

**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

REPLY FACTUM OF THE RECEIVER

April 24, 2024

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TO: **Service List**

REPLY FACTUM OF THE RECEIVER

1. This reply factum is being filed by the Receiver in response to the City's factum opposing the Sale Process for the Abell Units and the Simcoe Units. The same defined terms will be used as in the Receiver's factum dated April 22, 2024.

2. The City has raised a number of extremely complex legal arguments in relation to, among other things:
 - (a) The role of the Receiver;
 - (b) The City's status as a "regulatory body" under the BIA;
 - (c) The scope and interpretation of the *Planning Act*;
 - (d) The scope and interpretation of various zoning by-laws;
 - (e) The nature and priority of the Section 118 Restrictions under the *Land Titles Act*;
 - (f) The City's alleged priority over the interests of FOCU and CFF;
 - (g) The Receiver's ability to disclaim contracts;
 - (h) The Court's jurisdiction to issue a vesting order;
 - (i) The application and interpretation of *Orphan Well Association*¹
 - (j) The application of the criteria for a sale approval and vesting order set out in *Third Eye Capital*.²

¹ [*Orphan Well Association v. Grant Thornton Ltd.*](#), 2019 SCC 5 at 118

3. It is respectfully submitted that the issues raised by the City are premature, as previously discussed in the Receiver's factum.

4. The Receiver is fully prepared to, and intends to include all relevant information and documents in the data room to be set up as part of the Sale Process. It is also entirely open to the City to refer prospective purchasers to the Receiver as part of the Sale Process and the Receiver encourages the City to do so.

5. However, the City should not be permitted to interfere in the Sale Process. The Receiver has been mandated to sell the Abell Units and the Simcoe Units and is authorized to carry out its duties in accordance with the terms of the Receivership Order.

6. Allowing the City to interfere with and dictate the terms of the Sale Process is contrary to the "one proceeding" scheme of the BIA, which entrusts such powers to the Court-Appointed Receiver. Such a process will also **not** result in a full factual record being before the court on a sale approval motion. To the contrary, the predetermination of the City's legal rights in the manner proposed by the City will prevent a full factual record from being available and will prejudice the rights and interests of creditors, including FOCU and CFF as mortgagees of the Abell Units.

7. The City alleges, without evidence, that FOCU and CFF were fully aware of all the restrictions and legal requirements the City is asserting. The City also takes the categorical position that its "security interest" is ahead of the FOCU and CFF

² [*Third Eye Capital v. Ressources Dianor*](#), 2019 ONCA 508

mortgages. However, the City has attached each of the FOCU and CFF mortgages as exhibits to Mr. Rollins' affidavit.³ Each of the mortgages includes the following statement:

In accordance with registration AT3110448 registered on 2012/08/24, the consent of City of Toronto, Executive Director of the Housing Secretariat has been obtained for the registration of this document.

8. It is unclear how the City can take the position that, having consented to the mortgages, the mortgagees are restricted from realizing on their security in the event of default.

9. In addition, as reflected in the City's responding motion record, the City sent a letter to the Applicant's counsel dated September 20, 2023, objecting to the inclusion of, among other things, the Abell Lots and the Simcoe Lots in the definition of "Real Properties". The City also objected to the Receiver being given the following powers in relation to these properties:

Among the terms which the City asserts cannot or should not be applied to the Artscape Sandbox, Triangle Lofts, Simcoe Lofts, and Youngplace are the provisions in the revised Order that entitle the Receiver:

(a) 3b – to change the locks;

(b) 3c & p – enter into agreements (unless such agreements are consistent with the s. 37 *Planning Act* agreements or other restrictions on title and are consented to by the City);

(c) 3j – engage in efforts to sell the properties;

(d) 19 – 22 – impose a Receiver's charge on the properties.⁴

³ Rollins Affidavit, Exhibit F

10. Despite having voiced these objections, the City ultimately consented to the Receivership Order, which included the power of the Receiver to enter into or disclaim contracts, market and sell the properties and apply for a vesting order, as well as providing a first priority Receiver's Charge.

11. Having consented to the Receivership Order empowering the Receiver to take such steps, the City should not now be allowed to take the position that these powers should not have been granted and that the City, not the Receiver, has the right to control the Sale Process.

12. There are many other issues and concerns with the City's complex legal arguments regarding the effect of the *Planning Act* and zoning by-laws.

13. For example, the Staff Report dated May 26, 2010, which the City has attached as Exhibit L to Ms. Phipps' affidavit and which the City relies upon includes the following statement:

The Official Plan definition of "rental housing" explicitly excludes condominium registered units as a result of legal advice received during the formulation of the Plan. That legal advice was to the effect that a Section 37 or other agreement which attempts to secure rental housing cannot override the rights conferred by the Condominium Act, which means that despite the agreement provisions, individual condo-registered units could be sold and the municipality may not be able to enforce the agreement.

14. In addition, without acknowledging that the zoning by-laws that the City relies upon restrict the sale of condominium units or the rent payable by tenants of such units,

⁴ Affidavit of Doug Rollins, Exhibit N

if the zoning by-laws in fact purport to do so, they would appear to be *ultra vires* the City's powers under the *Planning Act*.

15. The City itself acknowledges that the Court has a discretion whether to permit the disclaimer of contracts and whether to issue a vesting order. As submitted in the Receiver's factum, such determinations must be made on a full factual record with the opportunity for all affected parties to file material and participate, not in a factual vacuum in advance of the Sale Process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of April, 2024.



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PROCEEDING COMMENCED AT TORONTO

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