

**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 TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR
VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC.,
URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK
DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING
RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE
ON KING INC. (collectively, the "Applicants") AND THE AFFILIATED ENTITIES IN
SCHEDULE "A" HERETO**

FACTUM OF CERTAIN PURCHASERS

June 29, 2016

DICKINSON WRIGHT LLP

Barristers & Solicitors
199 Bay Street
Suite 2200, P.O. Box 447
Commerce Court Postal Station
Toronto, Ontario, M5L 1G4

DAVID P. PREGER (36870L)

Email: dpreger@dickinsonwright.com
Tel: (416) 646-4606
Fax: (416) 865-1398

LISA S. CORNE (27974M)

Email: lcorne@dickinsonwright.com
Tel: (416) 646-4608
Fax: (416) 865-1398

Lawyers for certain purchasers of
Lawrence and St. Clair

TO: **SERVICE LIST**

PART I - OVERVIEW

1. This Factum is filed in support of a motion by Dickinson Wright LLP for the appointment of representative counsel for the purchasers of residential units from Urbancorp (Lawrence) Inc. (“**Lawrence**”) and Urbancorp (St. Clair Village) Inc. (“**St. Clair**”).
2. As discussed in greater detail below, the Purchasers are a particularly vulnerable group of creditors with a significant financial stake in these proceedings and face devastating financial consequences as a result of the insolvency of Woodbine and Bridlepath. Absent the appointment of representative counsel, the Purchasers have limited means to retain counsel to pursue their claims and interests in the context of this complex restructuring proceeding.
3. It is respectfully submitted that the appointment of representative counsel is fair and reasonable and will ensure that the Purchasers interests are placed before this Court in a time efficient and cost effective manner.

PART II - FACTS¹

A. Background

4. Pursuant to an Order dated May 18, 2016 (the “**Initial Order**”), St. Clair, Lawrence and other entities related to them (the “**CCAA Entities**”) were granted protection under the

¹ Unless otherwise stated, all references herein are to the Affidavit of Michael Brzezinski sworn June 29, 2016.

Companies' Creditors Arrangement Act (the "CCAA") and KSV Kofman Inc. was appointed as monitor (the "Monitor").²

5. In August of 2013, St. Clair purchased the real property located at 19 Innes Avenue, and 177 Caledonia Road, Toronto (the "St. Clair Property") for \$7.7 million. There are currently no mortgages or existing encumbrances registered against the St. Clair Property, apart from a construction lien registered on May 24, 2016 in the amount of \$209,954.00.³

6. In August of 2013, Lawrence acquired the real property located at 1780 Lawrence Avenue West, Toronto (the "Lawrence Property") for a purchase price of \$8.3 million. There are no mortgages or existing encumbrances currently registered against the Lawrence Property, other than a certificate of action dated May 31, 2016 claiming a lien in the amount of \$24,251.00.⁴

7. The Affidavit of Alan Saskin sworn May 13, 2016, sets out the following relevant facts regarding St. Clair and Lawrence:

- (a) The Lawrence Property is the proposed site of an eighty-eight (88) unit residential project, consisting of townhomes and single and semi-detached homes, sixty-five (65) of which were sold prior to construction;
- (b) The St. Clair Property is the proposed site of forty-one (41) residential townhomes, all of which were sold prior to construction; and
- (c) Construction has not commenced on either the Lawrence or St. Clair Properties, apart from demolition of a building on the St. Clair Property.

² Initial Order, Exhibit "A", Affidavit of Michael Brzezinski sworn June 29, 2016 ("Brzezinski Affidavit").

³ Parcel Register of the St. Clair Property, Exhibit "B", Brzezinski Affidavit.

⁴ Parcel Register of the Lawrence Property, Exhibit "C", Brzezinski Affidavit.

B. The Purchasers have a Significant Financial Stake in these Proceedings

8. In the Monitor's Second Report to Court dated June 24, 2016, the Monitor reports that the Purchasers have claims for the return of deposits ("**Deposits**") paid on account of the purchase price of their homes in the aggregate amount of \$7 million (\$3.7 million as against Lawrence and \$3.3 million against St. Clair, respectively). The Monitor also reports that the Deposits were not held in trust and have been spent.⁵

9. The Deposits paid by each Purchaser substantially exceed the \$40,000 maximum coverage available to each Purchaser from Tarion Warranty Corporation. There is no additional insurance or bond to cover the return of the Deposits.

10. In addition to the uncertainty regarding the Deposits, many Purchasers want to protect their rights to complete the purchase of their homes under the agreements they entered into with St. Clair and Lawrence. The Purchasers have serious concerns that should they be unable to complete the purchase of these homes, they will face significant personal and financial hardship, given the appreciation in the value of residential real estate in Toronto.

11. In its Second Report dated June 24, 2016, the Monitor seeks approval for a debtor in possession financing facility (the "**DIP Facility**") of up to \$12.5 million.⁶ The Purchasers have not been properly informed of the Monitor's recommendation regarding the DIP Facility, which is being sought for the benefit of all CCAA Entities, but secured by a charge only as against the St. Clair and Lawrence Properties (the "**DIP Charge**"). In addition to the existing court-ordered charges granted pursuant to the Initial Order, the imposition of the proposed DIP Charge would

⁵ Monitor's Second Report to Court dated June 24, 2016 at p. 11, Monitor's Motion Record.

⁶ Monitor's Second Report to Court dated June 24, 2016 at p. 10, Monitor's Motion Record.

result in charges in the aggregate amount of \$16,450,000, ranking in priority to the interests of the Purchasers. That amount exceeds the combined purchase price paid by Lawrence and St. Clair for both the St. Clair and Lawrence Properties, and threatens the Purchasers' recovery.

12. No information has been made available by the Monitor in its reports to justify the proposed amount of the DIP Facility. No detailed explanation has been provided as to the proposed use of the financing and no budget has been produced by the Monitor to support the need for a \$10 million to \$12.5 million DIP Facility. No explanation has been provided for the apparent disproportionate burden being placed upon the St. Clair and Lawrence estates, and there is no evidence that any effort was made to obtain DIP financing without a priming charge ranking in priority to the Deposits.

Retainer of Dickinson Wright

13. At the request of several purchasers of residential units from four Urbancorp entities, namely, Lawrence, St. Clair, Urbancorp (Bridle Path) Inc. ("**Bridlepath**"), and Urbancorp (Woodbine) Inc. ("**Woodbine**"), representatives of Dickinson Wright, including Lisa Corne and David Preger who will have carriage of this file, met with a larger group of purchasers from those developments to discuss the possibility of the Purchasers retaining Dickinson Wright to represent their collective interests in these and related proceedings.

14. Dickinson Wright has been retained by purchasers from each of Bridle Path, Woodbine, St. Clair and Lawrence to seek the appointment of Dickinson Wright as representative counsel of the purchasers of St. Clair, Lawrence, Bridle Path and Woodbine, in the *BIA* Proposal and *CCAA* proceedings.

15. Dickinson Wright has extensive experience and expertise in restructuring and insolvency law, and in particular, in relation to insolvent real estate development companies.

16. In May 2016, Dickinson Wright was retained by a group of approximately 35 purchasers (the “**Ad Hoc Curzon Purchasers**”) of residential townhouse condominium units from Urbancorp (Leslieville) Developments Inc. (“**Urbancorp Leslieville**”). Due to Urbancorp Leslieville’s failure to complete the construction and sale of the Leslieville homes, the Ad Hoc Curzon Purchasers retained Dickinson Wright to commence an Application for the appointment of an investigative receiver of Urbancorp Leslieville. That Application prompted Urbancorp Leslieville’s senior secured creditor to seek the appointment of Alvarez & Marsal Canada as receiver of Urbancorp Leslieville. Dickinson Wright is continuing to represent the Ad Hoc Curzon Purchasers in respect of the ongoing receivership proceedings of Urbancorp Leslieville.

PART III – ISSUES, LAW & AUTHORITIES

17. The issues before this Court are as follows:

- (a) Should the Court approve legal representation for the Purchasers by appointing Dickinson Wright LLP as representative counsel?
- (b) Should the Court direct Lawrence and St. Clair to pay the reasonable fees and disbursements of representative counsel?
- (c) Should the Court exercise its discretion to approve a court-ordered charge to secure payment of the reasonable fees and disbursement of representative counsel?

A. Appointing Representative Counsel

18. The Court may exercise its discretion to appoint representatives on behalf of vulnerable stakeholders and order that their legal and other professional fees be paid by the Applicants' estate.⁷

19. As noted by Justice Morawetz in *Nortel Networks Corporation*, the Court's authority to appoint representative counsel in *CCAA* proceedings derives from the following statutory sources:⁸

- (a) Rules 10.01 and 12.07 of the *Rules of Civil Procedure*; and
- (b) Section 11 of the *CCAA*.

20. The following factors, first summarized by Justice Pepall in *CanWest Publishing Inc.*, are regularly referenced by this Court when considering representative counsel orders:⁹

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under *CCAA* protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just, including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and

⁷ *Re Target Canada Co.*, 2015 CarswellOnt 620 at para. 61; *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 at paras. 13; *Re Fraser Papers Inc.*, 2009 CarswellOnt 6169 at para. 7.

⁸ *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 at paras. 10 to 12.

⁹ *Re CanWest Publishing Inc.*, 2010 CarswellOnt 1344 at para. 21 [*CanWest*]; *Re Target Canada Co.*, 2015 CarswellOnt 620 at paras. 60 to 61; *Re U.S. Steel Canada Inc.*, 2014 CarswellOnt 16465 at paras. 36 to 42.

- the position of other stakeholders and the Monitor.

Application of the *CanWest* Factors

(a) Vulnerability of the Purchasers

21. The Purchasers are an especially vulnerable and disparate group of creditors. As individuals, their unsecured claims are relatively small and do not factor in a significant way into the decision making of the key players in these proceedings, whose interests may be at odds with those of the Purchasers. This places the Purchasers on the sidelines, while these other parties make the decisions that will ultimately determine whether there is sufficient money to refund deposits, and whether the Purchasers will have the right to complete the purchase of their homes.

22. As matters currently stand, the Purchasers are at significant risk of losing their deposits. Moreover, in the time since they signed their purchase agreements, the price of real estate in Toronto has appreciated. As a result, the Purchasers are not only at risk of losing their deposits and any increase in value they may have received when the projects are completed, they also face the unenviable prospect of having to make another substantial financial outlay in order to find new homes in Toronto.

23. For the majority of the Purchasers, it would not be economical to retain their own legal counsel to represent their interests in these proceedings.

(b) Benefit to the Applicants and the Efficient Administration of the Estate

24. Representative counsel will benefit the estate by removing the need for the Monitor and the Applicants to deal with a potentially large number of individual unrepresented purchasers

advancing individual claims. This objective was promoted by Justice Morawetz in *Cash Store Financial Services*:¹⁰

I am also satisfied that a representation order will facilitate the administration of the CCAA proceeding and enhance its efficiency. The appointment of representative counsel will avoid the need for the Applicants to deal with a potentially large number of individual unrepresented borrowers advancing individual and possibly inconsistent claims.

25. Representative counsel can promote the interests of the Purchasers in a consistent and streamlined manner that will provide an overall benefit for the estate.

(c) Avoidance of Multiplicity of Legal Retainers

26. With such a large and diverse group of Purchasers, a multiplicity of individual legal retainers will cause significant inefficiencies and delay in these proceedings. Moreover, although the Purchasers are similarly situated claimants with aligned interests, they are at risk of putting forward inconsistent positions when there are multiple individuals or small groups being represented independently.

(d) The Balance of Convenience Favours the Appointment

27. In *Dugal v. Research in Motion*, Justice Campbell relied on the following “balance of convenience” test described in *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees’ Retirement Board)* in granting a representation order:¹¹

.... the test to be applied in considering a request for a representation order is not whether the individual members of the

¹⁰ *Re The Cash Store Financial Services*, 2014 ONSC 4567 at para. 20.

¹¹ *Dugal v. Research in Motion Ltd.*, 2007 CarswellOnt 7565 at para. 21.

group can be ascertained or found, but rather whether the balance of convenience favours granting of a representation order instead of individual service upon each member of the group and individual participation in the proceedings. Such an interpretation is consistent with the legislative purpose behind this provision, which is designed to encourage an expeditious means of resolving contentious issues without the cost and expense associated with a Rule 12 order. In analyzing the balance of convenience, I must consider the inconvenience that would be experienced by each party if the representation order were or were not granted.

28. The balance of convenience strongly favours granting a representation order in this case. While no stakeholder participating in this proceeding will be prejudiced by a representation order, the Purchasers are likely to suffer substantial prejudice if they do not have representative counsel who can advocate for their rights and put forward their collective position in all matters affecting their interests.

(e) No other Representative Counsel has been Appointed

29. No other representation order has been made for the Purchasers.

Commonality of Interest

30. A further consideration in granting a representative order is the “commonality of interest” among the Purchasers. The following principles are applicable to assessing commonality of interest:¹²

- (a) Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;

¹² *Re Stelco Inc.*, 2005 CarswellOnt 6818 (Ont. C.A.) at para. 23.

- (b) The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation;
- (c) The commonality of interests are to be viewed purposively, bearing in mind the object of the *CCAA*, namely to facilitate reorganizations if possible;
- (d) In placing a broad and purposive interpretation on the *CCAA*, the court should be careful to resist classification approaches that would potentially jeopardize viable plans;
- (e) Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant; and
- (f) The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the plan in a similar manner.

31. In *Rosseau Resort Developments Inc.*, Justice Peppal appointed representative counsel on behalf of purchasers of condominium units that had yet to close in the context of the receivership of a resort. She found that there was a “common interest” between the purchasers which justified a representative order.¹³

B. Representative Counsel Funding and Charge

32. Section 11.52 of the *CCAA* states:

On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of [...]

¹³*Rosseau Resort Developments Inc.*, Endorsement of Justice Peppal, August 20, 2009 (unreported).

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

...

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

33. This section is permissive and does not contain any specific criteria for a court to consider in granting such a charge. The following is a non-exhaustive list of factors which have been considered by the court in approving a charge:¹⁴

- (a) The size and complexity of the business being restructured;
 - St. Clair and Lawrence are large, sophisticated companies with complex financing arrangements.
- (b) The proposed role of the beneficiaries of the charge;
 - The Purchasers are a particularly vulnerable group who face devastating financial consequences if they are unable to recover their deposits or complete their purchase transactions.
- (c) Whether there is an unwarranted duplication of roles;
 - There has been no representation of the interests of the Purchasers in these proceedings to date.
- (d) Whether the quantum of the proposed charge appears to be fair and reasonable;

¹⁴ *Re Target Canada Co.*, 2015 CarswellOnt 620 at paras. 73-74.

- The unsecured claims of the Purchasers in respect of their deposits are \$7 million alone. In addition, if the Purchasers are unable to preserve their purchase agreements, they face additional losses. In the circumstances, the proposed charge of \$75,000 against each of the St. Clair and Lawrence estates is fair and reasonable.
- (e) The position of the secured creditors likely to be affected by the charge; and
- There are no secured creditors of St. Clair and Lawrence.
- (f) The position of the Monitor.

C. Response to the Monitor's Supplemental Report

34. With the greatest of respect to the Monitor, its suggestion that the appointment of representative counsel is premature does not consider the best interests of the Purchasers.

35. The case law is clear that it is important to move early in the proceeding for the appointment of representative counsel. In *CanWest*, Justice Peppal stated that a “watch and wait [approach] is unhelpful to the needs of the [proposed representative class] and to the interest of the Applicants. The fact that the “individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent” is not a reason to deny or delay their request for a representation order.¹⁵

36. The decisions regarding the DIP Facility and the conduct and outcome of the sales process will have very significant repercussions on the Purchasers' rights and interests. The

¹⁵ *Re CanWest Publishing Inc.*, 2010 CarswellOnt 1344 at para. 24.

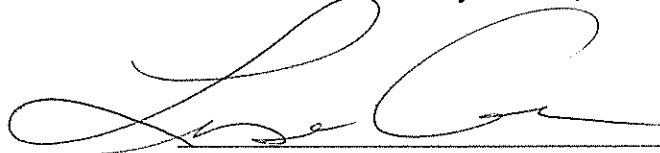
Monitor's recommendation of the DIP Facility highlights the vulnerability of the Purchasers and their need for legal representation in this process.

37. The Purchasers deserve and ought to be given the right to legal representation to ensure that they have a seat at the table and that their interests are put before this Court throughout these proceedings.

PART V - ORDER REQUESTED

38. For all of the foregoing reasons, Dickinson Wright respectfully requests an Order appointing it as representative counsel for the Purchasers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of June, 2016.



Lisa S. Corne

DICKINSON WRIGHT LLP

Barristers & Solicitors
199 Bay Street
Suite 2200, P.O. Box 447
Commerce Court Postal Station
Toronto, Ontario, M5L 1G4

DAVID P. PREGER (36870L)

Email: dpreger@dickinsonwright.com
Tel: (416) 646-4606
Fax: (416) 865-1398

LISA S. CORNE (27974M)

Email: lcorne@dickinsonwright.com
Tel: (416) 646-4608
Fax: (416) 865-1398

Lawyers for Certain Purchasers

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028
2. *Re Target Canada Co.*, 2015 CarswellOnt 620
3. *Re CanWest Publishing Inc.*, 2010 CarswellOnt 1344
4. *Re The Cash Store Financial Services*, 2014 ONSC 4567
5. *Dugal v. Research in Motion Ltd.*, 2007 CarswellOnt 7565
6. *Re Stelco Inc.*, 2005 CarswellOnt 6818 (Ont. C.A.)
7. *Rosseau Resort Developments Inc.*, Endorsement of Justice Peppal, August 20, 2009.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Rules of Civil Procedure, RRO 1990, Reg 194

Proceedings in which Order may be Made

10.01 (1) In a proceeding concerning,

(a) the interpretation of a deed, will, contract or other instrument, or the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(b) the determination of a question arising in the administration of an estate or trust;

(c) the approval of a sale, purchase, settlement or other transaction;

(d) the approval of an arrangement under the Variation of Trusts Act;

(e) the administration of the estate of a deceased person; or

(f) any other matter where it appears necessary or desirable to make an order under this subrule, a judge may by order appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who have a present, future, contingent or unascertained interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. R.R.O. 1990, Reg. 194, r. 10.01 (1).

Order Binds Represented Persons

(2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03. R.R.O. 1990, Reg. 194, r. 10.01 (2).

Settlement Affecting Persons who are not Parties

(3) Where in a proceeding referred to in subrule (1) a settlement is proposed and some of the persons interested in the settlement are not parties to the proceeding, but,

(a) those persons are represented by a person appointed under subrule (1) who assents to the settlement; or

(b) there are other persons having the same interest who are parties to the proceeding and assent to the settlement,

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons. R.R.O. 1990, Reg. 194, r. 10.01 (3).

(4) A settlement approved under subrule (3) binds the interested persons who are not parties, subject to rule 10.03.

PROCEEDING AGAINST REPRESENTATIVE DEFENDANT

12.07 Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

Courts of Justice Act, RSO 1990, c C.43

Costs

131. (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

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 TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (collectively, the "Applicants") AND THE AFFILIATED ENTITIES IN SCHEDULE "A" HERETO

Court File No. CV-16-11389-00CL

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

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF CERTAIN PURCHASERS

DICKINSON WRIGHT LLP

Barristers & Solicitors
199 Bay Street
Suite 2200, P.O. Box 447
Commerce Court Postal Station
Toronto, Ontario, M5L 1G4

DAVID P. PREGER (36870L)

Email: dpreger@dickinsonwright.com
Tel: (416) 646-4606
Fax: (416) 865-1398

LISA S. CORNE (27974M)

Email: lcorne@dickinsonwright.com
Tel: (416) 646-4608
Fax: (416) 865-1398

Lawyers for certain purchasers of
Lawrence and St. Clair