

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

**1951584 ONTARIO INC. (formerly DESANTE FINANCIAL SERVICES INC.) and
CWB MAXIUM FINANCIAL INC.**

Applicants

- and -

**4231 SHEPPARD AVENUE EAST INC., ABU SEIFEIN BRIMLEY PHARMA INC.,
BLESS HUI PHARMA INC., JG WINDSOR INC., JM WESTVIEW PHARMA INC.,
JUBILEE PROPERTY INVESTMENTS INC., MAPLE MEDI PHARMA INC., RIVER
HILL PHARMACY LTD., SJ EAST PHARMA INC., ST. MARY COOKSVILLE
PHARMA INC., ST. MARY THEOTOKOS PHARMA INC., STONEY CREEK
PHARMA INC., TORONTO APOTHECARY PHARMA INC., WESTWAY
HOLDINGS INC. and OLDE WALKERVILLE HOLDINGS INC.**

Respondents

RECEIVER'S FACTUM

**(approval and vesting orders, approval of fees and activities, sealing)
(Motion returnable August 12, 2021)**

August 9, 2021

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Lawyers for msi Spergel Inc. in its capacity as
court-appointed receiver of all of the assets, undertakings
and properties of the Respondents

I. NATURE OF THIS MOTION

1. This is a motion by msi Spergel Inc. in its capacity as court-appointed receiver (the “**Receiver**”) of the Respondents for approval and vesting orders (“**AVOs**”) in respect of the following sale transactions (together, the “**Transactions**”) in which the Receiver is the vendor:

- a. to 2842319 Ontario Inc. as assigned purchaser, dated May 3, 2021, for assets of the Respondent Maple Medi Pharma Inc. (the “**Maple Medi Transaction**”).
- b. to GSV Drugs Inc., dated June 7, 2021, for assets of the Respondent Toronto Apothecary Pharma Inc. (the “**Toronto Apothecary Transaction**”).
- c. to Guide Pharma Inc. as assigned purchaser, dated June 14, 2021, for assets of the Respondent Bless Hui Pharma Inc. (the “**Bless Hui Transaction**”).
- d. to Emily Crossing Inc. as assigned purchaser, dated June 14, 2021, for assets of the Respondent River Hill Pharmacy Ltd. (the “**River Hill Transaction**”).
- e. to Best Companions Pharm Inc. as assigned purchaser, dated June 14, 2021, for assets of the Respondent Stoney Creek Pharma Inc. (the “**Stoney Creek Transaction**”).

(together, the “**Pharmacy Transactions**”)

- f. to 2759232 Ontario Corporation, dated July 11, 2021, for assets of the Respondent 4231 Sheppard Avenue East Inc. (the “**4231 Sheppard Transaction**”).

2. Suggested draft AVOs are provided at tabs 3 to 8 of the Receiver's motion record. The drafts are all in substantial accordance with the Commercial List model approval and vesting order. A comparison is at tab 9.¹
3. This Receiver's motion is also for an order in suggested accordance with the draft filed at tab 10 of the motion record:²
 - a. approving the Receiver's first report dated February 1, 2021³ (the "**First Report**") and second report dated August 4, 2021⁴ (the "**Second Report**"), including the activities described therein and the statements of receipts and disbursements for each of the Respondent estates appended to the Second Report.⁵
 - b. approving the Receiver's fees, costs and expenses as set out in the fee affidavit appended to the Second Report.⁶
 - c. sealing the confidential appendices to the Second Report pending the filing of the applicable Receiver's Certificates (as defined in the relevant AVO) or further court order. The documents for which sealing is sought are:
 - i. in respect of the 4231 Sheppard Transaction: appraisal reports,⁷ unredacted copies of the sale and marketing proposals,⁸ Avison Young's final progress

¹ Receiver's motion record (the "**MR**"), at respective pages 738, 749, 760, 771, 782, 793 and 806.

² Tab 10, page 820 of the MR.

³ A copy of the First Report without appendices is included at page 123 of the MR.

⁴ Tab 2, page 11 of the MR.

⁵ The interim statements of receipts and disbursements are at pages 723 to 737 of the MR.

⁶ The fee affidavit of Mukul Manchanda sworn August 4, 2021 is at page 450 of the MR.

⁷ Second Report, confidential appendix 1 (omitted from the publicly filed MR).

⁸ Second Report, confidential appendix 2 (omitted from the publicly filed MR).

report,⁹ a comparative summary of offers received,¹⁰ and an unredacted copy of the sale agreement,¹¹ and

- ii. in respect of the Pharmacy Transactions: a summary of non-disclosure agreements and offers received¹² and unredacted copies of the sale agreements.¹³

(collectively, the “**Confidential Appendices**”)

II. FACTS

A. The Respondents

4. The Receiver was appointed by orders dated November 25, 2020, January 26, 2021, February 3, 2021, and April 8, 2021 – each adding respondents in this receivership.¹⁴
5. All the Respondents are or were carrying on the business of different retail pharmacies save 4231 Sheppard Avenue East Inc. (“**4231**”), Jubilee Property Investors Inc. and JG Windsor Inc. who are essentially holding companies for real estate where, in the case of 4231, a salon, and, in the case of the other two, pharmacies, are or were operated, as applicable.¹⁵

B. Receiver’s acts

6. To summarize what is more fully set out in the Second Report,¹⁶ since its appointment, the Receiver has stabilized the Respondents’ operations where necessary and completed sale processes for the assets of some of the Respondents. The latter is addressed below. As to

⁹ Second Report, confidential appendix 3 (omitted from the publicly filed MR).

¹⁰ Second Report, confidential appendix 4 (omitted from the publicly filed MR).

¹¹ Second Report, confidential appendix 5 (omitted from the publicly filed MR).

¹² Second Report, confidential appendix 6 (omitted from the publicly filed MR).

¹³ Second Report, confidential appendices 7-11 (omitted from the publicly filed MR).

¹⁴ Second Report, tab 2 (p. 12) of the MR, para. 17. Copies of the appointment orders are included at pages 36, 55, 74 and 94 of the MR.

¹⁵ Second Report, tab 2 (p. 12) of the MR, paras. 1-16.

¹⁶ Second Report, tab 2 (p. 12) of the MR, paras. 25-63.

the former, the Receiver has ensured that under its supervision, the Respondents' pharmacies remain open for business in the normal course, with most of the same personnel and the same hours of operation. To this end, the Receiver has, among other things:

- a. arranged for continued occupation and lease extensions.
 - b. arranged for insurance.
 - c. secured the continuation of pharmaceutical supplies.
 - d. met and re-hired some of the Respondents' employees including technicians and pharmacists, some as independent contractors.
 - e. ensured that Ontario College of Pharmacists ("OCP") requirements were met, including with respect to designated managers and narcotics signers.
7. The Receiver has also liaised with the Canada Revenue Agency as well as with Service Canada in respect of the *Wage Earner Protection Plan Act* and quantified some of the Respondents' liabilities, including as to purchase money security interests and rental arrears.
8. As to those Respondents to whom the Transactions do not relate, reference is made to paragraphs 56 to 63 of the Second Report, which sets out the following:
- a. sale efforts are ongoing in respect of the Respondents Olde Walkerville Holdings Inc. and Abu Seifein Brimley Pharma Inc., which are operating pharmacies.
 - b. five Respondents are non-operating:
 - i. the operations of St. Mary Theotokos Pharma Inc. and Westway Holdings Inc. had already stopped before the receiverships, and

- ii. JM Westview Pharma Inc., SJ East Pharma Inc. and St. Mary Cooksville Pharma Inc. ceased operation during these proceedings. They have been assigned in bankruptcy and the Receiver is investigating the disposition of their assets.
- c. Jubilee Property Investors Inc. and JG Windsor Inc. are single-asset real estate holding companies that seem to be subject to 40-year, non-arms' length leases on terms quite off-market with entities operating pharmacies and/or clinics on the premises. The Receiver is in negotiations with the tenants to purchase the real estate, and is preparing assignments in bankruptcy to preserve a right to challenge the leases if necessary.

C. The Transactions

- 9. The appointment orders are substantially per the Commercial List model order, and authorize and empower the Receiver to market and sell the applicable Respondents' assets.¹⁷
- 10. A summary table of all the transactions is provided at page 9 of this factum.

i. The 4231 Sheppard Transaction

- 11. The Respondent 4231 Sheppard Avenue East Inc. has virtually no operations and its sole asset is the commercial condominium unit located at 4231 Sheppard Avenue East, of which the Receiver seeks approval of the sale. The Receiver concluded that monetizing this Respondent's asset was in the best interests of stakeholders in the circumstances.
- 12. The Receiver obtained two independent appraisals and two sale and marketing proposals from real estate brokers. Avison Young was retained to conduct a sale process which the

¹⁷ Copies of the appointment orders are included at pages 36, 55, 74 and 94 of the MR.

Receiver has found extensive, commercially reasonable and satisfactory. Multiple offers were received, the details of which are set out in the Confidential Appendices. The Receiver identified the 4231 Sheppard Transaction as the best transaction located and locatable. It was the highest offer received and the only one without conditions. The Receiver considers that the terms of the 4231 Sheppard Transaction are fair and reasonable in the circumstances and meet the criteria for approval and vesting orders. The Receiver recommends its approval.¹⁸

13. A copy of the 4231 Sheppard Transactions asset purchase agreement (“**APA**”) with the purchase price and deposit information redacted is filed as part of the public motion record,¹⁹ with the full unredacted copy of the APA being filed as part of the Confidential Appendices to be sealed pending the Receiver’s filing the Receiver’s Certificate.²⁰

ii. The Pharmacy Transactions²¹

14. After stabilizing operations, the Receiver concluded that any reasonable going concern sale transactions located through a commercially reasonable sale process would be an option to consider in the best interest of stakeholders, including creditors, customers, suppliers, and employees. The Pharmacy Transactions are such transactions.
15. The Pharmacy Transactions are for substantially all the assets of the applicable Respondents. They allow for the pharmacies to continue as going concerns. The Receiver obtained sale and marketing proposals from two real estate brokers specialized in the pharmacy industry. A broker with ReMax West Realty Inc. with experience in marketing

¹⁸ Second Report, tab 2 (p. 12) of the MR, paras. 29-36.

¹⁹ MR, p. 192.

²⁰ Confidential Appendix 5.

²¹ Second Report, tab 2 (p. 12) of the MR, paras. 37-44.

pharmacy assets was retained to conduct a sale process which the Receiver has found extensive, commercially reasonable and satisfactory. Online data rooms were set up and accessible to interested parties subject to confidentiality agreements. Depending on the applicable Pharmacy Transaction, between 29 and 43 confidentiality agreements were executed and the Receiver received between 3 and 11 written purchase offers, the details of which are set out in the Confidential Appendices.

16. The Receiver identified each of the Pharmacy Transactions as the best transaction located and locatable for the applicable assets. The Receiver considers that the terms of the Pharmacy Transactions are fair and reasonable in the circumstances and meet the criteria for approval and vesting orders.
17. All the Pharmacy Transactions are conditional on this court's granting the AVOs sought. The Toronto Apothecary, Bless Hui, River Hill and Stoney Creek Transactions are also subject to successful lease assignments. The Bless Hui, River Hill, and Stoney Creek Transactions are further subject to OCP accreditation. The Receiver expects these conditions to all be successfully resolved, and the draft AVOs provide in the normal manner that no vesting occurs unless and until the Receiver files a Receiver's Certificate confirming that all the closing conditions have been fulfilled or waived.
18. A copy of the Pharmacy Transactions APAs with the purchase price and deposit information redacted is filed as part of the public motion record,²² with the full unredacted

²² MR, at pages, respectively, 279, 304, 336, 368 and 400.

copy of the APAs being filed as part of the Confidential Appendices to be sealed pending the Receiver's filing the applicable Receiver's Certificates.²³

iii. Summary table

19. A summary table is set out on the next page. Deposit and consideration details are omitted as they are part of the Confidential Appendices.

[See next page.]

²³ Confidential Appendices 7-11.

	Purchaser	Date of agreement	Purchased Assets	Terms of sale	Legal, etc. costs	Notable outstanding condition(s)	Closing date
4231 Transaction	2759232 Ontario Corporation	July 11, 2021	Sole asset (the condo) [s. 1(x)]	“As is, where is” [s. 5]	Each party pays its own Purchaser pays registration [s. 31]	AVO only	10 business days after AVO [s. 6]
Maple Medi Transaction	2842319 Ontario Inc. (post-incorporation assignment)	May 3, 2021	All interest in Respondent’s retail pharmacy business, including Fixed Assets, Intellectual Property, Lease, and Inventory, but excluding Excluded Assets (capitalized terms as defined) [s. 1.1]	“As is, where is” [s. 2.1]	Each party pays its own [s. 6.1]	AVO only	10 business days after AVO [s. 1.1]
Toronto Apothecary Transaction	GSV Drugs Inc.	June 7, 2021	<i>Id.</i>	<i>Id.</i>	<i>Id.</i>	- AVO - Lease assignment	<i>Id.</i>
Bless Hui Transaction	Guide Pharma Inc. (post-incorporation assignment)	June 14, 2021	<i>Id.</i>	<i>Id.</i>	<i>Id.</i>	- AVO - Lease assignment - OCP accreditation	<i>Id.</i>
River Hill Transaction	Emily Crossing Inc. (post-incorporation assignment)	June 14, 2021	<i>Id.</i>	<i>Id.</i>	<i>Id.</i>	- AVO - Lease assignment - OCP accreditation	<i>Id.</i>
Stoney Creek Transaction	Best Companions Pharm Inc. (post-incorporation assignment)	June 14, 2021	<i>Id.</i>	<i>Id.</i>	<i>Id.</i>	- AVO - Lease assignment - OCP accreditation	<i>Id.</i>

III. ISSUES AND LAW

20. The issues are whether the court should (A) make the AVOs sought, (B) make the sealing order sought, and (C) approve the Receiver's report, activities and fees.

A. Approval and Vesting

21. This court has jurisdiction to make the approval and vesting orders sought, including under s. 100 and 101 of the *Courts of Justice Act*²⁴ (the "CJA"), s. 243 of the *Bankruptcy and Insolvency Act*²⁵ (the "BIA"), and its equitable jurisdiction.

22. It is trite that this court's discretion to make approval and vesting orders is guided by the *Soundair*²⁶ criteria: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently, (ii) the efficacy and integrity of the process by which offers are obtained, (iii) whether there has been unfairness in the working out of the process, and (iv) the interests of all parties. The interests of all parties include those of the purchasers.²⁷

23. Here, for clarity, the sale processes undertaken by the Receiver were not pre-approved by this court by way of a sale process order *per se*. The sale process was undertaken under the receivership order.

24. The caselaw is that a preapproved sale process may be ideal, but it is not necessary.²⁸ The process may even predate any filing.²⁹ The threshold is reasonableness, not perfection; the

²⁴ [R.S.O. 1990, c. C.43.](#)

²⁵ [R.S.C., 1985, c. B-3.](#)

²⁶ *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#) ("*Soundair*"), p. 9.

²⁷ *Reciprocal Opportunities Incorporated v Sikh Lehar International Organization*, [2018 ONCA 713](#), paras. 55-56 and 61-62.

²⁸ *Bloom Lake, g.p.l. (Arrangement relatif à)*, [2015 QCCS 1920](#) ("*Bloom Lake*"), para. 29; *Soundair*, p. 17-18.

²⁹ *Nelson Education Limited (Re)*, [2015 ONSC 5557](#) ("*Nelson*"), paras. 31-33.

same *Soundair* criteria apply.³⁰ Courts have also considered whether additional sale efforts could realistically lend a better result, taking costs and opportunity costs into account. If not, this supports the approval of the transaction at hand.³¹

25. An important factor is that the Receiver is satisfied of the process' thoroughness and fairness in the circumstances. The court "should place a great deal of confidence in the receiver's expert business judgement",³² especially when, as here, the Receiver managed the process from the outset as an officer of the court.³³
26. Here, as recounted above and in the Second Report, the sale process followed the typical sequence developed by the insolvency practice and bench to maximize market exposition as well as fairness, transparency and integrity, while allowing desirable competition: broad advertisement, non-disclosure agreements, due diligence, reception of offers, negotiations, and then a motion for approval and vesting.
27. The processes provided a commercially reasonable amount of time in the circumstances (i.e. approximately 3½ months depending on the transaction³⁴) for prospective purchasers to complete due diligence and submit offers including in respect of specialized, retail and pharmaceutical assets. The processes were public and attracted substantial market interest, as recounted above. Ultimately, the processes led to offers that the Receiver accepted as reasonable, which speaks to the reasonableness of the sale process itself.

³⁰ *Bloom Lake*, para. 59; see also para. 39; *Soundair*, p. 8; see also p. 17-19.

³¹ *Elleway Acquisitions Limited v 4358376 Canada Inc.*, [2013 ONSC 7009](#) ("*Elleway*"), paras. 33-34, 37.

³² *Skyepharma PLC v Hyal Pharmaceutical Corp.*, [1999 CanLII 15007 \(ON SC\)](#), paras. 3, 7.

³³ *Tool-Plas Systems Inc. (Re)*, [2008 CanLII 54791 \(ON SC\)](#), paras. 4, 5, 18.

³⁴ See the listing agreements included in the MR at pages 186 and 249 and following.

28. As to vesting, the Transactions are all subject to this court vesting the purchased assets in the applicable purchaser free and clear. This is a “normal relief given in an asset sale” in insolvency proceedings and it is appropriate in this case for the reasons highlighted above.³⁵

29. Overall, the Receiver recommends the issuance of the sought AVOs.³⁶

30. This court may make the approval and vesting orders sought.

B. Sealing

31. This court has jurisdiction to make the sealing order sought, including under CJA s. 137(2). It is typical attendant relief in sales processes as a matter of “public interest”,³⁷ to protect the integrity of any future sale efforts should any of the Transactions fail to close for any reason. This has been found to “greatly outweigh” any deleterious effects.³⁸

32. The Confidential Appendices contain information that would be highly prejudicial if any future sale efforts were necessary.

33. Copies of the Confidential Appendices are provided as part of the public motion record with minimal redactions where possible, such as full copies of the APAs with only the price and deposit amount redacted.

34. The court may make the sealing orders sought which are appropriate in the circumstances.³⁹

³⁵ *Nelson*, para. 40.

³⁶ Second Report, tab 2 (p. 12) of the MR, para. 68.

³⁷ *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#), para. 84; see also *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC) [[2009 CanLII 39492](#)], paras. 3, 57.

³⁸ *Elleway*, paras. 47-48.

³⁹ Second Report, tab 2 (p. 12) of the MR, para. 45.

C. Approval of First and Second Reports, and Receiver's fees and activities

35. As mentioned by Morawetz J. in *Target*,⁴⁰ a *Companies' Creditors Arrangement Act* case, approval of a court officer's activities and reports is a relief "routinely granted." This is because court approval allows the Receiver to move forward with the next steps in the proceeding, brings the Receiver's activities before the court, allows an opportunity for the concerns of the stakeholders to be addressed and any problems to be rectified, enables the court to satisfy itself that the Receiver's activities have been conducted in a prudent and diligent manner, provides protection for the Receiver not otherwise provided in the BIA or the CJA, and protects the creditors from the delay in distribution that would be caused by re-litigation of steps taken and potential indemnity claims by the Receiver.⁴¹
36. As to the approval of the Receiver's fees, the issue is whether they are fair and reasonable. Caselaw-developed criteria guiding this analysis include (i) the nature and extent of the proceeding, (ii) the complications and difficulties encountered, (iii) the time spent by the court officer, (iv) the professionals' knowledge, experience and skill, (v) the results achieved, and (vi) the costs of comparable services. Further, the caselaw requires that the fees be verified by affidavit disclosing details sufficient to allow a reasonable appreciation.⁴²
37. The Receiver's activities since its appointments have been reported to the court and stakeholders in the First and Second Reports. Those activities are summarized above and

⁴⁰ *Target Canada Co. (Re)*, [2015 ONSC 7574](#).

⁴¹ *Target*, paras. 2 and 23.

⁴² See *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#), paras. 42-54.

are appropriate, timely, commercially reasonable, and in the best interest of the Respondents' estates.

38. Filed with the Second Report is an affidavit of Mr. Mukul Manchanda, licensed insolvency trustee at the Receiver, supported by true copies of detailed bills and confirming that the fees charged are comparable to those charged by msi Spergel Inc. in similar proceedings.⁴³ Included with the Second Report are also the Receiver's interim statements of receipts and disbursements as at June 30, 2021, which are provided for each of the Respondent estates as is appropriate to facilitate stakeholder's review.⁴⁴
39. This court's approval of the First and Second Reports and the Receiver's activities set out therein, including the statements of receipts and disbursements, would provide the desirable stability and other salutary effects noted in *Target*.
40. This court may therefore make the orders sought under this head of relief.

IV. NATURE OF THE ORDERS SOUGHT

41. The Receiver therefore seeks orders in suggested accordance with the draft orders filed at tabs 3 to 8 (AVOs) and 10 (approvals, sealing) of its motion record.

⁴³ The fee affidavit is at p. 450 of the MR.

⁴⁴ The statements of receipts and disbursements are at p. 722 of the MR.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of August, 2021.

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SCHEDULE A – LIST OF AUTHORITIES

1. *Royal Bank of Canada v Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
2. *Reciprocal Opportunities Incorporated v Sikh Lehar International Organization*, [2018 ONCA 713](#)
3. *Bloom Lake, g.p.l. (Arrangement relatif à)*, [2015 QCCS 1920](#)
4. *Nelson Education Limited (Re)*, [2015 ONSC 5557](#)
5. *Elleway Acquisitions Limited v 4358376 Canada Inc.*, [2013 ONSC 7009](#)
6. *Skyepharma PLC v Hyal Pharmaceutical Corp.*, [1999 CanLII 15007 \(ON SC\)](#)
7. *Tool-Plas Systems Inc. (Re)*, [2008 CanLII 54791 \(ON SC\)](#)
8. *Danier Leather Inc. (Re)*, [2016 ONSC 1044](#)
9. *Nortel Networks Corporation (Re)*, [2009] O.J. No. 3169 (ON SC) [[2009 CanLII 39492](#)]
10. *Target Canada Co. (Re)*, [2015 ONSC 7574](#)
11. *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#)

SCHEDULE B – RELEVANT STATUTES

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.

Courts of Justice Act, [R.S.O. 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.

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

(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.

Court lists public

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

Copies

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see.

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Court File No. CV-20-00650853-00CL

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Proceeding commenced in TORONTO

RECEIVER'S FACTUM
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