

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

ROYAL BANK OF CANADA

Applicant

- and -

EXPRESS GT PARTS SERVE 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**

SUPPLEMENTARY FACTUM OF ROYAL BANK OF CANADA

October 12, 2023

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PART I – BACKGROUND TO THE AMENDED APPLICATION

1. On June 6, 2023, Royal Bank of Canada (“**RBC**”) commenced an application for an Order, in substance, appointing Spergel (as defined below) as receiver of all the assets, undertakings and properties of Express GT Parts Serve Inc. (“**Express GTPS**”) acquired for, or used in relation to a business carried on by Express GTPS, and all proceeds thereof.

2. On June 19, 2023, both the application and its interim steps were timetabled pursuant to the endorsement of The Honourable Madam Justice Steele. The substantive hearing of the application was scheduled for August 23, 2023.

3. On August 17, 2023, less than one week before the hearing, and after all the other litigation steps had been completed, Express GTPS delivered a responding factum in which Express GTPS advised for the first time that it was challenging the Court’s jurisdiction to grant the relief sought in the receivership application.

4. On August 23, 2023, the receivership hearing commenced before the Court but was adjourned in light of Express GTPS’ late jurisdictional challenge. Pursuant to the endorsement of The Honourable Madam Justice Conway, counsel were instructed to work-out a timetable with respect to any resulting amendments to RBC’s notice of application, the substantive hearing was adjourned to October 23, 2023 and Express GTPS was ordered to operate its business in the ordinary course and not do anything that would dissipate its assets outside the ordinary course of business.

5. On August 29, 2023, RBC served an amended application in response to Express GTPS’ late jurisdictional challenge. While RBC’s view is that the Court has always had the jurisdiction to grant the relief sought in the receivership application, RBC has amended the application to respond to Express GTPS’ jurisdictional objections.

6. This supplementary factum is therefore intended to address Express GTPS' jurisdictional objections and to address RBC's amendments to the application. As such, this supplementary factum should be reviewed together with RBC's original factum dated August 14, 2023, which sets out RBC's substantive case against Express GTPS.

PART II – RELEVANT FACTS TO THE JURISDICTIONAL CHALLENGE AND THE AMENDMENTS TO THE NOTICE OF APPLICATION

7. Express GTPS has made the following jurisdictional arguments:

- (a) the receivership application is not authorized by the Rules, and, in particular, Rule 14.05(3)(g), because the receiver's appointment would not be ancillary to other relief properly claimed in an application;
- (b) the receivership application is not authorized contractually since there is no "direct" agreement between Express GTPS and RBC providing for the appointment of a receiver;
- (c) the receivership application is not authorized by section 243 of the BIA because Express GTPS is purportedly solvent; and
- (d) the receivership application is not authorized by section 101 of the CJA because that statute does not expressly authorize a receiver's appointment on a final (as opposed to interlocutory) order.

Express GTPS' Factum dated August 17, 2023 at paras. 64-69.

Bankruptcy and Insolvency Act (Canada) [BIA], s. 243.

Courts of Justice Act (Ontario), s. 101.

Rules of Civil Procedure (Ontario) [Rules], r. 14.05(3).

8. For the reasons set out in this supplementary factum, RBC does not agree with the jurisdictional arguments raised by Express GTPS, but has nonetheless amended the notice of application by adding the following underlined language to the relief being sought:

- (a) if necessary, abridging the time for service and filing of this amended notice of application and the application record or, in the alternative, dispensing with and/or validating service of same, and authorizing the amendments to this application as reflected on this amended notice of application;
- (b) the appointment of msi Spergel inc. ("**Spergel**") as receiver of all the assets, properties and undertakings of Express GT Parts Serve Inc. and all proceeds thereof (collectively, the "**Property**") or, in the alternative, as receiver of such component of the Property as this Court deems just; and
- (c) such further and other relief as is just, including, without limitation, a reference to a Judge presiding over the Commercial List or, in the alternative, to an Associate Justice, to determine what additional amounts may be owed by Express GTPS (as defined [above]) to RBC resulting from Express GTPS' use of RBC's Collateral (as Collateral is defined in the GSAs, as defined below), and Judgment against Express GTPS for such amount.

9. RBC has added the following underlined language to the substantive grounds of the notice of application:

- (m) it is just and equitable that a receiver be appointed as a receiver is necessary for the protection and monetization of the Property (or, in the alternative, such component of the Property as this Court deems just), following which any shortfall owing to RBC in respect of the Indebtedness (the "**Shortfall**"), if any, will still need to be accounted for. Specifically, it will be necessary in the event of the Shortfall to determine what amounts are owed by Express GTPS to RBC resulting from Express GTPS' use of the Collateral, and RBC is entitled to Judgment for such amount from Express GTPS up to the amount of the Shortfall[.]

10. In response to RBC's amended notice of application, Express GTPS served a supplementary affidavit, the substance of which is limited to:

- (a) Ms. Kaur calculating Express GTPS' purported gross profit of approximately \$36,117.10 from its actual purchase of inventory from GTPS (i.e., Ms. Kaur continues to ignore all the other Collateral, and only concerns herself with a narrow slice of inventory that she previously valued at approximately \$87,450); and
- (b) Ms. Kaur attaching a redacted copy of a police report.

Supplementary Affidavit of Gopinder Kaur sworn September 18, 2023 at paras. 2-10, 11-13 and Exhibit B thereto.

PART III – ISSUE

11. The sole issue addressed by this supplementary factum is confirming that the Court has the jurisdiction to grant the relief sought in the receivership application.

PART IV – LAW AND ARGUMENT

12. RBC has amended the notice of application to render the receiver's appointment "*ancillary to other relief claimed in a proceeding properly commenced by a notice of application.*" RBC has done so under section 67(1) of the PPSA.¹ At the same time, RBC does not agree with the late jurisdictional arguments raised by Express GTPS, and encourages this Court to affirm its jurisdiction to grant the receivership application as originally drafted.

Rules, supra, r. 14.05(3)(g).

Personal Property Security Act (Ontario) [PPSA], s. 67(1).

¹ This section authorizes the Court to, amongst other things, make "*any order necessary to determine questions of priority or entitlement in or to the collateral or its proceeds*" and "*make any order necessary to ensure protection of the interests of any person in the collateral, but only on terms that are just for all parties concerned.*"

A. The Court Has the Jurisdiction to Grant the Amended Application

13. The amended notice of application seeks a reference to determine what additional amounts may be owed by Express GTPS to RBC as a result of Express GTPS' use of RBC's Collateral, and Judgment against Express GTPS for such amount. Similar relief was granted by The Honourable Mr. Justice Penny in *Hockey Academy*, for the following reasons:

The Value Earned by the Landlord's Use of the Rink Equipment

[36] Having wrongfully withheld the rink equipment contrary to TD's valid security interest, and having used that equipment to generate revenues, it logically follows (assuming there is a shortfall from TD's realization on these assets) that CCL is liable to account for revenues reasonably attributable to the use of that equipment while it was being wrongfully withheld from TD.

The Need for a Reference

[37] I agree with the applicant that, particularly due to CCL's failure to produce relevant financial information, there is insufficient evidence in the present record to make any determination of the amount earned by the landlord's use of the rink equipment, if any. That is a potentially complex determination and certainly requires full access to CCL's accounting records dealing with its operation of the hockey arena business post-lease termination.

[38] CCL must produce this information and, if the parties are unable to agree, there must be a reference to a Master for the determination of what, if any, amounts may be owed to TD resulting from the landlord's use of the rink equipment.

Toronto-Dominion Bank v. Hockey Academy Inc., 2016 ONSC 4898 [Comm. List]
[*Hockey Academy*] (CanLII: <https://canlii.ca/t/gsv5h>) at paras. 36-38.

14. Similar reasoning exists in the present case, as it will be necessary for Express GTPS to account for revenues reasonably attributable to its use of RBC's Collateral, to the extent of any Shortfall suffered by RBC after realization by the Receiver. The Receiver's mandate will therefore assist in, amongst other things: (i) determining the amount of any Shortfall to RBC; and (ii) facilitating the production of the relevant financial information, which production Express GTPS has repeatedly resisted, so that the revenues earned from the Collateral and its proceeds can be properly calculated for the reference and associated requested Judgment.

B. Regardless, the Court Has Always Had the Jurisdiction to Grant the Application

15. Rule 14.05(3)(h) authorizes the granting of any relief by application, including the appointment of a receiver under the original version of the receivership application, “*where it is unlikely that there will be any material facts in dispute requiring a trial.*” At no time since the application was issued in June 2023 has Express GTPS ever identified any material facts in dispute requiring a trial, and the written/documentary record is clear that the materially-relevant facts put forward by RBC for the appointment of a receiver cannot seriously be disputed.

Rules, supra, r. 14.05(3).

16. The original application was also properly brought pursuant to Rule 14.05(3)(d), being the interpretation of the GSAs. As noted by the Court of Appeal:

[17] Here, the substance of the application was in respect of a matter under r. 14.05(3)(d): “the determination of rights that depend on the interpretation of a ... contract or other instrument”. This included the interpretation of the LOI, ALOI and GSA, about which there were no issues of credibility that required a trial to resolve. ...

[18] Moreover, there was no need for the respondent or the application judge to resort to s. 101 of the *Courts of Justice Act* or s. 243 of the *Bankruptcy and Insolvency Act*, for authority to appoint a receiver. Article 6.1(l) of the GSA specifically allows the respondent to “appoint, by an instrument in writing delivered to the [appellant], a receiver, manager or a receiver and manager (a “Receiver”) ... or institute proceedings in any court of competent jurisdiction for the appointment of a Receiver”, upon the appellant’s default.

[19] As a result, the application judge had jurisdiction to hear and determine the respondent’s application and to grant the requested relief.

Potentia Renewables Inc. v. Deltro Electric Ltd., 2019 ONCA 779 (CanLII:
<https://canlii.ca/t/j2nmm>) at paras. 17-19.

17. The fact that the GSAs in the present case are not with Express GTPS is irrelevant. The PPSA is clear that “*no transfer [of collateral] prejudices the rights of the secured party under the security agreement or otherwise*” and that “*Except as otherwise provided by this or any other Act, a security agreement is effective according to its terms between the parties to it and against third parties.*”

PPSA, supra, ss. 9, 39 and 48(2).

Lisec America, Inc. v. Barber Suffolk Ltd., 2012 ONCA 37 (CanLII:
<https://canlii.ca/t/fpphp>) at para 41.

18. It is also respectfully submitted that it does not lie in Express GTPS' mouth to allege it is purportedly solvent (and therefore immune from an application under section 243 of the BIA), when Express GTPS has repeatedly failed to submit Express GTPS' banking and other financial statements into evidence for the purpose of, amongst other things, "*validating Ms. Kaur's testimony and the narrative she's put together in her affidavit.*" When Ms. Kaur was requested to produce all CIBC unredacted bank statements from Express GTPS, this request was refused on grounds of relevance, but Express GTPS now puts its solvency squarely at issue.

Transcript of the Cross-Examination of Ms. Kaur at questions 402-405, Transcript Brief of RBC dated August 1, 2023 [Transcript Brief], Tab 3.

Chart of Undertakings, Under Advisements and Refusals of the Cross-Examination of Gopinder Kaur, Transcript Brief, *supra*, Tab 4.

19. An adverse inference should be drawn in this case against Express GTPS' purported solvency. Given that Ms. Kaur has "*material evidence to provide, particularly when that evidence constitutes the 'best evidence' available, it is likely that the Court will draw an adverse inference.*" As set out by the Supreme Court of Canada, it is particularly noteworthy that "*She alone could bring before the Court the evidence of those facts and she failed to do it.*"

Howard v. Sandau, 2008 ABQB 34 (CanLII: <https://canlii.ca/t/1vi6p>) at paras. 39-58.

Lévesque v. Comeau et al., [1970] S.C.R. 1010 (CanLII: <https://canlii.ca/t/1nl8x>) at 1012-1013.

20. Finally, contrary to Express GTPS' submissions, both this Court and the Court of Appeal for Ontario have interpreted section 101 of the CJA as permitting an application to appoint a receiver where the resulting order is final (i.e., the resulting order need not be interlocutory).

Business Development Bank of Canada v. 2197333 Ontario Inc., 2012 ONSC 965 (CanLII: <https://canlii.ca/t/fq4qf>) at paras. 2-6.

Ontario v. Shehrazad Non-Profit Housing Inc. (2007), 85 O.R. (3d) 81 (C.A.) (CanLII: <https://canlii.ca/t/1r4rn>) at paras. 14-17.

PART VI – RELIEF REQUESTED

21. For the reasons set out in RBC's original factum and this supplementary factum, it is respectfully submitted that this Court should grant RBC's application, in full.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of October, 2023.



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SCHEDULE “A”**AUTHORITIES CITED**Jurisprudence

1. *Toronto-Dominion Bank v. Hockey Academy Inc.*, 2016 ONSC 4898 [Comm. List] (CanLII: <https://canlii.ca/t/gsv5h>).
2. *Potentia Renewables Inc. v. Deltro Electric Ltd.*, 2019 ONCA 779 (CanLII: <https://canlii.ca/t/j2nmm>).
3. *Lisec America, Inc. v. Barber Suffolk Ltd.*, 2012 ONCA 37 (CanLII: <https://canlii.ca/t/fpphp>)
4. *Howard v. Sandau*, 2008 ABQB 34 (CanLII: <https://canlii.ca/t/1vj6p>).
5. *Lévesque v. Comeau et al.*, [1970] S.C.R. 1010 (CanLII: <https://canlii.ca/t/1nl8x>).
6. *Business Development Bank of Canada v. 2197333 Ontario Inc.*, 2012 ONSC 965 [Comm. List] (CanLII: <https://canlii.ca/t/fq4qf>).
7. *Ontario v. Shehrazad Non-Profit Housing Inc.* (2007), 85 O.R. (3d) 81 (C.A.) (CanLII: <https://canlii.ca/t/1r4rn>).

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, s. 243

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

- (a) is appointed under subsection (1); or
- (b) 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.

Courts of Justice Act, R.S.O. 1990, c. C-34, as amended, s. 101**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.

(2) An order under subsection (1) may include such terms as are considered just.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 14(2) and 14(3)**Application under Statute**

14 (2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes.

Application under Rules

14 (3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

- (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
- (b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;
- (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;
- (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;
- (f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;
- (g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;
- (g.1) for a remedy under the Canadian Charter of Rights and Freedoms; or
- (h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial.

Personal Property Security Act, R.S.O. 1990, c. P.10, ss. 9, 25(1), 39, 48(2) and 67(1)

Effectiveness of security agreement

9 (1) Except as otherwise provided by this or any other Act, a security agreement is effective according to its terms between the parties to it and against third parties.

Perfecting as to proceeds

25 (1) Where collateral gives rise to proceeds, the security interest therein,

- (a) continues as to the collateral, unless the secured party expressly or impliedly authorized the dealing with the collateral free of the security interest; and

(b) extends to the proceeds.

Alienation of rights of a debtor

39 The rights of a debtor in collateral may be transferred voluntarily or involuntarily despite a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but no transfer prejudices the rights of the secured party under the security agreement or otherwise.

Transfer of collateral

48 (2) Where a security interest is perfected by registration and the debtor, without the prior consent of the secured party, transfers the debtor's interest in all or part of the collateral, the security interest in the collateral transferred becomes unperfected thirty days after the later of,

(a) the transfer, if the secured party had prior knowledge of the transfer and if the secured party had, at the time of the transfer, the information required to register a financing change statement; and

(b) the day the secured party learns the information required to register a financing change statement, unless the secured party registers a financing change statement or takes possession of the collateral within such thirty days.

Court orders and directions

67 (1) Upon application to the Superior Court of Justice by a debtor, a creditor of a debtor, a secured party, an obligor who may owe payment or performance of the obligation secured or any person who has an interest in collateral which may be affected by an order under this section, the court may,

(a) make any order, including binding declarations of right and injunctive relief, that is necessary to ensure compliance with Part V, section 17 or subsection 34 (3) or 35 (4);

(b) give directions to any party regarding the exercise of the party's rights or the discharge of the party's obligations under Part V, section 17 or subsection 34 (3) or 35 (4);

(c) make any order necessary to determine questions of priority or entitlement in or to the collateral or its proceeds;

(d) relieve any party from compliance with the requirements of Part V, section 17 or subsection 34 (3) or 35 (4), but only on terms that are just for all parties concerned;

(e) make any order necessary to ensure protection of the interests of any person in the collateral, but only on terms that are just for all parties concerned;

(f) make an order requiring a secured party to make good any default in connection with the secured party's custody, management or disposition of the collateral of the debtor or to relieve

the secured party from any default on such terms as the court considers just, and to confirm any act of the secured party; and

(g) despite subsection 59 (6), if the secured party has taken security in both real and personal property to secure payment or performance of the debtor's obligation, make any order necessary to enable the secured party to accept both the real and personal property in satisfaction of the obligation secured or to enable the secured party to enforce any of its other remedies against both the real and personal property, including an order requiring notice to be given to certain persons and governing the notice, an order permitting and governing redemption of the real and personal property, and an order requiring the secured party to account to persons with an interest in the real property or personal property for any surplus.

Applicant

Respondent

Court File No. CV-23-00700602-00CL

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