

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

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
URBANCORP (WOODBINE) INC. OF THE CITY OF TORONTO, IN THE PROVINCE
OF ONTARIO**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
URBANCORP (BRIDLEPATH) INC. OF THE CITY OF TORONTO, IN THE
PROVINCE OF ONTARIO**

FACTUM OF CERTAIN PURCHASERS

June 29, 2016

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Lawyers for certain purchasers of
Woodbine and Bridlepath

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 (Woodbine) Inc. (“**Woodbine**”) and Urbancorp (Bridlepath) Inc. (“**Bridlepath**”).
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. On April 25, 2016, Woodbine and Bridlepath filed Notices of Intention to make a proposal under the *Bankruptcy and Insolvency Act* (the“**BIA**”) and KSV Kofman Inc. was appointed as Proposal Trustee (the “**Trustee**”).

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

5. The Trustee's Reports to the Court set out the following relevant facts regarding Woodbine and Bridlepath:

- (a) Woodbine purchased the real property located at 9064 Woodbine Avenue, Markham (the "**Woodbine Property**") in January 2014 for \$5,250,000;
- (b) Bridlepath purchased the real property located at 2425 Bayview Avenue, Toronto (the "**Bridlepath Property**") in March 20, 2014 for \$11,500,000;
- (c) The Woodbine Property is the proposed site of twenty-eight (28) low-rise residential units;
- (d) The Bridlepath Property is the proposed site of thirty-seven (37) low-rise residential units;
- (e) The Purchasers collectively paid deposits totalling \$7.4 million (\$1.9 million to Woodbine and \$5.6 million to Bridlepath) on account of the purchase price of their homes (the "**Deposits**"); and
- (f) The Deposits were not held in trust and have been spent.

6. The table below summarizes the mortgages against the Woodbine Property and Bridlepath Property:

Company	Lender	Security	Amount (\$)
Woodbine	Laurentian Bank of Canada ("Laurention")	9064 Woodbine Ave.	4,725,000 ²
Bridlepath	Atrium Mortgage Investment Corporation ("AMIC"), Terra Firma Capital Corporation ("TFCC")	2525 Bayview Ave.	10,350,000 ³
Woodbine and Bridlepath (as guarantors of Urbancorp Holdco Inc. ⁴)	TFCC – collateral Mortgage	2425 Bayview Ave. 9064 Woodbine Ave.	5,000,000
			20,075,000 ⁵

7. 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.

8. 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 Woodbine and Bridlepath. 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.

² Principal amount outstanding as at March 4, 2016.

³ Principal amount outstanding as at April 11, 2016.

⁴ Urbancorp Holdco Inc. ("Holdco") owns 100% of the share of Urbancorp Inc. The Companies are guarantors of the TFCC loan to Holdco. TFCC has a registered mortgage on the title to the Properties.

⁵ Total amount owing is likely not inclusive of all interest and other fees that may be payable.

B. Retainer of Dickinson Wright

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

10. 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 Bridle Path, Woodbine, St. Clair and Lawrence in the *BIA* Proposal and *CCAA* proceedings.

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

12. 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

13. 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 order Woodbine and Bridle Path 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

14. In *Kitchener Frame Limited*, Justice Wilton-Siegel, in appointing representative counsel to the union and non-union employees and providing for payment of the reasonable legal fees and disbursements of representative counsel by the debtors, confirmed that representative counsel appointments are appropriate in *BIA* proposals, “particularly in view of the authority granted under section 183(1) of the *Bankruptcy and Insolvency Act*.”⁶ The courts also derive authority to make representation orders from Rules 10.01 and 12.07 of the *Rules of Civil Procedure*.

15. 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 debtors’ estate.⁷

⁶ *Re Kitchener Frame Limited*, Endorsement of Justice Wilton-Siegel dated July 7, 2011 (unreported).

⁷ *Re Target Canada Co.*, 2015 CarswellOnt 620 at para. 61; *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028 at paras. 1.

16. The following factors, first summarized by Justice Pepall in *CanWest Publishing Inc.*, are regularly referenced by this Court when considering representative counsel orders:⁸

- 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
- the position of other stakeholders and the [Trustee].

Application of the *CanWest* Factors

(a) Vulnerability of the Purchasers

17. 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

⁸ *Re CanWest Publishing Inc.*, 2010 CarswellOnt 1344 at para. 21 [*CanWest*]; *Re Target Canada Co.*, 2015 CarswellOnt 620 at paras. 60 to 61.

make the decisions that will determine whether there is sufficient money to refund deposits, and whether the Purchasers will have the right to complete the purchase of their homes.

18. 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.

19. 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

20. Representative counsel will benefit the estate by removing the need for the Trustee 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*:⁹

⁹ *Re The Cash Store Financial Services*, 2014 ONSC 4567 at para. 20.

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.

21. 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

22. 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

23. 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:¹⁰

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

¹⁰ *Dugal v. Research in Motion Ltd.*, 2007 CarswellOnt 7565 at para. 21.

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.

24. 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

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

Commonality of Interest

26. 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:¹¹

- (a) Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
- (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* (or *BIA* proposal), namely to facilitate reorganizations if possible;

¹¹ *Re Stelco Inc.*, 2005 CarswellOnt 6818 (Ont. C.A.) at para. 23.

- (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 proposal] 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.

27. 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 a *BIA* receivership of a resort. She found that there was a “common interest” between the purchasers which justified a representative order.¹²

B. Representative Counsel Funding and Charge

28. Section 131 of the *Courts of Justice Act* provides as follows:

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

29. Section 197(1) of the *BIA* provides as follows:

Costs in discretion of court

197 (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

¹²*Rosseau Resort Developments Inc.*, Endorsement of Justice Peppal, August 20, 2009.

30. The following is a non-exhaustive list of factors which have been considered by the courts in approving a charge:¹³

- (a) The size and complexity of the business being restructured;
 - Woodbine and Bridlepath 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;
 - The unsecured claims of the Purchasers in respect of their deposits are \$7.4 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 Woodbine and Bridlepath estates is fair and reasonable.
- (e) The position of the secured creditors likely to be affected by the charge; and

¹³ *Re Target Canada Co.*, 2015 CarswellOnt 620 at paras. 73-74.

- The proposed representative counsel charge does not seek to prime any existing secured creditors.

(f) The position of the [Proposal Trustee].

C. Response to the Trustee's Supplemental Report

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

32. 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.¹⁴

33. The fact of the matter is that upcoming decisions regarding the expansion of the administration charge and the conduct and outcome of the sales process will have very significant repercussions on the Purchasers' rights and interests.


34. 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

¹⁴ *Re CanWest Publishing Inc.*, 2010 CarswellOnt 1344 at para. 24.

35. 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.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Kitchener Frame Limited.*, Endorsement of Justice Wilton-Siegel dated July 7, 2011 (unreported)
2. *Re Target Canada Co.*, 2015 CarswellOnt 620
3. *Re Nortel Networks Corp.*, 2009 CarswellOnt 3028
4. *Re CanWest Publishing Inc.*, 2010 CarswellOnt 1344
5. *Re The Cash Store Financial Services*, 2014 ONSC 4567
6. *Dugal v. Research in Motion Ltd.*, 2007 CarswellOnt 7565
7. *Re Stelco Inc.*, 2005 CarswellOnt 6818 (Ont. C.A.)
8. *Rosseau Resort Developments Inc.*, Endorsement of Justice Peppal, August 20, 2009.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Courts vested with jurisdiction

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;
- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;
- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Costs in discretion of court

197 (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

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 NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP (WOODBINE) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP (BRIDLEPATH) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Court File No.: 31-2114843

Court File No.: 31-2114850

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PROCEEDING COMMENCED AT
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FACTUM OF CERTAIN PURCHASERS

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