

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

**IN THE MATTER OF RECEIVERSHIP OF SEAFIELD RESOURCES LTD. OF
THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

FACTUM OF THE RECEIVER
(returnable May 19, 2015)

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TO: **SERVICE LIST**

SERVICE LIST

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PART I - INTRODUCTION

1. In this motion, the Receiver (as defined below) seeks an order granting the following relief:

- (a) approving the First Report of the Receiver to the Court, dated May 11, 2015 (the “**First Report**”), and the activities set out therein;
- (b) approving a proposed Sales and Investor Solicitation Process (the “**SISP**”) in relation to Seafield Resources Ltd. (“**Seafield**”) and its wholly owned subsidiary Minera Seafield S.A.S. (“**Minera**”);
- (c) increasing the amount of the Receiver’s Borrowings Charge that is provided for in the Receivership Order and deeming advances made by RMB Australia Holdings Limited and/or RMB Resources Inc. to Minera to be secured obligations under the Receiver’s Borrowings Charge; and,
- (d) authorizing the Receiver to assign Seafield into bankruptcy.

PART II - THE FACTS

A. Background to the Receivership

2. Seafield is a company incorporated pursuant to the Ontario *Business Corporations Act* and its principal asset is 100% ownership of Minera, a Colombian company that owns mining claims in the developmental stage in Colombia.¹

3. Seafield's principal secured creditor is RMB Australia Holdings Ltd. ("**RMB**") pursuant to a facility agreement dated February 21, 2013 (the "**Facility Agreement**").²

4. On July 15, 2014 Seafield failed to make a payment of \$406,000 to RMB due under the Facility Agreement and took certain other steps concerning Minera that RMB considered to be highly prejudicial to its interests.³ In September of 2014, RMB commenced an application to appoint KPMG Inc. ("**KPMG**") as receiver of Seafield.⁴ KPMG was appointed receiver (the "**Receiver**") by order of Justice Newbould dated September 9, 2014 (the "**Receivership Order**"), pursuant to Section 243(1) of the *Bankruptcy and Insolvency Act* (BIA) and Section 101 of the *Courts of Justice Act*.

5. The Receivership Order grants the Receiver the authority to sell the property of Seafield.⁵ It also grants the Receiver the power to exercise any shareholder, partnership, joint venture or other rights of Seafield, including its right as sole shareholder of Minera.⁶

¹ First Report of the Receiver to the Court, date May 11, 2015, at para. 3.1.1.

² First Report of the Receiver to the Court, date May 11, 2015, at para. 1.1.2.

³ First Report of the Receiver to the Court, date May 11, 2015, at para. 1.1.3.

⁴ First Report of the Receiver to the Court, date May 11, 2015, at para. 1.1.7.

⁵ Order of Justice Newbould, dated September 9, 2014 at para. 3(k).

⁶ Order of Justice Newbould, dated September 9, 2014 at para. 3(r).

6. The First Report sets out the activities of the Receiver since the Receivership Order, describes Seafield's property, and sets out the terms of the proposed SISP to facilitate the marketing, tendering and a possible investment in Seafield and/or Minera and/or a sale of all or part of their assets.

B. The SISP

7. The Receiver, in consultation with Seafield's secured creditors, has designed the SISP as a means of facilitating the optimum disposition of Seafield's business, including Minera. The SISP sets out procedures by which sale and investment proposals may be submitted and evaluated.

8. The SISP contemplates a two-phase process whereby potential bidders would be solicited and subsequently granted increasing levels of disclosure as to the assets and business of Seafield, based on meeting certain qualifications.

9. The SISP would require bidders to enter into confidentiality agreements as a prerequisite to gaining access to confidential information regarding Seafield's business and assets.⁷

10. The SISP would require the Receiver to return to the Court for directions in the event that no qualified bidder is identified at any given stage of the process.⁸

⁷ SISP at 2.5(2), 4.3(3) and 5.5(2).

⁸ SISP at 2.5(4).

11. The SISP would require the Receiver to disclose information regarding qualified bids to Seafield's principal secured creditor, RMB.⁹ The SISP would also permit RMB to submit a bid at the commencement of the second phase of the process.¹⁰

12. The SISP would require bidders to provide considerable disclosure of details relating to themselves and their proposed transactions, including evidence of financing and the identities of any entities that would sponsor or be involved in the proposed transaction in order to qualify interested bidders.¹¹

13. The SISP would require any successful bid to contemplate a transaction closing date no later than September 30, 2015.¹²

14. The SISP contemplates consultation with RMB subject to certain circumstances where consultation with RMB would cease or be suspended. The Receiver retains discretion to determine that there are no suitable bids and to return to the Court for directions.

15. Finally, the SISP would require Court approval of any successful bid as a condition for proceeding with a chosen transaction.¹³

⁹ SISP at 4.3.

¹⁰ SISP at 4.3(5).

¹¹ SISP at 5.2(d)-(f), (j).

¹² SISP at 5.2(l).

¹³ SISP at 5.8(1).

C. RMB's Advances to Minera

16. As a developmental stage gold company, Seafield does not have any source of revenue.¹⁴ It has been necessary to secure funding for Minera's operational costs during the Receivership to avoid reorganization proceedings in Colombia, which would be prejudicial to RMB's and other creditors' interests.¹⁵

17. Paragraph 21 of the Receivership Order provides for a Receiver's Borrowings Charge of up to \$750,000.¹⁶

18. Initially, Minera was financed under Receiver's Certificates totalling USD \$443,471.¹⁷ Minera entered a loan agreement with RMB on December 19, 2014 (the "**Minera Loan Agreement**"), which enables Minera to borrow up to USD \$3,000,000 to fund its operating costs.¹⁸

19. The Minera Loan was put in place to facilitate direct funding to Minera in order to ensure that the additional funding to Minera would be secured over Minera's assets in the event of an asset sale in respect of Minera.¹⁹

20. The Receiver supported the Minera Loan Agreement to ensure ongoing funding to Minera, to maintain Minera as a going-concern and preserve value.²⁰ In consideration for RMB entering the Minera Loan Agreement, the Receiver agreed to seek an order deeming the post-receivership advances provided by RMB to Minera to be secured

¹⁴ First Report of the Receiver to the Court, date May 11, 2015, at 6.6.1.

¹⁵ First Report of the Receiver to the Court, date May 11, 2015, at 6.1.2.

¹⁶ Order of Justice Newbould, dated September 9, 2014, at 21.

¹⁷ First Report of the Receiver to the Court, date May 11, 2015, at 6.1.3.

¹⁸ First Report of the Receiver to the Court, date May 11, 2015, at 6.1.4.

¹⁹ First Report of the Receiver to the Court, date May 11, 2015, at 6.1.5.

²⁰ First Report of the Receiver to the Court, date May 11, 2015, at 6.1.5.

under the Receiver's Borrowings Charge, which is already provided for in the Receivership Order.

21. The aggregate total of funds advanced to Minera through Receiver's Certificates and under the Minera Loan Agreement presently total approximately \$1,000,000. Additional disbursements will be required in the coming months.²¹ Accordingly, the existing cap on the Receiver's Borrowings Charge is not sufficient to secure the money that has been and will be necessary to advance to Minera to maintain its operations and avoid reorganization proceedings in Colombia.

D. The Reviewable Transactions

22. The Receiver has become aware of resolutions passed by Seafield's former board of directors that required Minera to adopt certain compensation obligations (the "**Labour Agreement Amendments**") to the benefit of certain (now former) executives/administrators of Seafield (the "**Executives**").²²

23. The Receiver consulted with Colombian counsel to assess the consequences of Minera adopting the Labour Agreement Amendments. The Receiver has learned that Colombian law may have the effect of giving a priority over Minera's assets to the Executives for claims arising out of the Labour Agreement Amendments.²³

24. Among the options available to address the effects of the Labour Agreement Amendments is to have Seafield assigned into bankruptcy in order to seek to have the

²¹ First Report of the Receiver to the Court, date May 11, 2015, at 6.1.7.,

²² First Report of the Receiver to the Court, date May 11, 2015, at 3.3.2.

²³ First Report of the Receiver to the Court, date May 11, 2015, at 3.3.4.

Labour Agreement Amendments set aside as “transfers at undervalue”, pursuant to Section 96 of the *Bankruptcy and Insolvency Act* (“BIA”).

PART III - ISSUES AND THE LAW

25. The relief sought by the Receiver in this motion raises the following issues of law:

- (a) Should the First Report be approved?
- (b) Should the SISP be approved?
- (c) Should the amount of the Receiver’s Borrowings Charge be increased and include advances made by RMB to Minera?
- (d) Should the Receiver be granted the authority to assign Seafield into bankruptcy?

A. THE FIRST REPORT SHOULD BE APPROVED

26. The activities of the Receiver, as set out in detail in the First Report, were all necessary and undertaken in good faith in furtherance of the Receiver’s duties and powers pursuant to the Receivership Order. The Receiver submits that such activities should be approved by this Court.

27. As highlighted in the First Report, among other things, the Receiver has:
- (a) Taken possession of the books and records of Seafield at its registered office;²⁴
 - (b) Taken steps to freeze the bank accounts of Seafield and to open a new account in the name of the receivership;²⁵
 - (c) Collected and analyzed information and documents related to Seafield's and Minera's business;
 - (d) Reviewed transactions and resolutions passed by Seafield's board of directors prior to Seafield's insolvency;
 - (e) Provided notice of its appointment as Receiver to Seafield's secured and unsecured creditors as it is required to do under Section 245(1) of the BIA;²⁶
 - (f) Retained and consulted independent counsel in Ontario and Colombia to provide advice concerning the assets and liabilities of Seafield;²⁷ and,
 - (g) Designed the SISP in consultation with Seafield's secured creditors.
28. In addition to the items listed above, the Receiver has been attempting to address challenges that have arisen in Colombia regarding its work and status as Receiver, as set out in detail in the First Report.²⁸

²⁴ First Report of the Receiver to the Court, date May 11, 2015, at 2.1.

²⁵ First Report of the Receiver to the Court, date May 11, 2015, at 2.2.

²⁶ First Report of the Receiver to the Court, date May 11, 2015, at 2.3.

²⁷ First Report of the Receiver to the Court, date May 11, 2015, at 2.5.

29. The Receiver respectfully submits that the First Report, and the Receiver's activities set out therein, reflect the proper and diligent execution of the Receiver's duties and should be approved by this Court.

B. THE SISP SHOULD BE APPROVED

30. The Receiver requests that this Court approve the SISP.

31. Section 243 of the BIA permits the Court to give the Court very broad discretion as to the powers it grant receivers to exercise control over the property of a company in receivership and in making orders generally in a receivership:

243(1) Court may appoint receiver

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.²⁹

[Emphasis added]

32. Justice Newbould granted the Receivership Order pursuant to Section 243(1). The Receivership Order expressly authorizes the Receiver to sell the property of Seafield

²⁸ First Report of the Receiver to the Court, date May 11, 2015, at.3.3.2.

²⁹ R.S.C., 1985, c. B-3.

and to exercise the powers of Seafield as sole shareholder of Minera.³⁰ The SISP represents the best way for the Receiver to fulfill its duty to obtain the maximum value of the estate's assets.

33. The Ontario Court of Appeal in *Royal Bank v. Soundair Corp.* set out the considerations that apply to a receiver's sale of an estate's assets. The Court of appeal summarized those considerations as follows:

- (a) It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
- (b) It should consider the interests of all parties.
- (c) It should consider the efficacy and integrity of the process by which offers are obtained.
- (d) It should consider whether there has been unfairness in the working out of the process.³¹

34. In *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, Justice Brown held that the criteria identified in *Soundair* inform the analysis that a court must conduct when approving a SISP.³² Justice Brown observed the following:

Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any

³⁰ Order of Justice Newbould, dated September 9, 2014, at para. 3(k).

³¹ *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 [*Soundair*], at 16.

³² 2012 ONSC 1750 [*CCM*].

sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (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.¹ Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.³³

35. The considerations identified by Justice Brown in *CCM* support the approval of the SISP in the present case.

i. Fairness, transparency and integrity of the SISP

36. The SISP provides for disclosure both by and to bidders at various stages of the process. This will allow potential bidders to gain a full appreciation of the assets that they propose to buy. It will also provide the Receiver with sufficient information about the nature of each proposed transaction, the parties that will be involved and how the proposed transaction will affect Seafield's stakeholders.

37. The SISP also sets out qualification criteria that the Receiver will use to evaluate proposals at various stages of the process.

³³ *CCM* at 6.

38. Seafield's principal secured creditor, RMB, support the SISP. Further, the Receiver would be required, subject to certain limitations and qualifications, to consult with RMB at various stages of the SISP and disclose information regarding qualifying bids to RMB.

39. RMB would be permitted under the SISP to make a bid at the second phase of the process as well as in the event that no qualified bidders are identified in the process, notwithstanding its non-participation up to that point.³⁴ However, if RMB did submit a bid, the consultation rights provided for it under the SISP would be suspended unless the bid were for an amount smaller than the amount owing to RMB by Seafield and the bid were accompanied by a covenant not to change the economic terms of the bid.³⁵ These limitations on sharing information with RMB and RMB's consultation rights are required to maintain the integrity of the process in a situation where RMB is itself a competing bidder.

40. The special position of RMB as secured creditor is recognized in the SISP, however, the SISP includes tight controls to prevent RMB from abusing its unique position within the process.

41. Finally, approval of the SISP would not result in the sale of Seafield's assets without further approval from this Court. The SISP is merely a set of procedures pursuant to which the Receiver intends to solicit bids for Seafield's assets and determine what, if any, sale of assets represents the best option for the estate.

³⁴ SISP at 4.3(5) and 5.5(2).

³⁵ SISP at 5.7.

ii. The commercial efficacy of the SISP

42. The Receiver believes that the SISP represents the most commercially efficacious way of marketing Seafield's property.

43. The Receiver will actively identify and contact parties that it believes to be potentially interested in acquiring Seafield's assets. As discussed above, the SISP sets out selection criteria that bidders will be able to make reference to in preparing their proposals.

44. The SISP requires a reasonable amount of disclosure on the part of potential bidders to allow the Receiver to reach a determination as to the suitability of each proposal. At the later stage of the SISP, proposals will be binding on the bidders. This will help ensure a high level of commitment among bidders and provide the Receiver with a reasonable level of certainty regarding the proposed transactions.

45. Finally, the Receiver believes the SISP contemplates a reasonable timeline for the solicitation, completion of due diligence and closing of a suitable sale or investment proposal. In the event any extensions of the timeline are required due to particularities of Colombian law, the Receiver retains the discretion to extend the timelines to the extent feasible.

iii. The SISP will optimize the chances of securing the best possible price of Seafield's property

46. The purpose of the SISP is to determine what consideration can be obtained on a possible sale of Seafield's assets. The SISP is reasonable in the circumstances. It

represents the most efficient way for the Receiver to market the assets of Seafield and Minera and attempt to realize value for the creditors of Seafield.

47. For the reasons set out above, the Receiver submits that the SISP is consistent with the criteria set out in *CCM* and would promote a disposition of Seafield's assets that satisfies the *Soundair* criteria. For these reasons, the Receiver submits that this Court should approve the SISP.

C. THE RECEIVER'S BORROWINGS CHARGE SHOULD BE INCREASED AND SHOULD INCLUDE ADVANCES MADE BY RMB TO MINERA

48. In the Receivership Order, Justice Newbould granted the Receiver the right to borrow money necessary or desirable for the purpose of funding the exercise of its powers and duties. Such borrowed money would be secured by a Receiver's Borrowings Charge over the property of Seafield.³⁶

49. The Receivership Order caps the Receiver's Borrowings Charge at \$750,000 "or such greater amount as the Court may by further Order authorize".³⁷ In other words, the Receivership Order contemplates the possibility that events in the Receivership would necessitate an increase in the cap on the Receiver's Borrowings Charge.

50. The Receiver submits that it is necessary and appropriate for this Court to authorize an increase in the cap on the Receiver's Borrowings Charge to USD \$3,000,000, or an equivalent amount in Canadian currency.

³⁶ Order of Justice Newbould, dated September 9, 2014, at para. 21.

³⁷ *Ibid.*

51. As the principal asset of Seafield's estate, it is of the utmost importance that Minera be maintained as a going concern until the Receiver has secured its disposition and realized its value for Seafield's creditors. This requires that Minera be funded so as not to jeopardize Minera's value as a going concern.

52. As discussed above, the Receiver supported the Minera Loan Agreement in order to avoid a reorganization of Minera. The Receiver believes that it was essential to secure funding for Minera through the Minera Loan Agreements in order to preserve the value of Seafield's estate.

53. The funding necessary to maintain Minera as a going concern has exceeded the amount originally contemplated in the Receiver's Borrowings Charge under the Receivership Order.

54. Further, it was necessary for RMB to advance money directly to Minera under the Minera Loan Agreement to ensure that such funding was secured by Minera's assets. The consequence of direct funding from RMB to Minera is that such new advances are not secured by the Receiver's Borrowings Charge over the assets of Seafield and specifically the shares of Minera in priority to other claims absent an order of this Court deeming them to be so secured.

55. The Receiver submits that advances by RMB to Minera under the Minera Loan Agreement are necessary and desirable for the purpose of funding the Receiver's execution of its duties, and are therefore properly secured under the Receiver's Borrowings Charge. Any prejudice to the unsecured creditors of Seafield is significantly

outweighed by continuing Minera as a going concern in order to realize the value from Seafield's principal asset – its ownership of and investment in Minera.

56. For the reasons set out above, the Receiver submits that this Court should increase the amount secured under the Receiver's Borrowings Charge to USD \$3,000,000 and deem post-receivership advances from RMB to Minera under the Minera Loan Agreement to be secured thereunder.

D. THE RECEIVER SHOULD BE AUTHORIZED TO ASSIGN SEAFIELD INTO BANKRUPTCY

57. The Receiver submits that it is proper and necessary for this Court to grant it the authority to assign Seafield into bankruptcy.

58. The Labour Agreement Amendments were adopted at the level of the subsidiary of Seafield on the eve of Seafield's insolvency.³⁸ As discussed above, the Labour Agreement Amendments raise suspicion, in part, because they may have the effect of turning the beneficiaries of those agreements into creditors of Minera with a priority to its assets in a manner that is potentially highly detrimental to the creditors of Minera and the other creditors of Seafield.

59. Section 96 of the BIA may provide a remedy for the effect of the Labour Agreement Amendments on the value of Seafield's estate. Section 96 of the BIA provides as follows:

96(1) Transfer at undervalue

On application by the trustee, a court may declare that a transfer at

³⁸ First Report of the Receiver to the Court, date May 11, 2015, at 3.3.2.

undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor;
or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

[Emphasis added].

60. Section 96 is only available to a trustee. Further, in the event that the beneficiaries of the Labour Contract Amendments are found to be dealing at arms-length, the Section 96 imposes a look back period of one year from the date of the initial bankruptcy event in which this remedy is available. The Labour Agreement Amendments were made in June of 2014.

61. In its capacity as Receiver, KPMG cannot bring an application under Section 96. Accordingly, it may be necessary to assign Seafield into bankruptcy in order to preserve

the value of its estate for its creditors by applying to set aside the Labour Agreement Amendments and any other reviewable transaction.

62. The Receiver respectfully submits that it should be granted the authority to assign Seafield into bankruptcy in the event that it determines it is necessary to do so.

PART IV - ORDER REQUESTED

63. For the reasons set out above, the Receiver respectfully requests the granting of an order substantially in the form contained in its Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of May, 2015.

A handwritten signature in black ink, appearing to read "Stephen Brown-Okruhlik", written over a horizontal line.

Stephen Brown-Okruhlik
McMillan LLP

Lawyer for the Receiver

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Royal Bank v. Soundair*, [1991] O.J. No. 1137.
2. *Colossus Mineral Inc., Re*, 2014 ONSC 514.
3. *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750.

SCHEDULE "B"
RELEVANT STATUTES

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, sections 96(1) and 243(1)

96(1) Transfer at undervalue

On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it,
or

(B) the debtor intended to defraud, defeat or delay a creditor.

243(1) Court may appoint receiver

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.

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE MOVING RECEIVER
(RETURNABLE MAY 19, 2015)**

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