

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ROYNAT INC.

Applicant

-and-

1000602770 ONTARIO LTD.

Respondent

FACTUM OF THE APPLICANT

(Application Returnable July 25, 2024)

July 16, 2024

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TO: SERVICE LIST

Court File No. CV-24-00001161-0000

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PART I – THE MOTION

The Applicant, Roynat Inc. ("**Roynat**") 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. ("**Spergel**" or the "**Receiver**"), as Receiver, without security, of all of the assets, undertakings and properties of the Respondent, 1000602770 Ontario Ltd. (the "**Debtor**") acquired for, or used in relation to the business or businesses carried on by the Debtor, including the Real Property (as defined below);
- 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 Roynat

1. It is Roynat'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) Roynat is a secured creditor of the Debtor pursuant to the Debenture and the Mortgage;
 - b) The Debtor is in Default of the Financing, which Defaults continue. The Financing Arrears are significant and continue to accrue;
 - c) The Debtor has failed to cure the Defaults, and the Demands issued by Roynat have expired. Roynat's Security provides Roynat with the right to appoint a Receiver over all property of the Debtor, as a result of the Defaults;
 - d) In the face of the expired Demand, the Debtor is insolvent. No further credit is available to the Debtor, and Roynat is no longer willing to offer any terms of forbearance to the Debtor in light of the failure of the Real Property Sale, and in the absence of either an imminent Refinancing or another source of funds in a sum sufficient to repay the Obligations in full. It is necessary for the protection of the Debtor's estate that a Receiver be appointed;
 - e) The Debtor has failed to communicate any plan acceptable to Roynat which would see the Obligations repaid in a timely manner, or at all.
 - f) There are Property Tax Arrears owing in relation to the Real Property, which may affect the value of Roynat's Security if allowed to continue growing.
 - g) The Debtor has not provided evidence to Roynat regarding the status of its remittances and filings with CRA, and may be indebted to CRA as well, including for amounts constituting deemed trusts in priority to Roynat's Security

- h) A Receiver will also be required to preserve 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 corporation incorporated pursuant to the laws of the Province of Ontario, and acts as a real estate holding company and is the owner of vacant real property municipally known as 225 Southgate Drive, Guelph, Ontario the "**Real Property**"), which is legally described as:

- a) LOT 20, PLAN 680; S/T EASEMENT IN FAVOUR OF THE BOARD OF LIGHT AND HEAT COMMISSIONERS OF THE CITY OF GUELPH OVER PT 36 61R2072 AS IN ROS223171; GUELPH (PIN 71491-0162 LT); and,
- b) LOT 21, PLAN 680; S/T EASEMENT IN FAVOUR OF THE BOARD OF LIGHT AND HEAT COMMISSIONERS OF THE CITY OF GUELPH OVER PT 37 61R2072 AS IN ROS223171; GUELPH (PIN 71491-0161 LT)

Reference: Affidavit of Cian McDonnell, sworn July 9, 2024, at paras 2 and 4 and Exhibits "A" and "B" thereto (the "McDonnell Affidavit").

3. Tristar Carriers Ltd. ("**Tristar**") is a corporation incorporated pursuant to the laws of the Province of Ontario operating as a trucking and transport company, and at all material times was a guarantor of the Obligations (as defined below) of the Debtor to Roynat.

Reference: McDonnell Affidavit, at para 6.

4. The Debtor is insolvent, and is currently in Default (a “**Default**”, or the “**Defaults**”) of the Financing (as defined below) as a result of the following:

- a) Arrears of principal and interest owing under the Financing (the “**Financing Arrears**”);
- b) Failure by Tristar to provide financial reporting to Roynat when due under the terms of the Letter Agreement (as defined below);
- c) Tristar is in default to its senior direct lender, Bank of Montreal (“**BMO**”), and Roynat is aware that Tristar is in a form of forbearance with BMO; and,
- d) Overdue property taxes owing in relation to the Real Property totaling \$11,941.70 as at June 27, 2024 (the “**Property Tax Arrears**”).

Reference: McDonnell Affidavit at para 7 and Exhibit “C” thereto.

5. Roynat is unwilling to provide the Debtor with any further credit or forbearance.

Reference: McDonnell Affidavit, at para 38.

The Obligations to Roynat and Security Held

6. As of July 3, 2024, the Debtor was directly indebted to Roynat in the amount of \$6,776,182.02, plus accruing interest and Roynat’s continuing costs of enforcement (the “**Obligations**”), in respect of the following financing advanced to the Debtor pursuant to the terms of an Offer of Finance dated August 14, 2023, and the subsequent amendments thereto dated September 7, 2023 and September 8, 2023, and Notification of Changes to Offer of Finance dated May 6, 2024 (the “**Letter Agreement**”):

- a) Loan Facility A: Term Loan Facility: in the amount of \$7,000,000.00 (the “**Financing**”).

Reference: McDonnell Affidavit, at para 9 and Exhibit “D” thereto.

7. A default by either of the Debtor or Tristar to any other lender constitutes a Default under the Letter Agreement.

Reference: McDonnell Affidavit, at paras 10-11.

8. The Financing is secured by, *inter alia*, the following:
 - a) Debenture from the Debtor dated September 5, 2023 in the sum of \$7,000,000.00 (the **“Debenture”**);
 - b) Charge/Mortgage of Land from the Debtor in the principal sum of \$7,000,000.00 and receipted as instrument number WC712167 on September 11, 2023 over the Real Property (the **“Mortgage”**), as governed by the terms of the Debenture;
 - c) General Assignment of Rents and Leases from the Debtor dated September 5, 2023, receipted on title to the Real Property on September 11, 2023 as instrument no. WC712170;
 - d) Guarantee and Indemnity from the Tristar dated September 5, 2023, and limited to the sum of \$7,000,000.00;
 - e) General Security Agreement from Tristar dated September 5, 2023.(collectively, the **“Security”**).

Reference: McDonnell Affidavit, at para 12 and Exhibits “E” to “I” thereto.

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

9. The Debenture secures all personal property of the Debtor. Roynat 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 Debenture.

Reference: McDonnell Affidavit, at paras 13-15, and Exhibit “J” thereto.

10. Royat also holds a perfected security interest in all personal property of Tristar. Royat is not seeking the appointment of a Receiver over the property of Tristar in the herein application.

Reference: McDonnell Affidavit, at paras 16-22, and Exhibit “K” thereto.

Royat’s Security Interest in the Real Property

11. Royat’s interest in the Real Property is secured by the Mortgage, which constitutes a first charge on the Real Property, as governed by the Debenture.

Reference: McDonnell Affidavit, at paras 23-26.

Defaults and Demand

12. The Debtor is insolvent, and has defaulted under the Financing, as set out above.

Reference: McDonnell Affidavit, at paras 7 and 27-28.

13. As a result of the Defaults, Royat 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 May 15, 2024 (collectively, the “**Demand**”).

Reference: McDonnell Affidavit, at para 29, and Exhibit “L” thereto.

14. Subsequent to the issuance of the Demand, the Debtor advised Royat that it was in the process of negotiating a sale of the Real Property for a sale price sufficient to repay the Obligations in full (the “**Real Property Sale**”), and provided Royat with a conditional Agreement of Purchase and Sale dated May 9, 2024, for the Real Property Sale, with a closing date of September 3, 2024 (the “**APS**”).

Reference: McDonnell Affidavit, at paras 30-31 and Exhibit “M” thereto.

15. The Debtor also advised Roynat that it was seeking a refinancing, concurrent with its efforts to complete a Real Property Sale (a “**Refinancing**”).

Reference: McDonnell Affidavit, at para 32.

16. With the signed conditional APS in place, Roynat allowed the Debtor a period of day-to-day forbearance, without waiving any rights in relation to the Financing, the Security, or the Obligations.

Reference: McDonnell Affidavit, at para 33.

17. On or about June 6, 2024, the Debtor advised Roynat that the Real Property Sale had been terminated. In the absence of further communication from the Debtor regarding a plan to repay the Obligations, on June 20, 2024, Roynat’s counsel advised the Debtor by email that Roynat was terminating its provision of day-to-day forbearance and would proceed to enforce its security by way of the herein application

Reference: McDonnell Affidavit, at paras 34-35 and Exhibit “N” thereto.

18. The Debtor has failed to repay the Obligations and has not provided Roynat with any evidence of an imminent Refinancing or sale of the Real Property, or of any other plan to repay the Obligations. Roynat has terminated the period of day-to-day forbearance provided, and is not willing to provide further forbearance to the Debtor in the current circumstances.

Reference: McDonnell Affidavit, at paras 37-38.

The Appointment of a Receiver

19. The Obligations due pursuant to the Demand have not been paid. The ten (10) day period

under section 244 of the BIA has expired. The Debtor is in default of the Financing. Roynat is unwilling to provide any further forbearance or credit to the Debtor. Roynat is in a position to appoint a receiver over the assets and property of the Debtor as secured by Roynat's Security, pursuant to section 243 of the BIA.

Reference: McDonnell Affidavit, at para 39.

20. The Debenture grants Roynat the right to appoint a Receiver over all personal property of the Debtor and over the Real Property, as a result of the Defaults.

Reference: McDonnell Affidavit, at paras 40-41.

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

Reference: McDonnell Affidavit, at para 51.

PART III – ISSUE, LAW AND ARGUMENT

Issue

22. The issue before this Court, and addressed below, is:

- a) Should Spergel be appointed as Receiver over the Debtor's Property?

The Appointment of a Receiver

23. 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) and (1.1) of the BIA also provides that, on an application by a secured creditor and following expiry of the notice period under s. 244(1) of the BIA, 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".](#)

24. The Debtor is in Default of its obligations to Roynat under the Financing. The Debtor is insolvent and has failed to cure the Defaults, despite the Demand, which has expired.
25. The Court has the power to appoint a receiver where it is just or convenient to do so. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver to carry out its work and duties more efficiently.

[Bank of Montreal v. Carnival National Leasing Limited \(2011\) ONSC 1007 \(CanLII\) at paragraph 24](#)

26. The appointment of a receiver is generally an extraordinary equitable remedy; however, where the loan agreement and related security instruments governing the relationship between the debtor and secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant, as the applicant is merely seeking to enforce a term of its bargain with the debtor.

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

[Bank of Montreal v. Sherco Properties Inc., 2013 ONSC 7023 \(CanLII\), at paragraph 42](#)

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

27. This relief becomes even less extraordinary when dealing with a default under a mortgage., as the mortgagee has a *prima facie* right to seek the appointment of a Receiver, and such relief is generally to be granted to that mortgagee "as a matter of course".

[BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 1953 \(CanLII\) at paragraph 44.](#)

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.

28. 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 paragraph 28, Tab 2 of the Applicant’s Book of Authorities.

29. This Court must undertake an examination of all of the circumstances, including the potential costs, the relationship between the debtor(s) and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver or receiver-manager.

[Bank of Nova Scotia v. Freure Village of Clair Creek, 1996 CanLII 8258 \(ONSC\) at paragraph 13](#)

[Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited, 2007 CanLII 297 \(ON SC\) at paragraph 11](#)

The Appointment of a Receiver – Summary of Submissions

30. It is respectfully submitted that when considering the factors set out in the relevant case law, the present circumstances are an appropriate case for the appointment of a Receiver, including the following:

- a) Roynat is a secured creditor of the Debtor pursuant to the Debenture and the Mortgage;

- b) The Debtor is in Default of the Financing, which Defaults continue. The Financing Arrears are significant and continue to accrue;
- c) The Debtor has failed to cure the Defaults, and the Demands issued by Roynat have expired. Roynat's Security provides Roynat with the right to appoint a Receiver over all property of the Debtor, as a result of the Defaults;
- d) In the face of the expired Demand, the Debtor is insolvent. No further credit is available to the Debtor, and Roynat is no longer willing to offer any terms of forbearance to the Debtor in light of the failure of the Real Property Sale, and in the absence of either an imminent Refinancing or another source of funds in a sum sufficient to repay the Obligations in full. It is necessary for the protection of the Debtor's estate that a Receiver be appointed;
- e) The Debtor has failed to communicate any plan acceptable to Roynat which would see the Obligations repaid in a timely manner, or at all.
- f) There are Property Tax Arrears owing in relation to the Real Property, which may affect the value of Roynat's Security if allowed to continue growing.
- g) The Debtor has not provided evidence to Roynat regarding the status of its remittances and filings with CRA, and may be indebted to CRA as well, including for amounts constituting deemed trusts in priority to Roynat's Security
- h) A Receiver will also be required to preserve 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.

31. It is respectfully submitted that the appointment of a receiver is just and equitable and is necessary for the protection of the estate of the Debtor and the interests of Roynat and other stakeholders.

PART IV – ORDER REQUESTED

32. Roynat 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 16th day of July, 2024



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Roynat Inc.

SCHEDULE "A"**LIST OF AUTHORITIES**

1. *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007 (CanLII);
2. *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205 (CanLII);
3. *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (CanLII);
4. *Elleway Acquisitions Limited v. The Cruise Professionals Limited*, 2013 ONSC 6866 (CanLII);
5. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII);
6. *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 (Ont. S.C.J. (Commercial List));
7. *Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49;
8. *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC);
9. *Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, 2007 CanLII 297 (ON SC).

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.

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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