

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

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

- and -

**BUCHH HOLDING INC., 2371561 ONTARIO INC., BRITMAN SPECIALTY PRODUCTS
INC., ROTALEC INTERNATIONAL INC. AND ROTALEC CANADA INC.**

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, THE TORONTO-DOMINION BANK

July 18, 2024

AIRD & BERLIS LLP

Brookfield Place, 181 Bay Street, s. 1800
Toronto, Ontario M5J 2T9

Miranda Spence (LSO #60621M)

Tel: (416) 865-3414

Fax: (416) 863-1515

Email: mspence@airdberlis.com

Kyle Plunkett (LSO #61044N)

Tel: (416) 865-3406

Fax: (416) 863-1515

Email: kplunkett@airdberlis.com

Counsel to The Toronto-Dominion Bank

PART I – SUMMARY OF FACTS

1. The Toronto-Dominion Bank (“**TD Bank**”) applies for an Order appointing Richter Inc. (“**Richter**”) as interim receiver (in such capacity, the “**Interim Receiver**”), without security, of the assets, undertakings and properties acquired for, or used in relation to, the business carried on by each of (i) Buchh Holding Inc. (“**Holding**”), (ii) 2371561 Ontario Inc. (“**237 ON**”), (iii) Britman Specialty Products Inc. (“**Britman**”), (iv) Rotalec International Inc. (“**Rotalec International**”), and (v) Rotalec Canada Inc. (“**Rotalec Canada**” and collectively with Holding, 237 ON, Britman, and Rotalec International, the “**Debtors**”), including all proceeds thereof (collectively, the “**Property**”) pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “**BIA**”).

2. The Debtors operate as a consolidation of multiple businesses, with the primary business operations involving the design and distribution of industrial automation products and customized robotics.¹ The Debtors have operations in Ontario, Quebec and Minnesota.²

3. The Debtors are indebted to TD Bank with respect to certain credit facilities, including operating loans and visa card facilities (collectively, the “**Credit Facilities**”) pursuant to and under the terms of: (i) a letter of agreement dated April 26, 2022 (as may have been amended, replaced, restated or supplemented from time to time, the “**Credit Agreement**”), and (ii) Canada Emergency Business Account loans to Holding and 237 ON, each granted by TD Bank.³

¹ The Affidavit of Amanda Bezner dated July 18, 2024 at para 7 (“**Bezner Affidavit**”) ([Caselines Master A17](#)).

² Pre-Filing Report of Richter, dated July 18, 2024 at para 9 (the “**Pre-Filing Report**”) ([Caselines Master A399](#)).

³ Bezner Affidavit at paras 8-9 ([Caselines Master A17](#)).

4. Each of the Debtors provided security in favour of TD Bank in respect of the indebtedness arising out of the Credit Facilities through, among other things, general security agreements granted to TD Bank.⁴

5. The Debtors defaulted under the Credit Agreement with respect to, among other things, failing to maintain a monthly borrowing base relative to the Credit Facilities.⁵ As a result, TD Bank engaged Richter to act as a consultant to review the Debtors' monthly borrowing base calculation and current financial situation, based on the available books and records.⁶

6. Where available, Richter engaged in a review of the Debtors' books and records and identified certain concerning errors regarding the Debtors' business records, including:

- (a) Eligible accounts receivable were overstated by approximately \$809,000;
- (b) Eligible inventory was overstated by approximately \$917,000; and
- (c) Priority payables were understated by approximately \$201,000.⁷

(collectively, the "**Investigation Results**")

7. As a result of these misstatements, the reported margin deficit of approximately \$60,000 as of April 30, 2024, was in reality an adjusted margin deficit of \$1,298,000.⁸ Management was made aware of the Investigation Results and have not disputed them.⁹

⁴ Bezner Affidavit at para 12 and Exhibit "E" ([Caselines Master A18 / A137](#)).

⁵ Bezner Affidavit at para 17 ([Caselines Master A19](#)).

⁶ Bezner Affidavit at para 26; Pre-Filing Report at para 2 ([Caselines Master A21 / A403](#)).

⁷ Pre-Filing Report at para 13; Bezner Affidavit at para 30 ([Caselines Master A405 / A22](#)).

⁸ Pre-Filing Report at para 13 ([Caselines Master A405](#)).

⁹ Pre-Filing Report at para 13 ([Caselines Master A405](#)).

8. Further, financial information pertaining to Britman and 237 ON was not provided to Richter and could not form part of its review.¹⁰

9. In light of the Investigation Results, TD Bank made formal written demand on the Debtors on July 4, 2024 for the payment of the amounts owed to TD Bank under the Credit Agreement (the “**Demand Letters**”). A notice of intention to enforce security (the “**BIA Notice**”) pursuant to subsection 244(1) of the BIA accompanied the Demand Letters sent to the Debtors.¹¹

10. The ten-day period set out in the BIA Notice expired on July 15, 2024. Notwithstanding the expiry of the notice period in the BIA Notice, the indebtedness owed by the Debtors to TD Bank has not been repaid.¹²

11. Within the past two weeks, the Debtors have taken certain steps outside the ordinary course of business to address their immediate cash flow issues, including: (i) terminating ten employees to reduce payroll; (ii) halting rent payments; (iii) contacting customers to push collection efforts; and (iv) moving inventory of the Debtors.¹³ It is unclear whether these steps were taken as part of a unified approach to rehabilitate the Debtors’ financial situation or represent a mismanagement of the Debtors’ business. It does appear, however, that there is significant risk to TD Bank’s collateral.

12. TD Bank will be moving to appoint a receiver over the Property. TD Bank seeks to appoint Richter as Interim Receiver immediately, so that the Interim Receiver may provide more robust monitoring of the Debtors’ activities so as to avoid further deterioration of TD Bank’s collateral.

¹⁰ Bezner Affidavit at para 30 ([Caselines Master A22](#)).

¹¹ Bezner Affidavit at para 28 ([Caselines Master A21](#)).

¹² Bezner Affidavit at para 29 ([Caselines Master A21](#)).

¹³ Bezner Affidavit at para 34 ([Caselines Master A22](#)).

PART III – ISSUES

13. The legal issue to be determined on this Application is whether this Honourable Court should appoint an interim receiver under section 47(1) of the BIA over the Property of the Debtors.

PART IV- LAW & LEGAL AUTHORITIES

A. Test for appointment under section 47(3) of the BIA

14. The Court’s discretion to appoint the Interim Receiver is set out in subsection 47(1) of the BIA.

15. Where notice of a secured creditor’s intention to enforce security pursuant to subsection 244(1) of the BIA was sent to a debtor, subsections 47(1) and 47(3) of the BIA provide that an interim receiver may be appointed if the appointment is “necessary for the protection of” the debtor’s estate or the interests of the creditor who sent the notice under subsection 244(1):¹⁴

Appointment of interim receiver

47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor’s property that is subject to the security to which the notice relates until the earliest of

(a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor’s property over which the interim receiver was appointed,

(b) the taking of possession by a trustee of the debtor’s property over which the interim receiver was appointed, and

(c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

¹⁴ *Bankruptcy and Insolvency Act*, [R.S.C., 1985, c. B-3](#) at s. 47(3).

(a) the debtor's estate; or

(b) the interests of the creditor who sent the notice under subsection 244(1).

16. The appointment of an interim receiver following the expiry of a Notice of Intention to Enforce Security pursuant to section 244(1) of the BIA is an interlocutory remedy relied upon by secured creditors to preserve the *status quo* until a fulsome receivership application can be heard. The applying creditor must establish that the appointment of the interim receiver is necessary for the protection of the debtor's estate or the protection of the interests of one or more creditors.¹⁵

17. Evidence as to the dissipation of assets is not required to appoint an interim receiver.¹⁶ Instead, facts demonstrating a *prima facie* case of borrower misconduct or defaults, including material misrepresentations to its lenders and/or serious breaches of its loan agreements, have been sufficient to appoint an interim receiver.¹⁷

18. An interim receiver has been appointed where a debtor was in serious breach and default of its loan agreements, had compromised the security of its secured creditors, had made material misrepresentations and shown a disregard with respect to its obligations under the loan and security agreements.¹⁸

¹⁵ *CWB Maximum Financial Inc. v. 2026998 Alberta Ltd.*, [2020 ABCA 118](#) at [paras 3, 16](#).

¹⁶ *CWB Maximum Financial Inc. v. 2026998 Alberta Ltd.*, [2020 ABCA 118](#) at [para 16](#); *Bank of Nova Scotia v. D.G. Jewelry Inc.* (2002), [38 C.B.R. \(4th\) 7](#) at [para 1](#) (ONSC).

¹⁷ *Royal Bank v. Applied Energy Systems Inc.* (2009), [61 C.B.R. \(5th\) 104](#) at [para 24](#) (ONSC).

¹⁸ *Royal Bank of Canada v. Applied Energy Systems Inc.*, [2009 CanLII 69785](#).

B. The Appointment of Interim Receiver is Necessary to Preserve the Interests of TD Bank

19. Here, the test for the appointment of an interim receiver pursuant to section 47 of the BIA is met.

A. The BIA Notices were sent to the Debtors

20. TD Bank, in its capacity as a secured creditor of the Debtors, sent the BIA Notice required under section 244 under both registered mail and by email to the Debtors.¹⁹

B. The Appointment of an Interim Receiver is Necessary for the Preservation of TD Bank's Interests

21. The appointment of an interim receiver is necessary for the protection of the Debtors' estate and the interests of TD Bank as secured lender.

22. TD Bank's application for the appointment of an interim receiver is cemented in its concerns about the accuracy of the financial information it had been given, in light of the Investigation Results, and that the Debtors appear to be reorganizing their business in a haphazard and disorganized manner. Each of the Investigation Results are material misrepresentations relevant to TD Bank's ability to realize on its security.

23. The appointment of an interim receiver is necessary to safeguard the Property on a temporary basis pending further investigation and oversight by Richter. The interim receivership is intended to be in place for a short period of time, until a formal receivership can be brought. The terms of the

¹⁹ Bezner Affidavit at para 28 and Exhibit "L" ([Caselines Master A21 / A357](#)).

requested order are tailored to solely safeguard the Property, rather than undertaking any enforcement action.

24. The Debtors' failure to provide the requested financial records pertaining to Britman and 237 ON has resulted in TD Bank having insufficient visibility on whether its security is at risk. There is considerable risk involved considering the state of affairs and confusion in which the Debtors find themselves.

25. This information asymmetry paired with Richter's Investigation Results, demonstrate that a court officer must be appointed to monitor the Debtors' affairs. It is appropriate to appoint an interim receiver to oversee and monitor the business and its assets, conduct a more in-depth review of the Debtors' assets and preserve the Property.

26. Recent correspondence suggests that the Debtors' inventory is being transported to new facilities, and that these decisions may have been made by individuals without the corporate authority to do so.²⁰ This third party is neither a director nor an officer of any of the Debtors and, accordingly, does not owe any fiduciary obligations to the Debtors' stakeholders.

27. The Investigation Results provide that eligible inventory of the Debtors was overstated by approximately \$917,000. This discrepancy, along with the information that TD Bank has received that inventory is being moved from Ontario to Montreal in a cost-cutting effort, is concerning.²¹ The clear instability in the Debtors' business and drastic changes in the Debtors' operations can imperil going-concern value, leaving TD Bank without recourse should this behaviour continue.

²⁰ Bezner Affidavit at Exhibits "M"- "N" ([Caselines Master A359 / A362](#)).

²¹ Bezner Affidavit at Exhibit "M" ([Caselines Master A359](#)).

Further, it is concerning that a party introduced as a prospective purchaser appears to be making business decisions outside the ordinary course without the apparent authority to be doing so.²²

28. Given TD Bank's loss of confidence in the directing minds of the Debtors, TD Bank is concerned that the business will be inalterably impaired unless conservatory measures are put in place.

29. An interim receiver was similarly appointed in *Canadian Western Bank v. Goshen Professional Care Inc.*, in circumstances where the Court found, among other things, that the debtor's failure to provide disclosure of financial information had made it impossible for the lender to ascertain whether its security was at risk, such that it was imperative for the receiver to monitor the debtor's revenues and disbursements.²³

30. TD Bank is not required to establish misfeasance as a pre-requisite for the appointment of an interim receiver.²⁴ Rather, these concerns and irregularities presented in the form of the Investigation Results weigh in favour of TD Bank establishing, on a balance of probabilities, the need for an immediate interim receivership to ensure the conservation of the Debtors' Property, and consequently, the protection of the interests of TD Bank regarding its security.

PART V – RELIEF SOUGHT

31. In light of the foregoing, it is respectfully requested that this Court grant the aforementioned relief.

²² Bezner Affidavit at Exhibits "M"- "N" ([Caselines Master A359 / A362](#)).

²³ *Canadian Western Bank v. Goshen Professional Care Inc.*, [2023 SKKB 162](#) at [para 59](#).

²⁴ *Royal Bank v. Canadian Print Music Distributors Inc.* (2006), [23 C.B.R. \(5th\) 42](#) (ONSC).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of July 2024.

A handwritten signature in black ink, appearing to be 'M. J. ...', written over a horizontal line.

AIRD & BERLIS LLP

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. *Bank of Nova Scotia v. D.G. Jewelry Inc.* (2002), [38 C.B.R. \(4th\) 7](#) (ONSC).
2. *Canadian Western Bank v. Goshen Professional Care Inc.*, [2023 SKKB 162](#).
3. *CWB Maximum Financial Inc. v. 2026998 Alberta Ltd.*, [2020 ABCA 118](#).
4. *Royal Bank v. Applied Energy Systems Inc.* (2009), [61 C.B.R. \(5th\) 104](#) (ONSC).
5. *Royal Bank v. Canadian Print Music Distributors Inc.* (2006), [23 C.B.R. \(5th\) 42](#) (ONSC).

**SCHEDULE “B”
RELEVANT STATUTES**

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

Appointment of interim receiver

47 (1) If the court is satisfied that a notice is about to be sent or was sent under subsection 244(1), it may, subject to subsection (3), appoint a trustee as interim receiver of all or any part of the debtor’s property that is subject to the security to which the notice relates until the earliest of

- (a) the taking of possession by a receiver, within the meaning of subsection 243(2), of the debtor’s property over which the interim receiver was appointed,
- (b) the taking of possession by a trustee of the debtor’s property over which the interim receiver was appointed, and
- (c) the expiry of 30 days after the day on which the interim receiver was appointed or of any period specified by the court.

Directions to interim receiver

(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) take possession of all or part of the debtor’s property mentioned in the appointment;
- (b) exercise such control over that property, and over the debtor’s business, as the court considers advisable;
- (c) take conservatory measures; and
- (d) summarily dispose of property that is perishable or likely to depreciate rapidly in value.

When appointment may be made

(3) An appointment of an interim receiver may be made under subsection (1) only if it is shown to the court to be necessary for the protection of

- (a) the debtor’s estate; or
- (b) the interests of the creditor who sent the notice under subsection 244(1).

THE TORONTO-DOMINION BANK
Applicant

- and -

BUCHH HOLDING INC. et al.
Respondents

Court File No. CV-24-00723986-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

FACTUM OF THE APPLICANT,
THE TORONTO-DOMINION BANK

AIRD & BERLIS LLP

Brookfield Place, 181 Bay Street, Suite 1800
Toronto, ON M5J 2T9

Miranda Spence (LSO #60621M)

Tel: (416) 865-3414

Fax: (416) 863-1515

Email: mspence@airdberlis.com

Kyle Plunkett (LSO #61044N)

Tel: (416) 865-3406

Fax: (416) 863-1515

Email: kplunkett@airdberlis.com

Lawyers for The Toronto-Dominion Bank