

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE TORONTO-DOMINION BANK

Applicant

and

**BALLO CARRIERS INC., 1000228842 ONTARIO INC., BHUPINDERJOT
SINGH BOPARAI, and NAWABBIR SINGH BOPARAI**

Respondents

**FACTUM OF THE APPLICANT,
THE TORONTO-DOMINION BANK**
(Returnable August 15, 2024)

August 6, 2024

FOGLER, RUBINOFF LLP

Lawyers
77 King Street West
Suite 3000, P.O. Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

Rachel Moses (LSO# 42081V)

Tel: 416-864-7627

rmoses@foglers.com

Carol Liu (LSO# 84938G)

Tel: 416-849-4150

cliu@foglers.com

Lawyers for the Applicant, The Toronto-
Dominion Bank

TO:	<p>NAGRA LAW 133 Milani Blvd, Suite 100 Vaughan, ON L4H 4M4</p> <p>Bhupinder Nagra bhupinder@nagralaw.net Tel: 416-674-0040</p> <p>Counsel for the Respondents, Ballo Carriers Inc., 1000228842 Ontario Inc., Bhupinderjot Singh Boparai, and Nawabbir Singh Boparai</p>	<p>BY EMAIL TO: bhupinder@nagralaw.net</p>
AND TO:	<p>BHUPINDERJOT SINGH BOPARAI 3 Belleville Dr. Brampton, ON L6P 1V7 Email: boparai3045@gmail.com</p> <p>Respondent</p>	<p>BY EMAIL TO: Boparai3045@gmail.com</p>
AND TO:	<p>NAWABBIR SINGH BOPARAI 3 Belleville Dr. Brampton, ON L6P 1V7 Email: nawab_boparai@live.ca</p> <p>Respondent</p>	<p>BY EMAIL TO: nawab_boparai@live.ca</p>
AND TO:	<p>MSI SPERGEL INC. 200 Yorkland Blvd., Suite 1100 Toronto, ON M2J 5C1</p> <p>Mukul Manchanda Email: mmanchanda@spergel.ca Tel: 416-498-4314</p> <p>Proposed Receiver</p>	<p>BY EMAIL TO: mmanchanda@spergel.ca</p>
AND TO:	<p>CANADA REVENUE AGENCY c/o Department of Justice Ontario Regional Office 120 Adelaide St. W., Suite 400 Toronto, ON M5H 1T1 Email: AGC.PGC.Toronto-Tax-Fiscal@justice.gc.ca</p>	<p>BY EMAIL TO: AGC.PGC.Toronto-Tax-Fiscal@justice.gc.ca</p>
AND TO:	<p>HIS MAJESTY THE KING IN RIGHT OF ONTARIO As represented by the Ministry of Finance Legal Services Branch 33 King Street, 6th Floor Oshawa, ON L1H 8H5</p>	<p>BY EMAIL TO: steven.groeneveld@ontario.ca</p>

	Attention: Steven Groeneveld Email: steven.groeneveld@ontario.ca Tel: 905-431-8380 Senior Counsel, Ministry of Finance	
AND TO:	INSOLVENCY UNIT Province of Ontario Email: insolvency.unit@ontario.ca	BY EMAIL TO: insolvency.unit@ontario.ca

FACTUM OF THE APPLICANT, THE TORONTO-DOMINION BANK

PART I - INTRODUCTION

1. The Applicant, The Toronto-Dominion Bank ("**TD**"), is seeking an order appointing msi Spergel inc. ("**Spergel**") as receiver of the assets, undertakings and properties of Ballo Carriers Inc. and 1000228842 Ontario Inc. ("**Ballo**" and "**100**" respectively, and together, the "**Companies**"), including the real property municipally known as 17-2131 Williams Parkway, Brampton [PIN 19416-0017] (the "**Brampton Property**"), pursuant to section 243 of the Bankruptcy and Insolvency Act ("**BIA**") and section 101 of the Courts of Justice Act ("**CJA**").

2. TD is also seeking judgment against Bhupinderjot Singh Boparai and Nawabbir Singh Boparai ("**Bhupinderjot**" and "**Nawabbir**" respectively, and together, the "**Guarantors**") guarantee of the indebtedness of the Companies to TD.

3. TD is seeking the receivership and judgment pursuant to a consent to receivership and a consent to judgment granted by the Respondents under a forbearance agreement.

PART II - SUMMARY OF FACTS

The Parties

4. The Companies were incorporated pursuant to the laws of Ontario. Ballo operates a trucking company based in Brampton. 100 is the owner of the Brampton Property. The Guarantors and Sukhpinder Kaur Boparai are the directors of Ballo, and

Nawabbir is the sole director of 100. The Guarantors are the officers of the Companies.¹

Credit Facilities and Security

5. Pursuant to a credit facilities agreement dated February 15, 2023, together with Schedule "A" – Standard Terms and Conditions, accepted by the Companies on February 15, 2023 (the "**Credit Agreement**"), TD established a \$650,000.00 operating loan ("**Operating Loan**") in favour of Ballo and a \$750,000.00 committed reducing term facility ("**Term Facility**") in favour of 100.²

6. The Operating Loan is repayable on demand. The Term Facility contemplated equal monthly payments of principal and interest.³

7. Pursuant to the "Availability of Operating Loan" section of the Credit Agreement, the Companies covenanted and agreed to repay the Operating Loan on demand.⁴

8. Pursuant to "7. Standard Positive Covenants" of Schedule "A" – Standard Terms and Conditions in the Credit Agreement, the Companies covenanted and agreed to, among other things: i) pay all amounts of principal, interest and fees on the dates, times and place specified in the Credit Agreement, ii) provide TD with information, financial data, additional security and documentation as TD may request from time to time and iii)

¹ Affidavit of Rukshana Belliappa affidavit sworn July 19, 2024 ("**Belliappa Affidavit**"), paras. 4, 12-13; Exhibit "A" and "B" – Corporate Profile Reports of the Companies.

² Belliappa Affidavit, para. 14; Exhibit "C" – Credit Agreement.

³ Belliappa Affidavit, para. 15.

⁴ Belliappa Affidavit, para. 16.

permit TD or its authorized representatives full and reasonable access to their premises, business, financial and computer records.⁵

9. The "Events of Default" section of the Credit Agreement provides:⁶

"The Bank may accelerate the payment of principal and interest under any committed credit facility hereunder and cancel any undrawn portion of any committed credit facility hereunder, at any time after the occurrence of any one of the Standard Events of Default contained in Schedule "A" attached hereto."

10. Subsections (a) and (d) of "10. Standard Events of Default" of Schedule "A" – Standard Terms and Conditions in the Credit Agreement further provide:

The Bank may accelerate payment of principal and interest under any committed credit facility hereunder and cancel any undrawn portion of any committed credit facility hereunder, at any time after the occurrence of any one of the following Events of Default:

(a) Non-payment of principal outstanding under this Agreement when due or non-payment of interest or fees outstanding under this Agreement within 3 Business Days of when due.

(d) If there is a breach or non-performance or non-observance of any term or condition of this Agreement or the Bank Security and, if such default is capable of being remedied, the default continues unremedied for 5 Business Days after the occurrence.⁷

11. TD also advanced to Ballo:

(a) A TD Visa business facility for an aggregate amount of \$55,000.00 (the "**Visa Facility**"); and

⁵ Belliappa Affidavit, para. 13, page 4.

⁶ Belliappa Affidavit, para. 14, on page 5.

⁷ Belliappa Affidavit, para. 15, on page 5.

- (b) an equipment lease facility through TD Equipment Financing for various vehicles (the "**TDEF Lease Facilities**"), pursuant to a Master Lease Agreement dated June 29, 2021 and related schedules (collectively the "**Master Lease Agreement and Schedules**").⁸

12. As security for the credit facilities, Ballo signed a General Security Agreement on March 29, 2021 (the "**Ballo GSA**") and 100 signed a General Security Agreement on February 21, 2023 (the "**100 GSA**").

13. The Ballo GSA and the 100 GSA are substantially the same, contain the same terms and are collectively the "**GSA**". Registration in respect of the GSA were duly made pursuant to the *Personal Property Security Act* (Ontario).⁹

14. Section 11, "Events of Default", of the GSA provides:

Obligations not payable on demand shall, at the option of the Bank, become immediately due and payable upon the occurrence of one or more of the following events (each, an "event of default"):

- a) The Grantor fails to pay when due, whether by acceleration of otherwise, any of the Obligations;
- b) The Grantor fails to perform any provision of this Agreement or of any other agreement to which the Grantor and the Bank are parties; [...]
- l) Any other event which causes the Bank, in good faith, to deem itself insecure [...]¹⁰

⁸ Belliappa Affidavit, para. 16, on page 6; Exhibit "D" – Credit Card Agreement and Exhibit "E" – Master Lease Agreement and Schedules.

⁹ Belliappa Affidavit, para. 17-18; Exhibit "F" and "G" – General Security Agreements of the Companies.

¹⁰ Belliappa Affidavit, para. 19.

15. Pursuant to section 12(a)(xii) "Remedies" section of the GSA, upon the occurrence of an event of default that has not been cured or waived, TD is entitled to appoint a receiver.¹¹

16. As further security for the Term Facility, 100 granted a Charge/Mortgage to TD registered as Instrument No. PR4173363 on February 22, 2023, in the principal amount of \$750,000.00, payable on demand, in connection with the Brampton Property, including Standard Charge Terms 8520. In addition, a Notice of Assignment of Rents-General was registered against the Brampton Property as Instrument No. PR4173364 on February 22, 2023. The Charge/Mortgage, TD Standard Charge Terms 8520, and Notice of Assignment of Rents-General are collectively the "**Mortgage Security**".¹²

17. Section 8 "Appointment of Receiver" under the Mortgage Security expressly entitles TD to appoint a receiver upon default of 100.

18. Each of the Guarantors provided TD with an unlimited personal guarantee for the debts of each of the Companies, all four personal guarantees are dated February 21, 2023 (the "**Guarantees**").¹³

19. Pursuant to section 5 "Continuing Guarantee" of the Guarantee, the obligations of the Guarantor hereunder will constitute and be continuing obligations and will apply to and secure any ultimate balance due to TD and will not be considered as wholly or

¹¹ Belliappa Affidavit, para. 20.

¹² Belliappa Affidavit, para 21; Exhibit "H" – Mortgage Security.

¹³ Belliappa Affidavit, para. 22-23; Exhibit "I", "J", "K" and "L" – Guarantees.

partially satisfied by the payment or liquidation at any time of any sum of money for the time being due or remaining unpaid to TD.¹⁴

20. Certified PPSA search results for the Companies with currency to July 11, 2024 indicate that Ballo has 42 registrations and 100 has TD as the only registrant.¹⁵

21. The parcel register for the Brampton Property, effective June 13, 2024, indicates TD as the first mortgagee. The parcel register also indicates registrations in favour of i) 2418338 Ontario Inc. for a Charge in the amount of \$200,000 registered on January 5, 2024 (the "**241 Charge**") and ii) Peel Condominium Corporation No. 416 for a condo lien in the amount of \$4,022 registered on April 30, 2024 ("**Condo Lien/98**").¹⁶

22. The realty tax certificate for the Brampton Property effective to June 17, 2024 indicates taxes owing for 2024 in the amount of \$3,611.70, broken down as \$3,440.17 for tax owing and \$171.53 for penalties/interest owing.¹⁷

Transfer to FRG and Forbearance Agreement

23. The accounts of the Companies were transferred to TD's Financial Restructuring Group ("**FRG**") on January 15, 2024, due to TD's concerns with the financial performance of the Companies.¹⁸

¹⁴ Belliappa Affidavit, para. 24.

¹⁵ Belliappa Affidavit, para. 25; Exhibit "M" – PPSA searches.

¹⁶ Belliappa Affidavit, paras. 26-27; Exhibit "N" – parcel register, 241 Charge, Condo Lien/98.

¹⁷ Belliappa Affidavit, para 28; Exhibit "N" – realty tax certificate.

¹⁸ Belliappa Affidavit, para. 29.

24. Thereafter, TD issued payment demands and Notices of Intention to Enforce Security pursuant to section 244 of the BIA (the "**Section 244 Notices**") to each of the Companies and the Guarantors, as follows:

- (a) On February 5, 2024, in respect of the Operating Loan and the Visa Facility, with a deadline of February 15, 2024;
- (b) On February 21, 2024, in respect of the TDEF Lease Facilities, with a deadline of March 4, 2024; and
- (c) On February 22, 2024, in respect of the Term Facility, with a deadline of March 4, 2024.¹⁹

25. Following the issuance of the Section 244 Notices and payment demands, the Companies and Guarantors requested that TD forbear from enforcing its rights and remedies.²⁰

26. On March 12, 2024, TD, the Companies, and the Guarantors entered into a Forbearance Agreement (the "**Forbearance Agreement**") pursuant to which TD agreed to refrain from exercising its rights and remedies under the Credit Agreement and the security documents delivered to TD until May 31, 2024 or until the occurrence of an Event of Default as defined in the Forbearance Agreement (the "**Forbearance Period**"). The Forbearance Agreement includes a consent to judgment and a consent to

¹⁹ Belliappa Affidavit, para. 30; Exhibit "O", "P" and "Q" – Demand letters and Section 244 Notices.

²⁰ Belliappa Affidavit, para. 31; Exhibit "R" – Emails between TD's lawyers and the Companies'/Guarantors' lawyers.

receivership in its schedules, which were executed by the Companies and the Guarantors as applicable.²¹

27. Under the Forbearance Agreement, the Companies and the Guarantors among other things:

- (a) Agreed to make payments to service and reduce the Indebtedness in accordance with clause 5.04 of the Forbearance Agreement; and
- (b) Consented to judgment and to the appointment of a receiver on application by TD to the Superior Court of Justice (Ontario) (clause 6.01(z) and (aa) and Schedules "C" and "D" to the Forbearance Agreement).²²

28. Shortly after the execution of the Forbearance Agreement, the Companies and Guarantors were in default of their obligations under the Forbearance Agreement. Despite the defaults, TD did not terminate the Forbearance Agreement, as it was entitled to do. Instead, TD provided notices of default to the Companies and Guarantors and reserved all of its rights and remedies, hoping that the Companies and Guarantors would repay all indebtedness owing to TD on May 31, 2024 – at the end of the Forbearance Period.²³

29. The Forbearance Period came to an end on May 31, 2024. From May 31, 2024 to June 11, 2024, Ms. Moses followed up with Ms. Nagra via multiple emails, reminding Ms. Nagra of her clients' contractual obligations under the Forbearance Agreement to repay all indebtedness by May 31, 2024, together with evidence that amounts owing to

²¹ Belliappa Affidavit, para. 32; Exhibit "S" – Fully executed Forbearance Agreement.

²² Belliappa Affidavit, paras. 33-34.

²³ Belliappa Affidavit, para. 35; Exhibit "T" – Notices of Default.

the Canada Revenue Agency for Priority Payables (as defined in the Forbearance Agreement), Ministry of Finance for Fuel Tax Arrears (as defined in the Forbearance Agreement), and the City of Brampton for property taxes on the Brampton Property. Ms. Moses also provided payout statements from TDEF regarding the amounts owing under the TDEF Lease Facilities.²⁴

30. None of Ms. Nagra, the Companies or Guarantors replied meaningfully regarding the payment of indebtedness, despite Ms. Moses' emails from May 31, 2024 to June 11, 2024.²⁵

31. The only response Ms. Moses received are emails from Ms. Nagra on June 3, 2024 with questions regarding the amounts owing under the TDEF Lease Facilities.²⁶

32. The Indebtedness remains outstanding and defaults continue. The June 2024 payment owing for the Term Facility is in arrears. The TDEF Lease Facilities are also in arrears.²⁷

33. On July 19, 2024, TD received a third party demand / requirement to pay in the amount of \$20,792.70 ("**RTP**") in connection with Ballo's account. The RTP is from the Federal Government of Canada pursuant to an order in the Matter of the Canada Labour Code, Part III (Labour Standards) dated July 19, 2024.²⁸

²⁴ Belliappa Affidavit, paras. 36 – 41; Exhibits "U", "V", "W" and "X" – Further emails between TD's lawyers and the Companies'/Guarantors' lawyers.

²⁵ Belliappa Affidavit, paras. 37 and 41.

²⁶ Belliappa Affidavit, para. 38; Exhibit "V" – Emails dated June 3, 2024.

²⁷ Belliappa Affidavit, para. 42.

²⁸ Belliappa Affidavit, para. 43; Exhibit "Y" – Requirement to Pay.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Nature of this Motion

34. TD, as secured creditor, seeks to appoint msi Spergel inc. as receiver of the Companies. The Companies consented to the appointment of a receiver upon default under the Forbearance Agreement. Further, the GSA and the Mortgage Security expressly provide for the appointment of a receiver upon default.

The Test for Appointing a Receiver

35. Pursuant to section [243\(1\) of the BIA](#) and [section 101 of the CJA](#), a court may appoint a receiver if it “is just and convenient” to do so.

36. In deciding whether or not to appoint a receiver, the court must have regard to all of the circumstances, including “the nature of the property and the rights and interests of all parties in relation thereto.” These include the rights of the secured creditor pursuant to its security.²⁹

37. In *Sherco Properties*, Morawetz J. (as he then was) confirmed that where the security instrument provides for a right to appoint a receiver upon default, the burden on the applicant seeking to have the receiver appointed is relaxed:

“... 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

²⁹ [Bank of Montreal v. Sherco Properties Inc., 2013 ONSC 7023 CanLII](#) (“*Sherco Properties*”) at para. 41 and [Bank of Montreal v. Carnival National Leasing Limited, 2011 ONSC 1007](#) (CanLII) at para. 24.

applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. See *Textron Financial Canada Limited v. Chetwynd Motels Limited*, [2010 BCSC 477](#); *Freure Village, supra*; *Canadian Tire Corp. v. Healy*, [2011 ONSC 4616](#) and *Bank of Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd.*, [2011 ONSC 1007](#).³⁰

38. In *2806401 Ontario Inc. o/a Allied Track Services Inc.*, Osborne J. stated at paragraph 13:

“Factors considered by courts when determining whether it is just or convenient to appoint a receiver include: the existence of a debt and a default, the quality of the security in issue, the fact that the creditor has a right to appoint a receiver under the loan documentation, the likelihood of maximizing the return to the parties, and the risk to the security holder, among others. [See, for example: *Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, [2011 ONSC 5612](#) (Commercial List) at para 22; *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, [2014 ONSC 5205](#) (Commercial List) at para 28; *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007 (Commercial List) at [paras 24](#) and [27](#) [*Carnival Leasing*]; and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, [2009 BCSC 1527](#) at para 25].”³¹

³⁰ [Sherco Properties, para. 42.](#)

³¹ [2806401 Ontario Inc. o/a Allied Track Services Inc., 2022 ONSC 5509 CanLII](#) at para. 13.

39. TD issued payment demands and Section 244 Notices to the Companies and the Guarantors on February 5, 2024 in respect of the Operating Loan and the Visa Facility.

40. With respect to the Operating Loan and Visa Facility, on a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days.³²

41. Under the Credit Agreement, the Companies agreed to repay the Operating Loan and the Visa Facility on demand, if TD demands repayment. TD has demanded payment. The failure to pay constitutes an Event of Default under the Credit Agreement.

42. Relying on this failure to pay by February 15, 2024, TD issued demands and Section 244 Notices in respect of the TDEF Lease Facilities and the Term Facility on February 21, 2024 and February 22, 2024, respectively.

43. Under the Forbearance Agreement, the Respondents promised and/or agreed to, among other things:

a) upon the occurrence of an event of default, the Respondents shall consent to TD immediately enforcing its rights under:

a. the consent to appointment of the receiver by immediately seeking application to the Court; and

b. the consent to judgment by immediately issuing an action or application in order to file and enforce the consent to judgment;

³² [Bank of Montreal v. Carnival National Leasing Limited, 2011 ONSC 1007](#) (CanLII) at para. 13.

- b) make three payments to the Bank, each in the amount of \$10,000.00 on or before March 20, 2024, April 20, 2024 and May 21, 2024 to reduce the amounts owing under the Visa Facility (the “**Visa Facility Payments**”) (Section 5.04(b) of the Forbearance Agreement);
- c) make all monthly payments as they come due and owing under the Credit Agreement and Master Lease Agreement and Schedules (Section 5.04(c) of the Forbearance Agreement);
- d) provide reporting on payment of priority payables due on May 21, 2024 (Section 6.01(l) of the Forbearance Agreement);
- e) cooperate with and provide access to TD's agent so that TD's agent can access and inspect the motor vehicles (Section 6.01(dd) of the Forbearance Agreement).

44. The Forbearance Agreement was heavily negotiated between counsel. Under the Forbearance Agreement, the Companies agreed and consented to the appointment of a receiver and to judgment in the event of default under the Credit Agreement and/or the Master Lease Agreement and Schedules and/or the GSA and/or the Mortgage Security and/or the Forbearance Agreement.

45. The Companies have failed to comply with its contractual obligations owed to TD under the Credit Agreement, the Master Lease Agreement and Schedules, the GSA, the Mortgage Security and the Forbearance Agreement. Justifiably, TD has lost confidence in the Companies.

46. TD has met the test for the appointment of a Receiver. TD is a secured creditor. It is owed under the credit facilities in excess of \$1.8 million. TD has made payment demand and issued the Section 244 Notices. TD is entitled to appoint a receiver under its security and under the Consent to Receivership. TD requires the assistance of a court-appointed receiver to realize on its security.

47. TD respectfully submits that it is just and convenient to appoint Spergel as receiver at this time for the following reasons:

- (a) the Operating Facility and Visa Facility are repayable on demand and remains outstanding;
- (b) under the Forbearance Agreement, TD provided the Companies with time to repay the indebtedness provided, among other things, that the Companies make the Visa Facility Payments;
- (c) the Companies immediately defaulted under the Forbearance Agreement by not cooperating with TD's agent for motor vehicle inspection, paying late or not paying the Visa Facility Payments, among other defaults;
- (d) the Companies have demonstrated a serious failure to comply with their obligations under the Credit Agreement, the Master Lease Agreement and Schedules, the GSA, the Mortgage Security and the Forbearance Agreement, as evidenced by the payment defaults, failing to keep current realty taxes in connection with the Brampton Property, failing to comply with its financial and reporting information, including advising TD on the

status of Priority Payables and generally failing to respond to and address TD's concerns;

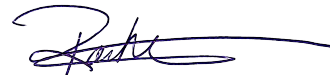
- (e) the Companies' actions have resulted in Events of Default under the Credit Agreement, the Master Lease Agreement and Schedules, the GSA, the Mortgage Security and the Forbearance Agreement and the Events of Default still continue;
- (f) the terms of the GSA and the Mortgage Security expressly permit the appointment of a receiver on default and the Companies agreed to these contractual terms when they signed and delivered the GSA and the Mortgage Security to TD in consideration of the credit facilities;
- (g) TD bargained for and relied upon enforcing the Consent to Receivership upon an Event of Default and the Companies agreed when they signed and delivered the Consent to Receivership to TD in consideration of the forbearance;
- (h) payment demands and the Section 244 Notices to the Companies have long since expired;
- (i) the indebtedness remains outstanding;
- (j) TD has provided the Companies with more than sufficient time to repay the indebtedness;

- (k) the receiver will be in a position to market and sell the Brampton Property for the benefit of all stakeholders;
- (l) TD has no line of sight on Priority Payables (other than realty taxes which is in arrears) as the Companies have failed and/or refused to provide the financial information required by TD under the Credit Agreement and the Forbearance Agreement; and
- (m) msi Spergel inc. has consented to act as receiver.

PART IV - ORDER REQUESTED

48. TD seeks an Order appointing msi Spergel inc. as Receiver and judgment on the Guarantees.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of August, 2024.



Rachel Moses

FOGLER, RUBINOFF LLP

Lawyers
77 King Street West
Suite 3000, P.O. Box 95
TD Centre North Tower
Toronto, ON M5K 1G8

Rachel Moses (LSO# 42081V)

Tel: 416-864-7627

rmoses@foglers.com

Carol Liu (LSO# 84938G)

Tel: 416-849-4150

cliu@foglers.com

Lawyers for the Applicant, The Toronto-Dominion Bank

SCHEDULE "A"

LIST OF AUTHORITIES

1. [*Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 \(CanLII\)](#)
2. [*Bank of Montreal v. Carnival National Leasing Limited*, 2011 ONSC 1007 \(CanLII\)](#)
3. [*Textron Financial Canada Limited v. Chetwynd Motels Limited*, 2010 BCSC 477 \(CanLII\)](#)
4. [*Canadian Tire Corporation, Ltd. v. Mark Healy et al.*, 2011 ONSC 4616 \(CanLII\)](#)
5. [*2806401 Ontario Inc. o/a Allied Track Services Inc.*, 2022 ONSC 5509 \(CanLII\)](#)
6. [*Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, 2011 ONSC 5612 \(CanLII\)](#)
7. [*RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 \(CanLII\)](#)
8. [*Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 \(CanLII\)](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. [Section 243\(1\) of the *Bankruptcy and Insolvency Act*, RSC 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.

2. [Section 101 of the *Courts of Justice Act*, RSO 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
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-and- **BALLO CARRIERS INC. et al.**
Respondents

Court File No. CV-24-00003238-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
BRAMPTON

FACTUM OF THE APPLICANT

FOGLER, RUBINOFF LLP

Lawyers

77 King Street West

Suite 3000, P.O. Box 95

TD Centre North Tower

Toronto, ON M5K 1G8

Rachel Moses (LSO# 42081V)

rmoses@foglers.com

Tel: 416-864-7627

Carol Liu (LSO# 84938G)

cliu@foglers.com

Tel: 416-849-4150

Lawyers for the Applicant