

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF Section 101 of the
Courts of Justice Act and Section 243 of the *Bankruptcy and Insolvency Act*

BETWEEN:

**EQUITYLINE MORTGAGE INVESTMENT CORPORATION, EQUITYLINE
SERVICES CORP., COMPUTERSHARE TRUST COMPANY OF CANADA and
ELLE MORTGAGE CORPORATION**

Applicants

-and-

2545174 ONTARIO INC.

Respondent

FACTUM OF THE APPLICANTS
(Application to Appoint a Receiver)

December 10, 2021

ROBINS APPLEBY LLP
Barristers & Solicitors
2600 - 120 Adelaide Street West
Toronto ON M5H 1T1

Dominique Michaud LSO #56871V
Email: dmichaud@robapp.com
Tel: (416) 360-3795

Joseph Jamil LSO #74614L
Email: jjamil@robapp.com
Tel: (416) 360-3783
Fax: (416) 868-0306

Lawyers for the Applicants

TO: DAVID SEED
Barrister & Solicitor
3040-3300 Bloor Street West
Center Tower
Toronto, ON M8X 2X3

LSO No.: 34871I
Email: dseedlaw@rogers.com
Tel: (416) 622-2440

Lawyer for the Respondent

AND SCHNEIDER RUGGIERO SPENCER MILBURN LLP
TO: 1000-120 Adelaide Street
Toronto, ON M5H 3V1

Davide Di Iulio LSO No.: 62160S
Tel: (416) 362-8282
Email: ddiulio@srlawpractice.com

Lawyers for iCapital Financial Services Corp.

AND ALI RANA
TO: Email: cis@mail.com

AND ONTARIO MINISTRY OF LABOUR, TRAINING, AND SKILLS
TO: DEVELOPMENT, DIRECTOR OF EMPLOYMENT STANDARDS AS
REPRESENTED BY MOF
CO/ MINISTER OF FINANCE
Crown Law Office – Civil
McMurtry-Scott Building
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Email: Steven.Groeneveld@ontario.ca
Insolvency.Unit@ontario.ca
Leslie.Crawford@ontario.ca

AND THE TDL GROUP CORP.
TO: 300-130 King Street West
Toronto, ON M5X 1E1

Douglas Chen
Email: dchen@rbi.com
Tel: (905) 339-6211

AND 1299400 ONTARIO LTD.
TO: 412-23 Westmore Drive
Etobicoke, ON M9V 3Y7

AND 2399574 ONTARIO INC.
TO: 202-200 Matheson Blvd.
Mississauga, ON L5R 3L7

-and-

228-2980 Drew Road
Mississauga, ON L4T 0A7

AND MERCHANT OPPORTUNITIES FUND LIMITED PARTNERSHIP
TO: 2000-1500 West Georgia Street
Vancouver, BC V6G 2Z6

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B E T W E E N:

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PART I - INTRODUCTION

1. The Applicants bring this Application to appoint BDO Canada Limited ("**BDO**" or the "**Receiver**") as receiver of the Respondent, 2545174 Ontario Inc. ("**254co**" or the "**Borrower**") pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**")¹ and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**").²

¹ *Bankruptcy and Insolvency Act*, [R.S.C. 1985, c. B-3](#), s. 243(1) [**BIA**].

² *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#), s. 101 [**CJA**].

2. The Applicants, Equityline Mortgage Investment Corporation (“**Equityline Investment**”) and Equityline Services Corp. (“**Equityline Services**”) (collectively, the “**Lender**”) made a secured loan to 254co in the principal amount of \$1,200,000 (the “**Loan**”), which was secured by, *inter alia*, a second ranking Charge on title against the property known municipally as 478-494 Kingston Road, Pickering, Ontario bearing PIN 26304-0055 and PIN 23604-0209 (collectively the “**Property**”). The Pickering Mortgage (defined herein) was registered on title against the Property in favour of Computershare Trust Company of Canada (“**Computershare**”).

3. As described below, 254co has previously been subject to a receivership. 254co has neither repaid the Loan upon its maturity date of October 1, 2020, nor has it come up with any credible plan that would seek repayment of the Loan.

4. Pursuant to the Applicants’ security described below, the Applicants are entitled to, *inter alia*, appoint a Receiver in the event that 254co is in default of the Loan.

5. Accordingly, the Lender commenced this proceeding and seeks an Order:

- (a) abridging the time for service of the Notice of Application and the Application Record herein and dispensing with further service thereof;
- (b) appointing BDO as the Receiver and manager in respect of all assets, undertakings and properties of the Borrower pursuant to section 243(1) of the *BIA* and section 101 of the *CJA* substantially in the form included in the Application Record; and
- (c) such further and other relief as to this Honourable Court may deem just.

PART II – THE FACTS

The Parties

6. The Applicant, Equityline Investment is an Ontario corporation with its registered office located at 550 Highway 7 Avenue East, 338, Richmond Hill, Ontario. Equityline Investment carries on business as a mortgage lender.³

7. The Applicant, Equityline Services is an Ontario corporation with its registered office located at 550 Highway 7 Avenue East, 338, Richmond Hill, Ontario. Equityline Services is the manager of Equityline Investment pursuant to the terms of a management Agreement between Equityline Services and Equityline Investment.⁴

8. The Applicant, Computershare, is a Canadian corporation with an office located in Toronto, Ontario. Computershare holds an interest in the Pickering Mortgage and the Markham Mortgage (defined herein) as the custodian for Equityline Services.⁵

9. The Applicant, Elle Mortgage Corporation (“**Elle**”), is an Ontario corporation with its registered office address located at 1240 Bay Street, 202, Toronto, Ontario.⁶

10. The Respondent, 254co is an Ontario company with its registered office located at 68 Finchley Circle, Markham, Ontario.⁷

³ Affidavit of Sergiy Shchavyelyev sworn December 7, 2021 (“**Shchavyelyev Affidavit**”) at para 4, Application Record (“**AR**”).

⁴ Shchavyelyev Affidavit at para 5.

⁵ Shchavyelyev Affidavit at para 6.

⁶ Shchavyelyev Affidavit at para 7.

⁷ Shchavyelyev Affidavit at para 8.

11. Naveed Ahmed Qureshi (“**Naveed**” or the “**Guarantor**”) is an individual residing in Ontario. Naveed is the sole director and officer of 254co. As set out below, Naveed personally guaranteed the debts of 254co to Equityline Investment and Equityline Services.⁸

The Property and the Business of 254co

12. 254co is the owner of the property municipally known as 478-494 Kingston Road, Pickering, Ontario bearing PIN 26304-0055 and PIN 23604-0209 (collectively the “**Property**”). The Property consists of a gas station with a Tim Horton’s kiosk and a 3 Storey office building (the “**Office Building**”). The Office Building is fully constructed but has no tenants.⁹

Background: 254co’s Previous Receivership Proceedings and the Loan

13. In or around June 2017, 254co entered into a mortgage loan commitment with Centurion Mortgage Capital Corporation (“**Centurion**”) in respect of the Property. As part of this loan, Centurion registered a first Charge against the Property, which secured the principal sum of \$8,000,000. The loan matured in or around February 2019 and 254co failed to repay the indebtedness owing to Centurion on the maturity date. Accordingly, Centurion enforced its mortgage and appointed BDO as Receiver of the Borrower pursuant to the terms of the Order of Justice Hailey dated June 24, 2019 (the “**Receivership Order**”).¹⁰

⁸ Shchavyelyev Affidavit at para 9.

⁹ Shchavyelyev Affidavit at para 10.

¹⁰ Shchavyelyev Affidavit at para 11; Exhibit 7 (Receivership Order), AR.

14. While in receivership, 254co arranged for a refinancing plan (the “**Refinancing Plan**”) which sought to, *inter alia*, pay down 254co’s indebtedness owing to Centurion, discharge the receiver, and subsequently obtain refinancing to repay both Centurion’s loan and the Lender’s Loan. As part of the Refinancing Plan and described more fully below, the Lender advanced \$1,200,000 to the Borrower as a short term bridge loan, which was secured by a second mortgage registered on the Property.¹¹

15. In light of the Refinancing Plan, 254co and Centurion entered into a forbearance agreement dated May 2, 2020 (the “**Forbearance Agreement**”) to provide 254co the necessary time to execute the Refinancing Plan. The Forbearance Agreement would only become effective if Naveed obtained an Order discharging BDO as Receiver.¹² Further, the Forbearance Agreement provided that, *inter alia*, upon default of the Forbearance Agreement by 254co and Naveed, 254co and Naveed consent to the appointment of a court appointed Receiver in substantially the same form of the Receivership Order.¹³

16. In or around June, 2020, Naveed brought a motion, on consent of BDO, to, *inter alia*, discharge BDO as Receiver. Pursuant to the Order of Justice Koehnen dated June 25, 2020 (the “**Discharge Order**”), BDO was discharged as Receiver.¹⁴ The Discharge Order also approved the Refinancing Plan, and authorized and directed the Receiver to carry out certain final outstanding matters as set out in the First and Final Report of the Receiver dated June 18, 2020.¹⁵

¹¹ Shchavyelyev Affidavit at para 12.

¹² Shchavyelyev Affidavit at para 13; Exhibit 8 (Forbearance Agreement), AR.

¹³ Exhibit 8 (Forbearance Agreement), AR, pp. 103-104, s. 5.1(j).

¹⁴ Shchavyelyev Affidavit at para 14.

¹⁵ Shchavyelyev Affidavit at para 15.

17. Notwithstanding the Refinancing Plan and the Discharge Order, 254co committed a further breach of its loan and security obligations owing to Centurion. In particular, 254co failed to refinance by December 1, 2020 in accordance with the Forbearance Agreement.¹⁶

18. Upon 254co breaching the terms of the Forbearance Agreement, Centurion intended to take enforcement steps against 254co in accordance with the Forbearance Agreement and its applicable security. However, the Lender and Centurion entered into an agreement whereby the Lender would, in addition to the \$1.2 million Loan advance to 254co, pay Centurion an additional \$500,000 to pay down 254co's indebtedness. On this basis, Centurion agreed to hold off on enforcing its security until at least March 1, 2021. The purpose of this further indulgence was to provide 254co with more time to refinance in accordance with the Forbearance Agreement. Despite this further indulgence, 254co breached the terms of the Forbearance Agreement by, *inter alia*, not refinancing.¹⁷

19. On September 2, 2021, Centurion had advised the Lender that it intended on proceeding to appoint a receiver over 254co. According to the demand letter, Centurion made formal written demand on 254co, as Borrower, and Naveed, in his personal capacity under the Guarantee, for repayment of the indebtedness in the amount of \$6,804,356.60, plus costs and unbilled protective disbursements.¹⁸ As a result, Centurion commenced receivership proceedings to appoint BDO as receiver of 254co and served the Applicants with Centurion's Application Record.¹⁹

¹⁶ Shchavyelyev Affidavit at para 16

¹⁷ Shchavyelyev Affidavit at para 17.

¹⁸ Shchavyelyev Affidavit at para 18.

¹⁹ Shchavyelyev Affidavit at para at para 19; Court file number CV-21-00669835-00CL pertains to Centurion's application to appoint BDO as Receiver over the Borrower.

20. As described below, in order to protect its interest, the Lender fully repaid 254co's indebtedness due and owing to Centurion. As a result, Centurion was fully repaid and did not proceed with its second receivership proceeding.²⁰

Security in Favour of the Lender

21. Pursuant to the terms of a mortgage commitment agreement dated April 26, 2020 (the "**Commitment**"), the Lender made the secured Loan to 254co.²¹

22. In support of the Loan, the Lender obtained, *inter alia*, the following security:

- (a) a second ranking Charge registered on title against the Property as Instrument No. DR1905389 (the "**Pickering Mortgage**") in favour of Computershare;
- (b) a Notice of Assignment of Rents-General (the "**NOAR**") registered on title against the Property as Instrument No. DR1905390 in favour of Computershare; and
- (c) collateral Charge registered on title against the property municipally known as 68 Finchley Circle, Markham, Ontario, L3R 8S1 (the "**Markham Property**"), being PIN No. 02956-0071 (LT) as Instrument No. YR3112943 (the "**Markham Mortgage**") in favour of Computershare.²²

23. Upon advancing the Loan proceeds, on or about June 26, 2020, the Pickering Mortgage, the NOAR, and the Markham Mortgage were registered in favour of the Lender and Computershare.²³

²⁰ Shchavyelyev Affidavit at para 20.

²¹ Shchavyelyev Affidavit at para 21.

²² Shchavyelyev Affidavit at para 22; Exhibit 14 (Pickering Mortgage), Exhibit 15 (NOAR), Exhibit 16 (Markham Mortgage), AR.

²³ Shchavyelyev Affidavit at para at para 23.

24. Naveed and his spouse, Naushaba Qureshi, are the registered owners of the Markham Property. The Markham Mortgage is further and collateral security for the obligations of 254co, as mortgagor, and Naveed, as Guarantor, under the terms of the Pickering Mortgage.²⁴

25. The Pickering Mortgage secured the principal sum of \$1,200,000 together with interest at a rate of 11.99% per annum, calculated and payable monthly.²⁵

26. The Pickering Mortgage provides for the following events of default, *inter alia*:

- (a) the Borrower is in default of any mortgages on the Property;
- (b) non-performance of any term or condition of the Pickering Mortgage; and
- (c) the Borrower fails to pay all taxes, including Property tax arrears.²⁶

27. Section 10 of the Pickering Mortgage provides that on default, the Lender is entitled to demand payment of the full amount owing on the Loan due immediately.²⁷

28. Section 32 of Schedule A to the Pickering Mortgage permits the Lender to appoint a receiver, in the event that the Borrower is in default of the Loan.²⁸

254co's Default of the Loan

29. 254co has breached the terms of the Loan and applicable security by, *inter alia*:

- (a) defaulting on the Centurion loan;

²⁴ Shchavyelyev Affidavit at para 24.

²⁵ Shchavyelyev Affidavit at para 25.

²⁶ Shchavyelyev Affidavit at para 26.

²⁷ Shchavyelyev Affidavit at para 27; Exhibit 13, AR, p. 159, s. 10.

²⁸ Shchavyelyev Affidavit at para 28; Exhibit 13, AR, p. 161, s. 32.

- (b) failing to fully repay the indebtedness owing to the Lender on its maturity date of October 1, 2020;
- (c) failing to make its monthly interest payments as they become due; and
- (d) allowing significant property taxes to accrue on the Property.²⁹

30. Throughout the history of the Loan, the Borrower frequently missed payments, which is an event of default under the Loan.³⁰

31. The Loan matured on October 1, 2020. As a result of the Borrower's failure to repay the Loan, the Lender commenced an enforcement proceeding bearing court file CV-21-00000438-0000 (the "**Collateral Enforcement Proceeding**") in respect of the collateral Markham Mortgage. This proceeding is ongoing.³¹

32. Further, when Centurion initiated its second receivership, in order to protect its interest as second mortgagee, the Lender fully repaid 254co's indebtedness due and owing to Centurion in the amount of \$6,404,493.19 (the "**Centurion Indebtedness**").³²

33. The Lender added the Centurion Indebtedness to the indebtedness due and owing by 254co to the Lender under the Pickering Mortgage and Markham Mortgage. This protective disbursement was done in accordance with the terms of the Pickering Mortgage.³³

²⁹ Shchavyelyev Affidavit at para 29.

³⁰ Shchavyelyev Affidavit at para 30.

³¹ Shchavyelyev Affidavit at para 31.

³² Shchavyelyev Affidavit at para 32.

³³ Shchavyelyev Affidavit at para 33.

34. Subsequent to the Lender's payment of the Centurion Indebtedness, Computershare transferred part of its interest in the Pickering Mortgage and Markham Mortgage to Elle Mortgage securing the total amount of \$8,600,000. Specifically, Computershare transferred 74.42% interest in the Pickering Mortgage to Elle Mortgage, in the amount of \$6,400,000. As a result, Computershare maintains 25.58% interest in the Pickering Mortgage. Further, Elle Mortgage's interest has priority over Computershare's interest. The interest apportionment of the Pickering Mortgage is identical to the interest apportionment of the Markham Mortgage.³⁴

35. In light of the various breaches, on November 22, 2021, the Applicants made formal written demand on 254co, as Borrower, and Naveed, in his personal capacity under the Guarantee, for repayment of the Loan, plus interest, legal costs and other protective disbursements incurred in respect of the Loan in the amount of \$8,944,381.79 (the "**Indebtedness**"). As set out above, the Centurion Indebtedness was included in the total sum of the Indebtedness. The Applicants also gave notice of their intention to enforce their security pursuant to section 244 of the *BIA* (the demand letter and the *BIA* notice are collectively, the "**Demand**").³⁵

36. 254co and Naveed failed to repay the Indebtedness owing to the Applicants in accordance with the Demand. Accordingly, the Applicants are entitled to, *inter alia*, appoint a Receiver.³⁶

37. As at December 6, 2021, the Lender was owed \$9,023,484.06 plus protective disbursements.³⁷

³⁴ Shchavyelyev Affidavit at para 34.

³⁵ Shchavyelyev Affidavit at para 35.

³⁶ Shchavyelyev Affidavit at para 36.

³⁷ Shchavyelyev Affidavit at para 37.

PART III – THE ISSUES AND THE LAW

A. Issues

38. The issue on this Application is whether it is just and convenient for this Court to appoint a receiver over the Borrower pursuant to section 101 of the *CJA* and section 243(1) of the *BIA*?

B. The Law

i. The Test to Appoint a Receiver

39. The test to appoint a receiver under section 101 of the *CJA* and section 243(1) of the *BIA* is whether it would be just or convenient to do so.

40. Section 101 of the *CJA* states:

In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

41. Section 243(1) of the *BIA* states:

on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

take any other action that the court considers advisable.

42. In assessing whether it is just and convenient to appoint a receiver, the question is whether it is more in the interests of all concerned to have the receiver appointed or not.³⁸ When there is a contractual power of appointment, the Court assesses "the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the [receiver]".³⁹

43. When deciding to appoint a receiver, the Court must have regard to all of the circumstances but in particular, the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right to appoint a receiver is an important factor to be considered as is the question of whether or not an appointment by the Court is necessary to enable the receiver to carry out its work and duties more efficiently.⁴⁰

44. The factors to be considered by the Court when determining whether to appoint a receiver include, *inter alia*:

- (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;⁴¹
- (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- (c) the nature of the property;
- (d) the rights of the parties thereto and the balance of convenience to the parties;

³⁸ *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, [2013 ONSC 1911](#) [*Pine Tree Resorts*] at para. 22, leave app ref'd [2013 ONCA 282](#).

³⁹ *Royal Bank of Canada v. CFNDRS Inc.*, [2017 ONSC 7661](#) [*CFNDRS*] at para. 9, citing *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), [40 C.B.R. \(3d\) 274](#) (Ont. Gen. Div.) [*Freure Village*] at para. 12.

⁴⁰ *CFNDRS* at para. 8, citing *Freure Village* at para. 11; *Bank of Montreal v. Carnival National Leasing Ltd.*, [2011 ONSC 1007](#) [*Carnival*] at para. 24.

⁴¹ *CFNDRS* at para. 8.

- (e) the preservation and protection of the property pending judicial resolution;
- (f) the fact that the creditor has the right to appoint a receiver under its security;
- (g) the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;
- (h) that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly, however this proposition does not apply or is less essential to a secured creditor with a right to enforce its security;⁴²
- (i) whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
- (j) the effect of the order on the parties;
- (k) the conduct of the parties;
- (l) the length of time that a receiver may be in place;
- (m) costs to the parties;
- (n) the likelihood of maximizing return to the parties;
- (o) facilitating the duties of the receiver; and
- (p) the secured creditor's good faith, commercial reasonableness of the proposed appointment, and any questions of equity.⁴³

ii. **It is Just and Convenient to Appoint a Receiver Over the Borrower**

45. The appointment of the Receiver is just and convenient in the circumstances because:⁴⁴

- (a) the terms of the Pickering Mortgage provides for the appointment of a receiver as a result of the Borrower's defaults on the Loan;

⁴² *Carnival* at para. 25; *Freure Village* at para. 13.

⁴³ Frank Bennett, *Bennett on Receiverships*, 3d ed. (Toronto: Thomson Reuters, 2011), at pp. 155-159; Applicant's Brief of Authorities ("BOA"), Tab 1; *Pine Tree Resorts* at para. 22.

⁴⁴ Shchavyelyev Affidavit at para. 44.

- (b) at this stage there is no credible means by which the Applicants will be repaid absent the sale of the Property;
- (c) the business of 254co, specifically the operation of the gas station and landlord, requires active management;
- (d) 254co and Naveed previously consented to the re-appointment of the Receiver under the terms of the Forbearance Agreement with Centurion;
- (e) a Court supervised receivership will ensure that the interests of all creditors and other stakeholders are considered with a view towards maximizing the realization on the Property; and
- (f) the appointment of a Receiver will avoid any potential disputes regarding expenses incurred and proceeds obtained in the sale of the subject Property.

46. For the foregoing reasons, it is just and convenient to appoint the Receiver over 254co.

PART IV - ORDER REQUESTED

47. The Applicants respectfully request an Order:

- (a) abridging the time for service of the Notice of Application and the Application Record herein and dispensing with further service thereof; and
- (b) appointing BDO as the receiver and manager in respect of all assets, undertakings and properties of the Borrower.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


Date: December 10, 2021



Dominique Michaud

Lawyers for the Applicants

Date: December 10, 2021



Joseph Jamil

Lawyers for the Applicants

SCHEDULE 'A'
LIST OF AUTHORITIES

1. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, [2013 ONSC 1911](#), leave app ref'd [2013 ONCA 282](#)
2. *Royal Bank of Canada v. CFNDRS Inc.*, [2017 ONSC 7661](#)
3. *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), [40 C.B.R. \(3d\) 274](#) (Ont. Gen. Div.)
4. *Bank of Montreal v. Carnival National Leasing Ltd.*, [2011 ONSC 1007](#)
5. Frank Bennett, *Bennett on Receivership*, 3d ed. (Toronto: Thomson Reuters, 2011)

SCHEDULE 'B'
STATUTES, REGULATIONS & BY – LAWS

1. *Bankruptcy and Insolvency Act, [R.S.C., 1985, c. B-3](#)*
2. *Courts of Justice Act, [R.S.O. 1990, c. C.43](#)*

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CORPORATION et al.**

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PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE APPLICANTS
(Application to Appoint a Receiver)**

ROBINS APPLEBY LLP

Barristers+ Solicitors
2600 - 120 Adelaide Street West
Toronto ON M5H 1T1

Dominique Michaud LSO #56871V

Email: dmichaud@robapp.com
Tel: (416) 360-3795

Joseph Jamil LSO #74614L

Email: jjamil@robapp.com
Tel: (416) 360-3783

Lawyers for the Applicants