



SUPERIOR COURT OF JUSTICE

**COUNSEL/ENDORSEMENT SLIP**

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DATE: January 11, 2024

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TITLE OF PROCEEDING: THE TORONTO-DOMINION BANK v. TORONTO ARTSCAPE INC.

BEFORE: JUSTICE STEELE

**PARTICIPANT INFORMATION**

**For Plaintiff, Applicant, Moving Party:**

Name of Person Appearing	Name of Party	Contact Info
Timothy Hogan Thomas Masterson	Lawyers for The Toronto Dominion Bank	<a href="mailto:thogan@harrisonpensa.com">thogan@harrisonpensa.com</a> <a href="mailto:tmasterson@harrisonpensa.com">tmasterson@harrisonpensa.com</a>

**For Defendant, Respondent, Responding Party:**

Name of Person Appearing	Name of Party	Contact Info
Craig A. Mills	Lawyer for the Toronto Artscape Inc.	<a href="mailto:cmills@millerthomson.com">cmills@millerthomson.com</a>

**For Other, Self-Represented:**

		Contact Info
Rachel Moses	Lawyer for MSI Inc. (Proposed Receiver)	<a href="mailto:rmoses@foglery.com">rmoses@foglery.com</a>
Michele Wright Christopher Henderson	Lawyers for City of Toronto	<a href="mailto:michele.a.wright@toronto.ca">michele.a.wright@toronto.ca</a> <a href="mailto:christopher.henderson@toronto.ca">christopher.henderson@toronto.ca</a>
Bart Sarsh Rosemary Fisher	Lawyers for First Ontario Credit Union Limited	<a href="mailto:sarshb@simpsonwiggles.com">sarshb@simpsonwiggles.com</a> <a href="mailto:fisherr@simpsonwiggles.com">fisherr@simpsonwiggles.com</a>
Dominique Michaud	Lawyer for Community Forward Fund	<a href="mailto:dmichaud@robapp.com">dmichaud@robapp.com</a>

Andrea Lusk	Lawyer for Toronto Standard Condominium Corporation	<a href="mailto:andrea.lusk@gmalaw.ca">andrea.lusk@gmalaw.ca</a>
Blair McRadu	Lawyer for MPCT DIF DAM Residence at Weston Inc.	<a href="mailto:bmcradu@osler.com">bmcradu@osler.com</a>
Danish Afroz	Lawyer for Vancity Community Investment Bank	<a href="mailto:dafroz@chaitons.com">dafroz@chaitons.com</a>
Yan Leduc	Government of Canada Department of Justice	<a href="mailto:yan.leduc@justice.gc.ca">yan.leduc@justice.gc.ca</a>
Mukul Manchanda	MSI Inc. (Proposed Receiver)	<a href="mailto:mmanchanda@spergel.ca">mmanchanda@spergel.ca</a>

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**ENDORSEMENT OF JUSTICE STEELE:**

- [1] This is an application by the Toronto-Dominion Bank for an order appointing msi Spergel Inc. as receiver over the assets (other than the excluded assets) of Toronto Artscape Inc. (“Artscape”).
- [2] Artscape also brings a motion seeking two approval and vesting orders related to the excluded assets, specifically:
- i. An approval and vesting order (the “AAHI AVO”) approving the transaction contemplated by an asset transfer agreement between Artscape and ANPHI Affordable Homes Inc. (“AAHI”) in respect of the transition of Artscape’s not-for-profit residential operations and assets (“NFP Residential Operations and Assets”) and vesting Artscape’s right, title and interest in and to the NFP Residential Operations and Assets in and to AAHI; and
  - ii. An approval and vesting order (the “ArtHubs AVO”) approving the transaction contemplated by an asset transfer agreement between Artscape and Toronto ArtHubs Inc. (“ArtHubs”) in respect of the not-for-profit community cultural hub assets of Artscape (“NFP Hub Operations and Assets”, and collectively with the NFP Residential Operations and Assets, the “Not-For-Profit Assets”) and vesting Artscape’s right, title and interest in and to the NFP Hub Operations and Assets in and to ArtHubs.
- [3] The application and motion are unopposed. In fact, the parties have worked together for several months, while forbearance agreements were in place, to craft the outcome proposed to the Court, including the Continuity Plan. The proposed Continuity Plan will support the preservation and continuation of Artscape’s not-for-profit assets through non-profit successors, for the benefit and welfare of Toronto’s artist community, among other things.
- [4] There are two issues:
- i. Is it just or convenient to appoint a receiver over the assets of Artscape?
  - ii. Should the Court grant the requested approval and vesting orders?

## **Background**

- [5] The debtor, Artscape, is a not-for-profit corporation incorporated under the laws of the Province of Ontario. Its head office is in Toronto.
- [6] Artscape’s operations included the management of affordable residential properties, live/work spaces, event venues and community cultural hubs in the City of Toronto (the “City”) for the arts community. Artscape manages and operates 14 properties across the City, including 265 affordable rental and ownership spaces, 115 commercial spaces over 500 event venue rentals each year. Most of the properties are subject to long-term leases and operating agreements with the City.
- [7] ArtHubs and AAHI, the proposed purchasers of the excluded assets, are also not-for-profit entities. ArtHubs is a non-share capital corporation incorporated under the laws of Canada. AAHI is a non-share capital corporation incorporated under the laws of the Province of Ontario. It is proposed that AAHI and ArtHubs will assume the excluded assets and continue the management and operational functions currently performed by Artscape.
- [8] TD is a secured creditor of Artscape under a general security agreement and a mortgage.
- [9] Artscape owes TD almost \$21 million.
- [10] Artscape defaulted under the terms of the loan agreement and TD issued a demand, which has expired. TD also sent a Notice of Intention to Enforce Security under the *Bankruptcy and Insolvency Act* (the “BIA”) on or about August 8, 2023.
- [11] Vancity Community Investment Bank, First Ontario Credit Union Limited and Community Forward Fund (with TD, collectively, the “Secured Creditors”) also have registered security interests as against Artscape’s assets and property.
- [12] Artscape has ceased operations.
- [13] Artscape has been working with the City on a plan to transfer the excluded assets to third parties so that certain essential services currently provided by Artscape may continue to be provided to the community by the third parties.

## **Analysis**

*Is it just or convenient to appoint a receiver?*

- [14] It is just or convenient to appoint a receiver in the circumstances.
- [15] Under section 243(1) of the BIA on application by a secured creditor, the Court may appoint a receiver where it is “just or convenient” to do so. Similarly, under section 101 of the *Courts of Justice Act* (the “CJA”) the Court may appoint a receiver where such an appointment is “just or convenient.”
- [16] In deciding whether it is “just and convenient” to appoint a receiver, the Court must consider all of the circumstances of the case, and, in particular, the nature of the property and the rights and interests of all

parties in relation to the property: *Bank of Nova Scotia v. Freure Village of Clair Creek*, [1996] OJ No. 5088, at para. 10.

[17] The relevant security documents include the right of applicant to seek the appointment of a receiver. Where the security documents provide this right, the burden on the applicant is lessened. The Court in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866, at para. 27, stated:

[W]hile the appointment of a receiver is generally regarded as an extraordinary remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

[18] The loans to TD are in default. There was a forbearance agreement entered into between the debtor and the Secured Creditors, which expired at the end of October 2023 and has continued day-to-day since then. The loan has not been repaid. The relevant security documents contemplate the applicant's right to appoint a receiver and the borrower consented to the Order sought by TD under the forbearance agreement.

[19] I am satisfied that it is just and convenient to appoint a receiver.

*Should the Court grant the requested AVOs?*

[20] I have determined that it is appropriate in the circumstances to grant the requested AVOs.

[21] Under section 100 of the CJA, the Court has the power to grant an approval and vesting order:

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.

[22] Vesting orders have their origins in equity (see *HBSC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of)* (2004), 51 O.R. (3d) 641) and are discretionary. The Court in *Lynch v. Segal*, [2006] OJ No 5014 explained, at para. 31, the flexible nature of the Court's power:

The rationale for the vesting power, therefore, is to permit the court to direct the parties to deal with property in accordance with the judgment of the court. The jurisdiction is quite elastic. Nothing in the language of [...] section 100 of the *Courts of Justice Act* [...] operates to constrain the flexible discretionary nature of the power.

[23] The Court of Appeal in *York (Regional Municipality) v. Thornhill Green Co-operative Homes Inc.*, 2010 ONCA 393 considered an appeal from this court where a vesting order was granted as part of receivership proceedings that culminated in the sale of non-profit co-operative housing units. The Court of Appeal noted that the principles set out in *Soundair* applied to the sale in receivership but added that because this was a sale of non-profit co-operative social housing assets, "the court will weigh [...] special factors" under the *Soundair* principles, "just as it would consider any unique circumstances in any receivership situation."

[24] Artscape asks the Court to consider the following special factors in this case:

- i. The continued viability of the project in its existing form;
- ii. The statutory rights of co-operative members under the *Co-operative Corporations Act* to participate in management and to have greater security of tenure;
- iii. The particular impact of legislative or other strictures on the value of the property in question, and
- iv. The need to preserve the availability of social public housing, whatever form that vehicle might take.

[25] I note and accept Artscape's submissions in para. 34 of its factum regarding the satisfaction of both the *Soundair* and *Thornhill* principles.

[26] Artscape stated that these transactions were necessary to preserve the not-for-profit operations and assets of Artscape. Without a non-profit successor in place, there is no party to manage and operate the affordable housing units and community hubs that have been operated and managed by Artscape.

[27] Artscape notes that Courts in Ontario have used their general power to grant vesting orders under section 100 of the CJA to resolve peripheral issues within a broader proceeding. Artscape points to *Laurentian University of Sudbury*, 2023 ONSC 632 as an example, where the court granted a vesting order that transferred the university's title and interest in certain lands in favour of owners of property that abutted on the university's property. In *Laurentian* the Court relied upon s. 100 of the CJA, as well as section 37(1) of the *Conveyancing and Law of Property Act*, and sections 36 and 11 of the *Companies' Creditors Arrangement Act*.

[28] As noted above, the relief sought by Artscape is not opposed. Notably, all creditors with a security interest in the Not-For-Profit Assets do not object to the granting of the AVOs. The City is supportive of the Asset Transfer Agreements as the agreements ensure operational continuity and the preservation of Artscape's non-profit operations. As noted by the City, the properties that are operated by Artscape are occupied by vulnerable third parties, who need operative elevators, electricity, etc. I am satisfied that the benefit of granting the relief sought outweighs any prejudice to those affected by it.

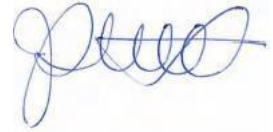
[29] However, there should be another root of jurisdiction to granting a vesting order in addition to or in place of the CJA: *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para 39. Artscape relies on the BIA and the Court's inherent jurisdiction.

[30] In order to facilitate the transfer of the Not-For-Profit Assets, by way of the AVOs sought by Artscape in its motion, pursuant to section 243(1) of the BIA and s. 101 of the CJA, *msi Spergel Inc.* is temporarily appointed receiver (the "Limited Purpose Receiver"), without security, over the Not-For-Profit Assets strictly for the sole and limited purpose of enabling this court to grant the AVOs sought by Artscape as required under the Asset Transfer Agreements. The Limited Purpose Receiver shall have no obligations or duties in respect to, and shall not take any steps or possession of, the Not-For-Profit Assets, and shall be immediately released and discharged as the Limited Purpose Receiver upon the granting of the AVOs pursuant to the Model Commercial List Receiver's discharge order. Further, since the Limited Purpose

Receiver is not taking any steps or performing any duties or taking possession of the Not-For-Profit Assets, the Limited Purpose Receiver shall not be required to file a report with the Court seeking approval of its conduct or its fees (as is typically required) with regard to this transfer of the Not-For-Profit Assets.

[31] Having reviewed the record and having been persuaded by the submissions of counsel, I am satisfied that, in these unique circumstances, it is appropriate to grant the requested approval and vesting orders.

[32] Orders attached.

A handwritten signature in blue ink, appearing to be "J. Lee", is located in the lower right quadrant of the page. The signature is fluid and cursive, with a horizontal line crossing through the middle of the letters.