COURT FILE NUMBER Q.B. 572 of 2021

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

PLAINTIFF AFFINITY CREDIT UNION 2013

DEFENDANT RITCHIE INDUSTRIES INC. and DUCK MOUNTAIN ENVIRONMENTAL LTD.

IN THE MATTER OF THE RECEIVERSHIP OF RITCHIE INDUSTRIES INC. and DUCK MOUNTAIN ENVIRONMENTAL LTD.

AND IN THE MATTER OF THE BANKRUPTCY OF RITCHIE INDUSTRIES INC. and DUCK MOUNTAIN ENVIRONMENTAL LTD.

BRIEF OF LAW
OF THE RECEIVER & TRUSTEE IN BANKRUPTCY, MNP LTD.

I. INTRODUCTION

1. MNP Ltd. (the "**Receiver**") was appointed as the Receiver and Manager (and Trustee in Bankruptcy) of all of the assets, undertakings and properties, including all proceeds thereof, of Ritchie Industries Inc. ("**Ritchie**") and Duck Mountain Environmental Ltd. ("**DME**"), pursuant to *inter alia* an Order of the Honourable Madam Justice A.R. Rothery issued June 29, 2021 (the "**Order**").

2. The Order authorizes and empowers the Receiver to market, including advertising and soliciting offers in respect of Ritchie's and DME's property (collectively, the "**Debtors**") and to negotiate terms and conditions in its discretion. In addition, the Order empowers the Receiver to apply for any vesting order(s) necessary to convey the same to a purchaser free and clear of any liens or encumbrances affecting such property.

Background – The Petro Can Property

3. The thrust of this application relates to a proposed sale of a PetroCanada service station located in Kamsack, Saskatchewan which, prior to these proceedings, was owned and operated by Ritchie (the "**Petro Can Property**"). The Petro Can Property consists of 2 single

story commercial buildings which are used as a convenience store/quick serve gas station and a car wash. The buildings were constructed in 2014.

4. With respect to the sale now proposed, the principals of the Proposed Purchasers (defined below) had expressed interest in purchasing the Petro Can Property before the Receiver's appointment and corporate counsel for Ritchie had made significant progress on an asset purchase agreement as of the Receiver's appointment.

5. Upon the appointment of the Receiver, the negotiations with representatives of the Proposed Purchasers continued and ultimately two separate Agreements were signed which were tailored to fit within the insolvency process. One agreement is for the real property making up the Petro Can Property, while the other is for associated personal property.

Background – DME Equipment

6. The second proposed sale to be approved involves a sale of miscellaneous pieces of equipment used by DME in its septic, water delivery and hydrovac excavation services (the "**DME Equipment**"). Here, the Receiver proposes a sale of such assets to Grasswood Auctions (623452 Saskatchewan Ltd.) ("**Grasswood**"), a well-established auctioneering firm in Saskatchewan (the "**DME Equipment Sale**").

7. Following a brief sales process seeking an *en bloc* sale of DME's assets (August 26-September 8, 2021), the Receiver solicited four auction proposals when the *en bloc* sales efforts yielded less than satisfactory results in the opinion of the Receiver. Following receipt and analysis of such proposals, the Receiver now recommends that it accept the cash purchase offer submitted by Grasswood.

Relief Sought in Respect of the Proposed Sales

8. The proposed sales of the Petro Can Property involve the real property and other proprerty being sold to two different, albeit related entities (the "**Petro Can Sale**"), while the DME Equipment Sale involves a sale directly to an auctioneer (the Petro Can Sale and the DME Equipment Sale are referred to collectively as the "**Proposed Sales**"). As such, the

Receiver proposes to use three (3) separate sale approval and vesting orders in this application.

9. In those orders, the Receiver applies for the following relief:

(a) Approving and authorizing the Receiver in its capacity as Receiver and Manager and Trustee in Bankruptcy of the assets, undertakings and properties of Ritchie to complete, the Asset Purchase Agreements (the "**Agreements**") made by Dhyan Holdings Ltd. and Jai Setaliyaveer Gas Inc. (the "**Proposed Purchasers**"), as outlined in the First Report of the Receiver in Relation to Ritchie Industries Inc. dated October 29, 2021, (the "**Ritchie Receiver's Report**") in Schedule 4 attached to the Confidential Addendum thereto (the "**Ritchie Confidential Addendum**");

(b) Vesting the Proposed Purchasers with all right, title, and interest of Ritchie in and to, the assets described in the Agreements, free and clear of all liens, charges, and encumbrances except as provided in such agreements, if any;

(c) Approving, authorizing and directing the Receiver to enter into the Bill of Sale dated October 31, 2021 between Grasswood and the Receiver (the "**Bill of Sale**") as outlined in the First Report of the Receiver in Relation to Duck Mountain Environmental Ltd. dated October 31, 2021 (the "**DME Receiver's Report**") in Schedule 11 to the Confidential Addendum thereto (the "**DME Confidential Addendum**");

(d) Vesting Grasswood with all right, title, and interest of DME in and to, the assets described in the Bill of Sale, free and clear of all liens, charges, and encumbrances except as provided in such agreements, if any;

(e) Approving the Receiver's activities as described within the Ritchie Receiver's Report and the DME Receiver's Report and the fees and disbursements of the Receiver and its legal counsel;

(f) Sealing the Ritchie Confidential Addendum and the DME Confidential Addendum until the Proposed Sales successfully close and Receiver's Certificates are filed; and

(g) Such further and other relief as counsel may request and this Honourable Court may allow.

II. FACTS

10. The Receiver refers the Court to the Ritchie Receiver's Report and the DME Receiver's Report and the Confidential Addenda thereto, which outline the facts underlying this application in detail, and further describes the Receiver's activities to date.

III. ISSUES

11. The following issues are raised on this application:

(a) Should this Honourable Court approve the Proposed Sales?

(b) Should this Honourable Court seal the Confidential Addends to the Receiver's Reports?

IV. ARGUMENT

(a) Should this Honourable Court approve the Proposed Sales?

12. Section 243 of the *Bankruptcy and Insolvency Act* [the ***BIA***] permits the court to appoint a Receiver to do any of the following:

(a) take possession of all or substantially all of the property of an insolvent person used in relation to the business carried on by the insolvent person;

(b) exercise any control that the court considers advisable over the property and over the insolvent person's business; and

(c) take any other action that the court considers advisable.

13. Section 247(b) of the *BIA* provides that a Receiver shall "act honestly and in good faith" and "deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner".

14. The decision of *Royal Bank v Soundair Corp.,* 4 OR (3d) 1, 83 DLR (4th) 76 [***Soundair***] enumerates the well-known criteria to be applied when considering the approval of a sale or

the sales process of a Receiver. When considering whether a proposed sale should be approved and ratified by the Court, the Court is to consider and determine:

(a) Whether the Receiver made sufficient effort to get the best price and has not acted improvidently;
(b) The interests of all parties;
(c) The efficacy and integrity of the process by which offers were obtained; and
(d) Whether there has been unfairness in the working out of the process.

15. *Soundair* has been cited with approval by the Saskatchewan Court of Queen's Bench in the relatively recent published decisions of *Toronto Dominion Bank v 101142701 Saskatchewan Ltd.*, 2012 SKQB 289, 401 Sask R 203 [***TD Bank***] at para 24 and *Atrium Mortgage Investment Corp. v King Edward Apartments Inc.*, 2018 SKQB 296, 65 CBR (6th) 15 at para 13 [***Atrium***].

16. In *TD Bank*, the Honourable Madam Justice A.R. Rothery stated at para 25 that "[c]ertainly, the Receiver must act honestly and in good faith; the Receiver must deal with the Debtor's assets in a commercially reasonable manner" and then went on to consider the four *Soundair* factors cited above.

17. It should also be noted that a court-appointed Receiver is afforded a high degree of deference in running such an asset sale within a receivership, provided that its course of action and recommendation is appropriate and nothing to the contrary is shown in the evidence. To order otherwise calls into question the Receiver's expertise and authority in the receivership process, thereby compromising both the integrity of the sales process, and undermining commercial certainty.

18. To that end, Galligan J.A. stated at paras 46-47 of *Soundair*:

> 46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

> 47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , *supra*, at p. 109 [O.R.]:
>
> > The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

19. With respect to the Proposed Sales, the Receiver submits that it has engaged in fair, impartial and provident efforts to yield the offers contemplated herein, and that the actions and processes it took in that regard was undertaken with a view towards obtaining the best price having regard to the economic interests of stakeholders.

20. Therefore, applying the test in *Soundair*, the Receiver submits the following.

Factor 1: Whether the Receiver made sufficient effort to get the best price and has not acted improvidently

a. The Petro Can Sale

21. As stated, the Receiver seeks to approve the Petro Can Sale without having conducted a sales process in respect of such assets.

22. It is important to note that at the time of the Receiver's appointment, representatives of the Proposed Purchasers and corporate counsel for Ritchie had already made significant progress in negotiating an asset purchase agreement for the Petro Can Property. Following appointment, the Receiver picked up where they left off and negotiated the Agreements to fit within the insolvency proceedings.

23. The Receiver submits that without the benefit of a sales process, the Courts must examine:

(a) the circumstances of why a sales process was not required in the opinion of the Receiver;

(b) whether the price received without a sales process is commercially reasonable; and

(c) whether the price reflects the market for such assets.

24. To that end, the Receiver submits that:

(a) The aggregate purchase price for the Petro Can Property remained the same before and after the Receiver's appointment;

(b) That aggregate purchase price is in excess of appraised value; and

(c) It is the view of the Receiver that because the aggregate purchase price was essentially negotiated before the onset of insolvency proceedings, the negative influence on pricing through "forced sale" dynamics have largely been avoided.

25. In the Receiver's view, ultimately, it is the market that sets the value of property. In the case at bar, the Receiver is of the view that a public sales process is unlikely to result in a higher purchase price than the one already on offer from the Proposed Purchasers[1] and that a market price for the Petro Can Property has been achieved.

26. In addition, there is no evidence before the Court of any improvident actions by the Receiver.

27. The Receiver therefore submits that sufficient efforts were made to get the best price for the Petro Can Property, that the best price was, in fact, achieved, and therefore that it has satisfied the first branch of the *Soundair* test in respect of that sale. Furthermore, as detailed below, the aggregate purchase price does little to prejudice any party.

b. The DME Equipment

28. With respect to the DME Equipment Sale, the results of the brief *en bloc* sales process yielded the following results:

(a) En Bloc Sales Process:

[1] See the Ritchie Confidential Addendum at paras 19-21.

i. Information Summaries were distributed to eighteen (18) interested parties;
ii. Nine (9) different parties signed Confidentiality Agreements and were given access to an online data room; and
iii. Three (3) different parties submitted offers to purchase to the Receiver.[2]

29. When, in the view of the Receiver, the three (3) offers to purchase were not sufficient, it requested auction proposals from four (4) separate auction service providers seeking both Straight Commission and Net Minimum Guarantee proposals. The results of this solicitation saw the following results:

(a) Four (4) Straight Commission Proposals;
(b) Three (3) Net Minimum Guarantee Proposals; and
(c) Two (2) Cash Offers.

30. The Receiver's analysis of the auction proposals is found at paras 24-29 of the DME Confidential Addendum.

31. It is key to note that the purchase price in the proposed DME Equipment Sale is between the Forced Orderly Liquidation Value (on the low end) and the Fair Market Value (on the high end) based on the appraisal performed by a valuator independent of Grasswood (see para 10 of the DME Confidential Addendum). In addition, to meet or exceed the Cash Offer from Grasswood with the other proposals, the DME Equipment would have to sell for Market Value or higher than appraised Market Value.[3]

32. Overall, the Receiver is of the opinion that the potential higher realization from the Straight Commission proposals and Net Minimum Guarantee proposals do not offset the risk associated.[4]

33. Therefore, the Receiver submits that given its efforts and the result achieved, that it has satisfied the first *Soundair* factor in respect of the DME Equipment Sale.

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[2] See the DME Confidential Addendum at paras 11-14.
[3] DME Confidential Addendum at para 27.
[4] DME Confidential Addendum at para 28.

Factor 2: The interests of all parties

34. With regard to the second factor, the Receiver submits that all interested parties are well served by the Proposed Sales.

35. If approved, the Petro Can Sale provides an efficient disposition of the Petro Can Property without the need to incur any additional costs running a sale process, while providing excellent value available to stakeholders once the order of distribution has been decided.

36. With respect to the DME Equipment, given the type and condition of the equipment, the Receiver submits that the stakeholders in these proceedings are also well served. The sales processes for these assets were relatively uncomplicated, with the requisite market analysis being conducted. Overall, the prices garnered for the DME Equipment is in excess of Forced Orderly Liquidation Value which is certainly in the interests of economic stakeholders. Finally, by selling now, the Receiver can move to clear out the real property of DME required for a sale without incurring additional costs for storage, for example.

37. The Receiver therefore submits that approval of the Proposed Sales serves the interests of all parties at the table.

Factor 3: The efficacy and integrity of the process by which offers were obtained

38. With respect to the third factor of *Soundair*, the Receiver submits that:

(a) For the foregoing reasons, the Receiver justifiably did not engage in a public sale process for the Petro Can Property, but that the market was properly ascertained for such asset; and

(b) the sales process for the DME Equipment was fair and efficient and targeted at an audience of those who expressed an interest in potentially purchasing these assets and sufficient to learn the market for these assets as well.

39. In addition, at all material times, the Receiver was responsive to the inquiries of all interested parties, and encouraged the submission of offers and interest on an ongoing basis

following its appointment. By all accounts, the end result, namely the prices, were a good outcome for all interested parties.

Factor 4: Whether there has been unfairness in the working out of the process

40. In respect of this fourth and final factor, is important to note that, as of the date of the Brief, no evidence has been tendered regarding any unfairness or irregularity in the processes described herein.

41. As such, the Receiver therefore submits that this Honourable Court should approve the Proposed Sales.

(b) Should this Honourable Court seal the Confidential Addenda?

42. The Receiver submits that sensitive information, including the particulars of the appraised values for the assets of Ritchie and DME are contained in the Ritchie Confidential Addendum and the DME Confidential Addendum to the respective to the First Reports of the Receiver dated October 29, 2021 (the "**Confidential Addenda**"). The Receiver is concerned that publicly disclosing this highly sensitive information would be prejudicial to the sales efforts in future sales process(es) should the Proposed Sales fail to close.

43. The Supreme Court of Canada, in the recent decision of *Sherman Estate v. Donovan*, 2021 SCC 25 [***Sherman Estate***], laid out the applicable test for when a party seeks a sealing order or other similar relief. In *Sherman Estate*, the Supreme Court affirmed the importance of the 'open court principle', but also affirmed the exceptions to such principle based largely on the existing jurisprudence. The test for doing so is summarized at para 38 of *Sherman Estate*:

> 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:

> (1) court openness poses a serious risk to an important public interest;
>
> (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.

44. Overall, despite *Sherman Estate* being a new decision, the Receiver submits that it need not turn established insolvency practice (sealing commercially sensitive information) on its head (in the correct circumstances). In particular, it is important to note that the main commentary in Sherman Estate deals with personal privacy (see paras 31-32), rather than commercial considerations in established and specialized insolvency practice. In that context, *Sherman Estate* has, to date, been utilized in two recent decisions dealing with insolvency proceedings.

45. First, in *Re Laurentian University of Sudbury*, 2021 ONSC 4769, Chief Justice Morawetz of the Ontario Superior Court expressed concerns that a particular confidential appendix did not appear to contain commercially sensitive and proprietary information. Upon consultation with counsel, it was agreed to narrow the scope of the sealing order sought. As such, Chief Justice Morawetz did grant a sealing order on the basis of the *Sherman Estate* test.

46. Secondly, in *Ontario Securities Commission v. Bridging Finance Inc.*, 2021 ONSC 4347, the applicant receiver requested a sealing order where confidential appendices set out details of the KERP (Key Employee Retention Program) compensation payments as well as information relating to a sale process. Chief Justice Morawetz granted the order after considering the three-part test in *Sherman Estate* and stating at para 27 that “the salutary effects of granting the order outweighed deleterious effects.”

47. In the case at bar and in relation to the first two prongs of the *Sherman Estate* test, the Receiver submits that disclosing sensitive information relating to the market, for and appraised value of, Ritchie and DME assets in advance of the transactions contemplated by the application would pose a harm to public interest and that no other reasonable measures could be used. Public harm would result from a future court-supervised sales process being

undermined. In addition, such action would harm the stakeholders at the table. The Receiver submits that the bulk of established insolvency practice in Saskatchewan supports this proposition. Nothing new is proposed in this regard.

48. With respect to the third and final prong of the *Sherman Estate* test, the Receiver proposes utilizing a rather creative solution to give life to the principle of proportionality articulated by the Supreme Court.

49. To strike a balance between the harm caused by releasing this sensitive information and the Open Court Principle, the Receiver proposes that the Confidential Addenda remain sealed until the respective transactions they concern are confirmed closed by the Receiver.

50. To accomplish this, the Receiver proposes that an additional line be added to the Receiver's Certificate for the Sale Approval and Vesting Order (Ritchie Real Property) [5] and to the Sale Approval and Vesting Order (DME Equipment) to be served on stakeholders and filed with the Court, thereby notifying the stakeholders and the Court that the Confidential Addenda may then be unsealed. In the Receiver's view this approach is very much in line with the proportionality requirement in *Sherman Estate* test meaning that the Confidential Addenda will not stay sealed indefinitely and that the sealing requested is directly tied to its purpose.

51. Overall, the Receiver further submits that salutary effects of temporary sealing of the Confidential Addenda outweigh any potential deleterious effects, and is necessary towards assisting the Receiver in keeping with the *Soundair* principles. Not only is the granting of this relief is reasonable in the circumstances, it is, in the Receiver's submission, appropriate and necessary.

[5] Note: there is a requirement that the two separate transactions for Ritchie's real property and other property relating to the Petro Can Sale close together. As such, only one sealing order and one Receiver's Certificate is needed for the Petro Can Sale.

VI. CONCLUSION

52. The Receiver respectfully requests that this Honourable Court grant the relief sought in this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Regina, in the Province of Saskatchewan, this 1st day of November, 2021.

KANUKA THURINGER LLP

Per: _____
Solicitors for the Receiver and Trustee in Bankruptcy,
MNP Ltd.

CONTACT INFORMATION AND ADDRESS FOR SERVICE

KANUKA THURINGER LLP
Lawyer in Charge of File: Alexander K.V. Shalashniy
1400 - 2500 Victoria Avenue, Regina, Saskatchewan S4P 3X2
Telephone: 306.525.7200
Fax: 306.359.0590
Email: ashlashniy@kanuka.ca
25120-0045/WNS
DM 3088787 v1

AUTHORITIES

Cases

Name & Citation	Paragraph	Principle
Royal Bank v Soundair Corp. (1991) 4 OR (3d) 1, 83 DLR (4th) 76 (ONCA)	16 46-47	Oft-cited test for asset sales in receiverships. Receivers afforded a high degree of discretion in recommending a sale. Courts should not lightly interfere with recommendation of receivers.
Toronto Dominion Bank v 101142701 Saskatchewan Ltd., 2012 SKQB 289, 401 Sask R 203	24	Saskatchewan Court of Queen's Bench citing the *Soundair* test.
Atrium Mortgage Investment Corp. v King Edward Apartments Inc., 2018 SKQB 296, 65 CBR (6th) 15	13	Saskatchewan Court of Queen's Bench citing the *Soundair* test.
Sherman Estate v. Donovan, 2021 SCC 25, 458 D.L.R. (4th) 361	31-32 38	The main focus of the decision was privacy considerations, not a commentary on insolvency practice. The three part test in respect of exemptions to the Open Court Principle.
Re Laurentian University of Sudbury, 2021 ONSC 4769	14	Insolvency courts can grant sealing orders in light of *Sherman Estate.*
Ontario Securities Commission v. Bridging Finance Inc., 2021 ONSC 4347, 90 C.B.R. (6th) 102	27	In the circumstances the salutary effects of granting the Sealing Order outweigh any deleterious effects in that particular insolvency context.

Statutes

Name	Section	Principle
The Bankruptcy and Insolvency Act	243 247(b)	Authority of Receiver to take possession of a Debtor's assets and to deal with them as approved by the Court Duty of Receiver to act honestly, in good faith and in a commercially reasonable manner.

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:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (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