

**COURT OF APPEAL FOR ONTARIO**

**IN THE MATTER OF AN APPLICATION UNDER** Section 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended.

**B E T W E E N:**

**HOME TRUST COMPANY**

**Applicant**

- and -

**2122775 ONTARIO INC.**

**Appellant  
(Respondent)**

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**FACTUM OF THE APPELLANT, 2122775 ONTARIO INC.**

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March 4, 2014

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**FACTUM OF THE APPELLANT, 2122775 ONTARIO INC.**

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**PART I - OVERVIEW**

1. The Appellant, 2122775 Ontario Inc. ("**212 Ontario**" or the "**Appellant**") has appealed the Decision (the "**Approval and Vesting Order**") of the Honourable Justice D. Brown dated February 14, 2014 (the "**Appeal**"). The return date of the Appeal is not yet set.
2. The Approval and Vesting Order was made as a result of a motion returnable February 14, 2014 by Collins Barrow Toronto Limited, in its capacity as the Court appointed receiver of 212 Ontario and its assets (the "**Receiver**"), to authorize and approve a sale transaction (the "**Transaction**") contemplated by an Agreement of Purchase and Sale ("**APS**") between the Receiver and a purchaser, Urbancorp (Downtown) Developments Inc. ("**Urbancorp**") for lands known municipally as 2426 and 2427 Bayview Avenue, Toronto, Ontario (the

“**Property**”). The Honourable Justice D. Brown authorized and approved the Transaction and granted a vesting order to Urbancorp on closing. This was in spite of the fact that 212 Ontario brought its own motion, also returnable February 14, 2014, to stay the sale proceedings pending the funding commitments it had received from its lender (“**Toronto Capital**”).

3. The Appellant now seeks directions from this Court as to whether the Approval and Vesting Order is automatically stayed pending the Appeal pursuant to s. 195 of the *Bankruptcy and Insolvency Act* (“*BIA*”).
4. It is the Appellant’s position that the Approval and Vesting Order is automatically stayed pursuant to s. 195 of the *BIA* and that there is no basis for the stay to be varied. Alternatively, if this Court should determine that the *BIA* stay provisions do not apply, the Appellant seeks a stay pursuant to the *Rules of Civil Procedure*.
5. In either scenario, the Appellant submits that it would suffer irreparable harm if the stay is not continued as its interest in the Property, as well as the interests of the other secured creditors of the Property (hereinafter defined as the Subsequent Mortgagees) which total \$17.35 million, will be vested out if the Transaction is allowed to be completed. If the Transaction proceeds it would also render the Appeal moot. The Appellant is the registered owner of the Property and is seeking to redeem, whereas Urbancorp is an unrelated third party purchaser who submitted a bid. As such, the Appellant submits that the balance of convenience under these circumstances favours the Appellant.
6. If the Approval and Vesting Order is not automatically stayed, the Appellant submits that it will be prejudicial to the Appellant’s position and to that of the Subsequent Mortgagees. If

the Transaction proceeds, the Appellant would be left without a remedy despite the fact that it has demonstrated, and can continue to demonstrate, that it has sufficient funding commitments to redeem the Home Trust Mortgage (as hereinafter defined), as well as the Receiver's fees and disbursements, and the lien claims. The Appellant can satisfy the Receiver's concerns and any alleged deficiencies and in doing so will protect its own investment in the Property as well as the \$17.35 million investment of the Subsequent Mortgagees (as hereinafter defined).

7. For these reasons, the Appellant submits that the stay should be continued (or, alternatively, granted).
8. Given the urgent and time sensitive nature of the Appeal, the Appellant is seeking an expedited Appeal. If the Approval and Vesting Order is not stayed, the Transaction will close on March 17, 2014 and a vesting order will be granted to Urbancorp thereby rendering the Appeal moot. It is imperative that a stay confirmed or granted before that date.

## **PART II - THE FACTS**

### **Background**

9. In 2010, the Appellant purchased the Property for the purposes of building a 20 luxury unit townhouse development (the "**Development**"). Construction on the Development commenced in early 2012 and approximately 80% of underground construction has been completed in addition to the exterior of a model home and all of the servicing.

**Reference:** Affidavit of Naheel Suleman sworn February 27, 2014



(“**Suleman Affidavit**”) at paras 3-6, p.12, Appellant’s Motion Record dated February 27, 2014 (“**Motion Record**”).

10. Home Trust Company (“**Home Trust**”) is a mortgage lender which advanced a first mortgage loan to 212 Ontario in the amount of \$6,500,000 (the “**Home Trust Mortgage**”).

**Reference:** Suleman Affidavit at para 10, p. 13, Motion Record.

11. VS Capital Corporation (“**VS Capital**”) is a mortgage lender which advanced two mortgage loans as follows:

- Mortgage of \$8,750,000 – second mortgage (note: this third mortgage became a second mortgage when the second mortgagee postponed its mortgage in favour of this one); and
- Mortgage of \$3,500,000 – fourth mortgage.

**Reference:** Suleman Affidavit at para 12, p. 13, Motion Record.

12. Zaherali Visram (“**Visram**”) is an individual resident in Toronto, Ontario and a mortgage lender who advanced a third mortgage loan to 212 Ontario in the amount of \$5,100,000 (note: this was initially a second mortgage but it was postponed to the third).

**Reference:** Appellant’s Motion Record, Suleman Affidavit at para 13, p.13.

13. VS Capital and Visram are hereinafter collectively referred to as the “**Subsequent Mortgagees**”).

**Reference:** Suleman Affidavit at para 14, p. 13, Motion Record.

14. The secured creditors of the Property are as follows:

CREDITOR	AMOUNT OF CHARGE	NATURE
Home Trust	\$6,500,000	Mortgage
VS Capital	\$8,750,000	Mortgage
Visram	\$5,100,000	Mortgage
VS Capital	\$3,500,000	Mortgage
Cameo Fine Cabinetry (Mississauga) Inc.	\$30,000	Mortgage
King Masonry Yard Ltd.	\$8,782	Construction Lien
UCIT Online Security Inc.	\$29,595	Construction Lien
Silverado Custom Home Corporation	\$37,500	Construction Lien

**Reference:** Suleman Affidavit at para 16, p. 14, Motion Record.

### **The Appointment of the Receiver**

15. As a result of a default in the Home Trust Mortgage, Home Trust commenced an application to appoint the Receiver which was ultimately returnable November 15, 2013.

**Reference:** Appellant's Motion Record, Suleman Affidavit at para 24, p.16.

16. The Receiver was appointed pursuant to the Order of the Honourable Justice Thorburn dated November 15, 2013 ("the **Receivership Order**"). The Appointment was made under section 243(1) of the *BIA* and section 101 of the *Courts of Justice Act* ("**CJA**").

**Reference:** Suleman Affidavit at para 25, p. 16, Motion Record.

### **Receiver's Motion for Marketing and Sales Process Approval**

17. The Receiver brought a motion on December 11, 2013 seeking, *inter alia*, approval of the marketing and sales process for the Property and an Order authorizing it to enter into an

agreement of purchase and sale. Pursuant to the Order of the Honourable Justice D. Brown dated December 11, 2013 (the “**Marketing Order**”), the Receiver was granted this relief.

**Reference:** Suleman Affidavit at para 26, p.17, Motion Record.

### **Financing Efforts by the Appellant**

18. Commencing in March 2013, the Appellant sought to obtain complete financing. Although the Appellant was able to obtain a complete financing commitment it was ultimately unable to execute on it and instead began investigating more traditional financing in late 2013/early 2014 which involved replacing the first mortgage with a new mortgage and having the second, third and fourth mortgages postponed to that mortgage.

**Reference:** Suleman Affidavit at paras 17-18, pp. 14-15, Motion Record.

19. The Appellant received financing commitments from the construction lender Toronto Capital Inc. (“**Toronto Capital**”) in January 2014. The Appellant sought consent to the financing commitments from the Subsequent Mortgagees which it received on February 10, 2014 because the Subsequent Mortgagees would be postponing their mortgages in favour of the new first and second mortgages. It was only once the consent was received, that the Appellant was in a position to proceed to redeem the Home Trust Mortgage and pay off the Receiver’s fees and disbursements and the lien claims.

**Reference:** Suleman Affidavit at paras 18-22, 29, pp.15-16 and17, Motion Record.

### **The Sale Approval Motion**

20. The Receiver marketed the Property and entered into the APS with Urbancorp. The Receiver then brought a motion for approval of the APS (the "**Sale and Vesting Approval Motion**") which was returnable on February 14, 2014, the APS having been entered into on January 22, 2014.

**Reference:** Suleman Affidavit at para 27, p. 17, Motion Record.

21. The Appellant received Term Sheets from Toronto Capital totalling \$8,000,000 in financing on January 21, 2014 which was to be secured by a new first and second mortgage. The APS was entered into on January 22, 2014. Given the contemporaneous timing of these events, the Receiver may have postponed the entering into of the APS with Urbancorp if it had then been advised by the Appellant of its intention to redeem but the Appellant did not yet have the consent from the Subsequent Mortgagees (received February 10, 2014) to agree to postpone their second, third and fourth mortgages to the new first and second mortgages.

**Reference:** Suleman Affidavit at para 19, p.15, Motion Record.

22. The Receiver delivered its motion materials on Friday, February 7, 2014. The Appellant did not then have the consent from the Subsequent Mortgagees but nevertheless intended to bring its own motion to stay the Transaction pending the funding commitments from Toronto Capital.

**Reference:** Suleman Affidavit at paras 28-30, pp. 17-18, Motion Record.

23. On February 10, 2014, the Appellant received the consent from the Subsequent Mortgagees, and on that date, counsel for the Subsequent Mortgagees wrote to counsel for the Receiver, enclosing the commitment letters and consent of the Subsequent Mortgagees.

**Reference:** Suleman Affidavit at paras 22, 29, 30, pp.16, 17-18, Motion Record.

24. The Appellant's counsel had a flood at his office which was subsequently closed from February 7 through 11, 2014. As a result, the Appellant was not in a position to deliver its motion materials to stay the Transaction and redeem the Home Trust Mortgage until February 13, 2014 (for the motion returnable on February 14, 2014). This is notwithstanding that the Term Sheets had been provided to the Receiver by counsel for the Subsequent Mortgagees on February 10, 2014, as aforesaid, and that the Receiver was therefore aware that the Appellant sought to redeem the Home Trust Mortgage.

**Reference:** Suleman Affidavit at paras 22, 29, 30-33, pp. 16, 17-18, Motion Record.

25. On the eve of the Sale and Vesting Approval Motion, the Receiver delivered its Second Supplemental Report which was critical of the financing commitments provided by Toronto Capital and alleged that the financing provided therein was insufficient to pay out the Home Trust Mortgage and costs and the unpaid receivership costs to date. The Receiver alleged that there was a funding deficiency of \$548, 917.

**Reference:** Suleman Affidavit at paras 34-35, p. 18, Motion Record.

26. The \$8,000,000 of financing provided by Toronto Capital was sufficient. The only issue was the manner in which the funds had been allocated as set out therein.

**Reference:** Suleman Affidavit at para 36, p.19, Motion Record.

27. Given that the Second Supplemental Report of the Receiver was not received until the end of the day on February 13, 2014, there was insufficient time for the Appellant to deliver further affidavit material for the Sale and Vesting Approval Motion and accordingly, the Appellant made arrangements for a representative of Toronto Capital to attend on February 14, 2014 to provide *viva voce* evidence which would confirm the binding commitments and the reallocation of funds to satisfy the Court and the Receiver.

**Reference:** Suleman Affidavit at paras 38-39, p. 19, Motion Record.

28. The Sale and Vesting Approval Motion was heard by the Honourable Justice D. Brown on February 14, 2014. The Appellant asked that Toronto Capital be allowed to give *viva voce* evidence with respect to the revisions and the unconditional nature of the commitment. The Honourable Justice D. Brown refused the request. The Appellant then asked for a one week adjournment so that it could file additional Affidavit material which would address the concerns raised by the Receiver in its Second Supplemental Report and that request was also refused.

**Reference:** Suleman Affidavit at paras 40-41, pp. 19-20, Motion Record.

29. Mr. Justice D. Brown's reasons (the "**Reasons**") were released on February 18, 2014. In his Reasons, His Honour determined that the Receiver was entitled to sell the Property on the basis that the Appellant's interests could be vested out. He approved the APS and issued the Approval and Vesting Order (which would be registered once the closing occurred).

**Reference:** Suleman Affidavit at paras 44-45, pp. 20-21, Motion Record.

30. In his Reasons, the Honourable Justice D. Brown was critical of the commitments delivered by the Appellant. He determined that the Appellant's proposal was not firm and inferior as the consideration was inadequate to pay the first mortgage and the Receiver's charge. In his Reasons, the Honourable Justice D. Brown treated the redemption request as a new bid instead of a redemption by an existing party and he refused to allow any opportunity by the Appellant, the redeemer, to demonstrate that it had the funds to close and satisfy any alleged deficiency.

**Reference:** Suleman Affidavit at para 41, p. 20, Motion Record.

### **The Appeal**

31. The Appellant has appealed the Order by way of Notice of Appeal dated February 24, 2014.

**Reference:** Suleman Affidavit at para 46, p. 21, Motion Record.

32. The net impact of the Approval and Vesting Order is that the Appellant will be dispossessed of the Property and its opportunities to complete the Development. The Subsequent Mortgagees will lose their \$17.35 million investment as there will be only limited means available after the payout of the Home Trust Mortgage, Receiver's costs and disbursements and construction liens for the second mortgage.

**Reference:** Suleman Affidavit at para 56, p. 23, Motion Record.

33. The questions raised in this Appeal include: whether the Appellant should be provided with an opportunity to redeem the Home Trust Mortgage and, whether the Motions Judge unfairly disregarded the interests of the parties and the equitable factors arising in this case.

34. In the Appeal, it is the Appellant's position that this Court should attempt to effect an equitable result which takes into consideration the interests of the parties. Allowing the Transaction to an unrelated third party to proceed to the detriment of the Appellant and the Subsequent Mortgagees. When the Appellant can provide financing is not an equitable result.

**Appellant has a Firm, Binding Commitment to Redeem**

35. Given the outcome of the Sale and Vesting Approval Motion, and the criticisms of the Receiver and the Honourable Justice D. Brown, the Appellant has obtained a clarified commitment from Toronto Capital which deals satisfactorily with all of the concerns and criticism. This would have been introduced through the *viva voce* evidence of Toronto Capital if the Appellant's request to provide *viva voce* evidence and/or request for a one week adjournment to file additional affidavit material had been granted at the Sale and Vesting Approval Motion.

**Reference:** Suleman Affidavit at paras 48-52, pp. 21-22, Motion Record.

36. At the Sale and Vesting Approval Motion, the Receiver and the Honourable Justice D. Brown claimed that the Term Sheets provided by the Appellant were not firm and were deficient in that they did not cover the Receiver's costs. These are, in fact, binding commitments and they do cover the Receiver's costs and disbursements. Any alleged deficiencies with the Term Sheets have now been clarified by way of a cover letter with two clarified commitments from Toronto Capital dated February 27, 2014. The commitments specifically address payment of the Home Trust Mortgage, Receiver's fees and disbursements, liens, legal fees, and working capital – remainder.



**Reference:** Suleman Affidavit at paras 23, 36, 43, 48-52, pp. 16, 19, 20, 21-22; Exhibits “I”, “J” and “K” to the Suleman Affidavit, pp.113, 115, 121, Motion Record.

37. \$8,000,000 in financing remains available to the Appellant and it can be funded within 14 days of an order to stay the Approval and Vesting Order. There is no reason to assume this same funding would not be available for the Appeal.

**Reference:** Suleman Affidavit at paras 50-51, p. 22, Motion Record.

### **The Stay**

38. On or about February 25, 2014, the Appellant advised the Receiver and all of the interested parties that the Approval and Vesting Order and the Transaction were automatically stayed as a result of the Appeal.

**Reference:** Suleman Affidavit at para 53, p. 22, Motion Record.

39. The Receiver and Urbancorp have taken the position that there is no automatic stay and have indicated that they intend to proceed with the Transaction. This underscores the urgency of the Motion and the Appeal.

**Reference:** Suleman Affidavit at para 55, p. 23, Motion Record.

### **PART III - ISSUES AND THE LAW**

40. The following issues are relevant to this appeal:
- (a) Is there an automatic stay with respect to the Approval and Vesting Order under appeal pursuant to s. 195 of the *BIA*?

- (b) Alternatively, should this Court stay the Approval and Vesting Order pursuant to Rule 63.02(1) of the *Rules of Civil Procedure* or Section 134(2) of the *Courts of Justice Act*?

### Section 195 of the *BIA*

41. Section 195 of the *BIA* provides for an automatic stay of proceedings on the filing of an appeal until the appeal is concluded.

**Reference:** *BIA*, s. 195

42. The Receiver is seeking the cancellation of a s. 195 stay, bears the burden of establishing compelling grounds for judicial intervention. The Court of Appeal may vary or cancel the stay if it appears that the appeal is not being prosecuted diligently or for such other reason as the Court of Appeal may deem proper.

**Reference:** *BIA*, s. 195

*After Eight Interiors Inc. v. Glen Wood Homes Inc.* 2006 ABCA121 (CanLII) (“*After Eight*”) at para 5, Appellant’s Brief of Authorities, Tab 1.

43. The test articulated in *RJR-MacDonald Inc. v. Canada (A.G.)* (“*RJR*”) is typically applied on an application to lift a s. 195 stay. Therefore, a criteria to be considered by a court in such circumstances are as follows:

- (a) whether there is a serious issue to be appealed;
- (b) whether the moving party would suffer irreparable harm if the stay is not lifted; and
- (c) whether the moving party would suffer greater harm than the respondent if the stay is not lifted.

**Reference:** *RJR*, Appellant's Brief of Authorities, Tab 2.

44. Courts have acknowledged that the discretion afforded by s. 195 is broader than articulated in the *RJR MacDonald* test. In other words, Courts have adopted a contextual approach which takes into account all of the relevant facts in the case.

**Reference:** *After Eight* at para 6, Appellant's Brief of Authorities, Tab 1.

45. Consistent with this approach, Courts considering applications to cancel a s. 195 stay have focused on the relative prejudice to the parties and generally, the interests of justice.

**Reference:** *After Eight* at para 6, Appellant's Brief of Authorities, Tab 1.

### **Section 195 Applies**

46. The Receiver may argue that s. 195 does not apply in this case on the basis that the Order was not made under the *BIA*, but under the *CJA*.
47. The appointment of the Receiver was a dual appointment under s. 243(1) of the *BIA* and section 101 of the *CJA*. In such cases, it cannot be said that a particular court order was made under one statute or another. The better view is that an order in a receivership proceeding is made under both statutes.
48. Support for this approach can be found in the decision of Lang J.A. in *BDC Venture Capital Inc. v. Natural Convergence Inc.* Here, a losing bidder had appealed an order approving a receiver's asset sale. Despite the fact that the receiver had been appointed under s. 101 of the *CJA* and s. 47 of the *BIA*. Lang J.A, in her reasons, stated that "on appeal, the Orders were stayed automatically pursuant to s. 195 of the *BIA*".

**Reference:** *BDC Venture Capital Inc. v. Natural Convergence Inc.* [2009] O.J. No. 3611, 2009 ONCA 637 (“*BDC Venture Capital*”) at para 2, Appellant’s Brief of Authorities, Tab 3.

49. On the basis of the Receiver’s dual appointment under the BIA and the CJA, and in light of the decision in *BDC Venture Capital*, the Appellant respectfully submits that s. 195 of the BIA applies.

**Alternative Argument: Motion to Stay**

50. In the alternative, should this Court determine that the s. 195 stay does not apply, the Appellant seeks an order staying the Order pursuant to the *Rules of Civil Procedure* or the *CJA*.

**Reference:** Rule 63.02(1) of the *Rules of Civil Procedure*  
*CJA*, s. 134(2)

51. The test for a stay is as set out below. The Appellant respectfully submits that a discretionary stay order pursuant to Rule 63.02 is appropriate and in the interests of justice for the following reasons:

- (a) Rule 63.02(1) of the *Rules of Civil Procedure* empowers a Court to stay an Order subject to appeal, “on such terms as are just”; and
- (b) Section 134 (2) of the *CJA* provides broad jurisdiction for interim orders pending appeal, specifically the Court of Appeal may make “any interim order considered just to prevent prejudice to a party pending the appeal”.

**Reference:** Rule 63.02 of the *Rules of Civil Procedure*  
s. 134(2) of the *CJA*

- (c) The test in deciding whether to grant a stay by order is the same as for the granting of an interlocutory injunction, i.e.: (i) is there a serious question to be decided; (ii) would compliance with the Order under appeal cause irreparable harm; and (iii) what is the balance of convenience. On appeal, greater weight is given to the fact that an adjudication has already taken place and is regarded as *prima facie* correct.

**Reference:** *RJR*, Appellant's Brief of Authorities, Tab 2.  
*820099 Ontario Inc. v. Harold E. Ballard Ltd.*, [1991] O.J. No. 480, 50 O.A.C. 254, (Divisional Court) at page 4, Appellant's Brief of Authorities, Tab 4.

### **Serious Issue to be Determined on Appeal**

52. On the first branch of the test, this Court must consider whether the Appeal raises a serious issue. This threshold test has been characterized as low and one that will be met except where the appeal is "doomed to almost certain failure" or frivolous or vexatious.

**Reference:** *N.G. v. Upper Canada College*, [2004] O.J. No. 1202 (Ont. C.A.) at para 15, Appellant's Brief of Authorities, Tab 5.  
*Matco Capital Limited v. Interex Oilfield Services Ltd.*, 2007 ABCA 317 at para. 8, Appellant's Brief of Authorities, Tab 6.

53. The Courts have established the criteria to be applied in a receivership proceeding and have enunciated factors which a Court must consider when deciding whether a receiver acted properly when selling a property:
- a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
  - b) whether the receiver considered the interests of all parties;

- c) the efficacy and integrity of the process by which offers were obtained; and
- d) whether there has been an unfairness in the working out of the process.

**Reference:** *Romspen Investment Corporation v. Woods Property Development Inc.*, [2011] O.J. No. 5871, 2011 ONCA 817 at paras 24-25, Appellant’s Brief of Authorities, Tab 7.  
*Royal Bank of Canada v. Soundair Corp*, 4 O.R. (3d) 1, [1991] O.J. No. 1137 at pages 5, 10 and 18, Appellant’s Brief of Authorities, Tab 8.

54. The Court of Appeal has determined that “the central issue raised on the motions and in these appeals is the application of the second criterion, the consideration of the interests of all parties.”

**Reference:** *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONCA 817 CanLII) at para 25, Appellant’s Brief of Authorities, Tab 7.

55. “Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.”

**Reference:** *Royal Bank of Canada v. Soundair Corp*, 4 O.R. (3d) 1, [1991] O.J. No. 1137 at page 19, Appellant’s Brief of Authorities, Tab 8.

56. “In determining whether to issue a vesting order terminating the interests of parties in a property, the court must review the equitable considerations supporting the respective positions of the parties.”

**Reference:** *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (ONSC) at para 19, Appellant’s Brief of Authorities, Tab 9.

57. The Appellant had \$8,000,000 in financing commitments, sufficient to redeem the Home Trust Mortgage and pay out the Receiver’s fees and disbursements and the lien claims at

the Sale and Vesting Approval Motion. This \$8,000,000 has simply been adjusted to clearly and unequivocally demonstrate that there are no deficiencies in the financing. The Appellant was denied the opportunity for its lender to provide *viva voce* evidence to confirm these facts at the Sale and Vesting Approval Motion.

58. If the Appellant had received the consent to the financing from the Subsequent Mortgagees prior to February 10, 2014, arguably it could have advised the Receiver of same before the Receiver entered into the APS with Urbancorp. The Term Sheets were provided on January 21, 2014. The APS was entered into on January 22, 2014. The consent was received on February 22, 2014.
59. The Appellant is seeking to redeem the Home Trust Mortgage. The Appellant is not an unrelated third party seeking to bid on the Property.
60. The Appellant submits that the Appeal raises serious issues, particularly those involving the interests of the parties.

### **Irreparable Harm**

61. The second branch of the test, irreparable harm, refers to the nature of the harm that would be suffered if a stay is not granted.
62. The irreparable harm component has to do with the nature, not the magnitude of the harm.

**Reference:** *RJR*, para 64, Appellant's Brief of Authorities, Tab 2.

63. In *RJR*, irreparable harm was described as "harm which either cannot be quantified in monetary terms or which cannot be cured".

**Reference:** *RJR*, para 64, Appellant's Brief of Authorities, Tab 2.

64. In some cases, it may be sufficient to establish irreparable harm where it can be shown that the relief sought would be nugatory if a stay is not allowed.

**Reference:** *Matco Capital Limited v. Interex Oilfield Services Ltd.*, 2007 ABCA 317 (CanLII) at para. 10, Appellant's Brief of Authorities, Tab 6.

65. As previously submitted by the Appellant, if the Transaction proceeds and the Approval and Vesting Order is not stayed, it would render the Appeal to be moot and the Subsequent Mortgagees will lose their \$17.35 million investment. Upon registration of the Vesting Order, title will have been transferred to Urbancorp and the Appellant will lose its Property. The harm suffered by the Appellant is clear and not speculative and would not be compensable or curable.

**Reference:** *Ontario v. Shehrazad Non-Profit Housing Inc.* (2007) 85 O.R. (3d) 81 (ONCA) at paras 25-26, Appellant's Brief of Authorities, Tab 10.

### **Balance of Convenience**

66. The last branch of the test is whether the interests of the Appellant outweigh that of the Receiver and Urbancorp.
67. Arguably, the balance of convenience favours the Appellant for these reasons:
- (a) The APS sought to be approved by the Receiver consists of a credit bid by Urbancorp, an unrelated third party. The financing commitment from the Appellant is not a bid but rather a request to redeem;
  - (b) The Appellant will lose its investment in the Property;



- (c) The Subsequent Mortgagees will lose their \$17.35 million investment in the Property;
  - (d) The Appellant was in a position to confirm the binding nature of the financial commitments at the Sale and Vesting Approval Motion but was denied the opportunity to do so; and
  - (e) The Appeal will be rendered moot.
68. A consideration of the relative prejudice favours the Appellant. If a stay is not granted, the potential harm that will be suffered by the Appellant far outweighs any benefit to the Receiver or Urbancorp. Any prejudice alleged to have been suffered by Urbancorp is compensable and minor compared to that which will be suffered by the Appellant and the Subsequent Mortgagees. For these reasons, the Appellant respectfully submits that the automatic stay should continue. Alternatively, it requests that the Approval and Vesting Order, and any related motions, be stayed.
69. The Appellant submits that the Receiver's proposal that a stay be lifted if granted is unreasonable for the reasons set out above. .

#### **PART IV - ORDER REQUESTED**

70. The Appellant respectfully requests an Order:
- (a) confirming that the Approval and Vesting Order is automatically stayed pursuant to s. 195 of the *BIA*;
  - (b) alternatively, if this Court should determine that there is no automatic stay, granting a stay of the Approval and Vesting Order pending disposition of the Appeal; and

(c) for an expedited Appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 4<sup>th</sup> day of March, 2014.

  
\_\_\_\_\_  
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## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *After Eight Interiors Inc. v. Glen Wood Homes Inc.* 2006 ABCA121 (CanLII)
2. *RJR-MacDonald Inc. v. Canada (A.G.)* [1994] 1 S.C.R. 311
3. *BDC Venture Capital Inc. v. Natural Convergence Inc.*, [2009] O.J. No. 3611, 2009 ONCA 637
4. *820099 Ontario Inc. v. Harold E. Ballard Ltd.* [1991] O.J. No. 480, 50 O.A.C. 254, (Divisional Court)
5. *N.G. v. Upper Canada College*, [2004] O.J. No. 1202 (Ont. C.A.)
6. *Matco Capital Limited v. Interex Oilfield Services Ltd.*, 2007 ABCA 317 (CanLII)
7. *Romspen Investment Corporation v. Woods Property Development Inc.*, [2011] O.J. No. 5871, 2011 ONCA 817
8. *Royal Bank of Canada v. Soundair Corp.*, 4 O.R. (3d) 1, [1991] O.J. No. 1137
9. *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (ONSC)
10. *Ontario v. Shehrazad Non-Profit Housing Inc.* (2007) 85 O.R. (3d) 81 (ONCA)

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

#### *Bankruptcy and Insolvency Act* R.S.C., 1985, c. B-3

#### APPEALS

**193.** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

R.S., 1985, c. B-3, s. 193;  
1992, c. 27, s. 68.

#### **Stay of proceedings on filing of appeal**

**195.** Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

R.S., 1985, c. B-3, s. 195;  
1992, c. 27, s. 69.

#### *Courts of Justice Act* R.S.O. 1990, Chapter C.43

#### **Declaratory orders**

**97.** The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed. 1994, c. 12, s. 39; 1996, c. 25, s. 9 (17).

**Powers on appeal**

**134.(1)** Unless otherwise provided, a court to which an appeal is taken may,

- (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
- (b) order a new trial;
- (c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

**Interim orders**

**(2)** On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

*Courts of Justice Act*  
**R.R.O. 1990, Regulation 194**  
*Rules of Civil Procedure*

**INTERPRETATION****General Principle**

**1.04 (1)** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

**ORDERS ON TERMS**

**1.05** When making an order under these rules the court may impose such terms and give such directions as are just. R.R.O. 1990, Reg. 194, r. 1.05.

**RULE 63 STAY PENDING APPEAL****STAY BY ORDER***By Trial Court or Appeal Court*

**63.02 (1)** An interlocutory or final order may be stayed on such terms as are just,

- (a) by an order of the court whose decision is to be appealed;
- (b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken. O. Reg. 465/93, s. 8.

HOME TRUST COMPANY  
Applicant

v.

2122775 ONTARIO INC.  
Appellant  
(Respondent)  
Court of Appeal No.: C58425

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

**FACTUM OF THE APPELLANT,  
2122775 ONTARIO INC.**

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