

**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 LISTED IN SCHEDULE "A"  
HERETO**

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**FACTUM  
OF THE MONITOR  
(Motion Returnable September 29, 2023 –  
Mattamy Settlement)**

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**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 LISTED IN SCHEDULE "A" HERETO**

**FACTUM  
OF THE MONITOR**

**PART I ~ OVERVIEW**

1. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Fifty-Eighth Report of KSV Restructuring Inc., in its capacity as the court-appointed monitor (the "**Monitor**") of the Applicants and various affiliated entities pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**"), dated September 25, 2023 (the "**Report**").

2. The Monitor brings a motion to approve the Minutes of Settlement (the “**Settlement**”) between the Monitor on behalf of Urbancorp Downsview Park Development Inc. and Urbancorp Toronto Management Inc., Adv. Guy Gissin, in his capacity as the Court-appointed Israeli Functionary of Urbancorp Inc. (the “**Foreign Representative**”), and Mattamy (Downsview) Limited (“**Mattamy**”).

3. The Settlement is conditional upon the Foreign Representative obtaining the approval of the Israeli court to the Settlement (“**Israeli Court Approval**”) which itself is conditional upon an amendment to the Initial Order made in these proceedings on May 18, 2016 (the “**Initial Order**”) to ensure that the settlement amount can be used to repay the actual amount of inter-company advances on a priority basis and ultimately be paid to Urbancorp Inc.

## **PART II ~ FACTS**

### **Background to the Settlement**

4. The Report contains a summary of the material terms of the Settlement and the Settlement is provided as an appendix to the Report.

5. Urbancorp Downsview Park Development Inc. (“**Downsview**”) and Mattamy, among other affiliated entities, are parties to an Amended and Restated Co-Ownership Agreement made as of July 30, 2013 (the “**Agreement**”).

6. A dispute arose under the Agreement as to Downsview’s entitlement to the Urbancorp Consulting Fee thereunder in the amount of \$5.9 million. The Urbancorp Consulting Fee is payable to UTMI.

7. Downview is a wholly-owned subsidiary of UCI and UCI is the only remaining material creditor of Downview. UCI's interests are represented by the Foreign Representative.

8. The Monitor, Mattamy and the Foreign Representative agreed to have the Honourable Frank J.C. Newbould K.C. (the "**Arbitrator**") determine UTMI's entitlement under the Agreement to be paid the Urbancorp Consulting Fee (the "**Arbitration**").

9. On July 6, 2022, the Arbitrator issued an award (the "**Award**") granting the Monitor the full amount it claimed as owing to UTMI (\$5.9 million) in respect of the unpaid Urbancorp Consulting Fee. Costs were also awarded to the Monitor and the Foreign Representative.

10. Mattamy then commenced an Application under Rule 14.05(2) of the *Rules of Civil Procedure* and Section 46 of the *Arbitration Act, 1991* (Court File No. CV-22-00688349-00CL) (the "**Application**") which was transferred to the Commercial List to be heard in the CCAA Proceedings pursuant to an order of the Court dated September 1, 2022.

11. Madam Justice Kimmel (the "**Application Judge**") heard the Application on March 10, 2023 and issued her endorsement on May 19, 2023 (the "**Decision**"), granting the Application, setting aside the Award, directing the parties to conduct a new arbitration before a new arbitrator, and awarding costs of \$30,000 to Mattamy.

12. On June 9, 2023, the Foreign Representative and the Monitor served and filed a Joint Notice of Motion for Leave to Appeal the Decision to the Ontario Court of Appeal (Court of Appeal File No. COA-23-OM-0172) (the “**Appeal**”).

13. The Monitor has engaged in active negotiations with Mattamy and the Foreign Representative in reaching the Settlement. In fact, such negotiations pre-date the Arbitration.

14. The Monitor is of the view that the Settlement falls within the range of what is fair and reasonable under the circumstances.

### **Background to Initial Order Amendment**

15. The Initial Order authorized the Monitor to cause any CCAA Entity with available cash to loan some or all of that cash to another CCAA Entity on an interest free inter-company basis up to an aggregate of \$1 million, such advances being secured by a court ordered charge.

16. At the time the Intercompany Lender’s Charge was approved by the Court pursuant to the Initial Order, UTMI had no assets and creditor recoveries from UTMI were therefore expected to be nil. UTMI provided back-office support for the Urbancorp Group, including human resources and accounting.

17. During the course of these proceedings, the necessary inter-company advances to UTMI have amounted to approximately \$4.7 million required to fund UTMI’s payroll, other back-office expenses and professional fees primarily to fund the litigation with Mattamy.

18. The Settlement will now provide UTMI with \$2.9 million in assets.

19. The Settlement is conditional upon the Foreign Representative obtaining Israeli Court Approval.

20. The Foreign Representative has informed the Monitor that obtaining Israeli Court Approval will be conditional upon the amendment of the \$1 million limit to reflect the actual amount advanced to UTMI in order that the settlement amount of \$2.9 million can be used to repay the actual amount of inter-company advances on a priority basis which ultimately means it will be paid to UCI.

21. As the ultimate beneficiary of funds available to Cumberland, being its parent corporation, UCI indirectly has claims against UTMI as a result of intercompany advances made during the CCAA proceedings by Cumberland to UTMI. To the extent UTMI had any assets, such assets would have been available to repay the actual advances to it pursuant to the Intercompany Lender's Charge.

### **PART III ~ ISSUES AND THE LAW**

#### ***The Court has the Jurisdiction to Approve the Settlement Agreements***

22. It is now settled law that the Court has the jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors.

[\*Nortel Networks Corporation \(Re\)\*, 2010 ONSC 1708 at para. 71.](#)

#### ***The Legal Test for Approval of the Settlement Agreements***

23. In assessing a settlement within the CCAA context, the court looks at the following three factors:

- (a) whether the settlement is fair and reasonable;
- (b) whether it provides substantial benefits to other stakeholders; and
- (c) whether it is consistent with the purpose and spirit of the CCAA.

[\*Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation\*, 2013 ONSC 1078 at para. 49.](#)

24. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parties, including creditors who are not signatories to a settlement agreement; and its benefit to the applicant and its stakeholders generally.

[\*Nortel Networks Corporation \(Re\)\*, 2010 ONSC 1708 at para. 73.](#)

25. Where the matter subject to settlement is not a relatively discreet legal issue, it is both necessary and appropriate to place reliance on the views of the Monitor who has the benefit of involvement with the applicant during the CCAA proceedings and has actively participated in the negotiations leading up to the proposed settlement.

[Nortel Networks Corporation \(Re\), 2010 ONSC 1096 at paras. 32-35.](#)

***The Legal Test has been Met***

26. In this case, the dispute giving rise to the Settlement involves the interpretation of a complex commercial agreement that contains numerous inconsistencies and possible gaps in its drafting. Accordingly, the subject matter of the Settlement is not a discreet legal issue.

27. The Settlement is the result of extensive negotiations between the Monitor and the Foreign Representative and Mattamy, respectively, and the Monitor is recommending that the Settlement be approved.

28. The Settlement is consistent with the spirit of the CCAA and these CCAA proceedings in particular. The Settlement maximizes the realizable value of certain receivables owing to UTMI when considering the vagaries of litigation plus the benefits of certainty and the avoidance of delay. In these CCAA proceedings in particular, the Settlement resolves the last outstanding material issue.

29. The Settlement is fair and reasonable under the circumstances for much the same reasons – it maximizes the realizable value of certain receivables owing to



UTMI in an efficient, commercially pragmatic manner and permits the Monitor to move forward to ultimately completing all of the outstanding matters left to administer in these proceedings.

### **Jurisdiction for Amending the Initial Order**

30. Paragraph 56 of the Initial Order is as follows:

THIS COURT ORDERS that any interested party (including the Urbancorp CCAA Entities and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

31. As discussed below, the only party that would be adversely affected by not granting the order sought would be UCI and the Foreign Representative supports the granting of the order. Furthermore, the granting of the order itself cannot be said to reasonably cause a prejudice to any other party; rather, it avoids an unjust windfall.

32. Recourse through the comeback clause is available when circumstances change. In supervising a proceeding under the CCAA orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems.

[Canada v. Canada North Group Inc. 2017 ABQB 550 \[Canada North\]](#) at para. 50, affirmed by [2019 ABCA 314](#), further affirmed by [2021 SCC 30](#).

33. However, while comeback relief may be appropriate, it cannot prejudicially affect the position of the parties who have relied *bona fide* on the previous order in question.

[Canada North at para. 68.](#)

### **Amending the Initial Order is Warranted**

34. Circumstances in these proceedings with respect to UTMI have changed. At the time of the Initial Order until the date of the Settlement UTMI had no assets. As a result of the Settlement it will receive \$2.9 million.

35. No creditor of UTMI at the time of the Initial Order was expected to receive any recovery on their claims.

36. However, now that UTMI will have funds to distribute exclusively as a result of Cumberland having funded the litigation which lead to the Settlement, UCI would actually be prejudiced (and the creditors of UTMI at the time of the Initial Order would obtain a windfall) by not amending the Initial Order to reflect the actual amount of inter-company advances made to UTMI.

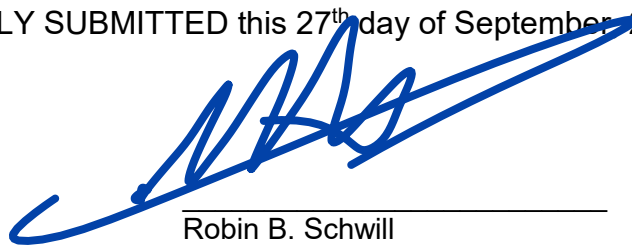
37. As the ultimate beneficiary of funds available to Cumberland, being its parent corporation, UCI indirectly has claims against UTMI as a result of intercompany advances made during the CCAA proceedings by Cumberland to UTMI. To the extent UTMI had any assets, such assets would have been available to repay the actual advances to it pursuant to the Intercompany Lender's Charge. Accordingly it is fair and

reasonable to avoid this prejudice by amending the Initial Order to reflect the actual and current circumstances.

**PART IV ~ RELIEF SOUGHT**

38. The Settlement and the related relief contemplated should be approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of September 2023.

A handwritten signature in blue ink, appearing to be 'R. Schwill', is written over a horizontal line. The signature is stylized and slanted.

Robin B. Schwill  
Davies Ward Phillips & Vineberg LLP

Lawyers for the Monitor

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. [Canada v. Canada North Group Inc., 2017 ABQB 550.](#)
2. [Canada v. Canada North Group Inc., 2019 ABCA 314.](#)
3. [Canada v. Canada North Group Inc., 2021 SCC 30.](#)
4. [Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2013 ONSC 1078.](#)
5. [Nortel Networks Corporation \(Re\), 2010 ONSC 1096.](#)
6. [Nortel Networks Corporation \(Re\), 2010 ONSC 1708.](#)

## SCHEDULE "B"

### STATUTORY PROVISIONS

#### *Arbitration Act, 1991, S.O. 1991, c. 17*

##### **Setting aside award**

**46 (1)** On a party's application, the court may set aside an award on any of the following grounds:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid or has ceased to exist.
3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.
4. The composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act.
5. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.
7. The procedures followed in the arbitration did not comply with this Act.
8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.
9. The award was obtained by fraud.
10. The award is a family arbitration award that is not enforceable under the Family Law Act, 1991, c.17, s.46 (1); 2006, c.1, s.1(7).

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**ONTARIO  
SUPERIOR COURT OF JUSTICE –  
COMMERCIAL LIST**

Proceeding Commenced at Toronto

**FACTUM  
OF THE MONITOR**

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