

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

-and-

RAMO CANADA INC.

Respondent

FACTUM OF THE APPLICANT

(Application Returnable November 21, 2023)

November 17, 2023

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Court File No. CV-23-00704072-00CL

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PART I – OVERVIEW

1. The Applicant, The Toronto-Dominion Bank (the “**Bank**”) brings this application for the appointment of msi Spergel inc. as Receiver (“**Spergel**”) as receiver (herein, the “**Receiver**”), without security, of all of the assets, undertakings and properties of the Respondent, Ramo Canada Inc. (the “**Debtor**”) acquired for or used in relation to a business or businesses carried on by the Debtor.

The Position of the Bank

2. 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 and the Lease;
 - b) The Financing Defaults, as a result of, *inter alia*, the chronic and unresolved borrowing excesses, whereby the Debtor exceeded or continued to exceed the authorized credit limit of the Operating Loan, the failure to provide financial reporting as it became due under the Financing, unusual account transactions with attempts to

- wire funds on deposited and not cleared cheques and failure to provide payments as same became due under the Lease Agreement;
- c) The Debtor has failed to cure the Financing Defaults, and the Demands issued by the Bank have expired;
 - d) In the face of the expired Demand, the Debtor is insolvent. No further terms of credit nor forbearance is available to the Debtor from the Bank. It is necessary for the protection of the Debtor's estate that a Receiver be appointed;
 - e) The Debtor has also defaulted under the Forbearance Agreement by failing to make the Weekly Payments as same have become due, and by failing to provide required Ongoing Reporting to the Bank thereunder;
 - f) 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 Financing Defaults and the Forbearance Defaults;
 - g) The Debtor is no longer operating from its head office premises, which is the last known address available to the Bank;
 - h) The Debtor has indicated that it does not oppose the herein Application; and,
 - i) 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

3. The Debtor is a company incorporated pursuant to the laws of the Province of Ontario, with its registered office located in the City of Toronto, Ontario, with the active registered business name “Ryan’s International”.

Reference: Affidavit of Daniel Chiappetta, sworn November 8, 2023, at para 2 (the “Third Chiappetta Affidavit”).

4. Raycho Genov (“**Genov**”) is an individual who resides in Etobicoke, Ontario and was at material times a principal of the Debtor and a guarantor of the Obligations in relation to the Financing, as defined herein, to the Debtor.

Reference: Third Chiappetta Affidavit, at para 4.

5. The Bank has previously applied to this Court under application bearing Court File No. CV-23-00704072-00CL, wherein it sought an Appointment Order appointing Spergel as Receiver of the Property of the Debtor (the “**Initial Application**”).

Reference: Third Chiappetta Affidavit, at para 5.

6. In the Initial Application, the Bank submitted several affidavits (the First Chiappetta Affidavit and the Second Chiappetta Affidavit), which are attached as Exhibits to the Third Chiappetta Affidavit.

Reference: Third Chiappetta Affidavit, at para 9 and at Exhibit “A” and “B” thereto.

7. Pursuant to the first Chiappetta Affidavit, the Bank provided certain Financing to the Debtor, and the Debtor committed certain defaults under the Financing, including:

- a) chronic and unresolved borrowing excesses, whereby the Debtor exceeded or continued to exceed the authorized credit limit of the Operating Loan (as defined in the First Chiappetta Affidavit);
- b) the Debtor's failure to provide financial reporting as it became due under the Financing;
- c) unusual account transactions, with attempts to wire funds on deposited and not cleared cheques; and
- d) The Debtor's failure to make payments as they became due under the Lease Agreement, with missed payments in June and July 2023.

(collectively, the "**Financing Defaults**").

Reference: Affidavit of Daniel Chiappetta Affidavit sworn August 15, 2023, at para 5 (the "Fist Chiappetta Affidavit").

8. As a result of the ongoing Defaults, the Bank issued the Demand to the Debtor and, following the expiration of the Demand, commenced the Initial Application.

Reference: First Chiappetta Affidavit, at paras 21-23 and at Exhibit "Q".

9. The Initial Application was adjourned several times, and ultimately withdrawn without prejudice pursuant to the Forbearance Agreement (as defined below) entered into between the parties.

Reference: Third Chiappetta Affidavit, at paras 6-7.

10. The Debtor subsequently defaulted under the terms of the Forbearance Agreement and the Bank is entitled to re-apply for the appointment of the Receiver as a result thereof.

Reference: Third Chiappetta Affidavit, at para 8.

The Obligations to the Bank and Security Held

11. As of November 6, 2023, the Debtor was indebted to the Bank in the amount of \$1,548,308.08, plus accruing interest and the Bank's continuing costs of enforcement including legal and professional costs (the "**Obligations**"), in respect of the Financing, and inclusive of a \$60,000.00 Canada Emergency Business Account loan.

Reference: Third Chiappetta Affidavit, at para 25.

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

- a) General Security Agreement from the Debtor dated October 29, 2020 (the "**GSA**");
and,
- b) Specific security pursuant to the Lease Agreement for certain equipment (the "**Equipment**"), including with respect to four (4) transit trailers (collectively, the "**Trailers**").

(12 (a) – (b) collectively, the "**Security**").

Reference: First Chiappetta Affidavit, at para 15 and at Exhibit "N" and Exhibit "O".

13. As set out below, the Trailers have since been returned to the Bank by the Debtor and are in the possession of the Bank.

Forbearance Agreement and Forbearance Defaults

14. Between August and September of 2023, the Bank and the Debtor negotiated the terms of a forbearance agreement (the "**Forbearance Agreement**").

15. The terms of the Forbearance Agreement included the following:

- a) Acknowledgement of the Defaults;

- b) Return of the Trailers to the Bank's agent by September 21, 2023, as a condition precedent, after which the Bank would withdraw the Initial Application on a without prejudice basis;
- c) Certain reporting regarding a related company to the Debtor, Bordex, as a condition precedent (the "**Initial Bordex Reporting**");
- d) Payment of weekly payments of \$30,000 each in satisfaction of the Overdraft, commencing September 5, 2023 (the "**Weekly Payments**"); and,
- e) Ongoing reporting regarding the Debtor and Bordex (the "**Ongoing Reporting**").

Reference: Affidavit of Daniel Chiappetta sworn September 19, 2023, at para 12 (the "Second Chiappetta Affidavit").

16. The Debtor failed to meet either of the conditions precedent of the Forbearance Agreement in a timely manner, and it was also the Bank's position that the Debtor was in default of same until it brought the Weekly Payments current from September 5, 2023 pursuant to the terms thereof.

Reference: Third Chiappetta Affidavit, at para 12.

17. Despite the Debtor's failure to meet the conditions precedent of the Forbearance Agreement and their noted default, the Bank did ultimately agree to withdraw the Initial Application without prejudice on the following terms:

- a) The Monthly Payment due and payable on September 25, 2023, was made as required under the Forbearance Agreement;
- b) The Initial Bordex Reporting was provided to the Bank by no later than 5:00 p.m., September 25, 2023; and,

c) The Trailers were confirmed to be in good working order on inspection.

Reference: Third Chiappetta Affidavit, at para 14.

18. The Debtor subsequently and unilaterally informed the Bank that it would be making Weekly Payments commencing on September 28, 2023.

Reference: Third Chiappetta Affidavit, at para 15 and at Exhibit "D".

19. The Debtor made the first Monthly Payment on September 28, 2023, but failed to provide the Initial Bordex Reporting, which was only provided in part on October 2 and 3, 2023.

Reference: Third Chiappetta Affidavit, at paras 16-17.

20. The Bank did withdraw the Initial Application on October 5, 2023, without prejudice. Despite the Debtor's defaults under the Forbearance Agreement, and without waiving same, the Bank advised that it would proceed under the Forbearance Agreement on the following terms:

- a) Immediate provision of the Ongoing Bordex Reporting and Additional Reporting, each of which were due October 2, 2023; and,
- b) No further defaults under the terms of the Forbearance Agreement.

Reference: Third Chiappetta Affidavit, at paras 18-19.

21. The Debtor defaulted under the terms of the Forbearance Agreement by failing to make the Weekly Payment due on October 6, 2023, or any Weekly Payment thereafter. Despite numerous requests from the Bank, the Debtor also failed to provide the Ongoing Reporting.

Reference: Third Chiappetta Affidavit, at para 21-22.

22. On October 16, 2023, the Bank advised the Debtor that it would bring the herein application due to the Debtor's defaults under the Forbearance Agreement, and the Debtor advised that

it would not oppose same.

Reference: Third Chiappetta Affidavit, at paras 23-24.

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

23. The GSA and the Lease secure all personal property of the Debtor. The Bank has registered Financing Statements 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 and the Lease.

Reference: First Chiappetta Affidavit, at paras 16-20, Exhibit "O" and Exhibit "P".

Defaults and Demands

24. The Debtor is insolvent and has defaulted under the Financing and the Forbearance Agreement, as set out above, which defaults continue.

Reference: First Chiappetta Affidavit, at para 38.

The Appointment of a Receiver

25. 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 in default of the Financing and the Forbearance Agreement. 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: Third Chiappetta Affidavit, at paras 25-30.

26. 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 and the Forbearance Agreement.

Reference: Third Chiapetta Affidavit, at paras 31-32.

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

Reference: Third Chiapetta Affidavit, at para 34.

PART III – ISSUE, LAW AND ARGUMENT

Issues

28. The issue before this Court, and addressed below, are:

- a) Should this Court appoint Spergel as Receiver over the Debtor's property?

The Appointment of a Receiver

29. Section 243(1) and (1.1) of the *BIA* provide as follows:

- (1) **Court may appoint receiver** – 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.
- (1.1) **Restrictions on appointment of receiver** – 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.

Reference: Section 243 (1) and (1.1) of the *BIA*

30. The Debtor is in Default of their obligations to the Bank under the Financing and the Forbearance Agreement. The Debtor is insolvent and have failed to cure the Financing Defaults or the Forbearance Defaults, despite the Demands.

31. Section 101 of the *Courts of Justice Act* R.S.O. 1990, c. C.43 (the "***Courts of Justice Act***") provides as follows:

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).

Reference: **Section 101 of the *Courts of Justice Act***

32. 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.

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

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

Reference: ***Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49 at paragraph 28**

34. Where a security instrument 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.

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

35. 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.

Reference: [Bank of Nova Scotia v. Freure Village of Clair Creek, 1996 CanLII 8258 \(ON SC\) 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

36. It is respectfully submitted that the present circumstances are an appropriate case for the appointment of a Receiver, including the following:

- a) The Bank is a secured creditor of the Debtor pursuant to the GSA and the Lease;
- b) The Financing Defaults, as a result of, *inter alia*, the chronic and unresolved borrowing excesses, whereby the Debtor exceeded or continued to exceed the authorized credit limit of the Operating Loan, the failure to provide financial reporting as it became due under the Financing, unusual account transactions with attempts to wire funds on deposited and not cleared cheques and failure to provide payments as same became due under the Lease Agreement;
- c) The Debtor has failed to cure the Financing Defaults, and the Demands issued by the Bank have expired;

- d) In the face of the expired Demand, the Debtor is insolvent. No further terms of credit nor forbearance is available to the Debtor from the Bank. It is necessary for the protection of the Debtor's estate that a Receiver be appointed;
- e) The Debtor has also defaulted under the Forbearance Agreement by failing to make the Weekly Payments as same have become due, and by failing to provide required Ongoing Reporting to the Bank thereunder;
- f) 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 Financing Defaults and the Forbearance Defaults;
- g) The Debtor is no longer operating from its head office premises, which is the last known address available to the Bank;
- h) The Debtor has indicated that it does not oppose the herein Application; and,
- i) 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.

37. 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 the Bank and other stakeholders.

PART IV – RELIEF REQUESTED

38. 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 17th day of November, 2023



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SCHEDULE "A"**LIST OF AUTHORITIES**

1. *Bank of Montreal v Carnival National Leasing Limited*, 2011 ONSC 1007 (CanLII).
2. *Swiss Bank Corporation (Canada) v. Odyssey Industries Incorporated* (1995), 30 C.B.R. (3d) 49.
3. *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (CanLII).
4. *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC).
5. *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.

*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.

THE TORONTO-DOMINION BANK

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Applicant

Respondent

Court File No. CV-23-00709616-00CL

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PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE APPLICANT

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