

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

**2046245 ONTARIO INC., 2222228 ONTARIO INC., 2473560 ONTARIO INC. and
2473441 ONTARIO INC.**

Applicants

- and -

2244039 ONTARIO INC. and 1526400 ONTARIO INC.

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND
INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE
COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

**FACTUM OF THE APPLICANT
(Application to Appoint Receiver – Returnable December 1, 2022)**

November 30, 2022

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TO: THE SERVICE LIST

PART I – OVERVIEW

1. 2046245 Ontario Inc. (“**204**”), 2222228 Ontario Inc. (“**222**”), 2473560 Ontario Inc. (“**560**”) and 2473441 Ontario Inc. (“**441**”) (collectively the “**Lenders**”) bring this application for the appointment of Albert Gelman Inc. (“**AGI**”) as receiver (herein, the “**Receiver**”) over the respondents 2244039 Ontario Inc. (“**224**”) and 1526400 Ontario Inc. (“**152**”) (jointly the “**Debtors**”) under section 243 of *the Bankruptcy and Insolvency Act* (the “**BIA**”)¹ and section 101 of the *Courts of Justice Act* (the “**CJA**”)². Capitalized terms used herein not defined shall have the meanings given to them in the affidavit of Jaskunwar Gill sworn October 25, 2022 (the “**First Gill Affidavit**”).
2. The Debtors are indebted to the Lenders in connection with credit facilities made available by the Lenders to the Debtors (the “Credit Facilities”) pursuant to and under the terms of First Commitment dated April 13, 2022 and the Second Commitment dated March 09, 2022 (the “Credit Agreements”). The First Commitment provided for a loan in the amount of \$10,750,000.00 in principal, plus all applicable interest, costs and other obligations owing thereunder and the Second Commitment provided for a loan in the amount of \$3,800,000.00 in principal, plus all applicable interest, costs and other obligations owing

¹ R.S.C., 1985, c. B-3.

² R.S.O. 1990, c. c.43.

thereunder (together, the “Indebtedness”). The Lenders holds a first-ranking and second-ranking security over the Debtors’ real and personal property.³

3. The First Commitment required that the Credit Facilities granted thereunder be repaid in full on or before the end of the two months term granted therein being June 13, 2022. The Second Commitment required that the Credit Facilities granted thereunder be repaid in full on or before the end of the two months term granted therein being June 13, 2022. The Debtors have failed to repay the Credit Facilities, which constitutes one of the numerous defaults committed by the Debtors under the Credit Agreements. The Lenders have been proactive in attempting to come to a resolution in respect of this matter, but the Debtors have not been willing or able to facilitate such a resolution. After four months, with no timely resolution in sight, the Debtors have determined that the path forward that will be most beneficial to the Debtors’ stakeholders is the bringing of this Application.

4. The Lenders have the right to enforce their rights under The First 224 and 152 Loan and Security Documents and The Second 224 and 152 Loan and Security Documents. Further, it is just and convenient to appoint a Receiver to preserve the assets of the Debtors and prevent the dissipation of those assets through lack of care and maintenance, for the benefit of all of the Debtors stakeholders,

³ First Gill Affidavit at paras. 21 and 26

and should it be necessary and appropriate sell the Debtors' real and personal property.

PART II - FACTS

5. The facts of this application are more fully set out in the First Gill Affidavit.

A. The Parties

6. The Lenders are secured creditors of the Debtors. As security for its obligations to the Lenders, including, without limitation, its obligations under the Credit Agreements, the Debtors provided security in favour of the Lenders (collectively, the "Security"), including the First 224 Mortgage and the First 152 Mortgage over 35 Cherrycrest; the Second 224 Mortgage and the Second 152 Mortgage over 12016 Airport; registration in respect of the First Commitment which was duly made pursuant to the *Personal Property Security Act* (Ontario); registration in respect of the Second Commitment which was duly made pursuant to the *Personal Property Security Act* (Ontario); the First 224 Assignment; the First 152 Assignment; the Second 224 Assignment; the Second 152 Assignment.⁴

7. The Debtors are corporations existing under the laws of the province of Ontario. Both of the Debtors' registered office addresses are located at 40 Pinecone Dr, Toronto. Jagdish Kaur Tiwana and Harcharan Singh Tiwana are the directors of

⁴ First Gill Affidavit at paras. 21, 24, 26 and 29

152 with Harcharan Singh Tiwana as the president and Jagdish Kaur Tiwana is the sole director and president of 224Ioannis (John) Neilas is the sole director and officer of the Debtor. The Debtors' business is operation of gas stations and the Debtors are the registered owners, respectively, of 35 Cherrycrest and 12016 Airport.

B. Default and Demand

8. Numerous defaults under the Credit Agreements have occurred and are continuing, including (among other things):
 - a. The Debtors failing to repay the Credit Facilities in full on or before the end of the terms as set out in the First Commitment and the Second Commitment, being June 12, 2022 and May 3, 2022 respectively; and
 - b. The Debtors failing to keep interest payments under the Credit Agreements current.⁵

9. As October 21, 2022, each of the Debtors owed the following amounts (including accruing interest and recovery costs and expenses) to the Lenders (a) \$11,112,165.85 pursuant to the First Commitment; and (b) \$4,171,915.35 pursuant to the Second Commitment.⁶

⁵ First Gill Affidavit at para. 31

⁶ First Gill Affidavit at para. 33

10. Starting in June 2022 and continuing through October 2022, the Lenders approached the Debtors regarding the Credit Facilities and issues surrounding the Credit Agreements, options for repayment, to attempting to negotiate a forbearance agreement. The Debtors were generally unresponsive or not agreeable to the Lender's efforts to resolve these issues or the Debtors were unable to obtain refinancing.⁷

11. On July 22, 2022 in relation to the Second Commitment and on August 20, 2022 in relation to the First Commitment the Lenders delivered a notices of intention to enforce security, the NITES, pursuant to s. 244(1) of the *Bankruptcy and Insolvency Act*. To date, none of the Debtors have responded in any meaningful way. Further to demands the Lenders, 204, 222 and 441, issued and obtained judgment in relation to the Second Commitment in Court File No. CV-22-00000075-0000.⁸

C. Lenders' Efforts to Resolve the Debtors Defaults Without Resorting to a Formal Insolvency Proceeding Since August.

12. By August, 2022 the Lenders had put the Debtors on notice that they were no longer inclined to wait any longer for repayment of the Indebtedness under the Credit Agreements. The Lenders, 204, 222 and 441 had taken debt recovery proceedings in Court File No. CV-22-00000075-0000 in relation the Second Commitment. Thereafter

⁷ First Gill Affidavit at paras. 40 and 41

⁸ First Gill Affidavit at paras. 35 and 37

the Lenders moved forward with negotiations to permit the Debtors to obtain re-financing of the Indebtedness. The Lenders proposed general terms for a strict forbearance agreement to which the Debtors did not engage with in any meaningful way.

13. The Lenders' counsel and the Debtors' counsel exchanged correspondence throughout the months of August, September and October wherein the Lenders again advised that it was prepared to forbear on terms and permit the Debtors time to re-finance. The Debtors provided various dates by which the Indebtedness would be repaid and/o re-financed in full. The Debtor did not advance in any meaningful way the re-financing that they had offered.

14. The Lenders have lost confidence that the Debtors intended to attempt, in good faith, to enter into re-financing obligations. The Lenders have made its position known that it would seek a receivership application if a mutually agreeable agreement could not be executed in a timely manner.⁹

PART III - LAW & ARGUMENT

15. The issue on this Application is whether the Court should appoint AGI as the Receiver over the Debtors pursuant to section 243 of the BIA and section 101 of the CJA.

A. The Test for Appointing a Receiver under the BIA and CJA

⁹ First Gill Affidavit at para. 42

16. Subsection 243(1) of the BIA provides that on application by a secured creditor, a court may appoint a receiver to, *inter alia*, take possession over the assets of an insolvent person and exercise any control that the court considers advisable over that property and over the insolvent person's business, again where it is "just or convenient".¹⁰

Similarly, the CJA enables the court to appoint a receiver where such appointment is "just or convenient".¹¹

17. In determining whether it is "just or convenient" to appoint a receiver under either the BIA or CJA, Ontario courts have applied the decision of Blair J. (as he then was) in *Bank of Nova Scotia v. Freure Village on Clair Creek*. In *Freure Village*, Blair J. set out that, in deciding whether the appointment of a receiver is just or convenient, the court "must have regard to all of the circumstances but in particular 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.¹²

18. Where the enumerated rights of the secured creditor under its security include the right to seek the appointment of a receiver, the burden on the applicant seeking the relief is relaxed. As stated by Morawetz J. (as he then was) in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*:

¹⁰ BIA, s. 243.

¹¹ CJA, s. 101.

¹² *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), [1996 CarswellOnt 2328 \(Ont Ct J\)](#) ["*Freure Village*"] at paras. [10](#), [12](#) and [13](#); *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, [2013 ONSC 6866](#) ["*Elleway*"] at para. [26](#)

... 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 applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.¹³

19. A court will consider in its discretion whether, on an examination of the surrounding circumstances, it is in the interests of all concerned to have the receiver appointed by the court.¹⁴

20. Where the history and evidence of the behaviour of a debtor indicate that a creditor's attempts to privately enforce its security will be delayed or otherwise fail, a court-appointed receiver is warranted.¹⁵

B. It is Both Just and Convenient to Appoint the Receiver in the Circumstances.

21. The appointment of the Receiver over the Debtors is just and convenient as a result of, among other things:

¹³ *Elleway* at para. [27](#) and *First Gill Affidavit* at para. 26(c)

¹⁴ *Freure Village* at para. [12](#); *Business Development Bank of Canada v. 2197333 Ontario Inc.*, [2012 ONSC 965](#) at para. [21](#)

¹⁵ *Freure Village* at para. [13](#)

- a. the Lenders hold a first and second priority over the Debtors' real and personal property.
- b. the Debtor's defaults pursuant to the terms of the Credit Agreements and the Security;
- c. the Lenders have made demand and issued necessary NITES and both have expired without payment being made.
- d. the Lenders is in a position to enforce its security as against the Debtors should they choose to do so.
- e. the Debtors' refusal to consider forbearance terms that would provide any meaningful protection to, or a path to recovery for, Lenders;
- f. the lack of any articulated alternative path forward for the Lenders; and
- g. the fact that a safe-guarding of the Security and possible sales process, if one is determined to be necessary, would be more efficient if conducted through a receivership proceeding;
- h. a receiver, as an officer of the court, would provide transparency and reassurance to the Debtors; creditors that the liquidation (if necessary) of the property is handled expeditiously and in a commercially reasonable manner. ¹⁶

22. The technical requirements for the appointment of a Receiver are also met:

- a. The Lenders are secured creditors entitled to make an application under section 243 of the BIA;

¹⁶ *First National Financial GP Corporation v. 3291735 Nova Scotia Limited*, [2018 NSSC 235](#) at para. [12](#)

- b. as required by subsection 243(1.1) of the BIA, the demand letter and NITES were delivered to the Debtors;
- c. in accordance with subsection 243(4) of the BIA, AGI is qualified and consents to act as the Receiver; and
- d. the Debtors are incorporated under the laws of Ontario, conduct business exclusively in Ontario and their locality is in Ontario, in accordance with subsection 243(5) of the BIA.¹⁷

23. The Lenders have noted on multiple occasions that the repayment of the Indebtedness in a timely manner is critically important. The Lenders have been exceedingly patient during the proposed re-financing but with a failed re-financing and no other opportunity to resolve the Indebtedness being offered in a timely manner on the table, the time has come for a greater level of control over the Debtors and its property.

24. A Court-appointed receivership, involving the Court's supervision, a forum for all stakeholders, the presence of fiduciary obligations, and maximum transparency, is the best way to ensure that the realization of the Debtors assets is conducted fairly and equitably, in recognition of the interests of all stakeholders.

PART IV - ORDER REQUESTED

¹⁷ First Gill Affidavit at paras. 8, 10 and 13

25. The Lenders respectfully request an Order substantially in the form of the draft Receivership Order contained in the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of November, 2022.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996 CarswellOnt 2328 \(Ont Ct J\)](#)
2. *Elleway Acquisitions Ltd v. Cruise Professionals Ltd*, [2013 ONSC 6866](#)
3. *1529599 Ontario Ltd v. Dalcor Inc*, [2012 ONSC 5707](#)
4. *Business Development Bank of Canada v. 2197333 Ontario Inc*, [2012 ONSC 965](#)
5. *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd*, [2010 BCSC 477](#)
6. *First National Financial GP Corporation v. 3291735 Nova Scotia Limited*, [2018 NSSC 235](#)

SCHEDULE “B”

RELEVANT STATUTES

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.

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.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under

- (i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or
- (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(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.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

(a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or

(b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

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.

Terms

(2) An order under subsection (1) may include such terms as are considered just

