

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

BETWEEN :

THE TORONTO-DOMINION BANK

Applicant

and

TORONTO ARTSCAPE INC.

Respondent

**FACTUM OF THE RESPONDENT
(Motion for Approval and Vesting Orders)**

January 3, 2024

MILLER THOMSON LLP
Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1101
Toronto, ON M5H 3S1

Craig A. Mills LSO#: 40947B
Tel: 416.595.8596
cmills@millertomson.com

Lawyer for the Respondent, Toronto Artscape
Inc.

TO: SERVICE LIST

PART I – NATURE OF THE MOTION

1. This factum is filed in support of a motion (the “**Motion**”) brought by Toronto Artscape Inc. (“**Artscape**”). This Motion is brought in tandem with an Application (the “**Receivership Application**”) of The Toronto-Dominion Bank (the “**TD Bank**” or “**Applicant**”) for an order appointing MSI Spergel Inc. as court-appointed receiver (the “**Proposed Receiver**”) over certain of Artscape’s assets (the “**Proposed Receivership Order**”).
2. On this Motion, Artscape is seeking:
 - a. an Approval and Vesting Order (the “**AAHI AVO**”),
 - i. approving the transaction contemplated by an Asset Transfer Agreement dated December 2023 (the “**AAHI 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
 - ii. vesting Artscape’s right, title and interest in and to the NFP Residential Operations and Assets, in and to AAHI, free and clear of all claims and encumbrances other than permitted encumbrances identified in, or assumed pursuant to, the AAHI Agreement; and
 - b. an Approval and Vesting Order (the “**ArtHubs AVO**”, and with the AAHI AVO, collectively, the “**Approval and Vesting Orders**”),
 - i. approving the transaction contemplated by an Asset Transfer Agreement dated December 22, 2023 (the “**ArtHubs Agreement**”, and

with the AAHI Agreement, collectively, the “**Asset Transfer Agreements**”), 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 with the NFP Residential Operations and Assets, collectively, the “**Not-For-Profit Assets**”); and

- ii. vesting Artscape’s right, title and interest in and to the NFP Hub Operations and Assets, in and to ArtHubs, free and clear of all claims and encumbrances other than permitted encumbrances identified in, or assumed pursuant to, the ArtHubs Agreement.
3. The Approval and Vesting Orders, if granted, will support the preservation and continuation (the “**Continuity Plan**”) of Artscape’s Not-For-Profit Assets through non-profit successors, for the benefit and welfare of the Toronto’s artist community and the general public.
 4. As a result of extensive discussions with TD Bank, the City of Toronto (the “**City**”) the Secured Lenders (as defined below) and other stakeholders, the Not-For-Profit Assets have been excluded from the Proposed Receivership Order in order to permit the implementation of the Continuity Plan. It is Artscape’s understanding that the various stakeholders are generally supportive of the proposed transactions. As of the date of this Factum, no party has expressed opposition to the granting of the Approval and Vesting Orders.

PART II – SUMMARY OF FACTS

5. Artscape is a not-for-profit corporation that manages and operates affordable residential properties, live/work spaces, event venues and community cultural hubs across the City

of Toronto for the arts and creative community. It has played an important role in supporting and fostering the development of the Toronto arts community for over 30 years.¹

6. Artscape manages and operates 14 properties across Toronto, which includes 265 affordable rental and ownership spaces, 115 commercial spots over 500 event venue rentals each year. The majority of the properties are subject to long-term leases, licenses and operating agreements with the City of Toronto. Its mandate is highly integrated with the City of Toronto's objectives relating to affordable housing and ensuring the development of arts and culture in Toronto.²
7. Due to the pervasive impact of the COVID-19 pandemic and mounting debt obligations, Artscape defaulted under various credit facilities with its various lenders, including TD Bank. It had a cash deficit of \$3.7 million and long term debt totaling \$31.7 million in 2022.³
8. Following a demand for payment from TD Bank in August 2023, it entered into forbearance agreements with TD Bank and its other secured lenders, First Ontario Credit Union, Community Forward Fund and Vancity Community Investment Bank (collectively, the "**Secured Lenders**").⁴
9. During the forbearance period, Artscape, the City and community stakeholders worked on developing the Continuity Plan for Artscape's Not-For-Profit Assets. It was concluded that the best way forward for the Continuity Plan was to pursue two pathways: (a) identifying a non-profit successor to take on the stewardship of

¹ Affidavit of Grace Lee Reynolds, sworn December 27, 2023 ("**Reynolds Affidavit**"), Motion Record of Toronto Artscape Inc., para 2.

² Reynolds Affidavit, paras 7, 22 - 24.

³ Reynolds Affidavit, paras 3, 4 and 29.

⁴ Reynolds Affidavit, paras 26, 35-39.

Artscape's NFP Residential Operations and Assets; and (b) developing a transition plan for Artscape's NFP Hub Operations and Assets. The NFP Hub Operations and Assets include a number of shared appreciation mortgages (the "**Shared Appreciation Mortgages**"), which are made available to artists and their families under an affordable residential ownership program.⁵

10. After thorough consideration, AAHI was identified as the preferred choice for transitioning the NFP Residential Operations and Assets. AAHI has experience in managing affordable housing and has an arts/community-oriented focus.⁶
11. In respect to the Not-For-Profit Assets, as an appropriate successor in the non-profit space could not be identified, Artscape, with the support of the City, concluded that transitioning these assets to a new non-profit entity – ArtHubs - would offer the best solution in continuing the mandate for the communities and stakeholders of the community hubs. ArtHubs is currently operating the community hub spaces as Artscape's agent. It also now employs 28 of Artscape's former full-time and part-time employees and 25 variable part-time unionized venue staff. ArtHubs operations will be funded by way of start-up funding from the City and possibly a working capital loan from an arts institution.⁷
12. To effect the transition of the NFP Residential Operations and Assets and the NFP Hub Operations and Assets, Artscape has entered into an Asset Transfer Agreement with ArtHubs, and anticipates having executed a similar Asset Transfer Agreement with AAHI (collectively, the "**Agreements**") at the time of this motion. In both cases, the Agreements contemplate the transfer of the respective Not-For-Profit Assets, including

⁵ Reynolds Affidavit, paras 41-42 and 90-98.

⁶ Reynolds Affidavit, paras 44, 49-53.

⁷ Reynolds Affidavit, paras 63 - 72.

lease agreements and related tenant leases, for \$1.00 and the assumption of certain liabilities. The Not-For-Profit Assets would be transferred on an “as is, where is” basis, subject to the granting of an approval and vesting order.⁸

13. The Not-For-Profit Assets are excluded from the within receivership proceedings under the draft receivership order filed by TD Bank. Artscape has consulted with each of the Secured Lenders in respect to the Not-For-Profit Assets which are the subject of the Agreements and, to the best of its knowledge, they are supportive of the proposed transactions (the “**Transactions**”).⁹
14. The over-arching objective of the Transactions is to ensure the continuity and preservation of Artscape’s affordable live/work spaces, community hubs and event spaces for the benefit Toronto’s artist community. The Transactions contemplate the transitioning of 8 leased properties to AAHI and ArtHub along with the Shared Appreciation Mortgages on 4 of the properties. A vesting order is being sought so that there is no going-forward risk to the not-for-profit successors.¹⁰
15. The continuation of these Not-For-Profit Assets will have a wide-ranging and positive impact on the arts community in Toronto and will assist in ensuring the continued availability of affordable housing.¹¹

PART III – ISSUES

16. The issue raised in this Motion is whether this Court should grant the Approval and Vesting Orders being sought by Artscape.

⁸ Reynolds Affidavit, paras 74-89.

⁹ Reynolds Affidavit, paras 6 and 100-101.

¹⁰ Reynolds Affidavit, paras 109-110.

¹¹ Reynolds Affidavit, paras 108-111.

PART IV – LAW AND ARGUMENT

17. The Asset Transfer Agreements for which Artscape is seeking court approval and a vesting order involve property that is to be excluded from the Proposed Receivership Order due to the not-for-profit nature of the underlying assets and to facilitate their transfer to non-profit successor entities.
18. As the underlying assets to be conveyed consist of its Not-For-Profit Assets, Artscape submits that, as discussed below, the analysis and considerations on this motion differ from that of a typical insolvency proceeding.

A. Section 100 of the *Courts of Justice Act*

19. In Ontario, the power to grant an approval and vesting order is established in section 100 of the *Courts of Justice Act*¹² (“**CJA**”). Section 100 states that:

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.”¹³

20. The roots of section 100 of the CJA and vesting orders more generally can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the Court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property. In other words, the Court had the power to vest property from one party to

¹² RSO 1990, c C43, s 100.

¹³ *Courts of Justice Act*, RSO 1990, c C43, s 100.

another in order to implement the order of the court.¹⁴

21. Vesting orders are equitable in origin and discretionary in nature. As explained by the Court in *Lynch v. Segal*, the power to grant vesting orders under section 100 is flexible:

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* [...] operates to constrain the flexible discretionary nature of the power.¹⁵

22. Blair J.A. elaborated on the nature of vesting orders in *Re Regal Constellation Hotel Ltd.* as follows:

A vesting order, then, had a dual character. It is on the one hand a court order (“allowing the court to effect the change of title directly”), and on the other hand a conveyance of title (vesting “an interest in real or personal property” in the party entitled thereto under the order).¹⁶

23. Section 100 has been held to provide Courts with the power to grant approval and vesting orders to convey title free and clear of encumbrances.¹⁷ They are also commonly used in insolvency matters to transfer entire businesses.
24. In granting a vesting order, a court that regard, a court will consider, among other things, whether the parties have consented to the vesting out of their interest in the assets to be transferred.¹⁸ If this consideration is ambiguous or inconclusive, the court may also consider the equities to determine if a vesting order is appropriate in the circumstances,

¹⁴ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para 34.

¹⁵ *Lynch v Segal*, [\[2006\] OJ No 5014](#) at para 31 (ON CA). See also *Smith v Davies*, [2018 ONSC 920](#) at para 141 (where the Court referred to *Lynch v Segal* as “[t]he leading case in Ontario regarding vesting orders”).

¹⁶ *Regal Constellation Hotel Ltd., Re*, [2004 CanLII 206](#) (ON CA) at para 33.

¹⁷ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at paras 25, 33-41.

¹⁸ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para. 106 and 109.

including the prejudice, if any, to a third party, whether there is any equity in the property and whether the parties are acting in good faith.¹⁹

B. Soundair Principles Support the Granting of the Approval and Vesting Orders

i. Soundair Principles, as Applicable, May Serve As A Guiding Framework

25. While the Transactions do not involve the Proposed Receiver and relate to assets that are to be excluded from the within Receivership Proceedings, the principles established for the approval of a sale in *Royal Bank of Canada v. Soundair Corp.*²⁰ may be informative and provide this Court with a guiding framework.²¹ The *Soundair* factors are:

- 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 were obtained; and
- d. whether there has been unfairness in the working out of the process.²²

26. The *Soundair* principles have been considered in cases involving the sale of social welfare assets. For instance, in *York (Regional Municipality) v. Thornhill Green Co-Operative Homes Inc.*²³ (“**Thornhill**”), Justice Morawetz (as then he was) granted a

¹⁹ *Third Eye Capital Corporation v Resources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at para. 110.

²⁰ *Royal Bank of Canada v. Soundair Corp.* (1991), [1991 CanLII 2727 \(ON CA\)](#) (“*Soundair*”),

²¹ *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2010 ONCA 393](#) at para 21.

²² *Royal Bank v Soundair Corp.*, [\[1991\] OJ No 1137](#) at para 16.

²³ *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2009 CanLII 37907 \(ON SC\)](#), *aff'd* *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2010 ONCA 393](#).

vesting order as part of receivership proceedings that culminated with a sale of 101 non-profit co-operative social housing units.²⁴ In considering an appeal from Justice Morawetz' decision, the Court of Appeal held the *Soundair* principles applied to the receivership sale, but added that in the context of a sale of non-profit co-operative social housing assets, "the court will weigh [...] special factors" under some or all of the *Soundair* principles – "just as it would consider any unique circumstances in any receivership situation".²⁵

27. In this case, these "special factors" included:

- a. the continued viability of the project in its existing form;
- b. the statutory rights of co-operative members under the *Co-operative Corporations Act* to participate in management and to have greater security of tenure;
- c. the particular impact of legislative or other strictures on the value of the property in question, and
- d. the need to preserve the availability of social public housing, whatever form that vehicle might take.²⁶

28. In *Thornhill*, the main purpose behind the sale was a change in structure from a co-operative governance model. The purchaser – Housing York – was also a social housing not-for-profit corporation, but not a co-operative corporation regulated by the Co-

²⁴ *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2009 CanLII 37907 \(ON SC\)](#), aff'd *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2010 ONCA 393](#).

²⁵ *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2010 ONCA 393](#) at para 24.

²⁶ *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2010 ONCA 393](#) at paras 23-24.

operative Corporations Act. As a result, the residents would no longer be members of a co-operative, but rather tenants of Housing York with new lease agreements.²⁷

29. Justice Morawetz found that the transaction ultimately "reflect[ed] the commercial realities of the situation and addresses in a comprehensive manner the financial problems currently facing Thornhill Green"²⁸, and that the "inescapable conclusion is that the co-operative governance model of Thornhill Green has not worked as envisioned. In my view, an operational change is necessary."²⁹
30. With respect to the sales process itself, Justice Morawetz found that given certain regulatory restrictions on the use of the assets, "the Receiver was not in a position to offer up the assets [...] through a traditional sale process."³⁰ By selling the assets to an experienced social housing provider, the Receiver took into account the specialized circumstances of the social housing context, and satisfied its duty to consider the interests of all parties.³¹
31. *Thornhill* was subsequently considered in *Co-operative Housing Federation of Canada v. Bridlewood Co-Operative Inc.*,³² which also involved the sale of non-profit co-operative social housing assets.
32. At issue in *Bridlewood* was whether the receiver conducted a reasonable and fair sales

²⁷ *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2010 ONCA 393](#) at paras 12, 35-36.

²⁸ *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2009 CanLII 37907 \(ON SC\)](#), at para 70.

²⁹ *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc* [2009 CanLII 37907 \(ON SC\)](#), at para 74.

³⁰ *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2009 CanLII 37907 \(ON SC\)](#), at para 67.

³¹ *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2009 CanLII 37907 \(ON SC\)](#), at para 67.

³² [2012 ONSC 5936](#) ("*Bridlewood*").

process, in accordance with the *Soundair* principles, when favouring the bid of one bidder over another. The Court placed great weight on the fact that offer supported by the receiver would ultimately preserve the affordable housing aspect of the assets being sold, despite transforming the social housing co-operative structure into a social housing tenancy structure similar in *Thornhill*, and increase rent costs of residents:

First, although neither the HPNP Offer nor the Marlin Revised Offer contemplate the continued viability of the co-op project precisely in its present form, the HPNP Offer comes close by proposing a new corporate vehicle to use all 131 units as affordable housing. The Marlin Revised Offer makes no such commitment. Second, it follows that of the two bids, it is only the HPNP Offer which aims to preserve the availability of a large block of affordable housing in the Town of Essex. A June 13, 2011 letter from the Windsor Essex Community Housing Corporation to CHF expressed strong concern "about any potential reduction in the current already inadequate supply of affordable housing".³³

33. Ultimately, Justice Brown (as then he was) approved the transaction after considering the *Soundair* and *Thornhill* principles.³⁴

ii. Application of the Soundair and Thornhill Factors

34. It is respectfully submitted that Artscape has satisfied both the *Soundair* and *Thornhill* principles based on the following considerations:

- a. while the proposed transfers are not being sought by the Proposed Receiver, Artscape worked closely with the City of Toronto and other stakeholders to identify appropriate not-for-profit successors that could continue the Not-For-Profit Assets under Artscape's operational mission to maintain affordable housing for the arts community and continuing the development of arts and

³³ *Co-operative Housing Federation of Canada v. Bridlewood Co-Operative Inc.*, [2012 ONSC 5936](#) at para 39.

³⁴ *Co-operative Housing Federation of Canada v. Bridlewood Co-Operative Inc.*, [2012 ONSC 5936](#) at paras. 49-50.

culture in Toronto;³⁵

- b. It has not acted improvidently. Due to the nature of the Not-For-Profit Operations and Assets, a typical sale process would not have been appropriate. Due to the non-profit aspect of these operations and their focus on offering affordable housing through an arts-related mandate, they are financially challenged to break-even as expenses exceed rent revenue before grants and other contributions.³⁶ For that reason, the Not-For-Profit Assets are to be transferred to successor non-profit entities pursuant to the Asset Transfer Agreements for nominal consideration and an assumption of liabilities;
- c. In respect to the affordable housing locations, not only is there a limited pool of non-profit affordable housing operators in Toronto, but they require a successor which has both sufficient experience and infra-structure to serve vulnerable populations and social service needs;³⁷
- d. Due to the uniqueness of Artscape's community cultural hubs, a viable successor could not be located, leading to the conclusion that a new non-profit entity retaining Artscape's operating knowledge would offer the best means to stabilize and improve service offerings and events within an arts-based mandate. To ensure the sustainability of its go-forward operations, ArtHubs has secured start-up funding from the City and a working capital loan from an arts institution (which is conditional upon a vesting order being granted);³⁸
- e. In respect to both Transactions, most of the leased properties are owned by the

³⁵ Reynolds Affidavit, paras 42, 44, 49 – 53 and 64-66.

³⁶ Reynolds Affidavit, paras 56, 57 and 73.

³⁷ Reynolds Affidavit, para 44.

³⁸ Reynolds Affidavit, paras 70-71.

City and are subject to lease agreements and operating agreements, restricting their use to not for profit purposes;³⁹

f. Further, the Shared Appreciation Mortgages are subject to s. 37 *Planning Act*⁴⁰ agreements and/or the Home Ownership Assistance Plan (“**HOAP**”) delivery agreements, the objectives of which are to ensure ongoing affordability of affordable housing units for artists and to secure the City’s financial contributions;⁴¹

g. Artscape has extensively consulted with the City, TD, the Secured Creditors, the landlords and the relevant unions in respect to its Continuity Plan and the Transactions. To the best of Artscape’s knowledge, all stakeholders are supportive of the Transactions;⁴² and

h. The Transactions are in the best interests of the residents and the community who live, work and/or utilize the Not-For-Profit Operations and Assets as they ensure the continuity of the affordable live/work spaces, the community cultural hubs and event spaces.⁴³

35. Another relevant consideration is that the City does not have the capacity or financial resources to assume operational control of the Not-For-Profit Operations and Assets. The City’s main objective is to ensure that a non-profit successor is in place to manage and operate the affordable housing units and community hubs that have been under Artscape’s purview.⁴⁴

³⁹ Reynolds Affidavit, paras 23-24.

⁴⁰ [*Planning Act, RSO 1990, c P.13, s. 37*](#)

⁴¹ Reynolds Affidavit, paras 95-96.

⁴² Reynolds Affidavit, paras 41-42, 63, 65, 82 and 99-101.

⁴³ Reynolds Affidavit, paras 107- 111.

⁴⁴ Reynolds Affidavit, para 8.

36. The continuation of Artscape’s affordable housing offering is particularly important as the City of Toronto is in a dire need to preserve the availability of social public housing. As at the third quarter of 2023, the City of Toronto had over 85,000 people on the waiting list seeking social housing accommodations.⁴⁵
37. Artscape respectfully submits that Transactions are appropriate as they fulfill the objectives of the Continuity Plan as contemplated by both Artscape’s management team and the City in preserving viable affordable housing projects and the continued existence of community hub spaces for the benefit of the arts community in Toronto. The safeguarding of vital community-oriented functions and the preservation of ongoing societal benefits will be furthered with the assistance of this Court.

iii. Vesting Order Under Section 100 Utilized to Resolve Peripheral Issues Within Insolvency Proceedings

38. Ontario courts have used their general power to grant vesting orders under section 100 of the *CJA* to resolve peripheral and ancillary issues within a broader insolvency proceeding.
39. As an example, in *Laurentian University of Sudbury*⁴⁶ (“**Laurentian University**”), the Court granted a vesting order which transferred Laurentian University’s title and interest in certain lands (the “**University Property**”) in favour of owners of property which abutted on the University Property (the “**Neighbours**”). At the time, Laurentian University was undergoing broader restructuring proceedings under the *Companies’ Creditors Arrangement Act*⁴⁷ (the “**CCAA**”). The University Property had been the subject of

⁴⁵ Reynolds Affidavit, para 108.

⁴⁶ [2023 ONSC 632](#).

⁴⁷ RSC, 1985, c C-36.

dispute between the University and the Neighbours. The University and the Neighbours entered into a settlement agreement under which the University would transfer the University Property to the Neighbours. To effect the transfer, the University brought a motion seeking a vesting order within its CCAA proceedings, but without the Monitor's involvement or support.⁴⁸ The vesting order would have been, generally, ancillary to the University's broader insolvency proceedings.

40. The Court granted the vesting order pursuant to, among other things⁴⁹, section 100 of the CJA, and transferred the University Property to the Neighbours free and clear of numerous encumbrances on title. In granting the vesting order, the Court took note that (i) there was no opposition to the order sought, (ii) that absent the vesting order, the parties would continue incurring costs, and (iii) that the Monitor took no position on the motion, as a Plan of Arrangement in the CCAA proceedings had already been approved. Overall, the Court granted the vesting order within the CCAA proceedings as it was an efficient way to solve peripheral issues.⁵⁰

41. Similarly, the Transactions are the result of extensive discussions with various stakeholders and the negotiated exclusion of the Not-For-Profit Assets from the Proposed Receivership Order. The Agreements have been entered into by successor non-profit entities subject to the granting of an Approval and Vesting Order. Artscape is not aware of any opposition to the Approval and Vesting Orders being sought.

C. Inherent Jurisdiction in BIA Proceedings

⁴⁸ The Monitor was not involved in the negotiations between Laurentian University and the neighbour owners, and did not take a position on the motion therein.

⁴⁹ The Court also held it also had jurisdiction to grant the order under sections 11 and 36 of the CCAA, and section 37 of the *Conveyancing and Law of Property Act*. The Court did not engage in a fulsome section 36(3) analysis and appeared to have relied on the flexibility of section 100.

⁵⁰ *Laurentian University of Sudbury*, [2023 ONSC 632](#) at paras 1-2, 10, 19-23.

42. In addition to its powers under s.100 of the CJA, the Court may exercise its inherent jurisdiction in approving the Transactions. The inherent jurisdiction of the provincial superior courts is a broad and diverse power. Inherent jurisdiction is exercisable “in any situation where the requirements of justice demands it” and that “nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which specifically appears to be so.”⁵¹
43. Section 183(1) of the *Bankruptcy and Insolvency Act* (the “**BIA**”) preserves the inherent jurisdiction of the Superior Court sitting in *BIA* matters:

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;⁵²

44. The exercise of inherent jurisdiction requires a hierarchical approach, in that the Court should first engage in statutory interpretation to determine the limits of its authority, adopting a broad, liberal and purposive interpretation that may reveal that authority. The *BIA* must be silent on a point, or not deal with it exhaustively. The Court may then turn to its inherent jurisdiction to fill possible gaps. Specifically, after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it.⁵³

⁵¹ *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552 at para 65, citing *Gillespie v Manitoba (Attorney General)*, [2000 MBCA 1](#) and *Board v Board*, [\[1919\] AC 956](#) (JCPC).

⁵² *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, s 183(1); *Business Development Bank of Canada v Astoria Organic Matters Ltd.*, [2019 ONCA 269](#) at para 64.

⁵³ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at paras 31; *Bankruptcy of Robert Simpson, Deceased*, [2023 ONSC 4948](#) at para 29

45. The *BIA* does not specifically address a situation such as this one in which the Not-For-Profit Assets have been excluded from the scope of the receivership. Arguably, this creates a unique situation or a “gap” between the Court’s statutory powers under the *BIA*, and the relief sought herein.
46. The benefit of granting the Approval and Vesting Orders outweighs any relative prejudice to those affected by it. As discussed above, all creditors with a security interest in the Not-For-Profit Assets do not object to the granting of the Approval and Vesting Orders. The Approval and Vesting Orders will serve to preserve valuable social welfare assets.
47. It has already been held that the Court may rely on its inherent jurisdiction to grant a reverse vesting order in proceedings under the *BIA*.⁵⁴ Courts have also affirmed that inherent jurisdiction may invoked to grant an approval and vesting order which vests off encumbrances on title to real property.⁵⁵
48. Therefore, it is submitted that the Court may, in the alternative, grant the Approval and Vesting Orders pursuant to its inherent jurisdiction.

PART IV - NATURE OF THE ORDERS SOUGHT

49. For the foregoing reasons, Artscape respectfully requests that this Honourable Court grant the Approval and Vesting Orders.

⁵⁴ *Peakhill Capital Inc. v Southview Gardens Limited Partnership*, [2023 BCSC 1476](#) at paras 20-21, citing *PaySlate Inc. (Re)*, [2023 BCSC 608](#) at paras 84-85.

⁵⁵ *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#) at paras 30-31.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of January, 2024.



MILLER THOMSON LLP

Per Craig A. Mills

40 King Street West, Suite 5800

Toronto, Ontario M5H 4A9

Lawyer for the Respondent, Toronto
Artscape Inc.

SCHEDULE "A": LIST OF AUTHORITIES

1. *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc.*, [2019 ONCA 508](#).
2. *Lynch v Segal*, [\[2006\] OJ No 5014](#) (ON CA).
3. *Smith v Davies*, [2018 ONSC 920](#)
4. *Regal Constellation Hotel Ltd., Re*, [2004 CanLII 206](#) (ON CA)
5. *Royal Bank of Canada v. Soundair Corp.* (1991), [1991 CanLII 2727 \(ON CA\)](#)
6. *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2010 ONCA 393](#)
7. *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2009 CanLII 37907 \(ON SC\)](#)
8. *York (Regional Municipality) v Thornhill Green Co-Operative Homes Inc.*, [2010 ONCA 393](#).
9. *Co-operative Housing Federation of Canada v. Bridlewood Co-Operative Inc.*, [2012 ONSC 5936](#)
10. *Laurentian University of Sudbury*, [2023 ONSC 632](#).
11. *Stephen Francis Podgurski (Re)*, 2020 ONSC
12. *Business Development Bank of Canada v Astoria Organic Matters Ltd.*, [2019 ONCA 269](#)
13. *Bankruptcy of Robert Simpson, Deceased*, [2023 ONSC 4948](#)
14. *Peakhill Capital Inc. v Southview Gardens Limited Partnership*, [2023 BCSC 1476](#)

SCHEDULE “B”

Courts of Justice Act, RSO 1990, c C43

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. R.S.O. 1990, c. C.43, s. 100.

Bankruptcy and Insolvency Act, RSC, 1985, c B-3

Courts vested with jurisdiction

- **183 (1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
 - **(a)** in the Province of Ontario, the Superior Court of Justice;
 - **(b)** [Repealed, 2001, c. 4, s. 33]
 - **(c)** in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
 - **(d)** in the Provinces of New Brunswick and Alberta, the Court of Queen’s Bench;
 - **(e)** in the Province of Prince Edward Island, the Supreme Court of the Province;
 - **(f)** in the Provinces of Manitoba and Saskatchewan, the Court of Queen’s Bench;
 - **(g)** in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
 - **(h)** in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

- **Superior Court jurisdiction in the Province of Quebec**

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

- **Courts of appeal — common law provinces**

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

- **Court of Appeal of the Province of Quebec**

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

- **Supreme Court of Canada**

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

THE TORONTO-DOMINION BANK
Applicant

and

TORONTO ARTSCAPE INC.
Respondent

Court File No. CV-23-00711609-00CL

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

Proceeding Commenced at
Toronto

**FACTUM OF
TORONTO ARTSCAPE INC.**

(Returnable January 5, 2023)

MILLER THOMSON LLP

Scotia Plaza
40 King Street West, Suite 5800
P.O. Box 1011
Toronto ON M5H 3S1

Craig Mills (LSO#: 40947B)

cmills@millerthomson.com

Tel: 416-595-8596

Fax: 416-595-8695

Lawyer for the Respondent