

Court File No. CV-16-11331-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**ROYAL BANK OF CANADA**

Applicant

- and -

**2292319 ONTARIO INC.**

Respondent

**SUPPLEMENTARY FACTUM OF THE COURT-APPOINTED RECEIVER  
(Motion of the Receiver returnable October 13, 2016)**

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
Suite 1800, Box 754  
181 Bay Street  
Toronto, Ontario  
M5J 2T9

**Sanjeev P. Mitra (LSUC No. 37934U)**  
Tel: (416) 865-3085  
Fax: (416) 863-1515  
Email: [smitra@airdberlis.com](mailto:smitra@airdberlis.com)

**Jeremy Nemers (LSUC # 66410Q)**  
Tel: (416) 865-7724  
Fax: (416) 863-1515  
Email: [jnemers@airdberlis.com](mailto:jnemers@airdberlis.com)

*Lawyers for the Receiver*

October 6, 2016

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

BETWEEN:

**ROYAL BANK OF CANADA**

Applicant

- and -

**2292319 ONTARIO INC.**

Respondent

**SUPPLEMENTARY FACTUM OF THE COURT-APPOINTED RECEIVER**  
(Motion of the Receiver returnable October 13, 2016)

**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**"), 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 Receiver's Motion Record dated July 19, 2016 [Motion Record].

2. SK Food Equipment ("**SK**") purports to sub-lease certain space at the Premises to businesses operating under the names of "**Cool Ocean Impex**" and "**Scrap to Go**". Each of SK, Cool Ocean Impex and Scrap to Go (the "**SK Parties**") was served with the Original Motion on July 19, 2016, which describes, *inter alia*, several defaults by SK under its head leases with the Debtor (the "**SK Leases**") and the Receiver's repeated requests that SK cure same. No one filed materials on behalf of any of the SK Parties, but a representative from SK appeared at the initial return of the Original Motion on July 28, 2016 to oppose the relief sought against the SK Parties.

First Report, *supra* para. 1.

3. At the initial return of the Original Motion on July 28, 2016, the Honourable Justice Wilton-Siegel granted SK an adjournment to allow it further time to cure its defaults under the SK Leases. Without limiting the generality of the foregoing, the July 28 Order expressly provides that “*the [l]ease in respect of Scrap to Go shall be terminated if insurance for its portion of the Premises as required by paragraph 7 of the relevant [l]ease has not been provided to the Receiver by August 7, 2016.*”

Order of the Honourable Justice Wilton-Siegel dated July 28, 2016 at para. 8 [July 28 Order].

Third Report of the Receiver dated September 30, 2016 [Third Report], at tab 1 to Receiver’s Supplementary Motion Record dated September 30, 2016.

4. The requisite insurance was not provided to the Receiver by August 7, 2016 and still remains outstanding, despite repeated requests from the Receiver to both SK and SK’s insurance broker. Moreover, additional defaults continue to exist with respect to the SK Leases, including, without limitation, both the failure and refusal to pay hydro arrears.

Third Report, *supra* para. 3 at para. 3.0.2-3.0.19.

5. It is the Receiver’s position that the relief in the Original Motion as against the SK Parties ought now to be granted.

### **Background**

6. 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].

7. The Premises is essentially the Debtor's sole asset – a two-floor, 87,000 square-foot commercial property located in Scarborough.

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

Third Report, *supra* para. 3 at paras. 1.0.2.

8. Apart from the spaces occupied by the SK Parties, other space at the Premises is occupied by Green Island Trading Company, which occupation is the subject of related litigation.

Third Report, *supra* para. 3 at paras. 1.0.4-1.0.5.

9. RBC did not consent to any of the SK Leases or any of the purported sub-leases with Cool Ocean Impex or Scrap 2 Go, which consent is required by the mortgage with the Debtor.

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

Appendix 8 to the Second Report of the Receiver dated August 30, 2016  
[Second Report], at tab 1 to Receiver's Responding Motion Record  
dated August 30, 2016.

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

10. On April 18, 2016, SK provided the Receiver with a copy of the SK Leases, being agreements to lease dated August 17, 2012, November 26, 2012 and February 18, 2014. The Receiver understands that SK purportedly sub-let the spaces referenced in the first two SK Leases to Cool Ocean Impex, a frozen seafood and lobster distribution business, and purportedly sub-let the space referenced in the third SK Lease to Scrap to Go, a scrap metal recycling business.

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

Third Report, *supra* para. 3 at paras. 1.0.5-1.0.6.

11. Amongst other things, each of the SK Leases:

- (a) requires SK to reimburse the landlord at the end of each month for hydro at the same rate that the landlord pays to the hydro service provider;

- (b) requires SK to obtain and maintain insurance, at SK's expense, "*as is normally obtained by a tenant of similar premises*";
- (c) requires SK to provide the landlord with proof of such insurance;
- (d) requires SK to "*complete any additional work necessary to prepare the [p]remises for the [t]enant's use at the [t]enant's expense*";
- (e) is limited to "*Warehouse for frozen food and vegetable, show room and office*" in the case of the first two SK Leases (the "**Cool Ocean Impex Spaces**") and "*Storage of waste metal including but not limited to used computers, T.V.s, automotives*" in the case of the third SK Lease (the "**Scrap to Go Space**");
- (f) permits assignment by SK, in which case SK "*shall remain liable for all obligations*"; and
- (g) permits the landlord to terminate the SK Leases if a default thereunder goes uncured for five days after delivery of a notice of default.

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

Appendices 5-6 to First Report.

Third Report, *supra* para. 3 at para. 1.0.6.

Appendix 2 to Third Report.

12. SK provided the Receiver with a certificate of insurance and commercial insurance policy on May 25, 2016 and June 16, 2016, respectively. The description of business operations stated in both documents is "*cold storage of customer's perishable goods, office and warehouse.*" Neither the certificate of insurance nor the commercial insurance policy makes any reference to a scrap metal business or metal recycling operations.

Third Report, *supra* para. 3 at para. 3.0.3.

13. On August 4, 2016, and August 17, 2016, subsequent to the July 28 Order requiring SK to provide evidence of adequate insurance, SK provided the Receiver with, respectively, a further certificate of insurance and commercial insurance policy, this time in the name of Scrap to Go.

The Receiver confirmed by way of a corporate profile search that Scrap to Go was not a legally incorporated entity and advised SK accordingly. The Receiver also obtained permission to speak to SK's insurance broker to confirm whether the tenant liability rider would cover the portion of the Premises occupied by Scrap to Go given that the business is outside the scope of use contemplated by SK's policy.

**Third Report, *supra* para. 3 at paras. 3.0.4-3.0.5.**

14. The Receiver has contacted SK's insurance broker on multiple occasions to confirm whether or not SK's insurance coverage extends to the space occupied by Scrap to Go. As at the time of the Third Report, the Receiver has not received a response, and the July 28 Order expressly provides that *"the [l]ease in respect of Scrap to Go shall be terminated if insurance for its portion of the Premises as required by paragraph 7 of the relevant [l]ease has not been provided to the Receiver by August 7, 2016."*

**Third Report, *supra* para. 3 at paras. 3.0.6-3.0.7.**

15. In addition, SK has not remitted any payment for its proportionate share of hydro arrears. It has flatly refused to pay its share for the period between March 31, 2016 and July 21, 2016, which the Receiver has calculated as being \$48,351 (pursuant to the meter reading comparison exercise discussed at some length in the Third Report), offering instead to pay \$35,576 to cover all its hydro obligations to September 9, 2016. SK has provided no principled basis for such calculation as at the date of the Third Report, the Receiver is not in possession of sufficient funds to pay the current arrears owing to Toronto Hydro and SK has threatened to bring legal action against the Receiver if hydro services are interrupted. Toronto Hydro has indicated that it will defer terminating electrical services to the Premises until October 17, 2016.

**Third Report, *supra* para. 3 at paras. 3.0.10-3.0.16.**

16. The Receiver also engaged CCI Group Inc. ("CCI"), an engineering consulting firm, to carry out a condition assessment of the SK spaces at the Premises. Amongst other things, CCI reported that:

- (a) fireproofing material at the underside of the second floor framing is either damaged or missing;
- (b) in the portion of the space occupied by Cool Ocean Impex, a tunnel has been constructed purportedly without a building permit;
- (c) there is no back flow prevention system to the water supply which is a requirement of the Toronto Municipal Code;
- (d) modifications by SK and/or its purported sub-tenants to the electrical system to facilitate the operations of Cool Ocean Impex and Scrap to Go appear to have been undertaken without a proper permit and without inspection or approval by the Electrical Safety Authority;
- (e) the condition and use by SK and/or its purported sub-tenants 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;
- (f) interior walls erected by SK and/or its purported sub-tenants to separate the Cool Ocean Impex and Scrap to Go spaces do not provide adequate fire safety between suites in accordance with the Ontario Building Code;
- (g) lighting has been removed from the portion of the warehouse occupied by Cool Ocean Impex, leaving the area with inadequate lighting in violation of the Toronto Municipal Code;
- (h) improper frost protection between the base of the Cool Ocean Impex walk-in coolers and the ground floor concrete slab is allowing water to penetrate and cause corrosion of the underlying slab;

- (i) a failure to keep the space in a clean and sanitary condition contrary to the Toronto Municipal Code;
- (j) the existence of black stains (likely mold) at various locations of the space occupied by Cool Ocean Impex, which appears to be a further violation of the Toronto Municipal Code; and
- (k) impact damage to a wall, which has not been repaired in accordance with the Toronto Municipal Code.

Third Report, *supra* para. 3 at paras. 3.0.17-3.0.18.

Appendix 11 to Third Report.

## **PART II: THE ISSUE**

17. The issue for determination is whether the Court should grant the relief sought in the Original Motion as against the SK Parties.

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

18. Continued opposition to the relief sought against the Scrap to Go Space would constitute an impermissible collateral attack against the July 28 Order, which expressly provides that *"the [l]ease in respect of Scrap to Go shall be terminated if insurance for its portion of the Premises as required by paragraph 7 of the relevant [l]ease has not been provided to the Receiver by August 7, 2016."* No such insurance was provided to the Receiver by August 7, 2016, or by any date.

July 28 Order, *supra* para. 3 at para. 8.

19. The rule against collateral attack *"prevents a party from undermining previous orders issued by a court or administrative tribunal."* The rationale behind the rule is to prevent a party from avoiding the consequences of an order issued against it, unless that party turns to the



direct attack procedures that are open to it (i.e. appeal in this case). There has been no attempt to appeal the July 28 Order, and the permitted time for such appeal has passed.

*Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 at paras. 71-72, at tab 1 of the Receiver's Brief of Authorities (for Supplementary Factum) dated October 6, 2016 [Supplementary Brief of Authorities].

*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at para. 33, at tab 2 of Supplementary Brief of Authorities, *supra*.

20. Moreover, and quite apart from the insurance default, there remain several additional and continuing defaults under all the SK Leases. Despite benefiting from the adjournment of the Original Motion on July 28, 2016, SK has failed to cure these defaults and has expressly refused to pay the full amount of its hydro arrears. As SK therefore does not come before the Court with clean hands, no further indulgence ought to be given for SK to cure what it has already advised it will not do.

#### **PART IV: CONCLUSION AND ORDER SOUGHT**

21. The July 28 Order gave the SK Parties a second opportunity to remedy the defaults under the SK Leases. They have failed to do so. SK has indicated that it will not do so. SK has failed to provide a principled basis for same or why it or any of the SK Parties should be entitled to remain in possession.

22. It is therefore respectfully submitted that the relief sought in the Original Motion regarding the SK Leases is appropriate and ought to be granted.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

October 6, 2016.

per:   
AIRD & BERLIS LLP  
Lawyers for the Receiver

**Tab A**

**SCHEDULE A**

1. *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629.
2. *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.

27231100.1

ROYAL BANK OF CANADA

- and -

2292319 ONTARIO INC.

Applicant

Respondent

Court File No. CV-16-11331-00CL

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)  
PROCEEDING COMMENCED AT TORONTO

**SUPPLEMENTARY FACTUM OF THE RECEIVER**  
(Motion of the Receiver returnable October 13, 2016)

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
Suite 1800, Box 754  
181 Bay Street  
Toronto, ON M5J 2T9

**Sanjeev P. Mitra (LSUC No. 37934U)**  
Tel: (416) 865-3085  
Fax: (416) 863-1515  
Email: [smitra@airdberlis.com](mailto:smitra@airdberlis.com)

**Jeremy Nemers (LSUC # 66410Q)**  
Tel: (416) 865-7724  
Fax: (416) 863-1515  
Email: [jnemers@airdberlis.com](mailto:jnemers@airdberlis.com)

*Lawyers for the Receiver*