

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

1175648 ONTARIO LIMITED

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, ROYAL BANK OF CANADA
(returnable November 15, 2024)**

November 5, 2024

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Sanjeev P.R. Mitra (LSO # 37934U)
Tel: (416) 865-3085
Email: smitra@airdberlis.com

Jeremy Nemers (LSO # 66410Q)
Tel : (416) 865-7724
E-mail: jnemers@airdberlis.com

Cristian Delfino (LSO # 87202N)
Tel : (416) 865-7748
E-mail: cdelfino@airdberlis.com

Lawyers for Royal Bank of Canada

PART I – NATURE OF THE APPLICATION

1. The Applicant, Royal Bank of Canada (“**RBC**”), makes an application for an Order (the “**Receivership Order**”), in substance, appointing msi Spergel inc. (“**Spergel**”) as receiver (in such capacity, the “**Receiver**”), without security, of all the assets, properties and undertakings of 1175648 Ontario Limited (the “**Debtor**”) acquired for, or used in relation to a business carried on by the Debtor, and all proceeds thereof (collectively, the “**Property**”).

PART II – SUMMARY OF FACTS

2. The Debtor is a privately-owned Ontario corporation formed on April 18, 1996, with its registered office and mailing address located in Puslinch, Ontario.

**Affidavit of Michael Foster sworn October 7, 2024 [Foster Affidavit] at para. 3,
Tab 4 of RBC’s Application Record dated October 17, 2024.**

3. The Debtor operates under two active business names: Adco Logistics and Adco Freight. The Debtor describes itself as a full service logistics provider, offering services in Canada, the United States and Mexico, with 35 vehicles and 35 drivers.

Foster Affidavit, *supra* at paras. 4-5.

4. The Debtor is indebted to RBC in connection with certain credit facilities (the “**Credit Facilities**”) made available by RBC to the Debtor pursuant to and under the terms of a credit agreement between RBC and the Debtor dated November 17, 2022 (the “**Primary Credit Agreement**”), a master lease agreement dated December 12, 2022 and the lease schedules thereunder (together, the “**Master Lease Agreement**”) and a Visa agreement dated November 24, 2024 (the “**Visa Agreement**” and, together with the Primary Credit Agreement and the Master Lease Agreement, the “**Credit Agreements**”).

Foster Affidavit, *supra* at para. 6.

5. As security for its obligations to RBC, the Debtor granted a general security agreement in favour of RBC dated November 24, 2022 (the “**GSA**”), registration in respect of which was duly made pursuant to the *Personal Property Security Act* (Ontario) (the “**PPSA**”).

Foster Affidavit, *supra* at para. 7.

6. Additionally, Balayogendiran Balasingam (the “**Guarantor**”), a director and officer of the Debtor, personally guaranteed the Debtor’s obligations to RBC under the Credit Agreements in the principal amount of \$750,000, pursuant to a written guarantee and postponement of claim agreement dated November 24, 2022.

Foster Affidavit, *supra* at paras. 7-8.

7. RBC has a PPSA registration against the Debtor in respect of all collateral classifications other than consumer goods (the “**General RBC Registration**”). In addition to the General RBC Registration, the Debtor’s certified PPSA search results reflect over 60 registrations by multiple registrants that appear to pertain to certain specific collateral and are made by a range of creditors, including numerous equipment finance companies, all of whom have been served with this application.

Foster Affidavit, *supra* at para. 9.

8. Certain of the Credit Facilities are repayable on demand. There have also been defaults under the Credit Agreements that the Debtor has failed to address to date. Further, RBC has discovered that the Debtor’s accounts receivables appear to be materially overstated, leading to a margin deficit of around \$2,000,000 and drawings that exceed the Debtor’s credit limit under the Credit Agreements.

Foster Affidavit, *supra* at para. 10.

9. As such, on July 24, 2024, RBC formally wrote to the Debtor and Guarantor and demanded repayment of the non-leasing amounts owed to RBC (the “**Demand Letters**”). As set out in the Demand Letters, and with respect to the non-leasing Credit Facilities under the Credit Agreements, \$2,736,460.38 was owing by the Debtor to RBC as of July 22, 2024 (the “**Demanded Indebtedness**”).

Foster Affidavit, *supra* at paras. 11-12.

10. The Demanded Indebtedness was not repaid.

Foster Affidavit, *supra* at para. 13.

11. On August 14, 2024, RBC offered the Debtor and the Guarantor an agreement to forbear from taking enforcement steps for approximately 1.5 months, until September 30, 2024.

Foster Affidavit, *supra* at para. 14.

12. The proposed forbearance agreement was not signed back by the Debtor or the Guarantor.

Foster Affidavit, *supra* at para. 14.

13. On September 18, 2024, RBC delivered to the Debtor and its counsel a notice of intention to enforce security pursuant to subsection 244(1) of the *Bankruptcy and Insolvency Act* (Canada) (the “**BIA**”).

Foster Affidavit, *supra* at para. 15.

14. The Demanded Indebtedness has still not been repaid, in full or in part.

Foster Affidavit, *supra* at para. 16.

15. At this stage, RBC believes that the only prudent and reasonable path forward is to take any and all steps necessary to protect the Property by having a receiver appointed. It is within RBC's rights under its security to do so.

Foster Affidavit, *supra* at para. 16.

PART III – ISSUE

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

PART IV – LAW AND ARGUMENT

The Test for Appointing a Receiver

17. RBC 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.

18. 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 on 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>).

19. When the rights of the secured creditor under its security includes a specific right to 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:

... 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.

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

20. More recently, The Honourable Mr. Chief Justice Morawetz's holding in *Elleway Acquisitions* was further affirmed in *iSpan Systems* by The Honourable Mr. Justice Osborne:

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 6912 at para. 31 [*iSpan Systems*] (CanLII: <https://canlii.ca/t/k0x62>).

It is Just and Convenient to Appoint the Receiver

21. RBC submits that the test for the appointment of a receiver is met. Pursuant to subsection 13(a) of the GSA, RBC is contractually entitled to have a receiver appointed over the Debtor upon default. Such default has occurred and the appointment of Spergel as receiver is not an extraordinary remedy; it is simply the result of enforcing a contractual term that was mutually assented to by the Debtor and RBC.

22. RBC wishes to take any and all steps necessary to enforce its security and realize on same and the appointment of Spergel as receiver is necessary for the protection of the Debtor's estate and the interests of RBC as a secured creditor. The Debtor has had ample time to repay the Demanded Indebtedness or make satisfactory arrangements acceptable to RBC, but has failed to do so.

Foster Affidavit, *supra* at para. 16.

23. At this stage, RBC believes that its 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 RBC's rights under its security to do so.

Foster Affidavit, *supra* at para. 16.

24. Spergel is a licensed insolvency trustee and is familiar with the circumstances of the Debtor and its arrangements with RBC. Spergel has consented to act as the Receiver should the Court so appoint it.

Foster Affidavit, at para. 20.

PART V – RELIEF REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of November, 2024.



AIRD & BERLIS LLP

Barristers and Solicitors
Brookfield Place
181 Bay Street, Suite 1800
Toronto, Ontario M5J 2T9

Sanjeev P.R. Mitra (LSO # 37934U)
Email: smitra@airdberlis.com

Jeremy Nemers (LSO # 66410Q)
E-mail: jnemers@airdberlis.com

Cristian Delfino (LSO # 87202N)
Email: cdelfino@airdberlis.com

Lawyers for Royal Bank of Canada

SCHEDULE “A”**AUTHORITIES CITED**Jurisprudence

1. [*Bank of Nova Scotia v. Freure Village on Clair Creek*](#) (1996), 40 C.B.R. (3d) 274, [1996] O.J. No. 5088 (Gen. Div. [Comm. List]).
2. [*Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*](#), 2013 ONSC 6866.
3. [*iSpan Systems LP*](#), 2023 ONSC 6212.

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, ss. 101 and 103**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.

Certificate of pending litigation

103 (1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2). R.S.O. 1990, c. C.43, s. 103 (1).

...

Order discharging certificate

(6) The court may make an order discharging a certificate,

- (a) where the party at whose instance it was issued,
 - (i) claims a sum of money in place of or as an alternative to the interest in the land claimed,
 - (ii) does not have a reasonable claim to the interest in the land claimed, or
 - (iii) does not prosecute the proceeding with reasonable diligence;
 - (b) where the interests of the party at whose instance it was issued can be adequately protected by another form of security; or
 - (c) on any other ground that is considered just,
- and the court may, in making the order, impose such terms as to the giving of security or otherwise as the court considers just. R.S.O. 1990, c. C.43, s. 103 (6).

Applicant

Respondent

Court File No. CV-24-00004738-0000

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Proceedings commenced at Brampton

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Sanjeev P.R. Mitra (LSO # 37934U)

Tel: (416) 865-3085

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