

Estate Nos. 31-2510937
31-2510938
31-2510939
31-2510940
31-2510941
31-2510942
31-2510943

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE BANKRUPTCY OF
URBANCORP (WOODBINE) INC., URBANCORP
(BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S
HOLLOW INC., KING TOWNS INC., NEWTOWNS AT
KINGTOWNS INC., DEAJA PARTNER (BAY) INC., AND
TCC/URBANCORP (BAY) LIMITED PARTNERSHIP,
BANKRUPTS**

**FACTUM
OF THE TRUSTEE
(Substantive Consolidation)**

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PART I ~ OVERVIEW

1. This motion deals with whether or not the bankrupt estates of Urbancorp (Woodbine) Inc., Urbancorp (Bridlepath) Inc., The Townhouses Of Hogg's Hollow Inc., King Towns Inc., Newtowns At Kingtowns Inc., DEAJA Partner (Bay) Inc., and TCC/Urbancorp (Bay) Limited Partnership (collectively, the "**Estates**") should be substantively consolidated into the estate of DEAJA Partner (Bay) Inc.

2. As the Estates are effectively consolidated into DEAJA Partner (Bay) Inc., the general partner, by operation of law and the fact that all of the subsidiaries of the limited partnership are mere nominees and bare trustees for the limited partnership, formally substantively consolidating the bankrupt estates will not prejudice any creditor and is, in fact, of benefit by way of administrative cost savings.

PART II ~ FACTS

3. On April 25, 2016, Urbancorp (Woodbine) Inc. ("**Woodbine**") and Urbancorp (Bridlepath) Inc. ("**Bridlepath**") each filed a Notice of Intention to Make a Proposal (the "**NOI Proceedings**") pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"). KSV Kofman Inc. ("**KSV**") was appointed as the Proposal Trustee in the NOI Proceedings.

Trustee's First Report dated May 17, 2019 (the "**First Report**") at Section 1.0, paragraph 1, Motion Record of the Trustee, Tab 2.

4. Pursuant to an order made by the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated October 18, 2016, Woodbine, Bridlepath, The Townhouses of Hogg's Hollow Inc. ("**Hoggs Hollow**"), King Towns Inc. ("**KingTowns**"), Newtowns at Kingtowns Inc. ("**Newtowns**"), DEAJA Partner (Bay) Inc. ("**DEAJA**") and TCC/Urbancorp (Bay) Limited Partnership ("**Bay LP**") (collectively, the "**Bay Entities**") were granted protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**") (the "**Bay CCAA Proceedings**") and KSV was appointed monitor in those proceedings (the "**Monitor**").

First Report at Section 1.0, paragraph 2, Motion Record of the Trustee, Tab 2.

5. DEAJA is the general partner of Bay LP. Each of the Bay LP subsidiaries (Woodbine, Bridlepath, Hoggs Hollow, KingTowns and Newtowns) is a nominee and bare trustee for Bay LP and, as such, their assets and liabilities are assets and liabilities of Bay LP.

First Report at Section 1.0, paragraph 3, Motion Record of the Trustee, Tab 2.

6. All of the issues in the Bay CCAA Proceedings have now been concluded. As such, on the recommendation of the Monitor, on April 30, 2019, the Court issued an order:

- (a) terminating, upon the filing of the discharge certificate, the Bay CCAA Proceedings and discharging KSV in its capacity as the Monitor of the Bay Entities; and
- (b) authorizing and directing the Monitor to file assignments in bankruptcy on the Bay Entities' behalf.

First Report at Section 1.0, paragraph 4, Motion Record of the Trustee, Tab 2.

7. On May 15, 2019, the Monitor filed the assignments in bankruptcy.

First Report at Section 1.0, paragraph 6, Motion Record of the Trustee, Tab 2.

8. The only remaining asset of the Bay Entities is approximately \$110,000 and there is only one remaining creditor of Bay LP, being Urbancorp Inc. which is owed approximately \$4.9 million.

First Report at Section 1.0, paragraph 8, Motion Record of the Trustee, Tab 2.

9. Substantively consolidating the Bay Entities' bankruptcy proceedings into the DEAJA estate will facilitate the orderly administration of the Bay Entities' bankruptcy proceedings and will be more cost efficient than conducting separate bankruptcy proceedings for each Bay Entity given that all of the subsidiaries are merely nominee companies for Bay LP having no independent assets or creditors.

First Report at Section 1.0, paragraph 7, Motion Record of the Trustee, Tab 2.

PART III ~ ISSUES AND THE LAW

10. The issue on this motion is whether or not the Estates should be substantively consolidated into the estate of DEAJA Partner (Bay) Inc.

11. The authority for substantive consolidation of bankrupt estates in Canada lies under the equitable jurisdiction of the Superior Court of Justice granted by s. 183(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**").

Redstone Investment Corp. (Receiver of), Re, 2016 ONSC 4453 [**Redstone**] at para. 8, Trustee's Book of Authorities, Tab 1.

12. Pursuant to the *Limited Partnerships Act* (Ontario) (the "**LPA**"), DEAJA is liable for the debts of Bay LP because the general partner's liability is unlimited. Section 85(1) of the BIA provides that, "on all the general partners of a limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee". Therefore, by operation of law, the assets of Bay LP vested in the Trustee of DEAJA on DEAJA's bankruptcy and, as a result, the Trustee of DEAJA holds all of the assets of both estates.

Ornge Global GP Inc., Re, 2013 ONSC 4518 at paras. 11 and 13, Trustee's Book of Authorities, Tab 2.

13. Each of the Bay LP subsidiaries (Woodbine, Bridlepath, Hoggs Hollow, KingTowns and Newtowns) is a nominee and bare trustee for Bay LP and, as such, their assets and liabilities are assets and liabilities of Bay LP also, therefore, rolling up into DEAJA.

First Report at Section 1.0, paragraph 3, Motion Record of the Trustee, Tab 2.

14. Accordingly, on the facts of this case, the assets and liabilities of the Bay Entities are effectively consolidated into DEAJA, the general partner, by operation of law in any event.

15. As such, granting an order to formally substantively consolidate the Estates will simply facilitate the orderly administration of the Bay Entities' bankruptcy proceedings and will be more cost efficient than conducting separate bankruptcy proceedings for each Bay Entity.

16. In determining whether to impose substantive consolidation, the court must balance the economic prejudice to the creditors resulting from continuing corporate separateness against the economic prejudice caused by consolidation. To establish that substantive consolidation is warranted, it must be shown that the "elements of consolidation" are present, and that the consolidation would prevent a harm or prejudice or would effect a benefit generally.

Redstone at para. 47 citing *Northland Properties Ltd., Re*, [1988] B.C.J. No. 1210 (B.C. S.C.), *affir'd Northland Properties Ltd., Re*, [1989] B.C.J. No. 63 (B.C.C.A.), *Trustee's Book of Authorities*, Tab 1.

17. The "elements of consolidation" are present in this case because the assets and liabilities of the Bay Entities are effectively consolidated into DEAJA, the general partner, by operation of law as outlined above.

18. The only remaining asset of the Bay Entities is approximately \$110,000 and there is only one remaining creditor of Bay LP, being Urbancorp Inc. which is owed approximately \$4.9 million.

19. Accordingly, substantively consolidating the bankrupt estates will not prejudice any creditor, is of benefit by way of administrative cost savings, and mirrors the situation which exists by operation of law in any event.

PART IV ~ RELIEF SOUGHT

20. For all of the foregoing reasons, the Estates should be substantively consolidated into the estate of DEAJA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of May, 2019.



Robin B. Schwill
Davies Ward Phillips & Vineberg LLP

Lawyers for the Trustee

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Redstone Investment Corp. (Receiver of), Re*, 2016 ONSC 4453.
2. *Omge Global GP Inc., Re*, 2013 ONSC 4518.

SCHEDULE "B"

STATUTORY PROVISIONS

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

85 (1) This Act applies to limited partnerships in like manner as if limited partnerships were ordinary partnerships, and, on all the general partners of a limited partnership becoming bankrupt, the property of the limited partnership vests in the trustee.

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;

Limited Partnerships Act, R.S.O. 1990, c. L.16, as amended

8. A general partner in a limited partnership has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership without limited partners except that, without the written consent to or ratification of the specific act by all the limited partners, a general partner has no authority to,

(a) do any act in contravention of the partnership agreement;

(b) do any act which makes it impossible to carry on the ordinary business of the limited partnership;

(c) consent to a judgment against the limited partnership;

(d) possess limited partnership property, or assign any rights in specific partnership property, for other than a partnership purpose;

(e) admit a person as a general partner;

(f) admit a person as a limited partner, unless the right to do so is given in the partnership agreement; or

(g) continue the business of the limited partnership if a general partner dies, retires or becomes incapable as defined in the Substitute Decisions Act, 1992 or a corporate general partner is dissolved, unless the right to do so is given in the partnership agreement.

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Proceeding Commenced at Toronto

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