

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

**IN THE MATTER OF** Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Sections 243(1) and 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

**B E T W E E N:**

**THE TORONTO DOMINION BANK**

Applicant

- and -

**1882540 ONTARIO INC.**

Respondent

**FACTUM OF THE APPLICANT**

June 10, 2016

**Thornton Grout Finnigan LLP**  
Barristers and Solicitors  
100 Wellington Street West  
Suite 3200  
Toronto ON M5K 1K7

**Leanne Williams (LSUC# 41877E)**  
Tel: 416-304-0060  
Email: [lwilliams@tgf.ca](mailto:lwilliams@tgf.ca)

**Rachel Bengino (LSUC# 68348V)**  
Tel: 416-304-1153  
Fax: 416-304-1313  
Email: [rbengino@tgf.ca](mailto:rbengino@tgf.ca)

Lawyers for the Applicant.

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

**IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended**

B E T W E E N:

**THE TORONTO DOMINION BANK**

Applicant

- and -

**1882540 ONTARIO INC.**

Respondent

**FACTUM OF THE APPLICANT**  
**(Motion for a Receivership Order returnable June 13, 2016)**

**PART I - NATURE OF THE MOTION**

1. On May 19, 2016, upon an application by The Toronto Dominion Bank (the “**Applicant**” or the “**Bank**”), this Honourable Court granted an order (the “**Receivership Order**”) appointing Dodick Landau Inc. (“**Dodick Landau**”) as the receiver (the “**Receiver**”) of the property, assets and undertaking of 1882540 Ontario Inc. (the “**Debtor**”) pursuant to

section 243(1) of the *Bankruptcy and Insolvency Act*<sup>1</sup> (the “**BIA**”) and section 101 of the *Courts of Justice Act*<sup>2</sup> (the “**CJA**”).

2. The Applicant now seeks to expand the definition of “Debtor” in the Receivership Order to the following entities that are intricately linked with the Debtor: 1632032 Ontario Ltd. (“**163**”), 1665651 Ontario Ltd. (“**166**”), 2495584 Ontario Inc. (“**249**”), 1873349 Ontario Inc. (“**187**”) (the latter three parties together with the Debtor, the “**WAB Group**”).

## **PART II - THE FACTS**

### **Background**

3. The Debtor owns a retail flower and delivery business both online and from several retail locations. It also operates under the name “What a Bloom”. Cesario Ginjo is a director and President of the Debtor.

**Affidavit of Daniel Prupas, sworn May 17, 2016 (“Prupas Initial Affidavit”) at paras. 3 and 4, Motion Record returnable June 13, 2016 (the “Motion Record”), Tab 2, Appendix I.**

4. The Debtor operates its head office from 65A Wingold Avenue, North York, Ontario (the “**Wingold Location**”) a production center at 494 Gilbert Avenue, Toronto, Ontario, (the “**Production Center**”) and several retail locations (collectively, the “**Retail Locations**”),

---

<sup>1</sup> R.S.C. 1985, c. B-3, as amended.

<sup>2</sup> R.S.O. 1990 c. C-43, as amended.

as more fully described in the First Report of the Receiver, dated June 10, 2016 (the “**First Report**”).

**Prupas Affidavit at para. 3, Motion Record, Tab 2, Appendix I.**

**First Report at para. 8, Motion Record, Tab 2.**

5. The Bank is a secured creditor and extended certain credit facilities to the Debtor pursuant to a credit agreement dated May 28, 2015, as amended by letter dated October 6, 2015 (the “**Credit Agreement**”).

**Prupas Affidavit at para. 9, Motion Record, Tab 2, Appendix I.**

6. 163 provided written guarantees to the Bank as security for the Debtor’s obligations owing to the Bank. 163 granted a general security agreement in favour of the Bank, which the Bank properly registered in Ontario.

**First Report at para. 18, Motion Record, Tab 2.**

7. As at May 16, 2016, the Debtor was indebted to the Bank in the amount of \$1,497,849.64, inclusive of interest, plus fees and costs incurred to date.

**Prupas Affidavit at para. 10, Motion Record, Tab 2, Appendix I.**

8. The Debtor had defaulted on the terms of the Credit Agreement and, on February 18, 2016, the Bank issued demand letters and Notices of Intention to Enforce Security under section 244 of the BIA (“**NOI**”) to the Debtor and to 163. The required notice period under such notices has expired.

**Prupas Affidavit at paras. 26 - 28, Motion Record, Tab 2, Appendix I.**

9. On May 19, 2016, the Court granted the Bank's application to appoint Dodick Landau as the Receiver of the Debtor's Property.

### **Criminal Investigation by Canada Revenue Agency ("CRA")**

10. The CRA has initiated a criminal investigation against the Debtor in the approximate amount of \$1.8 million (the "**CRA Investigation**"). The CRA also registered a security interest against the Debtor on January 15, 2016.

**First Report at para. 22, Motion Record, Tab 2.**

11. The CRA Investigation was to assess the trust accounts with respect to the payroll source deductions, HST and income tax trust accounts of the Debtor. On March 30, 2016, the CRA informed the Debtor about the CRA Investigation.

**First Report at paras. 24 and 30, Motion Record, Tab 2.**

12. At no point did the Debtor advise the Applicant about the CRA Investigation which was discovered by the Receiver. The CRA Investigation remains ongoing.

**First Report at para. 30, Motion Record, Tab 2.**

### **Findings of the Receiver since the Receivership Order**

13. Since the Receivership Order was granted, the Receiver has taken several steps to preserve and protect the Property and to investigate the location and disposition of the Property.

**First Report at para. 42, Motion Record, Tab 2.**

14. During its investigation, the Receiver has discovered that the Debtor's operations are significantly intertwined with the entire WAB Group. Cesario Ginjo is the principle behind each company in the WAB Group.

**First Report at paras 7, 14 and 49, Motion Record, Tab 2.**

15. The Debtor provides online flower services through several different domain names, including: whatabloom.com, memorialflowers.ca, dignity.memorialflowers.ca, 1800flowers.ca, flowercrazy.com and flowerscanada.com (collectively, the "**WAB Group Websites**"). Each of these domain names are registered to a company controlled by Cesario Ginjo, with the exception of 1800flowers.ca. Each of the WAB Group Websites are run from the same locations, with the same employees, assets and inventory.

**First Report at para. 10, Motion Record, Tab 2.**

16. The WAB Group also operates through corporate partner websites, whom the Debtor pays a commission to for access to their customer base (the "**WAB Partner Websites**").

**First Report at para. 10, Motion Record, Tab 2.**

17. The Receiver has discovered that all, or substantially all, of the sales receipts from the WAB Group are deposited into six banks accounts, which are owned by certain of the WAB Group.

**First Report at para. 49, Motion Record, Tab 2.**

18. 166 maintains a bank account with the Bank of Montreal ("**BMO**"), which receives all of the sales receipts from the WAB Group Websites, except 1800flowers.ca. 187 maintains a bank account with JP Morgan Chase which appears to collect all online sale receipts from

1800flowers.ca. All of the expenses of the WAB Group are funded by the Debtor, run from the Premises of the Debtor and use the employees of the Debtor.

**First Report at para. 49, Motion Record, Tab 2.**

19. The Debtor maintained two accounts with the Bank, which were used to collect sales receipts from the WAB Partner Websites. As a result of the receivership, 249 has been collecting the sales receipts from the WAB Partner Websites and paying all of the operating expenses of the WAB Group, since April 2016. 249 maintains a bank account with BMO.

**First Report at para. 49, Motion Record, Tab 2.**

20. Notwithstanding that the sales were not directly deposited with the Debtor, the Debtor has paid all of the operating expenses of the entire WAB Group through its accounts with the Bank, up to and until April 2016. The Debtor also opened an account with Royal Bank of Canada in April 2016. This account received funds from 187 and transferred those funds to 166 and 249.

**First Report at para. 49, Motion Record, Tab 2.**

21. Notwithstanding the Mr. Ginjo advised the Bank that Mother's Day was one of the busiest times of the year, the Debtor has failed to make a deposit into its accounts with the Bank since May 5, 2016.

**Prupas Affidavit at para. 45, Motion Record, Tab 2, Appendix I.**

22. The Debtor's pre-receivership sales receipts were redirected by Mr. Ginjo to his other fresh flower sales operations. The Debtor's receivables were directly deposited into accounts maintained by 166, 249 and 187. This is property which the Applicant holds security over.

**First Report at para. 14(b), Motion Record, Tab 2.**

23. Mr. Ginjo's actions in redirecting the Debtor's receivables to other accounts has continued since the date of the Receivership Order. In fact, between the dates of May 27, 2016 and June 1, 2016, Mr. Ginjo told the Greater Toronto Airport Authority to cancel the cheque it had deposited into the Debtor's account and re-issue it, which Mr. Ginjo then deposited into a non-Debtor bank account. Mr. Ginjo has also continued the operations of the Debtor through 166 using premises leased by the Debtor and contracts entered into by the Debtor.

**First Report at para. 14(c), Motion Record, Tab 2.**

24. The First Report outlines the receipts and disbursements and presents a detailed analysis of the transfers between the WAB Group's accounts.

**First Report at para. 49, Motion Record, Tab 2, Appendix Q.**

25. Through the investigation of the Receiver, it is evident that the WAB Group has substantially integrated cash management functions and operations. Further, the Debtor's Property has been transferred to accounts held in the names of the WAB Group with other banking institutions.



26. The WAB Group are not separate and distinct legal entities, but rather, are intricately linked corporations that operate the same business, through the same principle, from the same locations using the same assets and employees. Property of the Debtor, which the Applicant holds a security interest in and has appointed the Receiver over, has been used to pay expenses of the WAB Group, even though receipts from the WAB Group have not been transferred to the Debtor.

### **PART III - THE ISSUES**

27. Is it just and convenient for this Court to expand the definition of “Debtor” in the Receivership Order to the entire WAB Group?

### **PART IV - THE LAW**

#### **Appointment of a Receiver over 163 under Section 243 of the BIA and Section 101 of the CJA**

Section 243 of the BIA provides as follows:

#### ***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.

***Restriction on appointment of receiver***

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then. [...]

28. Section 101 of the CJA provides for the appointment of a receiver when “it is just or convenient” to do so.

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.

***Courts of Justice Act, R.S.O. 1990, c. C. 43, s. 101 (“CJA”).***

29. The following requisite factors have been met in these circumstances:
- (a) the Bank is a secured creditor;
  - (b) 163 is an “insolvent person” within the meaning of the BIA as the Applicant has issued a demand and NOI to 163 in respect of its guarantee of the Debtor’s obligations, which has not been paid, as such, 163 has ceased to meet its current obligations as they generally become due; and

- (c) the Bank served an NOI on 163 and the prescribed 10-days' notice period has expired.

**Prupas Affidavit at paras. 26-28, Motion Record, Tab 2, Appendix I.**

30. It is not essential that the moving party, if a creditor, establish that it will suffer irreparable harm if a receiver is not appointed. The main factor that the Courts will consider is whether a receiver is necessary to protect the interest of the secured creditor.

*Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.* 1995 CarswellOnt 39 (Ont. Gen. Div.), at para. 28, Applicant's Book of Authorities, Tab 1.

*Bank of Nova Scotia v. D. G. Jewelry Inc.*, 2002 CarswellOnt 3443, at para. 1, Applicant's Book of Authorities, Tab 2.

*Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007, 2011 CarswellOnt 896, at paras. 27 and 28, Applicant's Book of Authorities, Tab 3 [*Carnival*].

31. 163 guaranteed the obligations of the Debtor and granted a general security agreement in favour of the Applicant. Further, the Applicant issued a demand and NOI to 163, which was not repaid. The Applicant, as a secured creditor, is entitled to make an application under section 243 of the BIA to request that this Court appoint a receiver over the assets, undertakings and property of 163.

### **Appointment of a Receiver over the WAB Group under Section 101 of the CJA**

32. Section 101 of the CJA provides for the appointment of a receiver when "it is just or convenient" to do so.

**CJA, s. 101.**

33. In exercising this discretion, 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.

*Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 at paras. 11 and 13 (Ont. Gen. Div.), Applicant's Book of Authorities, Tab 4.

*Carnival, supra* at para. 23, Applicant's Book of Authorities, Tab 3.

CJA, s. 101.

34. The Court in *Anderson v Hunking* summarized the following principles to be applied in considering the appointment of a receiver in circumstances where the applicant does not have security over the respondent's assets:

- (a) appointing a receiver for the purposes of execution is extraordinary relief and should be granted sparingly;
- (b) the appointment of a receiver for this purpose is effectively execution before judgment and to justify the appointment there must be strong evidence that the plaintiff's right to recovery is in serious jeopardy;
- (c) there shall be due consideration for the effect on the parties as well as consideration of the conduct of the parties;
- (d) in deciding whether to appoint a receiver, the court must have regard to all the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto;

- (e) the test for the appointment of an interlocutory receiver is comparable to the test for interlocutory injunctive relief, which is:
- (i) preliminary assessment made of the merits of the case to ensure that it is a serious issue to be tried;
  - (ii) must be demonstrated that the moving party will suffer “irreparable harm” if the motion is refused; and
  - (iii) an assessment must be made to determine which parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits – that is, the “balance of convenience”;
- (f) where the plaintiff’s claim is based in fraud, a strong case of fraud, coupled with evidence that the plaintiff’s right of recovery is in serious jeopardy, will support the appointment of a receiver of the defendants’ assets;

*Anderson v Hunking*, 2010 ONSC 4008 at para. 27, Applicant’s Book of Authorities, Tab 5.

35. Expanding on the test in (e), above, the facts of this case demonstrate the following:

- (a) *preliminary assessment made of the merits of the case to ensure that it is a serious issue to be tried* - The Receiver has conducted investigative work which has led to the discovery of the various bank accounts and numbered companies that are all operating from the same premises, with the same assets, employees and inventory under the guise of the “What a Bloom” name.

- (b) *must be demonstrated that the moving party will suffer "irreparable harm" if the motion is refused* -- The Receiver has been unable to perform its duties without access to the other WAB Group's banking records and accounts. It is evident that Mr. Ginjo used several numbered companies interchangeably and deposited funds generated by the Debtor into the accounts of other members of the WAB Group. The Applicant unwittingly financed the entire WAB Group and would be irreparably harmed if the Receivership Order is not extended to allow the Receiver to take possession of the assets, accounts, books and records of the entire WAB Group. The Applicant's collateral has been redirected into accounts maintained by other members of the WAB Group.
- (c) *an assessment must be made to determine which parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits -- that is, the "balance of convenience"* -- The WAB Group will certainly suffer harm from the appointment of the Receiver over their assets, property and undertaking. However, this harm is outweighed by the prejudice to the Applicant, a secured creditor of the Debtor who unknowingly financed each member of the WAB Group. The Debtor has intentionally redirected funds to its affiliates in an effort to keep those funds from the Bank. Any resulting harm from the expanded receivership will mainly be felt by Mr. Ginjo who has continued the operations of the Debtor under another name using premises leased by the Debtor and contracts entered into by the Debtor.

36. The Courts will appoint a receiver over a company in circumstances where the company is intrinsically involved with the companies already in receivership, and where it is necessary to review and ascertain the transactions that have taken place within the network of companies.

***General Electric Canada Real Estate Financing Holding Co. v Liberty Assisted Living Inc.*, 2011 CarswellOnt 8054, at para. 10, Applicant’s Book of Authorities, Tab 6.**

37. The Court in *Romspen Investment Corp. v Hargate Properties Inc.* expanded the definition of “Debtor” in the receivership order to a third party that the Applicant did not have security over. The Court did so considering that the third party had a central role in operating the debtor’s business, its existence was in breach of the loan documents since the debtor’s revenue was diverted to the third party and deposited in its operating account, and the third party was in significant arrears to the CRA.

***Romspen Investment Corp. v Hargate Properties Inc.*, 2011 ABQB 759, at paras. 13 and 17, Applicant’s Book of Authorities, Tab 7 [“*Romspen*”].**

38. These factors are similarly applicable to the relationships between the Debtor and the rest of the WAB Group, given the CRA Investigation and that revenue from the Debtor’s online sales have been diverted to other accounts held in the names of the various members of the WAB Group. Mr. Ginjo used the Debtor’s sales revenue to finance operations of the other members of the WAB Group.

39. The Court in *Romspen* cited *WestLB AG, Toronto Branch v Rosseau Resort Development Inc.*, for the following quote as being applicable in its circumstances [Emphasis added]:

As noted by the Court of Appeal in *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*<sup>2</sup>, as a superior court of general jurisdiction,

the Superior Court has all of the powers that are necessary to do justice between the parties. Specifically, the jurisdiction to appoint a receiver and manager is found in section 101 of the *Courts of Justice Act*. It provides that a receiver may be appointed where it appears to a judge to be just or convenient to do so. The order may include such terms as are considered just. A receiver has been appointed over WAB Group in circumstances where they are intricately involved with WAB Group already in receivership and where it was just and convenient to do so: *Ed Mirvish Enterprises Ltd. v. Stinson Hospitality Inc.* [2007 CarswellOnt 7332 (Ont. Gen. Div. [Commercial List])]³. That said, the appointment of a receiver is an extraordinary remedy which should be granted sparingly: *O.W. Waste Inc. v. EX-L Sweeping & Flushing Ltd.*⁴.

*WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, 2009 CarswellOnt 6182, Applicant's Book of Authorities, Tab 8.

*Romspen, supra* at para. 18, Applicant's Book of Authorities, Tab 7.

40. Although the appointment of a receiver has been characterized as an extraordinary remedy, it is just and convenient to do so in these circumstances for the following reasons:
- (a) the Applicant would suffer irreparable harm if this Order is not approved;
  - (b) the WAB Group are intricately linked with the Debtor;
  - (c) Mr. Ginjo has financed the non-Debtor members of the WAB Group by redirecting the Debtor's sales revenue and receivables to accounts maintained by other members of the WAB Group;
  - (d) the CRA has initiated a criminal investigation against the Debtor, which the Debtor did not disclose to the Applicant;



- (e) the Debtor has additional accounts with other banking institutions that it did not disclose to the Applicant and funds were diverted to these accounts among the WAB Group; and
  - (f) Mr. Ginjo continues to operate the same business as the Debtor in the names of the other WAB Group using the assets and property financed by the Applicant.
41. Given the circumstances, it is just and convenient to expand the definition of “Debtor” in the Receivership Order to include 163 and each entity in the WAB Group.

#### **PART I - RELIEF REQUESTED**

42. The Applicant seeks the following relief:
- (a) expanding the definition of “Debtor” in the Receivership Order granted on May 19, 2016 to include 1665651 Ontario Ltd., 2495584 Ontario Inc., 1873349 Ontario Inc. and 1632032 Ontario Ltd.;
  - (b) removing the location of the debtor listed in the Receivership Order as 1444 Dupont Street, Unit 11, Toronto, Ontario, M6E 1P8; and
  - (c) such further and other relief as counsel may advise and that this Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10<sup>h</sup> day of June, 2016.

June 10, 2016

*Thornton Grout Finnigan LLP*

**Thornton Grout Finnigan LLP**

Barristers and Solicitors

100 Wellington Street West

Suite 3200

Toronto ON M5K 1K7

**Leanne Williams (LSUC# 41877E)**

Tel: 416-304-0060

Email: [lwilliams@tgf.ca](mailto:lwilliams@tgf.ca)

**Rachel Bengino (LSUC# 68348V)**

Tel: 416-304-1153

Fax: 416-304-1313

Email: [rbengino@tgf.ca](mailto:rbengino@tgf.ca)

Lawyers for the Applicant.

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

| No. | Case  |
|-----|---|
| 1   | <i>Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.</i> 1995 CarswellOnt 39 (Ont. Gen. Div.)                        |
| 2   | <i>Bank of Nova Scotia v. D. G. Jewelry Inc.</i> , 2002 CarswellOnt 3443  |
| 3   | <i>Bank of Montreal v. Carnival National Leasing Ltd.</i> , 2011 ONSC 1007, 2011 CarswellOnt 896                        |
| 4   | <i>Bank of Nova Scotia v. Freure Village on Clair Creek</i> (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328           |
| 5   | <i>Anderson v Hunking</i> , 2010 ONSC 4008  |
| 6   | <i>General Electric Canada Real Estate Financing Holding Co. v Liberty Assisted Living Inc.</i> , 2011 CarswellOnt 8054 |
| 7   | <i>Romspen Investment Corp. v Hargate Properties Inc.</i> , 2011 ABQB 759   |
| 8   | <i>WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.</i> , 2009 CarswellOnt 6182                            |

**SCHEDULE "B"**  
**RELEVANT STATUTES**

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, section 243
2. *Courts of Justice Act*, R.S.O. 1990 c. C-43, as amended, section 101
3. *Rules of Civil Procedure*, Rule 41

IN THE MATTER OF Section 101 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43, as amended, and in the matter of Sections 243(1) and 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

THE TORONTO-DOMINION BANK      and  
Applicant

1882540 ONTARIO INC.

Respondent

Court File No.: CV-16-11398-00CL

*ONTARIO*  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)

Proceedings commenced at Toronto

**FACTUM OF THE APPLICANT**

**Thornton Grout Finnigan LLP**  
Barristers and Solicitors  
100 Wellington Street West  
Suite 3200  
Toronto ON M5K 1K7

**Leanne Williams (LSUC# 41877E)**  
Tel: 416-304-0060  
Email: [lwilliams@tgf.ca](mailto:lwilliams@tgf.ca)

**Rachel Bengino (LSUC# 68348V)**  
Tel: 416-304-1153  
Fax: 416-304-1313  
Email: [rbengino@igf.ca](mailto:rbengino@igf.ca)

Lawyers for the Applicant