submits that the Court is put in a difficult position. The Disclaimer is an abuse of process; yet, without it, the DIP Lender will not advance funds. SU adds that it was not permitted to cross-examine the DIP Lender or access communication between the DIP Lender and LU. Insolvencies under the CCAA should be pursued in accordance with the relevant law and not at the whim of the DIP Lender.

[41] I do not agree with SU that the DIP Lender is running this process or, as it submits, that the DIP Lender has "ousted the jurisdiction of the Superior Court." First, the terms of the original DIP financing of $25M in February 2021, including its expiry on May 1, 2021, was well known to all stakeholders and approved by the Court. The funds were advanced at a critical time when instructors were being allocated for the 2021/22 academic year and offers being made to Grade 12 students. That is, it was critical that planning and resources for the Fall 2020 term be in place.

[42] The DIP Lender made submissions at the motion. While SU seemed concerned that such submissions were permitted, I saw no reason for the concern. Not surprisingly, the DIP Lender simply confirmed what was already widely known; the DIP Lender is a stranger to LU and was not a pre-filing lender. It is an arm's length commercial lender who has risk in a novel lending situation where its security is over a public institution. It has already advanced a significant amount and has specific conditions on advancing more. One of those conditions is that the Disclaimers are in place such that LU can increase its revenues.

[43] SU complained that it was not given access to information as between LU and the DIP Lender so that it could satisfy itself that the Disclaimer was truly an essential term of the second advance. SU was given the opportunity to submit written questions but was dissatisfied with the answers.

[44] More importantly, however, it is LU who is under CCAA protection and not SU. The only way for LU to put forward a viable plan for its creditors is to temporarily increase its liabilities. It is bound to comply with the terms of the DIP Lender who advised the Court, through its counsel, that it had done a financial analysis which indicated that the Disclaimer of the Federated Agreements was essential for an increased revenue stream for LU.

[45] The Court also heard from the Monitor. The Monitor was of the view that the Disclaimer was necessary for LU to make a viable proposal to its creditors. The Monitor provided pre and post restructuring projections for the next five fiscal years, starting with 2021/22. Without any restructuring, LU is forecasted to have an operating deficit of $42M in 2021/22 and approximately $25M per year in the following four years. That is without accounting for any payments to the DIP Lender or other creditors.

[46] The post restructuring projections include a DIP facility of $35M, an assumption that the Notices of Disclaimer become effective on May 1, 2021 and that the claims of other creditors will be paid over time. That projection will result in a deficit of $12.5M in 2021/22 and an average surplus of $14M over the next four years. However, from this surplus must come the repayment of the DIP Lender at $4 to $10M per year and payments to creditors from a large claims pool (pre-filing lenders are owed over $100M).

[47] There is no reason not to accept the financial projections presented by the Monitor. They were not challenged by SU. The projections make it clear that the revenue gained by LU from the Disclaimer is essential for its survival in this restructuring. It is an unavoidable and somewhat stark reality.

Issue #3 – The Disclaimer's Effect on French Language Programming and Services

[48] SU makes the following arguments with respect to French Language rights and the effect of the Disclaimer on those rights:

a. SU is a designated "public service agency" within the meaning of the *French Language Services Act*, R.S.O. 1990, c. F.32. As such, the public has the right to receive services from it in French and the Province of Ontario must provide funding to ensure this.

b. Under s. 23 of the *Charter of Rights and Freedoms*, the Province of Ontario must implement institutional measures to give effect to the Franco-Ontarian community's right to receive an educational experience in French including the allocation of appropriate resources to entities such as the SU.

[49] Given the above considerations, LU must take the needs of the Franco-Ontarian community into account within the context of CCAA proceedings. SU submits that the Franco-Ontario community is concerned about the impact of these proceedings, including a disproportionate effect on French programs, courses and services. As SU points out, in the affidavit of the President of LU in support of the CCAA proceeding, he does not once mention French language rights.

[50] SU is concerned about the lack of French used in this proceeding and LU's failure to honour its commitments to French-language programs, courses and services. Those failures have been brought to LU's attention in the past by the Franco-Ontarian community.

[51] For several years, the Franco-Ontario community has expressed a desire for a university by and for francophones. A "bilingual" institution is not enough as English tends to be the dominant language in such institutions.

[52] On March 11, 2021, in consultation with the *Assemblée de la Francophonie de l'Ontario* ("AFO"), francophone stakeholders from Sudbury and other northern Ontario communities announced a resolution to become a university controlled by and for the Franco-Ontarian community.

[53] SU offered to take over all of LU's French courses to attain this goal. LU refused. SU submits that if the Disclaimer is permitted to proceed, LU will not be in a position to fulfill its obligations to the francophone community. Those obligations were already in jeopardy before the restructuring. With 40% fewer courses available for LU students this fall, it is simply a slap in the face to the francophone community to permit the Disclaimer to proceed.

Analysis

[54] It is clear from SU's resolution made in March 2021 (and prior to the Disclaimer being delivered) that SU found itself incompatible with the current bilingual and tri-cultural mandate of the Federated Universities. Indeed, the language in the agreement between LU and SU, dated September 10, 1960, is mandatory in that it requires SU and LU to work together to build an institution of learning "which shall forever be bilingual and non-denominational in character": at para. 17.

[55] Given SU's clear dissatisfaction with bilingual programming, and its criticisms of LU's commitment to the provision of French-language courses and services, it is hard to understand why SU is objecting to the Disclaimer.

[56] On the contrary, the March 2021 resolution sets out a completely different path for LU. That resolution specifically states that SU is to immediately take steps toward a university managed and controlled by Ontario francophones to offer courses and services in French, that the working language at SU will be French, that SU assumes the responsibilities of a designated service provider under the *French Language Services Act*, provides training for its instructors as required under the *Charter*, and develops partnerships with other (presumably francophone) post-secondary institutions.

[57] Following the March 2021 resolution, SU commissioned a business plan, dated April 2021, for the "Université francophone de Sudbury" which charted the transition for SU to reach its new goal. Its vision included the establishment of an independent secular university that offered French language programs to develop leadership, while preserving a francophone identity and offering a practical curriculum which was not constrained solely by academics. This is a laudable and important goal which it is hoped that SU can achieve in the near future.

[58] Finally, it would not benefit the francophone community if LU is forced into bankruptcy. That would no doubt result in no educational offerings to the francophone community at all. LU has made a firm commitment to continuing as a bilingual and tri-cultural institution. Indeed, much of its funding is tied to compliance with those goals. The current restructuring will ensure that the number of students currently enrolled in French courses (43 programs) is maintained.

[59] Previously, the majority of courses offered by SU were in English. Post Disclaimer, SU is free to re-invent itself as a francophone university and without the constraints of the Federation Agreements. Indeed, providing such an option to the northern community would be desirable and would not be impeded by LU's restructuring.

SUMMARY AND ORDERS

[60] It is this Court's view that a bankruptcy for LU must be avoided in keeping with the objectives of the CCAA. The bankruptcy for LU will displace students and faculty, and will have a detrimental effect on stakeholders, suppliers and service providers in the Sudbury community. Avoidance of a bankruptcy and all of its deleterious effects on LU and its community means, amongst other consequences, a dissolution of the Federation Agreements. Difficult decisions must sometimes be made with unpleasant consequences. This is one of those decisions.

[61] Given all of the above, I make the following orders:

a. The motion brought by the University of Sudbury is dismissed.

b. Costs of this motion are to be discussed amongst counsel. If no resolution can be reached, I can be spoken to by way of a scheduled Case Conference.

c. La traduction officielle en français suivra.

C. Gilmore, J.

Date: May 7, 2021