

Court File No. 31-2114850
Estate File No. 31-2114850

**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

RESPONDING FACTUM OF STEFANO SERPA AND ADRIAN SERPA

(REPRESENTATIVE COUNSEL MOTION OF CERTAIN PURCHASERS OF WOODBINE AND BRIDLEPATH originally returnable August 31, 2016 and rescheduled to August 25, 2016)

August 23, 2016

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tab 1

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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

RESPONDING FACTUM OF STEFANO SERPA AND ADRIAN SERPA

(REPRESENTATIVE COUNSEL MOTION OF CERTAIN PURCHASERS OF WOODBINE AND BRIDLEPATH originally returnable August 31, 2016 and rescheduled to August 25, 2016)

PART I - OVERVIEW

1. This Factum is filed by Stefano Serpa ("**Stefano**") and Adrian Serpa ("**Adrian**") (together, the "**Serpas**") in response to the motion brought by Dickinson Wright LLP ("**DW**") on behalf of certain purchasers of residential homes from Urbancorp (Woodbine) Inc. ("**Urbancorp Woodbine**") and Urbancorp (Bridlepath) Inc. ("**Urbancorp Bridlepath**"). DW is seeking an Order, *inter alia*:

- (a) appointing DW as representative counsel for all the purchasers of residential units from Urbancorp Woodbine and Urbancorp Bridlepath, with an opt-out right for these purchasers;
- (b) directing Urbancorp Woodbine and Urbancorp Bridlepath, as applicable, on a monthly basis, to fund all reasonable legal, actuarial and financial expert and

advisory fees and other incidental fees and disbursements, as may have been or will be incurred by DW as representative counsel; and

- (c) ordering a representative counsel charge in favour of DW over the property of Urbancorp Woodbine and Urbancorp Bridlepath, limited to \$75,000 on each property, as security for their professional fees and disbursements, which shall rank subordinate to any secured lenders of Urbancorp Woodbine and Urbancorp Bridlepath and shall have the same priority as the applicable administration charge.

2. The Serpas oppose the appointment of DW as representative counsel for all purchasers of residential units or homes at the Bridlepath Project (defined below), the granting of funding for such representation and the ordering of a super-priority representative counsel charge over the Bridlepath Property (defined below) in favour of DW.

3. With respect to the purchasers of residential units at the Bridlepath Project, representative counsel is either not required or of limited utility; will not contribute to the efficiency of the administration of the estate or have a limited impact; may unnecessarily hinder the restructuring or liquidation or duplicate functions; and could even contribute to the depletion of the assets of the estate.

4. If this Honourable Court sees fit to appoint representative counsel for all the purchasers of residential homes or units at the Bridlepath Project, the Serpas oppose the granting of funding for such representation and the ordering of a super-priority representative counsel charge over the Bridlepath Property. Urbancorp Bridlepath is being asked to fund representative counsel whose fees will deplete the resources of the estate with limited corresponding benefit to either the purchasers or the restructuring or liquidation. Moreover, the representative counsel charge over the Bridlepath Property will have priority and trump any unsecured claims of the purchasers against Urbancorp Bridlepath. Finally, in its Third Report (defined below), the

Proposal Trustee (defined below) was opposed to the appointment of representative counsel funded by the Urbancorp entities including Urbancorp Bridlepath. Such an appointment would be premature, add additional cost and have no apparent benefit according to the Proposal Trustee (although, depending on the outcome of the sale process, the appointment might be appropriate at a later date according to the Proposal Trustee).

5. For all of these reasons and others detailed below, the Serpas request that this Honourable Court deny the relief requested in the proposed order submitted by DW with respect to the Bridlepath Property.

PART II - FACTS¹

6. Stefano is a purchaser of a home from Urbancorp Bridlepath that is to be constructed at 2425 Bayview Avenue, Toronto, Ontario (the "**Bridlepath Property**"). The purchased home is one in part of a development of approximately thirty-seven (37) low-rise residential units at the Bridlepath Property known as "Homes of the Bridle Path" (the "**Bridlepath Project**"). Stefano's brother, Adrian, has also purchased a home at the Bridlepath Project.

A. Background

7. On May 24, 2014, Stefano signed an Agreement of Purchase and Sale with Urbancorp Bridlepath to purchase Lot 17 at the Bridlepath Project ("**Lot 17**") for a purchase price of \$1,250,000.00.

8. Stefano paid Urbancorp Bridlepath a deposit of \$125,000.00 for Lot 17 and \$4,500 for a parking space for a total deposit of \$129,500.00.

9. Construction of the homes at the Bridlepath Project have not yet commenced although a majority of the pre-construction homes have been sold.

¹ References herein are to the Affidavit of Stefano Serpa sworn August 22, 2016.

10. Stefano's purchased home at Lot 17 is scheduled to be completed and ready for occupancy by April 28, 2017.

11. On May 24, 2014, Adrian, Stefano's brother, signed an Agreement of Purchase and Sale with Urbancorp Bridlepath to purchase Lot 24 at the Bridlepath Project ("**Lot 24**") for a purchase price of \$1,300,000.00.

12. Adrian paid Urbancorp Bridlepath a deposit of \$130,000.00 for Lot 24 and \$4,500.00 for a parking space for a total deposit of \$134,500.00.

13. Adrian's purchased home at Lot 24 is scheduled to be completed and ready for occupancy by April 28, 2017.

B. Urbancorp Bridlepath files for creditor protection under the BIA

14. On April 25, 2016, Urbancorp Bridlepath filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to the *Bankruptcy and Insolvency Act* (the "**BIA**"), with KSV Kofman Inc. as proposal trustee (the "**Proposal Trustee**" or "**KSV**"). The filing was part of a broader restructuring or liquidation, whereby other related or Urbancorp entities (collectively, "**Urbancorp**") filed under the BIA or *Companies' Creditors Arrangement Act* (the "**CCAA**"). The NOI period has been extended by this Court.

15. In its *First Report to Court of KSV Kofman Inc. as Proposal Trustee of Urbancorp (Woodbine) Inc. and Urbancorp (Bridlepath) Inc.* dated May 20, 2016, KSV stated that: "The Proposal Trustee understands that the Companies pre-sold freehold homes for the Projects and collected deposits totalling \$7.4 million related thereto (the "**Deposits**"). As these are freehold home projects, the Companies were not required to hold the Deposits in trust. The Proposal Trustee understands that the Deposits have been spent."

16. Only a portion of the Serpas' respective deposits on each of their Bridlepath purchased homes is legally covered by deposit insurance with Tarion Warranty Corporation ("**Tarion**"). The Serpas therefore run the risk of losing a portion of each of their deposits unless their deposits are fully refunded by Tarion, Urbancorp Bridlepath, the Proposal Trustee or another party.

17. Adrian and Stefano retained Fogler Rubinoff LLP ("**Foglers**") to represent their interests in these proceedings.

18. Another lawyer, Trent Morris, appears to represent six purchasers of Urbancorp pre-construction homes as shown on the Service List.

C. Representative Counsel

19. It is unclear or uncertain whether the purchasers of the homes at the Bridlepath Project, in which DW seeks to represent as representative counsel, are primarily individuals or corporations; sophisticated or not sophisticated; with means or without means to individually retain counsel; and investors or home buyers.

20. It is unclear or uncertain exactly how many purchasers of the residential units at the Bridlepath Project, from the total of 37 purchasers, have presently retained DW to represent them in these proceedings. Foglers represents two (2) purchasers of homes at the Bridlepath Project, Adrian and Stefano, and the Service List shows that Trent Morris already represents six (6) purchasers of pre-construction homes of Urbancorp.

21. *In the Supplement to the Third Report to Court of KSV Kofman Inc. as Proposal Trustee of Urbancorp (Woodbine) Inc. and Urbancorp (Bridlepath) Inc. dated June 29, 2016 ("**Third Report**")*, KSV stated, with our emphasis, as follows under heading 2.0, "Home Buyer Issues", that:

1. In recent days, KSV has been made aware of the following:
 - a) a letter dated June 16, 2016 from Alex Oren, a home buyer of Lawrence, attached as Appendix "A" (the "Oren Letter");
 - b) a letter dated June 22, 2016 from Gloriana Field, a home buyer of Bridlepath attached as Appendix "B" (the "Field Letter"); and
 - c) a meeting of home buyers held on June 27, 2016 at which lawyers from Dickinson Wright LLP ("Dickinson Wright") attended for the purposes of, *inter alia*, becoming home buyer representative counsel.
2. KSV has been responsive to all home buyer calls and communications throughout the CCAA and NOI proceedings, including corresponding with Mr. Oren at the outset of these proceedings and directing him to legal counsel.
3. KSV is concerned that home buyers may not appreciate the general objective of the CCAA and NOI proceedings, misinformation is spreading among home buyers and misleading comments are being attributed to KSV by certain home buyers. In response to these concerns:
 - a) A letter was sent from Davies Ward Phillips & Vineberg LLP ("Davies"), counsel to the Monitor and the Proposal Trustee to Dickinson Wright on June 24, 2016 (the "Davies Letter") responding to the Field Letter. Davies requested that the letter be shared with individuals who have entered into purchase agreements with Bridlepath. KSV has been advised that Dickinson Wright has not done so. A copy of Davies' Letter is attached as Appendix "C";
 - b) On June 29, 2016, KSV posted a notice to home buyers on its website at <http://www.ksvadvisory.com/insolvency-cases-2/urbancorp/> addressing issues that it understands to be of concern to home buyers (the "Notice"). KSV also provided a copy of the Notice to Dickinson Wright on June 29, 2016. A copy of the Notice is provided in Appendix "D"; and
 - c) KSV obtained a list of home buyers to determine the extent of Dickinson Wright's potential representation. A copy of the home buyers list is attached as Appendix "E".
4. The Davies Letter and the Notice summarize, among other things, that if the values provided by realtors are achieved during the Sale Process, many of the home buyers will see a substantial recovery on their Deposits, and many could be repaid in full. Accordingly, KSV is of the view that the appointment of representative counsel funded by the Urbancorp CCAA Entities, Bridlepath and Woodbine is premature, as it will add additional cost, with no apparent

benefit. Depending on the outcome of the Sale Process, the appointment of representative counsel may be appropriate at a later date.

22. Part of the Field Letter states, with emphasis, as follows: "...The more purchasers we can get from our project to band together with this firm [DW], the more likely it will be that they can be appointed by the court as counsel for us and get their fees paid by Urbancorp. What they could do for us is to put purchasers' rights front and centre before the court, and fight for solutions which protect our interests...You are not obligated to go with this firm [DW], you can retain your own lawyers but there is strength in numbers if we do band together there will be more impact on the court to recognize our rights".

23. *In the Supplement to the Fourth Report to Court of KSV Kofman Inc. as Proposal Trustee of Urbancorp (Woodbine) Inc. and Urbancorp (Bridlepath) Inc. dated August 17, 2016* (the "**Fourth Report**"), KSV stated as follows (footnote omitted) under heading 2.0, "Sale Process", that:

1. Sixteen offers were received by Bridlepath and twelve offers were received for Woodbine. The offers are in the process of being reviewed; however, a preliminary review of the best offers indicates that there should be proceeds sufficient to repay in full the amounts of the mortgages on the Properties. The sale proceeds may also be sufficient to satisfy or nearly satisfy all unsecured claims, including home buyer deposits. It should be noted that a claims process has not been undertaken in respect of either of the Companies. The offers remain subject to further review.

2. The Proposal Trustee intends to work with the Companies to complete transactions for each of the Properties, with a target closing date of approximately 60 days from the date of this motion. Any such sales will be subject to prior approval of this Court.

PART III — ISSUES AND THE LAW

24. The issues in this motion are as follows:

- (a) Should DW be appointed representative counsel for the purchasers of residential homes or units at the Bridlepath Project?; and
- (b) If so, should the request for funding such representation and a representative counsel charge in favour of DW over the Bridlepath Property be granted?

25. The Serpas submit that the appointment of representative counsel is not necessary in the circumstances and that the request for funding and a representative counsel charge is counter to the restructuring or liquidation objectives of Urbancorp Bridlepath under the BIA.

A. Appointment of Representative Counsel is Unnecessary

26. Ontario courts have jurisdiction under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel in cases where persons with interest in an estate cannot be readily ascertained, found or served.

10.01(1)...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.²

27. Another source of jurisdiction to appoint representative counsel can be found at Rule 12.07 of the *Rules of Civil Procedure*, which provides that 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".³

28. Within the BIA context, Justice Wilton-Siegel held in *Kitchener Frame Limited* that with respect to the principles regarding the appointment of representative counsel, he saw "no reason why such principles should not govern a proposal under the BIA in addition to CCAA

² *Rules of Civil Procedure*, R.R.O. 1990, Reg. 199, R. 10.01(1).

³ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 199, R. 12.07.

proceedings, particularly in view of the authority granted under section 183(1) of the *Bankruptcy and Insolvency Act*".⁴

29. The guiding principles regarding the appointment of representative counsel have been set out in several CCAA cases.⁵ The court has discretion under s. 11 to make any order that it considers appropriate in the circumstances. Ontario courts seized of CCAA proceedings have interpreted the discretion under s. 11 to include the authority, where appropriate, to appoint representative counsel and to order legal and professional expenses of such counsel to be paid from the estate of the applicant.⁶

30. Ontario courts seized of CCAA matters have held that representative counsel should not be appointed where the following factors are not present:

- (a) the group is vulnerable and has limited means to pursue their claims so they would benefit from an order appointing representative counsel;⁷
- (b) the granting of a representation order would provide a social benefit by assisting the members of the group and the representative counsel would provide a reliable resource for the group about the process;⁸
- (c) the appointment of representative counsel would have the benefit of streamlining and introducing efficiency to the process for all parties involved in the proceeding;⁹ and
- (d) the balance of convenience favours the appointment and it is fair and just including to the creditors of the estate.¹⁰

⁴ *Re Kitchener Frame Limited*, Endorsement of Justice Wilton-Siegel dated July 7, 2011 (Ont. S.C.J.) (unreported).

⁵ For example, *Target Canada Co. (Re)*, 2015 ONSC 303 (CanLII) (Ont. S.C.J.), at paras. 60, 61 ("**Target**"); *Nortel Networks Corporation (Re)*, 2009 CanLII 26603 (Ont. S.C.J.), at paras. 10-16 ("**Nortel**"); and *Canwest Publishing Inc.*, 2010 ONSC 1328 (Ont. S.C.J.), at para. 21 ("**Canwest**").

⁶ *Nortel*, para.12; *Target*, para. 61.

⁷ *Nortel*, paras. 13-14; *Canwest*, para. 21; *Target*, para. 61.

⁸ *Nortel*, paras. 13-14; *Canwest*, para. 21; *Target*, para. 61.

⁹ *Nortel*, paras. 13-14.

31. Courts considering representative counsel motions in CCAA proceedings have also taken into account whether the applicant and the monitor consent to the proposed appointment and whether there is any other specific support or opposition to the motion. For example, Morawetz J. (as he then was) noted in an endorsement approving the appointment of representative counsel in *Nortel* that the monitor supported the appointment and that no party was opposed.¹¹

32. The guiding principles in the appointment of representative counsel were nicely summarized by Justice Pepall (as she then was) in *Canwest* as including the following factors:

- 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 Monitor.¹²

33. The Proposal Trustee is an officer of the court and has an impartial, fair and non-partisan role in protecting the interests of all stakeholders including the purchasers of residential units at the Bridlepath Project. As commentators have pointed out; after the filing of an NOI or proposal under the BIA:

The trustee also has a role similar in some respects to that of a stakeholder. He accepts what the debtor gives to him under the proposal and distributes it to the creditors according to their rights. He

¹⁰ *Canwest*, para. 21; *Target*, para. 61.

¹¹ *Nortel*, para. 15.

¹² *Canwest*, para. 21.

should be impartial, fair and disinterested; he cannot be a partisan for either the debtor or any of the creditors beyond his statutory obligations...Most of the functions of a trustee are administrative. However, the trustee is also an officer of the court...¹³

B. Application of the Canwest Factors

(i) The Vulnerability and Resources of the Group Sought to be Represented

34. There are 37 or approximately 37 purchasers of homes at the Bridlepath Project. It is unclear whether they are primarily individuals or corporations; sophisticated or not sophisticated; with means or without means to individually retain counsel; and investors or home buyers. There is no evidence that the purchasers of these homes or residential units at the Bridlepath Project are a vulnerable group and lack the means or the ability to retain and instruct counsel. Two of the purchasers, Stefano and Adrian, have retained Foglers. The Service List indicates that six purchasers of an Urbancorp property have retained Trent Morris to represent their interests. One of the purchasers of a home at the Bridlepath Project, Gloriana Field, indicated in the Field Letter, that there would be strategic benefits to the appointment of representative counsel including getting their fees paid by Urbancorp and putting purchasers' rights front and centre before the court, and fighting for solutions which protect their interests. The Field Letter also made the point that purchasers were not obligated to retain DW, and that they could retain their own lawyers.

35. The Proposal Trustee is an officer of the court and has a duty of fairness and impartiality to all stakeholders including the purchasers of residential units at the Bridlepath Project. In its Third Report, the Proposal Trustee indicated, among other things, that " KSV has been responsive to all home buyer calls and communications throughout the CCAA and NOI proceedings".

¹³ John D. Honsberger and Vern DaRe, *Debt Restructuring: Principles and Practice* (Toronto: Thomson Reuters) (looseleaf), p. 8-37.

(b) Any benefit to the companies under CCAA/BIA NOI protection; any social benefit to be derived from representation of the group; the facilitation of the administration of the proceedings and efficiency

36. In its Third Report, the Proposal Trustee expressed the view that the appointment of representative counsel funded by the Urbancorp CCAA Entities, Urbancorp Bridlepath and Urbancorp Woodbine is premature, as it will add additional cost, with no apparent benefit although depending on the outcome of the Sale Process, the appointment of representative counsel may be appropriate at a later date.

37. The Davies Letter and the Notice, referred to in the Third Report, stated, among other things, that if the values provided by realtors are achieved during the Sale Process, many of the home buyers will see a substantial recovery on their Deposits, and many could be repaid in full. In its Fourth Report, the Proposal Trustee confirmed that a preliminary review of the best offers under the Sale Process indicates that there should be proceeds sufficient to repay in full the amounts of the mortgages on the properties, and that the sale proceeds may also be sufficient to satisfy or nearly satisfy all unsecured claims, including home buyer deposits. The target closing date of the sale of the properties is approximately two months according to the Proposal Trustee.

38. In *Target*, representative counsel was appointed over approximately 17,600 employees or a group that totalled in the thousands.¹⁴ In *Nortel*, the groups sought to be represented by counsel totalled in the hundreds or thousands.¹⁵ In *Canwest*, one of the groups sought to be represented by counsel totalled approximately 45 non-unionized employees.¹⁶

39. The purchaser group of residential units at the Bridlepath Project is much smaller and they have the potential of full recovery of their deposits in a timely fashion depending on the

¹⁴ *Target*, paras. 6, 61.

¹⁵ *Nortel*, paras. 2, 3.

¹⁶ *Canwest*, para. 4.

outcome of the Sale Process according to the Davies Letter and Fourth Report. Two to eight purchasers of residential units at the Bridlepath Project already have counsel. This leaves approximately 29 to 35 potential unrepresented purchasers in the group of Bridlepath purchasers. This is not a heavy load for the Proposal Trustee to deal with, in terms of reviewing claims from approximately 29 to 35 unrepresented purchasers. Combining that small number of purchasers in the group with the possibility of full and timely recovery of their deposits after or under the Sales Process, it is difficult to see what extra "value-added" representative counsel could bring to such a claims process in the circumstances.

40. For similar reasons, there is no or limited social benefit to be provided by the appointment of representative counsel and it will not streamline or introduce efficiency into the process. We are not dealing with hundreds or thousands of potential claimants in this purchaser group. The Proposal Trustee has the capacity to review approximately 29 to 35 individual claims by unrepresented purchasers of homes at the Bridlepath Project. As an officer of the court, the Proposal Trustee will conduct this review of claims or claims process in a fair, impartial and non-partisan manner. Also, if there is full and timely recovery of their deposits, one would expect that many or some of these purchasers may be satisfied with the returned deposit and that will end the matter from their perspective. If a purchaser wishes to explore other remedies of a more litigious nature after it has received full and timely recovery of its deposit, such as specific performance or damages for breach of contract, that purchaser is entitled to enlist its own counsel to investigate and pursue such claims, if any, against Urbancorp. However, such litigation should not be on the "dime" of Urbancorp Bridlepath and protected by a representative counsel charge that has the effect of trumping professional costs related to such litigation over the unsecured claims of purchasers. Introducing representative counsel after purchasers fully recover their deposits or before they are about to fully recover their deposits in a timely fashion will not streamline or introduce efficiency into the process but instead runs the risk of more court attendances and court filings by representative counsel in the

pursuit of remedies of a more litigious nature. Finally, an anticipated closing date of approximately two months to sell the Bridlepath Property, with the strong possibility of full recovery of deposits for purchasers shortly thereafter, is not unreasonable and represents a fairly quick sale and potential recovery of deposits for purchasers in the circumstances.

(ii) The Avoidance of a Multiplicity of Legal Retainers

41. The purchasers of residential units at the Bridlepath Project are not a large group. Of the 37 purchasers, two already have counsel and six others may already have counsel. The group may get smaller. Some purchasers may "walk" if they receive full recovery of their deposits, bringing the matter to an end from their perspective and not requiring legal representation on their part. A multiplicity of retainers is less a concern or problem in these circumstances.

(iii) The Balance of Convenience and Whether it is Fair and Just Including to the Creditors of the Estate

42. The balance of convenience does not favour the appointment of representative counsel. Some of the purchasers of residential units at the Bridlepath Project already have counsel. The Proposal Trustee, as an officer of the court, is duty bound to deal with these purchasers' claims in a fair, impartial and non-partisan manner. The Davies Letter and Fourth Report, taken together, suggests that substantial or full recovery of their deposits is a strong possibility under the Sales Process and that a quick sale (and potential recovery of deposits) of approximately two months is another possibility.

43. For some purchasers, a full or substantial recovery of their deposits may bring the matter to a close. For those purchasers wishing to pursue other remedies after the recovery of their deposits, they can retain their own counsel. These more litigious options, such as the remedy of specific performance or damages for breach of contract, should not be funded by

Urbancorp Bridlepath and supported by a super-priority representative counsel charge over the Bridlepath Property that subordinates the unsecured claims of purchasers to the professional costs related to such litigation. The appointment of representative counsel in circumstances where the deposits are recovered or about to be recovered by purchasers under the Sales Process is likely to generate unnecessary work for Urbancorp Bridlepath and their counsel and will probably not provide any corresponding benefit to the Bridlepath purchaser group or the restructuring or liquidation.

(iv) No Other Representative Counsel Has Been Appointed

44. While no other representative counsel has been appointed for the 37 purchasers of residential units at the Bridlepath Project, two of the purchasers have retained Foglers and six of the purchasers of homes at the Bridlepath Project or other Urbancorp property, as shown on the Service List, have retained Trent Morris.

(v) The position of other stakeholders and the Monitor/Proposal Trustee

45. At this time, as indicated in its Third Report, the Proposal Trustee opposes the appointment of representative counsel funded by the Urbancorp entities including the appointment for the group of purchasers of homes at the Bridlepath Project. The Serpas also oppose the appointment for the purchasers of residential units at the Bridlepath Project.

C. The Funding of Representative Counsel and Super-Priority Charge are Inappropriate in This Context

46. The Serpas also oppose the funding of representative counsel and the granting of a representative counsel charge in this context. Funding requests are granted where there is a demonstrated need for collective representation and an inability to fund such representation. At this time and given the possibility of recovery of the deposits in a timely manner after or under the Sales Process, there is no need for such representation, and no evidence of inability to pay

for individual representation among the purchasers of units at the Bridlepath Project. The granting of funding and a representative counsel charge would also deplete the limited assets of the estate and provide no or limited benefit to the restructuring or liquidation as a whole.

47. The court's authority to order legal and other professional expenses of representative counsel to be paid from the applicant's estate and an administration charge emanates from various statutory sources and case law.

48. Section 131 of the *Courts of Justice Act* and section 197(1) of the BIA grant the court discretion to order costs of and incidental to a proceeding.

49. Section 64.2(1) of the BIA provides the court with authority to grant certain parties a priority charge over the property of a debtor that has commenced proposal proceedings. In particular, under subsection 64.2(1)(c), the court may make an order declaring that all or part of the debtor's property is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of 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 the effective participation of that person in the proceedings. The court also has express authority under section 64.2(2) of the BIA to order that the security or charge rank in priority over the claim of any secured creditor.

50. In *Danier Leather Inc.*¹⁷, Penny J. made the following comments regarding section 64.2 of the BIA:

[56] Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

[57] Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the

¹⁷ *Danier Leather Inc. (Re)*, 2016 ONSC 1044 (CanLII) (Ont. S.C.J.), at paras. 56, 57 and 58.

charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process... .

[58] This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

51. In *Colossus Minerals Inc.*¹⁸, Wilton-Siegel J. approved the administration charge under section 64.2 of the BIA for three reasons:

[13] First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

[14] Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

[15] Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

52. Under the CCAA jurisprudence¹⁹, the courts have adopted the following non-exhaustive list of factors in deciding whether or not to approve an administration charge:

- the size and complexity of the business;
- the proposed role of the beneficiaries of the charge;
- whether there is an unwarranted duplication of roles;
- whether the quantum of the proposed charge appears to be fair and reasonable;
- the position of the secured creditors likely to be affected by the charge; and
- the position of the monitor (or proposal trustee).

¹⁸ *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 (CanLII) (Ont. S.C.J.), at paras. 13, 14 and 15.

¹⁹ *Target*, at para. 74. (emphasis added)

53. Applying some of the factors or principles set out in the case law above under section 64.2 of the BIA and CCAA, the Serpas oppose the funding of representative counsel for the purchasers of homes at the Bridlepath Project and the representative counsel charge over the Bridlepath Property for the following reasons:

(a) there is a strong possibility that these purchasers will receive a full recovery of their deposits in a timely manner;

(b) if purchasers recover their deposits or are expected to recover their deposits in a timely manner, the proposed services of representative counsel are not essential, critical or necessary to a successful proceeding by Urbancorp Bridlepath under the BIA and for the conduct of the Sales Process;

(c) two purchasers are represented by Foglers and the Service List shows that six purchasers are represented by Trent Morris;

(d) the Proposal Trustee is an officer of the court and is duty-bound to act fairly, impartially and in a non-partisan manner with all stakeholders including purchasers and when it comes to allowing or disallowing claims in any claims process;

(e) if a purchaser that has received full recovery of a deposit still wishes to pursue other possible remedies, such as breach of contract or specific performance, the purchaser should retain its own counsel at his or her expense; and

(f) the Proposal Trustee does not support the funding of representative counsel as indicated in its Third Report.

PART IV - CONCLUSION

54. For all of the foregoing reasons, the Serpas respectfully oppose the appointment of representative counsel for the purchasers of residential units at the Bridlepath Project and the funding of such counsel and the representative counsel charge against the Bridlepath Property.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of August, 2016.



Vern W. DaRe

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Re Kitchener Frame Limited*, Endorsement of Justice Wilton-Siegel dated July 7, 2011 (Ont. S.C.J.) (unreported)
2. *Target Canada Co. (Re)*, 2015 ONSC 303 (CanLII) (Ont. S.C.J.)
3. *Nortel Networks Corporation (Re)*, 2009 CanLII 26603 (Ont. S.C.J.)
4. *Canwest Publishing Inc.*, 2010 ONSC 1328 (Ont. S.C.J.)
5. John D. Honsberger and Vern DaRe, *Debt Restructuring: Principles and Practice* (Toronto: Thomson Reuters) (looseleaf)
6. *Danier Leather Inc. (Re)*, 2016 ONSC 1044 (CanLII) (Ont. S.C.J.)
7. *Colossus Minerals Inc. (Re)*, 2014 ONSC 514 (CanLII) (Ont. S.C.J.)

Schedule "B"

STATUTORY REFERENCES

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

11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of the person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

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

Court may order security or charge to cover certain costs

64.2 (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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.

Priority

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

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, R.R.O. 1990, Reg. 194

RULE 10 REPRESENTATION ORDER

REPRESENTATION OF AN INTERESTED PERSON WHO CANNOT BE ASCERTAINED

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.

RULE 12 CLASS PROCEEDINGS AND OTHER REPRESENTATIVE PROCEEDINGS

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, R.S.O. 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; and
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. 31-2114850
Estate File No. 31-2114850

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

IN BANKRUPTCY AND INSOLVENCY

PROCEEDING COMMENCED AT
TORONTO

**RESPONDING FACTUM OF STEFANO
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