

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

THE TORONTO-DOMINION BANK

Applicant

and

TORONTO ARTSCAPE INC.

Respondent

APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43

**FACTUM OF THE RECEIVER**

January 3, 2025

**FOGLER, RUBINOFF LLP**

Lawyers  
Scotia Plaza  
40 King Street West, Suite 2400  
P.O. Box #215  
Toronto, ON M5H 3Y2

**Catherine Francis (LSO# 26900N)**

cfrancis@foglers.com  
Tel: 416-941-8861

**Rachel Moses (LSO# 42081V)**

rmoses@foglers.com  
Tel: 416-864-7627

Lawyers for the Receiver

TO: **Service List**

# FACTUM

## PART I - OVERVIEW

1. This is a motion by msi Spergel inc. ("**Spergel**") in its capacity as the Court-Appointed Receiver (in such capacity, the "**Receiver**") of Toronto Artscape Inc. ("**Artscape**") for:

- (a) An Order approving the Second Report of the Receiver dated December 20, 2024 (the "**Second Report**") and the activities of the Receiver described therein;
- (b) An Order approving the Receiver's Interim Statement of Receipts and Disbursements as at December 18, 2024;
- (c) An Order approving the following sale transactions (collectively, the "**Transactions**"):
  - (i) The sale Units 51 and 65, Level 2, Units 4 and 7, Level 3 property located at 210 Simcoe Street, Toronto, Ontario (the "**210 Simcoe Units**") to the City of Toronto;
  - (ii) The sale of Units 5, Level 1, Units 2, 3, 6, 8, 12, 13, 14, 15, 25, 26, Level 2, Units 2, 3, 6, 8, 12, 13, 14, 15, 29, Level 3 property located at 38 Abell Street, Toronto, Ontario (the "**38 Abell Live/Work Units**") to the City of Toronto;

- (iii) Units 1, 2, Level 1 property located at 38 Abell Street, Toronto, Ontario (the "**38 Abell Commercial Units**") to Propeller Centre for the Visual Arts;
  - (iv) The sale of Units 8 and 9, Level 2, 180 Shaw Street, Toronto, Ontario ("**180 Shaw**") to Centre for Indigenous Theatre;
  - (v) The sale of Units 2 and 3, Level A, 180 Shaw to College-Montrose Children's Place;
  - (vi) The sale of Units 2 and 7, Level 1, 180 Shaw to Inspirit Foundation;
  - (vii) The sale of Unit 3, Level 1, 180 Shaw to Intergalactic Arts Collective;
  - (viii) The sale of Units 4 and 5, Level 1, Unit 1, Level 3, 180 Shaw to Koffler Centre of the Arts;
  - (ix) The sale of Unit 1, Level 1 and Unit 5, 180 Shaw to Small World Music Society;
  - (x) The sale of Unit 5, Level 2, 180 Shaw to Gillian Iles and Matthew Schofield;
- (d) An Order increasing the Receiver's Borrowing Charge from \$600,000 to \$670,000 *nunc pro tunc*;

- (e) An Order authorizing the repayment of amounts borrowed by the Receiver under Receiver's Certificates;
- (f) An Order sealing certain Confidential Appendices to the Second Report;
- (g) An Order authorizing and directing the Receiver to make a distribution to First Ontario Credit Union Limited ("**FOCU**"), or such other party, as directed by FOCU, upon the closing of the Transactions;
- (h) An Order authorizing and directing the Receiver to make a distribution to Community Forward Fund ("**CFF**"), or such other party, as directed by CFF upon the closing of the Transactions;
- (i) An Order authorizing and directing the Receiver to make a distribution to the City of Toronto for the outstanding realty taxes;
- (j) An Order approving the fees and disbursements of the Receiver; and
- (k) An Order approving the fees and disbursements of Minden Gross LLP ("**Minden**") and Fogler, Rubinoff LLP ("**Fogler**"), as legal counsel to the Receiver;

2. The Receiver's motion is supported by all stakeholders.

## **PART II - SUMMARY OF FACTS**

### **Appointment and Background**

3. Artscape is a Not-for-Profit corporation incorporated pursuant to the laws of the Province of Ontario, with its registered head office in Toronto, Ontario.<sup>1</sup>

4. Artscape's operations consisted of, among other things:

- (a) providing various property management services to residential units for artists and artist led families and commercial tenants, through arrangement with the City of Toronto;
- (b) providing mortgage program management for approximately 85 affordable home ownership units; and
- (c) providing venue rental from owned or leased premises.<sup>2</sup>

5. Artscape is the registered owner of the following real properties that are subject to the Receivership:

- (a) 130 Queens Quay East, 4<sup>th</sup> Floor, Toronto, ON;
- (b) 38 Abell Street, Toronto, ON comprising 2 commercial condominium units (the Abell Commercial Units), 20 live/work condominium units (the Abell Live/Work Units) and 1 parking stall;
- (c) 180 Shaw, comprising 15 commercial condominium units; and

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<sup>1</sup> Second Report, para. 2

<sup>2</sup> Second Report, para. 3

(d) The 210 Simcoe Units.<sup>3</sup> [collectively, the "**Real Properties**"]

6. By Order of Justice Steele dated January 11, 2024, Spergel was appointed as Receiver of certain property of Artscape, including the Real Properties, pursuant to section 243(1) of the Bankruptcy and Insolvency Act and section 101 of the Courts of Justice Act (the "**Appointment Order**").<sup>4</sup>

7. The Receiver retained Minden Gross LLP and, subsequently, Fogler, Rubinoff LLP as its independent legal counsel.<sup>5</sup>

8. On April 25, 2024, the Receiver brought a motion to seek the following relief from the court:

- (a) approving the First Report of the Receiver (the "**First Report**") and the activities of the Receiver described therein;
- (b) approving the Receiver's Interim Statement of Receipts and Disbursements as at April 11, 2024;
- (c) authorizing and directing the Receiver to execute a listing agreement between the Receiver and Avison Young Commercial Real Estate LP ("**Avison**") and to take such steps as the Receiver deems necessary or advisable to carry out the terms thereof;

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<sup>3</sup> Second Report, para. 4

<sup>4</sup> Second Report, paras. 5; Appendix 1

<sup>5</sup> Second Report, para. 8

- (d) authorizing and directing the Receiver, in conjunction with Avison as its real estate consultant, to carry out a sale process as described in the First Report (the "**Sale Process**");
- (e) increasing the Receiver's borrowing charge provided for in the Appointment Order; and
- (f) sealing certain Confidential Appendices to the First Report.<sup>6</sup>

9. By two separate Orders dated April 25, 2024, Justice Steele granted the relief sought by the Receiver.<sup>7</sup>

10. Following the approval of its activities in the First Report, the Receiver has undertaken the activities set out in paragraph 15 of the Second Report.<sup>8</sup>

11. The Receiver has also undertaken the Sale Process, as approved by the Orders of Justice Steele. Pursuant to the Sale Process, the Receiver has entered into Agreements of Purchase and Sale for:

- (a) 13 of the 15 units at 180 Shaw;
- (b) The 38 Abell Live/Work Units;
- (c) The 38 Abell Commercial Units; and
- (d) The 210 Simcoe Units.<sup>9</sup>

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<sup>6</sup> Second Report, para. 9

<sup>7</sup> Second Report, para. 10, Appendices 5 - 9

<sup>8</sup> Second Report, para. 15

12. The following Real Properties have not yet been sold:

- (a) 130 Queens Quay;
- (b) The remaining two units at 180 Shaw; and
- (c) The parking stall at 38 Abell.<sup>10</sup>

13. The Receiver's opinion is that the terms and conditions contained in each of the transactions for the 180 Shaw transactions, the 38 Abell Commercial Units, the 38 Abell Live/Work Units and the 210 Simcoe Units are commercially reasonable and that the purchase prices are within the market values for the Real Properties as evidenced by the appraisals which were filed under seal with the First Report.<sup>11</sup>

14. The Receiver has consulted with FOCU (which holds a first mortgage over the 180 Shaw and 38 Abell units), CFF (which holds a second mortgage over the 38 Abell units) and The Toronto Dominion Bank ("TD, which holds a General Security Agreement over all of Artscape's assets) and they all support completion of the transactions.<sup>12</sup>

### **Funding of the Receivership**

15. Pursuant to the Order of Justice Steele dated April 25, 2024, the court increased the borrowing power under the Appointment Order from \$300,000 to \$600,000.<sup>13</sup>

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<sup>9</sup> Second Report, paras. 16 – 32; Appendices 16 - 19

<sup>10</sup> Second Report, paras. 21, 22 and 33

<sup>11</sup> Second Report, paras. 23 and 34

<sup>12</sup> Second Report, paras. 16, 17, 19, 24, 35, 48 and 49

<sup>13</sup> Second Report, para. 38



16. The Receiver has borrowed \$70,000 from FOCU and \$600,000 from TD respectively. The advance from FOCU is for the operations of 180 Shaw Street and 38 Abell where FOCU holds security. The advance from TD is for the operations of 130 Queens Quay and 210 Simcoe Street where TD holds security. The Receiver is requesting an increase in its borrowing powers to \$670,000 to provide TD with the benefit of a Receiver's Certificate for its additional advances.<sup>14</sup>

### **Request for a Sealing Order**

17. The Receiver is seeking the continuation of the sealing order in respect of the Confidential Appendices to the First Report and a sealing order in respect of the Confidential Appendices to the Second Report, as they each contain commercially sensitive information, the release of which prior to the completion of all sale transactions would be prejudicial to the stakeholders of Artscape's estate.<sup>15</sup>

### **Receiver's Interim Statement of Receipts and Disbursements**

18. A copy the Receiver's interim statement of receipts and disbursements as of December 18, 2024 is attached as Appendix 22 to the Second Report.<sup>16</sup>

### **Fees and Disbursements of the Receiver and Counsel**

19. The Receiver seeks approval of the fees and disbursements of the Receiver and its legal counsel.<sup>17</sup>

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<sup>14</sup> Second Report, paras 38 and 39

<sup>15</sup> Second Report, para. 40

<sup>16</sup> Second Report, para. 46; Appendix 22

## **Approval of Distributions**

20. The Receiver seeks authorization to:
- (a) Distribute funds to FOCU and CFF in accordance with their payout statements;
  - (b) Pay arrears of municipal taxes related to the Real Properties;
  - (c) Repay borrowings under Receiver's Certificates.<sup>18</sup>

## **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

### **Approval and Vesting Orders**

21. The starting point for the analysis of whether or not to approve a transaction proposed by a Receiver is the decision of the Court of Appeal for Ontario in *Royal Bank v. Soundair*, [1991 CanLII 2727](#).

22. *Soundair* requires the court to canvass the following:
- (a) Whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
  - (b) The interests of all parties;
  - (c) The efficacy and integrity of the process by which offers are obtained; and
  - (d) Whether there has been unfairness in the working out of the process.

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<sup>17</sup> Second Report, paras. 41 – 45, Appendices 20 and 21

<sup>18</sup> Second Report, paras. 47 – 52, Appendices 23 - 27

23. In this case, the Receiver obtained prior approval of the Sales Process. With the assistance of Avison, the Receiver ran a robust marketing and sale process that was designed to obtain the best price for the properties based on current market conditions.

24. In addition:

- (a) Although the City of Toronto objected to the proposed Sale Process for the 38 Abell Units and the 210 Simcoe Units<sup>19</sup>, the Sale Process was ultimately approved with the addition of a Disclosure, Consultation and Evaluation Addendum negotiated between the Receiver and the City of Toronto;<sup>20</sup>
- (b) The City of Toronto was the successful bidder (purchaser) for the 38 Abell Live/Work Units and the 210 Simcoe Units, as a result of which the City of Toronto's objections to the sale of these units is moot;
- (c) The purchaser of the 38 Abell Commercial Units is the existing tenant of these units;
- (d) All of the purchasers of the 180 Shaw Units, other than Inspirit Foundation, are existing tenants of the units;

25. As stated in *Soundair*, there are important policy considerations weighing in favour of according a Receiver's recommendation deference and respecting the

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<sup>19</sup> See the Endorsement of Justice Steele dated April 25, 2024, Second Report, Appendix 2

<sup>20</sup> Order of Justice Steele; Second Report, Appendix 4

Receiver's business judgment based on the information available to the Receiver at the time and in the circumstances:

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in perception of receivers and in the perception of any others who might have occasion to deal with them...That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

26. In this case, all of the secured creditors approve the Transactions.

### **Approval of Activities and Fees**

27. The Receiver has set out its activities and fees and those of its legal counsel, which are at or below the rates charged by other firms. The Receiver requests approval of its activities and fees.

### **Distributions**

28. The Receiver has obtained independent legal opinions as to the security held by FOCU and CFF and payout statements from each of these creditors and seeks to distribute funds in accordance with the pay-out statements.

### **The Sealing Order**

29. The Receiver seeks an Order continuing the sealing of the Confidential Appendices to the First Report, which include appraisals of the Real Properties and information as to the appraised values, as well as the Confidential Appendices to the Second Report.

30. Disclosure of the Confidential Appendices to third parties would affect the integrity of the Sale Process, especially as there are a number of Real Properties which have not yet been sold.

31. This Court has the discretion to order that any document filed in a civil proceeding be treated as “confidential”, sealed and not form part of the public record. The test to determine if a sealing order should be granted is set out in *Sierra Club*, as recast in *Sherman Estate*:

- (a) Court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk;  
and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.<sup>21</sup>

32. The Supreme Court in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as preserving confidential information is an “important public interest” for purposes of this test. Limited sealing orders are routinely granted over sensitive commercial information in receivership proceedings to protect the interests of stakeholders in a sale process.

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<sup>21</sup> [Sierra Club of Canada v Canada \(Minister of Finance\)](#), 2002 SCC 41, at para 53; [Sherman Estate v. Donovan](#), 2021 SCC 25, at paras 38 and 43

33. In this case, the Confidential Appendices to the First Report are already sealed. It is appropriate to continue the sealing order and to seal the Confidential Appendices to the Second Report until all properties are sold.

**PART IV - ORDER REQUESTED**

34. It is submitted that the relief sought by the Receiver be granted.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 3<sup>rd</sup> day of January, 2025.



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Catherine Francis

**FOGLER, RUBINOFF LLP**

Lawyers  
Scotia Plaza  
40 King Street West, Suite 2400  
P.O. Box #215  
Toronto, ON M5H 3Y2

**Catherine Francis (LSO# 26900N)**

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40 King Street West, Suite 2400

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Toronto, ON M5H 3Y2

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