

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

**IN THE MATTER OF THE RECEIVERSHIP ORDER OF THE
HONOURABLE JUSTICE DIETRICH DATED
SEPTEMBER 21, 2021**

**AND PURSUANT TO THE ENDORSEMENT OF JUSTICE
PENNY DATED NOVEMBER 18, 2022**

B E T W E E N:

**DELOITTE RESTRUCTURING INC., IN ITS CAPACITY AS RECEIVER
AND MANAGER OF TRINITY CENTRES CAMBRIDGE**

**Plaintiff/
Defendant by Counterclaim**

and

RIVER CITY CHRISTIAN REFORMED CHURCH

**Defendant/
Plaintiff by Counterclaim**

and

TRINITY CENTRES FOUNDATION

Defendant by Counterclaim

**STATEMENT OF DEFENCE AND COUNTERCLAIM OF RIVER CITY
CHRISTIAN REFORMED CHURCH**

Procedural History

1. By Endorsement dated November 18, 2022, Justice Penny ordered that the claim by Deloitte Restructuring Inc. in its capacity as Receiver and Manager (“**Receiver**”) of Trinity

Centres Cambridge (“**TCC**”) be resolved within the context of the receivership under the Receivership Order of the Honorable Justice Dietrich dated September 21, 2021.

2. Pursuant to the Endorsement of Justice Penny, the Receiver was to deliver a detailed “claim” for arrears of rent alleged to be owing by River City Christian Reformed Church (“**RCC**”). The Receiver has delivered the Third Report of Deloitte Restructuring Inc. as the “claim”.

3. Pursuant to the Endorsement of Justice Penny, RCC delivers this detailed defence and counterclaim in response to the Receiver’s claim for arrears of rent alleged to be owing by RCC.

4. RCC disputes that it owes any arrears of rent or Taxes, Maintenance and Insurance or utilities (“**TMI**”) to TCC.

The Single Tenant and Option Agreement is Unenforceable

5. RCC entered into a partnership with Trinity Centres Foundation (“**TCF**”) to acquire the church at 15 Wellington Street in Cambridge, Ontario (the “**Property**”) with conditions that included, *among other things*, that RCC’s rent would not exceed \$50,000.

6. In the fall of 2019, RCC and TCF incorporated TCC which held title to the Property. Pursuant to its Articles of Incorporation, TCC’s purpose was “to advance the Christian faith by holding title to one or more properties and providing facilities for use by other registered charities, including churches and religious organizations” and to carry on other ancillary activities.

7. RCC contributed 100% of the equity in TCC through the payment of an option premium in the amount of \$506,200 (the “**Option Premium**”) under the Single Lease and Option

Agreement dated March 5, 2020 between TCC as Landlord and RCC as Single Tenant (“**Lease and Option Agreement**”).

8. Under the Lease and Option Agreement, RCC had an option to purchase the Property at any time during the 10-year term (the “**Option**”). However, the cost of exercising the Option is the sum total of the Option Premium and the value of the principal amount of the mortgage held by Coldpoint, plus interest which accrues at 2% per annum. In effect, RCC loses 71% of the value of the Option Premium immediately upon closing.

9. RCC has asserted in the Consolidated Action, *RCC v. Graham Singh et al*; court file no. CV-21-00672899-00CL, that it relied upon misrepresentations made by defendants in that action, including TCF, in entering into the Lease and Option Agreement. RCC also asserts that Miller Thomson LLP acted in breach of fiduciary duties owed to RCC and that it failed to properly advise RCC of the terms of the Lease and Option Agreement. RCC seeks an order setting aside or annulling the Lease and Option Agreement for fraud and pursuant to section 253(3)(h) of the *Canada Not for Profit Corporations Act* (“**CNCA**”).

10. RCC repeats and relies upon the allegations in the Consolidated Statement of Claim in support of its assertion that the Lease and Option Agreement is unenforceable and should be set aside.

TCC Leased Portions of the Premises Leased to RCC to Other Tenants

11. The Lease and Option Agreement purports to lease to RCC the entire church premises at 15 Wellington Street with RCC as the Single Tenant for a 10-year term on the following basis:

- (a) Fixed Rent of \$50,000 for the first year of the term (Article 5.3);

- (b) Maximum Basic Rent of \$250,000 per year for the remaining nine years of the term subject to the board of directors of TCC's discretion to discount this amount following discussions with RCC. In determining the amount of the discount, TCC must consider the net income *generated by the Tenant* with respect to its use, licensing or subleasing of the Premises to third parties (Articles 5.1 and 5.2);
- (c) Payment as Additional Rent all Taxes, and where the Premises or any portion thereof are not separately assessed, TCC shall, acting reasonably, calculate RCC's share of the taxes based on RCC's proportionate share of the Premises subject to adjustments and mitigating factors (Article 6.1);
- (d) Payment of Utilities (Article 7.2); and
- (e) Payment of expenses to maintain and repair the Premises leased by RCC if RCC fails to maintain and repair said Premises (Article 7.4).

12. Despite purporting to lease the entire Property to RCC, TCC leased out portions of the Property to two other tenants, One Movement and Proactive Training.

One Movement Leases 6,664 Square Feet

13. By a Sub-Licence Agreement made as of December 31, 2019, TCF (as the Landlord) entered into a lease with Autumn Fernandes on behalf of One Movement (as the Tenant) and leased 6,664 square feet of the third floor of the Property to One Movement commencing August 1, 2020 for a 5-year term ("**One Movement Lease**"). One Movement is not a registered charity, church or a religious organization.

14. In exchange, One Movement agreed to pay Base Rent of \$66,640 per annum plus HST being \$10 per square foot. One Movement is further obligated to pay Additional Rent TMI plus HST subject to a cap of \$20,000 per year. One Movement is also responsible for paying Utilities including Water, Gas and Hydro estimated at \$12,600 plus HST. Pursuant to the One Movement Lease, its Base Rent is subject to a discount of \$16,640 plus HST per year for sharing its space on Sundays. Finally, One Movement is responsible for paying maintenance and repairs done by TCC because of One Movement's acts plus 15% of the costs of the repairs.

15. The terms of the One Movement Lease were negotiated by Graham Singh on behalf of TCF. Subsequent to the execute of the One Movement Lease, the Landlord was changed to TCC.

16. The 6,664 square feet leased to One Movement are part of the total rental space that TCC purported to lease to RCC in the Lease and Option Agreement. RCC had no involvement in the negotiation of the terms of the One Movement Lease and is not a party to the Once Movement Lease.

17. In or about August 2020, RCC discovered that as part of the tenant improvements TCF/TCC negotiated with One Movement was the removal of the commercial grade kitchen in the Property to be converted into change rooms. As a result of One Movement's tenant improvements, RCC lost the use of the commercial grade kitchen, which was a fundamental part of the premises TCC leased to RCC in the Lease and Option Agreement, and which was necessary for RCC's use of the premises.

18. RCC further learned that One Movement refused to permit RCC to enter One Movement's leased area on Sundays unless all individuals removed their shoes. When RCC advised that this would not work for its use on Sundays, One Movement installed a door with a lock and refused to

provide RCC with a key to the lock. As a result of being locked out, RCC has not entered One Movement's space and One Movement has not shared its space on Sundays as set out in the purported space sharing agreement in Schedule D of the One Movement Lease.

19. One Movement has paid all rent directly to TCC. As far as RCC is aware, all payments made to TCC by One Movement were accounted for as Basic Rent plus HST. RCC is not aware of One Movement making any payments towards TMI or Utilities as required under the One Movement Lease.

Proactive Training Leased 3,085 SF

20. By a Sub-Licence Agreement made as of September 17, 2020, TCC (as the Landlord) entered into a lease with Emerson Petri on behalf of Proactive Training (as the Tenant) and leased 3,085 Square Feet of the basement of the Property to Proactive Training commencing on January 1, 2021 for a 5-year term ("**Proactive Lease**"). Proactive Training is not a registered charity, church or a religious organization.

21. In exchange, Proactive Training agreed to pay Gross Rent of \$39,000 per annum plus HST which was subject to an annual increase of 2.5% applied every January. The Proactive Lease is a gross lease and TCC agreed in Article 6.1 of the Lease to be solely responsible for and to promptly pay all utility charges applicable to the premises leased by this tenant (referred to as the "**Leased Premises**" for each tenant).

22. The terms of the Proactive Lease were negotiated by Graham Singh on behalf of TCC and/or TCF.

23. The 3,085 square feet leased to Proactive are part of the total rental space that TCC purported to lease to RCC. RCC had no involvement in the negotiation of the terms of the Proactive Lease and is not a party to the Proactive Lease.

24. Schedule D of the Proactive Lease purports to be a space sharing agreement whereby Proactive Training will make gym space available to RCC on Sundays to be used by the Children's Ministry. RCC does not have access to or use any gym space leased by Proactive Training on Sundays.

25. Proactive Training has paid all rent directly to TCC. RCC is not aware of the amount of the TMI and utilities for Proactive Training's Leased Premises that TCC agreed to pay under the Proactive Lease. Neither TCC nor the Receiver have provided RCC with the calculation of the portion of the TMI and utilities attributable to the Leased Premises under the Proactive Lease.

RCC no longer Leases the Premises in the Lease and Option Agreement

26. As a result of TCC entering in to Lease Agreements with One Movement and Proactive Training, RCC no longer leases the Premises as set out in the Lease and Option Agreement.

27. TCC has breached the terms of the Lease and Option Agreement rendering it unenforceable as against RCC.

28. Since January 1, 2021, RCC has leased 6,538 square feet of rentable space in the Property. RCC has paid \$50,000 plus HST in rent for 6,538 square feet in the Property since January 1, 2021. This is the market rate for the 6,538 square feet leased by RCC.

29. Contrary to the assertion by the Receiver in the Third Report of the Receiver, RCC has paid the full amount of the rent owing each month since January 1, 2021. There were a couple of months starting in March 2021 when the rent was paid late.

TCC Board rejected a Rent Increase for RCC starting February 2021

30. Even if the Lease and Option Agreement is enforceable, which is not admitted but expressly denied, the TCC Board rejected the purported unilateral increase in RCC's rent to \$144,360.00 per annum set out in TCF's letter of January 29, 2021.

31. On January 29, 2021, Graham Singh of TCF wrote to RCC attempting to increase the rent to \$144,360.00. Graham Singh did this without calling a TCC Board meeting to discuss a rent increase and in doing so breached the terms of the Lease and Option Agreement.

32. On January 30, 2021, Peter Elgersma, the only non-TCF and non-RCC director of the TCC Board, wrote to Graham Singh confirming that Graham Singh's decision that TCC needed to have a total rental income of \$250,000 was a punitive decision and that tripling RCC's actual rent would be parallel to an eviction notice. Peter Elgersma stated that any discussion of a rent increase for RCC would certainly include RCC, and should take place at a duly called board meeting with suitable amount of notice allowing for a discussion of the rationale and merits of such a decision.

33. Peter Elgersma put forward a written resolution to the TCC Board as follows:

“Resolution to rescind the proposed rent increase in the letter dated Jan 29, 2021 from Graham Singh to Greg & RCC Board.

- i. Whereas the discussion of this rent increase did not take place at the TCC Board table..
- ii. Whereas the requirement for a 180% increase in rent has not been demonstrated in the TCC financials

iii. Whereas a 180% rental increase would constitute an effective eviction.”

34. RCC understands that the Resolution was passed by TCC.

35. RCC has continued to pay the rent of \$50,000 plus HST since the TCC Board rejected the rent increase Graham Singh sought to impose in January 2021, and no rent arrears are owing.

The Receiver has not Exercised its Discretion under the Lease and Option Agreement in Good Faith

36. RCC asserts that, even if the Lease and Option Agreement is enforceable against it, which is not admitted but expressly denied, in performing TCC’s obligations under the Agreement, including in exercising its discretion under Article 5.2, the Receiver must act in good faith. For the reasons set out herein, RCC asserts that the Receiver has not acted in good faith.

37. The Receiver initially asserted in October of 2021 that \$50,000 plus HST was not an appropriate rent for RCC’s use of the Property. TCC has never met with RCC to obtain information on its use of the Property.

38. On November 5, 2021, counsel for RCC provided a summary of RCC’s current usage of the Property and a copy of the City of Cambridge Building Permit which showed larger and higher resolution breakdowns of the rentable space.

39. In response to a request by RCC for the Receiver’s understanding of RCC’s use of the Property, the Receiver provided a spreadsheet purporting to show the use of the Property by all tenants including RCC on November 11, 2021. The spreadsheet contained incorrect information on: the rentable square footage of the Property, RCC’s use of the Property, and that RCC shared space with One Movement on Sunday.

40. As a result of the incorrect information, the Receiver overstated the square footage rented by RCC.

41. On November 22, 2021, counsel for RCC provided a detailed letter to the Receiver's counsel setting out the inaccuracies in the spreadsheet, including that RCC did not share any space with One Movement and Proactive Training. Each of those tenants had exclusive use of the Leased Premises under the One Movement Lease and the Proactive Lease. RCC asserted that it should not be treated differently than the other tenants, One Movement and Proactive Training. RCC asserted that it should not pay higher rent than One Movement which was leasing more square footage at the Property than RCC. Finally, RCC agreed to continue to pay \$50,000 plus HST per annum.

42. RCC did not receive a response to its November 22, 2021 letter and it continued to pay \$50,000 plus HST per annum, which was accepted by the Receiver.

43. In the period between November 2021 and July 2022, the Receiver listed the Property for sale. The Property finally closed on July 7, 2022.

44. It was not until August of 2022, approximately a month following the closing of the Property, that the Receiver sought to re-engage RCC in negotiations concerning rent.

45. In August 2022, the Receiver asserted that RCC leased 14,796 square feet of the Property. The Receiver took the position that the square footage of the Property was 24,545 square feet, which was approximately 8,000 more square feet than rentable square footage of the Property, or that even existed.

46. The Receiver then subtracted the square footage in the One Movement Lease and Proactive Lease to arrive at the 14,796 square feet that the Receiver asserts RCC leases. This square footage

is higher than the square footage that the Receiver asserted that RCC leased in November 2021 *without* including any square footage of the One Movement and Pro Active Leases that the Receiver incorrectly asserted RCC shared – which was included in the Receiver’s November 2021 calculation of square footage rented by RCC.

47. By letter dated August 12, 2022, RCC advised the Receiver that the Receiver had incorrectly used the “area” in square meters from the Ontario Building Code Data Matrix – Part 11 from the first page of the building permit and converted this into square feet. The “area” on the building permit is the total area from the outside walls of the building on each floor. This is not the rentable space inside the building and includes stairwells, elevator shafts, utility areas and empty space above the auditorium (i.e., no floor) which are not part of the calculation for total rentable square footage, being the usable floor space in the tenanted premises.

48. RCC asserts that its rentable space is 6,538 square feet. RCC used the architectural drawings of the internal floor space and scale to update the calculation of its rentable space so that both the Receiver and RCC were working from the same independent and neutral figures.

49. RCC has agreed that it would pay \$8.75 per square foot for its space, with a rental discount of \$593.89 per month to reflect that RCC provided funds (part of the \$506,000 Option Premium) for renovations to its space that did not occur, the reduction of its usable space due to damages, and the state of disrepair of RCC’s space.

50. The Receiver has refused to consider the actual rentable space that RCC occupies at the Property in determining the appropriate rent payable by RCC. The Receiver continues to assert at paragraph 52 of the Third Report that RCC rents 14,796 square feet. The Receiver further continues to take into consideration the erroneous information that RCC uses some of One

Movement's and Proactive's Leased Premises on Sundays, despite being provided with evidence to the contrary including that RCC does not have a key to the locked Leased Premises of One Movement.

51. Contrary to the assertion by the Receiver at paragraph 58 of the Third Report, RCC has responded to all requests from the Receiver to clarify its calculations of the rentable space and the physical condition of its Leased Premises. The Receiver has simply refused to take RCC's position and the facts RCC has drawn to the Receiver's attention into consideration in exercising its discretion under Article 5.2 of the Lease and Option Agreement (if enforceable, which is not admitted but expressly denied) or in determining the market rent for RCC's Leased Premises.

52. RCC asserts that the Receiver has not acted in good faith. The Receiver is not taking into consideration relevant facts and factors in exercising its discretion or in determining the rent payable by RCC. This is evidenced in the position taken by the Receiver on September 23, 2022: that since the start of the Receivership, RCC owes \$177,375.00 in rent, being \$250,000 per annum less the amounts actually paid by RCC. In asserting that RCC owes this amount, the Receiver has not even deducted the amounts of rent paid by One Movement or Proactive Training from the total of \$250,000 Maximum Based Rent for the rental of the entire building in the Lease and Option Agreement.

53. RCC further asserts that the Receiver has not fulfilled its duties as an officer of the court to act honestly and in good faith, and as a fiduciary to all interested parties in TCC's assets. RCC is an unsecured creditor in the amount of \$506,200 of the Receivership. The Receiver has refused to take this into consideration and has only considered the interests and/or position of Coldpoint who brought the application for the court appointed receiver.

Market Rent is \$50,000 plus HST for RCC's Leased Premises

54. The rent asserted by the Receiver is not the market rent for RCC's Leased Premises.

55. RCC asserts that the market rent for its Leased Premises within the Property is \$50,000 plus HST per annum. This market rate accurately reflects the square footage of the Leased Premises at 6,538 square feet, the condition of the Leased Premises, and the cost of renting comparable space in the Cambridge Ontario market.

56. Further, RCC has leased the same premises from the new owner of the Property for \$50,000 plus HST per annum.

57. In the alternative, if RCC is found to owe rent arrears to TCC, RCC pleads and relies upon the right to set off those amounts against the \$506,200 owed by TCC to RCC pursuant to Section 11 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the common law principles and doctrine of legal and equitable set off.

RCC Does not Owe \$170,333.80 in TMI and Utilities

58. The Receiver incorrectly and unjustly asserts that RCC is responsible for paying all of the TMI for the Property under the Lease and Option Agreement.

59. As set out above, RCC asserts that the Lease and Option Agreement is not enforceable against RCC after TCC breached the Agreement and leased portions of RCC's original rental space – being the entire building – to new tenants, in new lease agreements, that RCC was not a party to and which RCC had no involvement in the negotiation of at the time.

60. Since TCC has leased separate spaces of the Property to each of RCC, One Movement and Proactive, it must determine the amounts of the TMI and Utilities for each separate space. This is important because each of the tenants use their space differently and One Movement and Proactive Training use more utilities than RCC because their spaces are air conditioned and RCC's space is not. The Receiver has failed to do this.

61. In the One Movement Lease, One Movement agreed to pay the TMI to a cap of \$20,000 per year and the Utilities (water, gas hydro) for its Leased Premises. Pursuant to the terms of the One Movement Lease, the Receiver has to determine the total TMI and Utilities for One Movement's Leased Premises, and seek payment from One Movement of the TMI and Utilities attributable to its rented space in accordance with the terms of its space.

62. In the Proactive Lease, TCC agreed that it was responsible for paying the TMI and Utilities for the space leased to Proactive Training. The Receiver cannot now seek for RCC to pay these amounts which TCC has already agreed to pay.

63. Even if the Lease and Option Agreement was enforceable (which is not admitted, but expressly denied), it would be unjust to require RCC to pay all of the TMI for the Property, including the space leased to other tenants when it was not involved in the negotiation of terms of those leases. RCC would not have agreed to pay the TMI and Utilities for other tenants that leased space in the building. RCC asserts that Receiver is estopped from seeking these amounts from RCC.

64. The Receiver has provided no calculation for the TMI and Utilities incurred for the 6,538 square feet leased and used by RCC.

65. As a registered religious charity, RCC does not pay property taxes. TCC commenced litigation to recovery property taxes and/or obtain an exemption from the payment of property taxes on this basis. RCC is not aware of the status of this litigation.

66. TCC can also make an application at the Tax Office in Cambridge for a tax rebate because RCC occupies the leased premises. RCC has confirmed that it will provide any documentation needed and cooperate fully with the Receiver in getting the rebate. To date, the Receiver has not made such an application on behalf of TCC.

67. RCC has, using information requested from the Receiver on the TMI and Utilities, calculated the amount of TMI and Utilities of its rentable space as \$44,903.00 for both the pre- and post-receivership periods.

68. Further, TCC used the \$506,200 paid by RCC to TCC to pay all of the TMI and Utility expenses for the Property. As such, RCC has already paid it portion of the TMI and Utilities.

69. In the alternative, in the event that RCC is found to owe TMI and Utilities to TCC, RCC pleads and relies upon the right to set off those amounts against the \$506,200 owed by TCC to RCC pursuant to Section 11 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the common law principles and doctrine of legal and equitable set off.

70. RCC ask that the claim against it for rent and TMI arrears owing to TCC be dismissed with costs on a full indemnity basis.

COUNTERCLAIM

71. The Plaintiff by Counterclaim, River City Christian Reformed Church (“RCC”), claims such amounts of rent or TMI arrears that may be determined to be owed by RCC to TCC:

- (a) As against TCC for breach of contract, and breach of the duty of good faith in regard to the negotiation and performance of the Lease and Option Agreement dated March 5, 2020;
- (b) As against TCF for breach of duties (contractual, tortious, equitable, fiduciary, statutory and/or other duties), including misrepresentation and fraud;
- (c) A declaration that the Lease and Option Agreement between TCC and RCC is rescinded or rendered void ab initio as a result of the Defendants by Counterclaim's actions;
- (d) the costs of this proceeding of a full indemnity basis, plus all applicable taxes; and,
- (e) Such further and other Relief as this Honourable Court may deem just.

72. The Plaintiff by Counterclaim, RCC, repeats and relies upon the allegations in the Statement of Defence in support of the Counterclaim.

73. In the event that Receiver's interpretation of the of the Lease and Option Agreement is correct, the Agreement should be rescinded or declared void ab initio as a result of TCC and/or TCF entering into the One Movement and Proactive Leases and leasing portions of the Premises leased to RCC to these tenants as the Landlord and without RCC's agreement on the terms of said leases.

74. RCC would not have entered into the Lease and Option Agreement had it been aware that TCC and/or TCF would enter into leases with other tenants to lease portions of the Property rented

to RCC under the Lease and Option Agreement and require RCC to pay rent, TMI and Utilities for the spaces leased to other tenants.

75. Further, TCF has been and continues to provide inaccurate information concerning the Lease and Option Agreement, and the space used by RCC at the Property. The full particulars of the inaccurate information provided by TCF to the Receiver are within the knowledge of TCF and the Receiver. TCF knows, or ought to know, that the information it is providing to the Receiver is inaccurate. The inaccurate information has caused the Receiver to assert that RCC owes more rent, TMI and utilities than are payable for RCC's rented space at the Property.

76. RCC has suffered, and will continue to suffer, damages as a result of the aforesaid breaches and misrepresentations by the Defendants by Counterclaim.

77. RCC requests that this Counterclaim be heard and determined together with the Receiver's claim against RCC.

December 12, 2022

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Court File No.

DELOITTE RESTRUCTURING INC., IN ITS CAPACITY AS
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ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

**STATEMENT OF DEFENCE AND COUNTERCLAIM
OF RIVER CITY CHRISTIAN REFORMED CHURCH**

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