Court File No. : CV-25-00743600-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

THE TORONTO-DOMINION BANK

Applicant

and

DAYMAK INC.

Respondent

APPLICATION UNDER Section 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 22, 2025

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(as at May 22, 2025)

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FACTUM OF THE APPLICANT

PART I - INTRODUCTION

1. The Toronto-Dominion Bank ("**TD**" or the "**Bank**") brings this application for the appointment of Albert Gelman Inc. ("**AGI**") as court-appointed receiver (the "**Receiver**") over the Respondent, DAYMAK Inc. (the "**Debtor**") under section 243 of the *Bankruptcy and Insolvency Ac* (the "**BIA**")[1] and section 101 of the Courts of Justice Act (the "**CJA**").[2] Capitalized terms used herein not defined shall have the meanings given to them in the affidavit of Kathryn Furfaro, sworn May 22, 2025 (the "**Furfaro Affidavit**").

2. TD is the senior secured and largest creditor to the Debtor. The Debtor is indebted to TD in connection with various credit facilities made available to the Debtor (the "**Facilities**")

[1] R.S.C., 1985, c. B-3.
[2] R.S.O. 1990, c. c.43.

pursuant to and under the terms of a letter of agreement dated December 8, 2022 ("**Letter of Agreement**").[3] TD holds a first-ranking security over the Debtor's personal property.[4]

3. As of April 7, 2025, the Debtor's total indebtedness to the Bank, exclusive of the Bank's costs of enforcement, was $15,774,442.83CAD and $506.99 USD.[5] Per a statement of affairs filed in the Debtor's NOI Proceeding (defined below) this constitutes approximately 72% of the Debtor's indebtedness.

4. The Debtor has been in default of the Letter of Agreement since March 31, 2024. The Bank initially did not enforce on its collateral as the Debtor made various representations that it would be refinancing its indebtedness to the Bank elsewhere.

5. Unfortunately, such refinancing did not occur. Furthermore, the Debtor's borrowing base has continued to erode, the Debtor has provided inadequate reporting to the Bank, and the reporting that has been provided shows that payments may have been made on shareholder loans, contrary to the Letter of Agreement and other agreements between the Bank and the Debtor.

6. As a result of these defaults, the Bank delivered a demand letter and notice pursuant to Section 244 of the BIA on April 15, 2025. The Debtor responded by filing a notice of intention to make a proposal pursuant to Section 50.4 of the BIA (the "**NOI**"), commencing the "**NOI Proceedings**". The Debtor has given an outline of a proposal (defined below as the "Proposal Outline") to the Bank. The Bank is not prepared to support the Proposal

[3] Furfaro Affidavit at para 12.
[4] Furfaro Affidavit at paras 20, 25.
[5] Furfaro Affidavit at para 14.

Outline, for the reasons given below, and instead brings this motion for an order (the "**Appointment Order**"), seeking to:

(a) lift the statutory stay of proceedings pursuant to section 69.4 of the BIA;

(b) terminat the NOI Proceedings pursuant to section 50.4(11) of the BIA;

(c) appoint AGI as trustee in bankruptcy of the Debtor, in lieu of its proposal trutee Dodick Landau Inc. (in such capacity, the "**Proposal Trustee**") pursuant to section 57.1 of the BIA; and

(d) appoint AGI as receiver and manager, without security, over all of the current and future assets, undertakings, and properties of the Debtor, pursuant to section 243 of the BIA and section 101 of the CJA.

7. The Debtor has advised, through its counsel, that it does not oppose the relief sought by the Bank in this application.

PART II - SUMMARY OF FACTS

8. The detailed background to this application is found in the Furfaro Affidavit.

A. Background

9. The Debtor is a manufacturer and wholesaler of e-bikes and electronic scooters, headquartered in Toronto, Ontario.[6]

[6] Furfaro Affidavit at para 11.

10. The Bank advanced three credit facilities to the Debtor pursuant to the terms of a letter of agreement (the "**Letter of Agreement**") between the Bank and the Debtor dated December 8, 2022. The Letter of Agreement was subsequently amended on July 17, 2023, September 13, 2023, and on December 5, 2024 (the "**December 2024 Amendment**").[7]

11. As of April 7, 2025, the Debtor's total indebtedness to the Bank, inclusive of AGI's professional fees of $21,980.63, and exclusive of the Bank's costs of enforcement, was $15,774,442.83CAD and $506.99 USD.[8]

12. The largest facility made available to the Debtor by the Bank is a is a demand revolving working capital facility intended to finance the Debtor's working capital needs ("**Facility 1**"). Facility 1's borrowing limit was determined by a borrowing base covenant (the "**Borrowing Base Covenant**") that, as of September 13, 2023, limited outstanding advances under the facility to the lesser of (1) $7,500,000 and (2) the sum of 80% of certain accounts receivable and 50% of raw materials and inventory (the "**Borrowing Base Covenant**").[9]

13. As security for the Indebtedness, the Debtor executed a general security agreement (the "**GSA**") in favour of the Bank, dated December 19, 2022. The GSA allows for he appointment of a receiver in the event of a default.[10] The GSA was registered pursuant to

[7] Furfaro Affidavit at para 12.
[8] Furfaro Affidavit at para 14.
[9] Furfaro Affidavit at paras 15 and 16.
[10] Furfaro Affidavit at paras 20 to 24.

the *Personal Property Security Act* and is the first-ranking general security interest over the Debtor and its property.[11]

B. Initial Defaults

14. The Debtor first defaulted on the Letter of Agreement in March 2024 when it breached the Borrowing Base Covenant after the Bank determined that accounts receivable were not being held in the Debtor's TD account after being converted to cash, but were instead being converted to equities deposited in an account with CIBC Wood Gundy, and therefore not qualified for margining. On that basis, a notice of default dated July 9, 2024 was delivered on July 18, 2024.[12]

15. From August 2024, the Bank has attempted to work with the Debtor to resolve these reporting deficiencies. The Debtor provided piecemeal and partial information.[13]

16. As a result of these deficiencies, the Bank elected to retain AGI to act as its financial advisor in respect of the Debtor in August 2024 pursuant to the terms of the Letter of Agreement.[14]

17. Between August and December 2024, the Debtor continually represented to the Bank that the Debtor was taking steps to arrange for a third party to refinance all of the Indebtedness and thereby terminate the Bank's relationship with the Debtor. The Bank was hopeful that such a refinancing would occur.[15]

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[11] Furfaro Affidavit at paras 25 and 26.
[12] Furfaro Affidavit at para 27.
[13] Furfaro Affidavit at para 29.
[14] Furfaro Affidavit at para 30.
[15] Furfaro Affidavit at para 31.

C. The December 2024 Loan Amendment

18. As an effort to support the Debtor in its refinancing attempts, the Bank decided that, notwithstanding the Debtor's ongoing defaults, the Bank was prepared to informally forbear and to instead provide the Debtor with further time to refinance the Indebtedness, through to May 22, 2025 (the "**May 22nd Payout Date**").[16]

19. As a result, on December 5, 2024 the Bank and the Debtor executed an amending agreement to the Letter of Agreement (the "**December 2024 Amendment**"). The December 2024 Amendment formalized the May 22 Payout Date and imposed more stringent reporting requirements on the Debtor.[17]

20. The Bank understood that the Debtor intended to use the period between December 5, 2024 and May 22, 2025 to pursue a refinancing with another bank. The Debtor made repeated references to another Canadian bank being willing to refinance the Indebtedness. Unfortunately, no refinancing ever occurred. [18]

D. Improper Related Party Transactions

21. As mentioned above, the Bank has become concerned that the Debtor may have been improperly repaying indebtedness to its shareholder, in breach of covenants to not repay debt other than to the Bank upon a default. The Debtor has given contradictory indications

[16] Furfaro Affidavit at para 32.
[17] Furfaro Affidavit at paras 33 to 34.
[18] Furfaro Affidavit at paras 37 to 38.

to the Bank as to whether this repayment did or did not occur, which causes the Bank to become even more concerned with the Debtor's recordkeeping and reporting practices.[19]

22. The reporting that has been provided shows related party transactions that have not been explained by the Debtor, despite repeated queries from the Bank. This includes related party transactions where the Debtor has not been able to provide any substantiating contracts or purchase agreements and transactions where accounts receivable unexplainedly disappear from accounts receivable records without cash being deposited.[20]

E. March 2025 Defaults and Demand

23. Unfortunately, as the May 22nd Payout Date under the December 2024 Amendment approached, the Debtor's borrowing base, as reported to the Bank as of December 31, 2024, January 31, 2025, and February 28, 2025, continued to erode and remained in breach of the Borrowing Base Covenant.[21]

24. The Debtor's information reporting also continued to be below the standard required by the Letter of Agreement and the Additional Reporting Covenant. The limited information that the Debtor did provide showed that the Debtor was facing acute financial distress.[22]

25. The Debtor's February 2025 reporting indicated a borrowing base shortfall of $1,281,121 and $882,996 in statutory priority payables, each of which is a breach of the Letter of Agreement.[23]

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[19] Furfaro Affidavit at paras 59 to 65.
[20] Furfaro Affidavit at paras 66 to 70.
[21] Furfaro Affidavit at para 39.
[22] Furfaro Affidavit at para 40.
[23] Furfaro Affidavit at para 42.

26. As a result, the Bank delivered a default notice on March 11, 2025. The Bank also delivered a set of queries intended to clarify the status of source deduction and HST arrears, uncollected accounts receivable, payments to shareholders, deposits to other Banks (in breach of the Letter of Agreement), and what appear to be related party accounts receivables.[24]

27. The Bank has not, to date, received satisfactory responses to these queries.

28. As a result of the Debtor's ongoing borrowing base default, unpaid priority payables, and inadequate reporting, the Bank delivered a demand letter and notice pursuant to Section 244 of the BIA on the Debtor on April 15, 2025.[25]

29. In response, the Debtor filed an NOI on April 25, 2025.[26]

30. On May 9, 2025 the Debtor's counsel provided the general terms of a proposal (the "**Proposal Outline**") that the Debtor intended to make to the Bank and to the Debtor's unsecured creditors. In short, the Debtor proposed to liquidate its assets, pay over all accounts receivable and certain lump sums to the Bank, provide a nominal sum to unsecured creditors, and use anticipated 2024 and 2025 Scientific Research and Experimental Development tax credits to offset the source deduction arrears.[27]

31. The Bank would be the primary beneficiary of such a proposal.

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[24] Furfaro Affidavit at para 44.
[25] Furfaro Affidavit at paras 50 to 51.
[26] Furfaro Affidavit at para 52.
[27] Furfaro Affidavit at paras 79 to 80.

32. The Proposal Outline is, in effect, a liquidation. There is no material distinction between the Proposal Outline and a receivership.

33. The Bank is not prepared to support the Proposal Outline. The Bank cannot vote to support any proposal at present, in light of the significant informational deficiencies and concerns that exist. The Bank simply does not know what it does not know. In light of these informational gaps despite cooperating with the Debtor, the Bank is firmly of the view that it should be able to control its own process.[28]

34. Furthermore, in light of the liquidating nature of the Proposal, the Bank ought to be entitled to have full control over the Debtor's liquidation, including via the appointment of its own chosen receiver. The Proposal does not leave any "equity" interest behind that would accrue to the Debtor's shareholders or management. The Debtor's shareholders no longer have any real interest in the Debtor and therefore do not require a management-led liquidation exercise.[29]

35. A receivership would, instead, allow the Bank to have more control over the liquidation of the Debtor's business. A receivership combined with a bankruptcy, which is proposed in this case, would ensure that any improper transactions at undervalue would be investigated and, where appropriate, reversed.

36. As stated above, the Debtor has advised through counsel that it does not intend to oppose this application.

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[28] Furfaro Affidavit at para 83.

[29] Furfaro Affidavit at para 84.

PART III - STATEMENT OF ISSUES

37. The issues to be determined by this Honourable Court on this application are:

(a) Should this Honourable Court lift the stay of proceedings under the BIA and terminate the NOI Proceeding?

(b) Should this Honourable Court appoint AGI as bankruptcy trustee in lieu of the Proposal Trustee?

(c) Should this Court make an Order pursuant to subsection 243(1) of the BIA and section 101 of the CJA appointing AGI as the Receiver over the Property of the Debtor?

PART IV - LAW AND ARGUMENT

A. Stay of Proceedings Should Be Lifted and NOI Proceedings Terminated

i. The Stay of Proceedings Should be Lifted to Allow the Bank to Bring this Application

38. Pursuant to section 69(1) of the BIA, on the filing of a notice of intention under section 50.4 of the BIA by an insolvent person, 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.[30]

39. Pursuant to section 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:

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[30] BIA, s. 69(1)

(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.[31] Accordingly, the lifting of the stay is discretionary.[32]

40. In considering the question of material prejudice under section 69.4(a), the material prejudice referred to therein 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.[33]

41. TD will be materially prejudiced if the stay of proceedings is not lifted. The Debtor, by its own admission via filing an NOI, is insolvent and intends to liquidate. TD, being the largest creditor, is the fulcrum creditor. As such, TD should be able to control and direct how its collateral liquidated. TD should also have access to the investigatory powers of a receivership to ensure that its recovery is maximized.

42. The Debtor has also advised through its counsel that it does not oppose the appointment of a receiver or the Appointment Order sought.

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[31] BIA, s. 69.4.
[32] *2806401 Ontario Inc. o/a Allied Track Services Inc*., 2022 ONSC 5509 (CanLII), at para 24
[33] *Cumberland Trading Inc.*, Re, 1994 CanLII 7458 at para 11, cited with approval in *Fiorito v. Wiggins*, 2017 ONCA 765 at para 31.

43. Under section 69.4 courts have "a wide discretion" based on the "particular facts of the particular case".[34] As such, the court is entitled to take into account all of the circumstances regarding the background to the Indebtedness, the flexibility and time afforded to the Debtor, the actions of the Debtor immediately before and after initiating the NOI Proceedings and the impact that the relief bring sought by the Debtor will cause the Bank's secured position to deteriorate.

44. For these reasons and the reasons set out below in respect to TD's request to appoint a receiver, TD submits that there are compelling reasons to lift the NOI stay of proceedings.

ii. Court Should Terminate the NOI Proceedings

45. Pursuant to Section 50.4(11) of the BIA, the Court may, on application of a creditor, declare NOI proceedings terminated prior to the expiration of the 30 day period if the Court is satisfied that, *inter alia*, either (1) the insolvent person will not likely be able to make a proposal before the expiration of the 30 day period that will be accepted by the creditors or (2) the insolvent person will not likely be able to make a viable proposal before the expiration of the 30 day period.[35]

46. The Bank has, for the reasons stated in the Furfaro Affidavit, reviewed the Proposal Outline and determined that it will not support either the Proposal Outline or any other proposal offered by the Debtor.[36]

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[34] *Fiorito v. Wiggins*, 2017 ONCA 765 (CanLII) at para. 35
[35] BIA, s. 50.4(11)
[36] Furfaro Affidavit at paras 80 to 84.

47. The Debtor has also, by virtue of its confirmed non-opposition to this application, impliedly stated that it will not make any proposal, let alone a viable proposal, prior to the expiration of the 30 day period.

48. As a result, this Court may declare the NOI Proceedings terminated, effective immediately, without need for the 30 day period to expire.

B. Appointment of AGI as Bankruptcy Trustee in Lieu of Proposal Trustee

49. The effect of a declaration under Section 50.4(11) of the BIA is that the Debtor will be deemed a bankrupt.

50. Pursuant to Section 57.1 of the BIA, a court may, following a declaration under Section 50.4(11) of the BIA, if satisfied that it is in the best interest of the creditors to do so, appoint a trustee to act as bankruptcy trustee in lieu of the proposal trustee appointed in the terminated NOI proceedings.[37]

51. In *Sport Maska Inc. v RBI Plastique Inc.* the Court of Queen's Bench of New Brunswick (the "**NBQB**") granted an order deeming a proposal rejected pursuant to Section 50(12) of the BIA, resulting in a deemed assignment pursuant to Section 57 of the BIA.[38] The NBQB also ordered, pursuant to Section 57.1 of the BIA that the debtor's NOI proceeding proposal trustee be replaced with a different trustee, its interim receiver.[39]

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[37] BIA s. 57.1

[38] *Sport Maska Inc. v. RBI Plastique Inc*., 2005 NBQB 394 <https://canlii.ca/t/1lzl7> ["***Sport Maska*"]**

[39] *Sport Maska* at paragraph 45.

52. The NBQB held that it was in the best interest of creditors for an interim receiver, who had previously been involved with the case for some time, to act as bankruptcy trustee in place of a proposal trustee with less experience.[40]

53. More recently, the Superior Court of Quebec granted an order terminating the 30 day period to file a proposal pursuant to Section 50.4(11) and appointed a new trustee as trustee in bankruptcy, pursuant to Section 57.1.[41] While no endorsement or reasons appears to be available, the mechanic employed is identical to that intended in this case.

54. As in *Sport Maska*, it is in the interest of the creditors for AGI to be appointed as bankruptcy trustee because it would be more efficient for a single person to act as both bankruptcy trustee and as receiver. The Bank, as the largest and fulcrum creditor, supports AGI acting in both roles. The Proposal Trustee has also indicated that it does not oppose this relief being sought.

C. TD is Entitled to the Appointment of a Receiver

55. This Court has the power to appoint a receiver or a receiver and manager under section 243(1) of the BIA and section 101 of the CJA.[42]

56. 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 considers advisable over that property and over the

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[40] *Sport Maska* at paragraph 45.

[41] *Syndic de Construction Opal inc.*, available in the original French and via Google Translate in English.

[42] BIA, section 243(1); CJA, s. 101

insolvent person's business, again where it is "just or convenient".[43] Similarly, the CJA enables the court to appoint a receiver where such appointment is "just or convenient".[44]

57. In determining whether it is "just or convenient" to appoint a receiver under either statute, Ontario courts have applied the decision of The Honourable Mr. Justice Blair (as then he was) in *Freure Village*. Here, His Honour confirmed that, in deciding whether the appointment of a receiver is 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.[45]

58. This Court has set out a number of factors, not as a checklist, but as a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: (a) whether irreparable harm might be caused if no order is made; (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; (i) the principle that the appointment of a receiver should be granted cautiously; (j) the consideration of whether a court

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43 BIA, section 243(1)
44 CJA, s. 101
45 *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 at para 10 (Gen. Div. [Comm. List]) [*Freure Village*].

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.[46] While not all of these factors are applicable in the circumstances of this case, viewed holistically, they demonstrate that the appointment of a receiver is just and convenient.

i. It is Just and Convenient to Appoint a Receiver in the Circumstances

59. As in the case at bar, when the rights of the secured creditor under its security includes a specific right to appointment of a receiver, the burden on the applicant seeking the relief is relaxed. The Honourable Mr. Chief Justice Morawetz held in *Elleway Acquisitions* that (emphasis added):

> ... 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.[47]

60. The Honourable Mr. Chief Justice Morawetz's holding in *Elleway Acquisitions* was further affirmed more recently in *iSpan Systems LP* by The Honourable Mr. Justice Osborne (emphasis added):

> Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the

[46] *Kingsett Mortgage Corp. v. Mapleview Developments Ltd., et al*., 2024 ONSC 1983, paras 24-25.
[47] *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd*., 2013 ONSC 6866 at para 27.

appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties [citations omitted].[48]
61.

62. Courts have found that it is unfair to hold a secured creditor "to remain without control of the process […] when the contracts to which the Debtor agreed give the Receivership Applicants a right to control the process through a receivership."[49]

63. In addition to TD's contractual right to appoint a receiver, the appointment of a Receiver over the Debtor is just and convenient as a result of, among other things:

(a) The Debtor does not oppose the appointment of a Receiver;

(b) the Debtor's numerous defaults pursuant to the terms of the Letter of Agreement;

(c) the Debtor's failure to provide the Bank with accurate and timely reporting, resulting in the Bank being unsure of the value of its collateral or its anticipated recovery;

(d) the Debtor having possibly made payments to other creditors ahead of the Bank, in violation of the Debtor's covenants and the Bank's rights as senior creditor;

(e) the Debtor's intention to liquidate its assets, meaning that there is no going-concern to be preserved in an NOI; and

(f) a liquidation process conducted through a receivership proceeding will be the most cost-effective means of maximizing recoveries.[50]

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[48] *iSpan Systems LP*, 2023 ONSC 6212 at para 31.
[49] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.* 2020 ONSC 1953 at para 71.
[50] Furfaro Affidavit, para 84.

64. Courts have also held that it is just and convenient to appoint a receiver where: (a) the lender's security is at risk of deteriorating; (b) there is a loss of confidence in the debtor's management; (c) there is a need to stabilize and preserve the debtor's business; and (d) the positions and interests of other creditors militate in favour of appointing a receiver.[51] All such factors are present here.

65. TD has been exceedingly patient and cooperative with the Debtor's own attempts to refinance and restructure. TD respectfully submits that the appointment of a Receiver is just and convenient in this case. TD respectfully submits that this Honourable Court ought to enforce the terms of the agreements – including, without limitation, the Letter of Agreement – between the Debtor and TD. This promotes commercial certainty that courts will hold commercial parties to their bargains.

66. A court-appointed receivership, involving the Court's supervision, involving a forum for all stakeholders, the presence of fiduciary obligations, and maximum transparency, is the best way to ensure that the realization of the Debtor's assets is conducted fairly and equitably, in recognition of the interests of all stakeholders. In the circumstances, the time has come for a greater level of control over the Debtor and its property.

[51] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*., 2020 ONSC 1953, para 45.

PART V - ORDER REQUESTED

67. In light of the foregoing, it is respectfully submitted that it is both just and convenient to appoint AGI as Receiver over the Property of the Debtor.

68. Accordingly, TD submits that this Honourable Court should lift the stay of proceedings in the NOI Proceedings and allow TD to appoint AGI as the court-appointed receiver over the Debtor by way of an Order substantially in the form of the draft Receivership Order contained in TD's Application Record.

69. **PURSUANT TO RULE 4.06.1(2.1), THE UNDERSIGNED** certifies that they are satisfied as to the authenticity of every authority cited in this factum.

MILLER THOMSON LLP

Per: Craig Mills/Matthew Cressatti
Lawyers for the Applicants

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22th day of May, 2025

MILLER THOMSON LLP

Per: Craig Mills/Matthew Cressatti
Lawyers for the Applicants

SCHEDULE "A"
LIST OF AUTHORITIES

1. *2806401 Ontario Inc. o/a Allied Track Services Inc.*, 2022 ONSC 5509\
2. *Cumberland Trading Inc.*, Re, 1994 CanLII 7458
3. *Fiorito v Wiggins*, 2017 ONCA 765
4. *Sport Maska Inc. v. RBI Plastique Inc.*, 2005 NBQB 394
5. *Syndic de Construction Opal inc.*, 2025 QCCS 325
6. *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088
7. *Kingsett Mortgage Corp. v. Mapleview Developments Ltd., et al*., 2024 ONSC 1983
8. *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd*., 2013 ONSC 6866
9. *Re:iSpan Systems LP*, 2023 ONSC 6212
10. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.* 2020 ONSC 1953

SCHEDULE "B"
RELEVANT STATUTES

***Bankruptcy and Insolvency Act*, R.S.C., 1985, C. B-3, as amended**

Court may terminate period for making proposal

50.4 (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.

Appointment of new trustee

57.1 Where a declaration has been made under subsection 50(12) or 50.4(11), the court may, if it is satisfied that it would be in the best interests of the creditors to do so, appoint a trustee in lieu of the trustee appointed under the notice of intention or proposal that was filed.

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.

Section 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

Section 243(1.1)

(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.

Section 243(6)

(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.

Section 244

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*, R.S.O. 1990, c. C.43, as amended**

Section 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.

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

THE TORONTO-DOMINION BANK and DAYMAK INC. Court File No. : CV-25-00743600-00CL
Applicant Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

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