

**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**

April 22, 2024

**FOGLER, RUBINOFF LLP**

Lawyers  
77 King Street West  
Suite 3000, P.O. Box 95  
TD Centre North Tower  
Toronto, ON M5K 1G8

**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**" or the "**Debtor**") for:

- (a) An Order approving the First Report of the Receiver dated April 11, 2024<sup>1</sup> (the "**First Report**") and the activities of the Receiver as set out in the First Report;
- (b) An Order approving the Receiver's Interim Statement of Receipts and Disbursements;
- (c) An Order authorizing and directing the Receiver to execute a listing agreement with 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;
- (d) An Order authorizing and directing the Receiver, in conjunction with Avison as its real estate consultant, to carry out a Sale Process as defined herein and described in the First Report;
- (e) An Order sealing the confidential appendices to the First Report;
- (f) An Order increasing the Receiver's borrowing Charge from \$300,000 to \$600,000; and

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<sup>1</sup> First Report of the Receiver dated April 11, 2024 ("**First Report**"), para. 1

(g) Such further and other Relief as to this Honourable Court may deem just.

2. The motion is supported (or not opposed) by all stakeholders other than the City of Toronto (the "**City**").

## **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>2</sup>

4. Artscape's operations consisted of, among other things:<sup>3</sup>

(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.

5. Artscape is the registered owner of the following real properties that are subject to the Receivership:<sup>4</sup>

(a) 130 Queens Quay East, 4<sup>th</sup> Floor, Toronto, ON;

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<sup>2</sup> First Report, para. 2

<sup>3</sup> First Report, para. 3

<sup>4</sup> First Report, para. 4

- (b) 38 Abell Street, Toronto, ON comprising 2 commercial condominium units, 20 live/work condominium units and 1 parking stall;
- (c) 180 Shaw Street, Toronto, ON comprising 15 commercial condominium units; and
- (d) 210 Simcoe Street, Toronto ON comprising 2 residential condominium units (each a "**Real Property**" and collectively, the "**Real Properties**").

6. By Order of the Honourable Madam Justice Steele dated January 11, 2024, Spergel was appointed as Receiver of certain property of Artscape (collectively, the "**Property**"), including the Real Properties, pursuant to section 243(1) of the Bankruptcy and Insolvency Act ("**BIA**") and section 101 of the Courts of Justice Act ("**CJA**") (the "**Receivership Order**").<sup>5</sup>

7. The Receivership Order provides, among other things, as follows:

5. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

b) to receive, preserve, and protect the Property, or any part or parts thereof ...

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<sup>5</sup> First Report, paras. 5 - 7; Appendices 1- 4

c) to manage, operate, and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

...

j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business, ... (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause; ...

l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

8. The Receiver retained Fogler, Rubinoff LLP (the "**Receiver's Counsel**") as its independent legal counsel.<sup>6</sup>

### **Activities of the Receiver**

9. Immediately upon its appointment, the Receiver directly, or through the Receiver's Counsel, attended to the following:<sup>7</sup>

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<sup>6</sup> First Report, para. 8

<sup>7</sup> First Report, para. 13

- (a) communicated with Artscape directly or through counsel in relation to, among other things, obtaining books and records of Artscape;
- (b) secured possession of the Real Properties and attended to all necessary repairs and maintenance, where applicable;
- (c) arranged for twice weekly security inspections of the Real Properties;
- (d) communicated with tenants with respect to occupation of the Real Properties and instructed said tenants to pay all arrears and future rent to the Receiver which continues to date;
- (e) arranged and managed ongoing supplier relationships and utility accounts;
- (f) monitored, approved and arranged payment for the ongoing operating expenses;
- (g) monitored, deposited and posted rental payments to the Receiver's trust account;
- (h) arranged for funding and issued Receiver's Certificates No. 1 and 2 (the "**Certificates**") in the amounts of \$70,000, which Certificate was funded by First Ontario Credit Union Ltd. ("**FOCU**") and \$100,000, which Certificate was funded by The Toronto-Dominion Bank ("**TD**"), respectively;
- (i) opened a dedicated trust account for the receivership;
- (j) arranged for two appraisals to be completed on the Real Properties;

- (k) arranged for the registration of the Receiver's interest on the title to the Real Properties;
- (l) arranged for liability insurance in the name of the Receiver;
- (m) notified the office of the Superintendent of Bankruptcy of its appointment as Receiver;
- (n) prepared and filed all documents mandated by the *Bankruptcy and Insolvency Act*;
- (o) obtained legal advice and opinions on issues relevant to the receivership;
- (p) held various discussions and communications with stakeholders pertaining to the marketing and sale of the Real Properties; and
- (q) communicated with the Canada Revenue Agency with respect to Artscape.

### **Proposed Sale Process**

10. As indicated above, pursuant to the Receivership Order, the Receiver is authorized to market any or all of the Property, including advertising and soliciting offers in respect of the Property, or any part or parts thereof, and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.<sup>8</sup>

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<sup>8</sup> First Report, para. 14

11. The Receiver engaged the services of Colliers International Realty Advisors Inc. and Avison to attend at and conduct a full narrative appraisal of the Real Properties.<sup>9</sup>

12. The Receiver requested listing proposals from Cushman & Wakefield ULC, Coldwell Banker Richard Ellis and Avison.<sup>10</sup>

13. The Receiver recommends proceeding with Avison's listing proposal for the following reasons:<sup>11</sup>

- (a) The commission structure is favourable;
- (b) The market valuations underlying the Avison listing proposal are in line with the appraised values of the Real Properties; and
- (c) The Avison office in Toronto, Ontario is extremely familiar with the area where the Real Properties are located.

14. In order to provide third parties with an opportunity to consider an acquisition of the Real Properties, the Receiver is proposing to market the Real Properties for sale for a period of approximately six weeks (the "**Sale Process**").<sup>12</sup>

15. The Sale Process is designed to ensure that the marketing process is fair and reasonable, and that prospective interested parties have the ability to make an offer to purchase the Real Properties.<sup>13</sup>

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<sup>9</sup> First Report, para. 15; Confidential Appendices 1 and 2

<sup>10</sup> First Report, para. 16, Appendix 5; Confidential Appendices 3 and 4

<sup>11</sup> First Report, para. 17

<sup>12</sup> First Report, para. 18



16. The principal elements of the proposed Sale Process are as follows:<sup>14</sup>
- (a) A transparent unpriced tender process with a bid deadline date;
  - (b) As soon as is reasonably possible, Avison will distribute marketing material notifying prospective purchasers of the existence of the Sale Process and list each of the Real Properties on the Multiple Listing Service inviting prospective purchasers to express their interest in making an offer in respect of the Real Properties, pursuant to the terms of the Sale Process;
  - (c) Prospective purchasers that wish to commence due diligence will be required to execute a non-disclosure agreement (“**NDA**”);
  - (d) Upon execution of the NDA, the Receiver, in conjunction with Avison, will determine if the prospective purchaser has a bona fide interest in pursuing a transaction and thus deem them a “**Qualified Bidder**”;
  - (e) Avison, in conjunction with the Receiver will prepare a confidential information memorandum (“**CIM**”), which will provide, among other things, information considered relevant to the Sale Process. The CIM will be sent to each Qualified Bidder;
  - (f) The Receiver and Avison will give each Qualified Bidder access to due diligence materials and information relating to the Real Properties;

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<sup>13</sup> First Report, para. 19

<sup>14</sup> First Report, para. 20

- (g) Due diligence access may include access to an electronic data room, on-site inspections, and other matters which a Qualified Bidder may reasonably request and as to which the Receiver may agree;
- (h) A binding offer, based on a form of Agreement of Purchase and Sale provided by the Receiver, must be submitted in writing to the Receiver by a date to be determined once the Real Properties have been extensively marketed;
- (i) The Receiver, in consultation with Avison, may extend the bid deadline, but is not obligated to do so. If the bid deadline is extended, the Receiver will promptly notify all Qualified Bidders;
- (j) A binding offer must comply with all of the following:
  - (i) The bid is an offer to purchase any or all of the Real Properties on terms and conditions acceptable to the Receiver and delivered to the Receiver prior to the bid deadline;
  - (ii) It is duly authorized and executed and includes a purchase price for the Real Properties expressed in Canadian dollars (the “**Purchase Price**”), together with all exhibits, schedules, and all applicable ancillary agreements thereto;

- (iii) Includes a letter of acknowledgement stating that the Qualified Bidder's offer is irrevocable and open for acceptance until a successful bidder is selected by the Receiver;
- (iv) Is accompanied by written evidence of a firm, irrevocable commitment for financing or other evidence satisfactory to the Receiver, at its sole discretion, of the ability of the Qualified Bidder to consummate the proposed transaction and pay the Purchase Price;
- (v) It fully discloses the identity of each entity that will be bidding for any or all of the Real Properties, or otherwise sponsoring, financing, participating, or benefiting from such bid;
- (vi) It includes an acknowledgement and representation from the Qualified Bidder that: (i) it has had an opportunity to conduct any and all due diligence regarding the Real Properties and the Receiver prior to making its bid, (ii) it has relied solely upon its own independent review, investigation, and/or inspection of any documents in making its bid, and (iii) it did not rely upon any written or oral statements, representations, warranties, or guarantees whatsoever, regarding the Real Properties, Artscape, or the completeness of any information provided in connection therewith;

- (vii) It includes evidence, in form and substance reasonably satisfactory to the Receiver, of authorization and approval from the Qualified Bidder's board of directors (or comparable governing body), if applicable, with respect to the submission, execution, and delivery of the binding offer submitted by the Qualified Bidder;
- (viii) Provides a deposit in the amount of not less than 5% of the Purchase Price offered by the Qualified Bidder;
- (ix) It is received by the Receiver by the bid deadline; and
- (k) The bid contemplates closing the transaction set out in the offer within 20 Business Days of the granting of an Approval and Vesting Order by the Court.

17. The Receiver will review and evaluate each offer and: (i) the Receiver may identify the highest bidder/superior offer for the Real Properties, or (ii) if no offer emerges from the Sale Process that the Receiver is prepared to recommend to the Court for approval, the Receiver will report on the outcome of the Sale Process and provide its recommendation on next steps.

18. The proposed timeframe is condensed, but the Receiver believes that the deadlines proposed in the Sale Process are reasonable in the circumstances.<sup>15</sup>

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<sup>15</sup> First Report, para. 21

19. The Receiver is of the view that, in the circumstances, the proposed Sale Process represents the best opportunity to identify a potential sale for the Real Properties and to maximize value for the benefit of Artscape's stakeholders.<sup>16</sup>

### **Funding of the Receivership**

20. Pursuant to paragraph 22 of the Receivership Order, the Receiver is empowered to borrow by way of a revolving credit or otherwise up to \$300,000.<sup>17</sup>

21. In accordance with the above, the receiver has borrowed \$70,000 from FOCU and \$100,000 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. In order for the Receiver to continue the operations, the Receiver requires an increase in its borrowing powers from \$300,000 to \$600,000.<sup>18</sup>

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

22. The Receiver is seeking a sealing order in respect of the Confidential Appendices to this First Report as they each contain commercially sensitive information, the release of which prior to the completion of a transaction would be prejudicial to the stakeholders of Artscape's estate.<sup>19</sup>

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<sup>16</sup> First Report, para. 22

<sup>17</sup> First Report, para. 23

<sup>18</sup> First Report, para. 24

<sup>19</sup> First Report, para. 25

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

23. A copy the Receiver's interim statement of receipts and disbursements as of April 9, 2024 is attached as Appendix 6 to the First Report.<sup>20</sup>

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

### **The Sales Process – Overview of the City's Position**

24. The City objects to the Sale Process, particularly the proposed marketing of the 20 live/work condominium units located at 38 Abell Street (the "**Abell Units**") and the two residential condominium units at 210 Simcoe Street (the "**Simcoe Units**").

25. After being served with the Receiver's Motion Record, the City took the position that:

- (a) The Sale Process is not sufficient "to bring about compliance with the regulatory obligations that exist regarding those two properties";
- (b) A prospective purchaser should be required to engage with the City's Housing Secretariat to either enter into a new housing agreement, or for the City to consent to an assignment of the existing one;
- (c) If the Receiver disagrees with the City's position regarding the "regulatory obligations", then the availability of a vesting order should be adjudicated prior to the Receiver carrying out the Sale Process.

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<sup>20</sup> First Report, para. 26; Appendix 6

26. The Receiver disagrees with the City's position. The Receiver is not seeking court approval of the sale of the Real Properties at this time, but rather court approval of the Sale Process to obtain bids for the Real Properties, in accordance with the Receiver's explicit powers under the Receivership Order.

27. The legal issues that the City is raising are complex and involve discretionary determinations. Such issues can only be determined based on the factual matrix presented following the Sale Process, with full participation of the affected stakeholders.

28. The decision whether to approve a sale and grant a vesting order, and on what terms, is entirely dependent on weighing the equities and determining whether to do so is just and equitable. It is not just, expeditious or cost-efficient to adjudicate such matters in a factual vacuum, particularly when the issues may become moot, depending on the outcome of the Sale Process.

### **The Secured Creditors**

29. Artscape has three sets of secured creditors with a significant economic interest in the Abell Units:

- (a) FOCU, which holds a first mortgage in the principal amount of \$5,700,000.00;<sup>21</sup>

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<sup>21</sup> Application Record dated December 21, 2023, Exhibits S and T

- (b) Community Fund Forward Assistance Corp./Fond De Progress Communautaire Societe De Gestion ("**CFF**"), which holds a second mortgage in the principal amount of \$2,215,000.00;<sup>22</sup>
- (c) TD, which holds a General Security Agreement over all of Artscape's assets to secure its indebtedness to TD.<sup>23</sup>

### **The Interests of the City**

30. The City is not an economic stakeholder.

31. With respect to the Abell Units, the City relies on an Incentives Contribution Agreement entered into between the City and Artscape on or about August 11, 2010 (the "**Abell ICA**"). Article 10 of the Abell ICA provides as follows:

#### **RESTRICTIONS ON CHANGES**

10.1 Neither the lands on which the Project is located, nor any part of the building in which the Project is located shall be sold or transferred by the Proponent unless the purchaser or transferee has first entered into an agreement with the City assuming the covenants set forth herein, which agreement shall be duly executed by the purchaser or the transferee and delivered to the City prior to sale or transfer.

10.2 To secure this obligation, the Proponent agrees to register a restriction pursuant to Section 118 of the Land Titles Act, on the title to each unit comprising the Project, requiring the prior written consent of the City's Chief Planner to any transfer of the Project, in whole or in part.

32. The Abell ICA is not registered on title to the Abell Units. However, on August 24, 2012, Artscape registered a restriction on title pursuant to Section 118 of the *Land*

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<sup>22</sup> Application Record dated December 21, 2023, Exhibits S and T

<sup>23</sup> Application Record dated December 21, 2023, Exhibit D



*Titles Act*, RSO 1990, c L.5 (the "**LTA**") as Instrument No. AT3110448, (the "**Abell Restriction**"), which restricts the transfer of the Abell Units without the prior written consent of the City's Director of Affordable Housing.

33. With respect to the Simcoe Units, the City relies on an agreement between 210 Simcoe Holdings Inc. dated July 12, 2021, a Contribution Agreement between the City and Artscape dated November 2014 (the "**Simcoe CA**"), and a restriction registered on title to the Simcoe Units pursuant to Section 118 of the LTA (the "**Simcoe Restriction**") (collectively with the Abell Restriction, the "**Section 118 Restrictions**").

### **The Receiver's Position**

34. The Receiver and the Receiver's Counsel thoroughly reviewed the City's position prior to recommending the Sale Process.

35. In a nutshell, the Receiver's position is as follows:

- (a) The Receiver is acting in accordance with its duties and powers under the Receivership Order and has a duty to maximize realization on the Real Properties for the benefit of the Debtor's stakeholders;
- (b) The Abell ICA and Simcoe CA are not binding on the Receiver and do not restrict the ability of a court-appointed receiver of Artscape to market the Abell Units or Simcoe Units for sale;
- (c) Paragraph 3(c) of the Receivership Order authorizes the Receiver to "cease to perform any contracts of the Debtor";

- (d) A receiver must have the ability to refuse to adopt contracts, in order to give meaning to its power to convey the assets free and clear of other parties' interests;<sup>24</sup>
- (e) The decision whether to disclaim a contract must be made having regard to the interests of all stakeholders;<sup>25</sup>
- (f) Whether it is appropriate for the Receiver to disclaim contracts should be determined after the Sale Process, and having regard to the impact on the Debtor's stakeholders, including in particular secured creditors;
- (g) To the extent that the Section 118 Restrictions could be construed as prohibiting the sale of the Real Properties or creating a positive obligation on the Receiver to sell only to an arts organization, they potentially violate:
  - (i) The public policy against restraints of alienation;<sup>26</sup>
  - (ii) The "positive covenants" rule;<sup>27</sup>
- (h) The Court has jurisdiction under s. 100 of the CJA and s. 243 of the BIA to vest the Section 118 Restrictions off title, as part of a sale approval process;<sup>28</sup>

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<sup>24</sup> [Royal Bank of Canada v. Penex Metropolis Ltd.](#), 2009 CanLII 45848 (ON SC), paras. 20 - 26

<sup>25</sup> [Penex](#), supra

<sup>26</sup> [Hongkong Bank of Canada v. Wheeler Holdings Ltd.](#), 1993 CanLII 148 (SCC), [1993] 1 SCR 167

<sup>27</sup> [Re Strus et al. and New Peel Developments Corp. Ltd. et al.](#), 1986 CanLII 2820 (ON SC); [Durham Condominium Corporation No. 123 v. Amberwood Investments Limited](#), 2002 CanLII 44913 (ON CA); [Black v. Owen](#), 2017 ONCA 397

- (i) Whether the Section 118 Restrictions should be vested off title should be determined in the context of a sale approval motion, on notice to all affected stakeholders.

36. Through the Sale Process, it is open to the City, any organization recommended by the City, tenants at the Real Properties or anyone else to submit a bid for one or more of the Real Properties.

37. It is only after the Sale Process that the Receiver will be in a position to make recommendations to the Court and that all affected stakeholders will be in a position to participate and make submissions on any agreements of purchase and sale recommended by the Receiver, based on a complete factual matrix.

### **The Sealing Order**

38. The Receiver seeks an Order sealing the confidential appendices, which include appraisals of the Real Properties and information as to the appraised values.

39. Disclosure of the confidential appendices to third parties would affect the integrity of the Sale Process.

40. 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.

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<sup>28</sup> [Third Eye Capital Corporation v. Ressources Dianor Inc.](#), 2018 ONCA 253; [Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.](#), 2019 ONCA 508; Endorsement of Justice Steele dated January 11, 2024 in the within Application, paras. 21 - 29

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>29</sup>

41. 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.

#### **PART IV - ORDER REQUESTED**

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

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<sup>29</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

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 22<sup>nd</sup> day of April, 2024.



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Catherine Francis

**FOGLER, RUBINOFF LLP**

Lawyers

77 King Street West  
Suite 3000, P.O. Box 95  
TD Centre North Tower  
Toronto, ON M5K 1G8

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

cfrancis@foglers.com

Tel: 416-941-8861

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

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**FACTUM**

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Lawyers

77 King Street West

Suite 3000, P.O. Box 95

TD Centre North Tower

Toronto, ON M5K 1G8

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

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Lawyers for the Receiver