

December 8, 2021

SENT VIA EMAIL

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Dear Sirs and Mesdames:

Re: Laurentian University of Sudbury – Standing Committee on Public Accounts

I am counsel to Laurentian University of Sudbury in the above-noted matter. I am writing in relation to the motion, passed today, by the Standing Committee on Public Accounts to request a Speaker's warrant to command the production of certain documents and information from Laurentian University. I understand that the Standing Committee will report to the House tomorrow, December 9, at 1:00 in the afternoon.

I ask that this letter be tabled in the House, and read by the Speaker, when the House considers the Committee's motion.

In my respectful submission, it would be inappropriate for a Speaker's warrant to be issued now. I say this for three reasons:

1. The Committee's request would seek to pre-empt and interfere with a pending determination by the Court on the very issue that is the subject matter of the requested Speaker's Warrant. That court application, brought by the Auditor General, was heard on Monday of this week by Chief Justice Morawetz of the Ontario Superior Court of Justice. He has reserved his decision and indicated that it will be issued shortly.
2. Complying with the Committee's request, or an ensuing Speaker's warrant, is legally impossible for the University, because it would cause the University to violate a court order made by Chief Justice Morawetz.
3. At the Committee's meeting today, factually inaccurate statements were made that likely influenced its decision to request a Speaker's warrant.

Interference with ongoing court process

The issue of whether s. 10 of the *Auditor General Act* provides the Auditor General with a right of access to an auditee's privileged information was fully argued on December 6, 2021 before Chief Justice Morawetz of the Ontario Superior Court of Justice.

It should be noted that since May, 2021 Laurentian University has provided the Auditor General with extensive and voluminous information on an ongoing basis. In addition, the Auditor General has direct access to the University's financial system and enrolment database.

The hearing on December 6 resulted from an application that the Auditor General herself had commenced.

The Chief Justice's decision is currently under reserve, and he stated that he would endeavour to release it quickly.

The Committee's purpose in seeking to compel information from the University is to hand that material over to the Auditor General. The Auditor General has participated in the Committee's efforts to obtain information from Laurentian.

One of the two questions that the Auditor General submitted to the court in her application is whether she may access an audit subject's privileged information. If the Speaker were to issue his warrant to compel Laurentian to provide privileged information for the purpose of providing it to the Auditor General, it would pre-empt an issue that is currently under reserve before the Chief Justice.

Because of the Committee's motion, we attended an urgent case conference with the Chief Justice this afternoon. The Auditor General and her counsel were present. We notified the Clerk of the Standing Committee of the case conference, but he was unavailable.

At the case conference, the Chief Justice very clearly expressed his serious concern that the steps taken by the Standing Committee were an attempt to circumvent the ruling he would soon issue on the Auditor General's application. He asked counsel to remind the Legislature of the *sub judice* rule.

The Supreme Court of Canada described the *sub judice* rule as follows:

A well-known rule of Parliamentary practice holds that no Member of the House of Commons should comment upon any matter that is pending before the courts. The following account of what is called the "*sub judice* rule" appears in *Beauchesne's Rules & Forms of the House of Commons of Canada* (6th ed. 1989), at p. 153 (para. 505):

Members are expected to refrain from discussing matters that are before the courts or tribunals which are courts of records. The purpose of this *sub judice* convention is to protect the parties in a case awaiting or undergoing trial and persons who stand to be affected by the outcome of a judicial inquiry. It is a voluntary restraint imposed by the House upon itself in the interest of justice and fair play.

Though the rule is a matter of Parliamentary convention and not of statutory law, “[i]t is desirable that the convention of Parliament as to matters *sub judice* should, so far as possible, be the same as the law administered in the courts”, or, in other words, that parliamentarians should act in a way that does not render more difficult the administration of the law by judges.¹

In my respectful view, the only course of action that would be consistent with the *sub judice* rule would be for the House to refrain from considering the Committee’s report, and from taking any action pursuant thereto, until after the application commenced by the Auditor General has been resolved.

If the House is unwilling to do so, and a Speaker’s warrant issues, we have advised the Chief Justice that a further motion for relief may be necessary, and he has indicated that he will make himself available as required.

Conflict with court orders

The House should know that a Speaker’s warrant will put the University in an impossible position. There is currently a court order prohibiting the University from disclosing documents relating to the confidential mediation going on in the CCAA proceeding. I enclose a copy of that order. The requests of the Committee, now sought to be transformed into a Speaker’s warrant, seek documents that pertain to the confidential mediation.

In my respectful submission, the House cannot properly ask that the University put itself in contempt of court. However, that would be the effect of the Speaker’s warrant that the Committee is requesting.

Factually inaccurate statements at Committee meeting

At the Committee’s meeting today, certain factually inaccurate statements were made and not corrected by anyone present, including the Auditor General:

- The Auditor General stated that she was only seeking information from the University up to *February 1, 2021*, when the University filed for CCAA protection. This was incorrect. At all times, the Auditor General’s demands have been for information up until the present day, including documents post-dating the CCAA filing.
- The Committee stated that the Auditor General’s audit had started in April 2021 and that the University had not provided any documents until November 17, 2021. This was incorrect. The University started to provide documents to the Auditor General very soon after she formally commenced her audit in May 2021. November 17 was when the University began to provide documents to the *Standing Committee*, and the Committee’s

¹ *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 SCR 391 at para 114.

request was first made only on October 15. The Committee was left with the impression that the University had failed to provide any documents for many months, which is simply wrong.

In my view, the Committee's decision was likely influenced by these factually inaccurate statements that were made to it.

We were not given notice of the Committee's meeting and so we did not have an opportunity to correct any of these misstatements. We did not even become aware the meeting was taking place until it was almost over, and so we do not know whether any other incorrect statements had already been made.

As I said above, my respectful submission is that it would not be appropriate for the House to request the issuance of a Speaker's warrant until the issues above have been resolved.

Yours truly,



Brian Gover

Enclosures: Procedural Memorandum and Endorsement, September 27, 2021
Notice of Application, September 28, 2021
Mediation Order, February 5, 2021

- c. Claude Lacroix, Chair, Board of Governors
- Dr. Robert Haché, President and Vice-Chancellor
- D. J. Miller, *Thornton Grout Finnigan LLP* (Insolvency counsel to the University)
- Sharon Hamilton, *Ernst & Young Inc.* (Court-Appointed Monitor of the University)
- Ashley Taylor, *Stikeman Elliott LLP* (Counsel to the Court-Appointed Monitor)
- Peter Osborne, *Lenczner Slaght* (Counsel to the Board of Governors of the University)
- Richard Dearden, *Gowling WLG (Canada) LLP* (Counsel to the Auditor General)
- Fredrick Schumann, *Stockwoods LLP*
- Celeste Boyer, *Laurentian University*