Court of Appeal File No.
Court File No. CV-24-00722697-00CL

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N

**IN THE MATTER OF APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, C-36, AS AMENDED (the "CCAA")**

**IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1000195736 ONTARIO LTD., 1000193772 ONTARIO LTD., AND MORGIS CORPORATION**

**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 decision of the Honourable Justice Cavanagh (the "**Application Judge**"), with respect to the denial of the application made by the Appellants under the *Companies' Creditors Arrangement Act* on August 20, 2024, at a time to be assigned, or as soon after that time as the motion can be heard.

**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 the Appellants leave to appeal the Application Judge's denial of the CCAA Application;

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:**

**Background**

5. The Application Judge heard two competing applications: (i) the Application below 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; and (ii) an Application for the appointment of a receiver (the "**Receivership Application**") over the Appellants. The

sales process under the SISP to be carried out within the CCAA proceedings would occur along the same timeframes as the sales process under the receivership proceedings proposed by the Appellants.

6. The Application Judge made an Order (the "**Receivership Order**") granting the relief sought in the Receivership Application and denied the CCAA Application. The Appellant filed a Notice of Appeal of the Receivership Order on June 15, 2024. The Appellant was advised by the Respondents in the Appeal that they believed that leave to appeal was required. Without prejudice to the Appellants' position that leave to appeal was not required, on June 16, 2024, the Appellants filed a Notice of Motion for leave to appeal of the Receivership Order. That motion is still pending before this Court.

7. The Appellants are requesting that leave be granted with respect to the two appeals, and that the appeals with respect to the denial of the CCAA Application and the granting of the Receivership Application be heard together.

8. The Application Judge erred in denying the CCAA Application, as the CCAA process 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 Appellants under the supervision

of a court-appointed officers (both refinancing and sale process if necessary). Furthermore, the CCAA proceedings would not prejudice the creditor seeking the appointment of the receiver because the terms of the proposed CCAA orders were such that the costs of the CCAA process would be made subordinate to the creditor seeking the appointment of the receiver and there was no evidence that the creditor would become under-secured during the CCAA proceedings.

9. As the issue of whether the Receivership Application or CCAA Application represents the better path forward are inextricably linked, the Application Judge's errors in denying the CCAA Application and granting the Receivership Application are that he:

(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 in the court below 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 the SISP under the proposed CCAA proceeding would only start to be prepared upon a motion to be

heard on or about October 2, 2024, such that the sales process would not actually be commenced until after that time, when in fact the Appellants' proposal under the CCAA was that the Monitor would begin taking steps immediately to prepare for the SISP. If the prospective refinancing does not close by August 30, 2024, such that the SISP could start immediately upon an order approving the SISP in the week following September 30, 2024, which was the same time frame that the Applicants in the court below 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 consider the relevant factor that related companies and entities of the Appellants (collectively, the Morgis Group) are themselves a significant creditor and that their position is undermined by receivership as opposed to CCAA process because of loss of value over the entire assembly, and thereby failed to consider the relevant factor of the impact of the Receivership Order on the greater body of creditors.

(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.

10. 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.

11. 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, and thus has importance beyond this case. 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.

12. In addition, the appeal is of critical significance to the proceeding. By denying the CCAA Application and granting the Receivership Order, the judge below effectively terminated the Appellants' restructuring efforts and may have impacted their ability to exercise the future rights of redemption.

13. 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 receivership applicant Trilend Lenders are secured with the property having a loan to equity ratio of approximately 55%. Furthermore, the Appellants are not seeking to extend the

timeframes for the milestones in the proposed CCAA proceedings (to the extent possible) and if the stay pending appeal is granted (which is being sought by separate motion) the Appellants will be continuing their refinancing and restructuring plan as set out in the CCAA Application pending the hearing of the requested appeal. Moreover, the Appellants are amenable to having the appeal expedited in accordance with this Honourable Court's practice in such matters.

**THE BASIS OF THE APPELLATE COURTS**

14. Section 13 and 14 of the CCAA.

**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) All materials tendered by the Appellants with respect to the appeal of the Receivership Order and the Appellants motion for a stay pending appeal; and

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

July 26, 2024

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**IN THE MATTER OF *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, C-36, AS AMENDED**

Cour of Appeal File No.:
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**ONTARIO COURT OF APPEAL**

Proceeding commenced at TORONTO

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