

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

*IN THE MATTER OF Section 101 of the Courts of Justice Act, R.S.O. 1990 c.C.43, as amended,
and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as
amended*

BETWEEN:

NATIONAL BANK OF CANADA

Applicant

- and -

COMMCACHE ASSET MANAGEMENT INC. and 52 LACROIX INC.

Respondents

**FACTUM OF THE RECEIVER
(returnable April 15, 2025)**

April 7, 2025

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as at March 31, 2025**

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AND TO:	MINISTER OF FINANCE INSOLVENCY UNIT 6th Floor, 33 King Street West Oshawa, ON L1H 8H5 Insolvency Unit insolvency.unit@ontario.ca
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PART 1 – OVERVIEW

1. BDO Canada Limited (“**BDO**”), in its capacity as the court-appointed receiver (the “**Receiver**”) of certain assets, undertakings and properties (the “**Property**”) of Commcache Asset Management Inc. (“**Commcache**”) and 52 Lacroix Inc. (“**52 Lacroix**”) submits this factum in support of its motion returnable April 15, 2025, for the following relief, among other things:

- (a) an Approval and Vesting Order, among other things, approving the sale transaction (“**Transaction**”) contemplated by the Agreement of Purchase and Sale, dated December 16, 2024, as amended by Amendment to Agreement of Purchase and Sale, accepted on March 21, 2025, and further amended by Amendment to Agreement of Purchase and Sale, accepted on March 25, 2025 (together, the “**Sale Agreement**”), between the Receiver and Sudbury Apartment Rentals Limited (the “**Purchaser**”), and vesting Commcache’s right, title and interest to the King Street Property (as defined below) in and to the Purchaser;
- (b) approving the proposed distribution to the National Bank of Canada (“**National Bank**”), the first mortgagee on the King Street Property;
- (c) approving the fees and disbursements of the Receiver and its counsel, as detailed in the Second Report to the Court dated April 4, 2025 (the “**Second Report**”); and
- (d) sealing the Confidential Appendices to the Second Report.

PART II – THE FACTS

Background

2. Upon the application of National Bank pursuant to the Order of the Honourable Justice Conway of the Ontario Superior Court of Justice (Commercial List), dated August 14, 2024 (the “**Receivership Order**”), BDO was appointed as the Receiver of the Property.

Receivership Order, dated August 14, 2024, attached as Appendix “A” to the Second Report.

3. At the date of the Receivership Order, Commcache and 52 Lacroix owned five residential, multi-plex apartment buildings located in various cities in Ontario (the “**Real Property**”).

Commcache owns four of the buildings, including the real property municipally known as 220-222 King Street, Sudbury, Ontario (the “**King Street Property**”). The King Street Property is a three-story, twelve-unit apartment building.

Second Report of the Receiver, dated April 4, 2025, para 11 [Second Report].

4. National Bank, the first mortgagee, holds a mortgage/charge in the principal amount of \$2,460,000 (the “**National Bank Charge**”) and general assignment of rents (the “**GAR**”), both of which were registered against the King Street Property on May 25, 2023.

Second Report, para 17.

King Street Property

5. The Receiver solicited listing proposals from three (3) realty listing brokerages. On February 7, 2025, the Receiver engaged Royal LePage North Heritage Brokerage (“**Royal LePage**”) as the sales agent for the King Street Property, which began marketing the property on February 14, 2025.

Second Report, paras 30-31.

6. The Receiver entered into the Sale Agreement with the Purchaser, which contained a number of conditions, including the completion of the Purchaser’s due diligence. The Sale Agreement did not grant the Purchaser any right of exclusivity. Accordingly, the Receiver continued to market the King Street Property, which was marketed for a total of six weeks until certain conditions were fulfilled and/or waived by the Purchaser.

Second Report, paras 34, 40.

7. The Receiver is seeking approval of the Sale Agreement and the Transaction contemplated therein.

8. The Receiver also requests approval of an interim distribution of the anticipated sale proceeds of the King Street Property to National Bank, the first mortgagee.

PART III – THE ISSUES

9. The issues before this Honourable Court are whether to:

- (a) grant the Approval and Vesting Order in respect of the King Street Property;
- (b) approve the interim distribution of the sale proceeds of the King Street Property;
- (c) approve the fees of the Receiver and its counsel, Dentons Canada LLP (“**Dentons**”); and
- (d) grant a sealing order in respect of the confidential appendices to the Second Report.

PART IV – LAW & ARGUMENT

The Sale Agreement Should be Approved

10. Pursuant to s. 243 of the BIA and s. 100 of the *Courts of Justice Act* (Ontario), the Receiver requests an Approval and Vesting Order approving the Sale Agreement and vesting the King Street Property in and to the Purchaser.

[*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 243.](#)

[*Courts of Justice Act*, RSO 1990, c C.43, s. 100.](#)

11. Pursuant to the Receivership Order, among other things, the Receiver was authorized to:
- (a) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver’s powers and duties;
 - (b) market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may seem appropriate; and
 - (c) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting the Property or any parts or parts thereof.

Receivership Order, para 4.

12. The Courts place a large degree of confidence in the actions taken and in the opinions formed by their court-appointed receivers. They assume the receiver is acting properly unless the

contrary is clearly shown and are reluctant to second-guess the considered business decisions made by the receiver.

Royal Bank of Canada v. Soundair Corp., [1991 CanLII 2727 \(ON CA\)](#), para. 14 [*Soundair*].

13. The Court of Appeal summarized the principles to apply when reviewing a sale by a court-appointed receiver as follows:

Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances -- particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure 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 clearly shown.

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

14. It is the essence of a receiver's function to make business judgments based on the elements available to it. The Court should examine the conduct of a receiver in light of the information it had when making its decisions and should be very cautious before deciding that a receiver's conduct is improvident based upon information that comes to light after it makes its decision.

[Soundair](#), para. 21.

15. The Court grants considerable deference to the decisions and recommendations of court-appointed receivers. A receiver's decision will be supported so long as it is within the bounds of reasonableness and it proceeds fairly.

Marchant Realty Partners Inc. v. 2407553 Ontario Inc., 2021 ONCA 375, para [19](#) [*Marchant Realty*].

Ravelston Corp. (Re), 2005 CanLII 63802 (ON CA), para [40](#).

[Soundair](#), para. 21.

The *Soundair* Principles are Met

16. The Courts consider the following principles to determine whether to approve a sale transaction in a receivership:

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

Soundair, para. 16.

(A) The Receiver made a Sufficient Effort to get the Best Price and Has Not Acted Improvidently

17. The listing agent, Royal LePage, broadly marketed the King Street Property for approximately six weeks. The marketing process led by Royal LePage included the following:

- (a) advertising the King Street Property as available for sale on multiple listing service (MLS) boards, specifically with associations in Sudbury regional real estate boards;
- (b) advertising the King Street Property for sale on the local and national websites of Royal LePage;
- (c) advertising the King Street Property as available for sale on social media forms relating to real estate advertising and investment;
- (d) directly contacting potential interested parties to solicit interest in the King Street Property; and
- (e) coordinating site visits.

Second Report, para 31.

18. In the Receiver's view, the marketing process was commercially reasonable and the King Street Property was exposed to the market for a sufficient period of time for prospective purchasers to make an offer. The best price and terms of sale were obtained in the circumstances.

Second Report, paras 39, 40.

19. The Receiver received two offers for the King Street Property. The Sale Agreement represents the best offer for the King Street Property, including a higher purchase price, and there is no evidence that further exposure to the market will result in a superior offer. This is further supported by the time the King Street Property remained on the market after the Receiver entered into the Sale Agreement with the Purchaser.

Second Report, paras 40-41.

20. During the marketing process, the Receiver regularly consulted with National Bank. When considering offers, the Receiver consulted with National Bank, which in turn sought the consent of Canadian Mortgage Housing Corporation ("CMHC"), as guarantor for the National Bank Charge. At all relevant times, National Bank was kept apprised of the process and consulted as appropriate.

Second Report, para 40.

(B) The Sale Agreement is in the Interests of All Parties

21. The Sale Agreement and the Transaction contemplated therein are in the interests of all parties for the following reasons:

- (a) the purchase price is reasonable in the circumstances and is higher than its appraised value and accordingly is an appropriate market price for this asset;
- (b) National Bank, the first mortgagee, supports the Transaction even though it is expected to suffer a shortfall in recovery of its indebtedness in relation to the King Street Property (subject to any recovery under the CMHC guarantee);
- (c) CMHC, as guarantor of the National Bank Charge, is supportive of the Transaction;

- (d) based on the marketing efforts and the offers received, it is unlikely that further negotiations or an additional offer would be received in which National Bank would be fully repaid;
- (e) the terms of the Transaction are typical for a sale by a receiver with respect to real property;
- (f) pursuant to the terms of the Sale Agreement, the Purchaser will assume all existing leases/tenants of the King Street Property; and
- (g) the Sale Agreement does not include any conditions which are expected to delay closing.

Second Report, paras 40-42.

(C) The Efficacy and Integrity of the Process

22. The Receiver solicited listing proposals from three (3) different realty brokerages to list the King Street Property for sale. The Receiver engaged Royal LePage after comparing listing proposal terms, including property listing price, sales agent commission structure and estimated sales timeline.

Second Report, para 30.

23. The Receiver submits that the sales process that was conducted by Royal LePage, under the Receiver's supervision is appropriate for a property of this nature under a court-supervised process. Despite receiving an offer and entering into an agreement of purchase and sale with the Purchaser, the sales process continued, and the King Street Property remained exposed to the market, resulting in one additional offer.

Second Report, paras 33-34, 40.

24. National Bank and CMHC, as guarantor of the National Bank Charge, are the only parties with an economic interest in the Transaction, and were consulted with respect to the offer from the Purchaser. Both are supportive of the Transaction.

Second Report, para 42.

25. At this juncture, it would be time-consuming and expensive to carry out another sales process, and in the Receiver's view, the process is unlikely to identify any new prospective purchasers who would offer a superior offer than the one contemplated in the Sale Agreement.

Second Report, para 42.

(D) No Unfairness in the Working Out of the Process

26. The sale process was conducted by the listing agent and overseen by the Receiver. The King Street Property was broadly exposed to the market over a period of many weeks, and all prospective purchasers had an equal opportunity to participate in the process and submit an offer. The Sale Agreement did not grant the Purchaser any right of exclusivity, which allowed prospective purchasers to continue to participate in the process despite the Receiver entering into an agreement of purchase and sale with the Purchaser. As such, there was no unfairness in the process.

Second Report, paras 34, 40.

27. Accordingly, for the reasons discussed herein, the principles of *Soundair* have been met, and the Receiver respectfully requests the Court's approval of the Sale Agreement.

Interim Distribution

28. The Receiver seeks approval of an interim distribution of the anticipated sale proceeds from the Transaction to National Bank, as the first mortgagee.

Second Report, paras 68-71.

29. Upon paying real estate commission fees, repayment of the Receiver's Borrowings, and municipal taxes, the Receiver expects to have enough cash on hand, less a reserve for any professional fees and receivership expenses, to make an interim distribution of \$1,475,000 to National Bank.

Second Report, paras 71-73.

30. National Bank holds valid and enforceable security against the King Street Property in the form of the National Bank Charge, GAR. The Receiver submits that the interim distribution is appropriate at this time.

Second Report, paras 74-75.

Professional Fees

31. The role of the Court on a motion to pass accounts is to evaluate them on the basis of the overriding principle of reasonableness. The following factors set out by the Court of Appeal in *Confectionately Yours Inc. (RE)*, provide guidance on how to evaluate the quantum of fees:

- (a) the nature, extent and value of the assets handled;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the debtor company, its officers or its employees;
- (d) the time spent, the receiver's knowledge, experience and skill;
- (e) the diligence and thoroughness displayed;
- (f) the responsibilities assumed;
- (g) the results of the receiver's efforts; and
- (h) the cost of comparable services when performed in a prudent and economical manner.

Confectionately Yours Inc. (Re), 2002 ONCA 45059 at para [45](#).

32. Justice Osborne recently noted:

While the above factors, including time spent, should be considered, value provided should predominate over the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. The measurement of accomplishment may include consideration of

complications and in difficulties encountered in the receivership (Diemer, at para. 45)

Triple-I Capital Partners Limited v 12411300 Canada Inc., 2023 ONSC 3400 at para [26](#).

33. The Court has also recognized a presumption that court-appointed officers will be entitled to recover their actual costs, absent evidence of extraordinary circumstances.

Sub-Prime Mortgage Corp. v. Phoenix Apartments Ltd., 2010 ONSC 6535 at para. [17](#).

34. The activities of the Receiver described in the Second Report were necessary and undertaken in good faith pursuant to the Receiver's duties and powers, and in each case, were in the best interests of the stakeholders generally. The Receiver has, at all times, carried out its duties with appropriate care, skill, and diligence.

35. The Receiver, having assumed responsibility for the Real Property, has spent considerable time diligently and thoroughly managing the Real Property, including communicating with property managers, consulting with mortgagees, engaging sales agents to market the remaining Real Property, and coordinating with contractors for repairs.

Second Report, paras 52-53.

36. The Receiver previously successfully oversaw the sale process of the 52 Lacroix Property and closed the transaction despite issues that arose just prior to closing. This resulted in additional time and expense that was not initially anticipated, but was necessary to close the transaction and prevent further costs from potentially being incurred.

Second Report, paras 53-54.

37. The Receiver's diligence and efforts have resulted in an executed Sale Agreement for the King Street Property, subject to the Court's approval. The Receiver has implemented and is currently overseeing a sale process for the Windsor Property.

Second Report, paras 34, 47-48.

38. As detailed in the Second Report, the Receiver has encountered challenges since its last report to the Court, which it has efficiently and diligently managed considering the nature and condition of the assets under receivership.

Second Report, para 63.

39. The Receiver and its counsel have separately accounted for the fees and disbursements incurred in respect of Commcache and 52 Lacroix. The fees were incurred at the respective party's standard rates with certain counsel charging discounted rates, and are fair, reasonable and justified in the circumstances. Further, the fees and disbursements sought accurately reflect the work done by the Receiver and its counsel in connection with the receivership.

40. The Receiver respectfully submits that the Receiver's fees and disbursements and those of its legal counsel detailed in the Second Report should be approved.

Sealing Order

41. The test for a sealing order, as set out in the Supreme Court of Canada decision of *Sierra Club of Canada v. Canada (Minister of Finance)*, and modified in the decision of *Sherman Estate v. Donovan*, has been met.

Sierra Club of Canada v. Canada (Minister of Finance), [2002 SCC 41](#) (CanLII), para 53 [Sierra Club]

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

42. The information contained in the Confidential Appendices to the Second Report is commercially sensitive and, if publicly disclosed, could materially and negatively impair the ability of the Receiver to market the King Street Property to other interested parties and obtain the highest and best price if the Sale Agreement is not approved or the Transaction does not close. Granting a time-limited sealing order maintains public confidence in the efficacy of the insolvency regime, which is an important public interest that should be protected.

Second Report, para 77.

43. Protecting the commercially sensitive nature of the Confidential Appendices outweighs any deleterious effects of the sealing order, and no reasonable alternative measure is available. The benefits of a sealing order outweigh its negative effects.

Sierra Club, para [53](#).

44. Accordingly, the Receiver requests an order that the Confidential Appendices to the Second Report be sealed and kept confidential and not form part of the public record until the closing of the Transaction in respect of the King Street Property or further order of this Honourable Court.

PART V – ORDER SOUGHT

45. The Receiver requests Orders granting the relief sought in its Notice of Motion, dated April 4, 2025.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 7, 2025

A handwritten signature in purple ink that reads "Dentons Canada LLP". The signature is written in a cursive, flowing style.

DENTONS CANADA LLP

*Lawyers for BDO Canada Limited in its capacity as
court-appointed receiver of Commcache Asset
Management Inc. and 52 Lacroix Inc.*

SCHEDULE “A”
LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.*, [1991 CanLII 2727 \(ON CA\)](#)
2. *Regal Constellation Hotel Ltd., Re*, [2004 CanLII 206 \(ON CA\)](#)
3. *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, [2021 ONCA 375 \(CanLII\)](#)
4. *Ravelston Corp. (Re)*, [2005 CanLII 63802 \(ON CA\)](#)
5. *Confectionately Yours Inc. (Re)*, [2002 CanLII 45059 \(ON CA\)](#)
6. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, [2023 ONSC 3400 \(CanLII\)](#)
7. *Sub-Prime Mortgage Corporation v. Phoenix Apartments Ltd.*, [2010 ONSC 6535 \(CanLII\)](#)
8. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002 SCC 41 \(CanLII\)](#)
9. *Sherman Estate v. Donovan*, [2021 SCC 25 \(CanLII\)](#)

I certify that I am satisfied as to the authenticity of every authority.

April 7, 2025

A handwritten signature in blue ink, consisting of a stylized 'S' followed by a large loop and a horizontal stroke.

SCHEDULE “B”
STATUTES AND REGULATIONS

Bankruptcy and Insolvency Act, RSC 1985, c B-3

Court may appoint receiver

[243](#) (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

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.

[Courts of Justice Act, RSO 1990, c C.43](#)

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

NATIONAL BANK OF CANADA

- and - COMMCACHE ASSET MANAGEMENT INC. and 52
LACROIX INC.

Applicant

Respondents

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