Court File No. CV-16-11549-00CL

# ONTARIO
# SUPERIOR COURT OF JUSTICE
**[COMMERCIAL LIST]**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC., AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")

AND IN THE MATTER OF TCC/URBANCORP (BAY) LIMITED PARTNERSHIP

## RESPONDING FACTUM OF STEFANO SERPA AND ADRIAN SERPA

(Home Buyer Damage Claims)
(Returnable April 13, 2017)

April 5, 2017

**FOGLER, RUBINOFF LLP**
Lawyers
77 King Street West, TD Centre
Suite 3000, North Tower
Toronto, ON M5K 1G8

**Vern W. DaRe**(LSUC #32591E)
Tel: (416) 941-8842
Fax: (416) 941-8852
Email: vdare@foglers.com

Lawyers for Stefano Serpa and Adrian Serpa

**TO**: SERVICE LIST

**CCAA PROCEEDINGS OF URBANCORP (WOODBINE) INC., URBANCORP (BRIDLEPATH) INC. ET AL.**

**SERVICE LIST**
**(UPDATED OCTOBER 25, 2016)**

**TO:** **WEIRFOULDS LLP**
The TD Bank Tower, Suite 4100
66 Wellington Street West
Toronto, ON M5K 1B7

**Edmond F.B. Lamek / Danny M. Nunes**
Tel: 416-947-5042 / 416-619-6293
Email: elamek@weirfoulds.com / dnunes@weirfoulds.com

**Lawyers for the Urbancorp CCAA Entities**

**AND TO:** **KSV ADVISORY INC.**
150 King Street West, Suite 2308
Toronto, ON M5H 1J9

**Bobby Kofman / Noah Goldstein / Robert Harlang**
Tel: 416-932-6228 / 416-932-6027 / 416-932-6225
Email: bkofman@ksvadvisory.com / ngoldstein@ksvadvisory.com / rharlang@ksvadvisory.com

**The Proposal Trustee**

**AND TO:** **DAVIES WARD PHILLIPS & VINEBERG LLP**
155 Wellington Street West
Toronto, ON M5V 3J7

**Jay Swartz / Robin B. Schwill / Dina Milivojevic**
Tel: 416-597-4107 / 416-597-4194 / 416-367-7460
Email: jswartz@dwpv.com / rschwill@dwpv.com / dmilivojevic@dwpv.com

**Lawyers for KSV Advisory Inc., in its capacity as the Proposal Trustee**

**AND TO:** **BENNETT JONES LLP**
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

**S. Richard Orzy / Raj S. Sahni**
Tel: 416-777-5737 / 416-777-4804
Email: Orzyr@bennettjones.com / SahniR@bennettjones.com

**Lawyers for Alan Saskin and Urbancorp Inc.**

**AND TO:** **BLAKE, CASSELS & GRAYDON LLP**
199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9

**Steve Weisz / Silvana M. D'Alimonte** / Michael McGraw
Tel: 416-863-2616 / 416-863-3860 / 416-863-4247
Email: steven.weisz@blakes.com / smda@blakes.com / michael.mcgraw@blakes.com

**Lawyers for Laurentian Bank of Canada**

**AND TO:** **ROBINS APPLEBY LLP**
120 Adelaide Street West, Suite 2600
Toronto, ON M5H 1 Tl

**Leor Margulies / Dominique Michaud**
Tel: 416-360-3372 / 416-360-3795
Email: lmargulies@robapp.com / dmichaud@robapp.com

**Lawyers for Terra Firma Capital Corporation**

**AND TO:** **TEPLITSKY, COLSON LLP**
70 Bond Street, Suite 200
Toronto, ON M5B 1X3

**James M. Wortzman / J. Ventrella / Catherine Allen**
Tel: 416-865-5315
Email: jwortzman@teplitskycolson.com / jventrella@teplitskycolson.com / callen@teplitskycolson.com

**Lawyers for Atrium Mortgage Investment Corporation**

**AND TO:** **FOGLER, RUBINOFF LLP**
77 King Street West
TD Centre North Tower
Suite 3000, P.O. Box 95
Toronto, ON M5K I G8

**Vern W. DaRe**
Tel: 416-941-8842
Email: vdare@foglers.com

**Lawyers for Adrian Serpa and Stefano Serpa**

**AND TO:** **TRENT MORRIS BARRISTER**
336-20 De Boers Drive
Toronto, ON M3J OH1

**Trent Morris**
Tel: 647-366-6837
Email: trent@trentmorris.ca

**Lawyer for six purchasers of pre-construction homes**

**AND TO:** **TORYS LLP**
79 Wellington Street West, 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1 N2

**Adam M. Slavens**
Tel: 416-865-7333
Email: aslavens@torys.com

**Lawyers for Tarion Warranty Corporation**

**AND TO:** **DICKINSON WRIGHT LLP**
199 Bay Street, Suite 2200, Commerce Court
Toronto, ON M5L 1G4

**Lisa Corne / David Preger**
Tel: 416-646-4608 / 416-646-4606
Email: lcorne@dickinsonwright.com / dpreger@dickinsonwright.com

**Lawyers for certain purchaser of pre-construction units**

**AND TO:** **DEPARTMENT OF JUSTICE CANADA**
Suite 3400
130 King Street West
Toronto, ON M5X 1 K6

**Fozia Chaudary**
Tel: 416-952-7722
Email: fozia.chaudary@justice.gc.ca

**AND TO:** **MINISTRY OF FINANCE**
77 Bay Street, 11th Floor
Toronto, ON M5G 2C8

**Kevin O'Hara**
Tel: 416-327-8463
Email: Kevin.Ohara@ontario.ca

**AND TO:** **GOLDMAN SLOAN NASH & HABER LLP**
480 University Ave Suite 1600
Toronto, Ontario M5G 1V2

**Mario Forte / Robert Drake**
Tel: 416 597 6477 / 416-597-5014
Email: forte@gsnh.com / drake@gsnh.com

**Lawyers for Fuller Landau LLP, Proposal Trustee to Alan Saskin**

**AND TO:** **DELZOTTO ZORZI, LLP**
4810 Dufferin Street, Suite D
Toronto, ON M3H 5S8

**Robert W. Calderwood / Sabrina Adamski**
Tel.: 416-665-5555
E-mail: rcalderwood@dzlaw.com / sadamski@dzlaw.com

**Lawyers for Furkin Construction Inc. and GMF Consulting Inc.**

**AND TO:** **FULLER LANDAU LLP**
151 Bloor Street West
Toronto, ON M5S 1S4

**Gary Abrahamson / Adam Erlich / Ken Pearl**
Tel: 416-645-6500
Email: GAbrahamson@FullerLLP.com / AErlich@FullerLLP.com / KPearl@FullerLLP.com

**Proposal Trustee to Alan Saskin**

**AND TO:** **DENTONS CANADA LLP**
400-77 King Street West, TD Centre
Toronto, ON M5K 0A1

**Neil Rabinovitch / Kenneth Kraft**
Tel: 416-863-4656 / 416-863-4374
Email: neil.rabinovitch@dentons.com / kenneth.kraft@dentons.com

**Lawyers for Adv. Gus Gissin, in his capacity as the Court-appointed Israeli Functionary of Urbancorp Inc.**

AND TO: **TORYS LLP**
79 Wellington Street West, Suite 3000
Toronto, ON M5K 1N2

**Scott Bomhof**
Tel: 416-865-7370
Email: sbomhof@torys.com

**Lawyers for First Capital Realty Inc.**

**AND TO** **FARBER FINANCIAL GROUP**
150 York Street, Suite 1600
Toronto, ON M5H 3S5

Hylton Levi
Tel: 416.496.3070
Email: hlevy@farberfinancial.com

3434636

# tab 1

Court File No. CV-16-11549-00CL

# ONTARIO
# SUPERIOR COURT OF JUSTICE
## [COMMERCIAL LIST]

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC., AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")

AND IN THE MATTER OF TCC/URBANCORP (BAY) LIMITED PARTNERSHIP

# RESPONDING FACTUM OF STEFANO SERPA AND ADRIAN SERPA

## PART I - OVERVIEW

1. This Factum is filed by Stefano Serpa ("**Stefano**") and Adrian Serpa ("**Adrian**") (together, the "**Serpas**") in response to the Home Buyer Damage Claims motion.

2. The Serpas are concerned that allowing the damage claims to proceed will prejudice their rights over their deposits. The adjudication of the Home Buyer Damage Claims may delay indefinitely the payment of their deposits. If successful, the Home Buyer Damage Claims may reduce the amount of their deposits. The Monitor generally disallowed the Home Buyer Damage Claims in accordance with the exclusion clause in the agreements of purchase and sale. To protect their rights in their deposits, the Serpas are of the view that the exclusion clause applies to the home buyers in the circumstances.

**PART II - FACTS**[1]

3. Stefano and Adrian purchased homes at the Bridlepath Project. They each provided Deposits. Each of their purchase agreements contained an exclusion clause that dealt with the liabilities of Urbancorp Bridlepath and the Deposits in the following terms:

> Notwithstanding anything contained in this Agreement it is understood and agreed by the parties hereto that in the event that construction of the Dwelling is not completed on or before the Closing Date for any reason or in the event the Vendor cannot complete the subject transaction on the Closing Date, other than as a result of the Purchaser's default, the Vendor shall not be responsible or liable to the Purchaser in any way for any damages or costs whatsoever including without limitation loss of bargain, relocation costs, loss of income, professional fees and disbursements and any amount paid to third parties on account of decoration, construction or fixturing costs other than those costs set out in the Tarion Addendum.

4. On November 3, 2016, Stefano and Adrian each received from the Monitor, among other things, a copy of their Home Buyer Claim Notice confirming the acceptance or allowance of each of their claims in the amount of their Deposits.

5. Under the Claims Process, home buyers were not required to file proofs of claim and generally were entitled to accept the claims as determined by the Monitor in the Home Buyer Claim Notice or to dispute the amount of the claim by filing an objection notice (the "**Home Buyer Objection Notice**").

6. In deciding whether or not to dispute or object to the Monitor's determination of their claims, Stefano and Adrian reviewed each of their purchase agreements and in particular, the "exclusion of liability" clause, which generally provided that if Urbancorp Bridlepath could not complete the respective transaction, Urbancorp Bridlepath would not be responsible or liable to them for any damages, other than for the deposit amount. Based on their review, reading and

---

[1] References herein, including defined terms, are to or in the Affidavit of Adrian Serpa sworn March 21, 2017.

understanding of the exclusion clause, Stefano and Adrian did not object to or dispute their claims under each Home Buyer Claim Notice. In particular, they understood the exclusion clause to have the effect of limiting the liability of Urbancorp Bridlepath to the return or refund of their Deposits and not including damages.

7. The Serpas are concerned about the potential prejudice to themselves and the majority of home buyers not seeking damages, if this Court allows the home buyers to seek damages in the face of the exclusion clause. The Fifth Report of the Monitor dated March 10, 2017 (the "**Fifth Report**") at section 2.0, paragraph 4, states that 64 home buyers (representing approximately 35% of total home buyers) filed a Home Buyer Objection Notice claiming damages in addition to their allowed deposit amount. This means that the majority of home buyers, or 65% of the total home buyers, are not seeking damages. The Monitor's Fifth Report at section 3.0, paragraph 4, also finds that of the minority of home buyers that are also seeking damages, that 74% graduated from college or university; 84% can read and understand English; 89% are employed, with the majority in white-collar jobs; 58% to 77% were represented by a real estate agent; 26% had a lawyer review the applicable agreement of purchase and sale; and 76% that requested an amendment to their applicable agreement had the amendment made to their agreement.

8. The potential prejudice to the Serpas and majority of home buyers includes the uncertain and indefinite delay of the payment of their deposits and the possible reduction of their deposits, if this Court permits the damage claims to proceed and the claimants are successful in their recovery of damages. If the damage claims are allowed to proceed, it is uncertain how long it will take to litigate or adjudicate the damage claims. The adjudication process may delay indefinitely the refund or payment of the deposits to the majority of home buyers. Also, if the damage claims are allowed to proceed and the home buyers are successful, it is uncertain whether the payment of damages by Urbancorp Bridlepath will reduce the amount available for the deposits. By allowing the damage claims, there is therefore the risk or potential prejudice to

the Serpas and the majority of home buyers, of a delayed refund and a reduced amount of their deposit.

## PART III — ISSUES AND THE LAW

9. Is the exclusion clause in the home buyers' purchase agreements enforceable in the circumstances?

### A. The Test

10. In *Tercon Contractors*[2], the Supreme Court of Canada established a new approach upon which exclusionary clauses should be analyzed. The Court adopted a three-pronged approach:

> (1) Did the parties intend for the exclusion clauses to apply to the circumstances of the particular case? This question depends on the court's interpretation of the intention of the parties as expressed in the contract.
>
> (2) If the clause applies, was it unconscionable?
>
> (3) If the clause applied and was not unconscionable, was it contrary to overriding public policy?

11. An Ontario Court has recently made the following comment regarding the new approach to exclusion clauses:

> This new approach whereby a court may determine that a specific exculpatory term within an otherwise valid contract is unconscionable and, therefore, unenforceable has been called the 'unconscionable term' doctrine by John D. McCamus in *The Law of Contracts,* Ch. 11, Section D(6). Among the innovations to contract law potentially implied by the adoption of this doctrine is the ability of a court to strike an unconscionable term from a contract while upholding the remainder of the agreement as valid.[3]

---

[2] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4 (CanLII), [2010] 1 S.C.R. 69 (S.C.C.), at paras. 121-123 ("*Tercon Contractors*").
[3] *7326246 Canada Inc. and Kevin Gardiner v. Ajilon Consulting*, 2014 ONSC 28 (CanLII) (Ont. S.C.J.), at para. 54.

12. In the same case, the Court cited Professor McCamus as follows regarding the potential application of the unconscionable term doctrine from *Tercon Contractors* to exclusion clauses:

> It may be, then, that the new doctrine will play an important role in striking down unfair terms in signed agreements where there is no realistic expectation that the written terms have been either read or, if read, understood by the signing party. In other words, the doctrine of unconscionable term may provide a common law device, long awaited by some, that can ameliorate the harsh impact of unfair terms in boilerplate or 'adhesion' contracts, offered particularly in the context of consumer transactions on a take-it-or-leave-it basis. [4]

13. The application or usage of the unconscionability doctrine to strike down exclusion clauses has not been without its critics. As Professor McCamus has noted, for a criticism of the doctrine from a law and economics perspective, see:

> A.J. Duggan, '...Three Unconscionable Contracts Cases from a Law and Economics Perspective'... . A similar exchange of views occurred in a Nova Scotia case involving two commercial parties. See *Atlas Supply Co. of Canada Ltd...*(sale of franchise-misleading projections of future business--'merger' and 'independent investigation' clauses held unconscionable). For criticism, see V.W. DaRe, 'Atlas Unchartered: When Unconscionability 'Says it All' (1996) 27 Can. Bus. L.J. 426.[5]

14. From this perspective, the non-enforceability of certain exclusion clauses (i.e., limited liability clauses (i.e. limiting liability to deposits), entire agreement or merger clauses, independent investigation clauses, etc.) and the imposition of compulsory contractual terms by the courts over these exclusion clauses (i.e., permitting damage claims, allowing oral agreements or imposing warranty obligations regarding certain pre-contractual statements (i.e., sale projections)) on the parties, runs the risk of creating uncertainty in contractual relations and imposing higher transaction costs. As I have written elsewhere:

> ...the judicial setting of compulsory terms over standard form exclusion clauses has the potential of affecting the certainty and therefore the transaction costs of a commercial agreement. ...These may include higher priced contracts, timely renegotiations and expensive litigation. For example, the compulsory warranty term set in *Atlas Supply* has the potential of

---

[4] *7326246 Canada Inc. and Kevin Gardiner v. Ajilon Consulting*, 2014 ONSC 28 (CanLII) (Ont. S.C.J.), at para. 59.

[5] John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at page 775, footnote 93.

> augmenting transaction costs. Warranted information is more costly. This raises the contract price of future franchises to offset the increased costs imposed by a new warranty requirement. The forced price adjustment also raises the prospect of re-opening and renegotiating franchise agreements which had been agreed upon and finalized by the parties. The new warranty requirement and the uncertain status of the exclusion clauses also raises the possibility of future court challenges to determine the status of potentially "warranted" projections made during pre-contractual negotiations. These renegotiation, legal and court costs are just some of the transaction costs that may be associated with the imposition of a compulsory warranty term.[6]

15. Justice Farley was more eloquent when he wrote in the inaugural edition of the *Annual Review of Insolvency* Law, that:

> The concept of 'in the shadow of the law' requires that the participants have a high degree of comfort as to the predictable outcome of a matter, whether it be based on statute or judge-made law.[7]

**B. Application of the Test**

***(i) Intention***

16. The first question posed by the new approach to exclusion clauses in *Tercon Contractors* is whether as a matter of interpretation the exclusion clause applies to the circumstances established in evidence. This will depend on the court's assessment of the intention of the parties as expressed in the contract.

17. The exclusion clause in question in the home buyer purchase agreements was referred to above. A key part of the text, with my emphasis, provides that "...it is understood and agreed by the parties hereto that in the event that construction of the Dwelling is not completed on or before the Closing Date for any reason or in the event the Vendor cannot complete the subject

---

[6] V.W. DaRe, "Atlas Unchartered: When Unconscionability 'Says it All' " (1996) 27 Can. Bus. L.J. 426, at p. 450-51.

[7] J.M. Farley, *Preface*, in Janis P. Sarra, ed, *Annual Review of Insolvency Law 2003* (Toronto: Carswell, 2004), at v.

transaction on the Closing Date, other than as a result of the Purchaser's default, the Vendor shall not be responsible or liable to the Purchaser in any way for any damages...".

18. It is respectfully submitted that the exclusion clause in the home buyer purchase agreements apply in the circumstances for the following reasons: (i) the parties expressly "understood and agreed" to the terms of the exclusion clause pursuant to the exclusion clause; and (ii) the evidence has established that the Dwelling/homes were "not completed on or before the Closing Date for any reason" or that the Vendor did not complete the transaction on the Closing Date other than as a result of the Purchaser's default.

***(ii) Unconscionabilty***

19. The second question is whether the exclusion clause was unconscionable at the time the contract was made, as might arise in a situation of unequal bargaining power between the parties. This second issue has to do with contract formation, not breach. Unconscionability requires the combination of inequality of bargaining power in the sense that one party is incapable of adequately protecting his or her interests and the use of that inequality by the stronger party to obtain an improvident bargain.[8] Contracts of adhesion and consumer contracts based on a "take it or leave it" basis often give rise to findings of unconscionability. As noted by Professor McCamus above, the doctrine of unconscionable term may provide a common law device that can ameliorate the harsh impact of unfair terms in boilerplate or 'adhesion' contracts, offered particularly in the context of consumer transactions on a take-it-or-leave-it basis.

20. In the context of consumer transactions, the concept of unconscionability has been incorporated under provincial legislation. These statutes typically apply to consumer

---

[8] *7326246 Canada Inc. and Kevin Gardiner v. Ajilon Consulting*, 2014 ONSC 28 (CanLII) (Ont. S.C.J.), at para. 63; and John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at page 407.

transactions and provide remedies where the transaction is determined by a court to be unconscionable. As pointed out by Professor McCamus:

> To assist the court in making the latter determination, a number of the statutes set out lists of factors that may be taken into account. The lists vary to some extent from one statute to another but the Ontario list, which is illustrative, sets out the following factors:
>
> (i) that the consumer is not reasonably able to protect his or her interest because of physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factors,
>
> (ii) that the price grossly exceeds the price of which similar goods or services are readily available to like consumers,
>
> (iii) that the consumer is unable to receive a substantial benefit from the subject-matter of the consumer representation,
>
> (iv) that there is no reasonable probability of payment of the obligation in full by the consumer,
>
> (v) that the proposed transaction is excessively one-sided in favour of someone other than the consumer,
>
> (vi) that the terms or conditions of the transaction are so adverse to the consumer as to be inequitable,
>
> (vii) that he or she is making a misleading statement of opinion on which the consumer is likely to rely to his or her detriment,
>
> (viii) that he or she is subjecting the consumer to undue pressure to enter into the transaction.[9]

21. It is respectfully submitted that the exclusion clause in the home buyer purchase agreements are not unconscionable for the following reasons:

> (i) the home buyer purchase agreements are not contracts of adhesion;
>
> (ii) as noted above, the Monitor's Fifth Report finds that of the home buyers that are also seeking damages, that 74% graduated from college or university; 84% can read and understand English; 89% are employed, with the majority in white-collar jobs; 58% to 77% were represented by a

[9] John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at page 423.

real estate agent; 26% had a lawyer review the applicable agreement of purchase and sale; and 76% that requested an amendment to their applicable agreement had the amendment made to their agreement;

(iii) the home buyers were reasonably able to protect their interests;

(iv) the majority of home buyers were represented by a real estate agent and had the option of retaining counsel to review the purchase agreement and some did retain counsel for that purpose; and

(v) this was not a "take it or leave it" transaction or situation since 76% that requested an amendment to their applicable agreement had the amendment made to their agreement.

***(iii) Public Policy***

22. Under the new approach to exclusion clauses in *Tercon Contractors,* even if the exclusion clause is held to be valid and applicable, the court may undertake a third enquiry, namely whether the court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

23. As noted above, public policy is ill served by the non-enforcement of exclusion clauses and the imposition of mandatory contract terms by the court over these clauses where it leads to uncertainty in contractual relations, unpredictable results and higher transaction costs. For example, if Urbancorp is held liable for damages notwithstanding the exclusion clause, the Court will have imposed a "full liability"/"damages entitlement" term into the purchase agreements where one didn't exist before. This introduces uncertainty in contractual relations and has the potential of augmenting transaction costs. A "full liability"/"damages entitlement" term or provision incorporated into the purchase agreements may mean higher priced agreements in the future to deal with this contingency This raises the contract price of future

agreements to offset the increased costs imposed by a new "full liability"/"damages entitlement" requirement or term. The imposition of a "full liability"/"damages entitlement" term or provision into the purchase agreements also raises some questions or uncertainty regarding the Claims Process. The Serpas did not object to the Monitor's determination of their claims, being the refund of their Deposits, because they thought they were legally bound by the exclusion clause. The majority of home buyers are not seeking damages. Many of them may have similarly felt bound by the exclusion clause. If the exclusion clause is held not to be enforceable, this may lead some home buyer claimants to argue that they are no longer bound to the Claims Process and they too are entitled to recover damages or seek damages. That is, the imposition of a new "full liability"/"damages entitlement" term or provision in the purchase agreements and the uncertain status of the exclusion clause also raises the possibility of future court challenges to the Claims Process by the majority of home buyer claimants who did not dispute the Monitor's intended refund of their deposits because they felt legally bound to the exclusion clause. These renegotiation, legal and court costs are just some of the transaction costs that may be associated with the imposition of a compulsory "full liability"/"damages entitlement" term or provision in the purchase agreements.

## PART IV - CONCLUSION

24. For all of the foregoing reasons, the Serpas respectfully submit that the exclusion clause in the purchase agreements apply in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of April, 2017.

Vern W. DaRe

# tab A

## SCHEDULE "A"

## LIST OF AUTHORITIES

1. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways),* 2010 SCC 4 (CanLII), [2010] 1 S.C.R. 69 (S.C.C.)

2. *7326246 Canada Inc. and Kevin Gardiner v. Ajilon Consulting*, 2014 ONSC 28 (CanLII) (Ont. S.C.J.)

3. John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005)

4. V.W. DaRe, "Atlas Unchartered: When Unconscionability 'Says it All' " (1996) 27 Can. Bus. L.J. 426

5. J.M. Farley, *Preface*, in Janis P. Sarra, ed, *Annual Review of Insolvency Law 2003* (Toronto: Carswell, 2004)

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC., AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS") AND IN THE MATTER OF TCC/URBANCORP (BAY) LIMITED PARTNERSHIP

Court File No. CV-16-11549-00CL

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**[COMMERCIAL LIST]**

PROCEEDING COMMENCED AT
TORONTO

# RESPONDING FACTUM OF STEFANO SERPA AND ADRIAN SERPA

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

**Vern W. DaRe (LSUC# 32591E)**
vdare@foglers.com
Tel: 416.941.8842
Fax: 416.941.8852

Lawyers for Stefano Serpa and Adrian Serpa