

Court File No: CV-23-00693494-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

**THE TORONTO-DOMINION BANK**

Applicant

- and -

**1871 BERKELEY EVENTS INC., 1175484 ONTARIO INC.,  
111 KING STREET EAST INC., 504 JARVIS INC. AND  
SOUTHLINE HOLDINGS INC.**

Respondents

---

**FACTUM OF THE RECEIVER**

(Motion returnable January 16, 2024)

---

January 10, 2024

**HARRISON PENZA LLP**

Barristers & Solicitors  
130 Dufferin Avenue, Suite 1101  
London, ON N6A 5R2

**Timothy C. Hogan (LSO #36553S)  
Robert Danter (LSO #69806O)**

Tel: 519-679-9660

Fax: 519-667-3362

Email: [thogan@harrisonpensa.com](mailto:thogan@harrisonpensa.com)  
[rdanter@harrisonpensa.com](mailto:rdanter@harrisonpensa.com)

Lawyers for the Receiver,  
msi Spergel inc.

TO: SERVICE LIST

## NATURE OF MOTION

1. This is a motion by msi Spergel inc. ("**Spergel**"), in its capacity as court-appointed Receiver (the "**Receiver**"), appointed pursuant to an order of the Ontario Superior Court of Justice – Commercial List (the "**Court**") dated July 7, 2023 (the "**Appointment Order**") of the Property (as defined in the Appointment Order) of the Respondents, 1871 Berkeley Events Inc., 1175484 Ontario Inc., 111 King Street East Inc., 504 Jarvis Inc. and Southline Holdings Inc. (the "**Debtors**") for, *inter alia*, the following relief:
  - a) An Order that the time for service, filing and confirmation of the Notice of Motion and the Motion Record be abridged so that this motion is properly returnable today and dispensing with further service and confirmation thereof;
  - b) An Order approving the First Report of the Receiver dated January 3, 2024 (the "**First Report**"), and the activities and conduct of the Receiver set out therein, provided, however, that only the Receiver, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way the approval of the First Report and Confidential Appendices;
  - c) An Order authorizing and directing the Receiver to execute a Listing Agreement (the "**Listing Agreement**") between the Receiver and Colliers International ("**Colliers**") for the sale of the Real Property (as defined below) and to take such steps as the Receiver deems necessary or advisable to carry out the terms thereof;
  - d) An Order authorizing and directing the Receiver, with Colliers as its real estate consultant, to carry out the sale process (the "**Sale Process**") for the sale of the Real Property (as defined below), as described in the First Report and to take such steps and execute such documentation as the Receiver considers necessary or desirable in carrying out its obligations thereunder, subject to prior approval of this Court being obtained before completion of any transaction under the Sale Process;
  - e) An Order sealing the Confidential Appendices to the First Report (the "**Confidential Appendices**") until the completion of the Sale Process and the

completion of the sale of the Real Property, or until a further order of this Court; and,

- f) An order for certain ancillary relief, including approval of the Receiver's Interim Statement of Receipts and Disbursements as at December 31, 2023, and of the fees of the Receiver and its counsel, Harrison Pensa LLP.
2. It is the position of the Receiver that the actions of the Receiver, as well as the Sale Process, should be approved and that the relief requested should be granted, for the following reasons:
- a) The Sale Process will be conducted in conjunction with an experienced real estate agent in Colliers and will encourage a competitive environment for the solicitation of offers and has the support of the Debtor's senior secured creditor, The Toronto-Dominion Bank (the "**Bank**" and,
  - b) Meets the "Soundair" principals as detailed below.

## THE FACTS

### The Debtors and the Real Property

3. Spergel was appointed as Receiver over the Debtors' Property (as defined in the Appointment Order), pursuant to the Appointment Order, which became effective on July 31, 2023. The Bank is the senior secured creditor of the Debtor.

***First Report to the Court Submitted by the Receiver dated January 3, 2024 (the "First Report"), paras 7-8 and Appendices "1" and "2" thereto.***

4. The Debtors are each Ontario corporations. 1871 Berkeley Events Inc. ("**1871 Berkeley**") operated an event venue from certain real property owned by 1175484 Ontario Inc. ("**1175**"), which is municipally known as 315-317 Queen Street East, Toronto, Ontario (the "**Real Property**"). The remaining Debtors had ceased operations prior to the Receiver's appointment.

***First Report, paras 1-5.***

5. Following its appointment and its review of the Debtors' finances, the Receiver determined that it was not feasible to carry on the business of 1871 Berkeley, and this Debtor has also ceased operations.

***First Report, para 27.***

6. The Real Property adjoins the real property municipally known as 301-311 Queen Street East, Toronto, Ontario (the "**311 Queen Property**"), which is under the care and control of MNP Ltd., as court-appointed Receiver (the "**311 Queen Receiver**").

***First Report, paras 19-22.***

7. The Real Property is the sole major asset in the Debtors' estates.

***First Report, paras 5, 24-25, and 32.***

#### The Proposed Sale Process

8. Pursuant to the Appointment Order, the Receiver is empowered and authorized to obtain appraisals of and to market any or all of the property of the Debtors, including the Real Property, including advertising and soliciting offers in respect of the property of the Debtors.

***First Report, para 31 and Appendix "B", at paras 3(d), (j), and (k).***

9. The Receiver has obtained two full narrative appraisals from licensed and experienced appraisers for the Real Property.

***First Report, para 33 and Confidential Appendices "A" and "B" thereto.***

10. The Receiver also obtained three listing proposals from experienced realtors in the relevant market, and ultimately chose that of Colliers, in part due to its pre-existing familiarity with the Real Property as listing agent on behalf of 1175.

***First Report, para 34 and Confidential Appendices "C" and "D" thereto.***

11. The Receiver is proposing the Sale Process which includes the following:
  - a) The Receiver will conduct a joint marketing effort for the Real Property and the 311 Queen Property with the 311 Queen Receiver, on the basis that this additional exposure will result in a better and higher recovery for each estate;
  - b) Colliers shall act as listing agent for each of the Real Property and the 311 Queen Property, and shall maintain a joint, confidential data room for prospective purchasers;
  - c) Each of the Receiver and the 311 Queen Receiver shall utilize separate but similar marketing documents and agreements of purchase and sale for the Real Property and the 311 Queen Property;
  - d) Each of the Receiver and the 311 Queen Receiver shall keep confidential any offers obtained in relation to the Real Property and the 311 Queen Property, respectively, and each receiver shall have absolute discretion to accept an offer made to it, regardless of whether an offer is made to the other receiver;
  - e) As listing agent, Colliers shall list the Real Property and the 311 Queen Property on the MLS service and distribute marketing materials to prospective purchasers. The listing shall not specify an asking price;
  - f) Potential purchasers, on execution of a non-disclosure agreement and approval by the Receiver, in conjunction with Colliers, shall be granted access to the joint data room which shall contain a Confidential Information Memorandum and other due diligence materials;
  - g) A Bid Deadline, and review of binding agreements of purchase and sale, as described in the First Report with the Receiver reviewing and evaluating same in order to identify the best and highest offers;

- h) Any sale of the Real Property shall be conducted on an “as is, where is” basis, with no representations or warranties provided by the Receiver in relation to the Real Property; and,
- i) Court approval of accepted bid and the closing of sale of the Real Property.

***First Report, paras 36- 38 and 41, and Appendices “3” and “4” thereto.***

- 12. The Receiver is of the view that the proposed Sale Process is a process with integrity that will encourage a competitive environment for the solicitation of offers, and will optimize the Receiver’s ability to evaluate options to maximize the value realized from the Real Property for the following reasons:
  - a) The proposed Sale Process allows for completion of a sale of the Real Property in a timely manner while allowing sufficient time for necessary due diligence;
  - b) The proposed Sale Process involves marketing the Real Property through an established and professional national broker and active marketing of the Real Property;
  - c) Conducting a joint marketing process with the 311 Queen Receiver will increase the exposure of the Real Property to the market, as well as sharing the costs of marketing the Real Property with the 311 Queen Receiver.

***First Report, paras 36- 37, and 39-40.***

Professional Fees and Disbursements

- 13. The current fees and disbursements of Spergel, in its capacity as Receiver, inclusive of HST, total \$128,815.91 as at November 30, 2023, as detailed in the First Report in relation to each Debtor.

***First Report, para 42 and Appendix “5” thereto.***

- 14. The current fees and disbursements of Harrison Pensa LLP, as counsel for the Receiver total \$31,850.21 as at January 2, 2024, inclusive of HST.

***First Report, para 43 and Appendix "6" thereto.***

15. 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, paras 43-44.***

Sealing Order

16. The Receiver is of the view that the information and documentation contained in the Confidential Appendices contains commercially sensitive information and should be sealed in order to avoid the negative impact that the dissemination of the confidential information contained therein would have if the sale of the Real Property is not completed. As a result, the Receiver is seeking a sealing order in respect of the Confidential Appendices until such time as the sale of the Real Property is complete, or until further order of this Court.

***First Report, para 45.***

Statement of Receipts and Disbursements

17. The Receiver's Interim Statement of Receipts and Disbursements as at December 31, 2023 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, para 46 and Appendix "7" thereto.***

**ISSUES, LAW AND ARGUMENT**

**The Court's Procedural Powers**

18. 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 at any time 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](#)

### **The Receiver's Activities**

19. The Receiver's activities in these proceedings have been undertaken in furtherance of the Receiver's duties and are consistent with the Receiver's powers, as set out in the Appointment Order. The Receiver has acted reasonably and in the best interests of the Debtors' 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, referenced in the Receiver's Book of Authorities at Tab 1.***

20. All of the Receiver's activities were conducted within the ambit of its powers granted by the Appointment Order and each of the activities were necessary to ensure that the proceedings were as orderly, effective and fair to all stakeholders as possible.
21. The Receiver therefore respectfully submits that the First Report, and its activities to date as set out therein, should be approved by this Court.

### **Approval of the Proposed Sale Process**

22. Receivers are clothed with the powers set out in the order appointing them. Receivers are consistently granted the power to market and sell property belonging to a debtor.

[Integrated Building Corp. v. Bank of Nova Scotia, 1989 ABCA 114 \(CanLII\).](#)

[Battery Plus Inc., Re, 2002 CanLII 49569 \(ON SC\) at paras 2-3, 19, 22-23, 34-35.](#)

23. Where a Court is asked to approve a transaction and a sales process in a receivership context, the Court is to consider:
  - i. whether the party made a sufficient effort to obtain the best price and to not act improvidently;



- ii. the interests of all parties;
- iii. the efficacy and integrity of the process by which the party obtained offers;  
and,
- iv. whether the working out of the process was unfair.

*Royal Bank of Canada v. Soundair Corp., 1991 CanLII 2727 (ON CA), at para 16.*

*Skyepharma PLC v. Hyal Pharmaceutical Corporation, 2000 CanLII 5650 (ON CA), at para 3.*

24. Based on the foregoing, it is respectfully submitted that this Honourable Court should approve the Sale Process. It is the Receiver's position that any sale resulting from the Sale Process would be in accordance with the *Soundair* principles, for the following reasons:

- a) The Sale Process includes a reasonably lengthy marketing period to expose the Real Property to the open market, and by jointly marketing the Real Property with the 311 Queen Property and the 311 Queen Receiver, the Receiver will expose the Real Property to additional prospective purchasers;
- b) The Receiver has engaged an experienced national real estate brokerage firm in Colliers, and has also obtained two full narrative appraisals of the Real Property by experienced agents;
- c) The Sale Process will provide all interested parties with an equal opportunity to bid on the sale of the Real Property; and,
- d) The Receiver will retain discretion to reject any or all bids if deemed commercially unreasonable.

***First Report, paras 36- 38 and 41, and Appendices "3" and "4" thereto.***

25. The Bank, as senior secured creditor of the Debtor, supports the Sale Process.

26. The Receiver respectfully submits that the Sale Process should be approved.

### **The Sealing Order Should be Granted**

27. It is submitted that it is just, appropriate and necessary to the integrity of these receivership proceedings that the Confidential Appendices be sealed by this Court. The Confidential Appendices contain sensitive information, the release of which prior to the completion of the sale of the Real Property could be prejudicial to the stakeholders of the Debtors.

### **Jurisdiction**

28. The Court's jurisdiction to seal documents filed with it is found in s. 137(2) of the *Courts of Justice Act* (Ontario):

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form a part of the public record.

[\*Courts of Justice Act \(Ontario\), s. 137\(2\).\*](#)

In addition to statutory jurisdiction, the Court also has inherent jurisdiction to issue sealing orders: "there is no doubt that the court has inherent jurisdiction, and jurisdiction under s. 137(2) of the Courts of Justice Act, to seal a portion of the court file."

[\*Fairview Donut Inc. v. The TDL Group Corp., 2010 ONSC 789 \(CanLII\), at para 34\*](#)

### **Discretion**

29. Sealing Orders are granted regularly in the context of Court-appointed receiverships where court openness may pose a risk to the public interest in enabling stakeholders in an insolvency to maximize the realization of a debtor's assets. In this context, such an order is necessary in order to prevent a serious risk to an important commercial interest; and the salutary effects of the sealing order outweigh its deleterious effects, which in this context includes the public interest in open and accessible court proceedings.

[\*Sierra Club of Canada v. Canada \(Minister of Finance\), 2002 SCC 41 \(CanLII\), \[2002\] 2 SCR 522, at paras 53-57.\*](#)

[\*Sherman Estate v. Donovan, 2021 SCC 25 \(CanLII\), at para 38.\*](#)

The Receiver submits that there are no reasonable alternative measures to a sealing order which would fulfill the twin purposes of (i) allowing this Court to review the reasonableness of the proposed Sale Process and (ii) ensuring that the commercially-sensitive information contained within the Confidential Appendices is not available to the public prior to the completion of any sale of the Real Property.

[Sherman, supra, at para. 38.](#)

30. Ontario Courts have recognized the customary practice of seeking a sealing order in the context of a sale approval motion, to which this motion is analogous. In *Ron Handelman Investments Ltd. v. Mass Properties Inc.*, Madam Justice Pepall stated:

[a]s is customary in sale approval motions, the Receiver seeks an order sealing the appraisal until the transaction is completed. This ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the transaction does not close and a new purchaser must be sought.

[B&M Handelman Investments Limited v. Mass Properties Inc., 2009 CanLII 37930 \(ON SC\), at para 26.](#)

[Maxtech Manufacturing Inc. \(Re\), 2010 ONSC 1161 \(CanLII\), at paras 29 and 30.](#)

The Confidential Appendices contain sensitive commercial information. Should the sale of the Real Property not proceed, the information contained within this confidential appendix could cause a reduction in any future sale of the Real Property, and harm the creditors of the Debtors if made available to the public. Protecting the information contained within the Confidential Appendices is an important commercial interest that should be protected. There is no other reasonable alternative to sealing that will prevent Confidential Appendices from becoming public.

31. With regard to the Confidential Appendices, it is the Receiver's opinion that the Confidential Appendices should remain sealed until the completion of the sale of the Real Property or an Order by this Court.

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

32. 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.
33. 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 (CanLII), at [paras. 33 and 45](#).***

34. 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.

**ORDER REQUESTED**

35. The Receiver requests the relief as set forth in the Notice of Motion and the related Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of January, 2024.



**HARRISON PENZA LLP**

Barristers & Solicitors

130 Dufferin Avenue, Suite 1101.

London, ON N6A 5R2

**Timothy C. Hogan (LSO #36553S)**

**Robert Danter (LSO #698060)**

Tel: (519) 679-9660

Fax: (519) 667-3362

Email: [thogan@harrisonpensa.com](mailto:thogan@harrisonpensa.com)

[rdanter@harrisonpensa.com](mailto:rdanter@harrisonpensa.com)

Lawyers for the Receiver,

msi Spergel inc.

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (CanLII)
3. *Battery Plus Inc., Re*, 2002 CanLII 49569 (ON SC)
4. *B&M Handelman Investments Limited v. Mass Properties Inc.*, 2009 CanLII 37930 (ON SC)
5. *Fairview Donut Inc. v. The TDL Group Corp.*, 2010 ONSC 789 (CanLII)
6. *Integrated Building Corp. v. Bank of Nova Scotia*, 1989 ABCA 114 (CanLII).
7. *Maxtech Manufacturing Inc. (Re)*, 2010 ONSC 1161 (CanLII)
8. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA)
9. *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII)
10. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII), [2002] 2 SCR 522
11. *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, 2000 CanLII 5650 (ON CA)

**SCHEDULE "B"  
RELEVANT STATUTES**

**Rules 2.03, 3.02, 16.04 and 16.08, Rules of Civil Procedure, R.R.O. 1990, Reg. 194.**

**COURT MAY DISPENSE WITH COMPLIANCE**

**2.03** The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

**EXTENSIONS OR ABRIDGMENT**

***General Powers of Court***

**3.02(1)** Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

***Times in Appeals***

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

***Consent in Writing***

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

**SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE**

***Where Order May be Made***

**16.04** (1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may take an order for substituted service or, where necessary in the interest of justice, may dispense with service.

***Effective Date of Service***

(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules.

**VALIDATING SERVICE**

**16.08** Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

(a) The document came to the notice of the person to be served; or

(b) The document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

**Section 137(2) Courts of Justice Act, R.R.O. 1990, Reg. 194.**

**SEALING DOCUMENTS**

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.



THE TORONTO-DOMINION BANK

v.

1871 BERKELEY EVENTS INC. et al

Applicant

Respondents

Court File No. CV-23-00693494-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO, ONTARIO

**FACTUM OF THE  
RECEIVER**

**HARRISON PENZA <sup>LLP</sup>**

Barristers & Solicitors

130 Dufferin Avenue, Suite 1101

London, Ontario N6A 5R2

**Timothy C. Hogan (LSO #36553S)**

**Robert Danter (LSO #69806O)**

Tel : (519) 679-9660

Fax: (519) 667-3362

Email: [thogan@harrisonpensa.com](mailto:thogan@harrisonpensa.com)

[rdanter@harrisonpensa.com](mailto:rdanter@harrisonpensa.com)

Lawyers for the Receiver,  
msi Spergel inc.