

Court File No. CV-24-00002865-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

and

CHEETAH CARRIERS INC. and UDIT GAUR

Respondents

**FACTUM OF THE APPLICANT,
ROYAL BANK OF CANADA**
(Returnable August 9, 2024)

August 6, 2024

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**FACTUM OF THE APPLICANT,
ROYAL BANK OF CANADA**

PART I - INTRODUCTION

1. The Applicant, Royal Bank of Canada ("**RBC**"), is seeking an order appointing msi Spergel inc. ("**Spergel**") as receiver of the assets, undertakings and properties of Cheetah Carriers Inc. (the "**Company**") pursuant to Section 243 of the *Bankruptcy and Insolvency Act* (the "**BIA**") and Section 101 of the *Courts of Justice Act* (the "**CJA**").

2. RBC is also seeking judgment against Udit Gaur ("**Udit**") under written guarantees and postponements of claim for the indebtedness of the Company to RBC.

PART II - SUMMARY OF FACTS

The Parties

3. The Company was incorporated pursuant to the *Canada Business Corporations Act*, with its registered head office located at 475 Harrop Drive, Milton, Ontario. Udit and Saurabh Chopra ("**Saurabh**") are directors of the Company. The Company provides trucking services throughout Canada and the United States.¹

Credit Facilities and Security

4. The Company entered into a credit facilities agreement dated August 10, 2023 (the "**Credit Agreement**") with RBC. Pursuant to the Credit Agreement, RBC

¹ Affidavit of Craig McInnes, affidavit sworn July 24, 2024 ("**McInnes Affidavit**"), paras. 10-13; Exhibit "A" – Corporate Profile Report of the Company.

established a revolving demand facility in the amount of \$1,000,000.00 and a Visa facility in the amount of \$100,000.00 (collectively, the "**Demand Facilities**").²

5. The Company also entered into a Master Lease Agreement dated February 2, 2023 with RBC, together with Leasing Schedule No. 201000072255 dated February 8, 2023, Leasing Schedule No. 201000072980 dated March 21, 2023, Leasing Schedule No. 201000073082 dated March 24, 2023, and Leasing Schedule No. 201000076217 dated September 8, 2023 (the "**Lease Agreement**").³

6. As security for the Demand Facilities, the Company signed a General Security Agreement on December 12, 2022 (the "**GSA**"), registration of which was duly made under the *Personal Property Security Act* (Ontario).⁴

7. Udit provided a Guarantee and Postponement of Claim for the debts of the Company dated December 12, 2022 limited to the sum of \$900,000.00 and a Guarantee and Postponement of Claim dated August 11, 2023 limited to the sum of \$1,100,000.00 (the "**Guarantees**").⁵

8. Pursuant to the four Leasing Schedules under the Lease Agreement, RBC established four lease facilities in favour of the Company to finance the purchases of various applicable motor vehicles, as identified in the Leasing Schedules ("**Lease Facilities**").⁶

² McInnes Affidavit, para. 15; Exhibit "C" – Credit Agreement.

³ McInnes Affidavit, paras.7 and 16; Exhibit "D" – Lease Agreement.

⁴ McInnes Affidavit, paras. 22-24; Exhibit "F" – GSA and Exhibit "G" – PPSA search against the Company.

⁵ McInnes Affidavit, para. 14; Exhibit "B" – Guarantees.

⁶ McInnes Affidavit, para. 16; Exhibit "D" – Lease Agreement.

9. The Demand Facilities are repayable on demand.⁷
10. The Demand Facilities and Lease Facilities are collectively the "**Credit Facilities**".
11. Pursuant to the "Events of Default" section of the Credit Agreement, failure by the Debtor to pay any principal, interest or other amount when due constitutes default under the Credit Agreement.⁸
12. Pursuant to the "Reporting Requirements" section of the Credit Agreement, the Debtor agreed:

"The Borrower will provide to the Bank:
 - (a) annual aged list of accounts receivable and aged list of accounts payable for the Borrower, within 90 days of each fiscal year end;
 - (b) annual personal statement of affairs for all Guarantors, who are individuals, within 90 days of the end of every fiscal year of the Borrower, commencing with the fiscal year ending in 2024;
 - (c) annual compilation engagement financial statement for the Borrower, including a cash flow statement, within 90 days of each fiscal year end;
 - (d) such other financial and operating statements and reports as and when the Bank may reasonably require."⁹

⁷ McInnes Affidavit, para. 17.

⁸ McInnes Affidavit, para. 19.

13. Section 11 "Events of Default" of the GSA provides, among other things:

"The happening of any of the following events or conditions shall constitute default hereunder which is herein referred to as "default":

- (a) the nonpayment when due, whether by acceleration or otherwise, of any principal or interest forming part of Indebtedness or the failure of Debtor to observe or perform any obligation, covenant, term, provision or condition contained in this Security Agreement or any other agreement between the Debtor and RBC; ..."¹⁰

14. Pursuant to section 13(a) "Remedies" of the GSA, upon default, RBC is entitled to appoint a receiver.¹¹

Defaults and Demands

15. The accounts of the Company were transferred to RBC's Special Loans and Advisory Services Group ("**SLAS**") due to RBC's concerns about the financial performance of the Company.¹²

16. Thereafter, RBC issued payment demands and Notices of Intention to Enforce Security pursuant to Section 244 of the BIA (the "**Section 244 Notices**") to the Company and Udit on March 6, 2024 regarding the Demand Facilities and on March 26,

⁹ McInnes Affidavit, para. 20.

¹⁰ McInnes Affidavit, para. 23

¹¹ McInnes Affidavit, para. 24.

¹² McInnes Affidavit, paras. 26-27; Exhibit "H" – Transition Letter.

2024 regarding the Lease Facilities, receipt of which were acknowledged by Udit via emails.¹³

17. To date, all of RBC's payment demands have expired without full repayment of the indebtedness owing under the Credit Facilities.¹⁴

18. From March 27, 2024 to May 7, 2024, RBC, through counsel, requested among other items, information from the Company regarding the statuses of the Company's business operations, bank accounts, accounts receivables, the locations of the Company's vehicles, and the location of the Company's books and records (the "**Requested Information**"). Despite several follow-ups, the Company failed to reply meaningfully to RBC's counsel regarding the Requested Information.¹⁵

19. From April 17, 2024 to June 26, 2024, RBC, through the efforts of its counsel and agent, took possession of and sold some of the trucks and trailers subject to RBC's security interest, being:

- (a) 2020 Freightliner Cascadia Truck, Serial No. 1FUJHHDR0LLLW8596
- (b) 2023 Hyundai Trailer, 53', Serial No. 3H3V532K1PJ473442
- (c) 2023 Hyundai Trailer, 53', Serial No. 3H3V532K3PJ473443
- (d) 2024 Utility Dry van Tandem Trailer, Serial No. 1UYVS253XR7079312

¹³ McInnes Affidavit, paras. 28-31; Exhibits "I", "J", "K" and "L" – Payment demands, Section 244 Notices and email responses from Udit.

¹⁴ McInnes Affidavit, paras. 52-53.

¹⁵ McInnes Affidavit, paras. 34-50; Exhibits "M" and "N" – Emails exchanged by RBC's counsel and the Company.

- (e) 2024 Utility Dry van Tandem Trailer, Serial No. 1UYVS2531R7079313
- (f) 2016 Freightliner 125 Cascadia Truck, Serial No. 3AKJGED51GDHV7196

(collectively the "**RBC Equipment**")¹⁶

20. With the exception of the 2020 Freightliner Cascadia Truck, Serial No. 1FUJHHDR0LLLW8596, which was determined to require further repairs before sale, the RBC Equipment was auctioned on June 26, 2024. The sales of the RBC Equipment resulting from the June 26 auction have not fully closed and/or settled and recoveries therefrom are not certain.¹⁷

21. The Company has been and remains in monetary default of the Lease Agreement by failing to repay the monthly payments due under the Lease Facility.¹⁸

22. To date, the Company has never presented RBC with any plan to fully repay the indebtedness outstanding.¹⁹

23. The indebtedness remains outstanding.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Nature of this Motion

24. RBC, as secured creditor, seeks to appoint MSI Spergel Inc. as receiver of the Company. The GSA expressly provides for the appointment of a receiver upon default.

¹⁶ McInnes Exhibit, paras. 41-50; Exhibits "O", "P", "Q", "R" – Emails between RBC's counsel, RBC's agent Ritchie Brothers and Notice of Sale issued by RBC.

¹⁷ McInnes Exhibit, para. 51.

¹⁸ McInnes Exhibit, para. 7.

¹⁹ McInnes Exhibit, para. 52.

The Test for Appointing a Receiver

25. Pursuant to section [243\(1\) of the BIA](#) and [section 101 of the CJA](#), a court may appoint a receiver if it “is just and convenient” to do so.

26. In deciding whether or not to appoint a receiver, the court must have regard to all of the circumstances, including “the nature of the property and the rights and interests of all parties in relation thereto.” These include the rights of the secured creditor pursuant to its security.²⁰

27. In *Sherco Properties*, Morawetz J. (as he then was) confirmed that where the security instrument provides for a right to appoint a receiver upon default, the burden on the applicant seeking to have the receiver appointed is relaxed:

“... 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 Limited v. Chetwynd Motels Limited*, [2010 BCSC 477](#); *Freure Village, supra*; *Canadian Tire Corp. v. Healy*, [2011 ONSC 4616](#) and *Bank of*

²⁰ [Bank of Montreal v. Sherco Properties Inc.](#), [2013 ONSC 7023 CanLII](#) (“*Sherco Properties*”) at para. 41 and [Bank of Montreal v. Carnival National Leasing Limited](#), [2011 ONSC 1007](#) (CanLII) at para. 24.

Montreal v. Carnivale National Leasing Ltd. and Carnivale Automobile Ltd., [2011 ONSC 1007](#).²¹

28. In *2806401 Ontario Inc. o/a Allied Track Services Inc.*, Osborne J. stated at paragraph 13:

“Factors considered by courts when determining whether it is just or convenient to appoint a receiver include: the existence of a debt and a default, the quality of the security in issue, the fact that the creditor has a right to appoint a receiver under the loan documentation, the likelihood of maximizing the return to the parties, and the risk to the security holder, among others. [See, for example: *Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, [2011 ONSC 5612](#) (Commercial List) at para 22; *RMB Australia Holdings Limited v. Seafield Resources Ltd.*, [2014 ONSC 5205](#) (Commercial List) at para 28; *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007 (Commercial List) at [paras 24](#) and [27](#) [*Carnival Leasing*]; and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, [2009 BCSC 1527](#) at para 25].”²²

29. RBC issued payment demands and Section 244 Notices to the Company and Udit on March 6, 2024 regarding the Demand Facilities.

²¹ [Sherco Properties, para. 42](#).

²² [2806401 Ontario Inc. o/a Allied Track Services Inc., 2022 ONSC 5509 CanLII](#) at para. 13.

30. With respect to the Demand Facilities, 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.²³

31. Under the Credit Agreement, the Company agreed to repay the Demand Facilities on demand, if RBC demands repayment. RBC has demanded payment. The failure to pay constitutes an Event of Default under the Credit Agreement and the GSA.

32. Relying on this failure to pay by March 18, 2024, RBC issued payment demands and a further Section 244 Notice in respect of the Lease Facilities on March 26, 2024.

33. The Company has failed to comply with its contractual obligations owed to RBC under the Credit Agreement, the Lease Agreement and Leasing Schedules and the GSA. Justifiably, RBC has lost confidence in the Company.

34. RBC has met the test for the appointment of a Receiver. RBC is a secured creditor. It is owed under the credit facilities in excess of \$1.6 million. RBC has made payment demand and issued the Section 244 Notices. RBC is entitled to appoint a receiver under its security. RBC requires the assistance of a court-appointed receiver to realize on its security.

35. RBC respectfully submits that it is just and convenient to appoint msi Spergel inc. as receiver at this time for the following reasons:

- (a) the Demand Facilities are repayable on demand and remain outstanding;

²³ [Bank of Montreal v. Carnival National Leasing Limited, 2011 ONSC 1007](#) (CanLII) at para. 13.

- (b) the Company has demonstrated continuous failures to comply with their obligations under the Credit Agreement, the Lease Agreement and Leasing Schedules and the GSA, as evidenced by the payment defaults under the Lease Facilities, failing to comply with its financial and reporting information and generally failing to meaningfully address RBC's concerns;
- (c) the Company's actions have resulted in Events of Default under the Credit Agreement, the Lease Agreement and Leasing Schedules and the GSA and the Events of Default still continue;
- (d) the terms of the GSA expressly permit the appointment of a receiver on default and the Company agreed to these contractual terms when it signed and delivered the GSA to RBC in consideration of the Credit Facilities;
- (e) payment demands and the Section 244 Notices to the Company have long since expired;
- (f) the indebtedness remains outstanding;
- (g) RBC has provided the Company with more than sufficient time to repay the indebtedness;
- (h) the receiver will be in a position to address any issues related to the assets and undertakings of the Company for the benefit of all stakeholders; and

- (i) msi Spergel inc. has consented to act as receiver.

Judgment on the Guarantee

36. A proceeding can be commenced by Application where it is unlikely that there will be any material facts in dispute requiring a trial.²⁴

37. Pursuant to paragraph 2 of the Guarantees, Udit agreed that his obligations will constitute and be continuing obligations and will apply to and secure any ultimate balance due or remaining due to RBC.²⁵

38. In March, 2024, RBC issued demands against Udit on the Guarantees, together with interest and costs.²⁶

39. Udit has failed to make payment.

40. There is no defence to Udit's liability on the Guarantees.

PART IV - ORDER REQUESTED

41. RBC seeks an Order appointing msi Spergel inc. as Receiver and judgment on the Guarantees.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of August, 2024.



Carol Liu

²⁴ Rule 14.05(3)(h) of the Rules of Civil Procedure.

²⁵ McInnes Affidavit, Exhibit "B" – Guarantees.

²⁶ McInnes Affidavit, Exhibits "I" and "K" – Demand letters and Section 244 Notices.

August 6, 2024

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SCHEDULE "A"

LIST OF AUTHORITIES

1. [*Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 \(CanLII\)](#)
2. [*Textron Financial Canada Limited v. Chetwynd Motels Limited*, 2010 BCSC 477](#)
3. [*Canadian Tire Corporation, Ltd. v. Mark Healy et al.*, 2011 ONSC 4616](#)
4. [*Bank of Montreal v. Carnival National Leasing Limited*, 2011 ONSC 1007
\(CanLII\)](#)
5. [*Central 1 Credit Union v. UM Financial Inc. and UM Capital Inc.*, 2011 ONSC
5612](#)
6. [*2806401 Ontario Inc. o/a Allied Track Services Inc.*, 2022 ONSC 5509 \(CanLII\)](#)
7. [*RMB Australia Holdings Limited v. Seafield Resources Ltd.*, 2014 ONSC 5205
\(CanLII\)](#)
8. [*Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527
\(CanLII\)](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. [Section 243\(1\) of the *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.

2. [Section 101 of the *Courts of Justice Act*, RSO 1990, c. C.43](#)

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).

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PROCEEDING COMMENCED AT
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