

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

THE TORONTO-DOMINION BANK

Applicant

-and-

ORBIT FREIGHT LTD.

Respondent

**FACTUM OF THE APPLICANT, THE TORONTO-DOMINION BANK
(Application Returnable March 11, 2021)**

March 9, 2021

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TO: Service List

Court File No. CV-21-00658361-00CL

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PART I – THE MOTION

The Applicant, The Toronto-Dominion Bank (“**the Bank**”) seeks the following Order, substantially in the form attached as Schedule “A” (the “**Appointment Order**”) to the Notice of Application:

- a) Appointing msi Spergel inc. as Receiver (“**Spergel**” or the “**Receiver**”), without security, of all of the assets, undertakings and properties of the Respondent, Orbit Freight Ltd. (the “**Debtor**”) acquired for, or used in relation to a business or businesses carried on by the Debtor (collectively, the “**Property**”);
- b) That the time for service, filing and confirming of the Notice of Application and the Application Record be abridged and validated so that this application is properly returnable today and dispensing with further service thereof; and,
- c) Such further and other relief as to this Honourable Court may seem just.

The Position of the Bank

1. It is the Bank's position that, despite the ten (10) day period under section 244(1) of the BIA not expiring until March 16, 2021, the present circumstances are an appropriate case for the appointment of a 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 Specific Security Agreement;
 - b) The Debtor is in Default of the terms of the Financing, which Defaults continue;
 - c) The Debtor is insolvent. No further terms of credit nor forbearance are available to the Debtor from the Bank. It is necessary for the protection of the Debtor's estate that a Receiver be appointed;
 - d) The Bank's Security provides the Bank with the right to appoint a Receiver over the Property of the Debtor secured under the GSA and the Specific Security Agreement, as a result of the Defaults;
 - e) Regarding the notice period set out in s. 244(1) of the *BIA*, the Bank submits that it is appropriate for this Honourable Court to appoint a Receiver prior to the expiry of same, for the following reasons:
 - i. The Debtor has ceased operations as at February 15, 2021, and the sole principal and guiding mind of the Debtor, Pandal, is a bankrupt. The Appointment of a Receiver will be necessary and appropriate on an urgent basis in order to realize on any secured assets of the Debtor, including any funds on deposit with BNS, and to apply any proceeds of same to the Obligations;

- ii. The assets of the Debtor include a number of motor vehicles. The appointment of a Receiver is just and appropriate in the circumstances to ensure that the Receiver is provided with immediate access to the Debtor's Property, in order to determine any competing interests in such property, and to avoid the dissipation of these assets by sale or any other means;
- iii. As Pandal is bankrupt, the Debtor is unable to undertake any of the actions for which the 10-day notice period is intended to provide a debtor time, including negotiation with its creditors, reorganization of its affairs, or any other attempts to avoid the enforcement of the Bank's Security;
- iv. The Bank respectfully submits that nothing would be served by allowing the 10-day period to expire, while the Bank's Security may be put in peril by any unnecessary delay. The Defaults are continuing and uncured, and the Bank submits that it would clearly be successful in its Application on the expiry of the notice period, in any event.

PART II – FACTS/OVERVIEW

2. The Debtor is an Ontario corporation, which formerly operated as a freight transport and warehousing company from its registered office location in Mississauga, Ontario.

Reference: Affidavit of Michelle Benoy, sworn March 8, 2021, at para 2 and Exhibit "A" thereto (the "Benoy Affidavit").

3. Satnam Singh Pandal ("**Pandal**") is the sole principal of the Debtor, and filed an assignment in bankruptcy as at March 2, 2021. Pandals' creditor package indicates that the Debtor ceased operations on February 15, 2021. Spergel has confirmed that the Debtor does not appear to be operating from its business premises.

Reference: Benoy Affidavit at paras 3-5 and Exhibit "B" thereto.

4. The Debtor is insolvent, and is currently in Default (a “**Default**”, or “**Defaults**”) of its obligations to the Bank as a result of the following:
- a) Pandal, as sole principal of the Debtor, has made an assignment in bankruptcy;
 - b) The Debtor has ceased operations;
 - c) The Debtor has borrowed in excess of the credit limit of the Operating Line (as defined below);
 - d) Failure to provide certain reporting as required under the terms of the Financing (as defined below); and
 - e) The Debtor has been carrying on banking activities at The Bank of Nova Scotia (“**BNS**”), contrary to the terms of the Financing, and despite the Bank’s requirement that all banking be returned to, and carried on at, the Bank

Reference: Benoy Affidavit at paras 7-8 and Exhibit “C” thereto.

The Obligations to the Bank and Security held

5. As of March 8, 2021, the Debtor is indebted to the Bank in the amount of \$1,994,281.85, plus accruing interest and the Bank’s continuing costs of enforcement (the “**Obligations**”), in respect of certain financing advanced to the Debtor pursuant to the terms of a Letter Agreement dated May 24, 2019 (the “**Letter Agreement**”), and a TD Equipment Financing Loan Agreement #20008660, dated June 22, 2020 (the “**TDEF Agreement**”), consisting of:
- a) Operating Loan: pursuant to the Letter Agreement, with a maximum credit limit of \$1,200,000 (the “**Operating Line**”);
 - b) Committed Reducing Term Facility: pursuant to the Letter Agreement, in the sum of \$180,000;

- c) Visa Facility: pursuant to the Letter Agreement, with a credit limit of \$50,000;
- d) Equipment Financing Term Facility: pursuant to the TDEF Agreement, with a credit limit of \$493,870.12.

(collectively, the “**Financing**”)

Reference: Benoy Affidavit, at paras 10-12 and Exhibits “D” and “E” thereto.

- 6. The Operating Line is payable on demand.
- 7. The Obligations are secured by, *inter alia*, the following:
 - a) General Security Agreement dated June 27, 2019 (the “**GSA**”);
 - b) Security Agreement for Specified Assets #20008660 dated June 22, 2020 and securing two (2) motor vehicles financed pursuant to the TDEF Agreement (the “**TDEF Vehicles**”) (the “**Specific Security Agreement**”).

(collectively, the “**Security**”)

Reference: Benoy Affidavit, at paras 14-15 and Exhibits “F” and “G” thereto.

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

- 8. The GSA secures 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) (the “**PPSA**”) to perfect its security interest in the personal property of the Debtor secured under the GSA and the Specific Security Agreement, including the TDEF Vehicles, in which the Bank claims a Purchase-Money Security Interest.

Reference: Benoy Affidavit, at paras 15-18, and Exhibit “H” thereto

9. BNS has a prior-in-time general security registration under the PPSA as against the Debtor. The Bank understands that BNS was the former banker for the Debtor, and intended to discharge this registration. The Bank's solicitor is working on seeing the BNS registration discharged. All other registrations as against the Debtor under the PPSA appear to be property-specific in nature. On March 8, 2021, the Bank placed BNS on notice of its GSA and requested that monies on deposit be paid over to the Bank. Any such funds on deposit can be directed to Spergel as Receiver, if appointed.

Reference: Benoy Affidavit, at paras 18-21, and Exhibit "H" thereto

Defaults and Demand

10. As a result of the continuing Defaults, the Bank did deliver to the Debtor a demand for payment and a Notice of Intention to Enforce Security pursuant to section 244(1) of the *Bankruptcy and Insolvency Act*, each dated March 5, 2021 (collectively, the "**Demand**").

Reference: Benoy Affidavit, at paras 22-23 and Exhibit "I" thereto

11. The ten (10) day period under section 244(1) of the BIA expires March 16, 2021

Reference: Benoy Affidavit, at para 25

The Appointment of a Receiver

12. The Obligations due pursuant to the Demand have not been paid. The Debtor is in Default of the Financing. Bank is unwilling to provide any further forbearance or credit to the Debtor.

Reference: Benoy Affidavit, at paras 24-25.

Personal Property

13. 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.

Reference: Benoy Affidavit, at paras 26-28 and Exhibit "F" and "G" thereto.

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

Reference: Benoy Affidavit, at para 37

PART III – ISSUES, LAW AND ARGUMENT

Issues

15. This motion raises the following issues:

- a) Should Spergel be appointed as Receiver over the Property;
- b) Is it appropriate to appoint Spergel as a Receiver over the Property prior to expiry of the 10-day notice period under s. 243 of the BIA, pursuant to s. 243(1.1)(b) thereof?

The Appointment of a Receiver

16. 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, Applicant's Book of Authorities, Tab 1.

17. The Debtor is in Default of its obligations to the Bank under the Financing. The Debtor is insolvent and has failed to cure the Defaults, despite the Demand.

18. 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*, Applicant’s Book of Authorities, Tab 2.

19. 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 Ltd.* (2011) 74 C.B.R. (5th) 300 at paragraph 24, Applicant’s Book of Authorities, Tab 3.

20. 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, Applicant’s Book of Authorities, Tab 4.

21. 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 at paragraph 42, Applicant's Book of Authorities, Tab 5.

22. 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: *The Bank of Nova Scotia v. Freure Village on Clair Creek*, 1996 CarswellOnt 2328 at paragraph 13, Applicant's Book of Authorities, Tab 6.

Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited, (2007), 27 C.B.R. (5th) at paragraph 11, Applicant's Book of Authorities, Tab 7.

23. The Court may appoint a Receiver over the property of a debtor prior to expiry of the 10-day notice period under s. 244(1) of the BIA, where it considers it "appropriate" to do so.

Reference: Section 243 (1.1)(b) of the *BIA*, Applicant's Book of Authorities, *supra*, at Tab 1.

24. The purpose of the 10-day notice period is to provide the insolvent person with an opportunity to negotiate, reorganize financial affairs, and attempt to avoid the enforcement of the creditor's security.

Reference: *Josephine V. Wilson Family Trust v. Swartz*, [1993] O.J. No. 2735, at para 16 Applicant's Book of Authorities, Tab 8.

Delron Computers Inc. v. Peat Marwick Thorne Inc., [1995] 5 W.W.R. 174, at para 12, Applicant's Book of Authorities, Tab 9.

The Appointment of a Receiver – Summary of Submissions

25. It is respectfully submitted that the present circumstances are an appropriate case for the appointment of a Receiver prior to expiry of the statutory notice period under the BIA, including the following:

- a) The Bank is a secured creditor of the Debtor pursuant to the GSA and the Specific Security Agreement;
- b) The Debtor is in Default of the terms of the Financing, which Defaults continue;
- c) The Debtor is insolvent. No further terms of credit nor forbearance are available to the Debtor from the Bank. It is necessary for the protection of the Debtor's estate that a Receiver be appointed;
- d) The Bank's Security provides the Bank with the right to appoint a Receiver over the Property of the Debtor secured under the GSA and the Specific Security Agreement, as a result of the Defaults;
- e) Regarding the notice period set out in s. 244(1) of the *BIA*, the Bank submits that it is appropriate for this Honourable Court to appoint a Receiver prior to the expiry of same, for the following reasons:
 - i. The Debtor has ceased operations as at February 15, 2021, and the sole principal and guiding mind of the Debtor, Pandal, is a bankrupt. The Appointment of a Receiver will be necessary and appropriate on an urgent basis in order to realize on any secured assets of the Debtor, including any funds on deposit with BNS, and to apply any proceeds of same to the Obligations;
 - ii. The assets of the Debtor include a number of motor vehicles. The appointment of a Receiver is just and appropriate in the circumstances to ensure that the Receiver is provided with immediate access to the Debtor's Property, in order to determine any competing interests in such property, and to avoid the dissipation of these assets by sale or any other means;

- iii. As Pandal is bankrupt, the Debtor is unable to undertake any of the actions for which the 10-day notice period is intended to provide a debtor time, including negotiation with its creditors, reorganization of its affairs, or any other attempts to avoid the enforcement of the Bank's Security;
- iv. The Bank respectfully submits that nothing would be served by allowing the 10-day period to expire, while the Bank's Security may be put in peril by any unnecessary delay. The Defaults are continuing and uncured, and the Bank submits that it would clearly be successful in its Application on the expiry of the notice period, in any event.

26. 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.

27. It is further submitted that it is appropriate to appoint a Receiver over the Debtor's Property prior to the expiry of the 10-day statutory notice period.

PART IV – RELIEF REQUESTED

28. 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 9th day of March, 2021



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SCHEDULE “A”**LIST OF AUTHORITIES**

1. *Bank of Montreal v. Carnival National Leasing Ltd.* (2011) 74 C.B.R. (5th) 300.
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.
4. *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] OJ No. 5088, 1996 CarswellOnt 2328 (OCJ – Gen. Div [Commercial List]).
5. *Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, (2007), 27 C.B.R. (5th);
6. *Josephine V. Wilson Family Trust v. Swartz*, [1993] O.J. No. 2735;
7. *Delron Computers Inc. v. Peat Marwick Thorne Inc.*, [1995] 5 W.W.R. 174.

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.

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