

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

**BETWEEN:**

ROYNAT INC.

Applicant

and

2796996 ONTARIO INC.

Respondent

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**FACTUM OF THE RECEIVER**

(Motion returnable June 22, 2023)  
Approval and Vesting Order and Ancillary Order

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June 15, 2023

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Lawyers for the Receiver,  
msi Spergel inc.

TO: SERVICE LIST

## NATURE OF MOTION

1. This is a motion by msi Spergel inc. ("**Spergel**"), in its capacity as court-appointed Receiver (the "**Receiver**"), appointed pursuant to an order of the Ontario Superior Court of Justice – Commercial List (the "**Court**") dated August 5, 2022 (the "**Appointment Order**") of the Property (as defined in the Appointment Order) of the Respondent, 2796996 Ontario Inc. (the "**Debtor**") for, *inter alia*, the following relief:
  - a) An Approval and Vesting Order, substantially in the form attached to the Notice of Motion at Schedule "A", *inter alia*, approving the transaction (the "**Transaction**") contemplated by the Agreement of Purchase and Sale between 14927524 Canada Inc. (the "**Purchaser**") and the Receiver dated March 31, 2023, a redacted version of which is appended to the Receiver's First Report as Appendix "7" and included in the Confidential Appendices (as defined herein) (the "**Sale Agreement**") for the sale of the Real Property (as defined herein) and vesting all of the right, title and interest in and to the Real Property of the Debtor absolutely in the Purchaser free and clear of and from any security, charge or other encumbrance;
  - b) An Ancillary Order, substantially in the form attached to the Notice of Motion at Schedule "B", *inter alia*, approving the Receiver's First Report to the Court dated June 14, 2023 (the "**First Report**") and the activities and conduct of the Receiver as detailed therein, sealing the Confidential Appendices to the First Report (the "**Confidential Appendices**"), Approving the Proposed Distribution (as defined in the First Report), discharging the Spergel as Receiver on the filing of the Certificate of Completion as provided for in the First Report, and releasing the Receiver from liability for its actions while acting in such capacity, save and except for the Receiver's gross negligence or willful misconduct, and other ancillary relief; and,
  - c) Such further and other relief as counsel may request and this Honourable Court may permit.
2. It is the position of the Receiver that the Receiver's actions and the Transaction should be approved and that the relief requested should be granted, for the following reasons:

- a) It is commercially reasonable offer for the Real Property;
- b) It provides certainty as to realizations, subject to the terms of the Sale Agreement (as defined herein);
- c) Avison Young (as defined herein) undertook a thorough marketing process for the Real Property, with full exposure to the market;
- d) The sale price is supported by the appraisals commissioned by the Receiver;
- e) The Receiver's sales process was fair, efficient, transparent and one with integrity that resulted in the best possible purchase price and meets the test as set out in Soundair;
- f) It is supported by Roynat; and,
- g) The Sealing Order ensures the integrity of the process and avoids any prejudice to stakeholders in the event that the Transaction does not close and the Receiver is required to remarket the Real Property.

## THE FACTS

### Appointment and Background

3. The Debtor is a Canadian owned, private corporation, incorporated pursuant to the laws of the Province of Ontario and was in the business as an Esso branded gas bar and convenience store. The Debtor operated from owned premises located at 88 Main Street West, Grimsby, ON (the "**Real Property**").

*First Report to the Court Submitted by the Receiver dated June 14, 2023 (the "First Report"), para 2*

4. Spergel was appointed as Interim Receiver over the Property of the Debtor on July 25, 2022 pursuant to the Interim Receivership Order of Justice McEwen, and subsequently was appointed as Receiver over the Property of the Debtor on August 5, 2022, pursuant to the Appointment Order following application of the Applicant, Roynat Inc. ("**Roynat**").

*First Report, paras 3 and 4 and Appendices "1", "2", "3", and "4" thereto*

5. Immediately upon its appointment, the Receiver secured possession of the Real Property and attended to all necessary repairs.

***First Report, para 12***

6. The Receiver sought proposals with respect to reviving the operations of the gas station in order to market the business as a going concern, however after a review of same and consultation with Roynat, it was determined that significant capital would be required to revive the operations of the gas station and attempt to market the business as a going concern.

***First Report, para 14***

MacEwen

7. The supplier of the business of the Debtor was MacEwen Petroleum Inc. ("**MacEwen**") pursuant to a Fuel Supply Agreement between MacEwen and the Debtor (the "**MacEwen FSA**"), entered into via assumption agreement. The MacEwen FSA contained a right of first refusal with respect to any sale of the Real Property (the "**MacEwen ROFR**").

***First Report, paras 15 and 16 and Appendix "5" thereto***

8. MacEwen advised the Receiver that it did not have an interest in purchasing the property, however, it did have an interest in preserving its rights under the MacEwen FSA. Following negotiations between the Receiver and MacEwen regarding the MacEwen FSA and MacEwen ROFR, the Receiver and MacEwen agreed as follows:
  - a) The Receiver would market the Real Property with the MacEwen FSA in place, and advise the market that if an offer, acceptable to the Receiver, is made that honors the MacEwen FSA and the MacEwen ROFR would not apply;
  - b) If a party was interested in the Real Property and wanted to attempt to renegotiate the terms of the MacEwen FSA, the Receiver would connect the party and MacEwen for such negotiations to take place; and,

c) If no party made an offer acceptable to the Receiver and the Receiver, as a court appointed officer, reported to the Court that it concluded that the MacEwen FSA was impairing the sale, then the Receiver would seek to disclaim the MacEwen FSA.

***First Report, para 17***

The Sales Process

9. The Appointment Order, among other things, authorized the Receiver to market any or all of the Property, and section 3(k)(i) thereof authorized the Receiver to sell, convey, transfer, lease or assign the Property or parts of the Property out of the ordinary course of business.

***First Report, Appendix "1" thereto, s. 3(k)(i)***

10. The Receiver engaged the services of Colliers International Realty Advisors Inc. and Wagner, Andrews & Kovacs Ltd. to attend at and conduct full narrative appraisals of the Real Property.

***First Report, para 19 and Confidential Appendix "1" thereto***

11. The Receiver obtained sales and marketing proposals from CBRE Limited and Avison Young Commercial Real Estate Services LP ("**Avison Young**") and subsequently concluded that the Avison Young proposal was most beneficial to the estate, and entered into an MLS Listing Agreement with Avison Young dated December 7, 2022

***First Report, paras 19-21 and Confidential Appendix "2" and Appendices "6" and "7" thereto***

12. Avison Young widely marketed the Real Property including listing the Real Property on MLS and reaching out to over 1900 contacts, which resulted in the receipt of five (5) offers dated March 31, 2023.

***First Report, paras 22 and 23 and Confidential Appendices "3" and "4" thereto***

13. Following a review of all offers submitted, the Receiver accepted the offer submitted by the Purchaser (the "**Accepted Offer**"). The Accepted offer is on an "as-is, where-is"

basis, conditional upon the Purchaser being able to obtain a satisfactory fuel supply agreement with MacEwen. The condition with respect to the fuel supply agreement was subsequently waived by parties.

***First Report, paras 24-26, Appendices "8" and "9" thereto and Confidential Appendix "9" thereto***

14. The Receiver recommends that the Transaction be approved as:
- a) The market was extensively canvassed by Avison Young pursuant to industry standards, and the Real Property was sufficiently exposed to the market;
  - b) The sale price is supported by the appraisals commissioned by the Receiver;
  - c) The Accepted Offer is commercially reasonable; and,
  - d) The Transaction has the support of the Debtor's first secured creditor, Roynat.

***First Report, paras 29-32***

Sealing Order

15. The Receiver is of the view that the information and documentation contained in the Confidential Appendices contains commercially sensitive information and should be sealed in order to avoid the negative impact that the dissemination of the confidential information contained therein would have if the Transaction is not completed. As a result, the Receiver is seeking a sealing order in respect of the Confidential Appendices until such time as the Transaction is complete, or until further order of this Court.

***First Report, para 18***

Fees and Disbursements

16. The current fees and disbursements of Spergel, in its capacity as Interim Receiver, inclusive of HST, total \$23,750.90 as at May 31, 2023. The current fees and disbursements of Spergel, in its capacity as Receiver, inclusive of HST, total \$157,042.03 as at May 31, 2023.

***First Report, para 41 and Appendix "10" thereto***

17. The current fees and disbursements of Harrison Pensa LLP, as counsel for the Receiver total \$46,329.16, inclusive HST.

***First Report, para 42 and Appendix "11" thereto***

18. It is the position of the Receiver that such fees and disbursements as set out above are reasonable and necessary, and should be approved by this Honourable Court.

***First Report, paras 41 and 42***

19. The Receiver estimates that costs to conclude the Transaction, if approved, and complete the administration of the estate should not exceed \$100,000, and as such recommends approval to hold this sum pending completion of all matters and the Receiver's discharge (the "**Fee Accrual**").

***First Report, para 43***

20. The Receiver's Interim Statement of Receipts and Disbursements is also appended to the First Report, and it is the Receiver's position that such receipts and disbursements are reasonable and should be approved.

***First Report, para 44 and Appendix "12" thereto***

Proposed Distribution

21. The Receiver has been advised by the Canada Revenue Agency (the "**CRA**") that there is an unsecured HST debt owing by the Debtor and that there was no priority claim for unpaid source deductions.

***First Report, para 45 and Appendix "12" thereto***

22. Pursuant to Paragraph 21 of the Appointment Order, the Receiver is authorized to issue certificates for any amount borrowed by it. The Receiver borrowed funds from Roynat

in the amount of \$100,000 to fund its disbursements during the receivership (the “**Receiver’s Borrowing**”).

***First Report, para 46 and Appendix “1”, para 21 thereto***

23. Pursuant to Paragraph 21 of the Appointment Order, the issuance of a Receiver’s Certificate has the effect of creating a charge on the Property, by way of a fixed and specific charge as security for the repayment of the monies borrowed, together with interest and charges thereon, in priority to all statutory interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (as defined in the Appointment Order) over the property of the Debtor in priority to all other security interest, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subordinate to the Receiver’s Charge (as defined in the Appointment Order).

***First Report, para 47 and Appendix “1”, para 21 thereto***

24. The Receiver conducted a title search with respect to the Real Property, which disclosed the following registrations:
- a) A Notice in favour of the Town of Grimsby registered on December 27, 2018 with respect to a development agreement between the former owner of the Real Property and the Town of Grimsby (the “**Grimsby Notice**”);
  - b) A first mortgage registered on October 6, 2021 in the principal amount of \$4,025,000 held by Roynat;
  - c) A second mortgage registered on October 8, 2021, in the principal amount of \$450,000 held by MacEwen; and,
  - d) A construction lien registered on July 21, 2022, in the amount of \$59,320 held by Tuddenham Enterprises Inc.

***First Report, paras 48 and 49 and Appendices “13”, “14” and “15” thereto***



25. The Accepted Offer specifically listed the Grimsby Notice as a permitted encumbrance which would remain on title to the Real Property following closing of the Transaction.

***First Report, para 40***

26. The Receiver has concluded that the first mortgage held by Roynat is a senior charge over the Real Property, subject to the claims under the Appointment Order.

***First Report, para 50***

27. On the basis of the foregoing, the Receiver is proposing to make a distribution (after payment of the fees and disbursements of the Receiver and the Receiver's Counsel outlined in the First Report, including the Fee Accrual) as follows (the "**Proposed Distribution**"):

- a) To Roynat for repayment of the Receiver's Borrowing in the amount of \$100,000 plus interest thereon in accordance with the Receiver's Certificate; and,
- b) Balance of any and all funds available in the Debtor's estate to Roynat, on account of the Debtor's secured indebtedness to Roynat. It is anticipated that Roynat will suffer a shortfall, and accordingly there will be no funds available for distribution for subsequent mortgage holders and any other stakeholders.

***First Report, para 51***

28. The Receiver seeks approval of the Proposed Distribution.

Discharge

29. Following the completion of the Transaction and the Proposed Distribution, the Receiver will have completed the administration of these receivership proceedings, and as such requests its discharge from the receivership.

***First Report, paras 52 and 53***

## ISSUES, LAW AND ARGUMENT

### The Court's Procedural Powers

30. The Court may, by order, extend or abridge any time prescribed by the Rules on such terms as are just. Further, the Court may dispense with compliance with any Rule at any time where and as necessary in the interest of justice. Finally, the Court may dispense with service where it is impractical to effect prompt service and/or it may validate service where it is satisfied that the document came to the notice of the person to be served.

***Rules 2.03, 3.02, 16.04 and 16.08, Rules of Civil Procedure, R.R.O. 1990, Reg. 194.***

### The Receiver's Activities

31. The Receiver's activities in these proceedings have been undertaken in furtherance of the Receiver's duties and are consistent with the Receiver's powers, as set out in the Appointment Order. The Receiver has acted reasonably and in the best interests of the Debtor's stakeholders, and this Court has the inherent jurisdiction to approve such activities.

***Bank of America Canada v. Willann Investments Ltd. (1993) 20 C.B.R. (3d) 223 (ONSC), at paras. 3 and 4, referenced in the Receiver's Book of Authorities at Tab 1.***

32. All of the Receiver's activities were conducted within the ambit of its powers granted by the Appointment Order and each of the activities were necessary to ensure that the proceedings were as orderly, effective and fair to all stakeholders as possible.
33. The Receiver therefore respectfully submits that the First Report, and its activities to date as set out therein, should be approved by this Court.

### Approval of the Transaction and the Approval and Vesting Order

34. Receivers are clothed with the powers set out in the order appointing them. Receivers are consistently granted the power to market and sell property belonging to a debtor. Absent evidence that a sale is improvident or that there was an abuse of process, it is

respectfully submitted that a Court is to grant deference to the recommendation of the Receiver to sell the Real Property and that the Respondents have not provided any evidence of improvident sale or abuse of process.

***Appointment Order, sub-paragraphs 3(j) and 3(k)***

***Royal Bank of Canada v. Soundair Corp. (1991), 4 OR (3d) 1 (ONCA) (“Soundair”) at paras. 21 and 29***

***Integrated Building Corp. v. Bank of Nova Scotia (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.)***

***Battery Plus Inc. (Re.), [2002] O.J. No. 731, at paras. 2-3, 19, 22-23, 34-5***

35. This Honourable Court has the jurisdiction to vest in any person an interest in real or personal property. Where a Court is asked to approve a transaction in a receivership context, the Court is to consider:

- i. whether the party made a sufficient effort to obtain the best price and to not act improvidently;
- ii. the interests of all parties;
- iii. the efficacy and integrity of the process by which the party obtained offers; and,
- iv. whether the working out of the process was unfair.

***Courts of Justice Act (Ontario), R.S.O. 1990, c. C-43, s. 100***

***Soundiar, supra at para. 16***

***Skyepharm PLC v. Hyal Pharmaceutical Corp. (1999), 12 C.B.R. (4th) 87 (ONSC., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)), (“Skyepharm PLC”) at para. 3***

36. Only in exceptional circumstances where there is clear evidence that a sale is improvident or involved an abuse of process will a Court intervene and proceed contrary to the recommendation of its officer, the Receiver. The Respondents have not provided any evidence of improvidence or abuse of process.

***Soundair, supra at para. 21***

***Skyepharma PLC, supra at para. 3***

37. It is respectfully submitted that the Transaction is provident and followed a thorough, impartial and fair sales process that fully tested the market, as indicated by the following factors:
- a) The market was extensively canvassed by Avison Young, a professional and licenced broker that is well known in the industry, pursuant to industry standards for a period of almost four months. Avison Young listed the Real Property on MLS and reached out to over 1900 contacts. The Real Property was sufficiently exposed to the market. 5 offers were received for the Real Property;
  - b) The sale price is supported by the appraisals commissioned by the Receiver which are included in the Confidential Appendix;
  - c) The Accepted Offer is commercially reasonable; and,
  - d) The Transaction has the support of the Debtor's first secured creditor, Roynat

**The Respondent's Appraisal**

38. The Respondent has provided an outdated Appraisal from Stry International Appraisals International Ltd. dated February 8, 2021 (the "**Stry Appraisal**"). The Stry Appraisal lists the prospective market value of the Real Property as a 'going concern' and states the following:

The prospective market value as a 'going concern' that is determined in this appraisal report is based on the owner achieving the projections of revenue, expenses and new income from the subject property that were provided to us by BCM Partners LLP, Chartered Professional Accountants in the preparation of this appraisal report. In the event they are not met, the appraiser reserves the right to change the prospective market value of the subject property.

39. It is respectfully submitted that at the time the Receiver took possession of the Real Property the business was not operating. The Stry Appraisal cannot be relied upon in these circumstances as being reflective of value of the Real Property.

40. Furthermore, the Court should conclude that the fair market value of the property is the purchase price in the best offer received in the sale process. As Tzimas, J. said in *Stanbarr Services Limited et al. v. Reichert*, "... the real proof in the pudding lies with actual offers, it does not lie with the appraisals; they are just estimates." As such, it is submitted that the Transaction ought to be approved.

***B&M Handelman Investments Ltd. v. Mass Properties Inc. (2009), 55 CBR (5th) 271 (ONSC [Commercial List]) at para. 13 ("Handelman")***

***Stanbarr Services Limited et al. v. Reichert, 2014 ONSC 6435 (CanLII), at para. 15***

***Bank of America Canada v. Willann Investments Ltd., 1992 CarswellOnt 1743 (Ont. Gen. Div. [Commercial List], at para. 5, as referenced in the Book of Authorities of the Receiver at Tab 2***

41. Roynat, as senior secured creditor, approves of the Transaction. The Sale Process was extensive, transparent, and fair to all parties involved. The Receiver respectfully submits that the Transaction should be approved.

#### **The Fees and Disbursements of the Receiver and the Receiver's Counsel Should Be Approved**

42. The Receiver respectfully submits that the Professional Fees of the Receiver and the Receiver's Counsel, as detailed in the First Report, should be approved.
43. In determining whether to approve the fees of a receiver and its counsel, the Court should consider whether the remunerations and disbursements incurred in carrying out the receivership were fair and reasonable and take into consideration the following factors, which constitute a useful guideline, but are not exhaustive:
- a) the nature, extent and value of the assets;
  - b) the complications and difficulties encountered;
  - c) the degree of assistance provided by the debtor;
  - d) the time spent;
  - e) the Receiver's knowledge, experience and skill;
  - f) the diligence and thoroughness displayed;
  - g) the responsibilities assumed;

- h) the results of the receiver's efforts; and,
- i) the cost of comparable services when performed in a prudent and economical manner.

***Bank of Nova Scotia v. Diemer, 2014 ONCA 851, at paras. 33 and 45.***

44. It is the Receiver's view that it and its counsel's fees and disbursements were incurred at the respective party's standard rates and charges, and are fair, reasonable and justified in the circumstances. Further, the fees and disbursements sought accurately reflect the work done by the Receiver and by its counsel in connection with the receivership.

#### **The Discharge of the Receiver**

45. The Receiver has substantially completed its mandate as contemplated by the Appointment Order, and under the *Bankruptcy and Insolvency Act*. Accordingly, the Receiver respectfully submits that it should be discharged and released, subject to the filing of a Certificate of Completion with the Court certifying that all activities necessary to conclude the receivership proceedings have been completed.
46. The Receiver is seeking a discharge at the hearing of this Motion in order to avoid the cost to the receivership estate of another motion, which would include another report to the Court, another motion record and the re-attendance by the Receiver and its counsel. The Receiver believes, under the circumstances of this receivership, that it is both efficient and appropriate for this Court to grant the Receiver a discharge upon the filing of the Certificate of Completion.
47. The Receiver also seeks a release from any and all liability that it now has or may hereafter have by reason of, or in any way arising out of, the act or omissions of the Receiver while acting in its capacity as Receiver, save and except for any gross negligence or wilful misconduct on the part of the Receiver.
48. The Release is a standard term and mirrors the language used in the Commercial List model discharge order. Indeed, as Justice Patillo asserted in *Kraus*, "in the absence of any evidence of improper or negligence conduct, the release should issue." As in *Kraus*, there is no such evidence in the case at bar. Thus, the Release should be granted.

*Pinnacle Capital Resources Ltd. v. Kraus Inc., 2012 CarswellOnt. 14138 (ONSC [Commercial List]), at para. 47, as referenced in the Book of Authorities of the Receiver at Tab 3.*

**ORDER REQUESTED**

49. The Receiver requests the following Orders:
- a) That the Transaction be approved as recommended by the Receiver and that an Approval and Vesting Order be granted;
  - b) That the relief sought in the Order (Distribution and Discharge) to be granted; and,
  - c) That the additional relief sought in the Ancillary Order be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of June, 2023.



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Lawyers for the Receiver,  
msi Spergel inc.

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Bank of America Canada v. Willann Investments Ltd.* (1993) 20 C.B.R. (3d) 223 (ONSC)
2. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 OR (3d) 1 (ONCA)
3. *Integrated Building Corp. v. Bank of Nova Scotia*, 1989 ABCA 114
4. *Battery Plus Inc., Re*, 112 A.C.W.S. (3d) 208 (ONSC [Comm. List])
5. *Skyepharm PLC. V. Hyal Pharmaceutical Corp.*, 1999 CanLII 15007 (ONSC)
6. *B&M Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 55 CBR (5th) 271 (ONSC [Commercial List])
7. *Stanbarr Services Limited et al. v. Reichert*, 2014 ONSC 6435 (CanLII)
8. *Bank of America Canada v. Willann Investments Ltd.*, 1992 CarswellOnt 1743 (Ont. Gen. Div. [Commercial List])
9. *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851
10. *Pinnacle Capital Resources Ltd. v. Kraus Inc.*, 2012 CarswellOnt. 14138 (ONSC [Commercial List])



**SCHEDULE "B"**  
**RELEVANT STATUTES**

**Rules 2.03, 3.02, 16.04 and 16.08, Rules of Civil Procedure, R.R.O. 1990, Reg. 194.**

**COURT MAY DISPENSE WITH COMPLIANCE**

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

**EXTENSIONS OR ABRIDGMENT**

***General Powers of Court***

3.02(1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

***Times in Appeals***

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

***Consent in Writing***

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

**SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE**

***Where Order May be Made***

16.04 (1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may take an order for substituted service or, where necessary in the interest of justice, may dispense with service.

***Effective Date of Service***

(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective.

(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules.

**VALIDATING SERVICE**

16.08 Where a document has been served in a manner other than one authorized by these rules or an order, the court may make an order validating the service where the court is satisfied that,

(a) The document came to the notice of the person to be served; or

(b) The document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

**Sections 100, 137(2) Courts of Justice Act, R.R.O. 1990, Reg. 194.**

**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.

**SEALING DOCUMENTS**

137(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record

ROYNAT INC.

-and-

2796996 ONTARIO INC.

Applicant

Respondent

Court File No. CV-22-00683167-00CL

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Proceeding commenced at  
Toronto, Ontario

**FACTUM OF THE RECEIVER**

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