

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**ROYAL BANK OF CANADA**

Applicant

- and -

**2292319 ONTARIO INC.**

Respondent

**RESPONDING FACTUM OF THE COURT-APPOINTED RECEIVER**  
(Motion of Green Island Trading Company returnable October 13, 2016)

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October 6, 2016

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**PART I: FACTS**

**Overview**

1. msi Spergel inc. ("**Spergel**"), in its capacity as the Court-appointed receiver (in such capacity, the "**Receiver**") of 2292319 Ontario Inc. (the "**Debtor**"), originally brought a motion returnable July 28, 2016 to, *inter alia*, terminate any and all purported leases, subleases and similar arrangements in respect of the premises at 38 Metropolitan Road in Toronto (the "**Premises**") and require any and all occupants of the Premises to deliver-up vacant possession of the Premises to the Receiver (collectively, the "**Original Motion**").

First Report of the Receiver dated July 18, 2016 [First Report], at tab 2 to Transcript Brief dated October 6, 2016 [Transcript Brief].

2. Green Island Trading Company ("**Green Island**") operates a marijuana production site from part of the Premises. It was advised of and served with the Original Motion on July 11 and 19, 2016, respectively, which describes, *inter alia*, several defaults by Green Island under its lease with the Debtor (the "**Green Island Lease**") and the Receiver's repeated requests that Green Island cure same. No one filed materials or appeared for Green Island at the hearing of the Original Motion on July 28, 2016, and the requested relief against Green Island was granted.

Second Report of the Receiver dated August 30, 2016 [Second Report], at tab 1 to Receiver's Responding Motion Record dated August 30, 2016.

Order of the Honourable Justice Wilton-Siegel dated July 28, 2016 [July 28 Order].

3. When the Receiver attempted to enforce the Order, it was contacted by a lawyer on August 7, 2016 who advised that he had been retained by Green Island, and who subsequently filed a motion to set aside the July 28 Order (the "**Green Island Motion**").

Second Report, *supra* para. 2 at para. 1.0.7.

Affidavit of Cuong Tran dated August 2016 at para. 7 [*Tran Affidavit*], tab 4 to Green Island's Motion Record dated August 19, 2016 [Green Island Motion Record].

4. The crux of the Green Island Motion is that Green Island is in "*complete compliance with all terms of the lease*" and that the Receiver is "*alleging trivial and technical non-compliance breaches*."

Tran Affidavit, *supra* para. 3 at paras. 5 and 8.

5. The breaches alleged by the Receiver include late payment of rent, non-payment of hydro arrears, inadequate evidence of insurance and various safety and building code violations. On cross-examination, Green Island's sole affiant admitted, amongst other things, that:

- (a) at no time did he review the Original Motion (or the Receiver's response to the Green Island Motion, for that matter);<sup>1</sup>
- (b) he did not write his affidavit;<sup>2</sup>
- (c) he "*know[s] nothing about the lease*" and had "*never take[n] a look about the lease*" (sic);<sup>3</sup> and
- (d) the defaults alleged by the Receiver do indeed appear to be material.<sup>4</sup>

Second Report, *supra* para. 2 at paras 3.0.3, 3.0.7-3.0.10 and 4.0.1-4.0.6.

Transcript of Cross-Examination of Cuong Tran conducted September 9, 2016 [Transcript], at tab 1 to Transcript Brief, *supra* para. 1.

6. It is the Receiver's position that the Green Island Motion ought to be dismissed with costs.

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<sup>1</sup> Transcript at questions 20-27, 32-40, 51-55, 315-321.

<sup>2</sup> Transcript at questions 104-107.

<sup>3</sup> Transcript at questions 67-70 and 82-95.

<sup>4</sup> Transcript at questions 99-101 and 105-133.

**Background**

7. Spergel was appointed by the Court as the Receiver on March 31, 2016 on the application of Royal Bank of Canada ("**RBC**"), to which the Debtor was indebted in the approximate principal amount of \$4 million. By the date of the Receiver's appointment, the Debtor had failed to pay its indebtedness to RBC, accumulated significant tax arrears to the City of Toronto, failed to account to RBC for rental income and been experiencing ongoing disputes amongst its shareholders.

Order of the Honourable Justice Wilton-Siegel dated March 31, 2016  
[Receivership Order].

First Report, *supra* para. 1 at paras. 1.0.1 and 1.0.4 [First Report].

8. The Premises is essentially the Debtor's sole asset – a two-floor, 87,000 square-foot commercial property located in Scarborough, approximately 45 metres from a church.

First Report, *supra* paras. 1 at para. 1.0.2.

Second Report, *supra* para. 2 at para. 1.0.2. and 4.0.5(c).

9. Apart from the space occupied by Green Island, other spaces at the Premises were/are occupied by:

- (a) another marijuana producer, Universal Trading Company ("**Universal**"), which vacated the Premises in or about early May 2016; and
- (b) a business operating under the name S.K. Food Equipment ("**SK**"), which purportedly subleases space to subtenants named "**Cool Ocean Impex**" and "**Scrap 2 Go**", and which spaces are the subject of related litigation.

First Report, *supra* para. 1 at paras. 1.04, 4.05 and 4.0.14.

10. RBC did not consent to the lease with Green Island or any of the other arrangements with Universal, SK, Cool Ocean Impex or Scrap 2 Go.

First Report, *supra* para. 1 at para. 6.0.1.

11. A total of eight Health Canada Personal-Use Production Licenses for marijuana were originally posted in the spaces occupied by Green Island and Universal. Green Island's affiant, Mr. Tran, testified under cross-examination in the Green Island Motion that five personal use licenses were issued to individuals connected to Green Island, but that no license was issued to Green Island itself.

First Report, *supra* para. 1 at paras. 4.0.5-4.0.6.

Transcript, *supra* para. 5 at questions 159-189.

Answers to Undertakings of Cuong Tran delivered September 16, 2016  
[Answers to Undertakings], at tabs 6-7 to Transcript Brief, *supra*  
para. 1.

### ***The Lease and the Defaults***

12. On April 18, 2016, Green Island provided the Receiver with a copy of the Green Island Lease, being an agreement to lease dated July 20, 2015 between it and the Debtor. Amongst other things, the Green Island Lease:

- (a) requires fixed rent to be paid on the first day of each month;
- (b) requires Green Island to pay for hydro and all other services and utilities, and to make appropriate arrangements with the applicable service providers;
- (c) requires Green Island "*to insure the property and operations of the [t]enant, including insurance for fire and such additional perils as are normally insured against, liability insurance and any other insurance as may be reasonably required by the [l]andlord*";
- (d) is limited to "*PRODUCTION MARIJUANA LICENSE*"; and
- (e) is limited to certain space on the second floor of the Premises.

First Report, *supra* para. 1 at para. 4.0.8.

Exhibit A to Tran Affidavit, *supra* para. 3.

13. Although the Tran Affidavit states that "*Green Island is in complete compliance with all terms of the lease,*" Mr. Tran admitted on cross-examination that he had no basis for making

such a statement, having never even taken a look at the lease (or, for that matter, the Original Motion or the Receiver's response to the Green Island motion).

Tran Affidavit, *supra* para. 3 at para. 5.

Transcript, *supra* para. 5 at questions 20-27, 32-40, 51-55, 92-95 and 315-321.

14. Indeed, Green Island's defaults continued well past the issuance of the July 28 Order.

For example:

- (a) despite the statement in the Tran Affidavit that "[a]ll rent payments have been made, and are up to date," August rent was not paid until August 22 (after its due date of August 1 and service of the Tran Affidavit on August 19); and
- (b) despite the statement in the Tran Affidavit that "[a]ll hydro arrears have been paid in full," arrears of \$78,772 remained outstanding as at the date of the Receiver's responding materials (with cheques not being issued until September 16 and finally delivered to the Receiver the following week).

Tran Affidavit, *supra* para. 3 at paras. 9-10.

Second Report, *supra* para. 2 at para. 3.0.8.

Answers to Undertakings, *supra* para. 11.

15. Moreover, since the Receiver's appointment on March 31, 2016, Green Island has failed to provide the Receiver with evidence of adequate insurance coverage. For example, despite stating that "*Green Island has a valid liability insurance policy*," the Tran Affidavit only includes an insurance certificate as an exhibit. On cross-examination, Mr. Tran undertook to provide a copy of the full insurance policy – the "*insurance booklet*" – but, as Green Island has repeatedly done, only delivered a few select pages.

Tran Affidavit, *supra* para. 3 at para. 11.

Exhibit "E" to Tran Affidavit, *supra* para. 3.

Transcript, *supra* para. 5 at questions 191-203.

Answers to Undertakings, *supra* para. 11.

16. The insurance issue is of particular concern to the Receiver, given both the nature of Green Island's business and the state of its occupied areas. The Receiver engaged CCI Group Inc. ("CCI"), an engineering consulting firm, to carry out a condition assessment of the Green Island occupied space. Amongst other things, CCI reported that:

- (a) continuing modifications by Green Island to the electrical system to facilitate marijuana production appear to have been undertaken without a proper permit and without inspection by the Electrical Safety Authority;
- (b) the condition and use by Green Island of the modified electrical system appear to be in violation of the Toronto Municipal Code and the electrical safety code, and pose a potential life and safety concern;
- (c) the watering system of Green Island's plants is undertaken without adequate waterproofing or drainage systems, such that water may be penetrating the second floor concrete slab and causing corrosion of the underlying steel deck and supporting structure; and
- (d) black stains (likely mold) are located at various parts of the space occupied by Green Island, particularly near the base of partition walls.

**Second Report, *supra* para. 2 at paras. 4.0.4-4.0.5.**

**Property Condition Assessment Report dated August 30, 2016, Appendix 9 to Second Report, *supra* para. 2 [Property Condition Assessment Report].**

17. The above safety issues are further heightened by Green Island's operational location being approximately 45 metres from a church, which appears on its face to violate a zoning by-law requiring medical marijuana production facilities to be at least 70 metres from a place of worship.

**Second Report, *supra* para. 2 at para. 4.0.5.**

**Property Condition Assessment Report, *supra* para. 16.**

**City of Toronto, by-law No. 0403-2014, *By-law to amend Zoning By-law No. 569-2013, as amended, to include permission for a Medical Marihuana Production Facility* (3 April 2014), s. 150.60.40.1(1).**

18. Green Island's counsel had originally advised that "[m]oving any licensed [marijuana] production licenses are on hold in light of the Allard (Federal Court) decision," but has since clarified that "as of August 24th there's a new licensing scheme that permits a framework under which [Green Island] could apply for a new licence [sic] and thereby move." Green Island's counsel further advised that the cost of interrupting the marijuana harvesting cycle would cost Green Island "potentially tens, if not hundreds of thousands of dollars," but faced with the very real risk of eviction (as already ordered by the Court), Mr. Tran was unable to advise on cross-examination if Green Island had initiated any steps to look for or secure alternative space.

Exhibit "B" to Tran Affidavit, *supra* para. 3.

Transcript, *supra* para. 5 at questions 346-349 and 354.

## **PART II: THE ISSUE**

19. The issue for determination is whether the Court should set aside or vary the July 28 Order.

## **PART III: THE LAW AND ARGUMENT**

20. As Green Island has not appealed the July 28 Order, the authority for the Green Island Motion appears to be rule 59.06(2) of the Rules, which provides that:

A party who seeks to,

- (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
- (b) suspend the operation of an order;
- (c) carry an order into operation; or
- (d) obtain other relief than that originally awarded,

may make a motion in the proceeding for the relief claimed.

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 59.06(2) [Rules].



21. In the absence of fraud, the threshold for setting aside or varying an Order is that:
- (a) the evidence could not with reasonable diligence have been discovered sooner;  
and
  - (b) the evidence "might" probably have altered the judgment.

*Hall v. Powers* (2005), 80 O.R. (3d) 462 at para. 12 (S.C.J.), at tab 1 of the Receiver's Brief of Authorities dated October 6, 2016 [Receiver's Brief of Authorities].

*Becker Milk Co. v. Consumers' Gas Co.* (1974), 2 O.R. (2d) 554 at 557 (C.A.), at tab 2 of Receiver's Brief of Authorities.

22. This test is similar to that used to set aside a default judgment, where the moving party's affidavit must explain the default and set forth facts supporting an arguable case on the merits.

*Lenskis v. Roncaioli*, [1992] O.J. No. 1713 at para. 11 (Gen. Div.), affirmed [1996] O.J. No. 381 (C.A.), at tab 3 of Receiver's Brief of Authorities.

23. However categorized, Green Island has satisfied neither branch of its onus.

#### ***Green Island Was Not Reasonably Diligent***

24. Evidence which could reasonably have been tendered prior to judgment cannot be used to afford a party a second opportunity to argue its case.

*Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 at 273c (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 518, at tab 4 of Receiver's Brief of Authorities.

25. Green Island's evidence could, with the most basic degree of diligence, have been advanced sooner. Green Island was both served with the Original Motion and given prior warning of same, but neither served responding materials nor attended at the hearing. It is Mr. Tran's testimony that he received the Original Motion record by email, but chose not to review it. This is not an accidental slip or omission, but an intentional act that ought to bar the Green Island Motion.

Tran Affidavit, *supra* para. 3 at para. 6.

Transcript, *supra* para. 5 at questions 20-27, 32-40, 51-55 and 315-321.

*Edwards Builders Hardware (Toronto) Ltd. v. Aventura Properties Inc.*, [2007] O.J. No. 3445 at paras. 47-48 (citing several authorities) (S.C.J.), at tab 5 of Receiver's Brief of Authorities.

***Green Island's Evidence Is of No Assistance to this Court***

26. Even if the Court were to overlook Green Island's failure to respond to the Original Motion prior to the July 28 Order, Green Island has still failed to put forward proper evidence to assist its cause. Mr. Tran admitted on cross-examination that he had still not reviewed the Original Motion at the time of swearing the Tran Affidavit or attending at the cross-examination. He further admitted that he did not write the Tran Affidavit and knows nothing about the lease or many of the other evidentiary items to which he swore and that are at the heart of the Green Island Motion. It is submitted that Mr. Tran's lack of first-hand knowledge of the material facts in dispute is fatal to the Green Island Motion.

Transcript, *supra* para. 5 at questions 20-27, 32-40, 51-55, 67-70, 82-95, 104-107 and 315-321.

*Valente v. Personal Insurance Co.*, 2010 ONSC 975, [2010] O.J. No. 623 at paras. 24-25, at tab 6 of Receiver's Brief of Authorities.

27. To the extent that Mr. Tran's evidence is of any assistance, it furthers the Receiver's case and the retention of the July 28 Order as against Green Island. For example, appended to Mr. Tran's answers to his cross-examination undertakings were cheques dated September 16, 2016 for hydro arrears of \$78,772 that had accumulated well before the July 28 Order and in respect of which the Receiver had alleged a default on the return of the Original Motion. Similarly, Mr. Tran undertook that he would provide a copy of the "insurance booklet" but did not do so, and the lack of adequate insurance was another alleged default on the return of the Original Motion.

Second Report, *supra* para. 2 at para. 3.0.8.

Answers to Undertakings, *supra* para. 11.

Transcript, *supra* para. 5 at questions 191-203.

28. Had Mr. Tran reviewed the Receiver's responding materials to the Green Island Motion, which he admitted that he had not done, he would have noted the Receiver's additional health and safety concerns with Green Island's occupation of and modifications to the Premises, as

reported by CCI in the Property Condition Assessment Report, in response to which no reply evidence was provided whatsoever.

Second Report, *supra* para. 2 at para. 4.0.5.

Property Condition Assessment Report, *supra* para. 16.

Transcript, *supra* para. 5 at questions 51-55.

**PART IV: CONCLUSION AND ORDER SOUGHT**

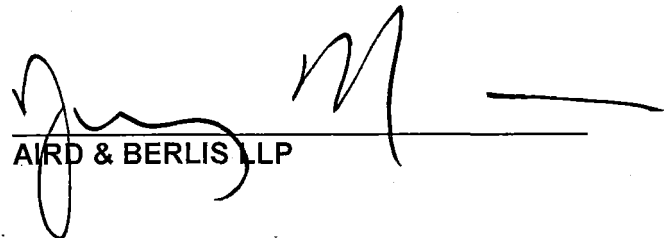
29. Green Island was essentially given a "get out of jail free card" in being offered a second opportunity to make its case before this Court. Green Island has failed to do so. It has come nowhere near meeting its evidentiary onus to set aside the July 28 Order.

30. It is therefore respectfully submitted that the Green Island Motion be dismissed in its entirety with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

October 6, 2016.

per:

A handwritten signature in black ink, appearing to be "J. M. Aird", written over a horizontal line.

AIRD & BERLIS LLP

*Lawyers for the Receiver*

**Tab A**

**SCHEDULE A**

1. *Becker Milk Co. v. Consumers' Gas Co.* (1974), 2 O.R. (2d) 554 (C.A.).
2. *Edwards Builders Hardware (Toronto) Ltd. v. Aventura Properties Inc.*, [2007] O.J. No. 3445 (S.C.J.).
3. *Hall v. Powers* (2005), 80 O.R. (3d) (S.C.J.).
4. *Lenskis v. Roncaioli*, [1992] O.J. No. 1713 (Gen. Div.), affirmed [1996] O.J. No. 381 (C.A.).
5. *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 518.
6. *Valente v. Personal Insurance Co.*, 2010 ONSC 975, [2010] O.J. No. 623.

# Tab B

## SCHEDULE B

### TEXT OF STATUTES, REGULATIONS & BY-LAWS

City of Toronto, by-law No. 0403-2014, By-law to amend Zoning By-law No. 569-2013, as amended, to include permission for a Medical Marihuana Production Facility (3 April 2014).

#### 150.60.40 Building Requirements

##### 150.60.40.1 General

###### (1) Separation Distance

A lot with a medical marihuana production facility must be:

(A) at least 70 metres from a lot in a:

- (i) Residential Zone category;
- (ii) Residential Apartment Zone category;
- (iii) Commercial Zone category;
- (iv) Commercial Residential Zone category;
- (v) Commercial Residential Employment Zone category;
- (vi) Institutional Zone category; and
- (vii) Open Space Zone category; and

(B) at least 70 metres from a lot with a:

- (i) public school;
- (ii) private school;
- (iii) place of worship; and
- (iv) day nursery.

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