

**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 January 30, 2025)**

January 24, 2025

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AND TO:	<b>CANADA MORTGAGE AND HOUSING CORPORATION</b> 900 - 2590 Laurier Blvd, Tour Belle Cour Québec, QC G1V 4C8 <b>Nicolas Rousseau</b> (Specialist Prevention and Default Management) <a href="mailto:nroussea@cmhc-schl.gc.ca">nroussea@cmhc-schl.gc.ca</a>

### Email List

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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**”, together with Commcache, the “**Debtors**”), submits this factum in support of its motion returnable January 30, 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 (the “**Sale Agreement**”), between the Receiver and Ashwini Inamdar (the “**Original Purchaser**”), as assigned by the Original Purchaser to 1001107085 Ontario Inc. (the “**Purchaser**”), and vesting the 52 Lacroix Property (defined below) in and to the Purchaser;
- (b) approving the proposed distributions to the National Bank of Canada (“**National Bank**”) and Robert O’Neill, the first and second mortgagees on the 52 Lacroix Property, and subsequent distributions to Mr. O’Neill without the need for further Court approval;
- (c) approving the fees and disbursements of the Receiver and its counsel, as detailed in the First Report; and
- (d) sealing the Confidential Appendices to the Receiver’s First Report to the Court dated January 21, 2025 (the “**First Report**”).

## **PART II – THE FACTS**

### **Background**

2. Upon the application of National Bank of Canada (“**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 First Report.**

3. The Debtors own five residential, multi-plex apartment buildings located in Ontario (the “**Real Property**”). Commcache owns four of the buildings, and 52 Lacroix owns one of the buildings, municipally known as 52 Lacroix Street, Chatham, Ontario (the “**52 Lacroix Property**”). The 52 Lacroix Property is 2.5-stories and approximately 4,800 square feet, divided into six separate residential units.

**First Report of the Receiver, dated January 21, 2025, para 8 [First Report].**

4. National Bank holds a first-ranking mortgage/charge in the principal amount of \$580,000 (the “**National Bank Charge**”) and general assignment of rents (the “**GAR**”), both of which were registered against the 52 Lacroix Property on January 7, 2021.

**First Report, paras 17, 61, 62.**

5. Robert O’Neill holds a second-ranking mortgage/charge in the principal amount of \$350,000 registered against the 52 Lacroix Property on September 15, 2022 (the “**O’Neill Charge**”).

**First Report, paras 18, 66, 67.**

### **52 Lacroix Property**

6. Prior to the Receiver’s appointment, the 52 Lacroix Property was listed for sale by a realtor, Prestige Group. Subsequent to its appointment, the Receiver instructed Prestige Group to continue marketing the 52 Lacroix Property.

**First Report, paras 34-36.**

7. The 52 Lacroix Property was marketed for approximately nine months which resulted in two offers since the Receiver’s appointment. The first offer contained various conditions that the Receiver could not satisfy. The second offer was from the Purchaser, and after negotiations, the Receiver entered into the Sale Agreement.

**First Report, para 36.**

8. The Receiver seeks approval of the Sale Agreement and the Transaction contemplated therein.



9. The Receiver also requests approval of a distribution of the anticipated sale proceeds of the 52 Lacroix Property to National Bank, the first mortgagee, and Robert O'Neill, the second mortgagee.

### **PART III – THE ISSUES**

10. The issues before this Honourable Court are as follows:

- (a) whether to grant the Approval and Vesting Order in respect of the 52 Lacroix Property;
- (b) whether to approve the distributions of the sale proceeds of the 52 Lacroix Property;
- (c) whether to approve the fees of the Receiver and its counsel, Dentons Canada LLP (“**Dentons**”); and
- (d) whether to grant a sealing order in respect of the confidential appendices to the First Report.

### **PART IV – LAW & ARGUMENT**

#### **The Sale Agreement Should be Approved**

11. 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 52 Lacroix 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.*

12. Pursuant to the Receivership Order, among other things, the Receiver was authorized to:

- (a) to 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, including without limitation those conferred by the [Receivership] Order;

- (b) to 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) to 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.**

13. 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].

14. 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](#).

15. 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.

16. 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**

17. 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**

18. Both before and after the Receiver's appointment, the 52 Lacroix Property was broadly marketed by the listing agent for approximately 9 months. The marketing process included the following:

- (a) advertising the property as available for sale on multiple listing service (MLS) boards, specifically with associations in Chatham-Kent and Kitchener-Waterloo regional real estate boards;

- (b) preparing marketing materials, including professional photographs and a digital information brochure;
- (c) advertising the 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 52 Lacroix; and
- (e) coordinating site visits.

**First Report, paras 35.**

19. In the Receiver's view, the marketing process was commercially reasonable and the 52 Lacroix 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.

**First Report, para 42.**

20. The Receiver received two offers for the 52 Lacroix Property. The Sale Agreement represents the best offer for the 52 Lacroix Property and is no evidence that further exposure to the market will result a superior offer.

**First Report, paras 37-38.**

21. During the marketing process the Receiver regularly consulted with each of National Bank and Mr. O'Neill regarding any developments and the terms of offers received. At all times the mortgagees were kept apprised of the process and consulted as appropriate.

**First Report, para 42.**

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

22. 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, although somewhat less than the appraised value, is an appropriate market price for this asset;

- (b) National Bank, the first mortgagee, supports the Transaction and is expected to recover its indebtedness in relation to the 52 Lacroix Property in full;
- (c) although it is expected that Mr. O'Neill, the second mortgagee, will suffer a shortfall, based on the marketing efforts and the offers received, it is unlikely that further negotiations or an additional offer would be received in which Mr. O'Neill would be fully repaid;
- (d) the terms of the Transaction are typical for a sale by a receiver with respect to real property;
- (e) pursuant to the terms of the Sale Agreement, the Purchaser will assume all existing leases/tenants of the 52 Lacroix Property; and
- (f) the Sale Agreement does not include any conditions which are expected to delay closing.

**First Report, paras 41-44.**

### **(C) The Efficacy and Integrity of the Process**

23. The sale process was ongoing at the time of the Receiver's appointment, and at that time, the 52 Lacroix Property had been formally on the market for approximately 6 months. The Receiver reviewed the steps taken to market the property and determined that the sale process was similar to a court-supervised process undertaken by Receivers in respect of this type of asset.

**First Report, paras 36,42.**

24. The two mortgagees, who are the only parties with an economic interest in the Transaction, were consulted with respect to the sale process and the offers received.

**First 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 offer a superior offer than the one contemplated in the Sale Agreement.

**First Report, para 44.**

**(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 in good faith, in a commercially reasonable manner. The 52 Lacroix Property was broadly exposed to the market over a period of many months, and all prospective purchasers had an equal opportunity to participate in the process and submit an offer. There was no unfairness in the process.

**First Report, para 35.**

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.

**Distributions**

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

**First Report, paras 63-65.**

29. After the distribution to National Bank, and payment of priority payables including professional fees, the Receiver expects to have excess funds on hand, net of a reserve to be maintained by the Receiver to pay outstanding fees, costs and expenses of the receivership related to 52 Lacroix. Accordingly, the Receiver requests authority to make an interim distribution to Mr. O'Neill, the second mortgagee, and also future distributions to Mr. O'Neill as appropriate without further Court order.

**First Report, paras 69,75.**

30. The proposed distribution amounts are as follows:

- (a) National Bank - \$408,712.17 plus the applicable per diem to date of payment and \$11,591.36 in legal fees incurred in respect of the 52 Lacroix Property, all as set out in the National Bank statement of account attached to the First Report; and
- (b) Robert O'Neill - \$45,000.

**First Report, paras 63-67.**

31. As noted above, it is expected that Mr. O'Neill will suffer a shortfall on the recovery of his indebtedness. For efficiency, the Receiver seeks authority to make future distributions to Mr. O'Neill from the reserve to be maintained by the Receiver, as the Receiver may determine to be appropriate, provided that such distributions will not exceed the amount of his secured indebtedness and the Receiver continues to maintain a reserve as necessary.

32. Each of National Bank and Mr. O'Neill hold valid and enforceable security against the 52 Lacroix Property in the form of the National Bank Charge, GAR and O'Neill Charge. The distributions are appropriate at this time to limit future Court appearances and stop interest accruing on the National Bank Charge.

**Professional Fees**

33. 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](#).

34. While the above factors, including time spent, should be considered, the 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 how much time it took. The measurement of accomplishment may include consideration of complications and in difficulties encountered in the receivership.

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

35. The Court has also recognized a presumption that court-appointed officers will be entitled to recover their actual costs, absent evidence of extraordinary circumstances, such as dishonest or reprehensible actions committed by the court-appointed officer in carrying out their duties. There is no suggestion that these factors apply in this case.

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

36. The activities of the Receiver described in the First 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 Debtors' stakeholders generally. The Receiver has at all times carried out its duties with appropriate care, skill and diligence.

37. The Receiver, having assumed responsibility for the Real Property, has spent extensive time diligently and thoroughly managing the Debtors' affairs as required, including communicating with the property managers, consulting with the mortgagees and various other stakeholders while successfully overseeing the sale process of the 52 Lacroix Property.

**First Report, para 16.**

38. The Receiver's diligence and efforts have resulted in an executed Sale Agreement for the 52 Lacroix Property subject to the Court's approval. The Receiver has faced challenges due to Mr. Oakes's lack of cooperation in advising the Receiver of books and records or providing pertinent information about the Debtors' business and affairs. The lack of information has burdened the Receiver to spend additional time making inquiries for information that could be readily available if provided by Mr. Oakes.

**First Report, paras 47, 49, 51.**



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 First 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 First Report is commercially sensitive and, if publicly disclosed, could materially and negatively impair the ability of the Receiver to market the 52 Lacroix 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.

**First Report, para 76.**

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 First Report be sealed and kept confidential and not form part of the public record until the closing of the Transaction in respect of the 52 Lacroix 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 January 21, 2025.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

January 24, 2025



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**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

January 24, 2025



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**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

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