

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

BETWEEN:

**THE TORONTO- DOMINION BANK**

Applicant

-and-

**1871 BERKELEY EVENTS INC., 1175484 ONTARIO INC., 111 KING STREET EAST  
INC., 504 JARVIS INC., and SOUTHLINE HOLDINGS INC.**

Respondents

**FACTUM OF THE RESPONDENTS  
(APPLICATION RETURNABLE MARCH 7, 2023)**

March 1, 2023

**Paliare Roland Rosenberg Rothstein LLP**  
155 Wellington Street West, 35th Floor  
Toronto ON M5V 3H1

**Jeffrey Larry (LSO# 44608D)**  
Tel: 416.646.4330  
E: [jeff.larry@paliareroland.com](mailto:jeff.larry@paliareroland.com)

**Daniel Rosenbluth (LSO# 71044U)**  
Tel: 416.646.6307  
E: [daniel.rosenbluth@paliareroland.com](mailto:daniel.rosenbluth@paliareroland.com)

Lawyers for the Respondents

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**PART I. OVERVIEW**

1. There is no basis to appoint a receiver in this case. The respondents are the owners and operators of a longstanding events and catering business called Berkeley Events. They concede that there have been certain events of default under TD's loan facilities, largely due to the pandemic era which was notoriously difficult for events businesses.
2. However, the pandemic is now receding, permitting Berkeley Events to gradually return to financial health. It has numerous weddings and other events booked for the coming months and the appointment of a receiver will almost certainly result in shutting down the business and terminating these events.

3. In the meantime, TD is extremely well secured. In addition to other forms of security, TD holds a mortgage on the Property (as defined below) where the respondents operate their business out of a large, historic church. The Property is worth many millions of dollars more than the indebtedness owing to TD.

4. Moreover, the proposed receivership would also have a highly prejudicial effect on an ongoing and valuable development property (next door to the Property) which is owned by certain of the respondents and their affiliates.

5. Just this past August, the Adjacent Property (as defined below) received zoning approval from the Ontario Land Tribunal for the proposed construction of a 19-storey condominium tower featuring 144 residential units. This development proposal has been ongoing since 2016 and has been supported by some of Toronto's most experienced planners, architects, legal counsel, and financiers.

6. The development next door is relevant because its viability depends entirely on the ability to sever and use a portion of the Property given that the tower itself is designed to overhang a courtyard beside the church on the Property.

7. If a receiver sells the Property now without first severing the courtyard, the entire development will be rendered non-viable. Not only would this destroy millions of dollars of market value for the respondents and their affiliates, but a further cascade of negative effects for other stakeholders would result, as described in more detail below.

8. The respondents and their sophisticated roster of development professionals – not a receiver – have the ability and experience to navigate the remaining steps of the

development process and deliver value for all stakeholders, including TD which bears no realistic risk of taking any loss on these loans.

9. At the same time, the Property and the Adjacent Property are already listed for sale under the only two scenarios that will preserve the ongoing development: either both properties will be sold on an *en bloc* basis, or the Property will be sold only once the courtyard is severed and conveyed to a buyer of the Adjacent Property. Imposing a receiver into an existing sale process will only add cost without any benefit.

10. This Court has long recognized that a request for a receivership should be approached with caution where the receiver would have no viable path for a value-maximizing sale of the collateral, and where an immediate sale of the collateral would destroy significant stakeholder value and prejudice innocent third parties.

11. That is precisely this case.

12. Accordingly, this application should be dismissed entirely or, at a minimum, adjourned to allow the respondents to obtain the necessary severance and sell the Property on its own or together with the Adjacent Property.

## **PART II. SUMMARY OF FACTS**

13. The respondents rely on the comprehensive summary of facts set out in the affidavit of Douglas Wheler (“**Wheler**”), the principal of each of the respondents. Set out below is a brief summary of the key factual issues.

**A. TD is extremely well-secured**

14. It appears undisputed that the Property is worth far more than the amount of TD's debt.

15. Specifically, the Property was appraised in September, 2022 by Avison Young, a reputable real estate firm.<sup>1</sup> The respondents are seeking a redaction of the commercially sensitive details of the appraisal (although TD already has a copy of it). The appraisal confirms that the Property is worth many millions of dollars more than the total amount of the debt owing to TD.<sup>2</sup>

16. In other words, there is no realistic prospect of any erosion to TD's position any time in the foreseeable future.

**B. The Property is the site of numerous upcoming weddings and events**

17. The Property is owned by the respondent 1175484 Ontario Inc. ("**117 Inc.**"). It is the site of a historic church built in 1871 that has been operating for 26 years as an event venue (the "**Berkeley Church**").<sup>3</sup>

18. Today, the Berkeley Church is the home of an events and catering business operated through various companies owned by Wheler, including certain of the respondents (collectively, "**Berkeley Events**").<sup>4</sup>

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<sup>1</sup> Confidential Exhibit, Exhibit D to the Affidavit of Douglas Wheler, affirmed March 1, 2023 ("**Wheler Affidavit**"), Responding Application Record ("**RAR**"), Tab 1D.

<sup>2</sup> Wheler Affidavit, paras. 20-25, RAR, Tab 1.

<sup>3</sup> Wheler Affidavit, para. 6, RAR, Tab 1.

<sup>4</sup> Wheler Affidavit, para. 7, RAR, Tab 1.

19. Berkeley Events employs 20 full-time employees and over 80 part-time workers.<sup>5</sup>

20. Berkeley Events has a busy upcoming events schedule for the spring and summer of 2023. Between March 1, 2023 through October, 2024, it has 105 events booked at the Berkeley Church and other venues serviced by Berkeley Church's kitchen. At the Berkeley Church alone, between March 1 and August 30 of this year, there are 15 weddings and 2 corporate/institutional events booked.<sup>6</sup>

21. If a receiver is appointed, it will presumably terminate Berkeley Events' operations immediately. Indeed, a receiver likely lacks the ability to honour Berkeley Events' obligations to its clients even if it was inclined to try.

**C. *The Property cannot yet be sold 'as is'***

**1. The Development Project – overview**

22. The Property is integral to the development site located next door at 301-311 Queen Street E. (the "**Adjacent Property**"), which is owned by other corporations controlled by Wheler.

23. The Adjacent Property is currently the site of another event venue. However, in 2016, 117 Inc. and other related parties (the "**Developers**") filed an application with the City for approval of a substantial development involving the construction of a 144-unit residential condominium tower above a podium with office-retail use (the "**Development Project**").<sup>7</sup>

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<sup>5</sup> Wheler Affidavit, para. 8, RAR, Tab 1.

<sup>6</sup> Wheler Affidavit, paras. 9-11, RAR, Tab 1.

<sup>7</sup> Wheler Affidavit, paras. 27-29, RAR, Tab 1.

24. The Developers assembled an experienced cast of planners and other professionals to support the development proposal, including the Goldberg Group as planners, BDP Quadrangle as architects, Alan Heisey as legal counsel, and both Harvey Kalles Real Estate Ltd. and Colliers Macauley Nicolls Inc. as real estate agents and advisors.<sup>8</sup>

25. Their efforts culminated in a decision of the Ontario Land Tribunal (“**OLT**”) dated August 2, 2022 which granted zoning amendments and related approvals for the Development Project.<sup>9</sup>

26. Based on this substantial and well-advanced project, the Adjacent Property has an appraised value of over \$30 million (the respondents seek confidential treatment of the appraisal on this application) and a first mortgage in favour of Equitable Bank (“**Equitable**”) of \$20.2 million.<sup>10</sup>

## **2. The Property is part of the Development Project**

27. Critically, the Development Project, as approved and appraised, involves the use of the courtyard adjacent to the Church and which forms part of the Property (and not the Adjacent Property) (the “**Courtyard**”).<sup>11</sup>

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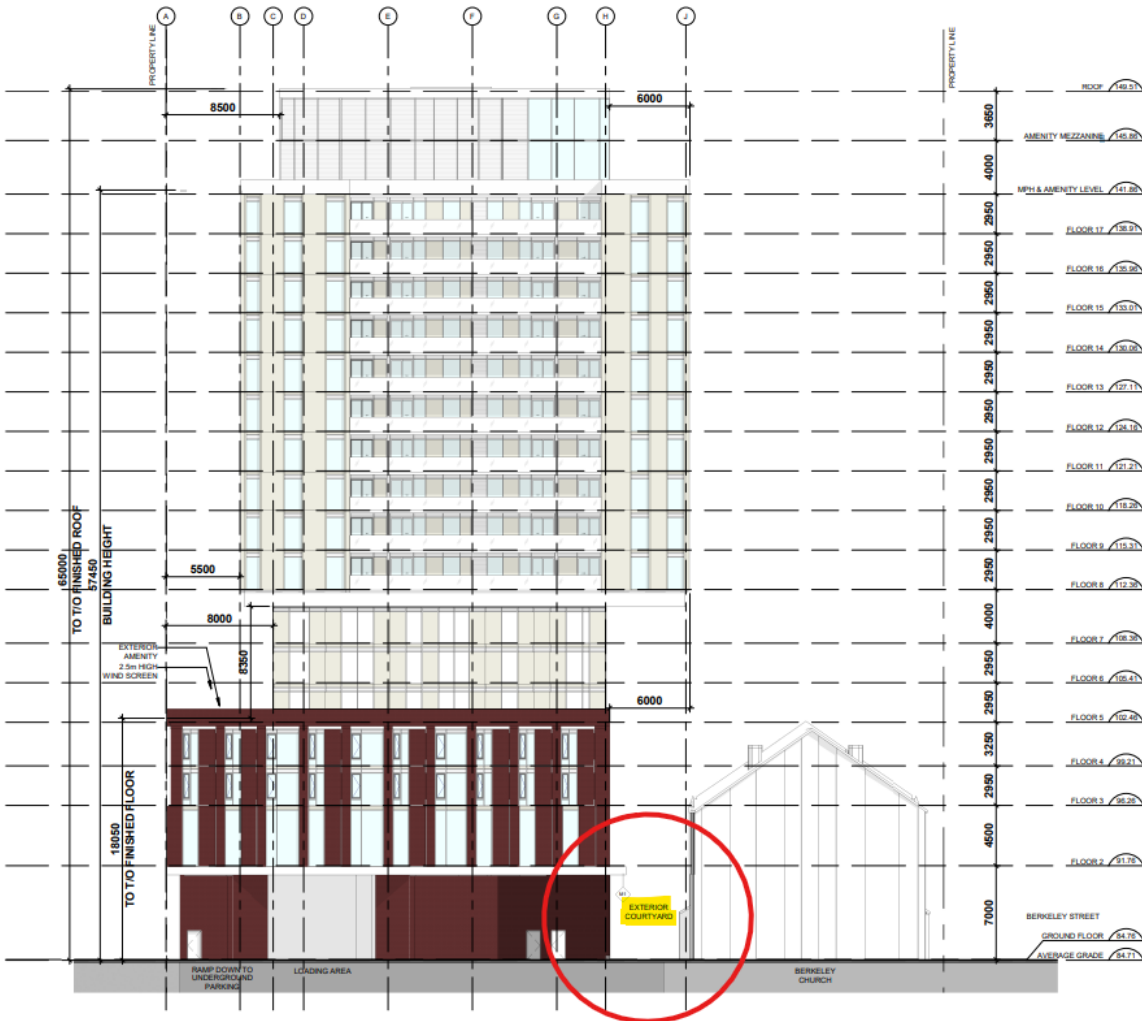
<sup>8</sup> Wheler Affidavit, para. 30, RAR, Tab 1.

<sup>9</sup> OLT Decision, Exhibit E to the Wheler Affidavit, RAR, Tab 1E.

<sup>10</sup> Wheler Affidavit, paras. 32-34; RAR, Tab 1; Confidential Exhibit, Exhibit F to the Wheler Affidavit, RAR, Tab 1F.

<sup>11</sup> Wheler Affidavit, para. 35, RAR, Tab 1.

28. The role of the Courtyard in the overall development is best illustrated by the following excerpt from the architectural plans, which show the proposed tower overhanging the space marked as “Exterior Courtyard”:



29. For this reason, in order for the Development Project to proceed, the Courtyard needs to be severed from the Property and conveyed to the owner (or any prospective purchaser) of the Adjacent Property.

30. In other words, if the Property is sold to a third party without first obtaining a severance of the Courtyard, the approved Development Project will lose a critical portion



of the land upon which its plans depend. Unsurprisingly, Wheler's evidence is that such a result would effectively render the Development Project non-viable.<sup>12</sup>

31. This would significantly impair the market value of the Adjacent Property, as well as the security position of Equitable, whose \$20.2 million mortgage is premised on the Development Project going forward. (Equitable is not before the Court on this application and does not appear to have been given notice of the proceeding by TD.)

32. As an alternative to selling the Property after obtaining the severance, the viability of the Development Project could be preserved by selling both the Property and the Adjacent Property on an *en bloc* basis to a single purchaser.

**D. Current status of the properties**

33. The Property and the Adjacent Property are both listed for sale on MLS and are being marketed consistent with the strategies set out above.<sup>13</sup>

34. In connection with the listing, the respondents have put forward a term sheet (prepared by their lawyers) which summarizes in more detail the various options and strategies set out above for selling the lands in a manner which will preserve the viability of the Development Project.<sup>14</sup>

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<sup>12</sup> Wheler Affidavit, paras. 36-39, RAR, Tab 1; Architectural Drawings for 301-311 Queen Street East, Exhibit G to the Wheler Affidavit, RAR, Tab 1G.

<sup>13</sup> Wheler Affidavit, paras. 50-53, RAR, Tab 1; Listing for 317 Queen Street East, Exhibit M to the Wheler Affidavit, RAR, Tab 1M; Adjacent Development Site Listings for 301, 305-311 Queen Street East, Exhibit N to the Wheler Affidavit, RAR, Tab 1N.

<sup>14</sup> Property Term Sheet re. Sale of the Properties, Exhibit L to the Wheler Affidavit, RAR, Tab 1L.

35. Meanwhile, the Property is booked for numerous weddings and other events this upcoming season.

36. During this time, and now that the Developers have received final zoning approvals, they intend to continue with their progress on the site. Wheler's affidavit describes certain logistical hurdles that have arisen due largely to TD's inappropriate refusal to release certain cash deposits in response to a CRA garnishment order.<sup>15</sup>

37. Nevertheless, Wheler deposes that the respondents are in a position to begin implementing the approvals recently granted by the OLT, starting with the registration of a "section 37 agreement" with the City concerning community benefits charges under the *Planning Act* and, separately, the severance of the Courtyard.<sup>16</sup>

### **PART III. ISSUE**

38. The issue on this application is whether it is just and convenient to appoint a receiver immediately rather than allowing the respondents the opportunity to continue pursuing the following options for the benefit of all stakeholders including TD: (i) the severance of the Courtyard and sale of the Property; (ii) the *en bloc* sale of the Property and Adjacent Property, or (iii) a refinancing to repay TD and allow the development to proceed.

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<sup>15</sup> Wheler Affidavit, paras. 40-49, RAR, Tab 1.

<sup>16</sup> Wheler Affidavit, paras. 31, 40-49, RAR, Tab 1.

## PART IV. LAW & ARGUMENT

### A. *Legal framework*

39. The appointment of a receiver is an extraordinary remedy.<sup>17</sup> The Court has the power to appoint a receiver where it is “just or convenient to do so.”<sup>18</sup> The Court will look at whether there is a risk to the creditor’s security position that justifies the cost and disruption of a receivership.<sup>19</sup>

40. While a contractual right to appoint a receiver lessens the extraordinary nature of a receivership, the remedy is still in the discretion of the Court and depends on all the relevant circumstances:

[Where a security instrument contemplates a court-appointed receiver,] the “just or convenient” question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including 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-manager.<sup>20</sup>

41. The issue before the court involves a functional and practical analysis. As Morawetz C.J. recently explained:

In assessing whether it is “just or convenient” to appoint a receiver in these circumstances, the relevant question to be asked is, “What function would the receiver perform?”<sup>21</sup>

42. Receivership applications have been denied where:

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<sup>17</sup> *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996 CanLII 8258](#) at para. 12 (Ont. S.C., Blair J. (as he then was)) (“**Freure Village**”).

<sup>18</sup> *Bankruptcy and Insolvency Act*, [R.S.C. 1985, c. B-3, s. 243\(1\)](#).

<sup>19</sup> See e.g. *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, [2009 BCSC 1527](#) at para. 25, citing *Bennett on Receivership*, 2d ed. (Toronto: Carswell, 1999) at p. 130.

<sup>20</sup> *Freure Village* at [para. 12](#).

<sup>21</sup> *Urbancorp Management Inc. (Re)*, [2021 ONSC 3593](#) at para. 28 (“**Urbancorp**”).

- (a) despite a contractual right to appoint a receiver, the value of the collateral could not be sold “in a value-maximizing process without [the debtor’s] voluntary, active management” such that a receiver’s involvement was not just and convenient;<sup>22</sup>
- (b) the creditor had “more than adequate security” and “the receivership may well damage the [borrower’s] apparently good relations with its landlord, employees, suppliers and customers”;<sup>23</sup> and
- (c) there was an adequate alternate remedy and “the appointment of a receiver will not accomplish any real purpose and will only result in an increase in administration expenses and a likely delay in the proceedings”.<sup>24</sup>

43. Conversely, courts are more inclined to appoint receivers where the applicant demonstrates that there are “no contracts or projects that would be frustrated”.<sup>25</sup>

44. Ultimately, the “just and convenient” test involves a holistic inquiry into the commercial practicalities of appointing a receiver. In this case, the analysis leads to the clear conclusion that the appointment of a receiver will impair value, significantly prejudice innocent third parties and serve no benefit to the stakeholders.

**B. A receivership is not just and convenient**

45. The appointment of a receiver would be unworkable and prejudicial.

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<sup>22</sup> *Royal Bank of Canada v. CFNDRS Inc.*, [2017 ONSC 7661](#) at para. 16.

<sup>23</sup> *Royal Bank of Canada v. Chongsim Investments Ltd.*, [1997 CanLII 12112](#) (Ont. Gen. Div.).

<sup>24</sup> *Urbancorp* at [para. 31](#).

<sup>25</sup> See e.g. *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, [2013 ONSC 6809](#) at para. 10.

46. The respondents have articulated a credible path forward to create substantial value for numerous stakeholders and repay TD in the process. They have obtained zoning approval for a substantial project and have assembled a deep roster of sophisticated planners and other development professionals who are familiar with the project. Only the respondents can execute on this mandate – not a receiver. In the meantime, TD is extremely well-secured and there is no realistic risk of any erosion to their position, even after the repayment of any tax debt owing to the CRA.

47. Against this backdrop, the key question as articulated by Morawetz C.J. is “what function would a receiver perform?” In this case, there are only two realistic courses of action for a receiver, and neither is workable:

- (a) it could either seek to sell the Property immediately without first attempting to obtain the severance necessary to preserve the Development Project; or
- (b) it could seek to obtain the severance before any sale by replacing or attempting to retain the respondents’ team of professionals and navigating the various development issues on its own.

**1. An immediate sale would be highly prejudicial**

48. An immediate sale of the Property without obtaining the necessary severance of the Courtyard would be catastrophic to virtually every impacted stakeholder.

49. As demonstrated by the Wheler Affidavit, this scenario will likely result in (i) the termination of the Berkeley Events business as a going concern and (ii) the non-viability of the Development Project.

50. First, the termination of the Berkeley Events business would significantly affect dozens of couples' wedding plans, many of whom are scheduled to be married in the coming weeks and months. These couples will be forced to re-plan their entire weddings on short notice.<sup>26</sup>

51. The business's 100 staff members would also be prejudiced and would suddenly find themselves looking for work.<sup>27</sup>

52. Second, the consequences on the Development Project would be equally prejudicial.

53. As explained above, the Development Project requires access to the Courtyard. This is not just a matter of convenience; rather, a material portion of the condominium tower is designed to occupy the Courtyard's air space. If the Property, including the Courtyard, is sold to a third party, there will be no path forward for the project in the form it has been approved.<sup>28</sup>

54. This would prevent 144 new homes from being added to the housing supply in Toronto, a city which is desperate for new homes.<sup>29</sup>

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<sup>26</sup> Wheler Affidavit, para. 56(d), RAR, Tab 1.

<sup>27</sup> Wheler Affidavit, para. 56(e), RAR, Tab 1.

<sup>28</sup> Wheler Affidavit, paras. 35-37, 56(a), RAR, Tab 1.

<sup>29</sup> Wheler Affidavit, para. 56(c), RAR, Tab 1.

55. Moreover, Equitable has a \$20.2 million mortgage on the Development Project. The sudden frustration of the project would severely impact the market value of the lands and, in turn, Equitable's security position.<sup>30</sup>

**2. Equally unworkable to appoint a receiver to pursue the severance**

56. The other primary available course of action for a receiver – to pursue and obtain the severance of the Courtyard before selling the Property – is equally unworkable for different reasons.

57. In this scenario, a receiver would be appointed simply to do what the respondents are already doing. There is no justification in this scenario for the added expense of a receiver, or for the likely reduction in value associated with a sale by a receiver.<sup>31</sup>

58. Moreover, it is reasonable to infer that a receiver will be less capable of executing on this mandate than the existing Developers. The receiver may not be able to retain the entire team of professionals currently working on the Development Project. TD may also not be prepared to fund the necessary work.

59. Moreover, even if a receiver is capable of navigating this process successfully – and even if there were a good reason to appoint a receiver to do what the Developers are already doing (which is denied) – there would still be no answer to the other key issue, namely the presumed termination of the Berkeley Events business as a going concern, with the associated prejudice to the business's employees and clients.

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<sup>30</sup> Wheler Affidavit, para. 56(b), RAR, Tab 1.

<sup>31</sup> Wheler Affidavit, para. 55, RAR, Tab 1.

**PART V. RELIEF SOUGHT**

60. The respondents respectfully request an order dismissing this application or, in the alternative, adjourning it *sine die* to allow for the development and sale process to continue to unfold on the basis that the respondents will continue to report to the Court.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of March, 2023.



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Jeff Larry/Daniel Rosenbluth



## **SCHEDULE "A"**

### **LIST OF AUTHORITIES**

1. *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996 CanLII 8258](#) (Ont. S.C.).
2. *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, [2009 BCSC 1527](#).
3. *Urbancorp Management Inc. (Re)*, [2021 ONSC 3593](#).
4. *Royal Bank of Canada v. Chongsim Investments Ltd.*, [1997 CanLII 12112](#) (Ont. Gen. Div.).
5. *Royal Bank of Canada v. CFNDRS Inc.*, [2017 ONSC 7661](#).
6. *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, [2013 ONSC 6809](#).

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY – LAWS

#### *Bankruptcy and Insolvency Act, RSC, 1985, c. B-3*

#### **PART XI: Secured Creditors and Receivers**

##### **Court may appoint receiver**

**243** (1) Subject to subsection (1.1), 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:

- (a)** 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;
- (b)** exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c)** take any other action that the court considers advisable.

**THE TORONTO- DOMINION BANK**

Applicant

-and-

Court File No. CV-23-00693494-00CL

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**Jeffrey Larry (LSO #44608D)**  
Tel.: 416.646.4330  
Email: jeff.larry@paliareroland.com

**Daniel Rosenbluth (LSO#71044U)**  
T: 416-646-6307  
E: daniel.rosenbluth@paliareroland.com

Lawyers for the Respondents