

Court File No. CV-24-00000592-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ROYAL BANK OF CANADA

Applicant

-and-

NORTH STAR FREIGHT FORWARDERS INC.

Respondent

FACTUM OF THE APPLICANT
(Application Returnable March 21, 2024)

February 28, 2024

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PART I – THE APPLICATION

The Applicant, Royal Bank of Canada (the “**Bank**”) seeks the following Order, substantially in the form attached as Schedule “A” and in template form (the “**Appointment Order**”) to the Notice of Application:

- a) Appointing msi Spergel inc. as Receiver (“**Spergel**” or the “**Receiver**”), without security, of all of the assets, undertakings and properties of the Respondent, North Star Freight Forwarders Inc. (the “**Debtor**”) acquired for, or used in relation to the business carried on by the Debtor;
- b) That the time for service, filing and confirming of the Notice of Application and the Application Record be abridged and validated so that this application is properly returnable today and dispensing with further service thereof; and,
- c) Such further and other relief as to this Honourable Court may seem just.

The Position of the Bank

1. It is the Bank's position that the present circumstances are an appropriate case for the appointment of the Receiver, including the following (all capitalized terms as defined herein):
 - a) The Bank is a secured creditor of the Debtor pursuant to the GSA;
 - b) The Debtor defaulted under the terms of the Letter Agreement, as a result of, *inter alia*, the following:
 - i. The failure to provide reporting as it became due after multiple attempts by the Bank to obtain such reporting;
 - ii. The Debtor has placed its own accounts on deposit only, resulting in interest arrears on the Financing;
 - iii. The Bank has concerns that the Debtor is not depositing all revenue to the Bank; and,
 - iv. The Operating Loan is not revolving;
 - c) The Debtor has failed to cure the Defaults, and the Demands issued by the Bank have expired;
 - d) In the face of the expired Demands, the Debtor is insolvent. No further terms of credit nor forbearance is available to the Debtor from the Bank;
 - e) The Bank's Security provides the Bank with the right to appoint a Receiver over all property of the Debtor, as a result of the Defaults;
 - f) The Debtor's property includes tractors and trailers, which are moveable assets that may be difficult to locate and subject to potential liens in favour of repairers and

storers. It is necessary for the protection of the Debtor's estate that a Receiver be appointed; and,

- g) A Receiver will also be required to preserve and maintain the property of the Debtor and complete the orderly sale of same, and to ensure that the proceeds of any such sale are applied to the Debtor's obligations. In relation to any such sale, the Appointment of Receiver is also necessary to deal with the subsequent claims to the proceeds.

PART II – FACTS/OVERVIEW

2. The Debtor is a company incorporated pursuant to the laws of the Country of Canada, with its registered office located in the Town of Caledon, Ontario.

Reference: Affidavit of Kevin Leung, sworn February 1, 2024, at para 2 and Exhibit "A" thereto (the "Leung Affidavit").

3. Inderjeet Singh Sekhon ("**Inderjeet**") is the sole principal of the Debtor and is a guarantor of the obligations owing by the Debtor to the Bank.

Reference: Leung Affidavit at para 3.

4. The Debtor operates a trucking transport business out of the premises located at 11553 Tenth Line, Halton Hills, Ontario.

Reference: Leung Affidavit at para 4.

5. The Debtor is insolvent, and is currently in Default (a "**Default**", or the "**Defaults**") of its obligations to the Bank as a result of the following:

- a) The failure to provide reporting as it became due after multiple attempts by the Bank to obtain such reporting;

- b) The Debtor has placed its own accounts on deposit only, resulting in interest arrears on the Financing (as defined below);
- c) The Bank has concerns that the Debtor is not depositing all revenue to the Bank; and,
- d) The Operating Loan (as defined below) is not revolving.

Reference: Leung Affidavit at para 5.

The Obligations to the Bank and Security Held

6. As of January 24, 2024, the Debtor was indebted to the Bank in the amount of \$1,213,486.94 CAD and \$245,889.78 USD, plus accruing interest and the Bank's continuing costs of enforcement including legal and professional costs (the "**Obligations**"), in respect of certain financing advanced to the Debtor pursuant to the terms of a Royal Bank of Canada Credit Agreement dated November 9, 2022 (the "**Letter Agreement**").

Reference: Leung Affidavit, at para 7 and Exhibit "B".

7. The credit facilities established by the Letter Agreement are:
- a) Revolving Demand Facility: with a maximum credit limit of \$1,600,000.00, upon which the sum of \$1,213,486.94 CAD and \$245,889.78 USD was owing as at January 24, 2024 (the "**Operating Loan**"); and,
 - b) Credit Card Facility: with a credit limit of \$200,000.00, upon which the sum of \$0.00 was owing as at January 24, 2024
- (collectively, the "**Financing**").

Reference: Leung Affidavit, at para 8.

8. The Operating Loan is payable on demand.

Reference: Leung Affidavit, at para 9.

9. The Financing is secured by, *inter alia*, the following:

- a) General Security Agreement from the Debtor dated November 9, 2022 (the “**GSA**”);
and,
- b) Guarantee and Postponement of Claim from Inderjeet dated November 9, 2022,
limited to the amount of \$1,800,000.00.

(collectively, the “**Security**”).

Reference: Leung Affidavit, at para 10 and Exhibits “C” and “D” thereto.

The Bank’s Security Interest in The Personal Property of the Debtor

10. The GSA secures all personal property of the Debtor. The Bank has registered a Financing Statement as against the Debtor pursuant to the provisions of the *Personal Property Security Act* (Ontario) to perfect its security interest in the personal property of the Debtor secured under the GSA.

Reference: Leung Affidavit, at paras 11-13, and Exhibit “E” thereto.

Defaults and Demands

11. On October 17, 2023, the Bank issued a letter to the Debtor advising of its default as a result of failing to provide reporting pursuant to the Letter Agreement, and that the Bank required the Debtor to remedy same prior to October 31, 2023.

Reference: Leung Affidavit, at para 14, and Exhibit “F” thereto.

12. The Debtor failed to respond to the Bank's letter dated October 17, 2023, and failed to provide the reporting as requested by the Bank.

Reference: Leung Affidavit, at para 15.

13. Due to the Default as set out above, there is a lack of transparency with respect to the status and stability of the Debtor's business.

Reference: Leung Affidavit, at para 16.

14. As a result of the Debtor placing its accounts on deposit only:

- a) Interest payments are in arrears to the Financing; and,
- b) The Bank has no visibility as to how the Debtor is meeting its other ongoing liabilities including Canada Revenue Agency for HST and employee deductions at source.

Reference: Leung Affidavit, at para 17.

15. As a result of the Defaults, the Bank delivered to the Debtor a demand for payment and a Notice of Intention to Enforce Security pursuant to section 244(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**"), each dated November 17, 2023, with respect to the indebtedness then owing. The Bank also delivered a demand to Inderjeet as the guarantor of the Debtor, also dated November 17, 2023 (collectively, the "**Demands**").

Reference: Leung Affidavit, at para 18, and Exhibit "G" thereto.

16. On November 23, 2023, Kevin Leung, with the Bank, met with the Debtor and requested that the Debtor provide the Bank with financial information and documentation.

Reference: Leung Affidavit, at para 19.

17. On November 28, 2023, counsel for the Bank e-mailed the Debtor with copies of the Demands and advised that the notice period under the Demands had expired, however the Bank was providing the Debtor forbearance, credit and banking services on a day-to-day basis in the Bank's discretion.

Reference: Leung Affidavit, at para 20 and Exhibit "H" thereto.

18. On November 28, 2023, the Bank e-mailed the Debtor requesting information, pursuant to the Letter Agreement, by December 6, 2023.

Reference: Leung Affidavit, at para 21, and Exhibit "I" thereto.

19. On December 6, 2023, Amandeep Singh, who advised that he is the external accountant of the Debtor, responded to Kevin Leung's e-mail and advised that they were collecting the required information, and asked until the end of day "Friday to submit required documents".

Reference: Leung Affidavit, at para 22, and Exhibit "J" thereto.

20. On December 7, 2023, the Bank e-mailed the Debtor confirming that the deadline was extended to end of day Friday, as requested.

Reference: Leung Affidavit, at para 23, and Exhibit "K" thereto.

21. On December 13, 2023, the Bank e-mailed the Debtor asking for an update regarding the requested information.

Reference: Leung Affidavit, at para 24, and Exhibit "L" thereto.

22. On January 11, 2024, counsel for the Bank e-mailed the Debtor advising that no response from the Debtor was received following the Bank's December 13, 2023 e-mail, that the Bank

had concerns, was terminating forbearance, credit and banking services, and the Bank would be applying to the Court for an order appointing a receiver over the property of the Debtor.

Reference: Leung Affidavit, at para 25, and Exhibit “M” thereto.

23. All statutory notice periods in relation to the Demands have expired, and the Debtor and Inderjeet have failed to repay the Obligations due, despite the Demands.

Reference: Leung Affidavit, at para 26.

The Appointment of a Receiver

24. The Obligations due pursuant to the Demands have not been paid. The ten (10) day period under section 244 of the BIA has expired. The Debtor in default of the Financing. The Bank is unwilling to provide any further forbearance or credit to the Debtor. The Bank is in a position to appoint a receiver over the assets and property of the Debtor as secured by the Bank’s Security, pursuant to section 243 of the BIA.

Reference: Leung Affidavit, at paras 27 and 28.

25. The GSA grants the Bank the right to appoint a Receiver over all personal property of the Debtor, as a result of the Defaults of the Debtor under the Financing.

Reference: Leung Affidavit, at paras 29 to 31.

26. Spergel has consented to act as Receiver, should this Honourable Court so appoint it.

Reference: Leung Affidavit, at para 42.

PART III – ISSUES, LAW AND ARGUMENT

Issues

27. The issues before this Court, and addressed below, are:

- a) Does this Court have jurisdiction to appoint the Receiver?
- b) Should this Court appoint the Receiver?
- c) If this Court decides to appoint the Receiver, then are the terms of the Receivership Order appropriate in the circumstances of this receivership?

(a) This Court has jurisdiction to appoint the Receiver

28. Subsection 243(5) of the BIA provides that an application under subsection 243(1) of the BIA is to be filed in a court having jurisdiction in the judicial district of the “locality of the debtor”, which is defined in section 2 of the BIA.

[BIA, s. 2, Schedule “B”](#); [BIA, s. 243\(5\), Schedule “B”](#).

29. The Debtor is a Canadian corporation with its registered office in Caledon, Ontario. The business carried on by the Debtor that is subject to the proposed receivership is located in Halton Hills, Ontario. The locality of the Debtor is, therefore, Ontario, and this application is properly brought before the Ontario Superior Court of Justice.

30. Subsection 243(4) of the BIA provides that only a trustee, as defined in section 2 of the BIA, may be appointed under subsection 234(1) of the BIA.

[BIA, s. 2, Schedule “B”](#); [BIA, s. 243\(4\), Schedule “B”](#).

31. Spergel is a trustee as defined in the BIA, and therefore, satisfies the requirements for appointment pursuant to the BIA.

(b) This Court should appoint the Receiver

32. Section 244(1) requires that a secured creditor provide an insolvent person with the requisite advance notice of its intention to enforce security.

[BIA, s. 244\(1\), Schedule “B”](#).

33. The Applicant sent the Demands together with its Notice of Intention to Enforce Security pursuant to such section of the BIA, to the Debtor on November 17, 2023, and this application is being heard on a date that is after the date on which any applicable notice periods expired.
34. Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (the “CJA”) provides for the appointment of a receiver by this Court where it is “just and convenient”. Section 243(1) of the BIA also provides that, on an application by a secured creditor, this Court may appoint a receiver if it considers it to be just and convenient to do so to: (a) take possession over the assets of an insolvent person; (b) exercise any control that the Court considers advisable over the property and business; or (c) take any other action that the Court considers advisable.
- [CJA, s. 101, Schedule “B”; BIA, s. 243\(1\) and 243\(2\), Schedule “B”.](#)
35. Where the loan agreement and related transaction documents contemplate the appointment of a receiver, this Court may have regard to the principles summarized by Justice Newbould in *RMB Australia Holdings Limited v. Seafield Resources Ltd.*:

28 In determining whether it is “just or convenient” to appoint a receiver under either the BIA or CJA, Blair J., as he then was, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) stated that in deciding whether the appointment of a receiver was 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. He also referred to the relief being less extraordinary if a security instrument provided for the appointment of a receiver:

While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the “extraordinary” nature of the remedy sought is less essential to the inquiry. Rather, the “just or convenient” question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not.

29 See also *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 (Ont. S.C.J. [Commercial List]), in which Morawetz J., as he then was, stated:

...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. See *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635 at paras. 50 and 75 (B.C. S.C. [In Chambers]); *Freure Village*, supra, at para. 12; *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 at para. 18 (S.C.J. [Commercial List]); *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (S.C.J. [Commercial List]).

[RMB Australia Holdings Limited v. Seafield Resources Ltd., 2014 ONSC 5205 \(CanLII\), paras 28-29.](#)

36. The existence of a contractual right to appoint a receiver in the loan agreement and related transaction documents is key. 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.

[Elleway Acquisitions Limited v. The Cruise Professionals Limited, 2013 ONSC 6866 \(CanLII\) at para 27.](#)

37. This relief that is granted more as a matter of course, is especially true in cases in which the circumstances further support such an appointment. That is the case here.

38. With this lower burden, the following additional “just or convenient” factors identified by Justice Farley in *Confederation Life Insurance Co. v. Double Y Holdings Inc.* may be considered:

a) The lenders’ security is at risk of deteriorating;

- b) There is need to stabilize and preserve the Debtor's business;
- c) Loss of confidence in the Debtor's management; and,
- d) Positions and interests of other creditors.

***Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List)) ["Confederation Life"], paras. 19-24, Tab 1 of the Applicant's Book of Authorities.**

39. It is not essential that the moving party/secured creditor establish that it will suffer irreparable harm if a receiver/manager is not appointed.

***Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated (1995)*, 30 C.B.R. (3d) 49 at para 28, Tab 2 of the Applicant's Book of Authorities.**

40. When the above *Confederation Life* factors are applied to this case, the Applicant submits that the burden to appoint a receiver has been met and that such appointment is just and convenient in the circumstances:

- a) ***The Debtor contractually agreed to the appointment of a receiver.*** The loan agreements and the related transaction documents among the Applicant and the Debtor expressly entitle the Applicant to appoint a receiver under certain circumstances, including the present circumstances. The Applicant now exercises these entitlements, subject to this Court's authority.
- b) ***The loan agreement is in default.*** As set out above, events of default have occurred and are continuing under the loan agreement and the related transaction documents. The Applicant has demanded on the Obligations. The Applicant provided the Debtor with statutory notice of their intention to enforce security, and the applicable notice periods have elapsed.

- c) ***The lenders' security is at risk of deteriorating.*** The Security largely consists of portable equipment, and the Bank is concerned that the Debtor does not have the working capital needed to maintain its property. If the property of the Debtor deteriorates, the realizable value of the Security will diminish as a result.
- d) ***The Debtor's business needs to be stabilized and preserved.*** The Debtor's liquidity crisis will continue to worsen in the absence of action. A receiver will be able to provide stability and transparency, and take the necessary steps to preserve the Security, including conducting an orderly sale process that will generate recoveries for creditors. If the Debtor's business experiences further disarray, or the Security is not preserved, there will be further negative consequences.
- e) ***The Applicant has lost confidence in the Debtor's management.*** The Debtor has not advised or provided evidence of alternatives to a receivership that stand any reasonable chance of success, despite significant time in which to do so. The Applicant has justifiably lost confidence in the management of the Debtor due to the events described in the Leung Affidavit, including failing to provide the Applicant various information, as requested.
- f) ***Position and interests of other Creditors.*** The Applicant is not the only creditor of the Debtor. As at the date of this Factum, no creditor has opposed the receivership application. The Receiver will be able to properly and equitably deal with the interests of creditors other than the Applicant. A receivership provides parties with an effective forum in which to deal with any issues, including any competing claims, that may arise in respect of the Debtor and its property.

41. As at the date of this Factum, the Applicant is not aware of any restructuring efforts by the Debtor that stands any reasonable chance of success.

(c) The Terms of the Receivership Order are Appropriate

42. The terms of the proposed Receivership Order are substantially the same as the terms of the Commercial List's model receivership order, and the modifications to same are indicated in the blacklined copy provided.

Blackline of the draft Order against the Model Receivership Order; Application Record, Tab 1, Schedule "A-2".

PART IV – ORDER REQUESTED

43. For the reasons set forth herein and in the Application Record, it is respectfully submitted that the appointment of a receiver is just and convenient and is necessary for the protection of the estate of the Debtor and the interests of the Bank and other stakeholders.

44. The Bank respectfully requests that this Honourable Court grant the Appointment Order substantially in the form attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of February, 2024



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Royal Bank of Canada

SCHEDULE "A"**LIST OF AUTHORITIES**

1. *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List))
2. *Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866 (CanLII)
3. *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (CanLII)
4. *Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

(f) is appointed under subsection (1); or

(g) 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

(2) 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.

locality of a debtor means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (localité)

trustee or **licensed trustee** means a person who is licensed or appointed under this Act. (*syndic* ou *syndic autorisé*)

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

Injunctions and receivers

101. (1) In the Superior Court of Justice, an interlocutory 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.

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FACTUM OF THE APPLICANT

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