



ONTARIO SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

COUNSEL SLIP/ENDORSEMENT

COURT FILE NO.: CV-24-00723986-00CL DATE: 31 July 2024

NO. ON LIST: 4

TITLE OF PROCEEDING: THE TORONTO-DOMINION BANK v. BUCHH HOLDING INC. et al

BEFORE JUSTICE: KIMMEL

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party, Crown:**

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Name of Person Appearing	Name of Party	Contact Info
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**For Other, Self-Represented:**

Name of Person Appearing	Name of Party	Contact Info

## **ENDORSEMENT OF JUSTICE KIMMEL:**

1. The Toronto-Dominion Bank ("TD Bank") seeks 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. TD Bank's security gives it a contractual right to seek the appointment of a receiver. The Debtors fell into default of their obligations under various Credit Agreements. Demands for payment and s. 244 BIA Notices of Intention to Enforce Security were delivered. The ten day notice period expired on July 15, 2024.
3. TD Bank satisfied the court that the appointment of a receiver on an interim basis was appropriate when Richter was appointed as interim receiver on July 19, 2024. New information came to light through the Interim Receivership that has caused TD Bank to lose confidence in the Debtors' management and ownership. The Interim Receiver reports that 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. The TD Bank's collateral is eroding at a rapid pace.
4. 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, particularly having regard to "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. See *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 at para 11 (ONSC).
5. The appointment of the Receiver will advance the overarching objective of enhancing and facilitating the preservation and realization of a debtor's assets, for the benefit of all creditors. See *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186 at para. 22.
6. Based upon agreed terms that allow for an initial carve out of 237 ON from the receivership to allow it to try to consummate a proposed transaction that is expected to close on August 12, 2024 (the "Proposed Transaction"), the Debtors are not opposing the amended order sought today, which is largely consistent with the Commercial List model receivership order. No one else on the service list (which includes the relevant tax authorities) opposes the order sought.
7. The proposed financing and Receiver's Borrowing Charge are appropriate given the lack of liquidity.
8. The proposed order contains a provision authorizing the Receiver to assign the Debtors into bankruptcy. It has been affirmed in many cases, including recently in the May 3, 2024 endorsement of Conway J. in *Enlightened Funding Corporation v. Velocity Asset And Credit Corporation et al*, at para 3, that the court may, in its discretion, authorize an assignment into bankruptcy if its purpose is to increase recoveries for stakeholders. An assignment in bankruptcy would 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. Further, 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 to benefit stakeholders, including TD Bank.
9. Given the transition from Interim Receiver to Receiver, it makes sense, and is consistent with this court's practice, to include in the order the approval of the Interim Receiver's First Reports and its activities and the activities of its counsel described therein.

10. I have reviewed the agreed terms between counsel for TD Bank and the Debtors regarding the carve out of 237 ON. Counsel for the Debtors did not appear today, after having commented upon and approved these terms (as indicated in email correspondence that the court was provided with). I have adopted those terms but amended them to align them with the practical realities of what the court would expect will happen if the parties need to re-attend. My amendments are procedural rather than substantive. The amended terms that shall apply are as follows:
- a. The motion of TD Bank for the appointment of a Receiver over the Debtors (other than 237 ON) shall proceed on an unopposed basis.
  - b. The Motion of TD Bank for the appointment of a Receiver over 237 ON returnable today, July 31, 2024, shall be adjourned to a 9:30 a.m. appointment which may be requested by TD's legal counsel on the first available date if the Proposed Transaction not close by August 12, 2024 (the "Return Date").
  - c. If the Proposed Transaction closes on or before August 12, 2024, TD Bank's motion as it relates to 237 ON will be dismissed on consent on the Return Date; the appointment of the Interim Receiver over 237 ON shall terminate on August 16, 2024 by operation of the terms of the July 19, 2024 appointment order.
  - d. If the Proposed Transaction does not close by close of business on August 12, 2024, the balance of TD Bank's Motion for the appointment of a Receiver over 237 ON shall be granted (by an amended and restated receivership order that is identical to the order signed today but with 237 ON included as one of the Debtors) on an unopposed or consent basis on the Return Date.
11. I have signed the requested order today subject to the above terms. It shall have immediate effect without the necessity of formal issuance and entry. I am not seized of any further return to court that may arise from the agreed terms.

A handwritten signature in black ink, appearing to read "Kimmel J.", is located below the text of item 11. The signature is written in a cursive, slightly slanted style.