

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

B E T W E E N:

THE TORONTO-DOMINION BANK

Applicant

- and -

**2743732 ONTARIO INC., SERGEI HOMIAKOV and IRENA GORZHALTSAN aka
IRENA HOMIAKOV**

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**

FACTUM OF THE APPLICANT

May 3, 2023

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PART I – OVERVIEW

1. 2743732 Ontario Inc. (the “**Debtor**”) has been in default for non-payment under its loan arrangements with The Toronto-Dominion Bank (“**TD Bank**”) since January 2023.¹ TD Bank holds first-ranking security on all of the property of the Debtor, including the real property municipally known as 162 Front Street, Sturgeon Falls, Ontario, P2B 2H8 and legally described as PT LT 3 CON 1 SPRINGER PT 4 - 6 36R6873 SRO & PT 4 - 6 36R7620; WEST NIPISSING; DISTRICT OF NIPISSING (the “**Real Property**”).

2. On March 30, 2023, TD Bank made formal demand for repayment on the Debtor and delivered a Notice of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the “**BIA**”).² As of March 29, 2023, the Debtor owes \$2,797,182.14 to TD Bank (the “**Indebtedness**”). This amount is exclusive of legal fees, disbursements and interest accruing from March 29th.³

3. The ten (10) day statutory period under subsection 244(1) of the BIA has now expired. The Debtor has failed or refused to repay the Indebtedness or enter into any arrangements acceptable to TD Bank for repayment of same. Accordingly, TD Bank is entitled to move to enforce its security and appoint msi Spergel Inc. (“**Spergel**”) as receiver of the Debtors’ assets, properties and undertakings, including the Real Property (collectively, the “**Property**”).

¹ Affidavit of Amanda Bezner sworn April 27, 2023 at para 22 [“**Bezner Affidavit**”].

² Bezner Affidavit at para 23.

³ Bezner Affidavit at para 24.

PART II – FACTS

4. The Debtor is a company incorporated pursuant to the laws of the Province of Ontario, with its stated registered office in Richmond Hill, Ontario, L4C 2A7.⁴

5. The Debtor operated a gas station at the Real Property. In addition to gasoline and diesel, it also sold other products under the Mobil banner, and had an associated convenience store. TD Bank understands that the Debtor has recently ceased operations. The Debtor also has two commercial tenants at the Real Property that carry on business as an automobile repair shop and a pizza restaurant, respectively, pursuant to lease agreements.⁵

6. The Debtor is indebted to TD Bank in connection with certain credit facilities made available by TD Bank to the Debtor (the “**Credit Facilities**”) pursuant to and under the terms of a letter of agreement dated August 13, 2021 (as amended, replaced, restated or supplemented from time to time, the “**Credit Agreement**”).⁶

7. The obligations of the Debtor are secured by:

- (a) a general security agreement dated September 10, 2021, which grants to TD Bank, among other things, a security interest in any and all of the property, assets and undertakings of the Debtor, registration in respect of which was duly made pursuant to the *Personal Property Security Act* (Ontario);

⁴ Bezner Affidavit at para 3.

⁵ Bezner Affidavit at paras 6-7.

⁶ Bezner Affidavit at para 9.

(b) a collateral charge/mortgage granted by the Debtor in the amount of \$3,035,000.00 in respect of the Real Property, which was registered on title on September 14, 2021 as instrument no. BS204267; and

(c) a General Assignment of Rents & Leases dated September 14, 2021, granted by the Debtor in respect of the Real Property, which was registered on title on September 14, 2021 as instrument no. BS204268,

(collectively, the “**Security**”).⁷

8. TD Bank is the only party with a registered security interest against the Debtor.⁸

9. The Credit Facilities made available pursuant to the Credit Agreement are repayable on demand upon the occurrence of an event of default. There have been one or more defaults by the Debtor under the Credit Agreement, including, without limitation, the failure to make any scheduled payments towards outstanding principal and interest since January 2023.⁹

10. Following the defaults under the Credit Agreement, TD Bank made formal written demand on the Debtor by letter dated March 30, 2023 and delivered a Notice of Intention to Enforce Security pursuant to subsection 244(1) of the BIA.¹⁰

⁷ Bezner Affidavit at para 11.

⁸ Bezner Affidavit at para 12.

⁹ Bezner Affidavit at paras 20, 22.

¹⁰ Bezner Affidavit at para 23.

PART III – ISSUES

11. The legal 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 Debtor.

PART IV- LAW & LEGAL AUTHORITIES

A. Spergel should be appointed as the receiver of the Property:

(i) *The test for the appointment of a receiver under s. 243(1) of the BIA and s. 101 of the CJA*

12. 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.¹¹ Similarly, the CJA enables the court to appoint a receiver where such appointment is "*just or convenient*".¹²

13. 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*.¹³ 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.¹⁴

¹¹ [Bankruptcy and Insolvency Act \(R.S.C., 1985, c. B-3\)](#), s 243 [BIA].

¹² [Courts of Justice Act, RSO 1990](#), c C. 43 at s 101 [CJA].

¹³ [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 (ONSC).

¹⁴ [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 at [para 11](#) (ONSC).

14. In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, the Supreme Court of British Columbia, citing *Bennett on Receivership*, listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver:

- (a) Whether irreparable harm might be caused if no order is made, although, 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;¹⁵
- (b) The risk to the security holder, taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of 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;

¹⁵ [*Re 2806401 Ontario Inc. o/a Allied Track Services Inc.*, 2022 ONSC 5509 at para 15.](#)

- (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.¹⁶

15. 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.*¹⁷

16. It is not essential that the moving party establish, prior to the appointment of a receiver, that:

- (a) It will suffer irreparable harm; or

¹⁶ [Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.](#), 2009 BCSC 1527 at [para 25](#); See also [Re 2806401 Ontario Inc. o/a Allied Track Services Inc.](#), 2022 ONSC 5509 at [para 13](#).

¹⁷ [Elleway Acquisitions Ltd. v. The Cruise Professionals Ltd.](#), 2013 ONSC 6866 at [para 27](#).

(b) That the situation is urgent.¹⁸

17. 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.¹⁹

(ii) The application of the test for the appointment of a receiver

18. Pursuant to the security documents granted by the Debtor to TD Bank, TD Bank is entitled to have a receiver appointed over the Debtor upon any default under the Credit Agreement or the Security. Accordingly, the appointment of a receiver in this case is not an extraordinary measure, it is simply the result of enforcing the contractual terms assented to by the Debtor.

19. Notwithstanding that fact, it is just or convenient to appoint a receiver in the circumstances. The Indebtedness owing to TD Bank exceeds \$2,797,182.14 and continues to accrue. Given this quantum, the appointment of a receiver is necessary to preserve the value of the Debtor's remaining assets, including securing the Real Property and safeguarding any funds generated from the operation of the Debtor's business from the Real Property. TD Bank believes that there are arrears of priority payables, including to Canada Revenue Agency and in respect of property taxes, which will continue to deteriorate without intervention. Given the Debtor's predicament, TD Bank's ability to realize on its Security may become moot, or at least not as fruitful, if the Debtor is permitted to continue operating independently, without the direct oversight of a receiver.

¹⁸ [*Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 at paras 28-29.](#)

¹⁹ [*Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 at para 13 \(ONSC\).](#)

20. TD Bank has limited visibility on the business operations and financial outlook of the Debtor. The Debtor has failed to make the scheduled payments under the Credit Agreement since January 2023. Despite ongoing efforts by Spergel, as agent for TD Bank, to dialogue with the Debtor, the Debtor has failed or refused to (a) acknowledge TD Bank's correspondence, (b) repay the Indebtedness in full or (c) enter into any arrangements acceptable to TD Bank for the full payment of the Indebtedness. Accordingly, TD Bank has reason to believe that if the status quo remains, it will continue to encounter difficulties with the Debtor in its efforts to enforce its rights under the Security.

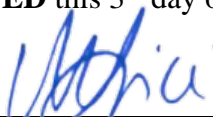
21. There is urgency to the relief sought by the Debtor, given the nature and use of the property as a gas station, and the fact that the business operations of the Debtor appear to have been abandoned. The appointment of a receiver is necessary to secure the Real Property.

22. Accordingly, TD Bank respectfully submits that the appointment of Spergel as receiver of the Debtor is appropriate in the circumstances.

PART V – RELIEF SOUGHT

23. In light of the foregoing, TD Bank respectfully requests that this Court grant the aforementioned relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of May, 2023.



Matilda Lici

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Bank of Montreal v. Carnival National Leasing Ltd.*](#), 2011 ONSC 1007
2. [*Bank of Nova Scotia v. Freure Village on Clair Creek*](#), 1996 CanLII 8258 (ONSC)
3. [*Elleway Acquisitions Ltd. v. The Cruise Professionals Ltd.*](#), 2013 ONSC 6866
4. [*Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*](#), 2009 BCSC 1527
5. [*Re 2806401 Ontario Inc. o/a Allied Track Services Inc.*](#), 2022 ONSC 5509

**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.

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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Proceedings commenced at Toronto

FACTUM OF THE APPLICANT
(Application returnable May 9, 2023)

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