February 22, 2023

HAND DELIVERED

The Honourable Justice Presiding in Chambers
Supreme Court of Nova Scotia
The Law Courts Building
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord/My Lady:

Re: The Toronto-Dominion Bank v Meridien Atlantic Fishing Ltd. and Rocky Coast Seafoods Ltd.

We represent the Applicant, the Toronto-Dominion Bank ("**TD**"), in respect of the application scheduled to be heard in regular chambers on March 7, 2023 for Deloitte Restructuring Inc. (the "**Receiver**") to be appointed as Receiver of the assets of the Respondents, Meridian Atlantic Fishing Ltd. ("**Meridien**") and Rocky Coast Seafoods Ltd. ("**Rocky**") (collectively, the "**Respondent**") pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") section 243.

SERVICE AND NOTICE

The relief sought in this application is pursuant to the BIA and therefore the Bankruptcy and Insolvency General Rules supersede our Civil Procedure Rules in the event of any inconsistency. BIA Rule 3 states:

> 3 In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

As this is a matter where the BIA does not specify a minimum notice of requirement, BIA Rule 6 applies. Rule 6 states:

> 6 (1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must

Gavin D. F. MacDonald | Partner
Direct 902 491 4464 **Main** 902 421 6262 **Fax** 902 421 3130 **Email** gmacdonald@coxandpalmer.com
Purdy's Wharf Tower I 1100-1959 Upper Water Street Halifax NS
Correspondence PO Box 2380 Central Halifax NS B3J 3E5

be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

(4) The court may, on an ex parte application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

In terms of measuring the four days provided for under BIA Rule 6, the period of time is governed by BIA Rule 4, which stipulates clear business days:

4 If a period of less than six days is provided for the doing of an act or the initiating of a proceeding under the Act or these Rules, calculation of the period does not include Saturdays or holidays.

In accordance with BIA Rule 6(1), it is the intention of TD to have legal counsel for Rocky and Meridien served with the materials by email. In addition, notice by email will be provided to the Office of Superintendent of Bankruptcy, Canada Revenue Agency and other secured creditors. Proof by affidavit of service will be filed prior to the hearing of this Application.

This Application includes a request for an abridgement pursuant to BIA Rule 6(4), if necessary, for the matter to be heard on the scheduled date.

APPOINTMENT OF A RECEIVER

Section 243 of the BIA provides as follows:

"(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any 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 a 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.

(1.1) in the case of an insolvent person in respect of whose property and notice is to be sent under Section 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 early enforcement under subsection 244(2); or

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

Pursuant to Subsection (1), we therefore submit that the test for appointment is that it must be just or convenient.

We draw the court's attention to the Affidavits of Vitaly Kormakov and Gavin MacDonald, which demonstrate that:

1. Notice has been given to the Respondent pursuant to Section 244(1) of the BIA;

2. The Respondent is in default of its obligations to the Applicant;

3. TD has a collateral mortgage charging the properties owned by Rocky located on Highway 1, Comeauville and identified as PIDs 30043939, 30206874, and 30043871, which includes the right of TD to appoint a receiver at page 3 under the heading "Appointment of Receiver";

4. TD has a General Security Agreement executed by the respondent, Meridien and thereby charging all of Meridien's present and after-acquired personal property, which includes the right of TD to appoint a receiver at Section 12(a)(xii); and

5. TD has a General Security Agreement executed by the respondent, Rocky and thereby charging all of Rocky's present and after-acquired personal property, which includes the right of TD to appoint a receiver at Section 12(a)(xii).

The Respondent is insolvent. Demand by the Applicant was made some time ago and TD submits that an appointment of receiver is just and convenient in these circumstances.

The determination of whether the appointment of a receiver is just or convenient was considered by this Court in *Royal Bank of Canada v Eastern Instructure Inc. and Allcrete Restoration Limited*, 2019 NSSC 243. In that decision, the Honorable Justice D. Timothy Gabriel outlined the many factors that may lead a Court to the conclusion that the appointment of a receiver is just or convenient. At paragraph 46 he stated:

> "[46] The seemingly innocuous words "just or convenient" do not, of course, clothe the court with carte blanche to do as it pleases. There is authority as to what they mean within the current lexicon. Consider, for example, the following excerpt from *Enterprise Cape Breton* (supra) at pp. 13 - 16:
>
> > In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell: Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
> >
> > (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish 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 the 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 the right to appoint a receiver under the documentation provided for in the loan;

(h) The enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;

(i) The principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;

(j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(k) The effect of the order on 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.

The author's further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument – appoint a receiver." [Emphasis added]

The Applicant submits that it is just or convenient to order the appointment of a receiver. The appointment of the receiver will permit the securing of the assets of the Respondent and an orderly liquidation of assets for the benefit of creditors consistent with their respective priorities at law. Failure to realize upon the assets secured for the money owed to the Applicant would create significant risk of loss. Alternatively, separate enforcements of the real estate by way of judicial foreclosure and personal property by way of power of sale pursuant to the *Personal Property Security Act* (Part V) would likely increase costs and thereby reduce recovery to the creditors. Whether by court-appointed receiver or judicial foreclosure, the Court must be involved in order to realize upon the secured assets. Finally, the Respondent executed security documents which provide TD with the right to appoint a receiver.

As noted by the Court in *Royal Bank of Canada v Eastern Infrastructure Inc. and Allcrete Restoration Limited*, it is not necessary to check all the boxes in respect to the factors noted by previous court decisions for the Plaintiff's application to succeed. The list is not exhaustive and such factors will not be applicable to every case (see para 53).

The Applicant submits that, although receivership is an extraordinary remedy, the existence of a contractual right to an appointed receiver, the facts in evidence, and the costs of the alternative warrant the appointment being made.

RECEIVERSHIP CHARGES

The proposed form of receivership order has been prepared based on the Court's precedent as published by practice memorandum and a black line copy to the approved version is enclosed for reference.

As part of the order, the receiver and its counsel are granted certain charges over the property of the respondent companies (see proposed form of order sections 20, 23 and 26). The Court's authority to grant such charges is codified in BIA s. 243(6), which provides:

> "(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations."

The Applicant submits that the amounts proposed by way of charges are reasonable in light of the extent of assets secured, the location of the business of the respondents, and consistent with the Court's general approach in receiverships. The proposed amounts have been reviewed by the proposed receiver, and it concurs with the Applicant's submissions.

All of which is respectfully submitted,

Gavin D. F. MacDonald
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Enclosures

Cc: Service List