CITATION: Royal Bank of Canada v Chill X Trans Inc., 2024 ONSC 4302
COURT FILE NO.: CV-24-00001450-000
DATE: 2024 07 31

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
ROYAL BANK OF CANADA	)	Matilda Lici, for the Applicant
	)	
	)	
Applicant	)	
	)	
- and -	)	
	)	
CHILL X TRANS INC.	)	Matthew Tubie, for the Respondent
	)	
	)	Robert Danter, for the Monitor msi Spergel Inc.
	)	
Respondent	)	
	)	
	)	**HEARD:** July 31, 2024, in person

REASONS FOR JUDGMENT

Fowler Byrne J.

[1] The Respondent Chill X Trans Inc. ("*Chill X*") is indebted to the Applicant Royal Bank of Canada ("RBC") through a number of credit facilities. The RBC has security over these debts, and for the most part, RBC ranks in priority to all other creditors. The RBC takes the position that Chill X is in default of many of its obligations. Accordingly, RBC seeks to enforce its security and to appoint smi

Spergel Inc. ("*Spergel*") as Receiver of the assets, properties and undertakings of Chill X.

[2] A number of other creditors of Chill X were served with the motion materials by RBC and by Spergel. It is not clear if Chill X served the other creditors. One such creditor, Daimler Truck Financial Services Canada Corporation, served a Notice of Appearance but advised RBC that they did not intend to appear at the hearing and that it supported RBC's application. In addition, a representative of the Bank of Montreal also contacted RBC and advised that they support this application but did not intend to appear. No other creditors appeared today and no other materials were filed.

I. Background

[3] RBC or RCAP Leasing Inc. ("*RCAP*") have provided the following credit facilities to Chill X:

a. A revolving demand facility of $1,800,000, dated July 10, 2023;

b. A Master Lease Agreement between dated December 1, 2023;

c. A conditional Sale Agreement, dated August 3, 2023 with respect to a 2018 Great Dane Refrigerated Trailer in the amount of $94,888.87; and

d. A Lease Agreement through RCAP for the lease of a used 2019 Mac Anthem Tractor, for the sum of $140,000.

(hereinafter "*the Credit Agreements*").

[4] RCAP is a wholly owned subsidiary of RBC.

[5] As part of these credit facilities, Chill X has agreed to give various forms of security. This security included a General Security Agreement dated July 10, 2023 ("*GSA*")

which grants RBC a security interest in any and all property, assets and undertakings of Chill X in Ontario and New York. This security was registered pursuant to the *Personal Property Security Act* ("*PPSA*"). The GSA defines the instances of default, and in paragraph 13(a) states that upon default, the RBC may appoint a receiver of Chill X's property.

[6] A number of other creditors have registered their security interests over Chill X, pursuant to the *PPSA*. Except for certain registrations over specific collateral registered by Evolution Capital Corporation, Coast Capital Equipment Finance Ltd., Mitsubishi HC Capital Canada Leasing, Inc., Wells Fargo Equipment Finance Company, De Lage Landen Financial Services Canada Inc., and Bank of Montreal, RBC's registration against all collateral classifications ranks ahead of all other secured creditors.

[7] The RBC maintains that Chill X is in default of the Credit Agreements by failing to provide its monthly margining report and by exceeding the credit authorized by the Credit Agreements. Chill X has failed to make interest payments that are due and owing. Chill X currently has no access to additional credit from RBC. In addition, Chill X is not depositing its receivables into its RBC bank account as required, so that the RBC can take the necessary payments.

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

[9] In the Borrowing Limit Certificate delivered for November 2023, Chill X advised the RBC that it has a significant receivable from 8634998 Canada Inc. ("*863*") operating as Bandesha Transport, in the sum of $236,303. 863 is also controlled by Shahid Tariq. According to the Credit Agreements, receivables from non-arm's

length parties are not to be included in the margin calculation. When the 863 receivable is removed, Chill X's borrowings are excess of what is permitted, creating a margin shortfall of $235,640.

[10] In the normal course, Chill X's receivables should be deposited daily to the RBC bank account, which would then be applied daily to the revolving credit line of credit. Once Chill X was under margin, they had no access to further funds from that account until the line of credit was paid down. Due to the failure to pay and persistent overdraft, the accounts were eventually closed.

[11] As a result of the defaults, RBC made a formal written demand for payment on January 24, 2024 accompanied by a Notice of Intent to Enforce Security under s.244(1) of the *BIA*. Demands were also delivered to the guarantors. As of May 24, 2024, the total amount outstanding pursuant to the Credit Agreements, plus a credit card, was $2,422,345.07, plus accruing interest and costs. The ten (10) day statutory period under s.244(1) of the *BIA* has expired.

[12] Since that demand letter was sent, RBC maintains that Chill X is unwilling to repay the indebtedness. RBC wishes to exercise its security under the GSA and seeks the appointment of a receiver. Spergel has consented to act as receiver.

[13] Chill X argued that it did not deposit money into the RBC account as required because the RBC had not yet made them "fully operational along with the services required to make the deposits." This was not fully explained. It also argued that RBC's decision to "freeze" the Chill X accounts on December 22, 2023 caused havoc, was a surprise, and without justification. They claim they were never told why the accounts were "frozen" until they received the demand letter from RBC.

[14] Since the demand for payment was made by RBC, RBC had difficulty obtaining any satisfactory information from Chill X. It could not ascertain who was running the business as it was conceded that one of the principles, Mr. Tariq was out of

the country. Accordingly, RBC proceeded with its application to appoint a Receiver.

[15] On April 23, 2024, the parties appeared before Tzimas J. wherein the RBC sought the appointment of a receiver. At that time Chill X requested an adjournment so that it could file responding materials. Justice Tzimas gave Chill X one final opportunity to voluntarily satisfy the RBC's requirements and possibly avoid the appointment of a receiver. Justice Tzimas gave Chill X until May 3, 2024 to provide specific information to the RBC. Following a brief review, if the RBC had any follow up questions or found deficiencies, Chill X had until May 10, 2024 to satisfy them. If there was disagreement or difficulty over any of the items, Justice Tzimas invited counsel to make a 9:00 a.m. appointment before her. Her Honour also ordered the appointment of a monitor, to held in abeyance until which time Chill X satisfied the documentary disclosure ordered. If Chill X failed to do so, the appointment of the Monitor would be effective immediately.

[16] It is not disputed that Chill X failed to provide all the information requested by May 3, 2024. Accordingly, on May 8, 2024 Spergel was appointed as a Monitor.

[17] When asked to explain why the information was not provided, counsel for Chill X indicated that when the Monitor arrived at the business premises of Chill X, it acted outside of its mandate, and more as a receiver. As a result, Chill X did not provide all the information requested. I pause to note here that there is no evidence before me to support this submission, and thus I cannot consider that argument. Also, the only evidence of the action taken by the Monitor was contained in the First Report of the Monitor, dated June 14, 2024 ("*First Report*") that was filed for this Application, which report does not support that version of what occurred.

[18] The First Report shows that on May 8, 2024, Spergel contacted counsel for Chill X and requested that the information set out in the endorsement of Tzimas J. be delivered without delay. Counsel for Chill X responded on May 14, 2024

acknowledging the appointment of the Monitor and suggesting that the Monitor reach out to Chill X directly. The Monitor requested the contact information and location of Chill X and again requested the previously ordered information. Having received no response, the Monitor followed up with counsel for Chill X on May 28, 2024. Contact information for the accountants of Chill X was provided two days later. The Monitor contacted Mr. Tariq directly on May 31, 2024, requesting the information previously ordered. The Monitor requested a meeting at the site on June 3, 2024. A meeting was set up for June 4, 2024 and Mr. Tariq advised that his representative Mr. Fani was instructed to cooperate with Spergel and provide the requested information. The meeting took place as planned but none of the requested information was provided, other than the location of Chill X in Montreal and the location of a leased yard. The Monitor was told that Mr. Tariq would instruct his accountants to provide the other information, but no information was forthcoming. The Monitor has also learned that another creditor of Chill X, Somona Capital, has made a demand for payment, assigned a bailiff but was unable to locate the unit that Somona claimed an interest in. No other information has since been provided by Chill X to the Monitor.

II. The Law

[19] RBC seeks the appointment of a receiver pursuant to s.243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 ("*BIA*") and s.101 of the *Courts of Justice Act,* R.S.O. 1990, c.C.43 ("*CJA*"). Section 243 of the *BIA* states that the Court may appoint a receiver if it considers it "just or convenient to do so." Likewise, s.101 of the *CJA* states that such an appointment can be made when it appears to be "just or convenient to do so."

[20] When determining if it is just or convenient to appoint a receiver, the court must have regard to all the circumstances, but in particular, the nature of the property

and the rights and interests of all the parties in relation thereto: *Bank of Nova Scotia v. Freure Village on Claire Creek* 1996 CanLII 8258 at para. 10.

[21] In *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited* 2022 ONSC 6186 at para. 25, the court adopted the factors taken into account in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*. 2009 BCSC 1527, when considering the appointment of a receiver. Those factors are:

a. whether irreparable harm might be caused if no order is made, but it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, where the appointment is authorized by the security documentation;

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.

III. Analysis

[22] Upon review of the evidence, I find that it is just and convenient to appoint Spergel as receiver, without security, of all the assets, properties and undertakings of Chill X acquired for or used in relation to the business.

[23] In coming to that conclusion, I have considered a number of factors.

[24] First, Chill X is in default on its payments and on some of its covenants. That has not been disputed. RBC's right to seek the appointment of a receiver in these circumstances is part of the contract between RBC and Chill X.

[25] Second, I have also considered the nature of Chill X's property and the risk to RBC. The main assets, as can be determined from the evidentiary record, are tractors, trailers (some of which are leased) and receivables. The trucks are not stationary and can be easily moved. The receivables are liquid and easily moved. It would be difficult to preserve and protect these assets, especially in light of Chill X's

failure to advise of the number of trucks they have and their whereabouts and its failure to regularly deposit its receivables into its RBC account.

[26] Thirdly, the size of the debt is significant – in excessive of $2,400,000 – and interest and costs continue to accumulate.

[27] Fourthly, I am particularly compelled by Chill X's failure to abide by the order of Justice Tzimas of April 23, 2024 to deliver documents to the RBC, and Chill X's failure to cooperate with a court-appointed monitor. If Chill X is not compliant with court orders, it is difficult to accept that they will cooperate with RBC on its own accord and satisfy its contractual obligations. Chill X has already shown itself to be unwilling to cooperate with the Monitor, although given the chance to do so.

[28] I also note that Chill X has had since January 2024 to raise the necessary funds to satisfy RBC's demand for payment. I have no evidence that they have made any efforts, other than to retain counsel. It has now been over six (6) months since the RBC made its demand for payment. Chill X has alleged that the actions of RBC have made it more difficult to obtain other financing. No evidence of this has been provided.

[29] Counsel for Chill X has asked that the relief not be granted for a number of reasons. First, he said that Chill X is still a viable business, operational, and that RBC's debts continued to be adequately secured. It claimed that the appointment of a receiver would mean an end to the business. This would have a detrimental impact on its customers that rely on Chill X and its several hundred employees. Secondly, Chill X argued that RBC made it difficult for it to satisfy their obligations. In particular, it asserts that its account at RBC was frozen thereby preventing them doing business. Thirdly, Chill X argued that appointing a receiver as the most drastic approach and not supported in law. Finally, Chill X argued that if I considered it appropriate to appoint a Receiver, that I delay the appointment for 30 days, to allow Chill X time to appeal the order.

[30] With respect to the first argument, there is no evidence to support it. Other than the assertion in Mr. Tariq's affidavit, he has provided no evidence that his business is ongoing, that he employees 200 people, and that the assets of the company are sufficient and secure. One of Chill X's most valuable assets is its receivables, but it has not provided the Borrowing Limit Certificate report since November 2023. Paradoxically, evidence of the viability of Chill X could have been readily addressed had it provided the information ordered by Tzimas J. The failure to do so causes concern.

[31] With respect to the second argument, the evidence also does not support this assertion. The uncontested evidence of RBC is that it was when Chill X exceeded its credit limits on the line of credit, that it was unable to withdraw anything further. Had Chill X deposited its receivables, as it was required to do, and the overdrafts and other margins were satisfied, Chill X could have once again draw down on its line of credit. Unfortunately, Chill X did not, and RBC made its formal demand.

[32] With respect to the law, Chill X relies on the 1983 edition of *Kerr on the Law and Practice as to Receivers* (16th ed.) by *R. Walton* (Toronto: Carswell, 1983). It argues that a receiver should not be brought in unless it can be shown that the subject matter of the proceedings would be in danger pending trial and that necessity or expediency is shown. With respect, this is no longer a complete statement of the law as set in *Freure Village* and *Canadian Equipment Finance*, above. In any event, I have found on the evidence that the assets of Chill X are in danger and that expediency has been shown.

[33] Chill X also argues that the appointment of a receiver is very strong and extraordinary relief (relying on *Fisher Investments Ltd. v. Nusbaum,* (1998) 31 C.P.C. (2d) 158). It argued that it should not ordered unless there is strong evidence that the creditor's right to recovery is in serious jeopardy (relying on *Ryder Truck Rental Can. Ltd. v. 568907 Ont. (Ltd.) (Trustee)* (1987) 16 C.P.C. (2d)

130). Again, these are only some of the factors that I should consider as more recently set out in *Freure Village* and *Canadian Equipment Finance*. Also, I have addressed these factors and considered that Chill X has failed to provide any evidence to rebut the evidence of RBC and the Monitor that Chill X is actively avoiding addressing its debts and disclosing the whereabouts of its assets. I have no evidence *other than* evidence showing that the creditor's right of recovery is in jeopardy.

[34] I do recognize that the appointment of a receiver will have an impact on Chill X, but the extent of that impact has not been proven by Chill X. I have no evidence of the extent and scope of its business. I have no evidence of how many employees it has, or its customer list. Other than the bald claims in Mr. Tariq's affidavit, no other evidence has been provided. Again, evidence of the impact of this order, could have been readily addressed had Chill X provided the information ordered by Tzimas J.

[35] With respect to the request that I stay enforcement of my judgment for 30 days, I see no reason to further delay. Chill X has already had one-half year to consider their options. Even while given extra time to file responding materials, Chill X elected to not cooperate with the Monitor.

[36] In addition, Chill X's right of appeal is governed by s.193 of the *BIA* and is not necessarily automatic. In all likelihood, Chill X must first bring a motion for leave to appeal pursuant to s.193(e) of the *BIA*. This appeal would probably not involve any of the automatic rights of appeal set out in sections 193(a) to (d). It would not involve an appeal of future rights as contemplated under s.193(a) of the *BIA*. "Future rights" are future *legal* rights, and not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that can also be exercised in the future: *Business Development Bank of Canada v. Pine Tree*

Resorts Inc. 2013 ONCA 282 at para. 13. Also, the appointment of a receiver does not bring in to play the value of property as contemplated by s.193(c): *Pine Tree Resorts Inc.* at para. 17; *Cardillo v. Medcap Real Estate Holdings Inc.* 2023 ONCA 852 at para. 21. The issues before the court would not put ss. 193(b) or 193(d) in play. In addition, even if leave is required, nothing in this judgment prevents Chill X from seeking leave to appeal this decision or bringing a motion to stay its enforcement in a timely way.

[37] Accordingly, I find that the balance of convenience favours appointing the receiver. Chill X has had ample time to address this debt. They were given the additional opportunity to cooperate with the Monitor before a receiver was appointed. It has not disclosed the location of its assets, over which the RBC has security. The response of Chill X has been non-responsive to any of the court's concerns, or the factors laid out in the case law.

IV. Conclusion

[38] Accordingly, and for the foregoing reasons,

a. Judgment to go in accordance with draft judgment filed and signed by me.

Fowler Byrne J.

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