

Court File No. CV-13-10313-00CL
Court of Appeal No.

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Respondent

MOTION RECORD OF THE RECEIVER

DICKINSON WRIGHT LLP

Barristers & Solicitors
199 Bay Street, Suite 2200
Toronto, Ontario, M5L 1G4

LISA S. CORNE

LSUC Registration No. 27974M
Email: lcorne@dickinsonwright.com
Tel: (416) 646-4608

Fax: (416) 865-1398

Lawyers for Collins Barrow Toronto Limited
in its capacity as receiver of 2122775 Ontario
Inc.

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TAB 1

COURT OF APPEAL FOR ONTARIO

BETWEEN:

HOME TRUST COMPANY

Applicant

- and -

2122775 ONTARIO INC.

Respondent

NOTICE OF CROSS-MOTION

Collins Barrow Toronto Limited (the "Receiver"), in its capacity as receiver of the assets, undertakings and properties of 2122775 Ontario Inc. ("212") will make a Cross-Motion to a single Judge of the Court of Appeal on Monday, March 10, 2014, at 10:00 a.m., or as soon after that time as the Cross-Motion can be heard at Osgoode Hall, 130 Queen Street, West Toronto, Ontario M5H2N5.

PROPOSED METHOD OF HEARING: The Motion is to be heard orally.

THE MOTION IS FOR:

- (a) an Order, if necessary, abridging the time for service and validating service of this Notice of Cross-Motion and Motion Record, and dispensing with further service hereof such that this Motion is properly returnable on March 10, 2014;
- (b) A Declaration that the Approval and Vesting Order granted by the Honourable

Mr. Justice D. Brown dated February 14, 2014 (the "Order") does not fall within Sections 193(a) through (d) of the *Bankruptcy and Insolvency Act* RSC 1985, c. B-3 (the "BIA");

- (c) A Declaration that the Order is not automatically stayed pursuant to section 195 of the *BIA* by the filing of 212's Notice of Appeal dated February 24, 2014;
- (d) In the alternative, in the event that the Order is stayed pursuant section 195 of the *BIA* , an order cancelling the stay of the Order;
- (e) An Order striking out paragraphs 43, 48, 49, and 51 of the Affidavit of Naheel Suleman sworn February 27, 2014 (the "Suleman Affidavit") and the following Exhibits attached thereto
 - i. Exhibit E – Copy of an email from Frank Mondelli and attached letter dated February 14, 2014 from Toronto Capital;
 - ii. Exhibit I – Letter from Toronto Capital dated February 27, 2014;
 - iii. Exhibit J – New Commitment Letter from Toronto Capital dated February 27, 2014;and
 - iv. Exhibit K – Letter from Toronto Capital, dated February 27, 2014;
- (f) Costs of this cross-motion on a substantial indemnity basis; and
- (g) such further relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS FOR THE MOTION ARE:

- (a) The Order under appeal does not fall within the meaning of sections 193(a) through (d) of the *BIA*, as those sections have been narrowly interpreted by the Courts:
- (b) Therefore, no appeal under the BIA from the Order can be brought without leave

- of a judge of the Court of Appeal;
- (c) The appellant, 212 has not sought or obtained leave to appeal pursuant to section 193 of the *BIA*, and leave to appeal should not be granted in the circumstances of this case;
 - (d) The appellant cannot satisfy the test for leave to appeal, because the Order is not contrary to law or an abuse of judicial power and does not involve any error;
 - (e) To the extent that the Order was granted under the *Courts of Justice Act R.S.O. 1990, c.C-43*, Rule 63.01 of the *Rules of Civil Procedure* provides that the delivery of a Notice of Appeal does not stay any provision of the Order, except a provision for the payment of money;
 - (f) The Order under appeal does not contain a provision for payment of money and is accordingly not stayed unless an order of the Court granting a stay is obtained;
 - (g) The appellant does not satisfy the test for obtaining a stay pending appeal, because the proposed appeal does not raise a serious question, and the balance of convenience does not favour granting a stay pending appeal;
 - (h) The Order under appeal was a discretionary order, and cannot be interfered with unless it has been exercised on an erroneous principle;
 - (i) Justice Brown granted the Order on proper principles, and the Order contains no palpable, obvious or overriding error;
 - (j) Justice Brown correctly concluded that the appellant did not have a right to

redeem at this late stage of the receivership sale process, and that allowing 212 additional time to raise financing would undermine the integrity of the receivership sale process, cause irreparable harm to the purchaser under the existing agreement approved by the court, and put a chill on the ability of receivers to secure the best price for the assets under their administration, to the overall detriment of all stakeholders;

- (k) The impugned portions of the Suleman Affidavit contain “fresh evidence” and 212 has not satisfied the requirements for introduction of fresh evidence;
- (l) Sections 193 and 195 of the *BIA* and sections 6(1)(b) and 134 of the *Courts of Justice Act*;
- (m) Rules 3 and 63 of the Rules of Civil Procedure; and
- (n) Such further and other grounds as counsel may advise and this Honorable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

- (a) The Order and Endorsement of Mr. Justice Brown dated February 14, 2014;
- (b) The Notice of Appeal dated February 24, 2014 delivered by 2122775 Ontario Inc.;
- (c) All of the material which was filed before Justice Brown in support of the motion on February 14, 2014, including :

- i. The Motion record of the Receiver dated February 7, 2014;
 - ii. The Supplemental Report of the Receiver dated February 5, 2014, which was sealed pursuant to the Order of Mr. Justice Brown dated February 14, 2014;
 - iii. The Second Supplemental Report of the Receiver dated February 13, 2014;
 - iv. The Affidavit of Susanna Han sworn February 14, 2014; and
- (d) Such further and other material as counsel may advise and this Honourable Court may permit.

March 4, 2014

DICKINSON WRIGHT LLP

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