

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

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

**URBANCORP (LESLIEVILLE) DEVELOPMENTS INC.,
URBANCORP (RIVERDALE) DEVELOPMENTS INC., &
URBANCORP (THE BEACH) DEVELOPMENTS INC.**

.

Respondents

**APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*,
R.S.C. 1985, c. B-3, as amended, section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30,
and under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43**

**FACTUM OF
CANADIAN IMPERIAL BANK OF COMMERCE
(Application Returnable May 31, 2016)**

GOWLING LAFLEUR HENDERSON LLP

Barrister and Solicitors
Suite 1600, First Canadian Place
100 King Street West
Toronto, ON M5X 1G5

Clifton P. Prophet / Frank Lamie

LSUC No.: 34825K / 54035S

Tel: (416) 862-3509/ (416) 862-3609

Fax: (416) 862-7661

**Lawyers for the Applicant,
Canadian Imperial Bank of Commerce**

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

B E T W E E N:

CANDAIAN IMPERIAL BANK OF COMMERCE

Applicant

- and -

**URBANCORP (LESLIEVILLE) DEVELOPMENTS INC.,
URBANCORP (RIVERDALE) DEVELOPMENTS INC., &
URBANCORP (THE BEACH) DEVELOPMENTS INC.**

Respondents

**APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*,
R.S.C. 1985, c. B-3, as amended, section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30,
and under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43**

**FACTUM OF
CANDIAN IMPERIAL BANK OF COMMERCE
(Application Returnable May 31, 2016)**

PART I – OVERVIEW

1. This is an application by CIBC, in its capacity as Administrative Agent and Syndication Agent for the Lenders (defined below) for an Order, *inter alia*, appointing Alvarez & Marsal Canada Inc. (“**A&M**”) as receiver and manager pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”) and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 (the “**CJA**”) (in such capacity, the “**Receiver**”), without security, and Construction Lien Trustee, without security, pursuant to s. 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the “**CLA**”) (in such capacity, the “**Construction Lien Trustee**” and

collectively with the Receiver, the “**Construction Receiver**”) of all of the property, assets, and undertakings of (a) Urbancorp (Leslieville) Developments Inc. (“**UC Leslieville**”); (b) Urbancorp (Riverdale) Developments Inc. (“**UC Riverdale**”); and (c) Urbancorp (The Beach) Developments Inc. (“**UC Beach**”, together with UC Riverdale, the “**Guarantors**”, and the Guarantors, together with UC Leslieville, the “**Debtors**”) acquired for, or used in relation to the Debtors’ business and the Projects (as defined below).

2. CIBC, in its capacity as Administrative Agent and Syndication Agent (in such capacity, the “**Agent**”) for CIBC, Canadian Western Bank (“**CWB**”), and Laurentian Bank of Canada (“**Laurentian**”, and together with CIBC and CWB, the “**Lenders**” or the “**Syndicate**”), which together are the senior secured and largest creditor of the Debtors, is seeking the appointment of the Construction Receiver because the Syndicate Loan (defined below) to UC Leslieville is in default and has matured, a material adverse change in the Debtors’ business has occurred as a result of, among other things, significant project cost overruns, and the Debtors’ current financial circumstances seriously impair their viability and negatively impact the value of the Lenders’ collateral, all of which is set out in more detail below.

3. CIBC and the other Lenders have now lost all confidence in the management of the Debtors’ in view of, among other things: (a) the significant cost overruns in relation to the Projects, (b) the mismanagement of the Projects thereby resulting in the registration of claims for lien, as described below, and (c) the Debtors’ continuing failure to repay the Syndicate Loan more than six (6) months following its maturity on October 31, 2015.

4. The Debtors are in default under the provisions of the Credit Agreement and a material adverse change in the Debtors’ business has occurred. The Debtors are insolvent and unable to meet all of their obligations as they generally become due. The Syndicate is concerned that immediate steps must be taken in order to preserve the value of the Project Lands. In particular, a Construction Receiver is necessary to ensure that the Projects operated by the Debtors are properly managed following the Debtors’ cessation of ongoing construction.

5. As at May 12, 2016, the Debtors are indebted to the Lenders in the amount of \$27,221,342.01.

6. Failure to appoint the Construction Receiver will likely result in a further significant decrease in the value of the Debtors' business and a reduction in recoveries for their stakeholders, including the Syndicate.

7. The appointment of A&M as the Construction Receiver of the assets and property of the Debtors is necessary to, among other things:

- (a) protect the Syndicate's interests and collateral and to prevent further deterioration of the Syndicate's collateral;
- (b) manage and realize on the Project Lands with a view to protecting the interests of stakeholders;
- (c) complete required registration and compliance steps under the *Condominium Act*, if determined to be advisable;
- (d) deal with construction lien claims, including trust claims; and
- (e) provide a mechanism for further required funding of the Projects, if deemed advisable, through the issuance of the Construction Receiver's certificates to the Syndicate.

8. The Syndicate is the view that a motion for advice and directions regarding the treatment of purchase contracts and the realization strategy in respect of the Projects ought to occur reasonably soon after the appointment of the Construction Receiver, should this Court see fit to authorize such appointment.

PART II - FACTS

I. BACKGROUND

9. UC Leslieville, UC Riverdale, and UC Beach are corporations incorporated pursuant to Ontario's *Business Corporations Act* with their head offices located at 120 Lynn Williams Street, Toronto, Ontario, Canada. UC Leslieville, UC Riverdale, and UC Beach are privately-owned corporations carrying on business as land developers principally focused on the purchase of

lands, the construction and development of improvements on the lands, and the sale of residential units on residential projects situate on the Leslieville Project Lands, Riverdale Project Lands, and Beach Project Lands (each as defined below and collectively, the **“Project Lands”**).

Affidavit of Paul Montgomery, sworn May 24, 2016 (the “Montgomery Affidavit”), at para. 6 and Exhibits “A” – “C”.

10. The Project Lands are owned by UC Leslieville and each of UC Leslieville, UC Riverdale, and UC Beach are responsible for the marketing, construction, and development of the Projects. UC Leslieville, UC Riverdale, and UC Beach are part of the Urbancorp group of land development companies controlled by Mr. Alan Saskin (the **“Urbancorp Group”**). Mr. Alan Saskin is the sole Director and President of UC Leslieville, UC Riverdale, and UC Beach.

Montgomery Affidavit, at paras. 7 - 9.

11. On April 21, 2016 and April 25, 2016, certain entities in the Urbancorp Group filed Notices of Intention to Make a Proposal (**“NOIs”**) under the BIA (collectively, the **“Urbancorp NOI Proceedings”**). On April 29, 2016, other related companies in the Urbancorp Group – Bosvest Inc., Edge Residential Inc., and Edge on Triangle Park Inc. – filed NOIs under the BIA. UC Leslieville, UC Riverdale, and UC Beach are not included in the Urbancorp NOI Proceedings.

Montgomery Affidavit, at para. 10.

12. On April 29, 2016, Mr. Saskin filed a Notice of Intention to Make a Proposal pursuant to the BIA in respect of Mr. Saskin personally.

Montgomery Affidavit, at para. 11 and Exhibit “D”.

13. On May 18, 2016, a number of entities in the Urbancorp Group, including certain of those entities that had previously sought and obtained protection under the Urbancorp NOI Proceedings, sought and obtained protection under the *Companies’ Creditors’ Arrangement Act* (Canada) (the **“CCAA”**) from the Ontario Superior Court of Justice (Commercial List) (the **“Urbancorp Group CCAA Proceedings”**) pursuant to the CCAA Initial Order issued by the Honourable Mr. Justice Newbould on May 18, 2016 (the **“Initial Order”**). UC Leslieville, UC

Riverdale, and UC Beach are not included in the Urbancorp Group CCAA Proceedings. Counsel for the CCAA debtors in the Urbancorp CCAA Proceedings and counsel for the Monitor thereof were caused to be served with notice of this Application.

Montgomery Affidavit, at para. 12 and Exhibit “E”.

II. URBANCORP DEBT AND SYNDICATE SECURITY

14. Pursuant to a Credit Agreement dated July 13, 2012, and amendments thereto (collectively, the **“Credit Agreement”**), the Lenders advanced loans to UC Leslieville, as guaranteed by the Guarantors pursuant to the Credit Agreement and certain guarantees, under the following credit facilities: (a) a term construction facility in respect of the Leslieville Project (the **“Leslieville Construction Facility”**) in an amount up to \$21,124,985; (b) a term construction facility in respect of the Riverdale Project (the **“Riverdale Construction Facility”**) in an amount up to \$18,560,460; (c) a term construction facility in respect of the Beach Project (the **“Beach Construction Facility”**) in an amount up to \$17,967,395; (d) a demand revolving letter of credit facility (the **“LC Facility”**) in an amount up to \$3,000,000; and (e) a capital loan facility (the **“Capital Loan Facility”**) in an amount up to a further \$2,500,000 million (collectively, the **“Syndicate Facility”**, and the loans advanced thereunder, the **“Syndicate Loan”**).

Montgomery Affidavit, at para. 13 and Exhibit “F”.

15. The funds advanced pursuant to the Syndicate Loan were for the purposes of, *inter alia*, financing the construction, development, and sale of residential lot subdivisions and construction of presold condominiums, townhomes, and semi-detached / detached houses located on the Projects Lands.

Montgomery Affidavit, at para. 14.

16. The Project Lands and the Projects thereon comprise: (a) the UC Leslieville condominium development bearing Property Identification Number (**“PIN”**) 21051-0408 (LT) located in vicinity of Curzon Street and Jones Avenue, Toronto (the **“Leslieville Project Lands”**); (b) the UC Riverdale development bearing numerous PINs located in vicinity of

Howie Avenue and Boulton Avenue, Toronto (the “**Riverdale Project Lands**”); and (c) the UC Beach development bearing numerous PINs located in vicinity of Vince Avenue and Hemlock Avenue, Toronto (the “**Beach Project Lands**” and each of the Project Lands, together with the projects thereon, the “**Leslieville Project**”, the “**Riverdale Project**”, and the “**Beach Project**”, respectively, and as more particularly described below and collectively, the “**Projects**”).

Montgomery Affidavit, at para. 15 and Exhibits “G” – “I”.

17. As security for all of the Debtors’ indebtedness owing to the Syndicate under the Credit Agreement, the Syndicate was granted, *inter alia*: (a) a Demand Debenture dated July 13, 2012, in favour of CIBC as Agent for and on behalf of the Lenders, in the principal sum of \$70,000,000 (the “**Debenture**”); (b) a Charge/Mortgage of Land between UC Leslieville, as Chargor, and CIBC, as Agent for and behalf of the Lenders, as Chargee, registered on July 24, 2012 (the “**Mortgage**”) against the Leslieville Project Lands, the Riverdale Project Lands, and the Beach Project Lands; (c) an Assignment of Unit Sales Agreements and Deposits dated July 13, 2012, in favour of CIBC as Agent for and on behalf of the Lenders; and (d) an Assignment of Construction Contracts date July 13, 2012, in favour of CIBC as Agent for and on behalf of the Lenders (collectively, the “**Syndicate Security**”, and together with the Credit Agreement, the “**Loan Documents**”).

Montgomery Affidavit, at para. 16 and Exhibits “J” – “M”.

18. The Lenders’ security interests in respect of personal property are perfected in the Province of Ontario by registrations under the *Personal Property Security Act* (Ontario). As noted above, the Lenders’ security interests in respect of the Project Lands are first registered in priority against the Project Lands

Montgomery Affidavit, at paras. 17-18 and Exhibits “N” – “P”.

19. In addition to the foregoing, the Debtors, Mr. Saskin, and Urbancorp Toronto Management Inc. (“**Urbancorp Management**”) executed a Cost Overrun and Completion Guarantee dated July 13, 2012, in favour of CIBC as Agent for and on behalf of the Lenders (the “**Cost Overrun Guarantee**”) pursuant to which the Debtors, Mr. Saskin, and Urbancorp Management agreed to pay all Non-Financed Costs and all Cost Overruns (both as defined in the

Credit Agreement) and to indemnify CIBC in its capacity as Agent for the Lenders from any costs, expenses, losses, and damages resulting from any Cost Overruns or actual costs for any items or services exceeding budgeted costs in connection with the Projects.

Montgomery Affidavit, at para. 19 and Exhibit “Q”.

20. Pursuant to the Urbancorp Group Initial Order, Urbancorp Management is currently subject to the Urbancorp Group CCAA Proceedings.

Montgomery Affidavit, at para. 20.

21. Urbancorp Management had provided management services to the Debtors and that it is currently in possession of all of the books and records of the Debtors. The Agent understands that The Debtors have no employees. Accordingly, the proposed Construction Receiver, if appointed by this Court, will require timely possession of the Debtors’ books and records and the cooperation and assistance of Urbancorp Management with respect to understanding the information contained in the Debtors’ books and records. As noted above, counsel for the CCAA debtors in the Urbancorp Group CCAA Proceedings, including Urbancorp Management, and counsel for the Monitor have been served with notice of this Application. Discussions between counsel have taken place concerning the basis upon which any receiver appointed may have the benefit of the efforts of Urbancorp Management’s staff.

Montgomery Affidavit, at para. 21.

22. In breach of the Credit Agreement, the Debtors have suffered a material adverse change in their financial condition and operations, are facing a financial crisis in their business, and have failed to repay the Syndicate Loan, the details of which are set out below.

Montgomery Affidavit, at para. 22.

III. OTHER SECURED CREDITORS AND INTER-CREDITOR ARRANGEMENTS

23. In addition to the Lenders’ secured claims, Travelers Insurance Company of Canada (“**Travelers**”) and Terra Firma Capital Corporation (“**Terra Firma**”) claim security over the

Debtors' property, in each case subordinate to the Syndicate Security (other than in respect of deposits from purchasers as set out below).

Montgomery Affidavit, at para. 23.

24. Terra Firma claims that it had advanced certain loans to UC Leslieville in connection with the Projects and has registered a mortgage against the Projects in respect of such loans. The Terra Firma indebtedness and security is subordinate to the Syndicate Loan and Syndicate Security pursuant to a Subordination and Standstill Agreement dated July 22, 2015 (the "**Terra Subordination and Standstill Agreement**").

Montgomery Affidavit, at para. 24-25 and Exhibit "R".

25. Travelers has provided certain credit support to the Debtors in relation to their registrations with Tarion Warranty Corporation ("**Tarion**") and has registered a mortgage against the Projects in respect of such credit support. Travelers has also provided excess condominium insurance coverage for deposits above and beyond the limits insured by Tarion.

Montgomery Affidavit, at para. 26.

26. Pursuant to the *Ontario New Home Warranties Plan Act*, Tarion provides new home buyers with the certain statutory deposit and warranty coverage as set out in such Act.

Montgomery Affidavit, at para. 27.

27. On July 24, 2012, CIBC as Agent entered into a Priority Agreement pursuant to which, *inter alia*, Travelers agreed to subordinate and postpone its indebtedness and security to the Syndicate's indebtedness and security in respect of the Leslieville Project, with the exception of the cash deposits provided to the Debtors by purchasers so long as such cash deposits remained held in trust, in respect of which Travelers retained priority.

Montgomery Affidavit, at para. 28 and Exhibit "S".

28. Based on information provided by counsel for Travelers, at present, UC Leslieville has a liability to Travelers pursuant to an outstanding Travelers bond in favour of Tarion, which

liability is subordinate to the Syndicate Security (except in respect of purchaser deposits as noted directly above).

Montgomery Affidavit, at para. 29.

29. In addition to the claims of Travelers and Terra Firma, the search report of registrations filed under the Ontario Personal Property Security Registry reflect a number of additional registrations not related to the Credit Facility provided by the Syndicate. The registrations appear to be in relation to certain other financing and equipment lessors, each of whom were caused to be served with notice of this Application.

Montgomery Affidavit, at para. 30.

IV. OTHER CREDITORS – LIEN CLAIMANTS & UNSECURED CREDITORS

Trade Creditors

30. Based on reporting provided by Altus Group Limited, construction cost management consultants in respect of the UC Leslieville, UC Riverdale, and UC Beach Projects, dated as at September 15, 2015, the Debtors' records reflected that they owed approximately: (a) \$4,064,528.40 of unsecured trade debt payables to approximately 71 trade creditors in connection with the Leslieville Project; (b) \$914,722.25 of unsecured trade debt payables to approximately 54 trade creditors in connection with the Riverdale Project; and (c) \$2,980,271.98 of unsecured trade debt payables to approximately 91 trade creditors in connection with the Beach Project. The Agent has not received any updated unsecured trade debt payables numbers from the Debtors nor has it been able to obtain access to the Debtors' books and records since on or about September 15, 2015, but the Agent notes that it appears that no work has been performed on the Projects since around that time period. Therefore, the Agent believes the amount of unsecured trade debt payables should not have materially increased. A more accurate calculation of the unsecured trade debt payables will be obtainable if the proposed Construction Receiver is appointed and performs a review of the Debtors' books and records.

Montgomery Affidavit, at para. 31.

Tax Arrears

31. The Agent understands that in April 2016, Canada Revenue Agency (“**CRA**”) issued a reassessment of potential additional amounts owing in respect of HST in respect of the Riverdale Project in the approximate amount of \$4.36 million. The Agent has not been able to confirm the status of the reassessment with the Debtors but it believes the amount subject to such reassessment remains unpaid.

Montgomery Affidavit, at para. 32.

Purchasers

32. Pursuant to a Deposit Trust Agreement with Travelers dated May 19, 2011, UC Leslieville was obliged to hold a certain minimum amount of the cash deposits collected from customers for the purchase of condominium units at the Leslieville Project, in trust. As at August 31, 2015, the Agent was advised that UC Leslieville’s counsel was holding approximately \$250,000 in cash deposits, plus accrued interest thereon, in trust, for a total of approximately \$333,000. The Agent has not been able to confirm the current amount of cash deposits held in trust by UC Leslieville’s counsel.

Montgomery Affidavit, at para. 33.

Lien Claimants

33. Based on a subsearch conducted of the Project Lands, as at May 17, 2016, a number of entities have registered construction liens or made claims for lien in the total aggregate amount of \$2,407,012.22 against the Projects in respect of labour and materials allegedly supplied as improvements in relation to the Projects. The entities with lien registrations and claims include: (a) Alpha Stairs and Railings Inc.; (b) Orin Contractors Corp.; (c) Roni Excavating Limited; (d) EXP Services Inc.; (e) Furkin Construction Inc.; (f) Silvio Construction Co. Ltd.; (g) Uptown hardware Ltd.; (h) NG Marin Inc.; and (i) MDF Mechanical Ltd.

Montgomery Affidavit, at para. 34 and Exhibit “T”.

34. As of May 25, 2016, the liens registered by Orin Contractors Corp. and NG Marin in respect of the Riverdale Project Lands have been bonded off. Notice of this Application was given to all lien claimants in respect of the Projects of which the Agent was aware as of May 25, 2016.

Montgomery Affidavit, at paras. 35-36.

V. URBANCORP'S FINANCIAL PROBLEMS

Status of the Projects

A. UC Leslieville

35. The Leslieville Project Lands are owned by UC Leslieville. UC Leslieville is also the project developer and the Vendor noted in the Leslieville Project's Purchase and Sale Agreement (the "PSA"). The Leslieville Project comprises 56 homes (55 condominium townhomes and a proposed freehold detached house). The condominium townhomes are located at 50 Curzon Street in east Toronto's Leslieville neighbourhood. The proposed detached house is located on Jones Avenue, adjacent to the condominium townhomes.

Montgomery Affidavit, at paras. 37-38.

36. All but one of the Leslieville Project condominium units have been "presold" pursuant to PSAs, which were executed back in 2011, prior to construction commencing.

Montgomery Affidavit, at para. 39.

37. The condominium townhome units come in two models, (i) 1505 sq ft, and (ii) 1975 sq ft. The proposed detached house is intended to be 2,282 sq ft. Each unit comes with one parking space. There are 10 excess parking spaces available for sale which have not been sold.

Montgomery Affidavit, at para. 40.

38. The exterior of the condominium is substantially completed (other than water/sewer connections, internal catch basins, certain rear decks and landscaping). The interior of the 55 condominium townhomes are at varying stages of completion. Construction of the proposed

detached house has not commenced. It appears that there has been no work conducted at the Leslieville Project site for several months and the Syndicate is concerned that the condition of the Leslieville Project has deteriorated given its unfinished state and weather conditions and that further deterioration will continue the longer the Leslieville Project is left without proper management and remains exposed to inclement weather conditions.

Montgomery Affidavit, at paras. 41-42.

39. There are approximately \$871,000 in letters of credit outstanding in support of UC Leslieville's development obligations to the City of Toronto.

Montgomery Affidavit, at para. 43.

B. Urbancorp Riverdale

40. As noted above, the Riverdale Project Lands are owned by UC Leslieville. UC Riverdale is the project developer and is the Vendor noted in the Riverdale Project's PSA. The Riverdale Project comprises forty-two (42) freehold townhomes, together with certain common elements.

Montgomery Affidavit, at paras. 44-45.

41. The Riverdale Project is located in east Toronto's Riverdale neighbourhood, with twenty-two (22) homes located on Howie Avenue and twenty (20) homes located on Boulton Avenue. All of the townhomes are the same size (2,085 square feet) and include a detached garage.

Montgomery Affidavit, at para. 46.

42. The common elements are comprised of, among other things, the laneway between Howie and Boulton Avenues (which provides the purchasers with access to their detached garages) and the walkways between certain blocks of townhomes. The common elements condominium corporation was registered on June 25, 2015.

Montgomery Affidavit, at para. 47.

43. Most of the 42 units were pre-sold in 2011, prior to construction commencing. The Riverdale project is now fully constructed, and all unit sales have recently been completed.

Approximately \$18.7 million was received as proceeds of sale and applied against the Syndicate Loan, subject to certain amounts held back for contingencies. CIBC, on behalf of the Syndicate, is in the process of registering partial discharges of the Syndicate's security in respect of the Riverdale Project lands.

Montgomery Affidavit, at para. 48.

44. There are approximately \$638,000 in letters of credit held by the City of Toronto in support of UC Riverdale's outstanding development obligations to the City of Toronto.

Montgomery Affidavit, at para. 49.

C. UC Beach

45. The Beach Project Lands are also owned by UC Leslieville. UC Beach is the project developer and is the Vendor noted in the Beach Project's PSA. The Beach Project comprises thirty-three (33) homes comprising: (a) thirty-two (32) semi-detached homes; and (b) one (1) detached home. The semi-detached and detached homes are freehold properties. The Beach Project is located on Vince Avenue (30 homes) and Hemlock Avenue (3 homes), a short distance from east Toronto's Beach neighbourhood.

Montgomery Affidavit, at paras. 50-51.

46. Of the 33 homes in the Beach Project, 25 have been fully constructed and the sale of these homes to the purchasers have been completed. The size of the constructed sold homes varies significantly from 1,675 sq ft to 2,990 sq ft. The Lenders have provided a partial discharge of their security in respect of the 25 homes sold.

Montgomery Affidavit, at para. 52.

47. Currently, there are eight (8) lots remaining to be constructed or completed which are in the very early stages of construction (from raw land to initial framing). Five of these 8 homes have been pre-sold pursuant to PSAs.

Montgomery Affidavit, at para. 53.

48. The size of the homes that were to be constructed range from 3,645 sq. ft. to 3,965 sq. ft. It appears that there has been no work conducted at the site for several months.

Montgomery Affidavit, at para. 54.

49. The Syndicate is concerned that the condition of the Beach Project has deteriorated given its unfinished state and weather conditions and that further deterioration will continue the longer the Beach Project is left without proper management and remains exposed to inclement weather conditions. There are letters of credit in the approximate amounts of \$846,000 and \$26,000 outstanding in support of UC Beach's outstanding development obligations to the City of Toronto and Toronto Hydro, respectively.

Montgomery Affidavit, at para. 55.

VI. EVENTS OF DEFAULT

50. The Debtors are in default of their obligations to CIBC under the Credit Agreement. The Debtors have failed to, *inter alia*:

- (a) repay in full the outstanding principal amount of the Syndicate Loan on or before the Maturity Date (as defined in the Credit Agreement), being October 31, 2015, as required pursuant to section 6.01(1) of the Credit Agreement;
- (b) repay the Lenders the outstanding amount owing to the Lenders under the Syndicate Loan upon demand; and
- (c) prevent the registration, accrual, and/or defence of claims, including claims for lien and CRA claims, as required under the Credit Agreement, all of which has had a material adverse effect on the Debtors' business.

Montgomery Affidavit, at para. 56.

51. The Debtors are also unable to meet their liabilities as they generally become due. This is evidenced by, *inter alia*, the amounts owed to construction lien claimants and the registration of the claims for lien against the Project Lands as described above.

Montgomery Affidavit, at para. 57.

52. Neither UC Leslieville, UC Riverdale, nor UC Beach can repay the Syndicate Loan.

Montgomery Affidavit, at para. 58.

53. The Debtors are unable to continue their operations and the appointment of the Construction Receiver is necessary in order to permit the orderly management, marketing, realization, and maximization of value of the Debtors' assets. The appointment of the Construction Receiver will also assist in an orderly resolution and administration of the construction lien claims in respect of the Projects.

Montgomery Affidavit, at para. 59.

VII. DEMAND & NOTICE OF INTENTION TO ENFORCE SECURITY

54. By letter dated May 12, 2016 (the "**Demand Letter**"), CIBC as Agent made demand for immediate repayment of the indebtedness owed by the Debtors. Attached to the Demand Letter addressed to UC Leslieville and the Guarantors was a Notice of Intention to Enforce Security pursuant to section 244 of the BIA (the "**244 Notice**").

Montgomery Affidavit, at para. 60 and Exhibit "U".

55. To date, the defaults as set out in the Demand Letter have not been remedied by either the Debtors or the Guarantors. The Lenders have received and applied against the Syndicate Loan, a series of partial payments in the approximate amount of \$18.7 million, less certain amounts held back for contingencies, from the proceeds of sale of the townhomes from the Riverdale Project.

Montgomery Affidavit, at para. 61.

56. The Debtors are indebted to the Lenders in the approximate amount of CDN \$27,221,342.01, as at May 12, 2016, plus interest and costs after such date (the "**Debt**").

Montgomery Affidavit, at para. 62.

VIII. NEED FOR A CONSTRUCTION RECEIVER

57. The Lenders have lost all confidence in the management of the Debtors in view of, *inter alia*, (a) the significant cost overruns to date, (b) the non-disclosure of such cost overruns to the Lenders, and (c) the mismanagement of the Projects, thereby resulting in the registration of claims for lien, as described above.

Montgomery Affidavit, at para. 63.

58. CIBC and the other members of the Syndicate have suffered and are expected to suffer further substantial prejudice and significant losses with respect to the Syndicate Loan, unless the proposed Construction Receiver is appointed to immediately secure and take over control and management of the Projects.

Montgomery Affidavit, at para. 64.

59. Reputation is fundamental to the operation of a condominium unit marketing operation. The continuation of defaults without an effective strategy to complete the Projects and sell and close units risks undermining the value of the Project Lands, to the detriment of the Syndicate and the Debtors' other stakeholders. Any further delay will further prejudice the Syndicate and the Debtors' other stakeholders. Therefore, there is urgency that the proposed Construction Receiver be appointed to take over control and management of the Projects immediately in order to prevent further deterioration of the Projects. Upon appointment, the proposed Construction Receiver will secure the Projects and assess the state of each of the Projects, with a view to determining an effective strategy, with the advice and directions of the Court as appropriate, to best maximize realizations in respect of the Projects for the benefit of the Debtor's stakeholders. In order to do so, the proposed Construction Receiver will require funding to conduct its due diligence and assessment as the Debtors currently have no cash and no revenue. The Lenders believe that approximately \$1.5 million in funding will be required during this estimated 6.5 week period and an additional \$1.5 million in funding for the implementation of a marketing process estimated to be completed by the end of September 2016, for a total of \$3.0 million. If a determination is made by the Construction Receiver to complete construction of one or more of the Projects, additional funding will be required on the advice and directions of the Court.

Montgomery Affidavit, at para. 65.

60. The appointment of a Construction Lien Trustee is also required in order to administer and manage the Projects, conduct sales, deal with the lien claims and the applicable holdbacks and trust funds pursuant to the CLA, as appropriate, all with a view to, *inter alia*, preserving the value of the Projects and minimizing the prejudice to the stakeholders, including the Syndicate and the currently existing and potential lien claimants.

Montgomery Affidavit, at para. 66.

61. The Syndicate anticipates providing operating financing to the Receiver and Construction Lien Trustee, as applicable, in connection with the Projects on a case-by-case basis pursuant to the issuance of Receiver's Certificates and Construction Lien Trustee's Certificates in its favour on the condition that the financing be in priority to all other charges and encumbrances and in priority to all present and future construction liens and trust claims whether or not perfected or preserved, in accordance with the terms of the Commercial List Users Committee Model Receivership Appointment Order and section 78(7) of the CLA.

Montgomery Affidavit, at para. 67.

62. The Debtors are in default under the provisions of the Credit Agreement and a material adverse change in the Debtors' business has occurred. The Debtors are insolvent and unable to meet all of their obligations as they generally become due. The Syndicate is concerned that immediate steps must be taken in order to preserve the value of the Project Lands. In particular, a Construction Receiver is necessary to ensure that the Projects operated by the Debtors are properly managed following the Debtors' cessation of ongoing construction.

Montgomery Affidavit, at para. 68.

63. Failure to appoint the Construction Receiver will likely result in a further significant decrease in the value of the Debtors' business and a reduction in recoveries for their stakeholders, including the Syndicate.

Montgomery Affidavit, at para. 69.

64. The Syndicate has provided the Debtors with numerous opportunities and significant time within which to meet its obligations. The Syndicate is concerned, however, given the financial condition and status of the Urbancorp Group and that the Debtors do not appear to have any viable strategy or resources to complete the construction, development, and sale of the Projects. The Syndicate is particularly concerned since it appears that no work has been performed on the Projects since last fall. The Syndicate believes that immediate steps must be taken by the Construction Receiver to take control of the Projects to secure and assess the state of each of the Projects with a view to developing a strategy with respect to such Projects, which strategy may include completing the construction and development of the Projects which are in various stages of completion or a sale of such Projects to one or more developers in their current state.

Montgomery Affidavit, at para. 70.

65. Should the appointment of A&M as Construction Receiver be granted, A&M will deal with the Project Lands and the applicable Projects in an organized and efficient manner for the benefit of those with a real economic stake in the Project Lands and the Projects.

Montgomery Affidavit, at para. 71.

66. The appointment of A&M as the Construction Receiver of the assets and property of the Debtors is necessary to, *inter alia*, (a) protect the Syndicate's interests and collateral and to prevent further deterioration of the Syndicate's collateral; (b) manage and realize on the Project Lands with a view to protecting the interests of stakeholders; (c) complete required registration and compliance steps under the *Condominium Act*, if determined to be advisable; (d) continue and complete the development, marketing, sale, and closing of the condominium units, if determined to be advisable; (e) deal with construction lien claims, including trust claims; and (f) provide a mechanism for further required funding of the Projects, if deemed advisable, through the issuance of the Construction Receiver's certificates to the Syndicate.

Montgomery Affidavit, at para. 72.

67. A&M has consented to act as Construction Receiver, if so appointed by this Court.

Montgomery Affidavit, at para. 74 and Exhibit "V".

PART III – LAW AND ARGUMENT

I. APPOINTMENT OF A RECEIVER

Principles Governing Appointment of a Receiver under ss. 243 of the BIA 101 of the CJA

68. The appointment of a receiver and manager is governed by sections 243 of the BIA and 101 of the CJA, which provide the Court with the power to appoint a receiver where it is “just and convenient” to do so and “just or convenient” to do, respectively.

69. Section 243 of the BIA authorizes the Court to appoint a receiver where such appointment is “just and convenient”. In this regard, s. 243 of the BIA provides:

243. (1) Court may appoint receiver – Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just and convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless:

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243(1).

70. Section 101 of the CJA provides as follows:

101. (1) Injunctions and receivers – In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) **Terms** – An order under subsection (1) may include such terms as are considered just.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101.

71. On an application by a secured creditor to have a receiver appointed by the Court pursuant to s. 243(1) of the BIA or s. 101 of the CJA, the Court should, when determining if the appointment is “just or convenient”, have regard to all of the circumstances of the case and, in particular:

- (a) the nature of the property over which the receiver is to be appointed;
- (b) the rights and interests of all parties in relation to the property over which the receiver is to be appointed; and
- (c) whether the secured creditor has a right under its security to appoint a receiver privately.

Bank of Nova Scotia v. Freure Village on Clair Creek, [1996] O.J. No 5088, at para. 10.

Callidus Capital Corp. v. Carcap Inc., 2012 ONSC 163, 84 CBR (5th) 300, at para 41.

72. While sometimes viewed as an extraordinary remedy, the Court has stated that where the security instrument permits the appointment of a receiver and where circumstances of default justify the appointment of a receiver, the “extraordinary” nature of the remedy sought is less essential to the inquiry. “Just and convenient” then becomes the Court determining whether it is more in the interests of all concerned to have a receiver appointed. Further, where the security instrument governing the relationship between the secured creditor and the debtor provides for the secured creditor’s right to appoint a receiver upon default, the burden on the secured creditor seeking to have a receiver appointed is substantially reduced. In such circumstances, Courts generally do not regard the nature of the remedy as extraordinary where the relevant security document permits the appointment of a receiver on the basis, *inter alia*, that the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

***Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635, at paras. 50 and 75.**

***Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No 5088, at para. 11 and 12.**

***Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 (S.C.J. [Commercial List]), at para. 18).**

***Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007 (S.C.J. [Commercial List]), [2011] O.J. No. 671, at para. 27.**

***Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.*, [1992] O.J. No. 330 (Gen. Div.), at paras. 2-6.**

73. In such circumstances, the “just and convenient” inquiry requires the Court to determine whether it is in the interests of all concerned to have the receiver appointed by the Court. The Court should consider the following factors, among others, in making such a determination:

- (a) The potential costs of the receiver;
- (b) The relationship between the debtor and the creditors;
- (c) The likelihood of preserving and maximizing the return on the subject property; and
- (d) The best way of facilitating the work and duties of the receiver.

***Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No 5088, at paras. 10-12.**

***Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 (S.C.J. [Commercial List]), at para. 18.**

***Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007 (S.C.J. [Commercial List]), [2011] O.J. No. 671, at paras. 26-29.**

***Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 (S.C.J.), at para. 15.**

74. In determining whether it is just and/or convenient in the circumstances, authorities on this matter suggest that factors to consider in the determination of whether it is appropriate to appoint a receiver include:

- (a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;
- (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
- (c) the nature of the property;
- (d) the apprehended or actual waste of the debtor's assets;
- (e) the balance of convenience to the parties;
- (f) the fact that the creditor has the right to appoint a receiver under its loan documents;
- (g) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;
- (h) the effect of the order on the parties;
- (i) the length of time that a receiver may be in place;
- (j) the likelihood of maximizing return to the parties; and
- (k) the goal of facilitating the duties of the receiver.

Houlden, Lloyd W., Morawetz, Geoffrey B/, and Sarra, Janis P. The 2012 Annotated Bankruptcy and Insolvency Act. (Toronto: Carswell 2011) at 957-958.

75. Courts have also stated that a finding of irreparable harm is not necessary, only a factor, in determining whether to appoint a receiver.

Swiss Bank Corp. (Canada) v. Odyssey Industries Inc. (1995), 30 C.B.R. (3d) 49 para 28.

76. Articles 3.1 (r) of the Debenture and the Mortgage provide CIBC with the right to appoint a private receiver or receiver-manager or apply to the Court seeking the appointment of a receiver or receiver-manager in respect of the Mortgaged Lands,

Montgomery Affidavit, para. 16 and Exhibits “J” - “K”.

77. The Court can, where it is appropriate to do so, place considerable weight on the fact that the creditor has the right under an instrument to appoint a receiver. The fact that a security agreement acknowledges the right of the creditor to make an application for a receiver is a strong factor in support of the imposition of a receiver.

***Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635, at paras. 50.**

***Maple Trade Finance Inc v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527, para 26.**

78. In addition, the fact that there have been failed attempts to refinance the debt and it cannot reasonably be anticipated that the debtor will be able to secure financing weighs in favour of appointing a receiver.

***Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 (S.C.J. [Commercial List], at para. 18.**

79. CIBC submits that a receiver is required for the following reasons:

- (a) The Syndicate Loan is in default;
- (b) Demand for payment has been made and no remedy has been provided;
- (c) Notices of Intention to Enforce Security have been delivered by the Syndicate;
- (d) The Debtors are unable to meet their liabilities generally as they become due;
- (e) The Syndicate and other stakeholders have suffered and are expected to suffer further substantial prejudice;
- (f) The Loan Documents provide for a contractual right to appoint a receiver in the event of default;

- (g) Given the current state of the Projects and Project Lands, a receiver with the protections afforded a Court appointment is necessary to take control and administer the Project Lands and the Projects; and
- (h) In the absence of a Court-appointed Receiver, the realization process would be far more difficult and the recoveries obtained therefrom would in all likelihood be further reduced. Both the stay of proceedings and the opportunity to conduct a court approved sale are of assistance in this regard.

Montgomery Affidavit, paras. 56-57 and 60-62.

II. APPOINTMENT OF CONSTRUCTION LIEN TRUSTEE

Section 68 Appointment

80. The CLA provides for the appointment of a trustee at section 68(1):

Application for appointment of trustee

68. (1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.

Construction Lien Act, R.S.O. 1990, c. C.30.

81. The role of the appointed trustee is to act impartially, for the benefit of all persons having an interest in the premises and the trustee has all the duties, powers, and obligations of a trustee at common law under the *Trustee Act*. The trustee has a fiduciary duty and the title to the property generally vests in the trustee.

700 King Street (1997) Ltd. (Receiver of) v. Acro Capital Inc. (2004), 35 C.L.R. (3d) 47 (Ont. S.C.J.) at para 32.

82. Under s. 34 of the former *Mechanics' Lien Act*, it was suggested that a trustee be appointed in two circumstances: mismanagement or abandonment of a project. Presently, there are three generally accepted circumstances when it is appropriate to appoint a CLA trustee:

- (a) Where the premises has income earning capacity and the lien claim could be satisfied out of that income;
- (b) Where the problem is financing and the court is satisfied that the project would be viable if it was refinanced and carried to completion; or
- (c) Where a trustee is needed to manage the premises in order to prevent deterioration.

Royledge Industries Inc. v. Perma-Roof Ont. Ltd. (1991), 2 O.R. (2d) 488 (Gen. Div.).

83. CIBC submits that the third circumstance is applicable in this case. Defaults have occurred under the Syndicate Loan, Demand Letters have been sent to the Debtors, numerous liens have been registered, and the Syndicate has lost all confidence in the management of the Debtors.

84. Prior to the CLA, a decision based on the *Mechanics' Lien Act* provided that the remedy of appointment of a trustee is to be used "when the present management is clearly unable to carry on with the business, either by reason of incompetence or dishonesty or neglect of the undertaking."

Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp. (19 April 1975), (Ont. H.C.) [unreported].

85. Under the CLA, the Court has stated that the appointment of a CLA trustee is an extraordinary remedy and that such a remedy would only be called for if the irresponsible acts of the debtor were imperilling the security interests of lien claimants. The remedy is designed to enable the Court to protect lien claimants.

Royledge Industries Inc. v. Perma-Roof Ont. Ltd. (1991), 2 O.R. (2d) 488 (Gen. Div.) at para 18.

86. The Syndicate submits that its security, along with the security of the lien claimants, will be compromised if a construction trustee is not appointed. There are several other entities which

are all at risk in realizing on their security due to the mismanagement of the Project Lands and the Projects by the Debtors.

87. The Court has also noted that in situations where the essential management functions of a company are being severely neglected, a CLA trustee may be appointed. To determine if a property has been “severely neglected” the Court stated that the test is that if management were allowed to continue, this would result in proportionately greater erosion than if a trustee were to be appointed. If that is the case, then a trustee should be appointed.

***Atlas-Gest Inc. v. Brownstones Building Corp.*, 1992 CarswellOnt 608 (Ont. C.J. [Gen. Div.]) at para 19.**

88. Further observations by Courts in respect of the appointment of a trustee have suggested that where the appointment of a trustee may be of use in order to obtain management of the premises and to prevent its deterioration, the appointment is justified. Deterioration is not limited to physical deterioration, rather, it relates to value of assets in an economic sense as well.

***Royledge Industries Inc. v. Perma-Roof Ont. Ltd.* (1991), 2 O.R. (2d) 488 (Gen. Div.) at para 23.**

***Atlas-Gest Inc. v. Brownstones Building Corp.*, 1992 CarswellOnt 608 (Ont. C.J. [Gen. Div.]) at para 21.**

89. In order to secure the management of the Projects for all stakeholders, including the construction lien claimants, a receiver and trustee must be appointed. Failing that appointment, the Projects will continue to lose value and none of the secured parties will realize fair value on their security.

Section 78(7) Priority

90. The Syndicate submits that if a construction lien trustee is appointed, it will support the filing of a motion before this Court for advice and directions in respect of the way forward regarding whether completion of the Projects ought to occur. Pending the outcome of such motion for advice and directions, the Syndicate may advance funds to the Construction Lien Trustee pursuant to s. 78(7) of the CLA.

91. Under s. 78(7) of the CLA, the Syndicate will receive a “super-priority” on these funds, which is analogous to debtor-in-possession financing under the *Companies Creditors’ Arrangement Act*.

92. The Courts have recognized that s. 78(7) gives any amount so borrowed by the Construction Lien Trustee priority over all other liens.

Avenue Structures Inc. v. Pacific Empire Development Inc., 2001
CarswellOnt, 8 C.L.R. (3d) 128 (Ont. Master) at para 56.

III. TREATMENT OF PURCHASE CONTRACTS

93. The Syndicate is of the view that a motion for advice and directions is necessary in respect of the treatment of purchase contracts and the realization strategy concerning the Projects.

94. The borrowing limit is based on an estimate that will take the process through to the conclusion of the marketing and sale process but it does not presume any approach to realization and actual results may vary.

IV. TERRA FIRMA ANTICIPATED POSITION

95. Terra Firma Capital Corporation, as subordinate mortgagee, may raise an objection to the appointment of A&M as Construction Receiver of the Debtors and the Projects on the basis of their perception of the costs of the receivership in the event A&M is appointed as Construction Receiver.

96. The Terra Firma objection to A&M’s proposed appointment is contrary to the Syndicate’s rights as first mortgagee (including its right to appoint a receiver) and to the terms of the Terra Subordination and Standstill Agreement. In particular, section 2(a)(iii) of the Terra Subordination and Standstill Agreement prohibits Terra Firma from enforcing its security, including by way of appointment of a receiver and manager, and paragraph 2(a)(v) of the Terra Subordination and Standstill Agreement prohibits Terra Firma from bringing legal proceedings

against UC Leslieville in respect of the Terra Firma debt or security, in both cases until the debt owing to the Syndicate is repaid.

Montgomery Affidavit, at para. 25 and Exhibit “R”.

97. A&M has been employed as the financial advisor to the Syndicate since August 2015 in connection with the Debtors and the Projects. In its capacity as financial advisor to the Syndicate concerning this situation, A&M has obtained information concerning the Projects and has worked with both the Syndicate and Altus Group, the cost consultant to the Syndicate, in connection with the Debtors and the Projects. As well, A&M has had the opportunity to attend at the sites of the Projects.

98. As a result of its prior role as financial advisor, A&M is well positioned to act as Receiver given the information that it has obtained and is experienced with the Projects. In addition, A&M is a highly respected professional services business with significant experience in insolvencies of all types, including construction and real estate insolvencies.

99. In the circumstances, the appointment of an alternative firm to act as the Construction Receiver would undermine efforts to date, reduce efficiency, and waste money and time.

V. CONCLUSION & RELIEF SOUGHT

100. CIBC and the other Lenders have now lost all confidence in the management of the Debtors' in view of, among other things: (a) the significant cost overruns in relation to the Projects, (b) the mismanagement of the Projects thereby resulting in the registration of claims for lien, as described below, and (c) the Debtors' continuing failure to repay the Syndicate Loan more than six (6) months following its maturity on October 31, 2015.

101. The Debtors are in default under the provisions of the Credit Agreement and a material adverse change in the Debtors' business has occurred. The Debtors are insolvent and unable to meet all of their obligations as they generally become due. The Syndicate is concerned that immediate steps must be taken in order to preserve the value of the Projects. In particular, a Construction Receiver is necessary to ensure that the Projects operated by the Debtors are properly managed following the Debtors' cessation of ongoing construction.

102. As at May 12, 2016, the Debtors are indebted to the Lenders in the amount of \$27,221,342.01.

103. Failure to appoint the Construction Receiver will likely result in a further significant decrease in the value of the Debtors' business and a reduction in recoveries for their stakeholders, including the Syndicate.

104. The appointment of A&M as the Construction Receiver of the assets and property of the Debtors is necessary to, among other things:

- (a) protect the Syndicate's interests and collateral and to prevent further deterioration of the Syndicate's collateral;
- (b) manage and realize on the Project Lands with a view to protecting the interests of stakeholders;
- (c) complete required registration and compliance steps under the *Condominium Act*, if determined to be advisable;
- (d) continue and complete the development, marketing, sale, and closing of the condominium units, if determined to be advisable;
- (e) deal with construction lien claims, including trust claims; and
- (f) provide a mechanism for further required funding of the Projects, if deemed advisable, through the issuance of the Construction Receiver's certificates to the Syndicate.

105. For the reasons set out above, it is just and equitable and in the interests of the Syndicate and the Debtors' stakeholders that A&M is appointed Construction Receiver of the Debtors.

PART IV – ORDER REQUESTED

106. CIBC, in its capacity as Administrative Agent and Syndication Agent for the Lenders respectfully requests an Order, *inter alia*, appointing A&M as Receiver pursuant to s. 243 of the BIA and s. 101 of the CJA, without security, and Construction Lien Trustee, without security, pursuant to s. 68 of the CLA, of all of the property, assets, and undertakings of (a) UC Leslieville; (b) UC Riverdale; and (c) UC Beach acquired for, or used in relation to the Debtors' business and the Projects.

ALL OF WHICH IS RESPECTIVELY SUBMITTED this 30th day of May, 2016.



GOWLING WLG (CANADA) LLP
Barristers and Solicitors
1 First Canadian Place,
100 King Street West, Suite 1600
Toronto, ON M5X 1G5

Clifton P. Prophet / Frank Lamie
(LSUC No. 34825K / 54035S)
Tel: (416) 862-3509 / (416) 862-3609
Fax: (416) 862-7661

Lawyers for the Applicant,
Canadian Imperial Bank of Commerce

SCHEDULE “A”

1. *Bank of Nova Scotia v. Freure Village on Clair Creek*, [1996] O.J. No 5088.
2. *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 CBR (5th) 300.
3. *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477, [2010] B.C.J. No. 635.
4. *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 3498 (S.C.J.) [Commercial List].
5. *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007 (S.C.J. [Commercial List]), [2011] O.J. No. 671.
6. *Farallon Investments Ltd. v. Bruce Pallett Fruit Farms Ltd.*, [1992] O.J. No. 330 (Gen. Div.).
7. *Anderson v. Hunking*, 2010 ONSC 4008, [2010] O.J. No. 3042 (S.C.J.).
8. Houlden, Lloyd W., Morawetz, Geoffrey B/, and Sarra, Janis P. *The 2012 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell 2011).
9. *Swiss Bank Corp. (Canoginada) v. Odyssey Industries Inc.* (1995), 30 C.B.R. (3d) 49.
10. *Maple Trade Finance Inc v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527.
11. *Business Development Bank of Canada v. 2197333 Ontario Inc.*, 2012 ONSC 965.
12. *Paragon Capital Corp v. Merchants & Traders Assurance Co.*, 2002 ABQB 430
13. *700 King Street (1997) Ltd. (Receiver of) v. Acro Capital Inc.* (2004), 35 C.L.R. (3d) 47 (Ont. S.C.J.).
14. *Royalede Industries Inc. v. Perma-Roof Ont. Ltd.* (1991), 2 O.R. (2d) 488 (Gen. Div.).
15. *Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp.* (19 April 1975) [1975] O.J. No. 438, (Ont. H.C.).
16. *Atlas-Gest Inc. v. Brownstones Building Corp.*, 1992 CarswellOnt 608 (Ont. C.J. [Gen. Div.]).
17. *Avenue Structures Inc. v. Pacific Empire Development Inc.*, 2001 CarswellOnt 643, 8 C.L.R. (3d) 128 (Ont. Master).

SCHEDULE “B”

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 243(1).

243. (1) Court may appoint receiver – Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just and convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person’s or bankrupt’s business; or
- (c) take any other action that the court considers advisable.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless:

- (a) the insolvent person consents to an earlier enforcement under subsection 244(2); or
- (b) the court considers it appropriate to appoint a receiver before then.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101.

101. (1) Injunctions and receivers – In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) Terms – An order under subsection (1) may include such terms as are considered just.

Rules of Civil Procedure, R.R.O 1990

Where Order May be Made

R16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service. R.R.O. 1990, Reg. 194, r. 16.04 (1).

Construction Lien Act, R.S.O. 1990, c. C.30.

Application for appointment of trustee

68. (1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.

Advances to trustee under Part IX

78. (7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

(a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and

(b) the amount received is not subject to any lien existing at the date of the trustee's appointment.
R.S.O. 1990, c. C.30, s. 78 (7).

Court File No. CV-16-11409-00CL

B E T W E E N:

CANADIAN IMPERIAL BANK OF COMMERCE

v.

URBANCORP (LESLIEVILLE) DEVELOPMENTS INC.

- Applicant -

- Respondents -

APPLICATION UNDER section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30, and under section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43

ONTARIO

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

FACTUM OF

**CANADIAN IMPERIAL BANK OF COMMERCE
(Application Returnable May 31, 2016)**

GOWLING WLG (CANADA) LLP

Barristers and solicitors

1 First Canadian Place

100 King Street West, Suite 1600

Toronto, Ontario, M5X 1G5

Clifton P. Prophet (LSUC No.: 34825K)

Frank Lamie (LSUC No.: 54035S)

Telephone: (416) 862-3509 / (416) 862-3609

Facsimile: (416) 862-7661

**Lawyers for the Applicant,
Canadian Imperial Bank of Commerce**