



SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-22-00691955-00CL

DATE: 23 May 2023

NO. ON LIST: 3

TITLE OF PROCEEDING: **ROYAL BANK OF CANADA v. 1731861 ONTARIO INC. et al**

BEFORE JUSTICE: **Justice Osborne**

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Rachel Moses	Lawyer for the Plaintiff, Royal Bank of Canada	rmoses@mindengross.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Nicolas C. Canizares	Lawyers for 1731861 Ontario Inc. operating as Plasticap, Peter J. Gossmann and Thomas Frank Lato	equinoxgroup@bellnet.ca

ENDORSEMENT OF JUSTICE OSBORNE:

1. RBC seeks the appointment of msi Spergel inc. as Receiver over the assets and undertakings and property of 1731861 Ontario Inc., operating as Plasticap, (the "Company") and all other property, assets and undertakings related thereto, all pursuant to section 243 of the BIA and section 101 of the CJA.
2. Defined terms in this endorsement have the meaning given to them in the motion materials, including the motion record dated December 21, 2022 and the supplementary motion record dated March 22, 2023.
3. The underlying facts are not contested by the Defendants, although they submit that it is not just or convenient to appoint a receiver, at least today.

4. RBC relies upon the Affidavit of Jan Oros sworn December 21, 2022 together with exhibits thereto, as well as the Supplementary Affidavit of Jan Oros sworn March 22, 2023 and exhibits thereto.
5. The Defendants have filed no affidavit evidence, although their counsel has submitted in connection with this motion an aide memoire outlining their position.
6. The Company is indebted to RBC pursuant to an Operating Facility and a Visa Facility, in turn made available pursuant to a credit facilities letter agreement dated December 31, 2020, and amended February 9, 2022. The Facilities are repayable on demand. The Company has failed to comply with its reporting obligations pursuant to the terms of the Facilities.
7. RBC issued written notice of default on October 3, 2022 and required the Company to remedy the default by October 15 which was not done. A second default letter was issued on November 8, 2022. It stated that, among other things, the Company had failed to provide the monthly borrowing limit certificate, monthly reporting of accounts receivable, accounts payable and inventory, and required defaults by November 15, 2022. The defaults were not remedied by that date.
8. The evidence reflects that RBC had been requesting since at least August, 2022 that the Company comply with its reporting requirements which, as noted above, it has failed to do.
9. RBC arrange to meet with the principals of the Company on November 17, 2022 at which meeting numerous documents were requested and agreed to be produced (see paragraphs 35 and 36 of the first Oros Affidavit).
10. RBC therefore made formal written repayment demand and issued section 244 BIA notices on November 28, 2022.
11. RBC is owed in excess of \$1.3 million.
12. The Company consented to the appointment of a receiver in the event of default as set out in section 13 of the General Security Agreement.
13. RBC is the only secured creditor according to its PPSA search.
14. RBC commenced this action, and the motion for a receiver was first returnable on January 19, 2023. On the consent of the parties, the Endorsement of Justice Wilton-Siegel made that day adjourned the motion to today's date on the terms and conditions set out in Schedule A to the Endorsement.
15. Those terms and conditions include payments to be made on an agreed schedule to reduce the indebtedness on sequential dates, with all indebtedness, together with legal fees and costs, to be repaid in full by May 19, 2023. By the same date, the Debtor agreed to provide RBC with evidence to the effect that all obligations to the CRA for HST and source deductions were current as of the date of pay out, being May 19, 2023.
16. The company and its principals, being the individual Defendants, formally consented to the receivership order which was to be held in escrow and enforce by RBC only in the event that the Company defaulted in its obligations.
17. The individual Defendants also consented to judgment on their personal guarantees, similarly to be held in escrow and only enforced upon default.
18. The judgement and receivership order were attached to and part of Schedule A to the Endorsement of Justice Wilton-Siegel.
19. The periodic payments in partial reduction of the indebtedness were made, albeit late.

20. The final payment, again payment of the full balance owing by May 19, has not been made at all, with the result that today, over \$1.7 million remains owing to RBC. The failure to make that payment is acknowledged by the Defendants.
21. Accordingly, RBC requests the appointment of the Receiver.
22. As noted above, the Defendants have filed no affidavit or other evidence but rather have submitted an aide memoire “for the purpose of seeking an extension to make payment to the Plaintiffs” (see para 1).
23. The Defendants request the extension on the basis that they have entered into a Term Sheet with an investor, attached to the aide memoire, and they submit that RBC will be paid in full on closing of the investment contemplated in that term sheet, and that RBC is further protected by the personal guarantees of the principals (the individual Defendants) which they acknowledge and to which judgement was consented in the event of default as reflected in the Endorsement of Justice Wilton-Siegel referred to above. As a result, the Defendants submit that they are “on the verge of securing additional financing”.
24. I have reviewed the term sheet, notwithstanding, as noted, that it is not filed pursuant to any sworn affidavit. It is dated March 14, 2022 and, on its face, contemplates that the investor “should be in a position to close this transaction with you.” (i.e., closing by April, 2022).
25. There is no evidence before me as to why, in the 14 months since the term sheet was entered into, it has not closed by April, 2022 as was anticipated, or at all.
26. Moreover, Schedule A to the term sheet sets out the conditions of closing which are extensive and material. They include completion of satisfactory due diligence of the Company and its legal affairs, the execution of definitive documents, including disclosure schedules, representations and warranties in a form and substance satisfactory to the investor, employment or consulting agreements, the absence of any material change in the business of the Company, the execution of a shareholder agreement and other terms.
27. There is no evidence before me from the Defendants as to the status of any of these conditions, or indeed at all.
28. Finally, the aide memoire also includes a letter from a solicitor dated May 19, 2023 confirming that a newly incorporated numbered company has been incorporated for the purpose of purchasing 10% of the Company for an agreed amount, and that \$100,000 from the proceeds will be available to pay RBC on or before June 9, 2023. There are no other particulars, and that amount of \$100,000 is a very small proportion of the total indebtedness.
29. The test for the appointment of a receiver pursuant to section 243 of the BIA or section 101 of the CJA is not in dispute. Is it just or convenient to do so?
30. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, 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. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.
31. 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 Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

32. Accordingly, is it just or convenient to appoint a receiver in the particular circumstances of this case?
33. In my view, it is, in the circumstances before me and given, in particular:
- a. the complete lack of any sworn affidavit evidence from any of the Defendants;
 - b. the consent to the appointment of a receiver in the event of default pursuant to the original GSA;
 - c. the consent to the appointment of a receiver and the consent to judgment expressly agreed to by the Defendants as terms of the adjournment and included in the Endorsement of Justice Wilton-Siegel in January, 2023;
 - d. the breach of those terms and in particular the failure to repay; and
 - e. the absence of any evidence demonstrating to me that there is any reasonable certainty of the ability to repay in the near future or at all.
34. msi Spergel inc. consents to act as Receiver and is appropriate.
35. Order and judgment to go in the form signed by me today, given the consent of the parties as reflected in the Endorsement of Justice Wilton-Siegel and the reasons set out above.

Olson, J.