

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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 THE RECEIVER

(Motion returnable October 14, 2022)

October 12, 2022

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msi Spergel inc.

TO: SERVICE LIST

PART I - NATURE OF MOTION

1. This is a motion by msi Spergel Inc., as court-appointed Receiver (the “**Receiver**”), appointed pursuant to the Order of the Honourable Justice Cavanagh dated August 24, 2021 (the “**Appointment Order**”) of the Property (as defined in the Appointment Order) for, *inter alia*, the following relief:
 - (a) Approval of the Receiver’s First and Final Report dated September 27, 2022 (the “**First Report**”) and the activities and conduct of the Receiver as detailed therein;
 - (b) Certain ancillary relief, including the approval of the Professional Fees and the Fee Accrual, and the authorization of the Proposed Distribution (all as defined in the First Report); and
 - (c) The release and discharge of the Receiver.

2. It is the position of the Receiver that the Receiver’s actions should be approved, and the relief requested should be granted, for the following reasons:
 - (a) The Receiver’s actions were reasonable, and the Receiver, at all times, acted within its mandate in carrying out its actions, pursuant to the provisions of the Appointment Order, and such actions are supported by Royal Bank of Canada (“**RBC**”), as secured creditor of RJ Packaging Incorporated operating as Custom Food Packaging (the “**Debtor**”);
 - (b) The Professional Fees and the Fee Accrual are reasonable in the circumstances, and should be approved;
 - (c) The Proposed Distribution is reasonable; and,
 - (d) Following the completion of the Proposed Distribution and all outstanding matters, as detailed in the First Report, the Receiver will have completed its administration of the estate of the Debtor, and should be discharged as Receiver accordingly.

PART II - THE FACTS

Actions of the Receiver

3. msi Spergel inc. was appointed as Receiver of all the assets, undertakings and properties (the "**Property**") of the Debtor, on August 21, 2021, pursuant to the Appointment Order, as defined above.

First and Final Report of the Receiver dated September 27, 2022 (the "First Report"), para. 3 and Appendix "1" thereto

4. The Receiver issued a Notice and Statement of the Receiver pursuant to subsection 245(1) and 246(1) of the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtor.

First Report, para. 9

5. On August 24, 2021, the Receiver attended at 1A-45 Basaltic Road, Concord, ON L4K 1G5 (the "**Premises**") which is the registered head office of the Debtor to take possession of the Property.

First Report, para. 10

6. The Receiver extracted an accounts receivable listing at the Premises and issued demand letters to regarding all outstanding accounts receivable of the Debtor totalling \$375,552.59. In discussions with customers of the Debtor, the Receiver determined that non of the receivables were collectible.

First Report, para. 11

7. Upon taking possession of the Property, the Receiver retained Platinum Asset Appraisals to provide an appraisal of the value of the inventory and equipment which indicated a forced liquidation value of the inventory and equipment between \$28,650 and \$41,350.

First Report, para. 13 and Appendix "2" thereto

8. As a result of the appraised value and the threshold of the Receiver to sell the assets of the Debtor without approval of the Court as detailed in the Appointment Order, the Receiver determined that it was commercially reasonable for the Receiver to sell the inventory and equipment by way of auction.

First Report, para. 14

9. On December 12, 2021, an auction was conducted by Platinum Asset Services Inc. resulting in gross proceeds of \$71,145 with no individual item being sold for more than \$25,000.

First Report, para. 14 and Appendix "3" thereto

10. The Receiver mailed a Wage Earner Protection Program notification to the eligible former employee of the Debtor. The Receiver estimates that the amounts owed to the employee which would provide the employee with security for payment pursuant to sections 81.3 or 81.4 of the *Bankruptcy and Insolvency Act* (the "**BIA**") totals \$2,000.

First Report, para. 15

Fees and Disbursements

11. The Receiver's Statements of Receipts and Disbursements is appended to the First Report, and it is the Receiver's position that such receipts and disbursements are reasonable and should be approved.

First Report, paras. 16 to 20 and Appendix "6" thereto

12. The total fees of the Receiver, inclusive of HST, total \$37,637.57 for the period from the Receiver's appointment to August 31, 2022, as set out in the First Report.

First Report, para. 16 and Appendix "4" thereto

13. The total fees and disbursements of Harrison Pensa LLP, as counsel for the Receiver, inclusive of HST, total \$8,584.07 for the period from the Receiver's appointment to September 6, 2022, as set out in the First Report.

First Report, paras. 17 and 18 and Appendix "5" thereto

14. It is the position of the Receiver that such fees and disbursements as set out above are reasonable and necessary, and should be approved by this Honourable Court.

First Report, para. 18

Proposed Distribution

15. Canada Revenue Agency ("**CRA**") has conducted an audit of the Debtor's payroll account and filed an unsecured claim in the amount of \$58,362.44.

First Report, para. 21 and Appendix "7" thereto

16. CRA has also conducted an audit of the Debtor's Harmonized Sales Tax ("**HST**") and filed an unsecured claim in the amount of \$50,916.54 (the "**HST Deemed Trust Claim**").

First Report, para. 22 and Appendix "8" thereto

17. On April 28, 2022 the receiver received a statement from Employment and Social Development Canada indicating a total of \$2,000 outstanding with security for payment pursuant to subsection 81.4(4) of the BIA.

First Report, para. 23 and Appendix "9" thereto

18. Legal counsel for the Receiver has prepared and provided the Receiver with a legal opinion regarding the validity and enforceability of the security interest of RBC, which states that, subject to the customary assumptions and qualifications, RBC has a valid and enforceable security interest in the Property.

First Report, paras. 25-26

19. On September 21, 2022, RBC provided details of the amounts due by the Debtor to RBC which total \$659,596.85 (plus interest and recovery expenses continuing to accrue).

First Report, para. 27

20. The Receiver recommends that a reserve not exceeding the sum of \$10,000 (not inclusive of HST), should be held for the final fees and expenses to complete the Receivership (the "**Fee Accrual**").

First Report, para. 19

21. The Receiver recommends the distribution as detailed in the First Report, as follows:

- (a) Professional Fees;
- (b) \$24,428.96 to the Receiver General in respect of the HST Deemed Trust Claim;
- (c) \$2,000.00 to the Receiver General in respect of the priority claim pursuant to subsection 81.4(4) of the BIA; and,
- (d) The balance of the funds residing in the Receiver's account, less the Fee Accrual, to RBC, which is not expected to be sufficient to repay the RBC Indebtedness in full

(collectively, the "**Proposed Distribution**")

First Report, paras. 24 and 28

22. The Receiver seeks approval of the Proposed Distribution.

Discharge

23. Following the completion of the Proposed Distribution and the outstanding matters, as detailed in the First Report, the Receiver will have completed the administration of the estate of the Debtor, and as such requests its discharge, following the filing of the Receiver's Certificate of Completion.

First Report, paras. 29-30

PART III - ISSUES, LAW AND ARGUMENT

A. The Court's Procedural Powers

24. The Court may, by order, extend or abridge any time prescribed by the Rules on such terms as are just. Further, the Court may dispense with compliance with any Rule where and as necessary in the interest of justice. Finally, the Court may dispense with service where it is impractical to effect prompt service and/or it may validate service where it is satisfied that the document came to the notice of the person to be served.

[Rules 2.03, 3.02, 16.04 and 16.08, Rules of Civil Procedure, R.R.O. 1990, Reg. 194](#)

B. The Receiver's Activities

25. The Receiver's activities in these proceedings were undertaken in furtherance of the Receiver's duties and are consistent with the Receiver's powers, pursuant to the Appointment Order. The Receiver has acted reasonably and in the best interests of the Debtor's stakeholders, and this Court has the inherent jurisdiction to approve such activities.

[Bank of America Canada v. Willann Investments Ltd. \(1993\) 20 C.B.R. \(3d\) 223 \(ONSC\), at paras. 3 and 4](#)

26. All of the Receiver's activities were necessary to ensure that the proceedings were as orderly, effective and fair to all stakeholders as possible. It is respectfully submitted that the Receiver's activities should be approved by this Court.

C. The Fees and Disbursements of the Receiver and the Receiver's Counsel Should Be Approved

27. The Receiver respectfully submits that the Professional Fees of the Receiver and the Receiver's Counsel, as detailed in the First Report, should be approved.
28. In determining whether to approve the fees of a receiver and its counsel, the Court should consider whether the remunerations and disbursements incurred in carrying out

the receivership were fair and reasonable and take into consideration the following factors, which constitute a useful guideline, but are not exhaustive:

- (a) the nature, extent and value of the assets;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the debtor;
- (d) the time spent;
- (e) the Receiver's knowledge, experience and skill;
- (f) the diligence and thoroughness displayed;
- (g) the responsibilities assumed;
- (h) the results of the receiver's efforts; and,
- (i) the cost of comparable services when performed in a prudent and economical manner.

[Bank of Nova Scotia v. Diemer, 2014 ONCA 851, at paras. 33 and 45.](#)

29. It is the Receiver's view that it and its counsel's fees and disbursements were incurred at the respective party's standard rates and charges, and are fair, reasonable and justified in the circumstances. Further, the fees and disbursements sought accurately reflect the work done by the Receiver and by its counsel in connection with the receivership.

D. The Proposed Distribution Should Be Approved

30. Orders granting distributions with a reserve for undetermined priority claims are routinely granted by Canadian courts in insolvency proceedings and receiverships.

[Re Windsor Machine & Stamping Ltd., 2009 CarswellOnt 4505 \(ONSC\), at para. 8](#)

[Re Abitibiwater Inc., 2009 QCCS 6461, 2009 CarswellQue 14224 \(QC. Sup. Ct.\) \("Abitibi"\), at paras. 70-75](#)

31. While Abitibi dealt with an interim distribution pursuant to a proceeding under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36, Justice Hascon

considered a number of factors in considering whether to approve a distribution, that are equally applicable to a receivership proceeding, including whether:

- (a) The payee's security is valid and enforceable;
- (b) The amounts owed to the payee exceed the distribution; and,
- (c) The distribution would result in significant interest savings.

[Abitibi, supra, at para. 75](#)

- 32. The Receiver has received an opinion from its counsel that the security held by RBC is valid and enforceable, and the amounts owing to RBC exceed the expected amount to be disbursed in the Proposed Distribution.
- 33. The Receiver respectfully submits that the Proposed Distribution should be approved.

E. The Discharge of the Receiver

- 34. The Receiver has substantially completed its mandate as contemplated by the Appointment Order, and under the *Bankruptcy and Insolvency Act*. Accordingly, the Receiver respectfully submits that it should be discharged and released, subject to the filing of a Certificate of Completion with the Court certifying that all activities necessary to conclude the receivership proceedings have been completed.
- 35. The Receiver is seeking a discharge at the hearing of this Motion in order to avoid the cost to the receivership estate of another motion, which would include another report to the Court, another motion record and the re-attendance by the Receiver and its counsel. The Receiver believes, under the circumstances of this receivership, that it is both efficient and appropriate for this Court to grant the Receiver a discharge upon the filing of the Certificate of Completion.
- 36. The Receiver also seeks a release from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of, the act or omissions of the Receiver while acting in its capacity as Receiver, save and except for any gross negligence or wilful misconduct on the part of the Receiver.

37. The Release is a standard term and mirrors the language used in the Commercial List model discharge order. Indeed, as Justice Patillo asserted in *Kraus*, “in the absence of any evidence of improper or negligence conduct, the release should issue.” As in *Kraus*, there is no such evidence in the case at bar. Thus, the Release should be granted.

[Pinnacle Capital Resources Ltd. v. Kraus Inc., 2012 CarswellOnt. 14138 \(ONSC \[Commercial List\]\), at para. 47.](#)

PART IV - ORDER REQUESTED

38. The Receiver requests the following Order:

- (a) That the relief sought in the Order (Distribution and Discharge) be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of October, 2022.



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (ONSC)
3. *Re Abitibiwater Inc.*, 2009 QCCS 6461, 2009 CarswellQue 14224 (QC. Sup. Ct.)
4. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851
5. *Pinnacle Capital Resources Ltd. v. Kraus Inc.*, 2012 CarswellOnt. 14138 (ONSC)
[Commercial List]

SCHEDULE "B"
RELEVANT RULES AND STATUTES

1. *Rules 2.03, 3.02, 16.04 and 16.08, Rules of Civil Procedure, R.R.O. 1990, Reg. 194*
2. Section 227 (4.1) and (4.2) of the Income Tax Act (R.S.C., 1985, c. 1 (5th Supp.))
3. Section 2201 of *Income Tax Regulations* (C.R.C., c. 945)

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

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PROCEEDING COMMENCED AT
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FACTUM OF THE RECEIVER

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