

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**BANK OF MONTREAL**

Applicant

- and -

**11977636 CANADA INC.**

Respondent

**FACTUM OF THE RECEIVER  
(Motion Returnable June 10, 2025)**

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**Lawyers for msi Spergel Inc., in its capacity  
as Court-Appointed Receiver**

**TO: THE SERVICE LIST**

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**FACTUM OF THE RECEIVER**

**PART I – OVERVIEW**

1. This Factum is submitted by msi Spergel Inc. (“**Spergel**”), in its capacity as court-appointed receiver (the “**Receiver**”), without security, of the assets, undertakings, and properties of 11977636 Canada Inc. (the “**Debtor**”), for an order, *inter alia*:

- (a) abridging the time for and validating the service of the Receiver’s Notice of Motion and Motion Record;
- (b) approving the proposed sale transaction (the “**Transaction**”) contemplated by an agreement of purchase and sale executed on April 24, 2025 (the “**165 APS**”) between the Receiver and 16582729 Canada Inc. (the “**Purchaser**”) and vesting in the Purchaser title in and to 652 Parkdale Avenue, North, Hamilton, Ontario (the

“**Hamilton Property**”), free and clear of all claims, liens and encumbrances except as permitted in the APS;

- (c) sealing Confidential Appendices 1 to 6 (the “**Confidential Appendices**”) to the First Report of the Receiver dated May 16, 2025 (the “**First Report**”);
  - (d) approving the First Report and the conduct and activities of the Receiver described therein;
  - (e) approving the fees and disbursements of the Receiver and its legal counsel, Chaitons LLP;
  - (f) approving the distribution of the net proceeds of sale of the Hamilton Property and setting aside the reserve funds as described in the First Report; and
  - (g) such other relief as the Court deems just.
2. Capitalized terms not defined herein have the meaning defined in the First Report.

## **PART II – FACTS**

### **Background**

3. Pursuant to an order (the “**Appointment Order**”) of the Ontario Superior Court of Justice (the “**Court**”) dated February 11, 2025 (the “**Receivership Date**”) upon application by Bank of Montreal (the “**Bank**”), Spergel was appointed Receiver over all of the assets, property and undertaking of the Debtor.<sup>1</sup>

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<sup>1</sup> First Report of the Receiver dated May 16, 2025 (the “**First Report**”) at para. 3, MR Tab 2; Appendices “1” and “2” to the First Report.

4. 1197 is a federal corporation with its registered head office located in Hamilton, Ontario. 1197 is the registered owner of the Hamilton Property and 5641 Nauvoo Road, Watford, Ontario (“**5641 Nauvoo**”).<sup>2</sup>

5. Prior to the Receiver’s appointment, the Debtor entered into an agreement of purchase and sale for the Hamilton Property (the “**Debtor APS**”).<sup>3</sup>

6. The Receiver requested that the Debtor provide information relating to the Debtor APS including, *inter alia*:<sup>4</sup>

- (a) how long the Hamilton Property was listed for;
- (b) how many offers were received and the proposed purchase price and deposit amount for those offers;
- (c) why the purchaser in the Debtor APS was selected;
- (d) whether there is any relationship between the Debtor and the purchaser; and
- (e) whether an independent broker was used.

7. On March 20, 2025, counsel for the Receiver requested, among other things, the contact information for the prospective purchaser be provided.<sup>5</sup>

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<sup>2</sup> First Report at para. 2, MR, Tab 2.

<sup>3</sup> Affidavit of Antoinette DePinto sworn June 3, 2025 (the “**DePinto Affidavit**”) at para. 4; Exhibit “C” to the DePinto Affidavit, Letter from counsel for the Debtor to counsel for the Receiver dated April 1, 2025.

<sup>4</sup> Exhibit “A” to the DePinto Affidavit, Email correspondence from the Receiver to the Debtor dated February 13, 2025 and February 21, 2025.

<sup>5</sup> Exhibit “B” to the DePinto Affidavit, Email correspondence between counsel for the Receiver and counsel for the Debtor between March 20, 2025 and April 10, 2025.

8. Counsel for the Debtor delivered a partial response to the Receiver's information requests on April 1, 2025.<sup>6</sup>

9. However, as the Receiver did not receive a satisfactory response to its inquiry regarding the Debtor APS, the Receiver proceeded with its marketing and sale process for the Hamilton Property.

### **The Sale Process**

10. Pursuant to the terms of the Appointment Order, the Receiver was empowered and authorized to, among other things, market any or all of the Debtor's assets, including advertising and soliciting offers in respect of the assets and negotiating such terms and conditions of sale as the Receiver, in its discretion, deemed appropriate.<sup>7</sup>

11. The Receiver engaged the services of Colliers International Realty Advisors Inc. ("**Colliers**") and Antec Appraisal Group ("**Antec**") to attend and prepare appraisals for the Hamilton Property.<sup>8</sup>

12. The Receiver requested sales and marketing proposals from three GTA commercial real estate brokers, Cushman & Wakefield ("**Cushman**"), Avison Young ("**Avison**"), and CB Richard Ellis ("**CBRE**"). The Receiver chose Cushman & Wakefield's proposals as their commission structure was lower, their valuation was in line with the appraisals received, and they were familiar with the market area.<sup>9</sup>

13. The Receiver entered into an MLS Listing Agreement with Cushman dated March 18, 2025, at a list price of \$1.00 (the "**Listing Agreement**") for the Hamilton Property.<sup>10</sup>

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<sup>6</sup> Exhibit "C" to the DePinto Affidavit, Letter from counsel for the Debtor to counsel for the Receiver dated April 1, 2025.

<sup>7</sup> First Report at para. 11, MR, Tab 2.

<sup>8</sup> First Report at para. 13, MR, Tab 2.

<sup>9</sup> First Report at para. 14, MR, Tab 2; Appendices "3" and "4" to the First Report and Confidential Appendices "4" and "5" to the Confidential Appendix Brief.

<sup>10</sup> First Report at para. 15, MR, Tab 2.

14. The Receiver, along with Cushman, designed a sale process for both properties to be fair and reasonable to ensure that prospective interested parties had the ability to make an offer to purchase the Hamilton Property.<sup>11</sup>

15. The Hamilton Property was widely marketed by Cushman to garner maximum interest by:<sup>12</sup>

- (a) the listing for the Hamilton Property being placed on the multiple listing service (“**MLS**”) and Toronto Regional Real Estate Board (“**TRREB**”);
- (b) an ‘eblast’ brochure being sent to 1,445 industrial brokers in the greater Toronto area (the “**GTA**”) on a bi-weekly basis;
- (c) arranging for a sale sign to be placed outside the Hamilton Property

16. The Hamilton Property was marketed for approximately 30 days.

17. The sale process for the Hamilton Property ultimately resulted in 13 parties making inquiries about the property, 1 tour was provided to a potential bidder, 3 non-disclosure agreements were executed and ultimately 2 bidders submitted offers for the property.<sup>13</sup>

18. The Receiver conducted extensive negotiations with the 2 bidders who submitted offers. A total of 8 offers were submitted for the property, including the 165 APS.<sup>14</sup>

19. The salient terms of the 165 APS include:<sup>15</sup>

- (a) the Hamilton Property is being sold on an “as is, where is” basis;

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<sup>11</sup> Appendices “3” and “4” to the First Report, MR, Tabs 2(3) and 2(4) and Confidential Appendices “4” and “5” to the Confidential Appendix Brief.

<sup>12</sup> Appendix “8” to the First Report, MR, Tab 2(8).

<sup>13</sup> First Report at para. 20, MR, Tab 2.

<sup>14</sup> Appendix “8” to the First Report, MR, Tab 2(8).

<sup>15</sup> Appendix “7” to the First Report, MR, Tab 2(7).

- (b) the 165 APS is conditional on Court approval and the issuance of an order vesting the Hamilton Property in the Purchaser free and clear of all claims and encumbrances, other than those listed in the 165 APS as permitted encumbrances (the “**AVO**”);
  - (c) the Purchaser has agreed to accept title to the Hamilton Property subject to the Leases (as set out in the 165 APS); and
  - (d) closing of the sale provided for in the 165 APS is scheduled to occur: (i) 21 days immediately following the date on which the AVO is granted, or (ii) such other date as the Receiver and the Purchaser may mutually agree upon.
20. Based on the offers received, the offer from the Purchaser is the highest and best available offer.<sup>16</sup>
21. The purchase price for the Hamilton Property set out in the 165 APS is greater than the estimated current market value from the appraisals.<sup>17</sup>
22. The Bank supports the completion of the Transaction contemplated by the 165 APS.

### **Sealing of the Confidential Appendices**

23. The Receiver is of the view that the Confidential Appendices should be filed with the Court on a confidential basis and sealed until the completion of the sale of the Hamilton Property. The Confidential Appendices include commercially sensitive information, including the offers received for the Hamilton Property and the final purchase price for the Hamilton Property. In the event that the sale of the Hamilton Property does not close, this information could prejudice the realization of maximum value from any future sale. The Receiver does not believe that any party will be prejudiced

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<sup>16</sup> First Report at para. 22, MR, Tab 2.

<sup>17</sup> Appendix “5” to the First Report, MR, Tab 2(5).

if the information is sealed at this time. Accordingly, the Receiver believes the proposed sealing order is appropriate.<sup>18</sup>

### **Activities of the Receiver to Date**

24. Paragraph 10 of the First Report includes a detailed summary of the Receiver's activities since the Receivership Date.<sup>19</sup>

### **Fees of the Receiver and its Counsel**

25. During the period to and including May 9, 2025, the Receiver expended a total of 104.15 hours in connection with this matter, giving rise to fees totaling \$50,654.04, (inclusive HST and disbursements) as more particularly set out in the affidavit of Trevor Pringle sworn May 15, 2025.<sup>20</sup>

26. During the period from February 11, 2025 to and including April 30, 2025, the Receiver's legal counsel, Chaitons LLP ("**Chaitons**") expended a total of 15.80 hours in connection with this matter, giving rise to fees and disbursements totaling \$6,993.46 (inclusive of HST and disbursements) as more particularly set out in the affidavit of Veronica Cesario sworn May 13, 2025.<sup>21</sup>

### **Claim from CRA**

27. On March 19, 2025, the Receiver received a claim from Canada Revenue Agency ("**CRA**") for HST in the amount of \$15,302.61 with respect to the outstanding period of January 1, 2022 to February 11, 2025. As there is no deemed trust portion, the HST claim ranks behind the prescribed security interests.<sup>22</sup>

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<sup>18</sup> First Report at para. 27, MR Tab 2.

<sup>19</sup> First Report at para. 10, MR Tab 2.

<sup>20</sup> First Report at paras. 29-30, MR, Tab 2; Appendix "10" to the First Report, MR, Tab 2(10).

<sup>21</sup> First Report at paras. 31-32, MR, Tab 2; Appendix "11" to the First Report, MR, Tab 2(11).

<sup>22</sup> First Report at para. 28, MR, Tab 2; Appendix "9" to the First Report, MR, Tab 2(9).



## Proposed Distributions

28. A title search conducted with respect to the Hamilton Property indicates the following registrations:<sup>23</sup>

- (a) a first mortgage in the principal amount of \$1,600,000.00 in favour of the Bank of Montreal;
- (b) a second mortgage in the principal amount of \$250,000 in favour of AKS Finance;
- (c) a lien in the amount of \$24,245 registered by the Minister of Finance.

29. The Receiver requested that Chaitons review the security held by the Bank. The Receiver has received the opinion from Chaitons that, subject to customary assumptions and qualifications for opinions of this nature, the security interests in favour of the Bank are valid and enforceable in the Province of Ontario.<sup>24</sup>

30. The City of Hamilton has a priority charge to the existing mortgages in respect of property tax arrears that have accrued in respect of the Hamilton Property. A property tax statement issued by Hamilton on February 21, 2025, confirms the balance owed, in the amount of \$24,712.93.<sup>25</sup>

31. In addition, the Receiver received notice from the Ministry of Finance that \$24,639.65 is owed to His Majesty the King in Right of Ontario as represented by the Minister of Finance in relation to land transfer tax arrears in respect of 5641 Nauvoo. A lien was registered by the Ministry of Finance for the land transfer tax arrears against 652 Parkdale and 5641 Nauvoo.<sup>26</sup>

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<sup>23</sup> First Report at para. 35, MR, Tab 2; Appendix “14” to the First Report, MR, Tab 2(14).

<sup>24</sup> First Report at para. 37, MR, Tab 2.

<sup>25</sup> First Report at para. 38, MR, Tab 2; Appendix “15” to the First Report, MR, Tab 2(15).

<sup>26</sup> First Report at para. 39, MR, Tab 2; Appendix “16” to the First Report, MR, Tab 2(16).

32. Accordingly, the Receiver is proposing to make certain distributions (after payment of the fees and disbursements of both the Receiver and the Receiver's counsel), as follows:<sup>27</sup>

- (a) to the City of Hamilton in the amount of \$24,712.93 or such amount accrued at the closing of the Transaction for outstanding property tax arrears;
- (b) to Bank of Montreal in the amount of \$1,400,000 or such other party as the Bank might direct, for the partial repayment of the charge/mortgage in favour of the Bank;
- (c) the Receiver will hold back any additional funds in the estate after the above distributions. As the administration of the receivership is not completed, the Receiver proposes to retain the surplus proceeds to fund its further activities and contemplates the need for a further motion(s) to the Court for directions with regards to a future distribution and with respect to the Receiver's discharge.

### **PART III – ISSUES**

33. The Receiver's motion raises the following main legal issues:

- (a) should the Court approve the 165 APS and the Transaction?
- (b) is it appropriate for the Court to seal the Confidential Appendices pending closing of the Transaction?
- (c) should the conduct and activities of the Receiver as described in the First Report be approved?

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<sup>27</sup> First Report at para. 40, MR, Tab 2.

- (d) should the fees and disbursements of the Receiver and its legal counsel, Chaitons LLP, be approved?
- (e) should the proposed distributions described in the First Report be approved?

## PART IV – LAW AND ARGUMENT

### **The Transaction Should Be Approved**

34. The following criteria are to be considered by the Court when asked to approve a sale of assets in a receivership context:<sup>28</sup>

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of the parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.

35. The *Soundair* factors are met on the facts of this case. The steps taken to market and sell the Hamilton Property, as detailed above, included listing the Hamilton Property on the open market for approximately 30 days with an experienced broker and eight offers from two potential purchasers were received for the Hamilton Property.

36. It is respectfully submitted that the Court should approve the 165 APS and the Transaction for the following reasons:

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<sup>28</sup> [\*Royal Bank of Canada v. Soundair Corp.\* \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#) [*“Soundair”*].

- (a) it is the result of a competitive and fair sale process conducted by the Receiver;
- (b) the Transaction maximizes the recovery from the Hamilton Property for the Debtor's creditors;
- (c) it is commercially reasonable and in the best interests of the Debtor's estate; and
- (a) the Transaction is supported by the Bank, who is the senior secured creditor of the Debtor.

### **The Sealing Order Should Be Granted**

37. The Receiver seeks an order sealing the Confidential Appendices to the First Report.

38. The Supreme Court of Canada has held that a sealing order may be granted:

- (a) where it is necessary to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) where the salutary effects of the confidentiality outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.<sup>29</sup>

39. This Court has applied the *Sierra* test in court-supervised sale proceedings to ensure that competitors or potential bidders do not gain an advantage if the sale transaction does not close. In *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, this Court held that

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<sup>29</sup> [\*Sierra Club of Canada v. Canada \(Minister of Finance\)\*, 2002 SCC 41](#) at para. 45 [“*Sierra*”].

the “integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.”<sup>30</sup>

40. In *Sherman Estate v. Donovan*, the Supreme Court of Canada held that a person asking a court to exercise discretion in limiting the ‘open court’ presumption must establish that:<sup>31</sup>

- (a) court openness poses a serious risk to public interest;
- (b) the order sought is necessary to prevent the risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

41. The Confidential Appendices to the First Report contain confidential and commercially sensitive information related to the Sale Process and the Transaction, including information regarding the bids received through the Sale Process, which if disclosed would be harmful and materially prejudicial to the receivership estate and stakeholders of the Debtors in the event the Transaction does not close as anticipated.

42. Sealing the information in the Confidential Appendices pending completion of the Transaction is necessary and appropriate to protect the integrity of the Sale Process.

### **The Activities of the Receiver Should Be Approved**

43. The Court has the inherent jurisdiction to review and approve the activities of a court-appointed receiver as set out in the receiver’s reports.<sup>32</sup>

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<sup>30</sup> [\*GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.\*, 2014 ONSC 1173](#) at para. 34.

<sup>31</sup> [\*Sherman Estate v. Donovan\*, 2021 SCC 25](#) at para. 38.

<sup>32</sup> [\*Bank of America Canada v. Willann Investments Ltd.\*, 1996 CanLII 2782 \(ONCA\)](#).

44. It is common practice for court officers to bring motions to seek approval of their reports and the activities set out therein. Court approval, among other things, allows the court officer to bring its activities before the court and presents an opportunity to address concerns of stakeholders, while enabling the Court to satisfy itself that the court officer's activities have been conducted in a prudent and diligent matter.<sup>33</sup>

45. The activities of the Receiver described in the First Report were all necessary and undertaken in good faith pursuant to the Receiver's duties and powers set out in the Appointment Order.

46. The Receiver therefore respectfully submits that the First Report and the activities described therein should be approved.

#### **The Fees and Disbursements of the Receiver and its Counsel Should Be Approved**

47. Spergel is seeking approval of its professional fees and disbursements incurred by it as Receiver and those of its legal counsel.

48. The Appointment Order provides that Spergel and its counsel shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts.<sup>34</sup>

49. In determining whether to approve the accounts of a Court-appointed receiver and its counsel, the Court will consider the overall value contributed, taking into account the following factors: a) the nature, extent and value of the assets; b) the complications encountered; c) the degree of assistance provided by the debtor; d) the time spent; e) the receiver's knowledge, experience and skill; f) the

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<sup>33</sup> [\*Target Canada Co. \(Re\)\*, 2015 ONSC 7574](#) at paras 2 and 23; [\*Triple-I Capital Partners Limited v 12411300 Canada Inc.\*, 2023 ONSC 3400](#) at paras 65-66

<sup>34</sup> Appendix "1" to the First Report at paras. 18-20, MR, Tab 2(1).

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 economic manner.<sup>35</sup>

50. The fees and disbursements of Spergel are fair and reasonable and have been properly incurred. The hourly rates charged by Spergel and its counsel are consistent with comparable firms practicing in the area of insolvency. The Receiver respectfully submits that it is appropriate to approve the fees and disbursements of Spergel and its counsel in the circumstances.

### **The Proposed Distributions Should Be Approved**

51. The Appointment Order provides that all funds received or collected by the Receiver, including without limitation, from the sale of all or any of the Property (as defined in the Appointment Order), shall be held by the Receiver to be paid in accordance with the terms of the Appointment Order or any further Order of the Court.<sup>36</sup>

52. The Receiver recommends approval of the distributions proposed in the First Report for the reasons set out above in paragraphs 28-32.

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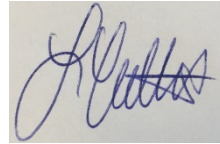
<sup>35</sup> [\*Bank of Nova Scotia v. Diemer\*, 2014 ONCA 851](#), at para. 33.

<sup>36</sup> Appendix "1" to the First Report at para. 13, MR, Tab 2(1).

**PART V – RELIEF SOUGHT**

53. For the reasons set out above, the Receiver respectfully recommends and requests that the Court grant the orders sought on this motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 3<sup>rd</sup> day of June, 2025. I certify the authenticity of every authority cited in the factum.



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**CHAITONS LLP**

*Lawyers for the Receiver, msi Spergel Inc.*



## SCHEDULE “A”

### LIST OF AUTHORITIES

1. [\*Royal Bank of Canada v. Soundair Corp.\* \(1991\), 4 OR \(3d\) 1 \(ONCA\)](#)
2. [\*Sierra Club of Canada v. Canada \(Minister of Finance\)\*, 2002 SCC 41](#)
3. [\*GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.\*, 2014 ONSC 1173](#)
4. [\*Sherman Estate v. Donovan\*, 2021 SCC 25](#)
5. [\*Bank of America Canada v. Willann Investments Ltd.\*, 1996 CanLII 2782 \(ONCA\)](#)
6. [\*Target Canada Co. \(Re\)\*, 2015 ONSC 7574](#)
7. [\*Triple-I Capital Partners Limited v 12411300 Canada Inc.\*, 2023 ONSC 3400](#)
8. [\*Bank of Nova Scotia v. Diemer\*, 2014 ONCA 851](#)

**SCHEDULE “B”**  
**RELEVANT STATUTES**

N/A

**BANK OF MONTREAL**

**-and- 11977636 CANADA INC.**

Applicant

Respondent

Court File No. CV-24-00088321-00CL

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT  
HAMILTON

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Appointed Receiver**