

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

- and -

FAIRVIEW NURSING HOME LIMITED

Respondent

**APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED***

**NOTICE OF MOTION
(Returnable September 25, 2014)**

BDO CANADA LIMITED, in its capacity as the Court-appointed Receiver (in such capacity, the “**Receiver**”), without security, for the purposes of marketing and selling the assets, undertakings, and properties of Fairview Nursing Home Limited (“**Fairview**” or the “**Debtor**”), will make a motion to the Ontario Superior Court of Justice (Commercial List) on Thursday, September 25, 2014 at 10:00 a.m., or as soon thereafter as the motion can be heard, at the Courthouse located at 330 University Avenue, Toronto, Ontario, Canada.

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

1. **THE MOTION IS FOR** Orders substantially in the forms of the draft Approval and Vesting Order attached hereto as **Schedule “A”** (the “**Sale Approval Order**”) and the Order approving certain ancillary relief attached hereto as **Schedule “B”** (the “**Ancillary Order**”), *inter alia*,

- (a) Abridging the time for service of the Notice of Motion and Motion Record, if necessary, and declaring that this motion is properly returnable on Thursday, September 25, 2014, and dispensing with further service thereof;
- (b) Approving the sale transaction between the Receiver, the Debtor, and Schlegel Villages Inc. (“**SVI**” or the “**Purchaser**”) contemplated by an Agreement of Purchase and Sale made as of July 22, 2014, and as subsequently amended by Letter Agreement dated August 29, 2014 (the “**Sale Agreement**”);
- (c) Vesting in the Purchaser, or its designate, the Debtor’s right, title, and interest in and to the assets described in the Sale Agreement (the “**Purchased Assets**”) free and clear of all liens and encumbrances other than certain permitted encumbrances;
- (d) Approving the First Report to Court of the Receiver dated September 15, 2014 (the “**Report**”), and the conduct, actions, and activities of the Receiver described therein, and the Confidential Supplement to the Report dated September 15, 2014 (the “**Confidential Supplement**”), and the conduct, actions, and activities of the Receiver described therein;
- (e) Sealing the Confidential Supplement and the Appendices thereto;
- (f) Approving the professional fees and disbursements of the Receiver and those of its legal counsel as detailed in the Report and the accompanying Affidavits; and
- (g) such further and other relief as counsel may advise and this Court deems just and/or equitable;

2. **THE GROUNDS FOR THE MOTION ARE:**

Issuance of Receivership Order

- (a) Following an application made by the Toronto-Dominion Bank and pursuant to an Order dated December 20, 2013 (the “**Receivership Order**”) granted by the Honourable Mr. Justice D. Brown of the Ontario Superior Court of Justice

(Commercial List), BDO Canada Limited was appointed as Receiver, without security, to market and sell the Property (as such term is later defined) as more specifically set out in the Receivership Order with respect to the assets, undertakings, and properties of Fairview acquired for, or used in relation to the business carried on by Fairview (collectively, the “**Property**”);

Conduct of Marketing and Sale Activities

- (b) The Receiver conducted the marketing and sale process in accordance with the Receivership Order, which included engaging Sean and John Jensen Realty Inc. (collectively, “**Jensen Realty**”);
- (c) With a view to completing a sale transaction that would, on balance, be in the best interest of the stakeholders, generally, the marketing and sale process developed and implemented by the Receiver together with Jensen Realty involved:
 - (i) A time frame of about 12.5 weeks (a 10-week marketing and due diligence period and 2.5 weeks to finalize offers into an agreement of purchase and sale);
 - (ii) The identification of a comprehensive potential purchaser target list, based upon Jensen Realty’s proprietary database of over 1,000 industry-related professionals and investors and other parties identified by Fairview;
 - (iii) Directly contacting targets via mass email listing announcements and specific calls to key parties and indirectly to others via an advertisement in the Globe & Mail (at least two (2) run dates in total during February and March 2014) and internet website listings;
 - (iv) The preparation of information for marketing and providing to potential purchasers, including a property overview document that briefly described the business and assets of Fairview being offered for sale, and other relevant items or reference details;
 - (v) The collection and posting of various financial and non-financial documents and other confidential information related to the Property into an electronic marketing/data room. In addition to being the primary source for information on Fairview for potential purchasers to perform their due diligence, the electronic marketing/data room also served to facilitate the fair and equal distribution of information to all registered prospective purchasers;

- (vi) Where a prospective purchaser expressed an interest in the sale process, a letter was sent by Jensen Realty which included some basic information concerning the sale process and a Confidentiality and Non-Disclosure Agreement (“NDA”) to be executed and returned to Jensen Realty. Upon receipt of the executed NDA by Jensen Realty, potential purchasers were granted access to the electronic marketing/data room; and
- (vii) The conduct of site and inspection tours of the Fairview premises and its facilities, as well as meetings with key staff;
- (d) The marketing and sale process undertaken ensured the best offer was obtained in the circumstances;
- (e) Through the fulsome marketing activities performed by Jensen Realty, the Receiver has structured a transaction with SVI that it believes is commercially reasonable and is overall in the best interest of Fairview’s stakeholders;

The Sale Agreement and Sale Transaction

- (f) The Receiver, Fairview, and SVI have entered into an Agreement of Purchase and Sale dated July 22, 2014, and as later amended by letter agreement dated August 29, 2014, for the sale of Purchased Assets;
- (g) The Purchased Assets comprises, in essence, *inter alia*, the real property, building, furniture and fixtures, capital equipment, resident receivables, inventory, bed licenses, and intangibles and excluded cash balances, related party receivables, and Ministry of Health and Long-Term Care funding relating to the period of operations prior to closing and certain books and records;
- (h) Based on the sale process undertaken by the Receiver, the marketing activities by Jensen Realty, and following the Receiver’s evaluation of the offers (including consultation with certain key stakeholders), the Receiver is of the opinion that the transaction negotiated with SVI fairly reflects what the market is prepared to pay for the Purchased Assets (as a going concern and as entire package) and provides, on balance, the greatest benefit to Fairview’s stakeholders, generally, including:

- (i) Preserving jobs and employment for most, if not all, of Fairview's current employees, as well as future employment opportunities;
 - (ii) Avoiding disruption to the lives of Fairview's elderly residents and their families that would have resulted from the closure of the facility or relocation of the bed licenses to one of the other Local Health Integration Networks (the "LHINs");
 - (iii) Preserving long-term care bed capacity in the Toronto Central LHIN with the intention of establishing a foundation for further investment and fostering future growth in long-term care bed capacity in the City of Toronto;
 - (iv) Preserving Fairview's business which will provide continuity of commerce for many of its suppliers/creditors; and
 - (v) Generating a fair and reasonable net realization for Fairview's creditors and other stakeholders;
- (i) the sale price and the terms set out in the Sale Agreement are commercially reasonable, are satisfactory to the Receiver and Fairview, and generate a fair and reasonable net realization for Fairview's creditors and other stakeholders;
 - (j) The transaction is fair and reasonable in the circumstances;

Sealing of Commercially Sensitive Information

- (k) The Confidential Supplement contains commercially sensitive information which ought to be sealed pending further Order of the Court;

Professional Fees

- (l) The professional fees and disbursements of the Receiver and its counsel are fair and reasonable in the circumstances;

General

- (m) Fairview supports the issuance of the Sale Approval Order and the Ancillary Order;
- (n) The additional grounds set forth in the Report and Confidential Supplement of the Receiver;

- (o) the circumstances that exist make the Orders sought by the Receiver appropriate;
- (p) the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and this Honourable Court's equitable and statutory jurisdiction thereunder;
- (q) the inherent jurisdiction of the Court;
- (r) Rules 1.04, 2.03, 3.02, 14.05(2), 16, and 37 of the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and
- (s) such further and other grounds as counsel may advise and this Honourable Court may permit.

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

- (a) the First Report to Court of the Receiver dated September 15, 2014;
- (b) the Confidential Supplement to the First Report of the Receiver dated September 15, 2014;
- (c) The Affidavits of Matthew E. Lem and Clifton P. Prophet, in respect of professional fees and disbursements; and
- (d) Such further material as counsel may advise and this Honourable Court may permit.

Date: September 15, 2014

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Solicitors for the Receiver

TAB A

Schedule "A"

Court File No. CV-13-10365-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE ●
JUSTICE ●

THURSDAY, THE 25th DAY
OF SEPTEMBER, 2014

B E T W E E N:

THE TORONTO-DOMINION BANK

Applicant

– and –

FAIRVIEW NURSING HOME LIMITED

Respondent

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

APPROVAL AND VESTING ORDER

THIS MOTION, made by BDO Canada Limited in its capacity as the Court-appointed Receiver (in such capacity, the "**Receiver**"), without security, for the purposes of marketing and selling the assets, undertakings, and properties of Fairview Nursing Home Limited (the "**Debtor**") for an Order, *inter alia*, approving the sale transaction (the "**Transaction**") between the Receiver, the Debtor, and Schlegel Villages Inc. (the "**Purchaser**") contemplated by an Agreement of Purchase and Sale made as of July 22, 2014, and as subsequently amended by Letter Agreement dated August 29, 2014 (the "**Sale Agreement**"), and appended to the First

Report of the Receiver dated September 15, 2014 (the “**Report**”), and vesting in the Purchaser the Receiver’s and the Debtor’s right, title, and interest in and to the assets described in the Sale Agreement (the “**Purchased Assets**”), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Report and the Confidential Supplement to the Report dated September 15, 2014 (the “**Confidential Supplement**”), and on hearing the submissions of counsel for the Receiver and those counsel listed on the Counsel Slip, no one appearing for any other person on the Service List, although properly served as appears from the Affidavit of Laura Taylor, sworn September 12 , 2014, filed:

1. **THIS COURT ORDERS AND DECLARES** that the time for service of the Notice of Motion, Motion Record, and Report is hereby abridged such that this motion is properly returnable today, that the manner of service is hereby approved and validated, and that all parties entitled to notice of this motion have been properly served with notice of this motion, and service on any other parties is hereby dispensed with.

2. **THIS COURT ORDERS AND DECLARES** that the Transaction is hereby approved, and that the Sale Agreement is commercially reasonable and in the best interests of the Debtor and its stakeholders. The execution of the Sale Agreement by the Receiver is hereby authorized and approved with such amendments as the Receiver may deem necessary, and the Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.

3. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Receiver’s certificate to the Purchaser substantially in the form attached as **Schedule A** hereto (the “**Receiver’s Certificate**”), all of the Receiver’s and Debtor’s right, title, and interest in and to the Purchased Assets described in the Sale Agreement shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise

(collectively, the “**Claims**”) including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Mr. Justice D. Brown dated December 20, 2013 (the “**Appointment Order**”); (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; (iii) the Responsive Security (as defined in the Appointment Order); and (iv) those Claims listed on **Schedule C** hereto (all of which are collectively referred to as the “**Encumbrances**”, which term shall not include the permitted encumbrances, easements and restrictive covenants listed on **Schedule D**) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

4. **THIS COURT ORDERS** that upon the registration in the Land Registry Office for the Land Titles Division #66 of Toronto of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario), the Land Registrar for the said Land Titles Division is hereby directed to enter Fairview LTC Inc. as the owner of the subject real property identified in **Schedule B** hereto (the “**Real Property**”) in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims listed in **Schedule C** hereto.

5. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver’s Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

6. **THIS COURT ORDERS AND DIRECTS** the Receiver to file with the Court a copy of the Receiver’s Certificate, forthwith after delivery thereof.

7. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Debtor’s records pertaining to the Debtor’s past and current employees, including personal

information of the Assumed Employees, as defined in the Sale Agreement. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtor.

8. **THIS COURT ORDERS** that, notwithstanding:

- (a) the pendency of these proceedings;
- (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor and any bankruptcy order issued pursuant to any such applications; and
- (c) any assignment in bankruptcy made in respect of the Debtor;

the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or voidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

9. **THIS COURT ORDERS AND DECLARES** that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario).

10. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

11. **THIS COURT ORDERS** that the Confidential Supplement is hereby sealed and shall not form part of the public record pending further Order of this Court.

SCHEDULE A

FORM OF RECEIVER'S CERTIFICATE

Court File No. CV-13-10365-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N :

THE TORONTO-DOMINION BANK

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– and –

FAIRVIEW NURSING HOME LIMITED

Respondent

RECEIVER'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice D. Brown of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated December 20, 2013, BDO Canada Limited was appointed Receiver (in such capacity, the "**Receiver**") of Fairview Nursing Home Limited (the "**Debtor**") as specifically set out in the Receivership Order of the Honourable Mr. Justice D. Brown of the Ontario Superior Court of Justice (Commercial List) dated December 20, 2013, pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act* (Canada), R.S.C. 1985, c. B-3, as amended (the "**BIA**").

B. Pursuant to an Order of the Court dated ●, the Court approved the agreement of purchase and sale made as of July 22, 2014, and as subsequently amended by Letter Agreement dated August 29, 2014 (the "**Sale Agreement**") between the Receiver, Debtor and Schlegel Villages Inc. (the "**Purchaser**") and provided for the vesting in the Purchaser of the Receiver's and Debtor's right, title and interest in and to the Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Assets; (ii) that the conditions to Closing as set out in article 4 of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;
2. The conditions to Closing as set out in article 4 of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and
3. The Transaction has been completed to the satisfaction of the Receiver.

This Certificate was delivered by the Receiver to the Purchaser at ● <Insert time.> on ● <Insert date.>.

BDO CANADA LIMITED, solely in its capacity as Court-appointed Receiver of Fairview Nursing Home Limited as specifically set out in the Receivership Order of the Honourable Mr. Justice D. Brown of the Ontario Superior Court of Justice (Commercial List) dated December 20, 2013, and not in its personal capacity

Per:

Name: Matthew Lem
Title: Senior Vice President

SCHEDULE B

SUBJECT REAL PROPERTY

LT 7-8 PL 366 CITY WEST; PT LT 9 PL 366 CITY WEST; PT LANE PL 366 CITY WEST
CLOSED BY CT526323, PT 3, 4, 6, 63R2391; PT LT 17-18 PL 1051 TORONTO PT 1,
63R2391; S/T CT500560E, CT526917E; CITY OF TORONTO, Property Identifier Number
21296-0399(LT); bearing municipal address 14 Cross Street, Toronto, Ontario, Canada.

SCHEDULE C

CLAIMS TO BE DELETED AND EXPUNGED FROM TITLE TO REAL PROPERTY

1. Notice, Instrument No. CT802464
2. Assignment General, Instrument No. CT837982
3. Charge, Instrument No. AT2450748
4. Notice of Assignment of Rents General, Instrument No. AT2450749
5. Charge Instrument No. AT3487149
6. Charge, Instrument No. AT3527775

SCHEDULE D

PERMITTED ENCUMBRANCES, EASEMENTS AND RESTRICTIVE COVENANTS RELATED TO THE REAL PROPERTY

(unaffected by the Approval and Vesting Order)

1. Reference Plan 63R-2363
2. Reference Plan 63R-2391
3. Easement, CT500560E in favour of the Corporation of the City of Toronto
4. Easement, CT526917E in favour of the Corporation of the City of Toronto
5. Agreement, CT602855 in favour of the Corporation of the City of Toronto
6. Agreement, CT554379 in favour of the Corporation of the City of Toronto
7. VTB Mortgage as defined in the Agreement
8. Vendor's Notice of Claim/Caveat re: Section 2.19 of the Agreement

Court File No. CV-13-10365-00CL

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ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

(PROCEEDING COMMENCED AT TORONTO)

APPROVAL AND VESTING ORDER

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Lawyers for Fairview Nursing Home

TAB B

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**THE HONOURABLE
JUSTICE**

**THURSDAY, THE 25th DAY
OF SEPTEMBER, 2014**

B E T W E E N:

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**APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED**

ORDER

THIS MOTION, MADE BY BDO CANADA LIMITED, in its capacity as the Court-appointed Receiver (in such capacity, the "**Receiver**"), without security, for the purposes of marketing and selling the assets, undertakings, and properties of Fairview Nursing Home Limited (the "**Debtor**"), for an Order, *inter alia*, (i) approving the First Report to Court of the Receiver dated September 15, 2014 (the "**Report**") and the Receiver's conduct activities outlined therein, and the Confidential Supplement to the Report dated September 15, 2014 (the "**Confidential Supplement**"), and the Receiver's conduct and activities outlined therein; (ii) sealing the Report and the Confidential Supplement and the Appendices thereto, and (iii) approving the professional fees and disbursements of the Receiver and its counsel, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Report and the Confidential Supplement, and on hearing the submissions of counsel for the Receiver and those counsel listed on the Counsel Slip, no one appearing for any other person on the Service List, although properly served as appears from the Affidavit of Laura Taylor, sworn September 15, 2014, filed:

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

APPROVAL OF FIRST REPORT & CONFIDENTIAL SUPPLEMENT

2. **THIS COURT ORDERS** that the First Report, the Confidential Supplement, and the activities of the Receiver outlined therein be and are hereby approved.

FEE APPROVAL

3. **THIS COURT ORDERS** that the fees for professional services and the disbursements of the Receiver, as set out in the Affidavit of Matthew E. Lem, sworn September 12, 2014, and counsel for the Receiver, as set out in the Affidavit of Clifton P. Prophet, sworn September 12, 2014, be and are hereby approved.

4. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

Court File No. CV-13-10365-00CL

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APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

(PROCEEDING COMMENCED AT TORONTO)

ORDER

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Solicitors for the Receiver

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**ONTARIO
SUPERIOR COURT OF JUSTICE
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(PROCEEDING COMMENCED AT TORONTO)**

NOTICE OF MOTION
(Returnable September 25, 2014)

GOWLING LAFLEUR HENDERSON LLP

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