

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

DUCA FINANCIAL SERVICES CREDIT UNION LTD.

Applicant

and

**ASHCROFT HOMES – 101 RICHMOND ROAD INC., ASHCROFT
HOMES – 108 RICHMOND ROAD INC., and ASHCROFT HOMES – 111
RICHMOND ROAD INC.**

Respondents

FACTUM OF THE RESPONDENTS/MOVING PARTIES

November 4, 2024

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SERVICE LIST

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PART I – INTRODUCTION

1. Ashcroft brings motion to halt the sales process while promoting the orderly discharge of the receiver, including payment to DUCA and the discharge of DUCA encumbrances, the payment of monies to be held in trust by the Receiver and the discharge of its receivership order, and the transferal of Ashcroft assets and property from BDO back to Ashcroft.
2. This factum addresses the importance and urgency of these steps to promote the best interests of all stakeholders, and why Ashcroft is entitled to investigate and potentially object to the Receiver's fees and disbursements.

PART II – SUMMARY OF FACTS

Background

3. Ashcroft Homes is the parent company of the residential projects known as 111 Richmond Road, 101 Richmond Road and 108 Richmond Road, which have over 600 residential condos and approximately 38,000 square feet of commercial space (the “**Property**”). Apart from 18 condominiums retained as rental properties, all residential condominiums have been sold. The commercial space has been retained it is Ashcroft’s intent to rent out these spaces when it takes back its assets and property.

Affidavit of Manny Difilippo, sworn on November 4, 2024, at para 3 [“Difilippo Affidavit”].

4. The Applicant, DUCA Financial Services Credit Union Ltd. (“**DUCA**”), is a credit union and granted Ashcroft a non-revolving five-year term loan in the amount of \$8,800,000 in relation to the Property.

Difilippo Affidavit, supra para 4.

5. DUCA brought an application when Ashcroft defaulted to appoint BDO Canada Limited (“**BDO**”) as receiver. By Order of His Honour Justice MacLeod, dated May 16, 2024, BDO was appointed as receiver over the Property, which was stayed until June 17, 2024, to allow Ashcroft to pursue and secure refinancing.

Difilippo Affidavit, supra paras 6-7.

6. On September 3, 2024, BDO brought a motion to approve its proposed sale process of the Property, its’ First Report and its’ interim statement of receipts and disbursements, which tallied a net receipt of \$185,402 for the Property. Ashcroft did not consent to or oppose the motion.

Difilippo Affidavit, supra para 9.

7. On September 3, 2024, Justice Corthorn granted the relief sought by BDO, and issued an endorsement with two accompanying Orders, one which restated and amended Justice MacLeod's May 16, 2024, Order (the "Amended Order") and the other which dealt with the sale of the Ashcroft Parties (the "Sales Process Order").

Difilippo Affidavit, supra para 10.

Ashcroft Refinancing

8. On August 27, 2024, Ashcroft requested a payout statement from BDO, specifically requesting the amount required for Ashcroft to pay out the full amount of indebtedness, including its costs and fees as well as those of its counsel, Dentons.

Difilippo Affidavit, supra para 11.

9. On September 19, 2024, having not heard back from BDO about a total amount including BDO's and its counsel's fees, Ashcroft again requested a statement and particulars from both DUCA and BDO as to the amount needed to pay off the indebtedness in full, namely BDO's and its counsel's fees and expenses. In that same correspondence, Ashcroft provided BDO with a signed commitment letter for \$8.5 million, which was set to fund by September 27, 2024.

Difilippo Affidavit, supra para 12.

10. On September 23, 2024, BDO informed Ashcroft that its combined fees and disbursements (including its legal fees) were \$425,000. BDO did not provide a breakdown setting out how it calculated these fees.

Difilippo Affidavit, supra para 14.

11. Ashcroft has persistently asked BDO for a breakdown and particulars of its fees, disbursements and legal fees in relation to the \$425,000. To date, BDO has not provided any particulars in respect of the \$425,000.

Difilippo Affidavit, supra para 15.

12. In late September 2024, based on BDO's representation that its current fees, disbursements and expenses were \$425,000, Ashcroft secured sufficient financing to pay off the indebtedness owed to DUCA and BDO.

Difilippo Affidavit, supra para 16.

13. On October 4, 2024, BDO was advised that Ashcroft had secured refinancing, which they directed to their solicitor's trust account to be held to pay out the indebtedness owed to DUCA as well as BDO's costs and expenses.

Difilippo Affidavit, supra para 17.

14. On October 7, 2024, BDO advised Ashcroft that they required \$8,500,000 in financing to cover its debts and to discharge the receiver. BDO also advised that it would provide a breakdown and particulars of the \$425,000 the following day, namely, by October 8, 2024.

Difilippo Affidavit, supra para 18.

15. At the same time, Ashcroft's counsel advised BDO that it would attempt to provide particulars of their refinancing by the next day as well.

Difilippo Affidavit, supra para 19.

16. On the following day, October 8, 2024, Ashcroft's counsel advised BDO and DUCA counsel that it had secured the amount of \$8,750,000 in the refinancing arrangement. Ashcroft's counsel provided particulars and a breakdown of how these funds were sufficient to

discharge the receiver and pay all debts, including debts not reported on by BDO in September, namely property taxes.

Difilippo Affidavit, supra para 20.

17. On October 9, 2024, BDO newly communicated that:

- a) It had not completed a breakdown of the alleged \$425,000 in fees and expenses but reminded Ashcroft that the debts are accruing daily;
- b) It was unsure when it would be able to provide information related to the \$425,000 in alleged fees and expenses;
- c) It had not included other liabilities and debts owed by the Ashcroft when providing the \$425,000 figure, although it was neither able to state what the other debts were, nor their amounts;
- d) BDO had, by that point, failed to pay HST and property taxes for the certain properties at issue;
- e) The amount owed by the Ashcroft fluctuated daily to the extent that the Receiver was struggling to compute the rent revenues and debt; and,
- f) The \$8,750,000 loan may be insufficient to cover the DUCA payout and outstanding debts required before BDO could be discharged as receiver.

Difilippo Affidavit, supra para 21.

18. On or around October 10, 2024, counsel for DUCA sent to Ashcroft, on its behalf and on behalf of BDO, a list of questions regarding the refinancing secured by Ashcroft. This email also confirmed that BDO would stay the Sales Process of the properties for one week, until October 17, 2024, to provide Ashcroft with time to consider the questions being asked.

Difilippo Affidavit, supra para 24.

19. BDO did not commit to terminating the Sales Process altogether, and instead indicated that they would consider the additional information Ashcroft provided before making any such determination.

Difilippo Affidavit, supra para 25.

20. On or around October 11, 2024, Ashcroft provided fulsome answers to DUCA and BDO's October 10 questions, providing all requested refinancing documentation.

Difilippo Affidavit, supra para 26.

21. On or around October 11, 2024, BDO provided Ashcroft with a summary of estate accounts along with an estimate of the use of refinancing proceeds as of October 31, 2024, noting that the amount of \$8.75 million would be "marginally sufficient" to cover the costs associated with terminating the proceedings.

Difilippo Affidavit, supra para 27.

22. At that time, BDO indicated that its professional fees up until September 30, 2024, were \$519,802.84 – which represents a \$94,802.84 increase from the \$425,000 amount in two weeks (September 13 to September 30). No explanation was provided by BDO for such a dramatic and significant increase in professional fees.

Difilippo Affidavit, supra para 28.

23. On October 11, 2024, counsel for DUCA provided a per diem amount for interest on the indebtedness of \$875.41, with professional fees still accruing.

Difilippo Affidavit, supra para 29.

24. In addition, BDO has requested assurance from Ashcroft that funding is available to cover further shortfalls without providing any particulars for why there would be a shortfall.

Difilippo Affidavit, supra para 30.

25. For reasons unknown to Ashcroft, BDO, in its role as Receiver, has failed or otherwise refused to provide particulars related to the total amount required to pay off all amounts owed and to discharge the Receiver or to provide a timeline regarding same, despite repeated requests for same from the Ashcroft since August 27, 2024.

Difilippo Affidavit, supra para 31.

PART III – ISSUES

26. The issues in dispute in this motion are:

- a) Whether the Sales Process should be halted and the Receiver discharged given that the estate has been substantially administered and there remains only incidental tasks to complete.
- b) Whether the Debtor should be granted leave, if necessary, and a preservation of rights to ask the Court to compel the Receiver to pass accounts.

PART IV – LAW AND ARGUMENT

The Sales Process Should be Halted, the Refinancing Approved, and the Receivership Discharged.

27. A court-appointed receiver owes fiduciary duties to all parties, including the debtor. A receiver has a duty to act honestly and in good faith and must deal with the property of the debtor in a commercially reasonable manner.

Royal Bank of Canada v Delta Logistics Transportation Inc. (2017), 2017 ONSC 368 (Ont SCJ) at para 11.

28. While the discharge of a receivership is intended to bring finality to the receivership proceedings, there is often ancillary work to be completed. For this reason, the discharge may be granted subject to the finalization of the outstanding work to be confirmed through the filing of a certificate of completion by the receiver.

West Face Capital Inc v Chieftain Metals Inc 2020 ONSC 5161 (Canlii) at para 20 [“*West Face Capital Inc v Chieftain Metals Inc*”].

29. A receiver should apply to discharge the estate when it is substantially administered and not wait for the completion of minor administrative tasks. Often, a receivership is substantially administered but certain administrative tasks may remain, including the receiver waiting to receive harmonized sales tax (HST) rebate or other tax clearances or refunds.

Model Discharge Order (Receiver) approved by Toronto Commercial List Users’ Committee – by Practical Law Canada Insolvency & Restructuring [“Model Discharge Order”] at p 3 (attached as Appendix “A”)

30. The Courts have adopted a two-stage discharge process to facilitate a discharge on substantial administration of a receivership. The first step is to obtain the discharge order, which will identify the outstanding duties of the receiver and provide that the receiver will file a certificate of completion of these remaining duties. The second step is to file the certificate once the remaining duties are complete. This makes the discharge effective.

Model Discharge at p 3.

31. The Court has discretionary power to manage insolvency proceedings. These powers include halting a sales process in situations where a debtor has secured adequate financing to cover the debts and expenses of a receivership. Similarly, it may make orders when the receiver or insolvent person brings motion for directions to promote the orderly discharge of the Debtor’s assets, namely discharging various encumbrances on property.

Triple-I Capital Partners 2023 ONSC 3400 at paras 10-12
West Face Capital Inc v Chieftain Metals Inc at para 35.

32. It makes commercial sense and is in the best interests of the parties for the Court to exercise its discretionary powers to create an expedited schedule to discharge the receivership in an orderly manner. In particular,

- a) To approve Ashcroft's refinancing;
- b) To direct Ashcroft to pay DUCA in accordance with its current payout statement, and for DUCA to discharge all encumbrances;
- c) To direct Ashcroft to pay the Receiver its proposed fees, disbursements expenses as well as any accounted for expenses from third parties in trust, and held in escrow pending the agreement of the parties or court order;
- d) To direct the Receiver to remove its receivership order from title to the Property;
- e) To direct the Receiver to deliver its accounts with accompanying fee affidavits; and,
- f) To direct the Receiver to deliver its final report and certificate of completion.

33. The Court should require this expedited timeline and promote the discharge of this receivership because Ashcroft has had sufficient refinancing to pay all indebtedness, fees and expenses since October 4, 2024. Also, Ashcroft's refinancing lender expects that the receivership will be discharged in a timely manner. Despite knowing that funds were readily available, the Receiver has not responded to Ashcroft's attempts in preparing and finalizing a discharge order. The Receiver has not prepared or delivered discharge materials. Failing to move forward expeditiously threatens Ashcroft's ability to carry on business because of the accrual costs linked to Ashcroft's debts, not to mention closing the financing transaction, including the provision of adequate security.

Difilippo Affidavit at paras 17, 20, 26, 32, 36. 38. 40-41.

34. In addition, once the refinancing monies have discharged the DUCA loan, the estate will have been substantially administered and only incidental tasks remain. Because the Sales Process is no longer warranted, the Receiver's remaining tasks (according to its First Report)

will be to: cancel the sales process with the third-party brokerage, transfer documentation, billings and property to Ashcroft, and deal with outstanding HST and property taxes.

Difilippo Affidavit at paras 38-39.

The Receiver's Fees and Disbursements should not be approved without submitting affidavit evidence and formal passing of accounts process

35. A debtor, or other interested stakeholder in a receivership, may apply to have the receiver's accounts reviewed. The purpose in passing the receiver's accounts is to afford the debtor, among others, the opportunity to question the receiver's activities and conduct. The Court has inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities.

Bankruptcy and Insolvency Act R.S.C. 1985, c. B-3 at s. 248(2).
Bank of Nova Scotia v Diemer, 2014 ONSC 365 at para 4.

36. It is a receiver's duty to pass detailed accounts and provide an accompanying affidavit to substantiate the hours spent and the disbursements incurred. The deference to which the receiver's business decisions are owed does not insulate its accounts from review to determine if they are fair and reasonable.

Confectionately Yours Inc. (Re), 2002 CanLII 45059 (ON CA), [2002] O.J. No. 3569 2 at para 30-31 [*"Confectionately Yours Inc. (Re)"*].
Impact Tool v Mould Inc., 2015 ONCA 393 (Canlii) at para 18.

37. In this case, the Receivership Order provides that the Receiver and its counsel shall pass their accounts. In its notice of motion, the Receiver indicates that it was pursuing the Court's approval of its interim statement of receipts and disbursements ("**R&D**"), which it intended to file with fee affidavits. To date, no R&D or fee affidavits have been delivered by the Receiver.

38. The Receiver has indicated that as of September 13, 2024, its fees and expenses were \$425,000, which massively increased in a two-week period to approximately \$520,000 by September 30th. Without explanation or particulars to date by the Receiver, Ashcroft should be afforded the opportunity to review the Receiver's accounts and fee affidavits and to reserve its right to request to the Court that the Receiver's R&D be subject to a passing of accounts. Ashcroft would be severely prejudiced if the Court considered the Receiver's R&D in this motion without even being afforded the opportunity to review them, less than 24 hours before the hearing.

PART V – ORDER

39. Ashcroft's request:

- a) Leave of this Honourable Court to pursue a proceeding as against the Receiver, BDO Canada Limited (the "**Receiver**") pursuant to paragraph 10 of the Amended and Restated Order attached as Schedule "A" to the Endorsement of Justice Corthorn dated September 3, 2024 ("September 3, 2024, Endorsement"), if necessary, as it relates to the Directions Ashcroft pursues in the relief below;
- b) Directions from this Honourable Court for the orderly administration of the entities under the Receivership and the discharge of the Receiver; namely,
 - i. An Order that Ashcroft is authorized and directed to complete the refinancing with HP ABL Fund Inc. in the amount of \$8,750,000 (the "**Financing**"), as directed and outlined in the payments below, with the surplus amounts under the Financing being available to Ashcroft on the terms and conditions outlined in the Financing and for its general corporate purposes.

- ii. An Order directing payment by the Ashcroft to DUCA in accordance with DUCA's payment statement as of November 5, 2024;
 - iii. An Order, upon DUCA's receipt of the payment set out at paragraph (b) above, discharging all DUCA encumbrances on Ashcroft's properties particularized at Schedule "A" of the September 3, 2024, Endorsement;
 - iv. An Order, directing payment by Ashcroft in the amount set out in Receiver's receipts and disbursements that it intends to file in its motion record (the **"Disputed Amount"**), to the Receiver, which amount shall be held in escrow without prejudice to Ashcroft's right to request the Court to compel the Receiver to pass its accounts;
 - v. An Order, upon payment by Ashcroft to the Receiver set out at paragraph (d) above, discharging the registration of the Receivership Order, as outlined in paragraph 20 of the Amended and Restated Order of the September 3, 2024, Endorsement (the **"Receivership Order"**);
 - vi. An Order suspending the Sales Process set out at Schedule B of the September 3, 2024, Endorsement (the **"Sales Process Order"**); and,
- c) The costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of November, 2024.



Raymond Murray / Sarah DelVillano

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Lawyers for the Respondents/Moving Parties,
Ashcroft Homes – 101 Richmond Road Inc.,
Ashcroft Homes – 108 Richmond Road Inc.,
and Ashcroft Homes – 111 Richmond Road
Inc

LIST OF AUTHORITIES

Legislation
<i>Bankruptcy and Insolvency Act</i> , R.S.C., 1985, c. B-3
Jurisprudence
<i>Royal Bank of Canada v Delta Logistics Transportation Inc.</i> (2017), 2017 ONSC 368 (Ont SCJ)
<i>West Face Capital Inc v Chieftain Metals Inc</i> 2020 ONSC 5161 (Canlii)
<i>Triple-I Capital Partners</i> , 2023 ONSC 3400
<i>Bank of Nova Scotia v Diemer</i> , 2014 ONSC 365
<i>Confectionately Yours Inc. (Re)</i> , 2002 CanLII 45059 (ON CA), [2002] O.J. No. 3569
<i>Impact Tool v Mould Inc.</i> 2015 ONCA 393 (Canlii)
Other
<i>Model Discharge Order (Receiver) approved by Toronto Commercial List Users' Committee – by Practical Law Canada Insolvency & Restructuring</i> [see attached as Appendix “A”]

APPENDIX "A"

Model Discharge Order (Receiver) (ON)

by Practical Law Canada Insolvency & Restructuring

Standard documents | **Maintained** | Canada

This is an annotated version of the model receivership **Discharge** Order approved by the Toronto Commercial List Users' Committee. The standard document in word format has the same text as the model Order (without footnotes) and can be used to blackline against the final proposed order.

About This Document

Model Orders (Insolvency)

This document is a model order that has been approved by the Toronto Commercial List Users' Committee (see **Discharge Order**). [The Consolidated Practice Direction Concerning the Commercial List, Effective June 15, 2023](#), directs that, where a model order has been approved by the Commercial List Users' Committee, a copy of the draft order blacklined to the model order indicating all variations sought from the model order must be filed (paragraph 69).

Model orders promote efficiency, expediency, and uniformity in insolvency matters. Model orders, however, are only a starting point. It is the responsibility of the parties drafting the order to customize the order to be appropriate to the circumstances and to satisfy the court that both the model and customized provisions should be granted (*Potentia Renewables Inc. v. Deltro Electric Ltd.*, 2019 CarswellOnt 15397 (Ont. C.A.), at paragraphs 42 and 43).

The model orders have been created by senior practitioners with feedback from the Commercial List justices. Most receivership proceedings in Ontario are headed by the Commercial List in Toronto, which has specific expertise in insolvency matters. For more information in respect of the Commercial List, see [Practice Note, Commercial List Practice Guide \(ON\)](#) and [Commercial List Filing Checklist \(ON\)](#).

Using This Document

The word version of this document is an unedited version of the model order (other than the footnotes having been removed) and can be saved as the clean version of the order against which the final draft order can be blacklined.

The drafting notes throughout this model order provide context and information in respect of provisions of this order, as well as highlighting customizations that may be appropriate in certain circumstances.

Discharge Order

This order contemplates the **discharge** of a **receiver** over the assets of one or more debtor companies appointed jointly pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA). The model order can be adapted to other types of receiverships appointed under other legislation. For more information on other types of receiverships and other enabling legislation, see Practice Note, *Receiverships: Overview: Types of Court-Appointed Receiverships*.

Protecting the **Receiver** and the Importance of Service of Application

A key purpose of a **Discharge** Order is to protect the **receiver** from lawsuits after it is discharged. A **receiver** is a hired professional. Either as part of the **Discharge** Order or by prior order, all the assets of the estate are distributed by the time the **receiver** is discharged. If **receivers** were commonly addressing lawsuits post **discharge**, they would almost certainly require material holdbacks from distribution to have assets available to address these claims. This would introduce significant delays in distribution and weaken the efficiency of the insolvency system. Claims are intended to be fully and finally resolved within a receivership, prior to the **receiver's discharge**.

Consequently, parties seeking to bring an action against a **receiver** after it has been discharged, or the impugned actions have otherwise been approved by court order, must demonstrate that they have a strong *prima facie* case in order to obtain leave to sue the **receiver**, provided that the party seeking to bring the claim was given notice of the **discharge** or approval application (*Blue Steel Investments LLC v. Hegco Canada Inc.*, 2013 CarswellAlta 884 (Alta. Q.B.), at paragraph 34) affirmed on reconsideration 2013 CarswellAlta 867 (Alta. Q.B.) and affirmed 2014 CarswellAlta 936 (Alta. C.A.).

As a result, it is imperative to have good service of the **discharge** application on all stakeholders, particularly any who may be aggrieved by steps taken or not taken by the **receiver**.

Supporting Material

A motion to **discharge** a **receiver** is typically accompanied by:

- The **receiver's** final report.
- An affidavit of each of the **receiver** and its counsel with respect to their fees.

Receiver's Final Report

The **receiver's** final report is an important document. Along with any earlier reports filed by the **receiver**, this report should fully and fairly detail all material actions (and inactions) of the **receiver**. The disclosure of actions and inactions, as well as the corresponding rationale, is the basis for the court approving the **receiver's** activities. Failure to disclose material steps or matters in the receivership on the record will weaken the protection of a **discharge** order as a court may not apply the doctrine of *res judicata* if the impugned matter was not clearly on the record.

Fee Affidavits

The fee affidavits are also important. There is no mandated statutory fee approval process for **receivers**. The court retains jurisdiction over court-appointed **receivers** and, typically, professional fees are approved within the receivership process, not in a separate court assessment process for costs. In all cases, the onus is on the **receiver** and

its counsel to establish that the compensation they seek is fair and reasonable (*Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 (Ont. C.A.), at paragraph 31, leave to appeal refused 2003 CarswellOnt 1043 (S.C.C.)).

Provincial practice differs around the procedure for **receivers** and their counsel to pass accounts. In Ontario, best practice is for each professional firm to provide a fee affidavit verifying the accounts they seek to have approved (*Confectionately*, at paragraph 38). The purpose behind fee affidavits is to ensure accuracy and to signal that, unlike questioning a **receiver** on its report, the threshold to question professionals on their accounts is low (*Confectionately*, at paragraph 65).

A fee affidavit typically contains the applicable professional invoices (with time entry descriptions redacted, if necessary), a summary of the timekeepers, their rates and hours billed on the file and confirmation that the rates and charges are the firm's standard rates and charges. The **receiver's** fee affidavit or report typically also opines that its fees and its counsel's fees are fair and reasonable.

Receiver's Discharge Certificate and Timing of **Discharge** Application

Often, a receivership will be **substantially administered** but certain administrative tasks may remain. For example, the **receiver** may be waiting to receive **harmonized sales tax** (HST) rebates or other tax clearances or refunds. It is better to apply for a **discharge** once the estate is substantially administered and not wait for the completion of minor administrative tasks, particularly ones that cannot be immediately completed. The benefit of applying for a **discharge** on substantial completion is that the substantive matters in the receivership are finalized and money is distributed sooner. Logistically, it also means that a **discharge** application can generally be combined with the last substantive distribution application, which eliminates the cost of one application. Obtaining a **discharge** order in a timely manner is also good practice management for both **receivers** and their counsel.

The courts have adopted a two-stage **discharge** process to facilitate a **discharge** on substantial administration of a receivership. The first step is to obtain the **discharge** order which will identify the outstanding duties of the **receiver** and provide that the **receiver** will file a **certificate** on completion of these remaining duties. The second step is to file the **certificate** once the remaining duties are complete. This makes the **discharge** effective.

Attach the Backsheet

A backsheet must be attached (see [Standard Document, Backsheet \(ON\)](#)).

Revised: May 11, 2010

Header

This header should be deleted in the draft order. It is in the standard document for blacklining purposes.

Court File No. _____

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE _____

)

WEEKDAY, THE #

JUSTICE _____

)

OF MONTH, 20YR

B E T W E E N:

PLAINTIFF

Plaintiff

-and-

DEFENDANT

Defendant

DISCHARGE ORDER

Style of Cause

If the receivership was commenced by Notice of Application, “Applicant” should replace “Plaintiff” and “Respondent” should replace “Defendant”.

For receiverships under the [BIA](#), every court document used in the course of a receivership must be entitled “In the Matter of the Receivership of [NAME OF DEBTOR(S)]” (section 9(4), *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368).

If the **receiver** is solely appointed under the [BIA](#), “In the Matter of the Receivership of [NAME OF DEBTOR(S)]” can replace the names of the parties. If the **receiver** is jointly appointed under the [BIA](#) and other legislation, the [BIA](#) heading can be added under the names of the parties.

THIS MOTION, made by [RECEIVER'S NAME] in its capacity as the Court-appointed receiver (the "Receiver") of the undertaking, property and assets of [DEBTOR] (the "Debtor"), for an order:

1. approving the activities of the Receiver as set out in the report of the Receiver dated [DATE] (the "Report");
2. approving the fees and disbursements of the Receiver and its counsel;
3. approving the distribution of the remaining proceeds available in the estate of the Debtor; [and]
4. discharging [RECEIVER'S NAME] as Receiver of the undertaking, property and assets of the Debtor; and
5. releasing [RECEIVER'S NAME] from any and all liability, as set out in paragraph 5 of this Order],

was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Report, the affidavits of the Receiver and its counsel as to fees (the "Fee Affidavits"), and on hearing the submissions of counsel for the Receiver, no one else appearing although served as evidenced by the Affidavit of [NAME] sworn [DATE], filed;

Recitals

Formatting

The model order uses "1, 2, 3, ..." in separate paragraphs to list the aspects of the application. Typically, the recitals of an order use "(i), (ii), (iii) ..." within one paragraph to list these items, to distinguish the list from the operative paragraphs of an order and to be consistent with [Form 59A](#) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

The sections dealing with the release are bolded as the committee considered this relief optional. If included, it should not be bolded. See [Drafting Note, Release](#) for more information.

Content

The recitals must be customized to list each type of relief sought at the application. Alternately, it is also common to simply delete the list of relief sought as it is not necessary. The paragraph reference in paragraph 5 should also be adjusted if the operative paragraphs change.

The date and number of the receiver's report should be identified, as well as the dates and affiants for the fee affidavits.

Service

The model Order does not contain language for abridging time of service as, barring extenuating circumstances, there should be time to serve all stakeholders. In practice, it is prudent to review the Affidavit of Service with the court, explaining how the service list was compiled and any issues with service, then requesting a provision abridging and dispensing with further service to address possible unknown issues with service. A clause that can be used is:

THIS COURT ORDERS that the time for service of the Notice of Motion and Motion Record of the **Receiver** is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

If this clause is used, it is customarily the first operative clause of the Order.

1. THIS COURT ORDERS that the activities of the **Receiver**, as set out in the Report, are hereby approved.

Approval of Court Reports

In *Target Canada Co. Re*, 2015 CarswellOnt 19174 (Ont. S.C.J.), Justice Morawetz approved language limiting court approval of reports so that only the court officer, in that case a monitor in CCAA proceedings, was entitled to rely on the court approval (*Target*, at paragraph 7). Justice Morawetz held that this limitation acknowledges the “good policy and practical reasons” for extending protection to court officers while avoiding overbroad protection of third parties on issues that had not been fully canvassed by the court (*Target*, at paragraphs 20-22).

In the *Commercial List Users’ Committee Newsletter Issue #11 (January 2019)*, at page 5, the Commercial List Users’ Committee advised that inclusion of this limiting language was expected to be required in all orders approving the reports and activities of court officers generally, including **receivers**. The following phrase should therefore be added to the end of paragraph 1:

”provided, however, that only the **Receiver**, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.”

Approval of Statement of Receipts and Disbursements

It is common to add a paragraph specifically approving the **Receiver’s** statement of receipts and disbursements. A new paragraph 2 can be inserted (usually after paragraph 1, with the rest of the paragraphs renumbered) as follows:

2. THIS COURT ORDERS that the **Receiver’s** statement of receipts and disbursements referred to

in the Report be and is hereby approved.

2. THIS COURT ORDERS that the fees and disbursements of the **Receiver** and its counsel, as set out in the Report and the Fee Affidavits, are hereby approved.

Fee Accruals

It is often difficult to provide a truly final account at the time the materials for the **discharge** application are filed. There is often some work to be done after the application (see [Drafting Note, Receiver's Discharge Certificate and Timing of Discharge Application](#)). For particularly complicated or contested **discharge** applications, there can also be material time spent in the days leading up to the application that will not be captured in the final invoices included in the Fee Affidavits.

The practice is to provide a limited fee accrual for additional professional fees and disbursements and to seek approval of payment of those fees and disbursements without the necessity of formally passing such accounts.

The amount of a fee accrual should be relatively minor compared to the fees for the balance of the administration of the receivership.

If a fee accrual is needed, the following paragraph can replace paragraph 2 in the model **Discharge** Order:

2. THIS COURT ORDERS that the fees and disbursements of the **Receiver** and its counsel, as set out in Report and the Fee Affidavits, are hereby approved along with such additional fees and disbursements of the **Receiver** and its counsel from and after the date of the Fee Affidavits as reasonably necessary to complete the administration of the receivership, in an amount not to exceed \$[AMOUNT], excluding HST ("Fee Accrual"), without the necessity of further passing such accounts.

3. THIS COURT ORDERS that, after payment of the fees and disbursements herein approved, the **Receiver** shall pay the monies remaining in its hands to [NAME OF PARTY].

Final Distribution

Paragraph 3 in the model **Discharge** Order is often modified to accommodate additional money that might be received by the **receiver** as well as the fee accrual for professional fees (see [Drafting Note, Fee Accruals](#)). The **receiver's** statement of receipts and disbursements along with a final distribution to the first secured creditor of the balance of the receivership estate is commonly approved in the **Discharge** Order. If a distribution provision is included, the heading of the document should be changed from “**Discharge** Order” to “Order “(Distribution and **Discharge**)”.

The materials filed in support of the application must support any proposed distribution. For a distribution to a secured creditor, the report would generally include that the **receiver** is recommending the distribution based on its review of the evidence of the secured debt from the lender along with the **receiver's** counsel's opinion that the security is valid and enforceable.

The following clause can be used instead of paragraph 3 in the Model Order to address these issues:

THIS COURT ORDERS that the **Receiver** is hereby authorized and directed to, from the proceeds of the estate of the Debtor in the **Receiver's** hands pay:

- a. The fees and disbursements herein approved;
- b. \$[AMOUNT] to [SPECIFY PARTY];
- c. The final fees and disbursements of the **Receiver** and its counsel from the Fee Accrual, without a necessity for a formal passing of those accounts; and
- d. The remainder, including any balance of the Fee Accrual and any proceeds received after the date of this Order, to [SECURED CREDITOR] provided that such payment does not exceed [DOLLAR BALANCE OF REMAINING SECURED DEBT].

4. THIS COURT ORDERS that upon payment of the amounts set out in paragraph 3 hereof [and upon the **Receiver** filing a **certificate** certifying that it has completed the other activities described in the Report], the **Receiver** shall be discharged as **Receiver** of the undertaking, property and assets of the Debtor, provided however that notwithstanding its **discharge** herein (a) the **Receiver** shall remain **Receiver** for the performance of such incidental duties as may be required to complete the administration of the receivership herein, and (b) the **Receiver** shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of [**RECEIVER'S NAME**] in its capacity as **Receiver**.

Remaining Duties and Receiver's Discharge Certificate

Remaining Duties

The remaining duties can either be clearly enumerated in the report or this paragraph can be amended to expressly enumerate the outstanding duties. As the **receiver's** compensation is effectively capped by the fee accrual, it is important to be clear on the scope of the additional work the **receiver** is required to do.

Receiver's Discharge Certificate

If the **receiver** has remaining duties to complete after obtaining the **discharge** order, the **discharge** becomes effective on filing a **Receiver's Discharge Certificate**. It is customary to attach a **Receiver's Discharge Certificate** and amend paragraph 4 of the model **Discharge** Order to reflect that the form of **Receiver's Discharge Certificate** is attached as Schedule "A". See [Standard Document, Receiver's Discharge Certificate \(ON\)](#) for a sample **discharge certificate**.

Ensure the cross-paragraph references are correct.

5. [THIS COURT ORDERS AND DECLARES that [**RECEIVER'S NAME**] is hereby released and discharged from any and all liability that [**RECEIVER'S NAME**] now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of [**RECEIVER'S NAME**] while acting in its capacity as **Receiver** herein, save and except for any gross negligence or wilful misconduct on the **Receiver's** part. Without limiting the generality of the foregoing, [**RECEIVER'S NAME**] is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within receivership proceedings, save and except for any gross negligence or wilful misconduct on the **Receiver's** part.]

Date of issuance _____

Release

The Model Order notes that this clause was the subject of debate on the Model Order Subcommittee, with some parties

feeling that a general release was not necessary given the protections in the order appointing the **receiver** and the approval of the **receiver's** reported activities throughout the course of the proceedings. The Model Order therefore includes this clause bolded, and in square brackets as an option, for the presiding Judge to consider in each case.

In practice, **receivers** want the comfort of the general release, and this clause is routinely sought and granted in **discharge** applications.

Backsheet and Schedules

A backsheet must be attached (see [Standard Document, Backsheet \(ON\)](#)).

If using a **Receiver's Discharge Certificate**, attach as Schedule "A" before the backsheet.

END OF DOCUMENT

**DUCA FINANCIAL SERVICES CREDIT
UNION LTD.**

- and -

**ASHCROFT HOMES – 101 RICHMOND ROAD INC.,
ASHCROFT HOMES – 108 RICHMOND ROAD INC., and
ASHCROFT HOMES – 111 RICHMOND ROAD INC.**

Applicant

Respondents

Court File No. CV-24-00095337-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT OTTAWA

FACTUM OF THE RESPONDENTS/MOVING PARTIES

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