

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE TORONTO-DOMINION BANK

Applicant

- and -

2580363 ONTARIO INC. AND 2580361 ONTARIO INC.

Respondents

FACTUM OF THE RECEIVER
(Motion Returnable April 27, 2023)

April 17, 2023

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FACTUM OF THE RECEIVER

PART I - INTRODUCTION

1. Msi Spergel inc., in its capacity as court-appointed receiver (the "**Receiver**") of the property, assets and undertakings (the "**Property**") of 2580363 Ontario Inc. ("**363**") and 2580361 Ontario Inc. ("**361**") (collectively, the "**Debtors**"), brings this motion for, *inter alia*, an Order:

- (a) validating service of the Notice of Motion, the Motion Record and the First Report of the Receiver dated April 12, 2023 (the "**First Report**");
- (b) approving the First Report and the actions and activities of the Receiver as described therein;
- (c) approving the sale transaction and vesting all right, title and interest of 361 in the real property owned by 361 and municipally known as 21 Augusta Street, Hamilton, Ontario and legally described as PIN 17170-0018 (LT) (the "**Real Property**") in the Agreement of Purchase and Sale dated January 27, 2023 and accepted February 6, 2023, as amended (the "**Purchase Agreement**") entered into between Muse Properties Ltd., as general partner for and on behalf of Muse Properties Limited Partnership (the "**Purchaser**") and the Receiver, free and clear of encumbrances and other charges and security interests as described in the Purchase Agreement (the "**Transaction**");
- (d) authorizing the Receiver to complete the Transaction, and thereafter to file the Receiver's Certificate;

- (e) approving the Receiver's Statement of Receipts and Disbursements included in the First Report;
- (f) approving the fees and disbursements of the Receiver (the "**Receiver's Fees**") to date as detailed in the First Report and authorizing the payment of the Receiver's Fees;
- (g) approving the fees and disbursements of counsel to the Receiver, Fogler, Rubinoff LLP ("**Counsel's Fees**"), to date as detailed in the First Report and authorizing payment of Counsel's Fees;
- (h) approving the sealing of Confidential Appendices to the First Report until completion of the Transaction, or further order of this Court;
- (i) approving the Fee Accrual defined or described in the First Report;
- (j) declaring that the Funds identified in the First Report are "Property" that fall under the receivership;
- (k) subject to the completion of the Transaction, authorizing and directing the Receiver to make the distributions proposed in the First Report; and
- (l) discharging the Receiver and releasing it from liability in its capacity as Receiver.

PART II – SUMMARY OF FACTS

2. The facts are set out in the First Report and any capitalized terms in this Factum that are not defined have the meaning ascribed to them in the First Report.

PART III – STATEMENT OF ISSUES, LAW & AUTHORITIES

Approval and Vesting Order

3. Court-appointed receivers are frequently granted the power to sell property belonging to the debtor and apply for a vesting order. For example, paragraph 3(1) of the Receivership Order granted in these proceedings expressly empowers and authorizes the Receiver "to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property."

4. Also, under section 100 of the *Courts of Justice Act* (Ontario), this Honourable Court has the power to vest in any person an interest in real or personal property that the court has the authority to order be disposed of, encumbered or conveyed.¹

5. The criteria to be applied when considering the approval of a sale by a Receiver are well established, and are summarized as follows:

- (a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) whether the interests of all parties have been considered;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the workout of the process.²

¹ *Courts of Justice Act* (Ontario), R.S.O. 1990, c. C-43, s. 100, Schedule "B".

6. It is the Receiver's position that under the sale process or listing of the Real Property that the Real Property was widely marketed, that any interested parties in the Real Property had a reasonable period in which to conduct due diligence, that The Toronto-Dominion Bank ("**TD**"), the Debtors' main secured creditor, was kept informed and that the sale process or listing facilitated the possibility of best offers. In this regard, it is respectfully submitted that the Transaction and related Approval and Vesting Order should be approved for the following reasons:

- (a) There were two appraisals of the Real Property, the market was extensively canvassed by the listing agent and the purchase price offered by the Purchaser for the Real Property under the Purchase Agreement is at market value for the Real Property;
- (b) The Real Property has been listed on MLS; and
- (c) TD, 361's senior secured creditor and first mortgagee, is not opposed to the sale of the Real Property to the Purchaser.

Sealing Order

7. It is just, appropriate and necessary to the integrity of these receivership proceedings and the sale process that the Confidential Appendices to the First Report be sealed by this Court until the sale is completed or further order of this court. The proposed sealed documents include the appraisals, summary of offers, progress reports regarding sale efforts and the unredacted copies of the sale and marketing proposals and Purchase Agreement, regarding

² [*Royal Bank of Canada v. Soundair Corporation*](#), 1991 CanLII 2727 (Ont. C.A.), Tab 1, Brief of Authorities of the Receiver dated April 17, 2023 ("**BOA**").

the Real Property. The proposed sealing is for a limited time, until the Transaction is completed or further order of the court. The public interest being protected is that if the confidential information in the Confidential Appendices to the First Report (i.e., appraised values, summary of offers, price information or purchase price information about the Real Property) were now made public, and if the Transaction subsequently did not close, any future listing or sale of the Real Property by the Receiver could be prejudiced or undermined: prospective purchasers or offerors, knowing the purchase price or appraised value, might underbid or not competitively bid and thereby potentially reduce the net sale proceeds available for stakeholders.

8. 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.³

9. The test for sealing documents as set out in [Sierra Club of Canada v. Canada \(Minister of Finance\)](#)⁴ ("**Sierra Club**") and [Sherman Estate v. Donovan](#)⁵ is as follows: (a) court openness poses a serious risk to an important public interest; (b) the order sought is necessary to prevent this serious 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. Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order – be properly ordered.

³ *Courts of Justice Act* (Ontario), s. 137(2), Schedule "B".

⁴ [Sierra Club of Canada v. Canada \(Minister of Finance\)](#), 2002 SCC 41 (CanLII), [2002] 2 S.C.R. 522 (SCC) at para. 53, Tab 2, BOA.

⁵ [Sherman Estate v. Donovan](#), 2021 SCC 25 (CanLII), at paras 37, 38, Tab 3, BOA.

10. Applying the first criteria in the above test, there is clearly a public interest in preserving commercially sensitive confidential information. In addition, courts have acknowledged that there is a public interest in maximizing recoveries in an insolvency that goes beyond the individual case. In this regard, sealing orders are often granted in receiverships. For example, appraisals, sale agreements, bids or offers and other commercial documents, attached as confidential appendices to a receiver's report, have been sealed where they contain sensitive commercial information, the release of which could be prejudicial to stakeholders and the sales process.⁶

11. As to the second criteria of the test, if the commercially sensitive information contained in the Confidential Appendices were made public BEFORE the Transaction closes, there would be a serious risk that this disclosure could negatively impact the future selling price of the Real Property.

12. Regarding the third criteria of the test, the proposed sealing order is temporary and proportionate. The benefits of the sealing order outweigh the negative effects. The sealing order will preserve the integrity of the sale process. This outweighs any potential negative effect that may result from temporarily restricting public access to a limited amount of information. It is therefore respectfully submitted that the criteria outlined in *Sherman Estate* for a sealing order over the Confidential Appendices of the First Report have been met in this case.

Receiver's Fees and Receiver's Counsel's Fees

13. The Receiver respectfully submits that the fees of the Receiver and its lawyer as detailed in the First Report should be approved in the circumstances.

⁶ [*Royal Bank of Canada v. Walker Hall Winery Ltd.*](#), 2011 ONSC 638 (CanLII), at paras. 13, 21, 22, Tab 4, BOA.

14. In determining whether to approve the fees of a receiver and its counsel, the court should consider whether the remuneration and disbursements incurred in carrying out the receivership were fair and reasonable. Value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. In making this assessment, the following factors constitute a useful guideline but are not exhaustive:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver's knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.⁷

⁷ [*Bank of Nova Scotia v. Diemer*](#), 2014 ONCA 851 (CanLII) (Ont. C.A.), at paras. 33 and 45, Tab 5, BOA.

15. The legal services provided by the Receiver's lawyer during this period, in which the fees and disbursements are being asked to be approved by this Court, as set out in the First Report, include the following:

- (a) Draft, review, revise and finalize motion record, orders, factum and brief of authorities, and Receiver's First Report, for this motion;
- (b) Review offers for Real Property; comment on offers with client; propose revisions to same;
- (c) Draft standard Purchase Agreement to be used for receivership sale;
- (d) Communications with the tenant of the Real Property;
- (e) Demand letter to tenant re. notice to vacate and rent; and
- (f) Draft Agreement to Vacate the Premises between the Receiver and the tenant.

16. It is the Receiver's view that it and its counsel's fees and disbursements were incurred at the Receiver's and Receiver's counsel's standard rates and charges, and are fair, reasonable and justified in the circumstances. Also, the fees and disbursements sought accurately reflect the work done by the Receiver and by its counsel in connection with the receivership. Finally, a courtesy discount was provided on one of the invoices of Receiver's counsel.

17. The results of the Receiver's efforts to sell the Real Property have generally been positive. The Receiver was able to have the premises vacated by the tenant in a timely, certain and cost-efficient manner pursuant to an agreement with the tenant. As a result, the Receiver is

in a position to provide the Purchaser with vacant possession of the Real Property on closing. Also, the Purchaser's offer for the Real Property is within market value of the Real Property.

The Funds

18. "Property" is broadly defined under section 2 of the Receivership Order. It covers "...all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including the Real Property, and also including all proceeds thereof." The Receiver was appointed over the Property, and pursuant to section 3(a) and (b) respectively of the Receivership Order, its powers include "to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property"; and "to receive, preserve and protect the Property...". After the appointment of the Receiver, two deposits were made in 361's account held at TD in the approximate amount of \$254,000 (the "**Funds**"). The Funds fall within the definition of "Property" and the Receiver has therefore treated the Funds as "Property" in the receivership.

Distribution, Fee Accrual and CRA's Deemed Trust Claims

19. The Receiver seeks approval to distribute funds in accordance with the proposed scheme of distribution set out in the First Report. In particular, the Receiver is requesting permission to make a distribution, as proposed in the First Report, to TD, from the net proceeds of sale from the Transaction.

20. The Receiver has received an opinion from its counsel that TD's security interest relative to the Debtors, including TD's first mortgage on the Real Property, is valid and enforceable.

21. After the completion of the Transaction, certain payments or holdbacks and the distribution to TD, as described in the First Report, the Receiver will take steps to deal with any outstanding matters in order to complete the administration of the receivership.

22. Orders granting distributions, and/or with a reserve or holdback, like the Fee Accrual, to cover work to be done to complete the administration, are routinely granted by courts in insolvency proceedings and receiverships.⁸

23. Generally, under subsection 222(1) and 222(4) of the *Excise Tax Act* and the applicable Regulation under the ETA⁹, deemed trusts that arise in conjunction with the obligation to remit HST/GST under the ETA exist by operation of law. A deemed trust exists continuously from the date the HST/GST is not remitted to the CRA. It attaches to the property of the debtor (and to any proceeds of the property) to the extent of the amount of the unremitted HST/GST. This is generally true whether or not the property is subject to a security interest, except where a secured creditor holds a "prescribed security interest". A prescribed security interest is generally an interest in land or in a building (a mortgage or hypothec) registered against the tax debtor's property *before* the tax debtor failed to remit the HST/GST which gave rise to the deemed trust in favour of the Crown. Under section 2(1) of the Prescribed Security Interest Regulation: "For the purpose of subsection 222(4) of the Act [ETA], a prescribed security interest, in relation to an amount deemed under subsection 222(1) of the Act [ETA] to be held in trust by a person, is that

⁸[*Re Windsor Machine & Stamping Ltd.*](#), 2009 CanLII 39772 (ON SC), at para. 8, Tab 6, BOA; [*Re Abitibiwater Inc.*](#), 2009 QCCS 6461 (CanLII) (QC SC), at paras 70-75, Tab 7, BOA.

⁹ Sections 222(4) and 222(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "ETA") and *Security Interest (GST/HST) Regulations* (SOR (Statutory Orders and Regulations) 2011-55 (the "Prescribed Security Interest Regulation").

part of a mortgage or hypothec securing the performance of an obligation of the person that encumbers land or a building, but only if the mortgage or hypothec is registered pursuant to the appropriate land registration system before the time the amount is deemed under subsection 222(1) of the Act [ETA] to be held in trust by the person."

24. A "prescribed security interest" will give a secured creditor priority over the Crown's deemed trust claim where the criteria have been satisfied under section 222 of the ETA and the Prescribed Security Interest Regulation.

25. The Receiver received from the Canada Revenue Agency (the "**CRA**"), on October 6, 2022 and October 31, 2022 respectively, a deemed trust claim on account of the HST owed by 361 and 363. The 361 deemed trust claim is in the approximate amount of \$22,000 ("**CRA's 361 Deemed Trust Claim**") and the 363 deemed trust claim is in the approximate amount of \$356,000 ("**CRA's 363 Deemed Trust Claim**"). TD's mortgage on the Real Property of 361 appears to have been registered against title before 361 failed to remit the HST, which gave rise to CRA's 361 Deemed Trust Claim.

26. Given that there are no realizations for the estate of 363, there are no funds available for payment of CRA's 363 Deemed Trust Claim. If the Funds of 361 are "Property" pursuant to the Appointment Order, then these funds or part of these funds are available for payment of CRA's 361 Deemed Trust Claim. However, the main asset or Property being realized by the Receiver is the Real Property. The Real Property is owned by 361. As noted above, the registration of TD's first mortgage on title of the Real Property occurred BEFORE 361 failed to remit the HST, which gave rise to CRA's 361 Deemed Trust Claim. Therefore, the Receiver is not recommending that CRA's 361 Deemed Trust Claim be paid from the net

proceeds realized from the Real Property before or in priority to TD's first mortgage granted by 361 over the Real Property with respect to the indebtedness of 361 to TD (instead, CRA's 361 Deemed Trust Claim will be paid from the Funds (assuming the Funds are "Property" under the Receivership Order)). The Receiver expects that there will be insufficient funds from the net sale proceeds to fully pay 361's debt to TD. Similarly, 363's debt to TD will continue to be outstanding. That is, TD will suffer a shortfall or deficiency under its credit facilities with the Debtors, together with any other stakeholders, notwithstanding the Receiver's proposed distribution of the net proceeds to TD. Consequently, there will be no surplus funds from the sale of the Real Property for stakeholders.

Discharge of the Receiver

27. The activities of the Receiver are described in detail in the First Report. After the completion of the Transaction and the payouts and holdback set out in the First Report, the Receiver will have substantially completed its mandate as contemplated by the Receivership Order and the *Bankruptcy and Insolvency Act (Canada)* (the "**BIA**") and respectfully submits that it is appropriate to discharge the Receiver upon the filing of its discharge certificate.

28. Prior to filing its discharge certificate, the Receiver will complete its duties and responsibilities by (i) ensuring that the amounts to be paid, reserved or distributed as ordered by this Court in these proceedings are paid, reserved or distributed; (ii) ensuring that the amounts secured by the Receiver's Charge and Receiver's Borrowings Charge, as described in the First Report, are paid in full; and (iii) preparing and filing its final report pursuant to section 246 of the BIA.

29. Upon the above payment, reservation or distribution of funds being made by the Receiver, there will be no remaining material assets subject to this receivership.

30. The Receiver respectfully submits that it is appropriate to grant a release in its favour. In *Pinnacle v. Kraus*¹⁰, in a decision granting the discharge of a court-appointed receiver and a release on the same terms as sought herein, Pattillo J. wrote:

The release is a standard term in the Commercial List model order of discharge. In my view, in the absence of any evidence of improper or negligent conduct on the part of the Receiver, the release should issue. A receiver is entitled to close its file once and for all.

PART IV – ORDER REQUESTED

31. For the reasons set out above, the Receiver respectfully requests the relief sought in the First Report.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of April, 2023.



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¹⁰ [*Pinnacle v. Kraus*](#), 2012 ONSC 6376 (CanLII), at para. 47, Tab 8, BOA.

SCHEDULE "A"

SCHEDULE “A”

LIST OF AUTHORITIES

1. [Royal Bank of Canada v. Soundair Corporation](#), 1991 CanLII 2727 (Ont. C.A.)
2. [Sierra Club of Canada v. Canada \(Minister of Finance\)](#), 2002 SCC 41 (CanLII) [2002] 2 S.C.R. 522 (SCC)
3. [Sherman Estate v. Donovan](#), 2021 SCC 25 (CanLII)
4. [Royal Bank of Canada v. Walker Hall Winery Ltd.](#), 2011 ONSC 638 (CanLII)
5. [Bank of Nova Scotia v. Diemer](#), 2014 ONCA 851(CanLII) (Ont. C.A.)
6. [Re Windsor Machine & Stamping Ltd.](#), 2009 CanLII 39772 (ON SC)
7. [Re Abitibiwater Inc.](#), 2009 QCCS 6461 (CanLII) (QC SC)
8. [Pinnacle v. Kraus](#), 2012 ONSC 6376 (CanLII)

SCHEDULE "B"

SCHEDULE “B”

TEXT OF STATUTES

Courts of Justice Act, R.S.0.1990, c C.43

Vesting Orders

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

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.

Bankruptcy and Insolvency Act, R.S.C. 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.

Definition of “receiver”

- (2) Subject to subsections (3) and (4), in this Part, “receiver” means a person who
 - (a) is appointed under subsection (1); or

- (b) is appointed to take or takes possession or control — 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 — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver- manager.

Definition of “receiver” — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition “receiver” in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver’s claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of “disbursements”

(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

Sections 222(4) and 222(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "ETA") and *Security Interest (GST/HST) Regulations* (SOR (Statutory Orders and Regulations) 2011-55 (the "Prescribed Security Interest Regulation"))

Trust for amounts collected

- **222 (1)** Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

Meaning of security interest

- **(4)** For the purposes of subsections (1) and (3), a security interest does not include a prescribed security interest.

Prescribed Security Interest Regulation

Prescribed Security Interest

- **2 (1)** For the purpose of subsection 222(4) of the Act, a prescribed security interest, in relation to an amount deemed under subsection 222(1) of the Act to be held in trust by a person, is that part of a mortgage or hypothec securing the performance of an obligation of the person that encumbers land or a building, but only if the mortgage or hypothec is registered pursuant to the appropriate land registration system before the time the amount is deemed under subsection 222(1) of the Act to be held in trust by the person.
- **(2)** For the purpose of subsection (1), if, at a particular time, an amount deemed to be held in trust by the person referred to in that subsection is not remitted to the Receiver General or withdrawn in the manner and at the time provided under Part IX of the Act, the amount of the prescribed security interest referred to in that subsection may not exceed the amount determined by the following formula until such time as all amounts deemed under subsection 222(1) of the Act to be held in trust by the person are withdrawn in accordance with subsection 222(2) of the Act or are remitted to the Receiver General:

$$A - B$$

where

A

is the amount of the obligation secured by the mortgage or hypothec that is outstanding at the particular time; and

B

is the total of

- **(a)** all amounts, each of which is the value determined at the particular time, having regard to all the circumstances including the existence of any deemed trust for the benefit of Her Majesty pursuant to subsection 222(1) of the Act, of all the rights of the secured creditor securing the obligation, whether granted by the person or not, including guarantees or rights of set-off or of

compensation but not including the mortgage or hypothec referred to in subsection (1), and

- **(b)** all amounts applied after the particular time on account of the obligation.
- **(3)** A prescribed security interest under subsection (1) includes the amount of any insurance or expropriation proceeds relating to land or a building that is the subject of a registered mortgage interest or registered hypothecary right, adjusted in accordance with subsection (2), but does not include a lien, a priority or any other security interest created by statute, an assignment or hypothec of rents or leases, or a mortgage interest or hypothecary right in any equipment or fixtures that a mortgagee, hypothecary creditor or any other person has the right absolutely or conditionally to remove or dispose of separately from the land or building.

Coming into Force

3 These Regulations are deemed to have come into force on October 20, 2000.

THE TORONTO-DOMINION BANK
Applicant

-and- **2580363 ONTARIO INC. and 2580361 ONTARIO INC.**
Respondents

Court File No. CV-22-0078521-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
HAMILTON

FACTUM OF THE RECEIVER

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