

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

BETWEEN:

ROYAL BANK OF CANADA

Plaintiff

- and -

HIGHYON ASSETS CORP., HIGHYON REALTY INC., BING PU AND SHUYAN XU

Defendants

FACTUM OF THE RECEIVER

(Motion returnable March 23, 2022)

March 15, 2022

HARRISON PENZA LLP

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Lawyers for the Receiver,
msi Spergel inc.

TO: SERVICE LIST

PART I - NATURE OF MOTION

1. This is a motion by msi Spergel inc., in its capacity as court-appointed receiver and manager (the “**Receiver**”), appointed pursuant to the Order of the Honourable Justice Gilmore dated October 16, 2020 (the “**Appointment Order**”) of the Property (as defined in the Appointment Order) for, *inter alia*, the following relief;
 - (a) An Approval and Vesting Order, approving the Transaction, as contemplated by the Sale Agreement between the Receiver and the Purchaser (as these terms are described and defined in the First Report of the Receiver dated March 14, 2022 (the “**First Report**”), for the sale of the real property known municipally as Suites 302 & 310, 350 Highway 7 East, Richmond Hill, ON and associated parking spots (collectively, the “**Real Property**”) and owned by the Defendant, Highyon Assets Corp. (the “**Debtor**”);
 - (b) Certain ancillary relief (the “**Ancillary Order**”) including:
 - (i) Approval of the First Report and the activities and conduct of the Receiver as detailed therein;
 - (ii) Approval of the Professional Fees (as defined in the First Report) of the Receiver and its counsel;
 - (iii) An Order sealing the Confidential Appendices to the First Report (the “**Confidential Appendices**”) until the completion of the Transaction, or until a further order of this Court;
 - (iv) Approval of the Proposed Distribution to the Plaintiff, Royal Bank of Canada (“**RBC**”); and,
 - (c) The release and discharge of the Receiver following completion of the Transaction.

2. The Transaction involves the sale of the Real Property, which is subject to security held by RBC in the form of, *inter alia*, a first-priority Charge/Mortgage of Land over the Real Property. RBC supports the Transaction and the Receiver's motion for approval of the Transaction.

3. It is the position of the Receiver that the Transaction and the Receiver's actions should be approved, and that the Approval and Vesting Order and Ancillary Order should be issued, for the following reasons:
 - (a) The Sale Process conducted by the Receiver was fair, run with integrity and was commercially reasonable and maximized the return to the Debtor's estate. The Sale Process fully exposed the Real Property to the market, and the Receiver retained Colliers International ("**Colliers**") as its listing agent, a professional and licensed broker that is well known in the market;
 - (b) The Transaction is supported by RBC as senior secured creditor of the Debtor;
 - (c) The purchase price for the Real Property accurately represents the fair market value of same, and the Purchaser's offer was the highest and best offer received by the Receiver in relation to the Real Property;
 - (d) The Confidential Appendices contain commercially sensitive information, including the unredacted Sale Agreement. The Sealing Order ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the Transaction does not close; and,
 - (e) The Professional Fees are reasonable and should be approved.

PART II - THE FACTS

Previous Actions of the Receiver

4. msi Spergel inc. was appointed as Receiver over the Property of the Debtor on October 16, 2020, pursuant to the Appointment Order, as defined above, including the Real Property.

First Report to the Court Submitted by the Receiver dated March 14, 2022 (the "First Report"), para 4 and Appendix "1" thereto

5. The Appointment Order, *inter alia*, authorized the Receiver to market, sell, convey, or transfer the Property or parts of the Property out of the ordinary course of business.

First Report, Appendix "1" thereto, s. 3(k)

6. The Real Property constitutes 14 private offices, a boardroom, a reception area, a kitchenette, and two underground parking spaces located in an office building in the City of Richmond Hill, Ontario.

First Report, para. 3

7. At the time of the Appointment Order, the Debtor was a party to nine (9) tenancy agreements with various tenants of the Real Property (the "**Tenants**"). Four (4) Tenants remain at the Real Property as at the date of the First Report.

First Report, paras. 13-14

8. RBC is a secured creditor of the Debtor, and holds a registered charge as against the Real Property. As at March 10, 2022, the Debtor was indebted to RBC in the amount of \$1,028,435.73 for accrued principal, interest and costs.

First Report, paras. 43-44

RBC's Security and Priorities

9. The Receiver is satisfied, based on the information available to it and subject to the payment of any unregistered interests, deemed trusts, statutory created priority claims and the prior ranking charges under the Appointing Order, that RBC holds valid and enforceable security over the Debtor's Property, including the Real Property, and that RBC has a first claim on the proceeds that will result from the Transaction.

First Report, para. 42 and Appendix "12" thereto

10. RBC also holds a borrowings charge in the sum of \$30,0000, pursuant to the terms of the Appointment Order, as security for monies borrowed by the Receiver in order to fund its activities during the receivership (defined in the First Report as the "**Receiver's Borrowings Charge**").

First Report, paras. 38-40

11. Further, the Receiver has estimated that, in addition to the fees and expenses incurred by the Receiver and its counsel to date, additional fees and expenses not to exceed \$35,000 (exclusive of HST and disbursements) shall be necessary in order for the Receiver and its counsel to complete the administration of the Debtor's estate (the "**Fee Accrual**").

First Report, para. 36

12. The Receiver is not aware of any unregistered interests, deemed trust claims, or other statutory created priority claims, aside from the Borrowing Charge and the Fee Accrual, and the potential accrual of property tax arrears prior to the intended closing of the Sale Transaction.

First Report, para. 45

Sales Process and the Transaction

13. After taking possession of the Real Property, the Receiver obtained two appraisals of same (the "**Appraisals**").

First Report, para. 15 and Confidential Appendices "1" to "3" to the First Report

14. After obtaining the Appraisals, the Receiver did seek listing proposals from real estate agents experienced in the local market, ultimately entering into a Listing Agreement with Colliers dated February 23, 2021.

First Report, paras. 17 and 19, Appendix "4" thereto, and Confidential Appendix "4" to the First Report

15. Prior to retaining Colliers, the Receiver did receive an offer to purchase the Real Property from the second mortgagee of same (the "**Second Mortgagee**"), for a

purchase price that was less than both the initial listing price, and the ultimate sale price for the Real Property. This offer was refused by the Receiver.

First Report, para. 18

16. The Real Property was initially listed at a price of \$1,100,000 on February 23, 2021.

First Report, para. 21

17. Colliers took, *inter alia*, the following steps to expose the Real Property to the market (collectively, the “**Sale Process**”):

- (a) Prepared sales and marketing materials, which were also available online to prospective purchasers;
- (b) Emailed sales and marketing materials to a comprehensive list of buyers; and,
- (c) Distributed marketing and sales materials to a network of commercial real estate agents.

First Report, para. 20, and Appendix “5” thereto

18. Despite the Sale Process, there was little initial interest in the Real Property from prospective purchasers; as a result, and pursuant to the advice of Colliers, the Receiver did authorize several price reductions between April 22, 2021 and February 16, 2022, ultimately reducing the list price of the Real Property to \$799,999.

First Report, para. 21

Purchaser’s Offer and Sale Agreement

19. On February 21, 2022, the Receiver received an offer from the Purchaser with respect to the Real Property, which was accepted, following negotiations, on February 28, 2022, conditional on Court approval. Aside from the offer received from the Second

Mortgagee, the Purchaser's offer was the only offer received by the Receiver, and this offer was lower than that of the Purchaser.

First Report, para. 22, Appendix "6" thereto, and Confidential Appendix "5" to the First Report

20. It is the Receiver's position that the Transaction is commercially reasonable in the circumstances, and represents the best and highest return to the Debtor's estate, and ultimately to RBC and the other stakeholders of the Debtor.

Proposed Distribution

21. The Receiver is seeking to distribute the proceeds of the Transaction pursuant to the Proposed Distribution as recommended and defined by the Receiver in the First Report, following payment of certain amounts in priority to the indebtedness owing by the Debtor to RBC (collectively, the "**Priority Payments**"), which are comprised of:

- (a) Fees and Disbursements of the Receiver and the Receiver's Counsel;
- (b) Any property taxes owing in relation to the Real Property;
- (c) Fee Accrual; and,
- (d) Receiver's Borrowings Charge in the principal amount of \$30,000;

(all as defined in the First Report)

First Report, para. 45

22. The Proposed Distribution as recommended by the Receiver includes a distribution up to the full amount owing to RBC, as no creditors of the Debtor rank in priority to RBC with the exception of any the Priority Payments set out above. The Receiver expects that there will be a shortfall in the amount owing to RBC, such that no funds will be available to secondary creditors of the Debtor.

First Report, para. 45

23. Following the completion of the Transaction and the Proposed Distribution, and with the exception of certain residual or administrative matters (to be paid for out of the Fee Accrual) the Receiver will have completed the administration of the estate of the Debtor and as such requests its discharge, following the filing of the final Receiver's certificate of discharge.

First Report, para. 46

Sealing Order

24. Until such time as the Transaction is complete, or until further order of this Court, the Receiver is of the view that the information and documentation contained in the Confidential Appendices 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.

First Report, para. 32

Fees and Disbursements

25. The current fees and disbursements of the Receiver, inclusive of HST and disbursements, total \$87,622.40 as at March 10, 2022, as set out in the First Report.

First Report, para. 33 and Appendix "9" thereto

26. The current Fees and Disbursements of Harrison Pensa LLP, as counsel for the Receiver total \$19,193.94 as at March 10, 2022, inclusive of disbursements and HST, as set out in the First Report.

First Report, para. 34 and Appendix "10" thereto

27. 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. 35

28. The Receiver's Interim Statements of Receipts and Disbursements is also 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. 37 and Appendix "11" thereto

PART III - ISSUES, LAW AND ARGUMENT

A. The Court's Procedural Powers

29. 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

30. The Receiver's activities 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](#)

31. 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. Approval of the Transaction and the Approval and Vesting Order

32. 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. Absent evidence that a sale is improvident or that there was an abuse of process, it is

respectfully submitted that a Court is to grant deference to the recommendation of the Receiver to sell the Real Property.

Appointment Order, sub-paragraphs 3(j) and 3(k)

Royal Bank of Canada v. Soundair Corp. (1991), 4 OR (3d) 1 (ONCA) (“Soundair”) at paras. 21 and 29

Integrated Building Corp. v. Bank of Nova Scotia (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.)

Battery Plus Inc. (Re.), [2002] O.J. No. 731, at paras. 2-3, 19, 22-23, 34-5

33. This Honourable Court has the jurisdiction to vest in any person an interest in real or personal property. Where a Court is asked to approve a transaction 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.

Courts of Justice Act (Ontario), R.S.O. 1990, c. C-43, s. 100

Soundiar, supra at para. 16

Skyepharm PLC v. Hyal Pharmaceutical Corp. (1999), 12 C.B.R. (4th) 87 (ONSC., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)), (“Skyepharm PLC”) at para. 3

34. Only in exceptional circumstances where there is clear evidence that a sale is improvident or involved an abuse of process will a Court intervene and proceed contrary to the recommendation of its officer, the Receiver.

Soundair, supra at para. 21

Skyepharm PLC, supra at para. 3

35. It is respectfully submitted that the Transaction is provident and followed a thorough, impartial and fair sales process that fully tested the market, as indicated by the following factors:
- (a) The Real Property was exposed to the market for approximately one year, and listed for sale with Colliers, a professional and licensed broker that is well known in the market;
 - (b) Colliers widely marketed the property to prospective purchasers and agents, including online marketing, which fully exposed the Real Property to the market;
 - (c) The Purchaser's offer was the highest and best offer received. There are currently no other offers to consider aside from the lower offer submitted by the Second Mortgagee, and little interest has been expressed in the Real Property; and,
 - (d) The purchase price Transaction is reasonable given the appraised value of the Real Property as set out in the Confidential Appendices.
36. In the circumstances set out above, the Court should conclude that the fair market value of the property is the purchase price in the best offer received in the sale process. As Tzimas, J. said in *Stanbarr Services Limited et al. v. Reichert*, "... the real proof in the pudding lies with actual offers, it does not lie with the appraisals; they are just estimates." As such, it is submitted that the Transaction ought to be approved.
- [B&M Handelman Investments Ltd. v. Mass Properties Inc. \(2009\), 55 CBR \(5th\) 271 \(ONSC \[Commercial List\]\) at para. 13 \("Handelman"\)](#)
- [Stanbarr Services Limited et al. v. Reichert, 2014 ONSC 6435 \(CanLII\), at para. 15](#)
- [Bank of America Canada v. Willann Investments Ltd., 1992 CarswellOnt 1743 \(Ont. Gen. Div. \[Commercial List\], at para. 5](#)
37. RBC, as senior secured creditor, approves of the Transaction. The Sale Process was extensive, transparent, and fair to all parties involved. The Receiver respectfully submits that the Transaction should be approved.

D. The Sealing Order

38. It is submitted that it is just, appropriate and necessary to the integrity of these receivership proceedings and the Transaction 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 Transaction would be prejudicial to the stakeholders of the Debtor in the event that the Transaction does not close.

Jurisdiction

39. 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\(2\)*](#)

40. 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. TDL Group Corp. \(2010\), 100 O.R. \(3d\) 510 \(ONSC\), at para. 34*](#)

Discretion

41. 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 at para. 53-57*](#)

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

42. 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 Transaction and (ii) ensuring that the commercially-sensitive information contained within the Confidential Appendices is not available to the public prior to the close of the Transaction.

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

43. Ontario Courts have recognized the customary practice of seeking a sealing order in the context of a sale approval motion. 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.

[Ron Handelman Investments Ltd. v. Mass Properties Inc., 55 C.B.R. \(5th\) 271 at para. 26](#)

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

E. The Proposed Distribution Should Be Approved

44. 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](#)

45. 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 an interim 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

- 46. 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.
- 47. The Receiver respectfully submits that the Proposed Distribution should be approved.

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

- 48. The Receiver respectfully submits that the Fees and Disbursements of the Receiver and the Receiver's Counsel, as detailed in the First Report, should be approved.
- 49. 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.](#)

50. 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.

G. The Discharge of the Receiver

51. The Receiver has substantially completed its mandate as contemplated by the Appointing Order, the Approval and Vesting Order, the Ancillary Order, and under the *Bankruptcy and Insolvency Act*. Accordingly, the Receiver respectfully submits that it should be discharged and released, following the filing of the final Receiver's certificate of discharge with the Court certifying that all payments contemplated by the First Report (including the Proposed Distribution, and the Priority Payments) have been made (the "**Discharge Certificate**"), and the activities necessary to conclude the receivership proceedings have been completed.
52. 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 Discharge Certificate.
53. 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.

54. 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

55. The Receiver requests the following Orders:
- (a) That the Transaction be approved as recommended by the Receiver and that an Approval and Vesting Order be granted; and
 - (b) That the relief sought in the Ancillary Order be granted, including the Proposed Distribution and the Discharge of the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March, 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. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 OR (3d) 1 (ONCA)
3. *Integrated Building Corp. v. Bank of Nova Scotia* (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.)
4. *Battery Plus Inc. (Re.)*, [2002] O.J. No. 731
5. *Skyepharm PLC v. Hyal Pharmaceutical Corporation*, 1999 CanLII 15007 (ONSC)
6. *B&M Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 55 CBR (5th) 271 (ONSC [Commercial List])
7. *Stanbarr Services Limited et al. v. Reichert*, 2014 ONSC 6435 (CanLII)
8. *Bank of America Canada v. Willann Investments Ltd.*, 1992 CarswellOnt 1743 (Ont. Gen. Div. [Commercial List])
9. *Re Fairview Donut Inc. v. TDL Group Corp.* (2010), 100 O.R. (3d) 510 (ONSC)
10. *Re Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 (SCC)
11. *Sherman Estate v. Donovan*, 2021 SCC 25
12. *Ron Handelman Investments Ltd. v Mass Properties Inc.* (2009), 55 CBR (5th) 271 (ONSC -[Commercial List])
13. *Re Maxtech Manufacturing Inc., RE* (2010), 64 B.C.R. (5th) 239 (ONSC - [Commercial List])
14. *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (ONSC)
15. *Re AbitibiBowater Inc.*, 2009 QCCS 6461, 2009 CarswellQue 14224 (QC. Sup. Ct.)
16. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851
17. *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. *Courts of Justice Act (Ontario), R.S.O. 1990, c. C-43, s. 100*
3. *Courts of Justice Act (Ontario), s. 137(2)*

ROYAL BANK OF CANADA

-and-

HIGHYON ASSETS CORP., *et al.*

Plaintiff

Defendants

Court File No. CV-20-00648781-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE RECEIVER

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