

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

**ROYAL BANK OF CANADA**

Applicant

and

**RJ PACKAGING INCORPORATED operating as CUSTOM FOOD PACKAGING,  
SMIT RAMESH JANI, MITALI SMIT JANI and JAYANTKUMAR NAGJIBHAI  
PANCHASARA**

Respondents

**FACTUM OF ROYAL BANK OF CANADA  
(Motion for Order appointing Receiver)  
(Returnable on August 19, 2021)**

August 16, 2021

**MINDEN GROSS LLP**  
Barristers and Solicitors  
2200 - 145 King Street West  
Toronto ON M5H 4G2

**Rachel Moses** (LSO# 42081V)  
rmoses@mindengross.com  
Tel: 416-369-4115  
Fax: 416-864-9223

Lawyers for Royal Bank of Canada

TO: SERVICE LIST

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

**ROYAL BANK OF CANADA**

Applicant

and

**RJ PACKAGING INCORPORATED operating as CUSTOM FOOD PACKAGING,  
SMIT RAMESH JANI, MITALI SMIT JANI and JAYANTKUMAR NAGJIBHAI  
PANCHASARA**

Respondents

**FACTUM OF ROYAL BANK OF CANADA**

**PART I - NATURE OF MOTION**

1. Royal Bank of Canada ("**RBC**") is bringing this application for the appointment of a receiver in respect of all of the assets, undertakings and properties of RJ Packaging Incorporated operating as Custom Food Packaging (the "**Debtor**").

**PART II - FACTS**

2. The Debtor carries on business as a sales and service master distributor of custom and standard pressure sensitive labeling equipment and systems.<sup>1</sup>

---

<sup>1</sup> Affidavit of W. Craig McInnes sworn July 9, 2021 ("**McInnes Affidavit**"), para. 5.

3. Pursuant to a commitment letter dated December 14, 2018 (the “**Credit Agreement**”), the Debtor is directly indebted to RBC in connection with the following credit facilities: (i) \$150,000 Revolving Demand Facility, (ii) \$50,000 Visa Facility and (iii) \$350,000 Lease Facility.<sup>2</sup>

4. The Revolving Demand Facility and the Visa Business Facility are repayable on demand. An event of default under the Lease Facility (section 18.1(g) of the Master Lease Agreement) occurs if the Debtor fails to perform its obligations under the Credit Agreement, i.e., failure to pay the Revolving Demand Facility upon demand.<sup>3</sup>

5. Under the Credit Agreement, the Debtor is required to provide RBC with certain financial reporting.<sup>4</sup>

6. As security for the credit facilities, the Debtor granted to RBC a general security agreement on the Bank’s Standard Form 924 (“**GSA**”).<sup>5</sup>

7. The GSA provides for a right to appoint a receiver upon default.<sup>6</sup>

8. The Debtor’s accounts were transferred to RBC’s Special Loans and Advisory Services Group in November 2020 for, among other things, breaching its reporting requirements under the Credit Agreement.<sup>7</sup>

---

<sup>2</sup> McInnes Affidavit, paras. 8-9, Exhibit “B” – Credit Agreement; Master Lease Agreement; Commitment to Lease; Interim Funding Agreement.

<sup>3</sup> McInnes Affidavit, para. 10, Exhibit “B” – Credit Agreement; Master Lease Agreement; Commitment to Lease; Interim Funding Agreement.

<sup>4</sup> McInnes Affidavit, para. 11, Exhibit “B” - Credit Agreement; Master Lease Agreement; Commitment to Lease; Interim Funding Agreement.

<sup>5</sup> McInnes Affidavit, para. 12(a), Exhibit “C” – General Security Agreement.

<sup>6</sup> McInnes Affidavit, para. 12(a), Exhibit “C” – General Security Agreement.

<sup>7</sup> McInnes Affidavit, para. 18.

9. A transition letter dated November 22, 2020 was sent to the Debtor advising:

“It appears to the Bank that the Company is experiencing financial difficulties. The Bank’s impression is based on:

1) the Company’s inability to meet the covenants and conditions which form part of the Company’s agreement with the Bank and the recent change in the Company’s financial performance and/or conditions.”<sup>8</sup>

10. In various written communications sent by the Debtor in October and November 2020, the Debtor represented to RBC that it would repay all indebtedness by October 28, 2020, delayed to November 10, 2020 and further delayed to December 10, 2020.<sup>9</sup>

11. The Debtor did not repay the indebtedness.<sup>10</sup>

12. RBC sent follow up communications to the Debtor in December 2020 and January 2021 in connection with the repayment of the indebtedness (and the operation of the Debtor’s accounts). By email sent on January 24, 2021, the Debtor advised RBC that all indebtedness would be repaid in full by April 2021:

“In terms of money, my inheritance and trust funds which are currently in India; I will be allowed to move this to Canadian account after year end in India which is in March. We should be in possession of more than enough funds here to repay bank loans and credit lines.

---

<sup>8</sup> McInnes Affidavit, para. 20, Exhibit “H” – Transition Letter and E-Mail acknowledgement.

<sup>9</sup> McInnes Affidavit, para. 19, Exhibit “G” – E-Mail communications.

<sup>10</sup> McInnes Affidavit, para. 21.

In the meantime I will send you monthly data on our progress for February and March. **Expecting to pay off all dues in April.** ... [bold and underline added].<sup>11</sup>

13. Despite the Debtor's undertaking, it did not provide "monthly data" on its "progress for February and March".<sup>12</sup>

14. RBC made demand on the Debtor for payment of the Revolving Demand Facility and the Visa Facility on March 4, 2021 (the "**First Demand Letter**") and issued a notice of intention to enforce security pursuant to section 244(1) of the Bankruptcy and Insolvency Act (the "**BIA Notice**").<sup>13</sup>

15. The Debtor failed to repay the indebtedness owing under the First Demand Letter. As a result, the Debtor was in default under the Lease Facility, entitling RBC to make demand for all amounts owing under the Lease Facility.<sup>14</sup>

16. RBC made demand on the Debtor for payment of the Lease Facility on March 17, 2021 and issued a BIA Notice (the "**Second Demand Letter**").<sup>15</sup>

17. In response to the First Demand Letter and BIA Notice, the Debtor retained legal counsel in early March 2021. Between March 8, 2021 and May 10, 2021 (a period of two months), RBC and the Debtor tried, without success, to enter into a

---

<sup>11</sup> McInnes Affidavit, paras. 22 to 24, Exhibit "I" and Exhibit "J" – E-Mail communications.

<sup>12</sup> McInnes Affidavit, para. 25.

<sup>13</sup> McInnes Affidavit, para. 26, Exhibit "K" – Demand Letters and BIA Notice dated March 4, 2021.

<sup>14</sup> McInnes Affidavit, para. 28.

<sup>15</sup> McInnes Affidavit, paras. 29, Exhibit "L" - Demand Letters and BIA Notice dated March 17, 2021.

forbearance agreement on terms first proposed by the Bank to the Debtor on March 11, 2021.<sup>16</sup>

18. During this period of time, the Debtor had almost no deposit activity and the Debtor's business account ("**RBC Current Account**") was in an overdraft position for the months of November 30, 2020 to December 31, 2020, January 29, 2021 to February 26, 2021, February 26, 2021 to March 31, 2021, May 31, 2021 to June 30, 2021 and June 30, 2021 to July 31, 2021.<sup>17</sup>

19. The final sign-back deadline (May 10, 2021) in the last proposed forbearance agreement expired and the Debtor (and the guarantors) failed to execute the forbearance agreement which would have, among other things:

- provided the Debtor with a forbearance period to August 31, 2021;
- required the Debtor to reduce the Indebtedness (as defined in the forbearance agreement made as of April 6, 2021) by monthly payments of \$10,000 on the 5<sup>th</sup> day of each month during the forbearance period;
- required the Debtor to consent to the appointment of a receiver (a requirement that was made known to the Debtor in March 2021 and which their lawyer advised RBC by email sent on March 9, 2021 that his clients were agreeable to, provided the forbearance period was 6 months);

---

<sup>16</sup> McInnes Affidavit, paras. 31 to 33, Exhibit "M" – E-Mail communications.

<sup>17</sup>Affidavit of Pauline Leitgeb sworn August 12, 2021, Exhibit "A" – RBC Business Account Statements.

- required the Debtor to provide evidence satisfactory to RBC that the Priority Payables (as defined in the Credit Agreement) are being paid and are current at the time of repayment of the indebtedness;
- required the Debtor to ensure that all monies generated by the Debtor in the course of its business operations are deposited into the RBC Current Account; and
- required the Debtor to honour all financial reporting covenants contained in the Credit Agreement.<sup>18</sup>

20. Even after the expiry of the sign-back deadline and the Debtor's refusal to execute the forbearance agreement, RBC still provided time to the Debtor to allow it to obtain refinancing. On June 14, 2021, more than one month after the expiry of the sign-back deadline, the Debtor advised RBC that CIBC declined its request for financing. No further communications were received by the Debtor or its lawyers in connection with repaying the indebtedness.<sup>19</sup>

21. The Debtor has not presented a repayment proposal satisfactory to RBC.<sup>20</sup>

22. The Debtor has received the benefit of a *de facto* forbearance period from October 2020 to July 2021, while it promised to repay the indebtedness, asked for a forbearance agreement which it later refused to sign and while it sought refinancing

---

<sup>18</sup> McInnes Affidavit, para.34.

<sup>19</sup> McInnes Affidavit, para.25

<sup>20</sup> McInnes Affidavit, para. 26.

from CIBC which was declined in mid-June 2021. The Debtor is in default under the Credit Agreement. The indebtedness remains outstanding.

### PART III - LAW AND ARGUMENT

23. Pursuant to section 243(1) of the Bankruptcy and Insolvency Act and section 101 of the Courts of Justice Act, a court may appoint a receiver if it is “just and convenient” to do so.

24. 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.<sup>21</sup>

25. 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 and not encompassing anything approaching 30 days.<sup>22</sup>

26. In this case, the Revolving Demand Facility and the Visa Facility are repayable on demand. The First Demand Letter was issued on March 4, 2021 and RBC waited four months before it commenced this receivership proceeding. Going back further, the Debtor promised to repay all indebtedness owing to RBC by October 28, 2020. RBC waited four months (from October 28, 2020 to March 4, 2021) before it issued the First Demand Letter. In all circumstances, the Debtor has been granted a reasonable amount of time to repay the indebtedness owing to RBC. Especially given

---

<sup>21</sup> [Bank of Montreal v. Sherco Properties Inc.](#), 2013 ONSC 7023 at para. 41 (“*Sherco Properties*”).

<sup>22</sup> [Bank of Montreal v. Carnival National Leasing Ltd.](#), 2011 ONSC 1007.



that the Debtor represented to RBC on January 24, 2021 that all indebtedness would be repaid in April 2021.

27. The Debtor admits that RBC advanced the Revolving Demand Facility, the Visa Facility and the Lease Facility. As at July 8, 2021, the Debtor was indebted to RBC pursuant to the Credit Agreement in the amount of \$572,754.79, together with outstanding interest, fees and costs (collectively the “**Indebtedness**”). The Indebtedness remains outstanding in full.

28. 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 moving for the appointment of a receiver 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 documents 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. ...**” [bold added].<sup>23</sup>

29. The following circumstances support the appointment of a Receiver:

- (a) pursuant to the Credit Agreement, the Debtor granted RBC security over all of its personal property pursuant to the GSA. The GSA provides for the appointment of a receiver (section 13(a) of the GSA) in the event of default. RBC’s position is that the terms of the security it holds in respect of the Debtor permit the appointment of a receiver;

---

<sup>23</sup> [Sherco](#), para. 42.

- (b) pursuant to the Credit Agreement, the Debtor was required, among other things, to provide to the Bank: i) annual notice to reader financial statements, within 90 days of each fiscal year end (Debtor's year end is December 31); and ii) annual aged list of accounts receivable, aged list of accounts payable and status of inventory, within 90 days of each fiscal year end. The Debtor failed to provide its financial reporting to RBC for its fiscal year end for 2019 and for its fiscal year end for 2020, resulting in default of its obligations for over 17 months and 4.5 months, respectively;
- (c) pursuant to the Credit Agreement, the Debtor was required to repay all principal sums outstanding under the Revolving Demand Facility and the Visa Facility upon demand (i.e., Standard Terms Form 472, REPAYMENT, section (c)). The Debtor failed to repay the Revolving Demand Facility and the Visa Facility. The First Demand Letter remains outstanding for over 5 months. The Debtor also failed to repay the Lease Facility. The Second Demand Letter remains outstanding for 4.5 months.
- (d) pursuant to the Credit Agreement, it is an "Event of Default" entitling RBC, in its sole discretion, to among other things, demand immediate repayment in full of all indebtedness and to realize on the GSA if the Debtor:
  - (i) fails to pay any principal, interest or other amount when due pursuant to the Credit Agreement, i.e., failure to pay the Revolving

Demand Facility and the Visa Facility under the First Demand Letter;

- (ii) fails to observe any covenant, term or condition or provision contained in the Credit Agreement, the GSA or any other agreement delivered to RBC or in any documentation relating hereto or thereto, i.e., the covenant to pay on demand the Revolving Demand Facility and the Visa Facility, the covenant to deliver its financial reporting, the covenant to pay the Lease Facility following the Second Demand Letter;
- (e) the Debtor does not directly challenge the breach in financial reporting, other than to state that RBC did not make a request until October 2019 and the obligation to provide financial reporting to RBC is that of the Debtor. More importantly, the Debtor admits to default under the Credit Agreement by acknowledging its “imperfect compliance with [its] financial obligations”;
- (f) the Debtor is clearly in default of the Credit Agreement;
- (g) RBC has provided the Debtor with an abundance of time to secure alternative financing and the financial risk of permitting the Debtor this time has been borne by RBC, to the prejudice of its secured position. For example:

- no financial reporting for fiscal year end 2020 and 2019 (other than an internal balance statement and income statement for fiscal 2019) in breach of the Credit Agreement,
  - almost nonexistent account deposit activity in the RBC Current Account since 2021; and
  - no transparency on payment of Potential Prior-Ranking Claims;
- (h) the Debtor's current proposal to repay the Indebtedness requires RBC to accept and maintain a long-term lending relationship with the Debtor when the Debtor is in default of its obligations under the Credit Agreement and when RBC has determined to terminate the relationship. It is RBC's position that it is not the function of the Court to rewrite Credit Agreements negotiated and executed by the parties;<sup>24</sup>
- (i) RBC has lost confidence in the Debtor as it failed or refused to honour any of the promises it made to repay the indebtedness and it is in default of its obligations under the Credit Agreement and the GSA;
- (j) RBC worked with the Debtor, from approximately October 2020 to July 2021, a period of over 8 months in an attempt to provide the Debtor with time to repay the indebtedness. The Debtor refused to enter into a forbearance agreement which the Debtor requested and which terms were "essentially" approved by the Debtor in mid-March 2021;

---

<sup>24</sup> [Servus Credit Union Ltd. v. Proform Management Inc., 2020 ABQB 316](#), at para. 30.

- (k) the Debtor has had the benefit of a *de facto* forbearance agreement from October 2020 to July 2021;
- (l) the Debtor has no real plan to repay the indebtedness, other than that the parties go back to their original position under the Credit Agreement, which is not satisfactory to RBC. It is RBC's position that the Debtor is not able to accomplish a refinancing or obtain funds from other sources to repay the indebtedness and the time has come to monetize the Debtor's assets to repay the indebtedness;
- (m) the Debtor admits that it made promises to repay the Indebtedness to RBC by October 28, 2020, delayed to November 10, 2020, further delayed to December 10, 2020 and again delayed to April 30, 2021;
- (n) the Debtor has not repaid the Indebtedness despite having more than 8 months to do so; and.
- (o) the Debtor acknowledges that it "is not in a financial position to repay all of the credit facilities, along with interests and fees at once."

### **The Parole Evidence Rule**

30. There is no documentary evidence showing that any oral or written representations were made by RBC that the Revolving Demand Facility and the Visa Facility would not be payable upon demand, that the "parties intended for the arrangements to continue for a longer period of time", or that "it was not contemplated by the parties that the [D]ebtor would be forced to repay the entirety of the financed

amount within such a short period time.” These statement made by the Debtor are factually unsupported and contradict the terms of the Credit Agreement, the Master Lease Agreement and the GSA (all signed by the Debtor) and which contain an “entire” or “whole agreement” clause.

31. Further, these unsupported statements made by the Debtor violate the parole evidence rule. A prior oral representation that contradicts the terms of a written agreement is not admissible under the parol evidence rule, and any collateral agreement founded upon it cannot stand.<sup>25</sup>

### **PART III - ORDER REQUESTED**

32. It is respectfully requested that an Order be granted appointing msi Spergel inc. as Receiver in respect of the Debtor.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 16<sup>th</sup> day of August, 2021.

*Rachel Moses*

---

Rachel Moses

**MINDEN GROSS LLP**  
Barristers and Solicitors  
2200 - 145 King Street West  
Toronto, ON M5H 4G2

**Rachel Moses** (LSO# 42081V)  
rmoses@mindengross.com  
Tel: 416-369-4115  
Fax: 416-864-9223

Lawyers for Royal Bank of Canada

#48481304122089 v1

---

<sup>25</sup> Hawrish v. Bank of Montreal (1969), 2 DLR (3) 600.

B E T W E E N

ROYAL BANK OF CANADA

Applicant

-and-

RJ PACKAGING INCORPORATED operating as CUSTOM  
FOOD PACKAGING, et al

Respondents

Court File No. CV-21-00665286-00CL

---

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

Proceeding commenced at Toronto

---

**FACTUM OF ROYAL BANK OF CANADA**

---

**MINDEN GROSS** LLP  
Barristers and Solicitors  
2200 - 145 King Street West  
Toronto, ON M5H 4G2

**Rachel Moses** (LSO# 42081V)  
[rmoses@mindengross.com](mailto:rmoses@mindengross.com)  
Tel: 416-369-4115

Lawyers for the Applicant

(File No. 4122089)