

Court File No. 31-2303814
Estate File No. 31-2303814

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

IN BANKRUPTCY AND INSOLVENCY

**IN THE MATTER OF THE PROPOSAL OF 1482241 ONTARIO LIMITED, OF THE
CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**CROWE SOBERMAN INC., in its capacity as
Licensed Insolvency Trustee of 1482241 Ontario Limited**

**FACTUM OF THE MOVING PARTY, 1482241 ONTARIO LIMITED
(Motion Returnable November 3, 2017)**

November 2, 2017

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TO: SERVICE LIST

PART I: OVERVIEW

1. 1482241 Ontario Limited (“**148 Ontario** or the “**Company**”) is an insolvent entity which owns a commercial property located at 240 Duncan Mill Road, Toronto, Ontario (“**Property**”). The Property is encumbered by two mortgages, substantial property taxes and is the subject of several pieces of litigation. 148 Ontario filed for protection from its creditors by filing a Notice of Intention to Make a Proposal (“**NOI**”) in accordance with the provisions of the *Bankruptcy and Insolvency Act* (“**BIA**”) on October 13, 2017. Crowe Soberman Inc. was appointed as Licensed Insolvency Trustee under the NOI (“**Proposal Trustee**”).

2. 148 Ontario is before this Honourable Court seeking the following relief: (a) a charge for professional fees; (b) approval of a debtor in possession loan to fund operating costs; (c) an extension of the time period for filing a proposal; and (d) approval of a sale process. The relief sought in (a), (b), and (c) is not controversial and will not be discussed in any detail in this factum. Each of these requests are supported by the Proposal Trustee and are not opposed. There is sufficient value in the Property to satisfy the existing secured creditors, property taxes, the interim financing charge, and the professionals’ charge through the stay extension period.

3. 148 Ontario also seeks an Order to empower the Proposal Trustee to conduct a public sale and marketing process for the Property, to engage a property manager pending the sale, and to sell the Property. The sale process has the support of the secured creditors, but is contested by a contingent litigation creditor: the Hussaini Group (as defined below).

4. More than three years ago, on June 13, 2014, Jamshid Hussaini, Neelofar Ahmadi and Homelife Dreams Realty Inc. (collectively the “**Hussaini Group**”) commenced an action against 148 Ontario and its principal, Alain Checroune (“**Mr. Checroune**”), seeking, *inter alia*, a

declaration that they own 20% of the shares of 148 Ontario and 20% of the interest in the Property, and an order allowing the plaintiffs to purchase the remaining shares of 148 Ontario and the remaining interest in the Property (“**Hussaini Litigation**”). 148 Ontario and Mr. Checroune counterclaimed for damages, resulting from the breach of a lease at the Property by the Hussaini Group.

5. It is respectfully submitted that the rights of this contingent litigation creditor, if any, can be properly decided once the Property has been sold, the mortgages and property taxes have been paid, and claims are filed in the pending proposal proceeding.

6. The litigation creditor relies on an unproven claim for specific performance and an unproven alleged interest in the Property to suggest the sale process should not be granted.

7. The litigation creditor, on an *ex parte* basis, sought and received a certificate of pending litigation (“**CPL**”) on the Property in 2014. The Hussaini Group also obtained an injunction order of the Ontario Superior Court in 2014, which restrains the sale of the Property by 148 Ontario without the consent of the Hussaini Group or further Order of this Court.

8. Respectfully, the relief sought in this motion is for the Property to be sold by the Proposal Trustee in a public, Court-supervised process, and not by 148 Ontario. As such, the injunction has no bearing on the relief being sought. In addition, any injunction of this Court is subject to further orders of this Court and is not an absolute or permanent bar.

9. In the context of the insolvency of 148 Ontario, it is inappropriate to prevent the creditors of the insolvent entity to have recourse to the assets of the Company while a complex, three-year-old piece of litigation winds its way through the courts. To do so would prefer the interest of a junior creditor with an unproven claim over the rights of all other creditors, including

secured creditors.

10. The most likely outcome of continuing to enjoin or prevent the sale of the Property pending the resolution of the claims of the Hussaini Group is to cause the bankruptcy of 148 Ontario and/or the appointment of a receiver by the First Mortgagees (as defined below), which will add time and costs to this process, and will not be beneficial to any stakeholder, including the Hussaini Group's claims for specific performance.

11. As such, it is respectfully submitted that the sale process order should be granted. To the extent the Hussaini Group remains interested in the Property and has the ability to close a transaction to acquire it, they can participate and bid along with all other interested parties in the Court-supervised sale process.

PART II - FACTS

Background

12. 148 Ontario is a company incorporated under the laws of the Province of Ontario. Its registered office address is located at the Property.¹

13. 148 Ontario is also the registered owner of the Property. The Property is a multi-unit, commercial building located near the intersection of Highway 401 and Don Mills Road in Toronto, Ontario. It has eight floors and approximately 220,000 square feet of rentable space.²

14. The main business of 148 Ontario is to manage and collect rent from the Property. In this capacity, it has three employees and also employs four contractors and some seasonal workers.

¹ Affidavit of Alain Checroune, sworn October 26, 2017 (“**Checroune Affidavit**”), para. 3, Motion Record, pg. 11.

² Checroune Affidavit, *ibid.*, para. 4, Motion Record, pg. 11.

The Company also owns and receives revenue from the parking at the Property.³

15. In order to focus on its restructuring, the Company has consented, subject to the order of this Court, to the Proposal Trustee retaining a reputable property management firm to manage the day-to-day property issues.⁴

16. The Property was purchased by 148 Ontario for \$15,300,000 in 2001.⁵

17. The Property is subject to the following mortgages:

(a) A first charge granted by 148 Ontario in favour of Computershare Trust Company of Canada (“**Computershare**”) in the amount of \$11,250,000, and registered on title to the Property on September 29, 2005 as Instrument No. AT935525 (“**First Mortgage**”). The First Mortgage was transferred from Computershare to Dan Realty Limited, E. Manson Investments Limited and Copperstone Investments Limited (collectively, the “**First Mortgagees**”) on June 2, 2016, and registered on title to the Property as Instrument No. AT4236037.

(b) A second in position charge granted by 148 Ontario in favour of Janodee Investments Ltd. and Meadowshire Investments Ltd. (collectively, the “**Second Mortgagees**”) in the amount of \$1,420,000, registered on title to the Property on September 21, 2016 as Instrument No. AT4349221 (“**Second Mortgage**”).⁶

³ Checroune Affidavit, *supra*, para. 5, Motion Record, pg. 11.

⁴ Checroune Affidavit, *ibid.*, para. 6, Motion Record, pg. 12.

⁵ Checroune Affidavit, *ibid.*, para. 7, Motion Record, pg. 12.

⁶ Checroune Affidavit, *ibid.*, para. 8, Motion Record, pg. 12.

18. Property taxes relating to the Property are due and owing by 148 Ontario to the City of Toronto in the amount of \$1,441,179.66.⁷

Factors leading to the filing of the NOI

19. The Company has been distracted and had its resources drained by litigation, and is subject to demands by various creditors.⁸

20. In 2017, the Company brought a motion for summary judgment seeking to dismiss the Hussaini Litigation, and discharging the CPL and the injunction. Unfortunately it's motion was denied by the Court on April 19, 2017, essentially on the basis that a more complete record was required.⁹

21. In addition to the Hussaini Litigation, the Company is party to several other lawsuits.¹⁰

22. On October 11, 2017, 148 Ontario received a demand letter from counsel for the First Mortgagees advising that it was in default under the First Mortgage and that it owed \$7,692,202.45 to the First Mortgagees. The letter also included a Notice of Intention to Enforce Security, which would expire 10 days after the notice was sent on October 11, 2017.¹¹

23. 148 Ontario has been struggling to pay its obligations as they come due as a result of the low occupancy rate of the Property. The Property is currently only 52% occupied, and, without

⁷ Checroune Affidavit, *supra*, para. 10, Motion Record, pg. 13.

⁸ Checroune Affidavit, *ibid.*, paras. 11-14, Motion Record, pgs. 13-14.

⁹ Checroune Affidavit, *ibid.*, para. 12, Motion Record, pg. 13. See also Order of Justice Whitaker, dated October 27, 2014, Moving Party's Brief of Authorities, Tab 1, and *Hussaini v. Checroune*, 2017 ONSC 2435, Moving Party's Brief of Authorities, Tab 2.

¹⁰ Checroune Affidavit, *ibid.*, para. 13 and Exhibit "D", Motion Record, pgs. 13, 39-40.

¹¹ Checroune Affidavit, *ibid.*, para. 4 and Exhibit "E", Motion Record, pgs. 14, 41-47.

more rental income from tenants, 148 Ontario has been unable to make payments relating to, for example, property tax arrears. Indeed, the bailiff was visiting the Property on a regular basis in respect of the property taxes owed to the City of Toronto.¹²

24. The Company has also received a disconnection notice from Ontario Hydro, who claimed to be owed in excess of \$100,000.¹³

25. It is also forecast that 148 Ontario's costs relating to the Property will increase in the winter due to increased expenditures for snow removal and utilities.¹⁴

26. As a result of the forgoing, on October 13, 2017, 148 Ontario commenced restructuring proceedings under the BIA by an NOI, with Crowe Soberman Inc. acting as the Proposal Trustee.¹⁵

27. The Company has filed a cash flow which indicates that without interim financing, the Company will be unable to operate in November. With the proposed debtor-in-possession funding being granted, the Company would be able to operate during the proposal period while the Proposal Trustee effects the sale of the Property.¹⁶

Sales Process

28. Under the sale process being sought, the Proposal Trustee will conduct a public process to sell the Property and, by way of a vesting order of this Court, to convey the Property free and

¹² Checroune Affidavit, *supra*, para. 16, Motion Record, pg. 14.

¹³ Checroune Affidavit, *ibid.*, para. 17, Motion Record, pg. 14.

¹⁴ Checroune Affidavit, *ibid.*, para. 18, Motion Record, pg. 15.

¹⁵ Checroune Affidavit, *ibid.*, para. 20, Motion Record, pg. 15.

¹⁶ Checroune Affidavit, *ibid.*, paras 21, 35-36 and Exhibit "G", Motion Record, pgs. 15, 19, 58-60.

clear of the various encumbrances which would ordinarily be vested out by such an order.¹⁷ The interests of the creditors in the proceeds can then be determined in the ordinary course, or subject to the terms of the proposal to be filed.

29. The sale process has all the ordinary features of a Court-supervised sales process, including the use of a real estate agent, the qualification of offers by a court officer (not management), the use of confidentiality to ensure the process is fair, and the ability for the qualified bidders to conduct an auction among qualified bidders to ensure the highest and best price is achieved.¹⁸

30. The sale process will run approximately 4 months and will allow the Company to be in a position to submit a proposal before the expiry of the 6 month time period usually provided to proposal debtors under the BIA.¹⁹

PART III - ISSUES AND LAW

31. There is one contested issue before this Honourable Court: Should the sale process order be granted notwithstanding the claims for specific performance by, or the other relief previously granted to, the Hussaini Group in the Hussaini Litigation?

32. It is respectfully submitted that the sale process should be approved. Given the insolvency of the Company, the sale of the property is inevitable. The Hussaini Litigation has been outstanding for 3 years at this point and it has not yet reached the discovery phase. It is unreasonable for the creditors of the Company to have to wait any longer to seek repayment of

¹⁷ Checroune Affidavit, *supra*, para. 31, Motion Record, pg. 17.

¹⁸ Checroune Affidavit, *ibid.*, para. 33, Motion Record, pgs. 17-18.

¹⁹ Checroune Affidavit, *ibid.*, para. 33, Motion Record, pg. 18.

their debts.

33. To hold that a claim for specific performance prevents a sale of the assets of an insolvent entity would encourage any party with a disputed claim in land to take that position. It would reorder the priorities in an ordinary insolvency by requiring a resolution of a contingent claim before payment of all other creditors, regardless of priority and regardless of the damage that may be suffered to the insolvent person's assets in the interim.

34. It would also require that in all cases where a claim of specific performance is made, the only insolvency options available to the debtor would be creditor driven options such as receiverships or bankruptcy. If Parliament had intended to provide this super priority to creditors claiming specific performance, they would have done so. However, the opposite is true. Parliament has stayed actions such as the Hussaini Litigation by the terms of the statute.²⁰

35. The Hussaini Group has had 3 years to attempt to move this matter forward and have not done so. It was 148 Ontario, not the Hussaini Group, which attempted to summarily resolve this issue. Ultimately, the Court found the matter too complex without a full trial of the issues. The existence of complex litigation should not be the basis for usurping the ordinary insolvency process.

36. The injunction was granted at the outset of these proceedings when the Company was not insolvent and there was an imminent threat of a private sale in which the litigants would have no security that they could receive payment from the proceeds. In the current circumstances, in this process, by contrast, the proceeds will be subject to the provisions of the Court and the litigant

²⁰ *Bankruptcy and Insolvency Act*, RSC 1095, c B-3, ss. 69(1). See also *Emergency Door Service Inc.*, 2017 ONSC 5284, paras. 15, 24-29, 37, 39, Moving Party's Brief of Authorities, Tab 3.

can seek to assert their interest in that process. In addition, the injunction order specifically provides that the Property can be dealt with by further Order of this Court.²¹

37. This Court favours the consolidation of actions into a single insolvency proceeding.²² Allowing for the insolvency proceeding to be held hostage by unproven claims of pre-existing litigation violates this principle.

38. The injunction and the CPL will not prevent a secured creditor from enforcing against the Property through power of sale or a receivership. As such, if the court upholds the position advanced by the Hussaini Group, it is most likely that the First Mortgagees, who have commenced their enforcement prior to the NOI being filed, will seek the leave of this court to commence such action.

PART IV - RELIEF REQUESTED

39. 148 Ontario respectfully requests the relief sought in the Notice of Motion, including approval of the sales process with respect to the Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



David Ullmann for the Moving Party,
1482241 Ontario Limited

²¹ Order of Justice Whitaker, dated October 27, 2014, Moving Party's Brief of Authorities, Tab 1.

²² *Ted Leroy Trucking Ltd.*, 2010 SCC 60, para. 22, Moving Party's Brief of Authorities, Tab 4.

SCHEDULE "A" - AUTHORITIES

- | No. | Case |
|------------|---|
| 1. | Order of Justice Whitaker, dated October 27, 2014 |
| 2. | <i>Hussaini v. Checroune</i> , 2017 ONSC 2435 |
| 3. | <i>Emergency Door Service., Re</i> , 2016 ONSC 5284 |
| 4. | <i>Ted Leroy Trucking Ltd.</i> , 2010 SCC 60 |

SCHEDULE "B" - LEGISLATION

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

Stay of proceedings — notice of intention

69 (1) Subject to subsections (2) and (3) and [sections 69.4, 69.5](#) and [69.6](#), on the filing of a notice of intention under [section 50.4](#) by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing by the insolvent person of a notice of intention under [section 50.4](#),

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as he would otherwise have, has any force or effect,

(c) Her Majesty in right of Canada may not exercise Her rights under

(i) subsection 224(1.2) of the *Income Tax Act*, or

(ii) any provision of the [Canada Pension Plan](#) or of the [Employment Insurance Act](#) that

(A) refers to subsection 224(1.2) of the *Income Tax Act*, and

(B) provides for the collection of a contribution, as defined in the [Canada Pension Plan](#), an employee's premium or employer's premium, as defined in the [Employment Insurance Act](#), or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts,

in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, and

(d) Her Majesty in right of a province may not exercise her rights under any provision of provincial legislation in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the [Canada Pension Plan](#) if the province is a *province providing a comprehensive pension plan* as defined in [subsection 3\(1\)](#) of the [Canada Pension Plan](#) and the provincial legislation establishes a *provincial pension plan* as defined in that subsection,

until the filing of a proposal under [subsection 62\(1\)](#) in respect of the insolvent person or the bankruptcy of the insolvent person.

Stay of proceedings — Division I proposals

69.1 (1) Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt;

(b) no provision of a security agreement between the insolvent person and a secured creditor that provides, in substance, that on

(i) the insolvent person's insolvency,

(ii) the default by the insolvent person of an obligation under the security agreement, or

(iii) the filing of a notice of intention under section 50.4 or of a proposal under subsection 62(1) in respect of the insolvent person,

the insolvent person ceases to have such rights to use or deal with assets secured under the agreement as the insolvent person would otherwise have, has any force or effect until the trustee has been discharged or the insolvent person becomes bankrupt;

(c) Her Majesty in right of Canada may not exercise Her rights under subsection 224(1.2) of the [Income Tax Act](#) or any provision of the [Canada Pension Plan](#) or of the [Employment Insurance Act](#) that refers to subsection 224(1.2) of the [Income Tax Act](#) and provides for the collection of a contribution, as defined in the [Canada Pension Plan](#), an employee's premium, or employer's premium, as defined in the [Employment Insurance Act](#), or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts, in respect of the insolvent person where the insolvent person is a tax debtor under that subsection or provision, until

(i) the trustee has been discharged,

(ii) six months have elapsed following court approval of the proposal, or

(iii) the insolvent person becomes bankrupt; and

(d) Her Majesty in right of a province may not exercise Her rights under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a **province providing a comprehensive pension plan** as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a **provincial pension plan** as defined in that subsection,

in respect of the insolvent person where the insolvent person is a debtor under the provincial legislation, until

(iii) the trustee has been discharged,

(iv) six months have elapsed following court approval of the proposal, or

(v) the insolvent person becomes bankrupt.

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**MOVING PARTY'S FACTUM
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