

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

CHILL X TRANS 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

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PART I – OVERVIEW

1. Chill X Trans Inc. (the “**Debtor**”) has been in default of its various reporting and payment obligations under its loan arrangement with Royal Bank of Canada (“**RBC**” or the “**Bank**”) since December 2023.¹ Except for certain registrations under the *Personal Property Security Act* (Ontario) (the “**PPSA**”) in respect of certain specific equipment and motor vehicles, RBC holds first-ranking security over all personal property of the Debtor.²

2. On January 24, 2024, RBC made formal demand for repayment (the “**Demand**”) on the Debtor and delivered a Notice of Intention to Enforce Security pursuant to s. 244 of the *Bankruptcy and Insolvency Act* (the “**BIA**”). As of January 23, 2024, a total of \$2,422,345.07 (exclusive of legal fees, disbursements and accruing interest) was owing by the Debtor to RBC (the “**Indebtedness**”).³

3. The ten-day statutory period under subsection 244(1) of the BIA has now expired.⁴ The Debtor has failed or refused to repay the Indebtedness or enter into any arrangements acceptable to RBC for repayment of same. Accordingly, RBC is entitled to move to enforce its security and appoint msi Spergel Inc. (“**Spergel**”) as receiver (in such capacity, the “**Receiver**”) of the Debtor’s assets, properties and undertakings (collectively, the “**Property**”).⁵

¹ Affidavit of Mark Arnold sworn March 27, 2024 at paras 10-12, Application Record of Royal Bank of Canada [“**Arnold Affidavit**”].

² Arnold Affidavit at para 7.

³ Arnold Affidavit at para 18.

⁴ Arnold Affidavit at para 21.

⁵ Arnold Affidavit at para 20.

PART II – FACTS

4. The Debtor is directly indebted to RBC and RCAP Leasing Inc. (“**RCAP**”) with respect to certain credit facilities (collectively, the “**Credit Facilities**”) made available by RBC and RCAP to the Debtor pursuant to and under the terms of:

- (a) a Credit Agreement dated July 10, 2023;
- (b) a Master Lease Agreement dated December 1, 2023;
- (c) the Conditional Sale Agreement no. 78577 entered into by the Debtor and RCAP on or about August 3, 2023 with a commencement date of August 15, 2023 in respect of a 2018 Great Dane ESS-1114-11053 Refrigerated Trailer, in the amount of \$94,888.87; and
- (d) the Lease Contract no. 579620-81280 entered into by the Debtor and RCAP on or about September 27, 2023 with a commencement date of October 1, 2023 in respect of a used 2019 Mack Highway Tractor, in the amount of \$140,000,

each as amended, replaced, restated or supplemented from time to time, and collectively referred to as the “**Credit Agreements**”.⁶

5. As security for the Debtor’s obligations to RBC, including, without limitation, under the Credit Agreements, the Debtor provided, among other things, a general security agreement (“**GSA**”) dated July 10, 2023, which grants to RBC, among other things, a security interest in any and all of

⁶ Arnold Affidavit at para 4.

the property, assets and undertakings of the Debtor in Ontario and New York, registration in respect of which was duly made pursuant to the PPSA.⁷

6. The obligations of the Debtor under the Credit Agreements are due and payable at the option of RBC upon the occurrence of an event of default or on demand. There have been one or more defaults by the Debtor under the Credit Agreements.⁸

7. The Debtor has not been providing monthly margining report to the Bank as required by the Credit Agreements. The last margin report received from the Debtor is for November 2023 and was received after that month.⁹

8. The borrowing limit available to the Debtor under the revolving line of credit provided by the Bank is based on a margin formula, which is calculated monthly based on the Debtor's delivery of a Borrowing Limit Certificate. The amount of credit available to the borrower will therefore vary monthly based on the level of its qualifying accounts receivable and any claims with priority over the bank.¹⁰

9. The last margin report received by RBC from the Debtor indicated accounts receivable of \$2,344,588. The reporting includes a receivable from Bandesha Transport, which is a business name used by 8634998 Canada Inc. ("**863**"). 863 is a company controlled by the same principal of the Debtor.¹¹

⁷ Arnold Affidavit at para 6.

⁸ Arnold Affidavit at para 16.

⁹ Arnold Affidavit at para 10.

¹⁰ Reply Affidavit of Mark Arnold sworn May 24, 2024 at para 4, Reply Record of Royal Bank of Canada [**"Reply Affidavit"**].

¹¹ Reply Affidavit at para 5.

10. Pursuant to the terms of the margin calculation in the Credit Agreements, receivables from non-arm's length entities should have been excluded from the Debtor's margin calculation. Based on the foregoing, the drawings under the line of credit were in excess of the permitted borrowing limit under the terms of the Credit Agreements. The current borrowing limit based on the last borrowing base calculation as at November 30, 2023 is \$1,564,360. At the time, the Debtor's operating line was fully drawn, which created a margin shortfall of \$235,640.¹²

11. The Debtor has failed to take steps to bring borrowings within the authorized credit limits under Credit Agreements. Accordingly, the Debtor currently has no access to credit under its revolving line of credit. Moreover, the Debtor has failed to make interest payments due and owing under the revolving line of credit.¹³

12. Further, the Debtor is required to use an account at RBC for its daily banking requirements. Proceeds of the Debtor's accounts receivable should be deposited to the Debtor's account at the Bank. Funds deposited to the Debtor's account at RBC are swept and applied against the revolving line of credit on a daily basis.¹⁴

13. As a result of the Debtor having a margin shortfall, the Debtor had no access to credit or deposits until drawings under the revolving line of credit were paid down to its credit availability under the revolving line of credit. This did not occur as the Debtor has not been making deposits into its account at RBC. The last deposit received into the Debtor's accounts at the Bank occurred on December 28, 2023.¹⁵

¹² Reply Affidavit at para 5.

¹³ Arnold Affidavit at para 11.

¹⁴ Reply Affidavit at para 6.

¹⁵ Reply Affidavit at para 6.

14. The principal of the Debtor appears to be in Pakistan and the Bank's enquiries as to who is running the business and affairs of the Debtor in his absence have gone unanswered.¹⁶

15. Pursuant to the endorsement of Justice Tzimas dated April 23, 2024, together with the accompanying Order of the same date, the Court directed the Debtor to deliver certain information, documents and records to the Bank by no later than May 3, 2024, failing which MSI Spergel Inc. was empowered to commence its mandate as Court-appointed monitor of the assets and undertaking of the Debtor (in such capacity, the "**Monitor**"). The Debtor failed or refused to provide any of the information prescribed in the Order within the time frame required by the Court and the appointment of the Monitor became effective.¹⁷

16. The GSAs granted by the Debtor allows RBC to appoint a receiver over the Debtor's Property upon the occurrence of a default.¹⁸

PART III – ISSUES

17. The legal issue to be determined on this Application is:

- (a) whether to appoint a receiver under s. 243(1) of the BIA or s. 101 of the CJA over the Property of the Debtor.

¹⁶ Reply Affidavit at paras 13-17.

¹⁷ Reply Affidavit at para 18.

¹⁸ Arnold Affidavit at para 8.

PART IV- LAW & LEGAL AUTHORITIES

A. Spergel should be appointed as the receiver of the Property:

(i) *The test for the appointment of a receiver under s. 243(1) of the BIA and s. 101 of the CJA*

18. Subsection 243(1) of the *Bankruptcy and Insolvency Act* 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 deems advisable over that property and over the insolvent person's business, in circumstances where it is "just or convenient" to do so.¹⁹ Similarly, the CJA enables the court to appoint a receiver where such appointment is "just or convenient".²⁰

19. In determining whether it is "just or convenient" to appoint a receiver under either the BIA or the CJA, Ontario courts have applied the decision of Blair J. (as he then was) in *Bank of Nova Scotia v. Freure Village on Claire Creek*.²¹ Blair J. held that 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.²²

20. In *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, citing *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.* and *Bennett on Receivership*, this Court listed numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver:

¹⁹ [Bankruptcy and Insolvency Act \(R.S.C., 1985, c. B-3\)](#), s 243 [BIA].

²⁰ [Courts of Justice Act, RSO 1990](#), c C. 43 at s 101 [CJA].

²¹ [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 (ONSC).

²² [Bank of Nova Scotia v. Freure Village on Clair Creek](#), 1996 CanLII 8258 at [para 11](#) (ONSC).

- (a) Whether irreparable harm might be caused if no order is made, although as stated above, where the appointment is authorized by the security documentation, it is not essential for a creditor to establish that it will suffer 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 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 a right to appointment under the loan documentation;
- (h) The enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;
- (i) The principle that the appointment of a receiver should be granted cautiously;
- (j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;
- (k) The effect of the order upon 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.²³

21. 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 is significantly relaxed. As stated by Morawetz J. (as he then was) in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*:

*... where 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. That is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.*²⁴

22. It is not essential that the moving party establish, prior to the appointment of a receiver, that:

- (a) it will suffer irreparable harm; or
- (b) that the situation is urgent.²⁵

23. 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.²⁶

²³ *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186 at [para 25](#), citing *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 at [para 25](#).

²⁴ *Elleway Acquisitions Ltd. v. The Cruise Professionals Ltd.*, 2013 ONSC 6866 at [para 27](#).

²⁵ *Bank of Montreal v. Carnival National Leasing Ltd.*, 2011 ONSC 1007 at [paras 28-29](#).

²⁶ *Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CanLII 8258 at [para 13](#) (ONSC).

(ii) *The application of the test for the appointment of a receiver*

24. RBC respectfully submits that the test for the appointment of a receiver pursuant to s. 243 of the BIA is met. First, pursuant to the GSA granted by the Debtor to RBC, RBC is entitled to have a receiver appointed over the Debtor upon any default under the Credit Agreements or pursuant to any failure by the Debtor to repay the Indebtedness owing to RBC on demand. Accordingly, the appointment of a receiver in this case is not an extraordinary measure; it is simply the result of enforcing the contractual terms assented to by the Debtor.

25. The Bank issued its Demand on January 24, 2024. On a demand loan, a debtor must be allowed a reasonable time to raise the necessary funds to satisfy the demand. Reasonable time will generally be of a short duration, not more than a few days and not encompassing anything approaching 30 days.²⁷ By the time the Bank's receivership application is heard, nearly five months will have passed since the issuance of the Demand, without the Indebtedness being repaid.

26. Second, the appointment of a receiver is necessary for the protection of the Debtor's estate and the interests of RBC as a secured creditor. The Indebtedness owing to RBC is significant (exceeding \$2,400,000), has long been outstanding, and continues to accrue. This application to appoint a receiver is grounded in RBC's concerns about the mismanagement and dissipation of RBC's collateral if the Debtor remains in the control of its directing mind, in whom RBC has lost all confidence.

27. RBC has no visibility on the extent of the liabilities of the Debtor, which liabilities may have statutory priority outside of a bankruptcy. Such liabilities may continue to accumulate without

²⁷ [Bank of Montreal v. Carnival National Leasing Ltd.](#), 2011 ONSC 1007 at [para 13](#).

intervention. The Debtor has failed or refused to comply with the terms of the Order of Justice Tzimas of April 23, 2024, which required the Debtor to deliver certain information, documents and records to the Bank in an effort to address the informational asymmetry facing the Bank.

28. The collateral is comprised of, *inter alia*, accounts receivable and motor vehicles used in the course of carrying on the Debtor's trucking business. The appointment of the receiver is necessary for the preservation of the collateral and the diligent supervision and management of same during an anticipated sales process. Specifically, the nature of the collateral—highly liquid and “on wheels”, in certain cases—requires the oversight of an independent party to ensure it is being adequately preserved. The Receiver will be able to preserve assets and further investigate the whereabouts of any other assets. Recovering on the Bank's security without a Receiver would take much longer, would be much less efficient, and would result in significant losses for RBC.

29. The balance of convenience weighs heavily in favour of RBC. Given the Bank's frustrated efforts to obtain current and accurate financial information from the Debtor and the Debtor's refusal to cooperate with the Bank and Spergel, in its current capacity as court-appointed monitor of the Debtor, the Bank is concerned that it would have difficulty enforcing its rights in the absence of a court-appointed receiver. The Debtor has not repaid the Demand Loans in full, nor provided any path forward for how it intends to satisfy the obligations owing to the Bank. The Debtor's conduct also favours appointment of a receiver.

30. RBC bargained for the right to appoint a Receiver by including that provision in its Security, which was accepted by the Debtor. Short of the appointment of a receiver, there are no other remedies available to RBC that will adequately protect its interests. A court-appointed receiver will


have authority to communicate directly with F & L's creditors, including the Receiver General, so that ACU has an accurate understanding of F & L's financial circumstances.

31. Accordingly, RBC respectfully submits that the appointment of Spergel as receiver of the Debtor is appropriate in the circumstances.


PART V – RELIEF SOUGHT

32. In light of the foregoing, RBC respectfully requests that this Court grant the aforementioned relief.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June 2024.



Sanjeev Mitra



Matilda Lici

**SCHEDULE “A”
LIST OF AUTHORITIES**

1. [*Bank of Montreal v. Carnival National Leasing Ltd.*](#), 2011 ONSC 1007
2. [*Bank of Nova Scotia v. Freure Village on Clair Creek*](#), 1996 CanLII 8258 (ONSC)
3. [*Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*](#), 2022 ONSC 6186
4. [*Elleway Acquisitions Ltd. v. The Cruise Professionals Ltd.*](#), 2013 ONSC 6866
5. [*Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*](#), 2009 BCSC 1527

**SCHEDULE “B”
RELEVANT STATUTES**

Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

PART XI

Secured Creditors and Receivers

Marginal note: 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.

Courts of Justice Act, RSO 1990, c. C. 43

Interlocutory Orders

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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

**ONTARIO
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(COMMERCIAL LIST)**

Proceedings commenced at Toronto

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