Court File No. CV-25-00001828-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

BUSINESS DEVELOPMENT BANK OF CANADA

Applicant

- and -

2868335 ONTARIO INC.

Respondent

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, BUSINESS DEVELOPMENT BANK OF CANADA (returnable May 16, 2025)

May 9, 2025

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PART I – NATURE OF THE APPLICATION

1. The Applicant, Business Development Bank of Canada ("**BDC**" or the "**Lender**"), makes an application for an Order (the "**Receivership Order**") appointing Grant Thornton Limited ("**GTL**") as receiver (in such capacity, the "**Receiver**"), without security, of all the assets, properties and undertakings of 2868335 Ontario Inc. (the "**Debtor**") acquired for or used in relation to the business carried on by the Debtor, including the real property located at (i) 40 West Drive, Brampton L6T 3T6 ("**40 West Drive**"), and (ii) 44 West Drive, Brampton L6T 3T6 ("**44 West Drive**" and collectively, the "**Real Property**"), and all proceeds thereof (collectively with the Real Property, the "**Property**").

2. The Debtor owes BDC approximately $15 million in principal and interest (plus costs and accruing interest) on a general secured basis. As further discussed below, the Debtor has defaulted under their lending arrangements with BDC, resulting in substantial arrears and priority tax obligations accrued.

3. This general secured debt is repayable on demand and BDC made formal written demand on February 13, 2025. Over two months have elapsed since the demands were released such that the BIA Notice (as defined below) has expired, and none of the debt has been repaid. There is no proposed plan forward by the Debtor, or its principals, to address the outstanding indebtedness.

4. BDC's security package includes the contractual right to the appointment of a receiver, and it is respectfully submitted that such appointment is just and convenient in this case. The only realistic resolution of this matter is the appointment of a receiver, as the debt obligations of the Debtor and the Real Property are languishing.

PART II – SUMMARY OF FACTS

<u>Background and BDC's Lending Arrangements with the Debtor</u>

5. The Debtor is a privately-owned Ontario corporation, with its registered office located in Brampton, Ontario. The Debtor's sole business is the leasing and maintenance of the Real Property. Santosh Sharma, Rimple Joshi and Harnek Singh Sarai (collectively, the "**Personal Guarantors**") are the Debtor's sole directors.

> **Affidavit of Adam Laiken sworn April 1, 2025 [Laiken Affidavit] at paras. 3-5, Tab 4 of BDC's Application Record dated February 11, 2025 [BDC's Application Record].**

6. The Debtor is indebted to BDC in connection to a certain credit facility (the "**Credit Facility**") made available by BDC to the Debtor pursuant to and under the terms of a Letter of Offer entered into between the Lender, as lender, and the Debtor, as borrower, dated January 6, 2023, as amended by an amending agreement dated January 17, 2023 (as amended, replaced, restated or supplemented from time to time, the "**Credit Agreement**").

> **Laiken Affidavit, *supra* at para. 7.**

7. As security for its obligations to BDC, the Debtor granted a general security agreement to BDC dated January 17, 2023 (the "**GSA**"), registration in respect of which was duly made pursuant to the *Personal Property Security Act* (Ontario) (the "**PPSA**").

> **Laiken Affidavit, *supra* at para. 8.**

8. The Personal Property Security Registration System Search Results (the "**PPSA Search**") for the Debtor confirms that the Lender has a perfected security interest in the personal property of the Debtor, as secured by the GSA.

Laiken Affidavit, *supra* at para. 11 and Exhibit "D".

9. The PPSA Search discloses no additional registrations as against the Debtor.

Laiken Affidavit, *supra* at para. 12.

10. As a term of the Credit Agreement, the Real Property is subject to a charge in favour of BDC, in the amount of $14,500,000.00, to secure repayment of amounts owed to the Lender (the "**BDC Charge**").

Laiken Affidavit, *supra* at para. 13 and Exhibit "E".

11. The BDC Charge is the first-in-time charge registered on title to the Real Property. The BDC Charge is the only charge registered on the Real Property.

Laiken Affidavit, *supra* at paras. 14-15.

<u>The Defaults</u>

12. Certain defaults under the Credit Agreement, including, without limitation: (a) as of April 1, 2025, the Debtor was seven months in arrears of their payment obligations to the Lender, and (b) that, as of October 9, 2024, property tax arrears were owing for 40 West Drive in the amount of $131,156.29; and, as of October 8, 2024, property tax arrears were owing for 44 West Drive in the amount of $101,092.81 (collectively, the "**Defaults**"). As funds were advanced to the Debtor under the Credit Agreement in February, the Debtor has only successfully made its March and

April 2024 payments (and certain standby fees predating the Credit Agreement) and has been in constant default every month following.

Laiken Affidavit, supra at para. 16.

13. On December 10, 2024, BDC released a letter to the Debtor listing, *inter alia*, the Defaults and providing that the Defaults must be cured by no later than December 20, 2024 (the "**Default Letter**").

Laiken Affidavit, *supra* at para. 17.

14. Following the issuance of the Default Letter, the Debtor failed address the Defaults and the Defaults remain ongoing.

15. Pursuant to the Credit Agreement, $14,821,481.32 was owing to the Lender by the Debtor for principal, interest and fees, plus costs and expenses, as of March 31, 2025 (the "**Indebtedness**").

Laiken Affidavit, *supra* at para. 18.

The Demands

16. On February 13, 2025, the Lender proceeded to make formal written demand on the Debtor and the Personal Guarantors for the payment of their respective obligations under the Credit Agreement and associated joint guarantee (collectively, the "**Demand Letters**"). The Demand Letters were accompanied by a Notice of Intention to Enforce Security (the "**BIA Notice**") pursuant to subsection 244(1) of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**").

Laiken Affidavit, *supra* at para. 18.

17. Despite the issuance of the Demand Letters and BIA Notice, the Debtor failed to honour the Demand Letters or make satisfactory arrangements with the Lender to repay, or enter into an agreement to satisfy, amounts owing under the Credit Agreement.

18. Counsel for BDC has been in without prejudice discussions with counsel for certain of the principals of the Debtors. In these discussions, although the substantive content of which is without prejudice, have not resulted in the settlement of these issues and the Lender considers the only reasonable and prudent path forward is to take any and all steps necessary to protect the Property by having a receiver appointed, and it is within the Lender's rights under the Security to do so. For the reasons above, including the continued accrual of interest on the Indebtedness, the Lender is of the position that there is no alternative to the appointment of a receiver.

Laiken Affidavit, *supra* at paras. 21-22.

PART III – ISSUE

19. The sole issue to be determined on this application is whether it is just and convenient for this Court to appoint GTL as receiver over the Property.

PART IV – LAW AND ARGUMENT

20. BDC seeks the appointment of a receiver pursuant to subsection 243(1) of the BIA and section 101 of the *Courts of Justice Act* (Ontario) (the "**CJA**"). Both statutes enable the Court to appoint a receiver and manager where such appointment is "*just or convenient*."

BIA, s 243(1); CJA, s 101.

21. 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 The Honourable Mr. Justice Blair in

Freure Village. In that case, His Honour confirmed 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.

> ***Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 at para. 10 (Gen. Div. [Comm. List]) [*Freure Village*] (CanLII: http://canlii.ca/t/1wbtz).**

22. When the rights of the secured creditor under its security include a specific right to the appointment of a receiver (as in the present case), the burden on the applicant seeking the relief is relaxed. Indeed, The Honourable Mr. Chief Justice Morawetz held in *Elleway Acquisitions* that:

> [W]hile 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.

> ***Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866 [Comm. List] at para. 27 [*Elleway Acquisitions*] (CanLII: http://canlii.ca/t/g22q3).**

23. More recently, The Honourable Mr. Justice Osborne echoed this holding in *iSpan Systems*:

> 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 is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties [citations omitted].

> ***iSpan Systems LP*, 2023 ONSC 6212 [Comm. List] at para. 31 [*iSpan Systems*] (CanLII: https://canlii.ca/t/k0x62).**

24. Unlike in the cases provided by the Debtor, this is a situation where there is a contractual right to appoint a receiver (in both the GSA and the BDC Charge) and the appointment of GTL is not extraordinary relief. Rather, this is the applicant seeking to enforce a term of an agreement already made by both parties.

25. BDC submits that the test for the appointment of a receiver is met. Pursuant to sections 14 and 15 of the GSA, BDC is contractually entitled to have a receiver appointed upon the nonpayment of any principal or interest when due. Such an event has occurred and the appointment of a receiver is no longer an extraordinary remedy; it is simply the result of enforcing a contractual term that was mutually assented to by the Debtor and BDC.

> **Laiken Affidavit, *supra* at Exhibit "C".**

26. More than a reasonable time for the Debtor to repay BDC has elapsed since issuance of the demand and BIA Notice on February 13, 2025. BDC, as a secured creditor, is now seeking to exercise the rights that are afforded to it under its security documents including, without limitation, the GSA and the BDC Charge.

> ***Bank of Montreal v. Carnival National Leasing Limited*, 2011 ONSC 1007, 74 C.B.R. (5th) 300, [2011] O.J. No. 671 at para. 13 (Gen. Div. [Comm. List]) [*Carnival Leasing*] (CanLII: https://canlii.ca/t/2fqm3).**

27. The Debtor failed to provide any concrete plan to address their outstanding obligations to the Lender or to cure the Defaults, through a negotiated forbearance agreement or otherwise.

> **Laiken Affidavit, *supra* at para 24.**

28. BDC is entitled to take any and all steps necessary to enforce its security and realize on same and the appointment of GTL as receiver is necessary for the protection of the Debtor's estate and the interests of BDC as a secured creditor.

29. GTL is a licensed insolvency trustee and is familiar with the Debtor's circumstances and arrangements with GTL. GTL has consented to act as the Receiver should the Court so appoint it.

> **Laiken Affidavit, *supra* at paras. 29-31.**

PART V – RELIEF REQUESTED

30. In light of the foregoing, it is respectfully submitted that this Court should grant the Receivership Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of May, 2025.

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SCHEDULE "A"

AUTHORITIES CITED

Jurisprudence

1. *Bank of Montreal v. Carnival National Leasing Limited*, 2011 ONSC 1007, 74 C.B.R. (5th) 300, [2011] O.J. No. 671 (Gen. Div. [Comm. List]).

2. *Bank of Nova Scotia v. Freure Village of Clair Creek* (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Gen. Div. [Comm. List]).

3. *Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866 [Comm. List].

4. *iSpan Systems LP*, 2023 ONSC 6212 [Comm. List].

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, s. 243**

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.

***Courts of Justice Act*, R.S.O. 1990, c. C-34, as amended, s. 101**

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.

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Proceedings commenced at Brampton

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