Court File No. CV-23-00705871-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

-and-

TORONTO COSMETIC CLINIC INC.

Respondent

FACTUM OF THE APPLICANT

(Application Returnable November 1, 2023)

October 27, 2023

HARRISON PENSA LLP
Barristers & Solicitors
130 Dufferin Avenue, Suite 1101
London, ON N6A 5R2

Timothy C. Hogan (LSO #36553S)
Melinda Vine (LSO #53612R)

Tel: (519) 661-6743
Fax: (519) 667-3362
Email: thogan@harrisonpensa.com
mvine@harrisonpensa.com

Lawyers for the Applicant,
The Toronto-Dominion Bank

TO: Service List

Court File No. CV-23-00705871-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

-and-

TORONTO COSMETIC CLINIC INC.

Respondent

PART I – THE MOTION

The Applicant, The Toronto-Dominion Bank (the "**Bank**") seeks the following Order, substantially in the form attached as Schedule "A" (the "**Appointment Order**") to the Notice of Application:

a) Appointing msi Spergel inc. as Receiver ("**Spergel**" or the "**Receiver**"), without security, of all of the assets, undertakings and properties of the Respondent, Toronto Cosmetic Clinic Inc. (the "**Debtor**") acquired for, or used in relation to physician-directed surgery clinic carried on by the Debtor;

b) That the time for service, filing and confirming of the Notice of Application and the Application Record be abridged and validated so that this application is properly returnable today and dispensing with further service thereof; and,

c) Such further and other relief as to this Honourable Court may seem just.

<u>The Position of the Bank</u>

1. It is the Bank's position that the present circumstances are an appropriate case for the appointment of the Receiver, including the following (all capitalized terms as defined herein):

    a) The Bank is a secured creditor of the Debtor pursuant to the GSA and has an interest in assets of the Debtor under the Lease Agreement;

    b) The Debtor defaulted under the terms of the Financing (which includes an operating facility payable on demand), as a result of, *inter alia*, the failure by the Debtor to maintain the required Debt Service Coverage Ratio in accordance with the Letter Agreement, the delivery to the Bank of misleading, false and/or otherwise inaccurate financial information and reporting, and operating in excess of the authorized credit limits and incurring obligations and making payments from its operating account with the Bank in excess of the deposits;

    c) The Debtor has failed to cure the Defaults, and the Demands issued by the Bank have expired;

    d) In the face of the expired Demands, the Debtor is insolvent. No further terms of credit nor forbearance is available to the Debtor from the Bank. It is necessary for the protection of the Debtor's estate that a Receiver be appointed;

    e) The Bank's Security provides the Bank with the right to appoint a Receiver over all property of the Debtor, as a result of the Defaults; and,

    f) A Receiver will also be required to preserve the property of the Debtor and complete the orderly sale of same, and to ensure that the proceeds of any such sale are applied to the Debtor's obligations. In relation to any such sale, the Appointment of Receiver is also necessary to deal with the subsequent claims to the proceeds.

2. Further, it is the Bank's position that the appointment of the Receiver is necessary due to the following issues highlighted in the Spergel Report (as defined herein):

    a) The Debtor consistently overreported revenue and assets in financial statements provided to the Bank;

    b) The Debtor consistently underreported liabilities in financial statements provided to the Bank; and,

    c) The Debtor consistently overreported net profit in financial statements provided to the Bank.

    As a result of the Debtor's inaccurate reporting to the Bank, it is the Bank's position that a Receiver is necessary to determine the accurate status of the books and records of the Debtor, and determine the actual state of the assets of the Debtor.

3. The Bank is further concerned that in the absence of a Receiver:

    a) Behnaz can draw excess funds out of the Debtor by way of shareholder dividend or salary; and,

    b) The Debtor can further erode the Bank's security position by failing to make remittances as required by the Canada Revenue Agency ("**CRA**").

PART II – FACTS/OVERVIEW

4. The Debtor is a company incorporated pursuant to the laws of the Province of Ontario, with its registered office located in the City of Toronto, Ontario, carrying on business as a physician-directed surgery clinic from a rented space located at 5400 Yonge Street, Toronto, ON.

Reference: Affidavit of Matthew Searle, sworn September 11, 2023, at para 2 and Exhibit "A" thereto (the "Searle Affidavit").

5. Behnaz Yazdanfar ("**Behnaz**") and Sina Kashani ("**Sina**") are the principals of the Debtor and guarantors of the Obligations in relation to the Financing, as defined herein, to the Debtor.

Reference: Searle Affidavit at paras 3 and 4.

6. The Debtor is insolvent, and is currently in default (a "**Default**", or the "**Defaults**") of its obligations to the Bank as a result of the following:

   a) failure by the Debtor to maintain the required Debt Service Coverage Ratio of not less than 120% at all times in accordance with the Letter Agreement;

   b) delivery to the Bank of misleading, false and/or otherwise inaccurate financial information and reporting, which could result in a material adverse change in the Debtor's operations and financial position, as detailed herein; and,

   c) operating in excess of the authorized credit limits under the Letter Agreement and incurring obligations and making payments from its operating account with the Bank in excess of deposits.

Reference: Searle Affidavit at para 6.

<u>The Obligations to the Bank and Security Held</u>

7. As of August 25, 2023, the Debtor was indebted to the Bank in the amount of $2,135,719.65, plus accruing interest and the Bank's continuing costs of enforcement including legal and professional costs (the "**Obligations**"), in respect of certain financing advanced to the Debtor pursuant to the terms of a Letter Agreement dated January 16, 2019 (the "**Letter Agreement**")

and a Master Equipment Leasing Agreement dated February 8, 2019 (the "**Lease Agreement**").

Reference: Searle Affidavit, at para 8 and Exhibits "B" and "C" thereto.

8. The credit facilities established by the Letter Agreement are:

    a) Operating Loan: with a maximum credit limit of $1,000,000.00 (the "**Operating Loan**"), on which the sum of $794,646.68 is owing as at August 25, 2023, 2023; and,

    b) Committed Reducing Term Facility: in the amount of $1,800,000.00 (the "**Term Loan**"), on which the sum of $1,197,278.91 is owing as at August 25, 2023.

Reference: Searle Affidavit, at para 9.

9. The Debtor was indebted to the Bank as at August 25, 2023 on the Lease Agreement in the sum of $5,976.49 (including HST).

(6 (a) – (b) and 7 collectively, the "**Financing**").

Reference: Searle Affidavit, at para 10.

10. Further, a loan in the amount of $40,000.00 was advanced to the Debtor under the Canada Emergency Business Account (loan offered by the Government of Canada), on which the amount of $40,000.00 is owing and repayable to the Bank.

Reference: Searle Affidavit, at para 11.

11. As consideration for the Financing, the Debtor requested and did receive a the following guarantees:

    a) Guarantee dated August 17, 2017, from Sina, unlimited in sum; and,

b) Guarantee dated October 21, 2015, from Behnaz, unlimited in sum.

(collectively, the "**Guarantees**").

Reference: Searle Affidavit, at para 12.

12. The Financing is secured by, *inter alia*, the following:

a) General Security Agreement from the Debtor dated October 19, 2015 (the "**GSA**"); and,

b) Title reservation and security pursuant to the Lease Agreement.

(collectively, the "**Security**").

Reference: Searle Affidavit, at para 13 and Exhibit "D" thereto.

The Bank's Security Interest in The Personal Property of the Debtor

13. The GSA secures all personal property of the Debtor. Pursuant to the Lease Agreement, the Bank holds a purchase-money security interest in the Equipment. The Bank has registered Financing Statements as against the Debtor pursuant to the provisions of the *Personal Property Security Act* (Ontario) to perfect its security interest in the personal property of the Debtor secured under the GSA and the Lease Agreement.

Reference: Searle Affidavit, at paras 14-17, and Exhibit "E" thereto.

Defaults and Demands

14. The Debtor is insolvent, and has defaulted under the Financing, as set out above, which defaults continue.

Reference: Searle Affidavit, at paras 19-23 and Exhibits "F", "G" and "H" thereto.

15. On June 29, 2022, and as a result of the Default, the Bank did issue a letter to the Debtor, advising that the Debtor was in default of the terms of the Financing and requiring that the Debtor comply with the terms of the Financing (the "**June Default Letter**").

Reference: Searle Affidavit, at para 19 and Exhibit "F" thereto.

16. Following receipt of the June Default Letter, the Debtor advised the Bank that certain financial reporting delivered to the Bank by the Debtor may have been inaccurate. The Bank was further advised via telephone call from Behnaz that the Debtor had entered into a Memorandum of Understanding with GraceMed LP with respect to the potential acquisition by GraceMed LP of the assets and business of the Debtor.

Reference: Searle Affidavit, at para 20.

17. On July 18, 2022, the Bank issued a letter to the Debtor, advising that the Debtor remained in default of the terms of the Financing by virtue of the Defaults as well as in inaccurate financial reporting and potential sale to GraceMed LP without the Bank's consent and requiring immediate repayment of the Debtor's indebtedness (the "**July Default Letter**").

Reference: Searle Affidavit, at para 21.

18. On August 18, 2022, as a result of the Debtor's continuing defaults, the Bank did issue a letter to the Debtor advising that the Debtor had committed additional defaults under the Financing by failing to repay outstanding amounts owing to the Bank, failing to provide the Bank or its agent access to its financial reporting, and operating in excess of authorized credit limits under the Letter Agreement (the "**August Default Letter**").

Reference: Searle Affidavit, at para 22, and Exhibit "H" thereto.

19. The Debtor failed and/or refused to pay the Obligations following receipt of the Bank's letters.

Reference: Searle Affidavit at para 23.

20. As a result of the Defaults, the Bank delivered to the Debtor a demand for payment and a Notice of Intention to Enforce Security pursuant to section 244(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**"), each dated August 22, 2022, with respect to the indebtedness then owing (the "**Demand**"). All statutory notice periods in relation to the Demand have expired.

Reference: Searle Affidavit, at para 24, and Exhibit "I" thereto.

21. As the Guarantees were payable on demand, on August 22, 2023, the Bank also issued demands for payment to Behnaz and Sina (the "**Guarantor Demand**").

Reference: Searle Affidavit, at para 25, and Exhibit "J" thereto.

22. The Bank did deliver a subsequent demand for payment and Notice of Intention to Enforce Security to the Debtor, both dated August 28, 2023, pursuant to the *BIA* (the "**Second Demand**"). The Second Demand was issued one year after the Demand as a result of attempts to negotiate terms with the Guarantors which ultimately failed.

Reference: Searle Affidavit, at para 26 and Exhibit "K" thereto.

23. The Bank has commenced a court action against each of the Guarantors by way of Statement of Claim dated December 12, 2022. The Guarantors have denied liability under their respective guarantees and have crossclaimed against each other.

Reference: Searle Affidavit, at para 28.

24. Behnaz has served and filed a Statement of Defence which alleges that she was persuaded by Sina to provide the Behnaz Guarantee and that the Behnaz Guarantee was obtained through undue influence exerted by Sina and that the Bank had actual or constructive knowledge of this. Behnaz has also denied that the Behnaz Guarantee is held in support of the Letter Agreement.

Reference: Searle Affidavit, at paras 29 and 30.

25. The Bank did engage Spergel as its agent to review the finances of the Debtor. Following its engagement, Spergel produced a report to the Bank dated December 15, 2022 (the "**Spergel Report**").

Reference: Searle Affidavit, at para 31 and Exhibit "L" thereto.

26. The Spergel Report identified that in addition to the Defaults, the Debtor is currently indebted to the Canada Revenue Agency for source deductions and HST which constitutes a further default of the Financing. The Spergel Report additionally confirmed that significant variances exist between the financial statements provided to the Bank by the Debtor and the tax returns filed by the Debtor including the consistent overreporting of net profit by the Debtor in its financial statements.

Reference: Searle Affidavit, at paras 32 and 33.

27. The Spergel Report specifically identified the following issues which are of significant concern to the Bank:

    a) The Debtor consistently overreported revenue and assets on the financial statements provided to the Bank when compared to the tax returns submitted to CRA;
    b) The Debtor consistently underreported liabilities on the financial statements provided to the Bank when compared to the tax returns submitted to CRA; and,

c) The Debtor consistently overreported net profit on the financial statements provided to the Bank when compared to the tax returns submitted to CRA.

Reference: Searle Affidavit, at paras 31-33.

The Appointment of a Receiver

28. The Obligations due pursuant to the Demand and Second Demand have not been paid. The ten (10) day period under section 244 of the BIA has expired. The Debtor in default of the Financing. The Bank is unwilling to provide any further forbearance or credit to the Debtor. The Bank is in a position to appoint a receiver over the assets and property of the Debtor as secured by the Bank's Security, pursuant to section 243 of the BIA.

Reference: Searle Affidavit, at paras 34 and 35.

29. The GSA grants the Bank the right to appoint a Receiver over all personal property of the Debtor, as a result of the Defaults of the Debtor under the Financing.

Reference: Searle Affidavit, at paras 36 to 37.

30. Spergel has consented to act as Receiver, should this Honourable Court so appoint it.

Reference: Furfaro Affidavit, at para 46.

PART III – ISSUES, LAW AND ARGUMENT

Issues

31. The issues before this Court, and addressed below, are:

a) Does this Court have jurisdiction to appoint the Receiver?

b) Should this Court appoint the Receiver?

c) If this Court decides to appoint the Receiver, then are the terms of the Receivership Order appropriate in the circumstances of this receivership?

(a) This Court has jurisdiction to appoint the Receiver

32. Subsection 243(5) of the BIA provides that an application under subsection 243(1) of the BIA is to be filed in a court having jurisdiction in the judicial district of the "locality of the debtor", which is defined in section 2 of the BIA.

BIA, s. 2, Schedule "B"; BIA, s. 243(5), Schedule "B".

33. The Debtor is an Ontario corporation with its registered office in Toronto, Ontario. The business carried on by the Debtor that is subject to the proposed receivership includes premises located in Toronto, Ontario. The locality of the Debtor is, therefore, Ontario, and this application is properly brought before the Ontario Superior Court of Justice (Commercial List).

34. Subsection 243(4) of the BIA provides that only a trustee, as defined in section 2 of the BIA, may be appointed under subsection 234(1) of the BIA.

BIA, s. 2, Schedule "B"; BIA, s. 243(4), Schedule "B".

35. Spergel is a trustee as defined in the BIA, and therefore, satisfies the requirements for appointment pursuant to the BIA.

(b) This Court should appoint the Receiver

36. Section 244(1) requires that a secured creditor provide an insolvent person with the requisite advance notice of its intention to enforce security.

BIA, s. 244(1), Schedule "B".

37. The Applicant sent the Demand and Second Demand together with its Notice of Intention to Enforce Security pursuant to such section of the BIA, to the Debtor on August 22, 2022 and August 28, 2023, and this application is being heard on a date that is after the date on which any applicable notice periods expired.

38. Section 101 of the *Courts of Justice Act,* R.S.O. 1990, c. C-43, as amended (the "**CJA**") provides for the appointment of a receiver by this Court where it is "just and convenient". Section 243(1) of the BIA also provides that, on an application by a secured creditor, this Court may appoint a receiver if it considers it to be just and convenient to do so to: (a) take possession over the assets of an insolvent person; (b) exercise any control that the Court considers advisable over the property and business; or (c) take any other action that the Court considers advisable.

CJA, s. 101, Schedule "B"; **BIA, s. 243(1) and 243(2), Schedule "B".**

39. Where the loan agreement and related transaction documents contemplate the appointment of a receiver, this Court may have regard to the principles summarized by Justice Newbould in *RMB Australia Holdings Limited v. Seafield Resources Ltd*:

> 28 In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was just or convenient, 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. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:
>
> > While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the

> "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, 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.

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

> ...while 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. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, supra, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List].
>
> **RMB Australia Holdings Limited v. Seafield Resources Ltd., 2014 ONSC 5205 (CanLII), paras. 28-29.**

40. The existence of a contractual right to appoint a receiver in the loan agreement and related transaction documents is key and transforms the appointment of a receiver from an extraordinary remedy to relief that is granted more as a matter of course, especially in cases in which the circumstances further support such an appointment. That is the case here.

41. With this lower burden, the following additional "just or convenient" factors identified by Justice Farley in *Confederation Life Insurance Co. v. Double Y Holdings Inc.* may be considered:

a) The lenders' security is at risk of deteriorating;

b) There is need to stabilize and preserve the Debtor's business;

c) Loss of confidence in the Debtor's management; and,

d) Positions and interests of other creditors.

> ***Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List)) ["*Confederation Life*"], paras. 19-24, Tab 1 of the Applicant's Book of Authorities.**

42. It is not essential that the moving party/secured creditor establish that it will suffer irreparable harm if a receiver/manager is not appointed.

> ***Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49 at paragraph 28, Tab 2 of the Applicant's Book of Authorities.**

43. When the above *Confederation Life* factors are applied to this case, the Applicant submits that the burden to appoint a receiver has been met and that such appointment is just and convenient in the circumstances:

a) ***The Debtor contractually agreed to the appointment of a receiver.*** The loan agreements and the related transaction documents among the Applicant and the Debtor expressly entitle the Applicant to appoint a receiver under certain circumstances, including the present circumstances. The Applicant now exercises these entitlements, subject to this Court's authority.

b) ***The loan agreement is in default.*** As set out above, events of default have occurred and are continuing under the loan agreement and the related transaction documents. The Applicant has demanded on the indebtedness. The Applicant provided the Debtor with statutory notice of their intention to enforce security, and the applicable notice periods have elapsed.

c) ***The lenders' security is at risk of deteriorating.*** The Debtor has incurred liabilities to CRA for failing to make required remittances. Absent the appointment of the Receiver, the Debtor can further erode the Bank's security position by failing to make additional required remittances to CRA.

d) ***The Debtor's business needs to be stabilized and preserved.*** A receiver will be able to take the necessary steps to preserve the Security, including conducting an orderly sale process that will generate recoveries for creditors. If the Security is not preserved, there will be further negative consequences. The Debtor's liquidity crisis will continue to worsen in the absence of action.

e) ***The Applicant has lost confidence in the Debtor's management.*** The Applicant has made efforts to explore alternatives to a receivership, without success. The Applicant has justifiably lost confidence in the management of the Debtor due to the events described in the Searle Affidavit and the Spergel, including failing to provide the Applicant various information, as requested, to ensure the Applicant's security is not at risk of deteriorating, and the Debtor's provision to the Bank of falsified financial statements. Without the continued monitoring of the books and records of the Debtor by the Receiver, it cannot be determined if there is any current or future recover available to the Bank. Additionally, in the absence of the appointment of the Receiver, the principals of the Debtor can draw excess funds out of the company by way of shareholder dividend or salary.

f) ***Position and interests of other Creditors.*** The Applicant is not the only creditor of the Debtor. As at the date of this Factum, no creditor has opposed the receivership application. The Receiver will be able to properly and equitably deal with the interests of creditors other than the Applicant. A receivership provides parties with an effective forum in which to deal with any issues, including any competing claims, that may arise in respect of the Debtor and its property.

44. As at the date of this Factum, the Applicant is not aware of any restructuring efforts by the Debtor that stands any reasonable chance of success.

(c) The Terms of the Receivership Order are Appropriate

45. The terms of the proposed Receivership Order are substantially the same as the terms of the Commercial List's model receivership order, and the modifications to same are indicated in the blacklined copy provided.

> **Blackline of the draft Order against the Model Receivership Order; Application Record, Tab 1, Schedule "A-2".**

PART IV – ORDER REQUESTED

46. For the reasons set forth herein and in the Application Record, it is respectfully submitted that the appointment of a receiver is just and convenient and is necessary for the protection of the estate of the Debtor and the interests of the Bank and other stakeholders.

47. The Bank respectfully requests that this Honourable Court grant the Appointment Order substantially in the form attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2023

HARRISON PENSA LLP
Barristers & Solicitors
130 Dufferin Avenue, Suite 1101
London, ON N6A 5R2

Timothy C. Hogan (LSO #36553S)
Melinda Vine (LSO #53612R)

Tel: (519) 661-6743
Fax: (519) 667-3362
Email: thogan@harrisonpensa.com
mvine@harrisonpensa.com

Solicitors for the Applicant,
The Toronto-Dominion Bank

SCHEDULE "A"

LIST OF AUTHORITIES

1. *RMB Australia Holdings Limited v. Seafield Resources Ltd.,* 2014 ONSC 5205 (CanLII);

2. *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List));

3. *Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

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.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

(f) is appointed under subsection (1); or

(g) is appointed to take or takes possession or control — 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 — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition *receiver* in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

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

Injunctions and receivers

101. (1) In the Superior Court of Justice, an interlocutory 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.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

THE TORONTO-DOMINION BANK	v.	TORONTO COSMETIC CLINIC INC.
Applicant		Respondent

Court File No. CV-23-00705871-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE APPLICANT

HARRISON PENSA LLP
Barristers & Solicitors
130 Dufferin Avenue, Suite 1101
London, Ontario N6A 5R2

Timothy C. Hogan (LSO #36553S)
Melinda Vine (LSO #53612R)

Tel : (519) 661-6743
Fax: (519) 667-3362
Email: thogan@harrisonpensa.com
mvine@harrisonpensa.com

Lawyers for the Applicant,
The Toronto-Dominion Bank