Court File No. CV-24-00034048-0000

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**THE TORONTO-DOMINION BANK**

Applicant

- and -

**CREATIVE HOMESCAPES INC., 1974592 ONTARIO INC. AND 1646395 ONTARIO INC.**

Respondents

**APPLICATION UNDER SUBSECTION 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 RECEIVER, ALBERT GELMAN INC.

**(Motion returnable July 28, 2026)**

July 21, 2026


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TO: **SERVICE LIST**

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## PART I - INTRODUCTION

1. On the application of The Toronto-Dominion Bank ("**TD Bank**") pursuant section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "**CJA**"), the Honourable Justice Kalajdzic made an Order on October 10, 2024 (the "**Appointment Order**", as further amended on November 12, 2024), appointing Albert Gelman Inc. ("**AGI**") as receiver (in such capacity, the "**Receiver**"), without security, of all property, assets and undertakings of Creative Homescapes Inc. ("**Creative**"), 1974592 Ontario Inc. ("**197**"), and 1646395 Ontario Inc. ("**164**") (collectively

referred to as the "**Debtors**"), acquired for, or used in relation to a business carried on by the Debtors (collectively, the "**Property**").[1]

2. On or about February 9, 2026, Creative was assigned into bankruptcy.[2]

3. Since the granting of the Appointment Order, the Receiver has, among other things, realized upon substantially all of the Debtors' assets (as further described below).[3]

4. Accordingly, the Receiver brings this motion for an order (the "**Distribution and Discharge Order**"), which, among other things:

(a) approving the First Report and the Second Report of the Receiver dated November 5, 2024, and July 9, 2026, respectively, and the actions, conduct and activities of the Receiver described therein;

(b) approving the professional fees and disbursements of the Receiver, as set out in the Fee Affidavit of Tom McElroy, sworn July 9, 2026 (the "**AGI Fee Affidavit**");

(c) approving the fees and disbursements of the Receiver's independent counsel, Garfinkle Biderman LLP ("**GB**"), as set out in the Fee Affidavit of Wendy Greenspoon-Soer, sworn June 26, 2026 (the "**GB Fee Affidavit**");

(d) approving the Receiver's Estimated Fee Accruals (as defined and described in the Second Report);

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[1] Second Report of AGI dated July 9, 2026 ["**Second Report**"], at paras 1 and 3, Motion Record of AGI dated July 13, 2026 ["**AGI MR**"], Tab 2.
[2] Second Report, at para 41(y).
[3] Second Report, at para 39.

(e) approving the Receiver's final statement of receipts and disbursements as of July 8, 2026 (the "**Final SRD**");

(f) authorizing the Receiver to destroy the Debtors' physical and electronic books and records (the "**Books and Records**") not otherwise required by the Receiver for the administration of the Debtors' estate;

(g) authorizing and directing the Receiver to distribute all funds held by the Receiver in connection with this receivership, in the following order of priority (collectively, the "**Proposed Distributions**"):

(1) firstly, to AGI in respect of unpaid amounts secured by the Receiver's Charge and the Receiver's Borrowings Charge (as defined in the Appointment Order), including the fees and disbursements of the Receiver and the Receiver's independent legal counsel, and the Estimated Fee Accruals; and

(2) secondly, to TD Bank, up to the full amount owing by the Debtors to TD Bank;

(h) upon completion of the Remaining Activities (as defined below) and the Receiver's filing of a certificate with the Court certifying that all matters required to be completed in connection with this receivership have been completed to the satisfaction of the Receiver (the "**Discharge Certificate**"), discharging AGI as Receiver and releasing it from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of AGI while acting in its capacity as the Receiver, save and except for any gross negligence or wilful misconduct on the part of AGI.

## PART II - SUMMARY OF FACTS

5. Capitalized terms not defined herein have the meanings ascribed to them in the Second Report.

### ***The Debtors***

6. Each of the Debtors is a company incorporated pursuant to the laws of the Province of Ontario. Shawn Kelly was the sole director of each of the Debtors, who passed away in October 2024.[4]

7. Creative carried on business as a supplier of landscaping, hardscaping and ancillary goods and services for both commercial and residential customers.[5]

8. 197 is a real estate holding company that owned the real property from which Creative used to operate until its sale on February 28, 2024. 197 has no operations or assets.[6]

9. 164 is Mr. Kelly's holding company that owns 100% shares in Creative. 164 has no ongoing operations and the Receiver understands that its sole asset is the shares in Creative.[7]

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[4] Second Report, at para 13.
[5] Second Report, at para 14(a).
[6] Second Report, at para 14(b).
[7] Second Report, at para 14(c).

***TD Bank's Security***

10. TD Bank is the Debtors' senior secured creditor pursuant to a demand operating facility and credit card facility. As of September 10, 2024, the Debtors were indebted to TD Bank in the amount of $2,056,906.00 ("**TD Bank Debt**"), plus accruing interest and costs. Among other things, the Debtors granted general security agreements in favour of TD Bank as security for the TD Bank Debt. 197 and 164 also provided corporate guarantees for the TD Bank Debt.[8]

11. GB, as independent legal counsel to the Receiver, has provided the Receiver with a security opinion in respect of TD Bank's security (the "**Security Opinion**"). Subject to the assumptions and qualifications set out therein, the Security Opinion provides, among other things, that TD Bank's security is valid and enforceable, creates a valid security interest in the applicable collateral and has been properly perfected or otherwise evidenced by the required registrations.[9]

***Other Secured Creditors and Unsecured Creditors***

12. A search under the *Personal Property Security Act* (Ontario) (the "**PPSA**") against Creative indicates that, in addition to TD Bank, there are 20 parties that have registered financing statements against Creative.[10]

13. In respect of 197 and 164, in addition to TD Bank, Vault Capital Corporation has registered a financing statement, which was registered after TD Bank.[11]

[8] Second Report, at para 19.
[9] Second Report, at para 20.
[10] Second Report, at para 15.
[11] Second Report, at para 21.

14. Creative has numerous unsecured creditors. A claims process has not been conducted by the Receiver given that TD Bank will suffer a significant shortfall on the repayment of its secured debt from the Debtors.[12]

15. The Receiver is not aware of any material unsecured creditors for either 197 or 164.[13]

***Asset Realizations***

16. To the best of the Receiver's knowledge, neither 197 nor 164 owns any material assets.[14]

17. Creative's material assets consist primarily of its inventory, vehicles, equipment and accounts receivable.[15]

18. In light of the limited market interest in acquiring Creative's business and assets as a going concern, the Receiver determined that the orderly liquidation of the inventory, vehicles, and equipment assets, together with the collection of outstanding accounts receivable, represented the course of action most likely to maximize recoveries for stakeholders.[16]

19. Creative's inventory and equipment were sold by Canam-Appraiz Inc. ("**Canam**") through a public auction conducted in December 2024, with additional liquidation sales occurring periodically through March 2025. The public auction and subsequent sales generated gross proceeds of approximately $556,000.00.[17]

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[12] Second Report, at para 25.
[13] Second Report, at para 26.
[14] Second Report, at para 27.
[15] Second Report, at para 28.
[16] Second Report, at para 29.
[17] Second Report, at para 32.

20. With the assistance of a former employee of Creative, the Receiver has collected approximately $143,000.00 in accounts receivable.[18]

21. Creative also leased or financed certain vehicles and equipment through various financing companies. The Receiver's counsel corresponded with each of these creditors to determine: (a) whether their security interests in the applicable assets had been properly perfected; and (b) whether any equity remained in the assets after satisfaction of the secured creditors' claims. Where the secured creditor's security interest was properly perfected and there was no realizable equity in the asset, the Receiver released any interest in the asset in favour of the secured creditor.[19]

***The Proposed Distributions***

22. The Receiver's Final SRD is attached at Appendix "H" to the Second Report, which reflects the Receiver's receipts and disbursements to July 8, 2026.[20] As set out in the Final SRD, the Receiver is currently holding funds in the amount of $180,130.00, after deducting fees and costs of the Receiver and its counsel (the "**Remaining Funds**"), which is the only remaining asset of the Debtors.[21]

23. The Receiver proposes to distribute the Remaining Funds, as follows:

(a) payment of amounts owing to the Receiver, the Receiver's independent counsel, secured by the Receiver's Charge and the Receiver's Borrowings Charge; and

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[18] Second Report, at para 36.
[19] Second Report, at para 33.
[20] Second Report, at para 38.
[21] Second Report, at para 39.

(b) the balance to TD Bank up to the amount owing by the Debtors for principal, costs and interest arrears. The Receiver anticipates that TD Bank will suffer a substantial shortfall on its secured debt.[22]

***The Final SRD, Fees and Remaining Activities***

24. The Receiver's fees for the period to June 30, 2026 are detailed in the AGI Fee Affidavit, attached to the Second Report at Appendix "I". The Receiver's fees encompass 417.1 hours at an average hourly rate of approximately $461.59, for a total of $192,530.50 plus applicable taxes. The Receiver seeks approval of total fees inclusive of applicable taxes in the amount of $217,599.47.[23]

25. The fees and disbursements of GB for the period to June 26, 2026 are detailed in the GB Fee Affidavit, attached to the Second Report at Appendix "J". GB's fees encompass 53.7 hours at an average hourly rate of approximately $656.29, for total fees of $35,242.56 and accounts totalling $40,244.04 inclusive of disbursements and applicable taxes.[24]

26. The Receiver is of the view that the hourly rates charged by GB are consistent with the rates charged by law firms practising in the area of insolvency in the Toronto market, and that the fees charged by GB are reasonable and appropriate in the circumstances.[25]

27. In order to complete its mandate, the Receiver intends to make the Proposed Distributions, pay the final fees of the Receiver and GB as set out in the Estimated Fee Accruals, and undertake

[22] Second Report, at para 47.
[23] Second Report, at para 43.
[24] Second Report, at para 44.
[25] Second Report, at para 45.

such other administrative activities as may be required to complete its mandate (collectively, the "**Remaining Activities**").[26]

28. Upon completion of the Remaining Activities, the Receiver will file the Discharge Certificate with the Court in order to effect its discharge as the Receiver of the Debtors.[27]

***<u>The Debtors' Books and Records</u>***

29. During the course of this receivership, the Receiver has taken steps to secure and preserve the Debtors' Books and Records, including arranging for the storage of physical records and the backup of the Debtors' electronic data.[28]

30. As the Remaining Activities are nearing completion, the Receiver proposes to destroy the Debtors' books and records, as they are no longer expected to be required for the administration of the estate and the continued costs of storing and maintaining them are not necessary.

## PART III - ISSUES, LAW AND ARGUMENT

31. The issues to be determined on this motion are whether this Court should:

(a) approve the First Report and the Second Report, and the actions, conduct, and activities of the Receiver described therein;

(b) approve the professional fees and disbursements of AGI and its independent legal counsel, including the Receiver's Final SRD and Estimated Fee Accrual;

[26] Second Report, at para 48.
[27] Second Report, at para 49.
[28] Second Report, at para 41(f) and (l).

(c) approve and authorize the Receiver to make the Proposed Distributions;

(d) authorize the Receiver to destroy the Books and Records not otherwise required by the Receiver for the administration of the Debtors' estate; and

(e) approve the discharge and release of the Receiver.

***The First Report and the Second Report, and the Activities of the Receiver Should Be Approved***

32. It has become common practice for court officers to bring motions to seek approval of their reports and the activities set out therein. Court approval, among other things, allows the court officer to bring its activities before the court and presents an opportunity to address concerns of stakeholders, while enabling the court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent manner.[29]

33. The Receiver's activities described in the First Report and the Second Report were undertaken in accordance with the Receiver's duties and powers under the Appointment Order, were necessary and appropriate in the circumstances, and were in the best interests of the Debtors' stakeholders.

34. The Receiver respectfully submits that the First Report and the Second Report, and the activities described therein should be approved.

[29] *Kingsett Mortgage Corporation v. Churchill Lands United Inc.*, 2024 ONSC 7127 at para 45.

***<u>The Fees and Disbursements of the Receiver and its Counsel Should Be Approved</u>***

35. The Appointment Order provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements, in each case, at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.[30]

36. On a motion to pass account, the Court should consider the "overriding principle of reasonableness" with the predominant consideration in such assessment being the overall value contributed by the court-appointed officer and its counsel. There is no need for the Court to engage in a docket-by-docket or line-by-line assessment of the accounts as minute details of each element of professional services may not be instructive when looked at in isolation.[31]

37. In determining whether to approve the accounts of a court-appointed receiver and its counsel, the Court will consider the following non-exhaustive factors:

(a) the nature, extent and value of the assets;

(b) the complications and difficulties encountered;

(c) the degree of assistance provided by the debtor;

(d) the time spent;

(e) the receiver's knowledge, experience and skill;

(f) the diligence and thoroughness displayed;

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[30] Second Report, Appendix "A"-Appointment Order at para 19.
[31] *Nortel Networks Inc.*, 2022 ONSC 6680 at para 10.

(g) the responsibilities assumed;

(h) the results of the receiver's efforts; and

(i) the cost of comparable services when performed in a prudent and economical manner.[32]

38. The AGI Fee Affidavit and the GB Fee Affidavit are appended to the Second Report.[33] The Receiver is of the view that GB has charged standard hourly rates that are consistent with the market rates for insolvency services of this nature rendered by other firms in the City of Toronto and that GB's fees are reasonable and appropriate in the circumstances.[34]

39. The Receiver respectfully submits that the fees and disbursements of the Receiver and GB should be approved.

***The Proposed Distributions Should Be Approved***

40. Orders authorizing distributions are routinely granted by Canadian courts in insolvency proceedings, including receiverships.[35] Distributions are also expressly contemplated by the Commercial List Model Discharge Order.[36]

41. In determining whether it is appropriate to authorize an interim distribution the Court will consider the following factors:

[32] *Bank of Nova Scotia v Diemer*, 2014 ONCA 851 at para 33.
[33] Second Report, Appendix "I" and Appendix "J".
[34] Second Report, at para 45.
[35] *Ontario Securities Commission v. Bridging Income Fund L.P.*, 2022 ONSC 4472 at paras 8 and 12; *First Source Financial Management v. Chacon Strawberry Fields Inc.*, 2024 ONSC 7229 at para 44.
[36] Commercial List Model Receiver Discharge Order, at para 3.

(a) whether the proposed recipient's security is valid and enforceable;

(b) whether the amounts that are owed to the proposed recipient exceed the proposed interim distribution amount; and

(c) whether the proposed interim distribution would result in interest savings.[37]

42. The Appointment Order provides that all funds received or collected by the Receiver, including without limitation, from the sale of all or any of the Property (as defined in the Appointment Order), shall be held by the Receiver to be paid in accordance with the terms of the Appointment Order or any further order of the Court.[38]

43. The Receiver obtained a legal opinion from its counsel, GB, confirming that, subject to the qualifications, assumptions, limitations, and discussions therein, the security granted to TD Bank constitutes valid and enforceable security, creates a valid security interest in the applicable collateral, and has been properly perfected or otherwise evidenced by the required registrations.[39]

44. As confirmed in the Final SRD, the Receiver is currently holding the Remaining Funds in trust. The Remaining Funds comprise the Debtors' only remaining assets.[40]

45. The Receiver seeks authorization to distribute the Remaining Funds in the manner set out at paragraph 23 above. The Proposed Distributions are consistent with the priority scheme described in the First Report, under which TD is the senior secured creditor of the Debtors, subject

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[37] *First Source Financial Management v. Chacon Strawberry Fields Inc.*, 2024 ONSC 7229 at para 45.
[38] Second Report, Appendix "A", at para 13.
[39] Second Report, at para 20.
[40] Second report, at para 39.

only to Wells Fargo Capital Finance Corporation Canada ("**Wells Fargo**") having a prior-ranking security interest over certain inventory.[41]

46. The Receiver was informed by Canam that, on or about January 14, 2025, Canam remitted $187,096.05 directly to Wells Fargo from the proceeds of inventory sold at an equipment auction. The inventory was subject to Wells Fargo's first-ranking security interest, and the remittance was made in recognition of Wells Fargo's priority entitlement to those proceeds.

47. As of September 10, 2024, TD Bank was owed approximately $2,056,906.00, exclusive of accruing interest, fees, and costs.[42] The indebtedness owing to TD Bank far exceeds the amount of the Proposed Distributions. Accordingly, the Receiver respectfully submits that the Proposed Distributions are appropriate and should be authorized.

***The Receiver Should Be Authorized to Destroy the Books and Records***

48. This Court has the jurisdiction to authorize the destruction of the Books and Records pursuant to section 243(1)(c) of the BIA, which provides this Court with the jurisdiction to appoint a receiver to "take any other action that the court considers advisable" if it is "just or convenient to do so".[43] Section 243(1)(c) has been interpreted broadly as conferring jurisdiction on Canadian courts to do what "justice dictates" and "practicality demands".[44]

49. As indicated in the Final SDR, costs of record storage were $8,724.00 as of July 8, 2026.[45]

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[41] First Report of AGI dated November 5, 2024 ["**First Report**"], at para 16, Motion Record of AGI dated November 6, 2024, Tab 2.
[42] Second Report, at para 19.
[43] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 243(1)(c)
[44] *Third Eye Capital Corporation v. Resources Dianor Inc.*, 2019 ONCA 508 at paras 52 and 57.
[45] Second Report, Appendix "H"

50. Practical considerations support authorizing the Receiver to destroy the Books and Records, as the costs associated with their continued storage are unnecessary in light of the imminent completion of the Remaining Activities and the Receiver's anticipated discharge from this receivership.

***The Receiver's Discharge and Release Should Be Approved***

51. A court-appointed receiver is an officer and instrument of the Court. Typically, a court-appointed receiver is discharged by the court once it has completed the substance of its mandate. Creditors typically support the requested discharge at that time as they do not wish additional receivership expenses to be incurred which would reduce their recoveries.[46]

52. A receiver will typically seek a full release upon discharge because of the receiver's concern that, if it is discharged without a full release, it may be required to spend time and money defending unmeritorious actions commenced after it is discharged. Once discharged, a receiver is unable to recover costs in defending such actions from the estate.[47] The purpose of the release provisions in the Order is to remove the necessity for the holding back of post-receivership funds and/or conducting of a "claims bar" process, both of which add time and cost to the receivership.[48]

53. The Receiver has realized on substantially all of the Debtors' assets and has only the Remaining Activities set out at paragraph 27 above to complete.

[46] *Ed Mirvish Enterprises Limited v. Stinson Hospitality Inc. (2009)*, 2009 CanLII 55113 at para 8 (ONSC).
[47] *Ed Mirvish Enterprises Limited v. Stinson Hospitality Inc. (2009)*, 2009 CanLII 55113 at para 8 (ONSC).
[48] *Ed Mirvish Enterprises Limited v. Stinson Hospitality Inc. (2009)*, 2009 CanLII 55113 at para 13 (ONSC).

54. Once the Receiver has completed the Remaining Activities, the Receiver will have completed its mandate. The Receiver therefore respectfully submits that it should be discharged and released following the filing of the Discharge Certificate with the Court, certifying that the Remaining Activities have been completed to the satisfaction of the Receiver.

55. The proposed Distribution and Discharge Order also contemplates certain releases in favour of the Receiver, which are appropriate in the circumstances and contains the customary carve-out for gross negligence or wilful misconduct.

**PART IV - RELIEF REQUESTED**

56. The Receiver respectfully requests this Court grant the proposed Distribution and Discharge Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 21st day of July 2026.

Yupei (Summer) Xia

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Lawyers for the Receiver,
Albert Gelman Inc.

**SCHEDULE "A" – LIST OF AUTHORITIES**

1. *Bank of Nova Scotia v Diemer*, 2014 ONCA 851
2. *Ed Mirvish Enterprises Limited v. Stinson Hospitality Inc. (2009)*, 2009 CanLII 55113
3. *First Source Financial Management v. Chacon Strawberry Fields Inc.*, 2024 ONSC 7229
4. *Kingsett Mortgage Corporation v. Churchill Lands United Inc.*, 2024 ONSC 7127
5. *Nortel Networks Inc.*, 2022 ONSC 6680
6. *Ontario Securities Commission v. Bridging Income Fund L.P.*, 2022 ONSC 4472
7. *Third Eye Capital Corporation v. Resources Dianor Inc.*, 2019 ONCA 508

I certify that I am satisfied as to the authenticity of every authority cited in the factum, in accordance with Rule 4.06.1(2.1) of the *Rules of Civil Procedure*, R.R.O, 1990, Reg. 194.

Date July 21, 2026

*Signature*

## SCHEDULE B – TEXT OF STATUTES, REGULATIONS & BY-LAWS

**_Bankruptcy and Insolvency Act_, RSC 1985, c B-3**

**PART XI**
**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**

**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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**File Number: 7923-006**