

**ONTARIO
SUPERIOR COURT OF JUSTICE
[IN BANKRUPTCY]**

B E T W E E N:

**IN THE MATTER OF THE PROPOSAL OF
NEPTUNE SECURITY SERVICES INC.**

FACTUM OF THE TORONTO-DOMINION BANK

May 17, 2023

BLANEY McMURTRY LLP
Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto ON M5C 3G5

Eric Golden (LSO #38239M)
Tel: (416) 593-3927
egolden@blaney.com

Chad Kopach (LSO #48084G)
Tel: (416) 593-2985
ckopach@blaney.com

Lawyers for The Toronto-Dominion Bank

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FACTS

Overview and Relief Sought

1. The Toronto-Dominion Bank (“**TD**”) seeks an Order terminating forthwith pursuant to s. 50.4(11) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended (“**BIA**”), the 30-day stay period provided for in s. 50.4(8) which commenced on May 5, 2023 (the “**Stay Period**”) when Neptune Security Services Inc. (“**Neptune**”) filed its Notice of Intention to Make a Proposal (the “**Neptune NOI**”).
2. In the alternative, TD seeks an Order that s. 69 of the BIA no longer operates in respect of TD, pursuant to s. 69.4 of the BIA.
3. If the Stay Period is terminated, TD further seeks an Order appointing msi Spergel Inc. (“**Spergel**”) as receiver (in such capacity, the “**Receiver**”), without security, of all of the current and future assets, undertakings and property of Neptune pursuant to section 243(1) of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”).
4. TD also seeks an order pursuant to section 14.04 of the BIA substituting/appointing Spergel as the trustee in bankruptcy of Neptune effective immediately upon the termination of the Stay Period.

Neptune, the TD Loans and Related Security

5. Neptune is a private security company that operates in various provinces, and whose main source of revenue is government contracts. It recently came to TD's attention that Neptune had also began operating as a construction company.

Motion Record of TD dated May 12, 2023 ("**Record**"), affidavit of Kathryn Furfaro sworn May 12, 2023 ("**Furfaro Affidavit**"), p.15 paras 11 and 13.

6. In or about August, 2017, TD established its first loan facility for Neptune. Subsequently, in August, 2020, TD established an operating loan repayable on demand (the "**Operating Loan**") in favour of Neptune to a limit of \$5.5 million pursuant to a Demand Operating Facility Agreement between TD and Neptune dated on or about August 7, 2020, as amended on December 24, 2021, which increased the borrowing limit to \$9 million (collectively, the "**TD-Neptune Operating Loan Agreement**").

Record, Furfaro Affidavit, p. 16, para 16, and Operating Loan Agreement, Exhibit 6.

7. The Operating Loan is secured by a General Security Agreement dated July 21, 2017, over Neptune's assets and undertaking (the "**Neptune GSA**"). The Neptune GSA is first ranking security over the assets and undertaking of Neptune.

Record, Furfaro Affidavit, p. 17, para 17, and Neptune GSA, Exhibit 7.

TD's Attempt to Investigate Media Reports Against Neptune

8. On or about March 23, 2023, Neptune's account at TD was transferred to TD's Financial Restructuring Group ("**FRG**") following the first of the four investigative reports about Neptune published by the Canadian Broadcasting Corporation/Radio Canada beginning on March 23, 2023

(the “**Media Reports**”). Representatives of TD’s FRG and of Spergel attended at Neptune’s premises on April 5, 2023.

Record, Furfaro Affidavit, p. 17 para 18.

9. On April 6, 2023, an engagement letter was forwarded to Neptune (the “**Engagement Letter**”), for the purposes of TD appointing Spergel as TD’s consultant to review and assess the financial position, business and operations of Neptune, and to advise TD’s FRG in connection with Neptune’s indebtedness to TD (the “**Consultant**”). As part of Spergel’s proposed appointment as Consultant, by way letter dated April 6, 2023, Spergel also sought specific financial documentation from Neptune to commence its review and fulfill its mandate (the “**Financial Disclosure Request**”). Neptune repeatedly failed to comply the Financial Disclosure Request or execute the Engagement Letter.

Record, Furfaro Affidavit, p. 17, paras 19-21, Demand Letter, Exhibit 1, and Email Exchange April 6-24, Exhibit 9.

10. Subsequent media reports revealed that Neptune’s principal, Robert Butler, had been using two identities, but had not be named in Neptune’s corporate structure submitted to the *Autorité des marchés publics* (AMP), the agency that oversees public contracts in Quebec. The reports stated that the AMP had added Neptune to Quebec’s registry of companies inadmissible to public contracts, stating that the use of multiple numbered companies unauthorized to hold contracts allows Neptune to evade the law.

Record, Furfaro Affidavit, p. 18, para 22.

11. The media reports also revealed that Neptune had been banned for five years from accepting public contracts in Quebec (which ban has been temporarily suspended until May 18,

2023), and also barred from bidding on federal contracts. As well some of Neptune's federal contracts had been cancelled, and it had closed operations in Quebec.

Record, Furfaro Affidavit, p. 18, para 22.

TD's Demand, and Neptune's NOI

12. On April 28 2023, TD issued to Neptune its Notices of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the "**BIA**"), together with a demand letter seeking payment in full of the amounts owing under TD's loans to Neptune, being \$9,020,493.70 in respect of the Operating Loan, and \$87,906.01 in respect of a Visa credit card loan facility.

Record, Furfaro Affidavit, p. 14, paras 7 and 8, and Demand Letter, Exhibit 1.

13. On Friday May 5, 2023, being the last business day before TD's demand for payment and s. 244 BIA Notice was set to expire on Monday, May 8, 2023, Neptune filed a Notice of Intention to make a Proposal pursuant to section 50.4(1) of the BIA (the "**Neptune NOI**"). Harris & Partners was named as Proposal Trustee.

Record, Furfaro Affidavit, p. 14, para 9, and Neptune NOI, Exhibit 2.

Neptune's Financial Situation

14. The Neptune NOI reveals that Neptune is facing a priority tax claim for almost \$18 million following an assessment from Revenue Quebec, consisting of \$6,587,000.00 in unremitted QST and \$11,148,600.00 in unremitted source deductions (the "**Neptune Tax Liability**"). The Neptune NOI list of creditors also sets out TD as Neptune's only secured creditor, with a debt of \$8,968,955.78. The Proposal Trustee has recently produced tax liability documents indicating that the Neptune Tax Liability is much greater than in the Neptune NOI, with a tax claim of more than

\$34 million, consisting of \$11,029,766.65 in unremitted QST and \$23,279,767.14 in unremitted source deductions.

Record, Furfaro Affidavit, p. 19, paras 23 and 24, and List of Creditors, Exhibit 2.

Record, Furfaro Affidavit, p. 22, para 36, and Neptune tax liability documents, Exhibit 15.

15. The Neptune Tax Liability is approximately 97% of Neptune's unsecured debt, though Neptune is challenging the tax assessment. If Neptune's challenge is successful, then Neptune's indebtedness to TD represents almost all of Neptune's total indebtedness.

Record, Furfaro Affidavit, p. 19, para 25

16. Neptune's accounts receivable (the "**Neptune AR**") is its only asset of any significance in terms of enforceability and recoverability. As of April 24, 2023, the Neptune AR for Quebec was \$16,127,357.17 (most under 60 days), and \$13,754,953.66 for the rest of Canada (with almost \$5.5 million over 60 days).

Record, Furfaro Affidavit, p. 19, paras 26 and 27, and Neptune's AR ageing summaries, Exhibit 10.

Change in AR Ageing – April 24 to May 8

17. In the late evening of May 9, 2023, the Proposal Trustee provided counsel for TD with a number of Neptune's documents that had been requested by TD's counsel, including a Neptune AR aging as of May 8, 2023. This updated AR aging revealed that in two weeks since April 24, 2023, the Neptune AR had been depleted by approximately \$10 million, to \$10,600,882.16 for Quebec and \$9,567,971.83 for the rest of Canada (over half of which was over 90 days). The depletion in the Neptune AR had not been used to pay down Neptune's indebtedness to TD under the Operating Loan, which had increased from \$6,940,000.00 on April 4, 2023 to almost \$9 million as of April 28, 2023.

Record, Furfaro Affidavit, p. 20, paras 28-30, Neptune AR aging as of May 8, 2023, Exhibit 12.

18. Two other documents delivered on May 9, 2023 included Neptune's Balance Sheet and Trial Balance as of May 8, 2023 (the "**Balance Sheet and Trial Balance**"), and Profit & Loss Statement from July 1, 2022 through May 8, 2023 (the "**P & L**"). The Balance Sheet and Trial Balance and the P & L include large discrepancies in the amounts reported with respect to Neptune's obligations to Revenue Quebec - a difference of more than \$14 million compared to the Neptune Tax Liability set out in the Neptune NOI - as well as massive entries for "undeposited funds". Neptune's accounting records are not in order, and cannot be relied upon to understand Neptune's financial position.

Record, Furfaro Affidavit, pp. 20-23, paras 31-37, Balance Sheet and Trial Balance, Exhibit 13, P & L, Exhibit 14, and Neptune's tax liability documents, Exhibit 15.

19. Neptune is in breach of the terms and covenants of the TD-Neptune Operating Loan Agreement, and the Neptune GSA, the latter of which provides for the appointment of a receiver upon default.

Record, Furfaro Affidavit, p. 23, paras 38 and 39, Neptune GSA, Exhibit 7.

20. TD has lost all confidence in Neptune and its management. Under no circumstance will TD support or vote in favour of any Proposal put forward by Neptune. Given the evidence produced to date, Neptune will not be able to make a viable proposal before the expiration of the Stay Period. In any event, it will not be able to make a proposal before the expiration of the Stay Period that will be accepted by TD. TD will be materially prejudiced if the Stay Period is not immediately lifted to permit the appointment of a receiver.

Record, Furfaro Affidavit, p. 23, paras 40-43.

LAW

Jurisdiction to Terminate the Stay

21. Pursuant to s. 50.4(11) of the *BIA*, the Court may terminate the 30-day stay period provided for in s. 50.4(8) of the *BIA*, if the Court is satisfied that:

- (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
- (b) the insolvent person will not be likely able to make a viable proposal before the expiration of the period in question,
- (c) the insolvent person will not be likely able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
- (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected.

BIA, s. 50.4(11)

22. Pursuant to s. 69.4 of the *BIA*, the Court may order that the stay period does not operate in respect of a creditor if it is satisfied:

- (a) that the creditor is likely to be materially prejudiced by the continued operation of those sections; or
- (b) that it is equitable on other grounds to make such a declaration,

BIA, s. 69.4

23. When considering the question of material prejudice under s. 50.4(11)(d) or s. 69.4(a), the material prejudice referred to there in is an objective prejudice as opposed to a subjective one. That is, “it refers to the degree of the prejudice suffered vis-à-vis the indebtedness and the attendant security, and not to the extent that such prejudice may affect the creditor *qua* person.” It does not refer to the extent to which the prejudice subjectively affects the creditor.

Cumberland Trading Inc., Re, [1994 CanLII 7458](#) at para 11, cited with approval in *Fiorito v. Wiggins*, [2017 ONCA 765](#) at para 31.

Exponents Canada Inc. v. Sharma, [2014 ONSC 7097](#), at para 64

24. The prejudice to TD if the stay remains in place is objectively material. The Neptune AR, which appears to be the only likely source of recovery for the amounts owing under the Operating Loan, have been depleted by \$10 million in the two weeks between April 24, 2023, and May 8, 2023 (see paras 16 and 17, above). This material prejudice to TD, Neptune's only secured creditor, cannot be permitted to continue.

25. In any event, the test in s. 50.4(11) is disjunctive as to its four grounds, as noted by Justice Farley in *Com/Mit Hitech Services Inc., Re.* In that case, when discussing (b) and (c) – regarding the ability to make a viable proposal, or a proposal that would be accepted by the creditors, Justice Farley noted “the Bank is the overwhelming creditor and thus is in a veto position. It has seen what the Debtor has done in the past and what it is proposing to do with respect to New Clean. It is justifiably not impressed; to the contrary it has in all fairness lost all confidence in the debtor.” In that case, Justice Farley held that the Bank had made out its case for terminating the 30 day stay period.

[\[1997\] O.J. No. 3360](#) at para 9.

26. If Neptune is successful in challenging the Neptune Tax Liability, Neptune's indebtedness to TD represents almost all of Neptune's total indebtedness, TD is “in a veto position”, as described by Farley J. in *Com/Mit Hitech Services Inc., Re.* If Neptune is not successful, then the Neptune Tax Liability survives, and TD still remains Neptune's only secured creditor at almost \$9 million.

27. S. 50.4(11) can be utilized where it is clear that the debtor has no hope of making a viable proposal or a proposal acceptable to creditors even though no proposal has been filed. Where a

creditor holding sufficient votes to defeat a proposal has indicated that it will not accept a proposal, that will be sufficient to satisfy s. 50.4(11)(c).

Bankruptcy and Insolvency Law of Canada, 4th Edition, [§ 4:6. Termination of Notice of Intention and Stay](#), citing *Cumberland Trading Inc., Re*, [1994 CanLII 7458](#)

Jurisdiction and Test for Appointing a Receiver

28. The appointment of a receiver is governed by section 243 of the BIA and section 101 of the CJA, which expressly provide that a Court may appoint a receiver where it is “just or convenient to do so”.

BIA, s. 243, and CJA s. 101

29. In determining whether it is “just or convenient” to grant the request of a secured creditor to have a receiver appointed, the Court should have regard to all of the circumstances of the case, and in particular:

- (a) The nature of the property over which the receiver is to be appointed
- (b) the rights and interests of all parties in relation to the property over which the receiver is to be appointed; and
- (c) whether the secured party has a right under its security to appoint a receiver.

Bank of Nova Scotia v. Freure Village of Clair Creek, [1996 CanLII 8258](#) at para 10, *Bank of Montreal v. Carnival National Leasing Ltd.*, [2011 ONSC 1007](#) at para 23 and 24.

30. Applied herein, these factors support granting the relief sought. TD’s security provides for the appointment of a receiver in the circumstances. Given the depletion of AR - \$10 Million over the last two weeks, and the significant and increasing indebtedness under the Operating Loan, Neptune cannot realistically be expected to take the steps necessary to protect its estate. Absent intervention, the AR will continue to decrease, and the Operating Loan debt will continue to climb.

Substitution of the Trustee

31. Pursuant to s. 14.04 of the BIA, the Court may for cause remove a trustee and appoint another trustee in the trustee's place.

BIA s. 14.04

32. "Cause" under s. 14.04 is not limited to a lack of impartiality or unreasonable conduct. It will also exist where circumstances prevent the creditors from working in harmony with the trustee.

Bankruptcy and Insolvency Law of Canada, 4th Edition, [§ 2:22. Appointment and Substitution of Trustees – Removal of Trustee by the Court and Appointment of a Substitute](#), and *Bank of Montreal v. A.C. Poirier & Associates Inc.*, [2008 CarswellNB 194](#) at para 37

33. As well, the pending receivership requested by TD will, absent an order substituting the trustee, result in two separate licensed trustees administering the bankruptcy and the receivership, which is not cost effective or desirable.

ORDER SOUGHT

34. TD accordingly seeks an order terminating the stay period under the NOI, appointing Spergel as receiver over Neptune substantially in the form attached as Schedule "A" to the Amended Notice of Motion, and substituting/appointing Spergel as the trustee in bankruptcy of Neptune effective immediately upon the termination of the Stay Period.

May 17, 2023

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:



ERIC GOLDEN/CHAD KOPACH
Lawyers for The Toronto-Dominion Bank

SCHEDULE A

Cumberland Trading Inc., Re, [1994 CanLII 7458](#)

Fiorito v. Wiggins, [2017 ONCA 765](#)

Exponents Canada Inc. v. Sharma, [2014 ONSC 7097](#)

Com/Mit Hitech Services Inc., Re [\[1997\] O.J. No. 3360](#)

Bank of Nova Scotia v. Freure Village of Clair Creek, [1996 CanLII 8258](#)

Bank of Montreal v. Carnival National Leasing Ltd., [2011 ONSC 1007](#)

Bank of Montreal v. A.C. Poirier & Associates Inc., [2008 CarswellNB 194](#)

SCHEDULE B

STATUTES AND REGULATIONS

Bankruptcy and Insolvency Act

R.S.C., 1985, c. B-3

...

Removal and appointment

14.04 The court, on the application of any interested person, may for cause remove a trustee and appoint another licensed trustee in the trustee's place.

...

Where assignment deemed to have been made

50.04(8) Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),

(a) the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

...

Court may terminate period for making proposal

50.04(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual

expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

...

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.

...

Court may declare that stays, etc., cease

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

- (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
- (b) that it is equitable on other grounds to make such a declaration.

...

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.

...

Courts of Justice Act, R.S.O. 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).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

...

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FACTUM OF THE TORONTO-DOMINION BANK

BLANEY McMURTRY LLP

Barristers & Solicitors
2 Queen Street East, Suite 1500
Toronto ON M5C 3G5

Eric Golden (LSO #38239M)

Tel: (416) 593-3927
egolden@blaney.com

Chad Kopach (LSO #48084G)

Tel: (416) 593-2985
ckopach@blaney.com

Lawyers for The Toronto-Dominion Bank