

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

B E T W E E N:

**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

**APPLICATION UNDER SUBSECTIONS 47(1) AND 243(1) OF THE *BANKRUPTCY AND  
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE  
*COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED**

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**FACTUM OF THE APPLICANT**

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March 6, 2023

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## **PART I – OVERVIEW**

1. Each of the Respondents, 1871 Berkeley Events Inc. (“**Berkeley**”), 1175484 Ontario Inc. (“**117 Ontario**”), 111 King Street East Inc. (“**111 King**”), 504 Jarvis Inc. (“**Jarvis**”) and Southline Holdings Inc. (“**Southline**” and, collectively, the “**Debtors**”), has been in default of its obligations to the Applicant, The Toronto-Dominion Bank (“**TD**” or the “**Bank**”) since October 2022.
2. On October 11, 2022, the Bank made formal demand for payment on each of the Debtors and delivered Notices of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the “**BIA**”). Collectively, the Debtors owe the Bank over \$10 million exclusive of legal fees, disbursements and accruing interest.
3. The ten (10) day statutory period under subsection 244(1) of the BIA has long expired. Despite the Debtors’ position that the Bank is well secured, over the past five months the Debtors have been unable to repay the indebtedness or enter into any arrangements acceptable to the Bank for repayment of same.
4. Accordingly, the Bank is entitled to move to enforce its security and appoint MSI Spergel Inc. (“**MSI**”) as receiver of the Debtors’ assets, properties and undertakings (collectively, the “**Property**”).

## PART II – FACTS

5. The facts are set out in greater detail in the affidavits of Kathryn Furfaro sworn February 2, 2023 (the “**Furfaro Affidavit**”), and March 6, 2023 (the “**Second Furfaro Affidavit**”).
6. In brief:
  - (a) TD entered into credit agreements dated April 17, 2017 and August 1, 2019 with the Debtors (the “**Credit Agreements**”);<sup>1</sup>
  - (b) The credit facilities granted pursuant to the Credit Agreements are secured by, among other things, general security agreements granted by each of the Debtors (the “**GSA(s)**”,<sup>2</sup> and a first-ranking collateral charge granted by 117 Ontario (the “**Charge**”) and secured on title to the property located at 315-317 Queen Street East, Toronto (the “**Real Property**”)<sup>3</sup>;
  - (c) Each of the GSAs granted by the Debtors allows TD to appoint a receiver over the Debtors’ property upon the occurrence of an Event of Default, which is defined in each of the GSAs as when the applicable Debtor “fails to pay when due, whether by acceleration of otherwise, any of the Obligations”<sup>4</sup>;

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<sup>1</sup> Furfaro Affidavit at [para 7](#), [Exhibits G](#) and [H](#).

<sup>2</sup> Furfaro Affidavit at [para 9](#), [Exhibits I, J, K, L, M](#)

<sup>3</sup> Furfaro Affidavit at [para 9\(c\)](#), [Exhibit N](#)

<sup>4</sup> Furfaro Affidavit at [para 12](#)

- (d) The standard charge terms of the Charge further entitle TD to move for the appointment of a receiver over the Real Property in the event of a default;<sup>5</sup>
  - (e) On October 11, 2022, TD issued default letters to the Debtors. The defaults, as at that date, included failing to pay scheduled amounts of principal, interest and fees on the dates they became due, among several other non-monetary defaults;<sup>6</sup>
  - (f) On October 27, 2022, TD made formal written demand on the Debtors, which demands were accompanied by notices of intention to enforce security (the “**BIA Notices**”) delivered to the Debtors pursuant to s. 244 of the BIA;<sup>7</sup>
  - (g) As at October 25, 2022, a total of \$10,414,747.90 (exclusive of legal fees, disbursements and accruing interest) (the “**Indebtedness**”) was owing by the Debtors to TD. The Indebtedness continues to accrue.<sup>8</sup>
7. Since the issuance of the Demands more than four months ago, and despite ongoing efforts by TD to dialogue with the Debtors, the Debtors have failed or refused to (a) repay the Indebtedness or (b) enter into any arrangements acceptable to TD for repayment of the Indebtedness.<sup>9</sup>

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<sup>5</sup> Furfaro Affidavit at [para 14, Exhibit P](#)

<sup>6</sup> Fufarfo Affidavit at [para 20, Exhibit R](#)

<sup>7</sup> Furfaro Affidavit at [para 21](#); Second Furfaro Affidavit at para 5, Exhibit C.

<sup>8</sup> Furfaro Affidavit at [para 22](#).

<sup>9</sup> Furfaro Affidavit at [para 23](#)

### **PART III – ISSUES**

8. The sole issue to be determined on this Application is whether to appoint a receiver under s. 243(1) of the BIA or s. 101 of the CJA over the Property of the Debtors.

### **PART IV- LAW & LEGAL AUTHORITIES**

#### **A. Test for the appointment of a receiver under s. 243(1) of the BIA and s. 101 of the CJA**

9. Subsection 243(1) of the BIA provides that, on application by a secured creditor, a court may appoint a receiver to, *inter alia*, take possession over the assets of an insolvent person and exercise any control that the court deems advisable over that property and over the insolvent person's business, in circumstances where it is "*just or convenient*" to do so.<sup>10</sup> Similarly, the CJA enables the court to appoint a receiver where such appointment is "*just or convenient*".<sup>11</sup>
10. In determining whether it is "just or convenient" to appoint a receiver under either the BIA or the CJA, Ontario courts have applied the decision of Blair J. (as he then was) in *Bank of Nova Scotia v. Freure Village on Clair Creek*.<sup>12</sup> Blair J. held that 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,*" which includes the rights of the secured creditor under its security.<sup>13</sup>
11. In *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, this Court, citing the Supreme Court of British Columbia and *Bennett on*

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<sup>10</sup> [Bankruptcy and Insolvency Act \(R.S.C., 1985, c. B-3\)](#), s 243 [BIA].

<sup>11</sup> [Courts of Justice Act, RSO 1990](#), c C. 43 at s 101 [CJA].

<sup>12</sup> [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 (ONSC).

<sup>13</sup> [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 at [para 11](#) (ONSC).

*Receivership*, listed numerous factors which have been historically taken into account in determining whether it is appropriate to appoint a receiver:

- (a) Whether irreparable harm might be caused if no order is made, although as stated above, where the appointment is authorized by the security documentation, it is not essential for a creditor to establish that it will suffer irreparable harm if a receiver is not appointed;
- (b) The risk to the security holder of not appointing a receiver, taking into consideration the size of the debtor's equity in the assets, and the need to protect or safeguard the assets while litigation takes place;
- (c) The nature of the property;
- (d) The apprehended or actual waste of the debtor's assets;
- (e) The preservation and protection of the property pending judicial resolution;
- (f) The balance of convenience to the parties;
- (g) The fact that the creditor has a right to appointment under the loan documentation;
- (h) The enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- (i) The principle that the appointment of a receiver should be granted cautiously;
- (j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

- (k) The effect of the order upon the parties;
  - (l) The conduct of the parties;
  - (m) The length of time that a receiver may be in place;
  - (n) The cost to the parties;
  - (o) The likelihood of maximizing return to the parties; and
  - (p) The goal of facilitating the duties of the receiver.<sup>14</sup>
12. Where the enumerated rights of the secured creditor under its security include the right to seek the appointment of a receiver, the burden on the applicant is significantly relaxed. As stated by Morawetz J. (as he then was) in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*:
- ... where the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. That is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.*<sup>15</sup>
13. It is not essential that the moving party establish, prior to the appointment of a receiver, that:
- (a) It will suffer irreparable harm; or

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<sup>14</sup> [\*Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited\*](#), 2022 ONSC 6186 at [para 25](#).

<sup>15</sup> [\*Elleway Acquisitions Ltd. v. The Cruise Professionals Ltd.\*](#), 2013 ONSC 6866 at [para 27](#); [\*Bank of Montreal v. Sherco Properties Inc.\*](#), 2013 ONSC 7023 at [para 42](#).

(b) That the situation is urgent.<sup>16</sup>

14. Where the history and evidence of the behaviour of a debtor indicate that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver is warranted.<sup>17</sup>

**B. Similar cases where the Court has appointed a receiver**

15. In *Royal Bank of Canada v. Eastern Infrastructure Inc.*,<sup>18</sup> the Court granted the application commenced by Royal Bank of Canada (“RBC”) and appointed a receivership over the respondents in circumstances where, among other things:

- (a) there were “myriad creditors beside RBC”, including lien claimants and significant amounts owed pursuant to both HST and Workers’ Compensation Board (“WCB”) legislation;<sup>19</sup>
- (b) the obligations owing to RBC were significant and had long been outstanding;<sup>20</sup>
- (c) the respondents’ cash reserves and assets were being depleted without being replenished;<sup>21</sup>
- (d) there was a steady increase in liabilities having statutory priority outside of a bankruptcy (including the HST and WCB amounts);<sup>22</sup> and

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<sup>16</sup> *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 at [paras 28-29](#).

<sup>17</sup> *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 at [para 13](#) (ONSC).

<sup>18</sup> *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243.

<sup>19</sup> *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243 at [para 41](#).

<sup>20</sup> *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243 at [para 44](#).

<sup>21</sup> *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243 at [para 48](#).

<sup>22</sup> *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243 at [para 50](#).



- (e) the respondents provided no plan to repay or pay down their obligations.<sup>23</sup>
16. In *Bank of Montreal v. Sherco Properties Inc.*,<sup>24</sup> the Court appointed a receiver in circumstances where, among other things:
- (a) the terms of the security held by Bank of Montreal permitted the appointment of a receiver;
  - (b) the value of the security was continuing to erode as interest and tax arrears continued to accrue;
  - (c) over the past two years, the respondent had not been able to accomplish a refinancing or sale, and the “*time [had] come to turn the sales process over to an independent court officer*”.<sup>25</sup>
17. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*,<sup>26</sup> Business Development Bank of Canada (“**BDC**”) applied for the appointment of a receiver over the respondents, which owned and operated an inn that had experienced financial difficulties over the years, “*particularly since the economic downturn of 2008*”. The respondents were indebted to BDC for over \$2.5 million. The respondents had paid nothing on account of the BDC loans for over nine months.
18. BDC’s application was opposed by the respondents as well as Romspen Investment Corporation (“**Romspen**”), which was the second mortgagee on the respondents’ property

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<sup>23</sup> *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 243 at [para 51](#).

<sup>24</sup> *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023.

<sup>25</sup> *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 at [paras 47-48](#).

<sup>26</sup> *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONSC 1911.

after BDC. Both the respondents and Romspen sought to take on and control the sale of the property. They argued that there was sufficient equity to pay out BDC regardless of who sold the property. The respondents further argued that appointing a receiver would affect the 165 reservations that had been made for the inn that summer. *“Fifteen family reunions have been booked. The inn provides 110 summer jobs, which the respondents say will be imperilled if a receiver is appointed”*.

19. The Court granted BDC’s application to appoint a receiver for several reasons, including:
- (a) BDC was contractually entitled to the appointment of a receiver;<sup>27</sup>
  - (b) a receiver is the court's officer, with duties and obligations to both the court and to all the stakeholders, further noting:

*If stakeholders disagree about the appropriate marketing process, the court can determine what is in the interests of all of them. Similarly, if allocation issues arise concerning how sales proceeds should be allocated among assets, each with different security against them, this is something a receiver can explore, and on which it can make recommendations to the court. Ultimately, the court can decide the issue if necessary.*<sup>28</sup>
  - (c) a receivership posed two particular benefits: a stay of proceedings, and the fact that any purchaser would obtain a vesting order, thus protecting it against any potential claims from other creditors;<sup>29</sup> and
  - (d) in circumstances where there was disagreement among stakeholders about how the property should be marketed, it was appropriate to appoint a receiver.<sup>30</sup>

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<sup>27</sup> [\*Business Development Bank of Canada v. Pine Tree Resorts Inc.\*, 2013 ONSC 1911 at para 55.](#)

<sup>28</sup> [\*Business Development Bank of Canada v. Pine Tree Resorts Inc.\*, 2013 ONSC 1911 at para 52.](#)

<sup>29</sup> [\*Business Development Bank of Canada v. Pine Tree Resorts Inc.\*, 2013 ONSC 1911 at para 53.](#)

<sup>30</sup> [\*Business Development Bank of Canada v. Pine Tree Resorts Inc.\*, 2013 ONSC 1911 at para 54.](#)

**C. A receiver should be appointed in this case**

20. The Debtors do not deny that they are indebted to the Bank, or that the Bank is entitled to appoint a receiver under the terms of its Security. Rather, the Debtors argue that TD should not be entitled to the appointment of a receiver, because the Real Property has potentially greater value if it is sold together with the Adjacent Property, or after a portion of the Real Property is severed, due to its development potential.
21. This is an insufficient basis to decline to appoint a receiver. The Debtors' position must be weighed against the following facts:
  - (a) The Debtors have not paid any amounts to TD in almost five months;
  - (b) The Debtors have failed to adhere to their reporting obligations, such that TD has no information regarding the Debtors' business;
  - (c) The Debtors have been banking with other, unknown financial institutions, in breach of their covenants under the Credit Agreements;
  - (d) The Debtors have failed to advise TD of the extent of their obligations to CRA, which rank in priority to TD, or to advise of how they intend to address those obligations;
  - (e) The Debtors have not made any commitments as to the date by which they intend to sell the Real Property or make other arrangements to the Bank.
22. In effect, the Debtors are asking this Court to order an indefinite forbearance period, without making any of the commitments that a financial institution would typically demand of a defaulting borrower.

23. The Debtors have had months to make arrangements to repay TD, to deal with the Real Property, or to make other arrangements satisfactory to TD. They have failed to do so.
24. In the circumstances, the Bank is entitled to an order appointing MSI as the receiver.

**PART V – RELIEF SOUGHT**

25. In light of the foregoing, TD respectfully requests that this Court grant the receivership order attached as Tab 4 to the Application Record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 6<sup>th</sup> day of March, 2023.



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Miranda Spence



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Matilda Lici

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. [\*Bank of Montreal v. Carnival National Leasing Ltd.\*](#), 2011 ONSC 1007
2. [\*Bank of Montreal v. Sherco Properties Inc.\*](#), 2013 ONSC 7023
3. [\*Bank of Nova Scotia v. Freure Village on Clair Creek\*](#), 1996 CanLII 8258 (ONSC)
4. [\*Business Development Bank of Canada v. Pine Tree Resorts Inc.\*](#), 2013 ONSC 1911
5. [\*Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited\*](#), 2022 ONSC 6186
6. [\*Elleway Acquisitions Ltd. v. The Cruise Professionals Ltd.\*](#), 2013 ONSC 6866
7. [\*Royal Bank of Canada v. Eastern Infrastructure Inc.\*](#), 2019 NSSC 243

**SCHEDULE “B”  
RELEVANT STATUTES**

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

**PART XI**

**Secured Creditors and Receivers**

**Marginal note: 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.

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***Courts of Justice Act, RSO 1990, c. C. 43***

**Interlocutory Orders**

**Injunctions and receivers**

**101 (1)** 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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

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

Proceedings commenced at Toronto

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