CITATION: Laurentian University of Sudbury, 2021 ONSC 4769
COURT FILE NO.: CV-21-00656040-00CL
DATE: 2021-07-05

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **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

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell and Derek Harland*, for the Applicant

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

Vern W. DaRe, for the DIP Lender

Pamela Huff, for Royal Bank of Canada

Stuart Brotman and Dylan Chochla, for Toronto-Dominion Bank

George Benchetrit, for Bank of Montreal

Peter J. Osborne, for the Board of Governors

Natasha MacParland, Lender Counsel for the Applicant

Andrew J. Hatnay, for Thorneloe University

Tracey Henry, for Laurentian University Staff Union (LUSU)

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General Association (LUSA)

André Claude, for University of Sudbury

HEARD: July 5, 2021

ENDORSEMENT

[1] Laurentian University of Sudbury (the “Applicant” or “LU”) brought this motion for an order authorizing and directing the Applicant to retain Cushman & Wakefield (“C&W”) as real estate advisor to the Applicant (in such capacity, the “Real Estate Advisor”).

[2] The evidentiary basis for the requested relief is set out in the Fifth Report of the Monitor.

[3] No party opposed the requested relief.

[4] The Applicant is of the view that a Real Estate Advisor with experience and expertise, particularly in the post-secondary and public sectors, will provide critical guidance to the Applicant and be in the best position to advise on developing a strategic plan for the Applicant’s real estate portfolio.

[5] The Applicant issued a request for quotations on May 18, 2021 and 32 organizations downloaded the relevant material. The Applicant ultimately received six proposals, which it reviewed with the Monitor. Interviews were then conducted with four potential candidates.

[6] The Applicant notes that the Amended and Restated Initial Order does not require the Applicant to seek court approval when retaining a real estate advisor. The Applicant notes that the process that was undertaken represented a hybrid between: (a) the procurement process that would typically be undertaken by the Applicant within the public sector outside of a CCAA proceeding; and (b) the steps and process that would be undertaken by an Applicant or the Monitor in inviting expressions of interest to act as a real estate advisor in a CCAA proceeding, in communicating with such parties and in reviewing and considering responses received from interested parties. As the process did not strictly follow all terms of a public sector procurement process, and incorporated aspects of a more typical CCAA engagement process, the Applicant decided to seek court approval of same.

[7] In addition, in the proposed draft order, the Applicant inserted language that purports to provide additional protection for those involved in the selection process.

[8] The Monitor comments on certain public sector parameters beginning at para. 22 of the Fifth Report, and concludes at paragraph as follows 33:

> “The Monitor notes that while the process carried out in respect of soliciting and receiving proposals and selecting C&W was carried out within a shortened timeline and did not meet all the requirements of the Public Sector Parameters, the Monitor is satisfied that the process was open, transparent and competitive and similar to processes conducted in other CCAA proceedings. The Monitor also notes that the abbreviated process is necessary in the circumstances to permit LU to advance its restructuring efforts on a timely basis.

[9] The Monitor supported the Applicant’s position.

[10] Having reviewed the Fifth Report of the Monitor and hearing submissions, I am satisfied that it is appropriate to authorize and direct LU to retain the services of C&W, as Real Estate Advisor.

[11] The Applicant also seeks, as part of the order, a provision sealing the unredacted proposal of C&W which will be attached as a Confidential Appendix to the Fifth Report. C&W has advised the Applicant that its unredacted proposal contains commercially sensitive and proprietary information that, if disclose publicly and made available to competitors, could jeopardize the business of C&W.

[12] The appropriateness of including a sealing provision in a order was recently addressed by the Supreme Court in *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37 – 38.

> [37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc*., 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
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> > (1) court openness poses a serious risk to an important public interest;
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> > (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
> >
> > (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding the public from a hearing, or redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspaper Ltd. v. Ontario*, 2005, SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[13] Having reviewed the Confidential Appendix, I expressed the view that certain aspects of the appendix did not appear to contain commercially sensitive and proprietary information. Upon receiving further instructions, counsel advised that certain portions of the appendix could form part of the public record and the scope of the sealing provision was narrowed.

[14] In my view, the revised form of Confidential Appendix satisfies the three prerequisites referenced in *Sherman Estate*.

[15] In the result, LU's motion is granted and an order has been signed.

Chief Justice G.B. Morawetz

Date: July 5, 2021