

**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**

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**FACTUM OF THE APPLICANT, THE TORONTO-DOMINION BANK**

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July 29, 2024

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## **PART I – SUMMARY OF FACTS**

1. The Toronto-Dominion Bank (“**TD Bank**”) applies for an Order appointing Richter Inc. (“**Richter**”) as receiver (in such capacity, the “**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 section 243(1) 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*, as amended (the “**CJA**”).

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

3. The Debtors are indebted to TD Bank with respect to certain credit facilities, including operating loans and certain ancillary facilities (collectively, the “**Credit Facilities**”) pursuant to and under the terms of: (i) a letter of agreement dated April 26, 2022 (as 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.<sup>3</sup>

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

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

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

<sup>3</sup> First Bezner Affidavit at paras 8-9 ([Caselines Master A17](#)).

in favour of TD Bank (the “**Security**”).<sup>4</sup> The Security provides that, upon default, TD Bank has the right to seek the appointment of a receiver.

5. The Debtors defaulted under the Credit Agreement with respect to, among other things, failing to operate within or maintain a monthly borrowing base relative to the Credit Facilities.<sup>5</sup> As a result, TD Bank engaged Richter to act as a consultant to review the Debtors’ monthly borrowing base calculation and current financial situation, and TD Bank’s collateral position, based on the available books and records.<sup>6</sup>

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.<sup>7</sup>

(collectively, the “**Preliminary Investigation Results**”)

7. As a result of these misstatements, the reported margin deficit of approximately \$60,000 as of April 30, 2024, was in fact approximately \$1,298,000.<sup>8</sup> In other words, the Debtors were borrowing money from TD Bank based on reporting that was inaccurate – to TD Bank’s prejudice – by over \$1.2 million. Management was made aware of the Preliminary Investigation Results and did not dispute them.<sup>9</sup>

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<sup>4</sup> First Bezner Affidavit at para 12 and Exhibit “E” ([Caselines Master A18 / A137](#)).

<sup>5</sup> First Bezner Affidavit at para 17 ([Caselines Master A19](#)).

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

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

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

<sup>9</sup> 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, accordingly, could not form part of its review.<sup>10</sup>

9. In light of the Preliminary 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.<sup>11</sup>

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.<sup>12</sup>

#### **A. The Interim Receiver**

11. On July 19, 2024, the Court granted an order appointing Richter as interim receiver of the Property of the Debtors (in such capacity, the “**Interim Receiver**”).

12. During the course of its appointment, the Interim Receiver discovered, after reviewing the business operations of the Debtors, that the estimated shortfall in the borrowing base calculation (the “**Borrowing Base Calculation**”) under the Credit Facilities had declined from a deficiency of \$1,300,000 in April 2024, to a deficiency of \$2,200,000 as at July 23, 2024.<sup>13</sup> Again, none of this had been reported to TD Bank despite the Debtors having obligations to make regular reports to TD Bank.

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<sup>10</sup> First Bezner Affidavit at para 30 ([Caselines Master A22](#)).

<sup>11</sup> First Bezner Affidavit at para 28 ([Caselines Master A21](#)).

<sup>12</sup> First Bezner Affidavit at para 29 ([Caselines Master A21](#)).

<sup>13</sup> First Report of Richter in its capacity as Interim Receiver, dated July 29, 2024 at para 19 (the “**Interim Receiver’s Report**”) ([Caselines Master A535](#)).

13. Immediately after discovering the margin deficiency and the erosion of TD Bank's collateral, TD Bank took steps to reduce and cap the operating line available to the Debtors and cancelled the Debtors' VISA cards, as authorized pursuant to the Credit Agreements.<sup>14</sup>

14. As compared to 2023, sales decreased by 54% in May 2024 and by 56% in June 2024. A more significant decline is expected for July 2024.<sup>15</sup> Further, the Interim Receiver found that the Debtors have insufficient liquidity to operate their businesses.<sup>16</sup>

15. Due, in part, to the concerns above, TD Bank has lost all confidence in the Debtors' management and ownership.

## **PART II – ISSUES**

16. The legal issue to be determined on this Motion is whether this Honourable Court should appoint Richter as the receiver of the Debtors' Property.

## **PART III- LAW & LEGAL AUTHORITIES**

17. Here, the test for the appointment of a receiver pursuant to section 243 of the BIA and 101 of the CJA is met, and it is just and convenient to appoint a receiver over the assets of the Debtors.

### **A. Test for the Appointment of a Receiver**

18. 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 of the assets of an insolvent person and exercise any

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<sup>14</sup> The Affidavit of Amanda Bezner dated July 29, 2024, at para 6 (“**Second Bezner Affidavit**”) ([Caselines Master A469](#)).

<sup>15</sup> Interim Receiver's Report at para 19 ([Caselines Master A535](#)).

<sup>16</sup> Interim Receiver's Report at para 23 ([Caselines Master A536](#)).

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.<sup>17</sup> Similarly, the CJA enables the court to appoint a receiver where such appointment is "just or convenient".<sup>18</sup>

19. 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 Claire Creek*.<sup>19</sup> 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.<sup>20</sup>

20. As is here, 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.<sup>21</sup>

21. In *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, this Court listed numerous factors that are taken into account when determining whether it is appropriate to appoint a receiver:

- (a) Whether irreparable harm might be caused if no order is made, although, as stated above, where the appointment is authorized by the security documentation, it is not

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<sup>17</sup> *Bankruptcy and Insolvency Act*, [R.S.C., 1985, c. B-3, s. 243](#).

<sup>18</sup> *Courts of Justice Act*, [R.S.O. 1990, c. C.43, s. 101](#).

<sup>19</sup> [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 (ONSC).

<sup>20</sup> [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 at [para 11](#) (ONSC).

<sup>21</sup> [Elleway Acquisitions Ltd. v. The Cruise Professionals Ltd.](#), 2013 ONSC 6866 at [para 27](#).

essential for a creditor to establish that it will suffer irreparable harm if a receiver is not appointed;

- (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;
- (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.<sup>22</sup>

(collectively, the “**Hypoint Factors**”)

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

- (a) It will suffer irreparable harm; or

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<sup>22</sup> *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186 at [para 25](#), citing *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at [para 25](#).

(b) That the situation is urgent.<sup>23</sup>

**B. It is Just and Convenient to Appoint a Receiver**

23. Here, the test for the appointment of a receiver pursuant to section 243 of the BIA and 101 of the CJA is met. The overarching objective of the appointment of a receiver is to enhance and facilitate the preservation and realization of a debtor's assets, for the benefit of all creditors.<sup>24</sup> Without going through each of the Hypoint Factors, it is clear that the appointment of the Receiver is necessary to halt the depreciation of the Debtors' assets for the benefit of all creditors.

24. The rapid pace at which TD Bank's collateral is eroding by permitting the Debtors to continue to operate in the ordinary course is causing irreparable harm.<sup>25</sup> No creditors will benefit from the Debtors' currently unprofitable business operations, which appear to have been historically maintained through misleading and outdated statements to maintain an unjustified borrowing base. Based on the findings of the Interim Receiver, TD Bank has been financing the Debtors while revenues and inventory have dropped, all while being wrongfully informed that there was sufficient collateral to support the lending arrangements.

25. The Borrowing Base Calculation as of July 23, 2024 reflects a margin deficit of \$2,200,000, which is likely to grow due to the low level of revenue, with sales half of what they were in 2023, and as operating expenses of the Debtors continue to accrue.<sup>26</sup>

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<sup>23</sup> [Bank of Montreal v. Carnival National Leasing Ltd.](#), 2011 ONSC 1007 at [paras 28-29](#).

<sup>24</sup> [Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited](#), 2022 ONSC 6186 at [para 22](#).

<sup>25</sup> Second Bezner Affidavit at para 8 ([Caselines Master A469](#)).

<sup>26</sup> Interim Receiver's Report at para 19 ([Caselines Master A535](#)).



26. Without the continuation of the Credit Facilities, the Debtors have no liquidity to continue operating as a going concern, including the ability to meet ongoing payroll obligations.<sup>27</sup> In addition, the realization value of the assets indicates that TD Bank will likely incur a significant loss. The Interim Receiver has noted that in the week following their appointment, the Debtors have had net cash outflows of \$26,000 (as receipts from customers were approximately \$141,000 with disbursements of approximately \$167,000).<sup>28</sup>

27. Further, the inventory accounting provided to TD Bank, which was used to calculate the available credit facilities, was outdated and misleading as to the viability of the Debtors' business.<sup>29</sup> Upon review, the Interim Receiver noted that the Debtors' inventory had material overstatements and missing inventory of approximately \$755,000.<sup>30</sup> The principal of the Debtors was unable to explain these overstatements.<sup>31</sup>

28. As it stands, the Interim Receiver is not empowered to halt the ongoing deterioration of TD Bank's collateral without being appointed as the Receiver. Given the significant shortfall for TD Bank, and the lack of liquidity to operate, appointing a Receiver to take control of the Debtors to protect the collateral of the TD Bank is both just and convenient.

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<sup>27</sup> Second Bezner Affidavit at para 6 ([Caselines Master A469](#)).

<sup>28</sup> Interim Receiver's Report at para 19 ([Caselines Master A535](#)).

<sup>29</sup> Interim Receiver's Report at para 19 ([Caselines Master A535](#)).

<sup>30</sup> Interim Receiver's Report at para 20 ([Caselines Master A536](#)).

<sup>31</sup> Interim Receiver's Report at para 20 ([Caselines Master A536](#)).

**C. Bankruptcy of the Debtors**

29. The Court has jurisdiction to grant an order authorizing the Receiver to assign the Debtors into bankruptcy, in part, to allow for increased recoveries to stakeholders.<sup>32</sup>

30. Authorizing the Receiver to have the power to assign the Debtors into bankruptcy is a matter of discretion, to be exercised by the Court in the circumstances of each case.<sup>33</sup> This Court has considered the benefits to stakeholders when allowing this type of assignment to occur, including that an assignment in bankruptcy will alter the priorities such that the statutory deemed trusts for GST and HST owed by the Debtors will no longer apply, thereby increasing recoveries for stakeholders.<sup>34</sup> Here, in light of the misrepresentations made to TD Bank in providing the Credit Facilities, it is reasonable that the Receiver be empowered to bankrupt the Debtors should it benefit stakeholders, including TD Bank.

**PART IV – RELIEF SOUGHT**

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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 29<sup>th</sup> day of July 2024.



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AIRD & BERLIS LLP

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<sup>32</sup> [Endorsement of Justice Conway dated May 3, 2024](#) in *Enlightened Funding Corporation v. Velocity Asset And Credit Corporation et al* at para 3.

<sup>33</sup> [Endorsement of Justice Conway dated May 3, 2024](#) in *Enlightened Funding Corporation v. Velocity Asset And Credit Corporation et al* at para 4.

<sup>34</sup> [Endorsement of Justice Conway dated May 3, 2024](#) in *Enlightened Funding Corporation v. Velocity Asset And Credit Corporation et al* at para 4.

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. [\*Bank of Nova Scotia v. Freure Village on Clair Creek\*](#), 1996 CanLII 8258 (ONSC).
2. [\*Elleway Acquisitions Ltd. v. The Cruise Professionals Ltd.\*](#), 2013 ONSC 6866.
3. [\*Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited\*](#), 2022 ONSC 6186.
4. [\*Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.\*](#), 2009 BCSC 1527.
5. [\*Bank of Montreal v. Carnival National Leasing Ltd.\*](#), 2011 ONSC 1007.
6. [\*Endorsement of Justice Conway dated May 3, 2024\*](#) in *Enlightened Funding Corporation v. Velocity Asset And Credit Corporation et al.*

**SCHEDULE “B”  
RELEVANT STATUTES**

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

**Court may appoint receiver**

**243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

**[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).

**THE TORONTO-DOMINION BANK**  
Applicant

- and -

**BUCHH HOLDING INC. et al.**  
Respondents

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

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

Proceedings commenced at Toronto

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