Court of Appeal File No.
Court File No. CV-24-00716381-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N

1599285 ONTARIO LIMITED, RICK BERWICK, 2702749 ONTARIO INC., PETER ADAMO, CROCETTA ADAMO, ANJAY LIMITED, A-ONE AUTO INVESTMENTS INC., CINZIA SORRENTI, ELCRM HOLDINGS INC., SERGIO MOLELLA, DONALD IERFINO, PIERINA PIZZARDI, PIZZARDI INVESTMENTS, AMOND MANAGEMENT INC., SALISI INVESTMENTS LTD., LORENZO ANTONINI, CARMEN ANTONINI, TINA BETTI, ANTHONY BONDI, GIUSEPPA BONDI, C.P.M.C MARQUEZ HOLDINGS INC., FREDY ROSSI, 2438747 ONTARIO LIMITED, 2205633 ONTARIO LIMITED, 1620375 ONTARIO LIMITED, 1288601 ONTARIO LIMITED, AMSTEL MANUFACTURING (1993) INC., BRUCE MCKINLAY, M ANTONINI HOLDINGS INC., GABRIELE PIZZARDI, IMPERIO SA HOLDINGS INC., RONALD CHEMIJ, MARY CHEMIJ, TERRY CHEMIJ, LUBA CHEMIJ, and TAXMART INC.

Applicants
(Respondents in Appeal)

– and –

1000195736 ONTARIO LTD., 1000193772 ONTARIO LTD., and MORGIS CORPORATION

Respondents
(Appellants)

APPLICATION UNDER SUBSECTION 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

NOTICE OF MOTION
(LEAVE TO APPEAL)

THE APPELLANTS, 1000195736 Ontario Ltd., 1000193772 Ontario Ltd. and Morgis Corporation (the "**Appellants**") will make a motion for leave to appeal to the Court of

Appeal for Ontario from the Order of the Honourable Justice Cavanagh (the "**Application Judge**"), dated July 5, 2024 (the "**Receivership Order**"), made at Toronto, on a date to be set by the Registrar.

PROPOSED METHOD OF HEARING: The motion is to be heard

☒ In writing under subrule 16.03.1(1)

☐ In writing as an opposed motion under subrule 37.12.1 (4);

☐ In person;

☐ By telephone conference;

☐ By video conference.

at the following location

Osgoode Hall, 130 Queen Street West, Toronto, ON M5H 2N5

THE MOTION IS FOR:

1. An Order granting leave to Appeal to the Court of Appeal for Ontario the Receivership Order;

2. Costs of the Application and of the hearings below be awarded to the Appellants on a substantial indemnity basis;

3. An order if necessary extending the time to serve the Notice of Motion for leave to appeal; and

4. Such further and other relief as the Appellant may request and this Honourable Court may deem just.

GROUNDS FOR THE MOTION FOR LEAVE OF APPEAL:

5. The Application Judge heard two competing applications: (i) the Application below (the "**Receivership Application**") for the appointment of a receiver over the Appellants; and (ii) an Application by the Appellants for creditor protection under the *Companies' Creditors and Arrangement Act* ("**CCAA**") (the "**CCAA Application**") to allow it a short period of time conclude a refinancing transaction before September 30, 2024 that had already negotiated, and if the refinancing transaction did not close by that date, then to immediately launch a Sales and Investment Solicitation Process ("**SISP**") run by the court-appointed Monitor to concurrently look for a buyer (as would occur in a receivership) and simultaneously look for other refinancing alternatives. The sales process under the SISP would occur along the same timeframes as the sales process under the receivership proceedings proposed by the Applicants below.

6. Furthermore, the CCAA would preserve and maximize value in a way that a receivership proceeding could not because: (i) it would allow the Appellants to conclude other purchase transactions so as to complete the land assembly that would allow the construction of the multi-use residential and commercial complex on the corner of Avenue Road and Eglington Avenue, which has been in the works for years; (ii) it would allow the Appellants to deal with the refinancing of the project in a set timeframe and in conjunction with the sales process (if necessary) which is not possible in a receivership; and (iii) preserved a number of different and concurrent avenues to repay the Applicants under the supervision of a court-appointed officers (both refinancing and sale process if necessary).

7. The Application Judge granted the Receivership Application and dismissed the CCAA Application. As a result, the Appellants have commenced the within appeal and will be seeking leave to appeal the dismissal of the CCAA Application pursuant to the CCAA. The Appellants will be requesting that the two appeals be heard together.

8. The Application Judge erred in granting the Receivership Order in that he committed the following errors:

(a) Erred in principle and in law by applying the wrong legal test by deciding on a final basis whether or not he believed financing would close as opposed to considering whether there was a reasonable prospect that the CCAA would provide the Appellants with the opportunity to restructure.

(b) Erred in principle and in law by failing to consider relevant legal factors that much be considered by a judge hearing competing CCAA and receivership applications. While the Application Judge cited the "just and convenient" test regarding the appointment of the receiver, he failed to consider and apply that test in the context of the multi-factorial considerations that have emerged from the jurisprudence with respect to competing CCAA and receivership applications that guide the consideration and exercise of any discretion in the "just and convenient" test.

(c) Erred in principle and in law by making a final finding, or a finding that had the effect of a final finding, regarding the prospects of the legitimacy or likelihood of refinancing closing when the uncontested evidence was that

the refinancing was expected to be closed by September 30, 2024, or sooner, such that the request for protection under the CCAA was not open ended, but rather based on a concrete plan that showed that there was a germ of a plan, and the Applicant Judge erred discounting such uncontested evidence.

(d) Erred made making the palpable and over-riding error of fact by making a finding that there was no evidence from the prospective refinancing lender that the refinancing was still available, when in fact there was recent written confirmation from the prospective refinancing lender confirming that all due diligence had been completed and that the refinancing was proceeding.

(e) Erred in principle and in law in exercising discretion by relying upon an irrelevant factor, being the amount of the deposit that was paid to refinancing lender, when there was uncontradicted evidence that the refinancing lender did not have an issue with the amounts that had been paid to date or the changes in the dates the payments had been made.

(f) Erred in law by misinterpreting and misapplying the legal test of "loss faith in management" as a criterion in granting the Receivership Order. That criterion addresses concerns regarding the debtor’s conduct in the management of the business. There was no evidence or allegation at the beginning of the proceedings about any loss of faith in management. The

Applicants then attempted to backfill their position through plainly bald allegations about loss of faith in management devoid of any evidentiary grounding. After that, the Respondents made a belated allegation based on the irrelevant consideration regarding the amount of a deposit which had been paid to the refinancing lender, when there was uncontroverted evidence that the refinancing lender themselves had no issue with the amounts which had been paid to them.

(g) Failed to appreciate evidence and give any consideration to the relevant reasons regarding why obtaining refinancing took as long as it did and how the refinancing from a non-Canadian funder did not take long once that occurred.

(h) Failed to consider the relevant factor of to the uniqueness of the property at the issue and loss of value caused by the appointment of a receiver under the Receivership Order as opposed to the CCAA process.

(i) Failed to consider the relevant factor of to the fact that the CCAA process would not prejudice the secured creditor, as it contemplated the commencement of the sales process at the same time.

(j) Misapprehended the timing of when steps would begin to be taken to prepare for the sales process, finding that such a process would only commence on a motion on October 2, 2024, when in fact the Appellants clearly stated that during the hearing that the proposal under the CCAA

was that the Monitor would begin taking steps immediately to prepare for a sale if the prospective refinancing does not close by September 30, 2024, which was the same time frame that the Applicants stated it would take a receiver to be ready to launch a sales process.

(k) Failed to consider that the proposed terms of the CCAA Order was that the costs of the CCAA would be subordinate to the Applicants' debt; and

(l) Failed to give weight to the fact that related companies and entities of the Appellants (collectively, the Morgis Group) is itself a significant creditor and that position is undermined by receivership vs CCAA sale because of loss of value over the entire assembly.

(m) Failed to consider the relevant factor of the impact of the receivership as opposed to a CCAA on the greater community of stakeholders, including a women's shelter that is to be provided with a number of homes in the complex.

9. Leave should be granted as there are arguable grounds of appeal and the issues raised are significant to the bankruptcy practice and ought to be considered and addressed.

10. The proposed appeal raises an issue that is of general importance to the practice of bankruptcy and insolvency matters and the administration of justice as a whole. The Court of Appeal has not had an opportunity to consider the factors and tests that Courts

must keep in mind when considering competing CCAA and Receivership applications. These issues impact a large number of cases. In addition, the appointment of the Receiver interferes and impacts that the right of a debtor or mortgagor to redeem the property, and therefore when a receivership order is made in respective of real property it impacts the future rights of the debtor mortgagor and raises issues of such importance that leave to appeal should be granted. Guidance from this Honourable Court on these issues is needed. It is therefore desirable that leave to appeal be granted.

11. The granting of leave will not unduly delay the progress of the proceedings or cause any prejudice. The property at issue is fully secured, and the Applicants are over secured with the property having a loan to equity ratio of approximately 55%.

THE BASIS OF THE APPELLATE COURTS

12. Section 183(2) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), as amended, states that an appeal lies to the Court of Appeal for an Order pursuant to the BIA. The Receivership Order was granted pursuant to the BIA.

13. Section 193(e) of the BIA.

14. Section 6(1)(b) of the *Courts of Justice Act*, RSO 1990, c C.45, as amended, states that an appeal lies to the Court of Appeal from a final order of a judge of the Superior Court of Justice, except an order referred to in section 19(1)(a) or in another Act from which an appeal lies to the Divisional Court.

15. Attached as Schedule “A” is the Notice of Appeal served July 15, 2024 commencing the appeal.

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

(a) All evidence tendered on the Application to appoint a receiver;

(b) Factum of the Applicants, dated April 19, 2024;

(c) Factum of the Respondents, 1000195736 Ontario Ltd., 1000193772 Ontario Ltd., and Morgis Corporation, dated May 24, 2024;

(d) Pre-filing report of the Proposed Monitor PricewaterhouseCoopers Inc., filed June 24, 2024;

(e) Such further and other evidence as counsel may advise and the court may permit.

Schedule “A”

Court of Appeal File No.

Court File No. CV-24-00716381-00CL

COURT OF APPEAL FOR ONTARIO

B E T W E E N

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NOTICE OF APPEAL

THE APPELLANTS, 1000195736 Ontario Ltd., 1000193772 Ontario Ltd. and Morgis Corporation (the "**Appellants**") appeal to the Court of Appeal for Ontario from the Order

of the Honourable Justice Cavanagh (the "**Application Judge**"), dated July 5, 2024 (the "**Receivership Order**"), made at Toronto.

THE APPELLANTS ASK THAT:

(a) The Receivership Order be set aside;

(b) Costs of the Appeal and of the hearings below be awarded to the Appellants on a substantial indemnity basis; and

(c) Such further and other relief as the Appellant may request and this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

16. The Application Judge heard two competing applications: (i) the Application below (the "**Receivership Application**") for the appointment of a receiver over the Appellants; and (ii) an Application by the Appellants for creditor protection under the *Companies' Creditors and Arrangement Act* ("**CCAA**") (the "**CCAA Application**") to allow it a short period of time conclude a refinancing transaction before September 30, 2024 that had already negotiated, and if the refinancing transaction did not close by that date, then to immediately launch a Sales and Investment Solicitation Process ("**SISP**") run by the court-appointed Monitor to concurrently look for a buyer (as would occur in a receivership) and simultaneously look for other refinancing alternatives. The sales process under the SISP would occur along the same timeframes as the sales process under the receivership proceedings proposed by the Applicants below.

17. Furthermore, the CCAA would preserve and maximize value in a way that a receivership proceeding could not because: (i) it would allow the Appellants to conclude other purchase transactions so as to complete the land assembly that would allow the construction of the multi-use residential and commercial complex on the corner of Avenue Road and Eglington Avenue, which has been in the works for years; (ii) it would allow the Appellants to deal with the refinancing of the project in a set timeframe and in conjunction with the sales process (if necessary) which is not possible in a receivership; and (iii) preserved a number of different and concurrent avenues to repay the Applicants under the supervision of a court-appointed officers (both refinancing and sale process if necessary).

18. The Application Judge granted the Receivership Application and dismissed the CCAA Application. As a result, the Appellants have commenced the within appeal and will be seeking leave to appeal the dismissal of the CCAA Application pursuant to the CCAA. The Appellants will be requesting that the two appeals be heard together.

19. The Application Judge erred in granting the Receivership Order in that he committed the following errors:

(a) Erred in principle and in law by applying the wrong legal test by deciding on a final basis whether or not he believed financing would close as opposed to considering whether there was a reasonable prospect that the CCAA would provide the Appellants with the opportunity to restructure.

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THE BASIS OF THE APPELLATE COURTS

20. Section 183(2) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), as amended, states that an appeal lies to the Court of Appeal for an Order pursuant to the BIA. The Receivership Order was granted pursuant to the BIA.

21. Section 6(1)(b) of the *Courts of Justice Act*, RSO 1990, c C.45, as amended, states that an appeal lies to the Court of Appeal from a final order of a judge of the Superior Court of Justice, except an order referred to in section 19(1)(a) or in another Act from which an appeal lies to the Divisional Court. The exceptions do not apply to this appeal. The Decision is a final order of the Superior Court of Justice.

22. Leave to appeal is not required.

July 15, 2024

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Cour of Appeal File No.:
Court File No.: CV-24-00716381-00CL

1599285 ONTARIO LIMITED, ET AL.	-and-	1000195736 ONTARIO LTD., ET AL
Applicant (Respondents on Appeal)		Respondent (Appellants)

ONTARIO COURT OF APPEAL

Proceeding commenced at TORONTO

NOTICE OF MOTION
(LEAVE TO APPEAL)

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