

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

B E T W E E N:

EQUITABLE BANK

Applicant

and

JAMES GAULT HOLDINGS INC. and 1606077 ONTARIO INC.

Respondents

**FACTUM OF THE RECEIVER
(Returnable January 16, 2024)**

January 12, 2024

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto ON M5H 3S1

Jeffrey Carhart (LSO#:23645N)
Tel: 416-595-8615
jcarhart@millerthomson.com

Gavin H. Finlayson (LSO#: 44126D)
Tel: 416.595.8619
gfinlayson@millerthomson.com

Monica Faheim (LSO#: 82213R)
Tel: 416-597-6087
mfaheim@millerthomson.com

Lawyers for the Receiver, MNP Ltd.

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

B E T W E E N:

EQUITABLE BANK

Applicant

and

JAMES GAULT HOLDINGS INC. and 1606077 ONTARIO INC.

Respondents

**SERVICE LIST
(UPDATED JANUARY 4, 2024)**

TO: **WEIRFOULDS LLP**
66 Wellington Street West, Suite 4100
P.O. Box 35, Toronto-Dominion Centre
Toronto ON M5K 1B7

Wojtek Jaskiewicz (LSO # 49809L)
Tel: 416-365-1110
wjaskiewicz@weirfoulds.com

Lawyers for the Applicant

AND TO: **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Jeffrey Larry (LSO #44608D)
Tel.: 416-646-4330
jeff.larry@paliareroland.com

Daniel Rosenbluth (LSO# 71044U)
Tel.: 416-646-6307
douglas.montgomery@paliareroland.com

Lawyers for the Respondents

AND TO: **MNP LTD.**
1 Adelaide Street East, Suite 1900
Toronto, Ontario M5C 2V9

Deborah Hornbostel
Tel: 416-515-3885
Deborah.hornbostel@mnp.ca

Receiver of James Gault Holdings Inc. and 1606077 Ontario Inc.

AND TO: **MILLER THOMSON LLP**
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto ON M5H 3S1

Jeffrey Carhart (LSO#:23645N)
Tel: 416-595-8615
jcarhart@millerthomson.com

Gavin H. Finlayson (LSO#: 44126D)
Tel: 416.595.8619
gfinlayson@millerthomson.com

Monica Faheim (LSO#:82213R)
Tel: 416-597-6087
mfaheim@millerthomson.com

Lawyers for MNP Ltd., in its capacity as the Receiver of James Gault Holdings Inc. and 1606077 Ontario Inc. right below MNP

AND TO: **MNP Ltd.**
1 Adelaide Street East, Suite 1900
Toronto, Ontario M5C 2V9

Deborah Hornbostel
Tel: 416-515-3885
Deborah.hornbostel@mnp.ca

Receiver

AND TO: **MSI SPERGEL INC.**
200 Yorkland Blvd.
Suite 1100
Toronto, ON M2J 5C1

Mukul Manchanda
Tel: 416-498-4314
mmanchanda@spergel.ca

Receiver of 1871 Berkeley Events Inc., 1175484 Ontario Inc., 111 King Street East Inc., 504 Jarvis Inc. and Southline Holdings Inc.

AND TO: **HARRISON PENZA LAWYERS**
130 Dufferin Avenue
Suite 1101
London, ON N6A 5R2

Timothy C. Hogan (LSO #36553S)
thogan@harrisonpensa.com

Robert Danter (LSO #69806O)
rdanter@harrisonpensa.com

Tel: 519-679-9660

Lawyers for the Receiver, msi Spergel Inc.

AND TO: **DEPARTMENT OF JUSTICE**
120 Adelaide Street West, Suite 400
Toronto, Ontario M5H 1T1

AGC-PGC.Toronto-Tax-Fiscal@justice.gc.ca
Tel: 647-256-7459

Lawyers for Canada Revenue Agency

AND TO: **MINISTER OF FINANCE**
Legal Services
777 Bay Street, 11thFloor
Toronto, Ontario M5G 2C8

Insolvency.Unit@ontario.ca
Tel: 416-941-8817

AND TO: **CITY OF TORONTO**
Revenue Services
5100 Yonge St.,
Toronto, ON M2N 5V7

propertytax@toronto.ca
Tel: 416-338-0889

Email Service List:

wjaskiewicz@weirfoulds.com; jeff.larry@paliarerland.com;
douglas.montgomery@paliarerland.com; Deborah.hornbostel@mnp.ca;
jcarhart@millერთhompson.com; gfinlayson@millერთhompson.com;
mfaheim@millერთhompson.com; mmanchanda@spergel.ca; thogan@harrisonpensa.com;
rdanter@harrisonpensa.com; AGC-PGC.Toronto-Tax-Fiscal@justice.gc.ca;
Insolvency.Unit@ontario.ca; propertytax@toronto.ca;

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

B E T W E E N:

EQUITABLE BANK

Applicant

and

JAMES GAULT HOLDINGS INC. and 1606077 ONTARIO INC.

Respondents

TABLE OF CONTENTS

	Page No.
PART I - INTRODUCTION	1
PART II - SUMMARY OF FACTS	2
PART III - STATEMENT OF ISSUES.....	8
A. THE SALE PROCESS SHOULD BE APPROVED.....	8
B. RECEIVER’S BORROWINGS CHARGE SHOULD BE INCREASED	11
C. THE ACTIVITIES AND FEES OF THE RECEIVER, AND THE FEES OF ITS LEGAL COUNSEL SHOULD BE APPROVED.....	12
D. THE CONFIDENTIAL APPENDICES SHOULD BE SEALED.....	14
PART IV - ORDER REQUESTED	15

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

B E T W E E N:

EQUITABLE BANK

Applicant

and

JAMES GAULT HOLDINGS INC. and 1606077 ONTARIO INC.

Respondents

MOVING PARTIES' FACTUM

PART I - INTRODUCTION

1. MNP Ltd. was appointed receiver (in such capacity, the “**Receiver**”) of James Gault Holdings Inc. (“**Gault**”) and 1606077 Ontario Inc. (“**160**” and collectively, with Gault, the “**Debtors**”) pursuant to an order (the “**Appointment Order**”) of the Ontario Superior Court of Justice (Commercial List) (the “**Court**”) dated August 8, 2023.
2. The Debtors’ property comprises principally of real property located at the following municipal addresses: 301 Queen Street East, Toronto (“**301 Queen**”) and 305-311 Queen Street East, Toronto (“**305-311 Queen**”, and together with 301 Queen, the “**Real Property**”).
3. The Receiver seeks an order (“**Sale Process Approval Order**”), among other things:
 - (a) Approving the Receiver’s proposed sale process to market and sell the Real Property, including approval of the template Agreement of Purchase and Sale and form of Non-Disclosure Agreement;
 - (b) Authorizing the Receiver to enter into the Listing Agreement (as defined below);

- (c) Approving an increase in the borrowing limit of the Receiver to \$900,000 (from \$500,000) (the “**Receiver’s Borrowings Charge**”);
- (d) Approving the Receiver’s Interim Statement of Receipts and Disbursements as at December 31, 2023;
- (e) Approving the activities of the Receiver, as described in the first report of the Receiver dated January 5, 2024 (the “**First Report**”), and the fees and disbursements of the Receiver and the Receiver’s legal counsel, Miller Thomson LLP; and
- (f) Sealing the Confidential Appendices to the First Report.

4. The Receiver recommends that the Sale Process (as defined below) be approved. It will be conducted in conjunction with an experienced real estate agent. It will encourage a competitive environment for the solicitation of offers and maximize the exposure of the Real Property by jointly marketing it with the adjacent Berkeley Church Property (as defined below). The Sale Process provides flexibility and transparency for prospective purchasers and has the support of the Debtors’ senior secured creditor.

PART II - SUMMARY OF FACTS

5. All terms capitalized but not defined herein are as defined in the First Report. The full facts giving rise to the receivership proceedings are set out in further detail in the First Report and the Supplement to the First Report dated January 12, 2024 (the “**Supplement to the First Report**”).

6. The Appointment Order was granted on the application commenced by Equitable Bank (“**EQ Bank**”) as the Debtors were in default of their secured obligations to EQ Bank. As at the

end of April, 2023, the outstanding indebtedness of the Debtors to EQ Bank was \$21,674,000 with interest and other charges continuing to accrue.¹

7. There are unique and complex real estate issues concerning the Real Property, including, among other things:

- (a) a zoning by-law order issued by the Ontario Land Tribunal which sets out specific requirements for site plan approval, including as set out in certain agreements with the City of Toronto and conditions set out therein;²
- (b) the adjacent property to the east of the Real Property at 315-317 Queen Street East has an existing church (the “**Berkeley Church**”) onsite that is designated as a heritage site (the “**Berkeley Church Property**”). This property is owned by 1175484 Ontario Inc. (“**117**”), a company owned and controlled by the same principal, who owned and controlled the Real Property. 117 was placed into receivership on the application of Toronto Dominion Bank pursuant to the Order of Justice Steele dated July 31, 2023. The Receiver of 117 is msi Spergel Inc. (“**MSI**”);³
- (c) the property to the south of the Real Property at 132 Berkeley Street, Toronto (the “**Concert Property**”) is owned by Concert Real Estate Corporation and OPG132 Holdings Inc. (collectively “**Concert**”). There are certain agreements between the

¹ First Report at para 3, Tab 2 to the Motion Record of the Receiver dated January 5, 2024 (the “**Motion Record**”).

² First Report at para 2, Tab 2 to the Motion Record.

³ First Report at para 9, Tab 2 to the Motion Record.

Debtors and Concert which set out various requirements for the development of the Real Property;⁴

- (d) issues that would arise if a potential purchaser developed the Real Property without the Berkeley Church Property, including the requirement that the truck turnaround bay must be granted as an easement to Concert, the potential that the City of Toronto may require a conservation plan and a Heritage Easement Agreement, among other issues;⁵ and
- (e) other complexities due to the current design of the proposed development.⁶

8. Mr. Dough Wheler (“**Wheler**”) is the sole officer and director of the Debtors, and of 117.

9. The Receiver, concurrently with MSI, is seeking the Court’s approval of a sale process (the “**Sale Process**”) set out in detail in the First Report. The following is a summary of the features of the proposed Sale Process:⁷

- (a) the process shall be administered jointly with MSI given the potential for a greater recovery for both the Real Property and the Berkeley Church Property;
- (b) Colliers will be retained as the listing broker on a Multiple Listing Service (“**MLS**”) listing;
- (c) the listing will not specify an asking price;

⁴ First Report at para 10, Tab 2 to the Motion Record.

⁵ First Report at paras 21-22, Tab 2 to the Motion Record.

⁶ First Report at paras 20-22, Tab 2 to the Motion Record.

⁷ First Report at paras 24-34, Tab 2 to the Motion Record.

- (d) all offers received for each respective property shall be kept confidential and shall not be shared with the other receiver without prior written consent;
- (e) each receivership estate shall maintain its absolute discretion to accept an offer received, regardless of whether the offer is made to one or both receivership estates;
- (f) the form of template agreement of purchase and sale (“**APS**”) and non-disclosure agreement (“**NDA**”) used in the sale process shall be substantially in the form attached as Appendices “E” and “F” to the First Report;
- (g) As soon as possible following Court approval Colliers will list the Real Property and distribute marketing material to prospective purchasers, and invite prospective purchasers to express their interest in making an offer pursuant to the terms of the Sale Process;
- (h) Colliers will call for offer submissions approximately eleven weeks following court approval of the process (the “**Bid Deadline**”). The Bid Deadline was revised, as indicated in the Supplement to the First Report, in consultation with Mr. Wheler, Colliers and MSI. This was done to address concerns expressed by Mr. Wheler as to the length of the initial proposed Sale Process set out in the First Report;⁸
- (i) Upon execution of the NDA, the Receiver, in conjunction with Colliers, will determine if the potential bidder has a bona fide interest in pursuing a transaction and thus deem them a “**Qualified Bidder**”;

⁸ Supplement to the First Report of the Receiver dated January 12, 2024.

- (j) Colliers in conjunction with the Receiver will prepare a confidential information memorandum (“**CIM**”) which shall include information considered relevant to the Sale Process. The CIM shall be provided to Qualified Bidders;
- (k) The Receiver and Colliers will provide each Qualified Bidder access to a jointly maintained electronic data room (“**Data Room**”), which will be administered by Colliers. The Data Room shall include due diligence materials;
- (l) A binding APS, based on the template APS provided by the Receiver, must be submitted by the Qualified Bidder to Colliers in writing by the Bid Deadline;
- (m) The Receiver, in consultation with Colliers, may extend the Bid Deadline once. If the Bid Deadline is extended, Colliers will promptly notify all Qualified Bidders;
- (n) A binding Agreement of Purchase and Sale must meet the requirements and conditions set out at paragraph 34(i) of the First Report;
- (o) Each binding and compliant APS will be evaluated by the Receiver, and the Receiver may identify the highest bidder for the Real Property (the “**Successful Bid**”);
- (p) If no binding APS is identified that the Receiver is prepared to recommend to the Court for approval, the Receiver will report in the outcome of the Sale Process and provide its recommendation on next steps;
- (q) The Receiver shall have the right to enter into an exclusive transaction in respect of the Real Property outside of the Sale Process prior to the selection of the Successful Bidder;

- (r) The sale of the Real Property shall be on an “as is, where is” basis;
- (s) The Receiver shall have the right to deny or limit any parties’ access to confidential information at any time, if in the Receiver’s view, in its sole discretion, a party is not likely to be serious about submitting a bid for the Real Property or may use the information for a collateral purpose;
- (t) The Receiver shall not be under any obligation to accept the highest or best (or any) bid made, and any selection of the Successful Bid(s) shall be entirely in the discretion of the Receiver; and
- (u) EQ Bank shall be entitled to submit a credit bid, provided that such credit bid is on terms and conditions acceptable to the Receiver.

Receiver’s Borrowings Charge

10. In accordance with paragraph 21 of the Appointment Order, the Receiver has borrowed \$98,000 by way of Receiver’s Certificates to date, used to fund outstanding property taxes, insurance premiums, security, maintenance and utility charges relating to the Real Property. To date no professional fees have been paid. The Receiver anticipates requiring an additional \$400,000 to its borrowing limited to advance the receivership in the manner described in the First Report, including carrying out the Sale Process.⁹

11. Given the complexities associated with the Real Property it is prudent for the Receiver to have additional borrowing room to deal with contingencies.

⁹ First Report at para 38, Tab 2 to the Motion Record.

12. The Receiver is seeking an order increasing the Receiver's borrowing limit from \$500,000 to \$900,000, and confirming the Receiver's Borrowings Charge applies and extends to any increased borrowings of the Receiver.

PART III - STATEMENT OF ISSUES

13. This factum addresses the following issues:

- (a) whether the court should approve the proposed Sale Process;
- (b) whether the court should approve the increase to the Receiver's Borrowings Charge;
- (c) whether the court should approve the activities of the Receiver, as set out in the First Report, and the professional fees of the Receiver and its legal counsel;
- (d) whether the court should seal the confidential appendices to the First Report.

A. THE SALE PROCESS SHOULD BE APPROVED

14. The court has jurisdiction to approve the activities of a receiver appointed by it either by the terms of the appointing order or through the inherent jurisdiction of the court to supervise the conduct of court appointed officers.¹⁰

15. The court has jurisdiction to approve a sale process to be undertaken by a receiver appointed by the court and commonly does so.¹¹

¹⁰ *Bank of America Canada v. Willann Investments Ltd.* (1993), 20 C.B.R. (3d) 223; aff'd 1996 CanLII 2782 (ONCA), at paragraphs 3-5.

¹¹ *Re CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750 (Can LII); *Crate Marine*, 2015 ONSC 1062 (CanLII).

16. There are four factors the court should consider in exercising its discretion whether to authorize a sale process. The factors are:¹²

- (a) is a sale transaction warranted at this time;
- (b) will a sale benefit the “economic community”;
- (c) do any of the creditors have a bona fide reason to object to the sale of the business or the assets; and
- (d) is there a better viable alternative.

17. The Sale Process of the Receiver in these circumstances is appropriate for the court to approve for the following reasons:

- (a) A sale transaction is warranted at this time – the Receiver was appointed after the Debtors defaulted on their obligations to EQ Bank. The very purpose of appointing the Receiver was to facilitate the sale of the collateral subject to EQ Bank’s security.
- (b) The sale benefits the “economic community” – the sale will monetize the Real Property for the benefit of the creditors.
- (c) Do any creditors have a *bona fide* reason to object to the sale – no objection has been raised to the Receiver selling the Real Property.

¹² *Crate Marine*, [2015 ONSC 1062](#) (CanLII), at para. 14.

- (d) Is there a better viable alternative – there are only two alternatives: the sale of the Real Property or the repayment of creditors through a refinancing. At this time there is no viable alternative other than to move forward with a sale process.

18. After the court is satisfied that it is appropriate to approve a sale process, when reviewing a sale process proposed by a receiver a court should consider the following factors:¹³

- (a) the fairness, transparency and integrity of the proposed process;
- (b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
- (c) whether the sale process will maximize the chances, in the particular circumstances, of securing the best possible price for the assets that are for sale.

19. In reviewing a receiver's decisions and recommendations, the court exercises considerable caution and grants considerable deference to the receiver. As the Court of Appeal in *Regal Constellation Hotel Limited* stated,¹⁴

...although the courts will carefully scrutinize the procedures followed by a receiver, they rely upon the expertise of their appointed receivers and are reluctant to second guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is shown”

20. The Sale Process recommended by the Receiver is a reasonable, robust and transparent process designed to realize fair value for the Real Property and satisfies the criteria for approval.

¹³ *Re CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750](#) (Can LII) at para. 13.

¹⁴ *Regal Constellation Hotel Ltd.*, [Re 2004 CanLII 206 \(ON CA\)](#), at para. 23

21. The Sale Process (including its timeline, conditions, and other terms) maximizes the exposure of the value of the Real Property by jointly marketing it with the Berkeley Church Property, it proposes reasonable deadlines in the circumstances, and provides flexibility and transparency for the purchasers, who can submit offers for either the Real Property or the Berkeley Church Property separately or both properties together, with their own allocation of the purchase price. In addition, the Sale Process as proposed creates a competitive bidding environment which may result in higher offers and better terms.¹⁵

22. The Receiver is also of the view that the retention of Colliers as listing agent is appropriate and beneficial due to, among other things, their expertise, the comprehensive and realistic marketing proposal strategy provided to the Receiver, the competitive commission structure, and their selection by MSI for the Berkeley Church Property sale process.¹⁶

B. RECEIVER'S BORROWINGS CHARGE SHOULD BE INCREASED

23. The Receiver is seeking an order increasing the Receiver's Borrowings Charge at paragraph 21 of the Appointment Order from the principal amount of \$500,000 to \$900,000, and confirming the Receiver's Borrowings Charge applies and extends to any increased borrowings of the Receiver.

24. The Appointment Order provides for funding of the Receiver's activities and duties, as set out in the Appointment Order, including interim expenditures. The Receiver's Borrowings Charge charges the Debtors' Property (as defined in the Appointment Order) as security for the repayment

¹⁵ First Report at para 35, Tab 2 to the Motion Record.

¹⁶ First Report at para 36, Tab 2 to the Motion Record.

of monies borrowed. Such borrowing (and the provision of security) is expressly authorized under subsection 31(1) of the BIA.¹⁷

25. The Receiver anticipates requiring additional funding to discharge its duties under the Appointment Order and requests a corresponding increase to the Receiver's Borrowings Charge.

26. The Court has jurisdiction to grant (and/or increase) a Receiver's Borrowings Charge pursuant to sections 243(1)(c) of the BIA to "take any other action that the court considers advisable".¹⁸

27. It is respectfully submitted that it is appropriate in the circumstances to grant the increase to the Receiver's Borrowings Charge on the same terms as those in the Appointment Order at paragraphs 21 to 24.

C. THE ACTIVITIES AND FEES OF THE RECEIVER, AND THE FEES OF ITS LEGAL COUNSEL SHOULD BE APPROVED

28. Paragraph 18 of the Appointment Order requires the accounts of the Receiver and its legal counsel to be passed from time to time by a judge of the Ontario Superior Court of Justice. In approving the accounts of the Receiver and its legal counsel, the compensation sought must be fair and reasonable having regard to all relevant factors including the following:¹⁹

- (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

¹⁷ Section 31(1), BIA.

¹⁸ See *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, [2021 ABCA 226](#) at para 20, citing both s. 243(1)(c) and s. 31(1) of the BIA.

¹⁹ *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#) (CanLII) at para 33

- (e) the receiver's knowledge, experience and skill;
- (f) the diligence and thoroughness displayed;
- (g) the responsibility assumed;
- (h) the results of the receiver's efforts; and
- (i) the cost of comparable services when performed in a prudent and economical manner.

29. The Receiver submits that the fees and disbursements of the Receiver and those of its legal counsel as detailed in the First Report should be approved because the Receiver and its counsel engaged diligently since the date of the Appointment Order to, among other things:

- (a) understand the complex nature and characteristics of the Debtors' property, including the agreements that subject the Real Property to onerous requirements and restrictions, much of which required expert legal advice on planning law and property development matters;
- (b) communicate with Colliers, counsel for Concert and the City of Toronto to complete required research and investigation in respect of the status of agreements and future plans for the Real Property;
- (c) obtain a comprehensive security opinion on the EQ Security, which due to the complexity of the issues associated with the Real Property runs to some 82 pages;
- (d) work with MSI to agree upon a joint marketing effort for the Real Property and the Berkeley Church Property that would maximize value and that reflects its pertinent features, applicable zoning laws, and other issues;

- (e) obtain and review marketing proposals from the Brokers, obtain quotes for an appraisal of the air and below ground rights and related construction easements from the Broker, and ultimately obtain the appraisal from Colliers; and
- (f) other activities as described in the First Report.

30. Ultimately, as a result of the Receiver's efforts (including joint efforts with MSI), a comprehensive Sale Process was successfully developed for the court's consideration. The Sale Process reflects the complicated nature of the Real Property. The significant activities completed by the Receiver were necessary to ensure that an effective Sale Process is implemented. The Receiver's diligence will also ensure that potential bidders who participate in the Sale Process have all of the information necessary to make an informed bid and that the best purchase price for the Real Property is obtained.

31. The fees and disbursements of the Receiver and its legal counsel were incurred at the respective party's standard rates and charges, and that they are fair, reasonable and justified in the circumstances. They are set out in the fee affidavits appended to the First Report. Finally, the fees and disbursements accurately reflect the work done by the Receiver and its counsel in connection with the receivership.

D. THE CONFIDENTIAL APPENDICES SHOULD BE SEALED

32. Subsection 137(2) of the *Courts of Justice Act* provides that 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.²⁰

²⁰ *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 137.

33. In *Sherman Estate v. Donovan*, the Supreme Court of Canada established a three-part test for a sealing order:²¹

- (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.

34. Citing *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada reasoned in *Sherman Estate* that a general commercial interest in preserving confidential information is an important interest because of its public character.²²

35. Here, the important public interest to be protected is the ability for parties in an insolvency proceeding to protect the economic interests of stakeholders by keeping confidential Sale Process documents confidential until the Sale Process is implemented and a transaction closes. This is important because if the information were to become public it would harm a further sale process.

36. The sealing order sought is narrow, proportional, and time limited. The Receiver is only seeking to seal the confidential appendices from the public record pending a closing of a transaction in respect of the Real Property or until further order of the Court.

PART IV - ORDER REQUESTED

37. The Receiver respectfully request that this Honourable Court grant the relief provided for in the draft Order at **Tab “3”** to the Motion Record.

²¹ *Sherman Estate v Donovan*, [2021 SCC 25](#) at para 38.

²² *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#) (CanLII).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of January, 2024.



Miller Thomson LLP

MILLER THOMSON LLP

Scotia Plaza
40 King Street West, Suite 5800
Toronto ON M5H 3S1

Jeffrey Carhart (LSO#:23645N)

Tel: 416-595-8615
jcarhart@millerthomson.com

Gavin H. Finlayson (LSO#: 44126D)

Tel: 416.595.8619
gfinlayson@millerthomson.com

Monica Faheim (LSO#:82213R)

Tel: 416-597-6087
mfaheim@millerthomson.com

Lawyers for the Receiver, MNP Ltd.

SCHEDULE “A”

LIST OF AUTHORITIES

1. *Bank of America Canada v. Willann Investments Ltd.* [\(1993\), 20 C.B.R. \(3d\) 223](#)
2. *Re CCM Master Qualified Fund v. blutip Power Technologies*, [2012 ONSC 1750](#)
3. *Crate Marine*, [2015 ONSC 1062](#)
4. *Regal Constellation Hotel Ltd., Re* [2004 CanLII 206 \(ON CA\)](#)
5. *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, [2021 ABCA 226](#)
6. *Bank of Nova Scotia v Diemer*, [2014 ONCA 851](#)
7. *Sherman Estate v Donovan*, [2021 SCC 25](#)
8. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. Bankruptcy and Insolvency Act (R.S.C., 1985, c. B-3)

Borrowing powers with permission of court

31 (1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

Security under Bank Act

(2) For the purpose of giving security under section 427 of the Bank Act, the interim receiver, receiver or trustee, when carrying on the business of the bankrupt, is deemed to be a person engaged in the class of business previously carried on by the bankrupt.

Limit of obligations and carrying on of business

(3) The creditors or inspectors may by resolution limit the amount of the obligations that may be incurred, the advances that may be made or moneys that may be borrowed by the trustee and may limit the period of time during which the business of the bankrupt may be carried on by the trustee.

Debts deemed to be debts of estate

(4) All debts incurred and credit received in carrying on the business of a bankrupt are deemed to be debts incurred and credit received by the estate of the bankrupt.

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.

2. Courts of Justice Act, R.S.O. 1990, c. C.43

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. R.S.O. 1990, c. C.43, s. 137.

EQUITABLE BANK
Plaintiffs

and

JAMES GAULT HOLDINGS INC. et al.
Defendants

Court File No. CV-23-00700642-00CL

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

Proceeding Commenced at
TORONTO

RECEIVER'S FACTUM

MILLER THOMSON LLP

Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto ON M5H 3S1

Jeffrey Carhart (LSO#:23645N)

Tel: 416-595-8615
jcarhart@millerthomson.com

Gavin H. Finlayson (LSO#: 44126D)

Tel: 416.595.8619
gfinlayson@millerthomson.com

Monica Faheim (LSO#:82213R)

Tel: 416-597-6087
mfaheim@millerthomson.com

Lawyers for the Receiver, MNP Ltd