



SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.: CV-23-00699663-00CL DATE: 26 May 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: The Toronto-Dominion Bank v. Injection Technologies Inc.
et al.

BEFORE JUSTICE: STEELE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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ENDORSEMENT OF JUSTICE STEELE:

1. This is an application by The Toronto-Dominion Bank (“TD”) seeking:
 - a) The appointment of Deloitte as receiver and manager of all of the assets of Injection Technologies Inc. (“Injection Technologies”), Moldco Plastics Inc. (“Plastics”), and Moldco Holdings Inc. (“Holdings”) (collectively, the “Debtors”);
 - b) Authorization and direction to the Receiver to offer the assets of the Debtors for sale and to deal with the assets of the Debtors substantially in accordance with the process set out in Deloitte’s pre-filing report; and
 - c) Leave to the Receiver to move to assign the Debtors into bankruptcy, and authorize Deloitte to act as trustee in bankruptcy.
2. The Debtors do not oppose the application.
3. Each of the Debtors is indebted to TD in connection with certain credit facilities. As security for the Debtors’ obligations, they each provided a GSA, dated June 10, 2021, which grants TD a security interest in the any and all of the property, assets and undertakings of the Debtors, registration in respect of which was made under Ontario’s PPSA and British Columbia’s PPSA.
4. The Debtors’ obligations to TD are cross-guaranteed.
5. With regard to Injection Technologies, there are other registrations in addition to TD’s, including registrations made by Wells Fargo Equipment Finance Company, Bank of Montreal, De Lage Landen Financial Services Canada Inc., Meridian Onecap Credit Corp., BMW Canada Inc., and CWB National Leasing Inc.
6. Each of the GSAs granted by the Debtors gives TD a right to appoint a receiver over the Debtors’ property upon the occurrence of an Event of Default. There have been several defaults under the credit agreements, including non-compliance with margin requirements, ratio and reporting covenants, a material adverse change in connection with a \$6.2 million inventory write-down, and a borrowing base shortfall of \$8.1 million.
7. In February 2023, with the cooperation of the Debtors, TD retained Deloitte to review the Debtors’ financials and operations. Among other issues, the Debtors have amassed significant tax arrears and source deduction arrears, as well as an inventory write-down in early 2023 in the amount of approx. \$6.2 million. The Debtors are well in excess of the maximum allowable credit and have been so for over a year. There is a significant borrowing base shortfall. The Debtors will run out of cash unless TD advances further monies.
8. TD issued default letters in January and March 2023, which set out the Debtors’ non-compliance with certain requirements and covenants under the credit facilities. The Debtors have failed to cure the defaults.

9. TD made formal written demand on the Debtors on May 2, 2023, attaching notices of intention to enforce security pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act*. As of May 1, 2023, the Debtors owe TD approx. \$13 million CAD and approx. \$1.9 million USD.

Appointment of Receiver

10. The Court may appoint a receiver where it is “just and convenient” to do so: CJA, s. 101(1). Similarly, under section 243(1) of the BIA, on an application by a secured creditor, where the Court considers it to be just or convenient to do so, the Court may appoint a creditor to:
- 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.
11. In order to determine whether it is just and convenient to appoint a receiver, the Court must have regard to all of the circumstances. In particular, the following considerations have been held to be relevant:
- The moving party has a right under its security to appoint a receiver;
 - The security is in jeopardy; and
 - Whether it is in the interests of all concerned to have a receiver appointed by the Court. This analysis includes an examination of the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the working duties of the receiver and manager.

Bank of Nova Scotia v. Freure Village on the Clair Creek, 1996 CanLII 8258 (ONSC) at paras. 10-13.

12. TD states that the appointment of a receiver is necessary and appropriate for the following reasons:
- a) TD’s security position has deteriorated and will continue to deteriorate absent the appointment of a Receiver;
 - b) The Debtors do not have sufficient cash on hand to continue operations, and the Shareholders are not prepared to provide monies ranking behind TD’s security to fund operations;
 - c) For the protection of the estate of the Debtors and to realize on the collateral subject to TD’s security for the benefit of TD and any other stakeholders.
13. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant seeking the appointment of the receiver is relaxed. Generally, the appointment of a receiver is an extraordinary equitable remedy. However, the Courts do not regard the remedy in this way where the relevant security documents permit the appointment. This is because the applicant is seeking to enforce a term of an agreement that both parties made: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, at para. 27, *Hands-On Capital Investments Inc. v. DMCC Holdings Inc.*, April 19, 2023 (Ont. S.C.J.), at para. 48.

14. Pursuant to the security documents granted by the Debtors to TD, TD is entitled to have a receiver appointed upon any default under the credit agreements or the security. Accordingly, the appointment of a receiver in this case is the result of enforcing the contractual terms agreed to by the Debtors.
15. In any event, it is just and convenient to appoint a receiver in the circumstances (see paras. 25-29 of TD's factum).

Ability of the Receiver to Assign the Debtor into Bankruptcy

16. TD seeks the granting of leave to the Receiver to assign the Debtors into bankruptcy and states that the relief is appropriate for the following reasons:
 - a) The financial information of the Debtors is inadequate and inaccurate;
 - b) The Debtors have many unpaid, unsecured creditors who will want to be able to advance their claims in an orderly fashion and who will be interested in the reasons for their loss;
 - c) The Debtors engaged in a number of large transactions over the past 5 years including the acquisition by the current shareholders, the de facto amalgamation of their business operations, the irregularities in their accounting records and payment history with CRA, and the unexplained disappearance of approx. \$6 million of inventory value.
17. As noted by TD, a receiver is not precluded from assigning a debtor into bankruptcy and acting as trustee: *Terrace Sporting Goods Ltd. (Re)*, [1979] O.J. 3361, at paras. 1 and 9, *Solid Holdings Ltd. (Re)*, 2019 BCSC 126, at para. 19, aff'd 2019 BCCA 231.
18. I am satisfied that the addition of this power into the powers set out in paragraph 3 of the Model Order is appropriate in the circumstances.
19. Order to go in the form signed by me today with immediate effect and without the necessity of formal issuance or entry.

