

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

BETWEEN:

JCF CAPITAL ULC

Applicant

and

TALON INTERNATIONAL INC., MIDLAND DEVELOPMENT INC., 1456253 ONTARIO INC., 2025401 ONTARIO LIMITED, BARREL TOWER HOLDINGS INC., HARVESTER DEVELOPMENTS INC., TALON INTERNATIONAL DEVELOPMENT INC., TFB INC., 2263847 ONTARIO LIMITED AND 2270039 ONTARIO LIMITED

Respondents

APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED, AND SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3 AS AMENDED

**FACTUM OF
THE APPLICANT
(Application Returnable November 1, 2016)**

October 28, 2016

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PART I - OVERVIEW

1. This Application is made by JCF Capital ULC (“**JCF**” or the “**Lender**”), for an order pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act* (Canada) (“**BIA**”) and section 101 of the *Courts of Justice Act* (Ontario) (the “**CJA**”) appointing FTI Consulting Canada Inc. (“**FTI**”) as receiver (the “**Receiver**”), without security, over the assets, undertakings, properties and legal and beneficial ownership interests of Talon International Inc. (“**Talon**”),

Midland Development Inc. (“**MDI**”), 1456253 Ontario Inc. (“**145**”), 2025401 Ontario Limited (“**2025401**”), Barrel Tower Holdings Inc. (“**Barrel**”), Harvester Developments Inc. (“**Harvester**”), Talon International Development Inc., TFB Inc. (“**TFB**”), 2263847 Ontario Limited (“**2263847**”), and 2270039 Ontario Limited (“**2270039**”, and collectively, the “**Debtors**”) comprising, acquired for, or used in relation to the condominium residence and hotel branded as the Trump International Hotel & Tower (the “**Hotel**”) and Trump Residences (the “**Residence**”) located at 311 and 325 Bay Street, Toronto, Ontario, including those assets, undertakings, and properties described in Schedule “A” to the draft appointment order filed with this application (the “**Appointment Order**”), and any interest held by Harvester to which the Crown may have rights, but excluding cash and accounts receivable of any Debtor (collectively, the “**Property**”).

2. The Debtors are collectively indebted to JCF in the approximate amount of CAD\$300,000,000 pursuant to a credit agreement that has been in default since July 2015 and that matured in December 2015.

3. The Debtors’ indebtedness to JCF is secured by a comprehensive security package granted to Computershare Trust Company of Canada, as agent for JCF.

4. JCF seeks to appoint the Receiver to market and sell the Property in a fair, efficient and transparent court process and intends to bid its debt as a stalking horse credit bid in this process.

5. At the November 1, 2016 return of this application, JCF seeks an order appointing the Receiver, a corresponding stay of proceedings, appointment of representative counsel for hotel

and residential unit owners and other customary relief set out in the Appointment Order. That relief is the subject of this factum.

6. Should the Appointment Order be granted, it is anticipated that the Receiver will request a Court date approximately three weeks hence to seek additional relief, including approval of a sales process in which the Property will be marketed and sold.

7. The appointment of FTI as receiver is just and convenient in the circumstances.

PART II – FACTS

8. The facts relevant to this Application are set out in detail in the affidavit of Jay Wolf sworn October 25, 2016 (the “**Wolf Affidavit**”). Below is a brief summary of those facts.

9. Talon was originally the registered owner of the lands known municipally as 311 Bay Street and 325 Bay Street, Toronto, Ontario, on which was developed and constructed the sixty-five storey five-star luxury Hotel and Residence (collectively, the “**Project**”).

Wolf Affidavit at para. 3

10. The condominium units in the Hotel and the Residence were created upon the registration of two separate condominiums, and marketed and sold to the public as hotel guestroom-type condominium units (“**Hotel Units**”) or luxury residential condominium units (“**Residential Units**”). To date, 50 of the 261 Hotel Units and 44 of the 118 Residential Units have been sold to third parties (the “**Hotel Unit Owners**” and “**Residential Unit Owners**”, respectively, and together, the “**Unit Owners**”). The remaining 211 unsold Hotel Units and 74 unsold Residential Units (together, the “**Unsold Units**”), as well as certain parking units, are condominium units

owned by Talon. Certain commercial, retail, and amenity spaces in the Hotel and Residence, as well as 10 parking units, are condominium units owned by TFB.

Wolf Affidavit at para. 4

11. Talon and TFB are nominees for the beneficial owners of the Project, being MDI, 1456253, 2025401, Barrel and Harvester (collectively, the “**Beneficial Owners**”). MDI, holding 68.5% of the beneficial interest in the real property comprising the Property, does not object to the appointment of the Receiver.

Wolf Affidavit at paras. 5 & 19

12. The Hotel is operated primarily pursuant to a hotel management agreement between Trump Toronto Hotel Management Corp. (“**TTHMC**”) and Toronto Standard Condominium Corporation No. 2267 (the “**Hotel Condominium Corporation**”), and the Residence is operated primarily pursuant to a condominium management agreement between TTHMC and Toronto Standard Condominium Corporation No. 2279 (the “**Residence Condominium Corporation**”, together with the Hotel Condominium Corporation, the “**Condominium Corporations**”), as well as pursuant to a number of material servicing and licensing agreements with TTHMC, and agreements with the Condominium Corporations regarding the spa and fitness facilities and the food and beverage facilities.

Wolf Affidavit at paras. 45& 46

13. It is anticipated that TTHMC will continue the management of the Hotel and Residence, and it is contemplated that the proposed receivership and Sale Process will not disrupt the

operations of the Hotel and the Residence, the guest experience for Hotel guests or the lives of those living in the Residential Units.

Wolf Affidavit at para. 99

14. To finance construction of the Project, Raiffeisen Bank International AG (as successor to Raiffeisen Zentralbank Österreich Aktiengesellschaft, the “**Bank**”) provided first priority secured credit facilities to Talon (as nominee) and the Beneficial Owners (collectively, the “**Borrowers**”) pursuant to a credit agreement dated October 9, 2007 (as amended, the “**Credit Agreement**”) with an original aggregate commitment amount of up to \$310.5 million

Wolf Affidavit at para. 6

15. All of the obligations of the Borrowers under the Credit Agreement are secured by comprehensive grants of collateral security by the Borrowers in favour of Computershare Trust Company of Canada, as agent for the lenders under the Credit Agreement (in such capacity, the “**Agent**”).

Wolf Affidavit at para. 7

16. The Borrowers’ obligations to the Bank under the Credit Agreement and Loan Documents (as defined in the Credit Agreement) are guaranteed by six guarantors: Talon Development, TFB, 2263847, 2270039, 1699558 Ontario Inc. (“**1699558**”), and 2314403 Ontario Limited (“**2314403**”) (collectively, the “**Guarantors**”). Each guarantee is secured by grants of security in favour of the Agent, for and on behalf of JCF.

Wolf Affidavit at para. 8

17. The collateral pledged by 1699558 and 2314403 comprises only shares of certain of the Debtors, which shares are not necessary to this proposed receivership, and accordingly 1699558 and 2314403 are not named as respondents in these proceedings.

Wolf Affidavit at para. 8

18. Since July 2, 2015, the Borrowers have been in continuous default under the Credit Agreement. Among these defaults, the Respondents have failed to pay the aggregate principal amount of CAD\$279,346,768.70 due on the maturity date of December 31, 2015. Accordingly, as at September 29, 2016, the Borrowers owed an aggregate principal indebtedness of CAD\$279,346,768.70 plus accrued interest of CAD\$21,674,656.69, for a total indebtedness as of September 29, 2016 of CAD\$301,021,425.39, plus fees and expenses (together with all interest, fees and expenses continuing to accrue thereafter, the “**Senior Indebtedness**”).

Wolf Affidavit at para. 9

19. On September 29, 2016, JCF acquired the Bank’s right, title and interest in the Credit Agreement, the Loan (as defined in the Credit Agreement) and Loan Documents (as defined therein), including all guarantees and security securing the Loan and all related rights. This acquisition was effective pursuant to the terms of the Credit Agreement by the giving of notice of assignment on October 3, 2016.

Wolf Affidavit at para. 10

20. The notice of assignment was followed by a reservation of rights letter on October 4, and on October 11, 2016, the Agent issued a demand for repayment of the Senior Indebtedness to the

Debtors for and on behalf of JCF, including delivering to each Debtor a notice of intention to enforce security under section 244 of the *BIA*.

Wolf Affidavit at para. 12

21. To date, despite reasonable notice to repay the Senior Indebtedness and repeated notifications of default since July 2015, the Debtors remain in default of their obligations under the Credit Agreement, and the 10-day statutory notice period under the *BIA* has expired.

Wolf Affidavit at para. 13

22. The scope of the proposed receivership is to be limited to only those assets and undertakings directly related to the Project, other than cash and accounts receivable, and no other assets and undertakings of the Debtors, even if those assets form part of JCF's collateral. The limited scope of the receivership is proposed to minimize disruption to the day-to-day business at the Hotel and Residence, while enabling the Receiver to undertake its mandate in an efficient and transparent manner.

Wolf Affidavit at paras. 15, 100 & 101

23. It is expected that the Receiver, if appointed, will seek court approval for and, if approved, commence a sale process for the Property (the "**Sale Process**"). JCF intends to submit a bid for the assets in such Sale Process, as approved by the Court, by way of a credit bid of the Senior Indebtedness.

Wolf Affidavit at paras. 16

24. It is proposed that JCF will fund the professional costs of the receivership through the granting of loans to the Receiver, secured by a charge with priority to the claims of parties notified of these proceedings, which is anticipated to be sufficient to permit the Receiver to conduct the Sale Process to market and sell the Property. Any need for financing of Hotel operations during the process, none of which is currently anticipated, will be addressed by the Receiver in due course, if necessary.

Wolf Affidavit at para. 18

25. In connection with seeking the appointment of the Receiver, JCF also seeks the appointment of Chaitons LLP (“**Chaitons**”) as representative counsel for the Unit Owners (in such capacity, “**Representative Counsel**”), and an order confirming that funding of Representative Counsel’s reasonable fees and disbursements up to \$100,000 shall form part of the Senior Indebtedness.

Wolf Affidavit at paras. 109 & 111

PART III – ISSUES

26. The following issues are to be resolved in this Application:
- A. Does this Court have jurisdiction to appoint the Receiver over the Debtors?
 - B. Is it just or convenient for the Court to appoint a Receiver over the Property?
 - C. If a Receiver is appointed, are the terms of the order requested appropriate, including:
 - (i) Limitation of Scope of Receivership;
 - (ii) Receiver’s Borrowings Charge, Administrative Charge & Priorities;

- (iii) Harvester's Interests;
 - (iv) Provisions Restricting Notice; and
 - (v) Protections for the Receiver.
- D. Should this Court approve representation for the Unit Owners by appointing Chaitons as Representative Counsel?
- E. Should the Court confirm the reasonable fees and disbursements of Chaitons, as Representative Counsel, to a maximum of \$100,000 as part of the Senior Indebtedness?

PART IV – ARGUMENT

A. This Court has Jurisdiction

27. Subsection 243(5) of the BIA specifies that an application under subsection 243(1) of the BIA is to be filed in a court having jurisdiction in the judicial district of the “locality of the debtor”, which is defined in section 2 of the BIA. It is respectfully submitted that the locality of the Debtors is Ontario, and that this application is properly brought before the Ontario Superior Court of Justice.

BIA, s. 2 & s. 243(5); Schedule B to this Factum

28. All of the Debtors, including both legal owners of the real property comprising the Property, are Ontario corporations with registered head offices in Ontario, except for beneficial owners Barrel and Harvester. All of the business carried on by the Debtors subject to the proposed receivership is located in downtown Toronto. Correspondingly, all of the “Property”, as defined in the Appointment Order, is located in Ontario.

29. FTI is a trustee as defined in the BIA, and therefore satisfies the requirements for appointment set out in section 243(4) of the BIA.

B. It is Both Just and Convenient to Appoint a Receiver

30. JCF seeks the appointment of the Receiver pursuant to subsection 243(1) of the BIA and section 101 of the CJA. Subsection 243(1) of the BIA is clear that where it is “just or convenient” to do so, the court may appoint a receiver. Similarly, the CJA enables the court to appoint a receiver where such appointment is “just or convenient”.

BIA, s. 243(1) and CJA, s. 101, Schedule B to this Factum

31. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, Blair J. (as he then was) described the basic principles governing the judicial appointment of a receiver as follows:

The Court has the power to appoint a receiver or receiver and manager where it is “just or convenient” to do so [citation omitted]. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular, the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered, but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently [citations omitted]. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed [citation omitted].

Bank of Nova Scotia v. Freure Village on Clair Creek, 1996 CarswellOnt 2328 (Ct J (Gen Div - Commercial List)) [“*Freure Village*”] at para. 11, Book of Authorities, Tab A; *1529599 Ontario Ltd v. Dalcour Inc*, 2012 ONSC 5707, 2012 CarswellOnt 12474 (Commercial List) [“*Dalcour*”] at para. 40, Book of Authorities, Tab B

32. In the present case, having regard to all of the circumstances, it is both just and convenient for this Court to appoint the Receiver over the Property for the following reasons:

(a) The Debtors are indebted to JCF in excess of \$300,000,000, events of default have occurred since July 2, 2015 and are continuing, the indebtedness matured in December

2015 and, after demand for repayment and the expiry of applicable notice periods, the Debtors are unable or unwilling to satisfy their financial obligations to JCF;

See, for example, *Dalcor*, supra at para. 41, Book of Authorities, Tab B; *Business Development Bank of Canada v. 2197333 Ontario Inc.*, 2012 ONSC 965, 2012 CarswellOnt 2062 (Commercial List) [*"BDC"*] at para. 21 Book of Authorities, Tab C

Wolf Affidavit at paras. 85-90;

BIA, ss. 243(1.1) and 244(1), Schedule B to this Factum

- (b) Many of the documents pledging security in favour of the Agent, for the benefit of JCF, include an express agreement from the applicable Debtor to the appointment of a receiver in these circumstances;

BDC, supra at para. 21, Book of Authorities, Tab C; *Dalcor*, supra at para. 40, Book of Authorities, Tab B; *Freure Village*, supra at para. 13, Book of Authorities, Tab A; *Textron Financial Canada Ltd v. Chetwynd Motels Ltd*, 2010 BCSC 477, 2010 CarswellBC 855 [*"Textron"*] at paras. 50 and 55, Book of Authorities, Tab D

Wolf Affidavit at para. 93 and Exhibit DD

- (c) The appointment of the Receiver will facilitate a transparent, orderly and fair marketing and sale process for the Property, which will result in either the efficient turn-over of the Property to JCF pursuant to a stalking horse credit bid of the Senior Indebtedness, or will identify a purchaser willing to exceed the value of JCF's credit bid and become the new owner of the Property;
- (d) The proposed receivership is designed to be minimally disruptive to the ongoing operations of the Hotel and minimally disruptive to the residents who live in the Residence;
- (e) MDI, holding 68.5% of the beneficial interest in the real property comprising the Property, does not object to the appointment of the Receiver.

Wolf Affidavit at para. 19

C. The Terms of the Application Order Sought are Appropriate

33. The terms of the Appointment Order include certain additional terms and conditions as compared to the Model Order (defined below), including: (i) limitations of the scope of the proposed receivership, (ii) a mechanism for the Receiver to borrow money to fund its professional costs and those of its advisors and consultants in the proposed proceedings, and court-ordered priority charges for certain obligations, (iii) the inclusion in the definition of “Property” of any interest held by Harvester to which Her Majesty the Queen in Right of the Province of New Brunswick (the “**Crown**”) may have rights, (iv) restrictions on the statutory obligation of the Receiver to give notice to creditors, and (v) certain court-ordered protections for the Receiver.

34. In JCF’s respectful submission, these provisions are each reasonable and necessary to maximize the efficiency of the Receiver’s mandate and minimize the disruption to the Hotel and Residence.

i. Scope of the Receivership

35. The scope of the Appointment Order contemplates that the Receiver will be appointed only in respect of the “Property” as defined therein, which will be the subject of the Sale Process, even though JCF’s collateral extends beyond such “Property”.

36. Property is limited to: the assets, undertakings, properties and legal and beneficial ownership interests of the Debtors comprising, acquired for, or used in relation to the Hotel and

Residence, and any interest held by Harvester to which the Crown may have rights, but excluding cash and accounts receivable of any Debtor.

37. The scope of the Appointment Order therefore does not interfere with the normal course business operations of the Debtors: the Receiver will not take possession of any Property nor have any authority over or responsibility to employees of the Debtors, or any authority to exercise any voting rights of Talon in the Condominium Corporations. TTHMC will continue the management of the Hotel and Residence, and the guest experience for Hotel guests and the lives of those living in the Residential Units are not expected to be interrupted.

38. The scope of the proposed receivership is further limited to exclude the Debtors' cash and accounts receivable; JCF is seeking only certain mandatory disclosure by the Debtors with regards to cash and accounts receivable in order that the receivership is minimally disruptive.

39. The proposed receivership would not include within its scope the Condominium Corporations, and the Receiver is expressly prevented from exercising any rights in respect of Talon's declarant or membership interests in the Condominium Corporations (without further order of the Court). However, the Condominium Corporations have information about Unit Owners that the Receiver and Representative Counsel require to undertake their mandates. Accordingly, JCF is seeking an order requiring the Condominium Corporations to provide names and contact information for all Unit Owners or mortgagees to the Receiver. It is submitted that this direction is fair and reasonable.

40. The proposed Appointment Order also contemplates a stay of proceedings which will prevent further steps in the outstanding and ongoing litigation by or against Talon in respect of

the Project. The Receiver will have the ability under the terms of the proposed Appointment Order to consent to the commencement or continuation of any such litigation, to the extent necessary, and may return to Court for advice and directions in respect of this litigation if necessary.

41. Commensurate with the limited scope of the receivership described above, the powers of the Receiver in the proposed Appointment Order have also been substantially limited from those set out in the Ontario Commercial List Users Committee Model Order (the “**Model Order**”). For example, the Receiver will not have possession of any Property, will have no right to manage any part of the Debtors’ business, settle debt or prosecute or defend proceedings on behalf of any Debtor, as would a receiver appointed under the Model Order.

42. It is submitted that the scope is both necessary and sufficient to ensure a thorough and efficient Sale Process that will maximize value, while at the same time being minimally disruptive to the operations of the Hotel and lives of people that call the Residence home.

ii. Administrative Charge, Receiver’s Borrowings Charge and Priority

43. Pursuant to subsection 243(6) of the BIA, if the Receiver is appointed under subsection 243(1), the Court may make an order respecting the payment of fees and disbursements of the Receiver, including one that gives the Receiver a charge, ranking ahead of any secured creditors, over all or part of the Debtors’ property, but only if this Court is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

44. The proposed Appointment Order provides for an “**Administration Charge**” to secure the reasonable fees and disbursements of the Receiver and its counsel, in each case at their standard rates and charges, and a “**Receiver’s Borrowings Charge**” (together with the Administration Charge, the “**Charges**”) to secure monies borrowed by the Receiver from time to time for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by the Appointment Order, including its fees and disbursements, and the fees and disbursements of its counsel and any consultant or agent retained by the Receiver.

45. It is anticipated that the professional costs of the receivership will be funded entirely through borrowings by the Receiver from JCF, secured by the Receiver’s Borrowings Charge.

46. Subject to a further motion on notice to interested parties with respect to the priority of the Charges, the Appointment Order specifically provides that the Charges will not have priority over any security interests, trusts, liens, charges and encumbrances, statutory or otherwise, which are properly perfected security interests as of the date of the Appointment Order in favour of any person, other than the security interests of JCF and Midland Resources Holding Limited (which interest has been assigned to MDI, a Respondent with notice of these proceedings).

47. JCF accordingly submits that the Charges do not prime or prejudice any parties who do not have notice of these proceedings, and they are therefore both appropriate in the circumstances and within the Court’s statutory jurisdiction to grant.

iii. Crown Interest in Harvester’s Property

48. Harvester was dissolved on August 16, 2016 pursuant to s. 139(1)(c) of the New Brunswick *Business Corporations Act* (the “**NBBCA**”), which permits the Director under the

NBBCA to issue a certificate of dissolution where a corporation has not filed its required fees, notices and/or documents required by the NBBCA.

NBBCA, s. 139, Schedule B to this Factum

49. Upon dissolution of a company pursuant to the NBBCA, the portion of property distributable to a creditor or shareholder who cannot be found shall either be transferred, delivered or conveyed to the Crown, or converted into money and paid to the Minister of Finance. If at any time a person establishes that he is entitled to any money paid to the Minister of Finance due to corporate dissolution, the Minister of Finance is required to pay an equivalent amount to him or her. Other undistributed property of a dissolved corporation vests in the Minister of Finance, subject to any entitlement to distribution by a creditor or shareholder. The NBBCA also provides that an action or proceeding can be brought against a dissolved company within two years of its dissolution date *as if the corporation had not been dissolved*.

NBBCA, s. 152, 153, 154, Schedule B to this Factum

50. Riordon J of the New Brunswick Court of Queen's Bench held in respect of dissolved companies that "forfeiture of a company's charter does not in my opinion have as a result the termination of the debts of the company", because the NBBCA allows proceedings against a dissolved company, and also allows any interested person to apply to revive such company, and its liabilities, as though it had never been dissolved. This finding is consistent with well settled law in Alberta, under a comparable statute to the NBBCA, that the Crown obtains "the ultimate surplus of the assets of the defunct company remaining after all obligations of the company are satisfied.... the *residue* only... being the *bona vacantia*".

Bank of Montreal v. Stephen (1989 CarswellNB 9 (NBQB)), at para. 40, Book of Authorities Tab E

Embree v. Miller (1916), 11 Alta LR 127 (ABSC Appellate), at para 14, Book of Authorities Tab F

51. Any of Harvester's beneficial interest in the Property as of the date of its administrative dissolution would be subject to the provisions of the NBBCA. No such interests were converted into money, and accordingly any residual interest may ultimately vest in the New Brunswick Minister of Finance, subject to the interests of Harvester's creditors, including JCF. In light of the amount of debt secured by the Property, no residual interest in the Property at the conclusion of a sale in the proposed Sale Process is expected.

52. In JCF's respectful submission, the administrative dissolution of Harvester, having occurred within the last two years, does not in any way hinder or interfere with the appointment of the Receiver over the Property.

53. In any event, the Legal Services branch of the New Brunswick Attorney General has been served with a copy of JCF's application record.

iv. Receiver's Obligation to Give Notice

54. The proposed Appointment Order provides at paragraph 34 that the Receiver, if appointed, shall only be required to give notice of the receivership proceedings to creditors of Talon and TFB. This provision, if granted, would relieve the Receiver from its obligations under section 245 of the BIA, which requires notice to be given to "all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained." The grounds and justification for this relief lie in the limited scope of the receivership, and the nature of the interests of the Debtors that constitute Property.

55. Talon and TFB, the creditors of whom the Receiver would be required to give notice under the Appointment Order, are the legal owners of the Property comprising the Hotel and Residence. The Property of the other Debtors that is subject to this receivership includes only beneficial ownership interests in the real property comprising the Property, but no personal property that JCF is aware of other than a few contracts related to the Project, and in any case excludes all cash and accounts receivable. Accordingly, it is submitted that creditors of Debtors other than Talon and TFB should not be affected by the proposed receivership, and thus it is not necessary or constructive to put the Receiver to the time and cost of notifying creditors of the Debtors other than Talon and TFB.

56. There is precedent for Courts waiving compliance with section 245 of the BIA in receiverships. In an August 8, 2014 order granted by Mr. Justice Morawetz in the receivership proceedings of Redstone Investment Corporation and Redstone Capital Corporation ("*Redstone*"), the receiver was relieved from compliance with the provisions of subsections 245(1)(b) and 245(2) and ordered only to provide notice of the receivership to the Superintendent of Bankruptcy. While no endorsement was given in respect of the relief from compliance with statutory notice provisions, it is notable that in *Redstone* the proceedings began as CCAA proceedings and were converted to a receivership. The Redstone creditors would have been on notice of the original CCAA proceedings.

In the Matter of the Receivership of Redstone Investment Corporation, Court File No. CV-14-10495-00CL, Order of Mr. Justice Morawetz, dated August 8, 2014, at para. 34, Book of Authorities Tab N

57. Similarly in the order appointing a receiver over Victorian Order of Nurses for Canada, Mr. Justice Penny waived compliance with sections 245(1), 245(2) and 246 of the BIA, provided the receiver gave notice of its appointment to the Superintendent of Bankruptcy. In that case, the

receiver was appointed in conjunction with an initial order being made under the CCAA, in order to engage the provisions of the *Wage Earner Protection Program Act*.

Victorian Order of Nurses for Canada (Re), Court File No. CV-15-1192-00CL, Order of Mr. Justice Penny dated November 25, 2015, at para. 6, Book of Authorities Tab O

Victorian Order of Nurses for Canada (Re) 2015 ONSC 7371, at paras. 48-55, Book of Authorities Tab G

58. While the foregoing cases serve as examples of relief from the receiver's notice requirements in situations where creditors may already have notice, JCF respectfully submits that such relief is also appropriate in the current circumstances, where no creditors of the Debtors other than those of Talon and TFB will be affected by the limited scope of the receivership.

v. Protections of Receiver

59. The proposed Appointment Order includes limitations of liability and other protections for the Receiver. The majority of these limitations and protections are contained in the Model Order, and to the extent there are variances, those variances reflect the limited scope of the proposed receivership.

60. For example, paragraph 20 of the proposed Appointment Order provides that the Receiver shall have no obligations under sections 81.4(5) or 81.6(3) of the BIA, and shall not be deemed to be in possession or control of any Property for the purposes of the BIA, *Wage Earner Protection Program Act* or any other applicable legislation.

BIA section 81.4(5), Schedule B to this Factum

BIA section 81.6(3), Schedule B to this Factum

61. These changes to the Model Order do not grant the Receiver higher or greater protections than are ordinarily granted to receivers in comparable situations, but rather are consistent with

the limited scope of the receivership. The Receiver will not be in possession of and will not directly dispose of current assets of the Debtor (and thus could have no liability under section 81.4(5)) and there is no pension fund (and thus there could be no amounts owing under 81.6(3)).

D. Appointment of Representative Counsel

62. It is well recognized that in receivership proceedings the Court may exercise its discretion to appoint representatives on behalf of vulnerable stakeholders and order that their legal and other professional fees be paid by the Debtors' estate.

West LB AG, Toronto Branch v The Rosseau Resort Developments Inc., Court File No. CV-09-8201-00CL, Endorsement of the Honourable Madam Justice Pepall dated August 20, 2009 (unreported) ["Rosseau"], Book of Authorities Tab H

Ontario Securities Commission v Portus Alternative Asset Management Inc., 2006 CarswellOnt 1724, Book of Authorities Tab I

Ontario Securities Commission v Norshield Asset Management (Canada) Ltd., Court File No. 05-CL-5965, Order of the Honourable Mr. Justice C.L. Campbell dated February 7, 2006, Book of Authorities Tab P

Grosvenor Park Media Fund LP v Arc Productions Ltd. et. al., Court File No. 16-CV-11472-00CL, Order of the Honourable Justice Newbould dated August 19, 2016, Book of Authorities Tab Q

63. The Ontario Superior Court has held that its jurisdiction to appoint representative counsel in the context of CCAA proceedings is found in Section 11 of the CCAA and pursuant to Rules 10.01 and 12.07 of the *Rules of Civil Procedure*. There is a comparable provision to CCAA section 11 applicable to receiverships at section 183(1) of the BIA, which Mr. Justice Wilton-Siegel in *Kitchener Frame Limited* cited as authority for appointing representative counsel in the context of BIA proposals. JCF accordingly respectfully submits that this Court has the jurisdiction to appoint representative counsel in these proposed receivership proceedings pursuant to Rules 10.01 and 12.07 and BIA section 183(1).

Re Nortel Networks Corp., 2009 CarswellOnt 3028 at paras. 10 – 12, Book of Authorities Tab J

Re Kitchener Frame Limited, endorsement of Justice Wilton Siegel dated July 7, 2011 (unreported), Book of Authorities Tab K

Courts of Justice Act, Rule 10.01, Schedule B to this Factum

Courts of Justice Act, Rule 12.07, Schedule B to this Factum

BIA section 183(1), Schedule B to this Factum

64. The Unit Owners share a commonality of interest in respect of the receivership and the proposed sale process, such that appointing Chaitons as Representative Counsel will prevent a duplication of proceedings, promote efficiency and be more cost-effective. These factors were significant in Justice Pepall's decision to appoint representative counsel for the owners of units in *West LB AG, Toronto Branch v The Rosseau Resort Developments Inc.*, and are similarly applicable here.

Rosseau, supra, at para. 1, Book of Authorities Tab H

65. To the extent Unit Owners have individual claims against one or more of the Debtors or in respect of the Property, those claims would not appropriately be within the mandate of Representative Counsel. In order to properly carry out its Court-ordered mandate and add value to these proceedings, it is submitted that Representative Counsel should represent Unit Owners who may otherwise be unrepresented in respect of their common issues in the receivership only. This common interest focus is provided for in the proposed order appointing Representative Counsel.

66. It is submitted that Chaitons is uniquely suited to act as Representative Counsel. Chaitons is a well-respected law firm with extensive experience in insolvency proceedings and has recently been appointed as representative counsel for a group of investors in the receivership proceedings involving Redstone Investment Corporation and its affiliates. Chaitons also has

extensive experience representing developers, lenders and court officers involving residential, resort and hotel condominium developments.

67. The appointment of representative counsel is a discretionary remedy. In the CCAA context, the following factors, first summarized by Justice Pepall in *CanWest Publishing Inc.*, are referenced by this Court when considering representative counsel orders:

- 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 proceeding 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.

Re CanWest Publishing Inc., 2010 CarswellOnt 1344 at para. 21 [*“CanWest”*], Book of Authorities Tab L

68. In JCF’s respectful submission, the majority of these factors are equally applicable to the appointment of Representative Counsel in the present proposed receivership proceedings, and each factor is satisfied in favour of such an appointment:

- (a) Vulnerability. While there is no evidence on the record as to the financial wherewithal of the Unit Owners or their ability to independently retain counsel, they are nevertheless affected by the appointment of the Receiver and the Sale Process. The Unit Owners are international and have collectively invested \$108,000,000 into the Project. The day-to-day

operations being maintained as seamlessly as possible, and the expeditious pursuit of the Sale Process, are critically important to all of the Unit Owners.

- (b) *Benefit to Sale Process, Administration of the Proceedings & Avoidance of Multiple Retainers.* A single point of contact, as opposed to a multiplicity of retainers, for the internationally diverse Unit Owners who is well versed in insolvency processes will greatly benefit the efficiency of the Sale Process and assist the administration of the proceedings generally. Representative Counsel will be consulted in connection with the motion to approve the Sale Process.
- (c) *Balance of Convenience.* In *Dugal v. Research in Motion*, Justice Campbell relied on the following “balance of convenience” test described in *Police Retirees of Ontario Inc. v. Ontario (Municipal Employees’ Retirement Board)* in granting a representation order:

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

As discussed above, the appointment of Representative Counsel is likely to increase efficiencies both for the Unit Owners and for the Receiver, expedite and simplify the Sale Process and avoid multiple retainers. Importantly, the opt-out mechanism provided for in

the proposed representative counsel order will ensure no Unit Owner who does not wish to have their rights represented by Chaitons will be so compelled. Accordingly, it is submitted that the balance of convenience favours appointing Chaitons as Representative Counsel.

Dugal v. Research in Motion Ltd., 2007 CarswellOnt 7565 at para. 21, Book of Authorities Tab M

- (d) Position of Other Stakeholders. Since the Receiver will not be in possession of any Property, and cash is excluded from the scope of the proposed Appointment Order, JCF is prepared to fund the costs of Chaitons as Representative Counsel, if appointed, up to \$100,000, which amount will be added to the Senior Indebtedness and made a part of the credit bid.

E. Fees of Representative Counsel

69. The Court's jurisdiction to grant an order with respect to the fees of Representative Counsel is based in Section 131 of the *Courts of Justice Act*, which provides that "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" and Section 197(1) of the BIA, which provides that "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".

Courts of Justice Act s. 131, Schedule B to this Factum

BIA s. 197(1), Schedule B to this Factum

70. JCF is prepared to fund Chaitons, in its capacity as Representative Counsel, up to \$100,000 and requests that the Court exercise its discretion to make the costs order sought.

PART V – CONCLUSION

71. For the reasons stated herein, it is both just and convenient to appoint FTI as Receiver of the Property in the circumstances.

72. Accordingly, it is respectfully submitted that the relief requested by JCF ought to be granted, and FTI be appointed as Receiver over the Property, on the terms of the proposed Appointment Order, and that Representative Counsel should be appointed, on the terms of the proposed order appointing Representative Counsel, filed.

PART VI – ORDER REQUESTED

73. JCF seeks orders substantially in the forms attached as Tab 3 (the Appointment Order) and as Tab 4 (the order appointing Representative Counsel) to its Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of October, 2016.



Pamela Huff / Chris Burr / Kelly Peters
Lawyers for the Applicant

SCHEDULE "A"
LIST OF AUTHORITIES

<u>Cases</u>	
A	<i>Bank of Nova Scotia v. Freure Village on Clair Creek</i> , 1996 CarswellOnt 2328 (Ct J (Gen Div - Commercial List))
B	<i>1529599 Ontario Ltd v. Dalcour Inc.</i> , 2012 ONSC 5707, 2012 CarswellOnt 12474 (Commercial List)
C	<i>Business Development Bank of Canada v. 2197333 Ontario Inc.</i> , 2012 ONSC 965, 2012 CarswellOnt 2062 (Commercial List)
D	<i>Textron Financial Canada Ltd v. Chetwynd Motels Ltd</i> , 2010 BCSC 477, 2010 CarswellBC 855
E	<i>Bank of Montreal v. Stephen</i> (1989 CarswellNB 9 (NBQB))
F	<i>Embree v. Miller</i> (1916), 11 Alta LR 127 (ABSC Appellate)
G	<i>Victorian Order of Nurses for Canada (Re)</i> 2015 ONSC 7371
H	<i>West LB AG, Toronto Branch v The Rosseau Resort Developments Inc.</i> , Court File No. CV-09-8201-00CL, Endorsement of the Honourable Madam Justice Pepall dated August 20, 2009 (unreported)
I	<i>Ontario Securities Commission v Portus Alternative Asset Management Inc.</i> , 2006 CarswellOnt 1724
J	<i>Re Nortel Networks Corp.</i> , 2009 CarswellOnt 3028
K	<i>Re Kitchener Frame Limited</i> , endorsement of Justice Wilton Siegel dated July 7, 2011 (unreported)
L	<i>Re CanWest Publishing Inc.</i> , 2010 CarswellOnt 1344
M	<i>Dugal v. Research in Motion Ltd.</i> , 2007 CarswellOnt 7565
<u>Orders</u>	
N	<i>In the Matter of the Receivership of Redstone Investment Corporation</i> , Court File No. CV-14-10495-00CL, Order of Mr. Justice Morawetz, dated August 8, 2014
O	<i>Victorian Order of Nurses for Canada (Re)</i> , Court File No. CV-15-1192-00CL, Order of Mr. Justice Penny dated November 25, 2015
P	<i>Ontario Securities Commission v Norshield Asset Management (Canada) Ltd.</i> , Court File No. 05-CL-5965, Order of the Honourable Mr. Justice C.L. Campbell dated February 7, 2006
Q	<i>Grosvenor Park Media Fund LP v Arc Productions Ltd. et. al.</i> , Court File No. 16-CV-11472-00CL, Order of the Honourable Justice Newbould dated August 19, 2016

SCHEDULE "B"
RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 2

Definitions

In this Act,

...

"locality of a debtor"

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

...

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 14.06

14.06 (1) No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

Application

(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

(a) an interim receiver;

(b) a receiver within the meaning of subsection 243(2); and

(c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

...

Liability in respect of environmental matters

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

- (a) before the trustee's appointment; or
- (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

...

Non-liability re certain orders

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

- (i) complies with the order, or
- (ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

- (i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or
- (ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

Stay may be granted

(5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

Costs for remedying not costs of administration

(6) If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims

(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs

(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 81.4

Security for unpaid wages, etc. — receivership

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 — less any amount paid for those services by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Commissions

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

Security for disbursements

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person's business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000 — less any amount paid for those disbursements by a receiver or trustee — by security on the person's current assets that are in the possession or under the control of the receiver.

Rank of security

(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2.

Liability of receiver

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

Claims of officers and directors

(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

Non-arm's length

(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances — including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered — it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

Proof by delivery

(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

Definitions

(9) The following definitions apply in this section.

compensation includes vacation pay but does not include termination or severance pay.

person who is subject to a receivership means a person any of whose property is in the possession or under the control of a receiver.

receiver means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 81.6

Security for unpaid amounts re prescribed pensions plan — receivership

81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

(iii) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament,

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament, and

(iii) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*.

Rank of security

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

Liability of receiver

(3) If the receiver disposes of assets covered by the security, the receiver is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

Definitions

(4) The following definitions apply in this section.

person who is subject to a receivership means a person any of whose property is in the possession or under the control of a receiver.

receiver means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 183

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.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 197

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.

How costs awarded

(2) The court in awarding costs may direct that the costs shall be taxed and paid as between party and party or as between solicitor and client, or the court may fix a sum to be paid in lieu of taxation or of taxed costs, but in the absence of any express direction costs shall follow the event and shall be taxed as between party and party.

Personal liability of trustee for costs

(3) Where an action or proceeding is brought by or against a trustee, or where a trustee is made a party to any action or proceeding on his application or on the application of any other party thereto, he is not personally liable for costs unless the court otherwise directs.

When costs payable

(4) No costs shall be paid out of the estate of the bankrupt, excepting the costs of persons whose services have been authorized by the trustee in writing and such costs as have been awarded against the trustee or the estate of the bankrupt by the court.

(5) [Repealed, 2005, c. 47, s. 110]

Priority of payment of legal costs

(6) Legal costs shall be payable according to the following priorities:

(a) commissions on collections, which are a claim ranking above any other claim on any sums collected;

(b) when duly authorized by the court or approved by the creditors or the inspectors, costs incurred by the trustee after the bankruptcy and prior to the first meeting of creditors;

(c) the costs on an assignment or costs incurred by an applicant creditor up to the issue of a bankruptcy order;

(d) costs awarded against the trustee or the estate of the bankrupt; and

(e) costs for legal services otherwise rendered to the trustee or the estate of the bankrupt.

Costs of discharge opposed

(6.1) If a creditor opposes the discharge of a bankrupt, the court may, if it grants the discharge on the condition that the bankrupt pay an amount or consent to a judgment to pay an amount, award costs, including legal costs, to the opposing creditor out of the estate in an amount that is not more than the amount realized by the estate under the conditional order, including any amount brought into the estate under the consent to the judgment.

Costs where opposition frivolous or vexatious

(7) If a creditor opposes the discharge of a bankrupt and the court finds the opposition to be frivolous or vexatious, the court may order the creditor to pay costs, including legal costs, to the estate.

(8) [Repealed, 2005, c. 47, s. 110]

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 243

Court may appoint receiver

(1) 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 or 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.

Restriction on appointment of receiver

(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 not 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.

Definition of "receiver"

(2) Subject to subsections (3) and (4), in this Part, "receiver" means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — 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 — under
 - (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
 - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of "receiver" — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition "receiver" in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one

that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of "disbursements"

(7) In subsection (6), "disbursements" does not include payments made in the operation of a business of the insolvent person or bankrupt.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 244

Advance notice

- (1) A secured creditor who intends to enforce a security on all or substantially all of
- (a) the inventory,
 - (b) the accounts receivable, or
 - (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

- (2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

- (2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

- (3) This section does not apply, or ceases to apply, in respect of a secured creditor
- (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
 - (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3: Section 245

Receiver to give notice

245 (1) A receiver shall, as soon as possible and not later than ten days after becoming a receiver, by appointment or otherwise, in respect of property of an insolvent person or a bankrupt, send a notice of that fact, in the prescribed form and manner, to the Superintendent, accompanied by the prescribed fee, and

- (a) in the case of a bankrupt, to the trustee; or
- (b) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

Idem

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Names and addresses of creditors

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

Business Corporations Act, S.N.B. 1981, c. B-9.1: Section 139

139 (1) Subject to subsections (2) and (3), where a corporation

- (a) has not commenced business within three years after the date shown in its certificate of incorporation,
- (b) has not carried on its business for three consecutive years, or
- (c) is in default in sending to the Director any fee, notice or document required by this Act, the Director may dissolve the corporation by issuing a certificate of dissolution under this section or he may apply to the Court for an order dissolving the corporation, in which case section 144 applies.

139 (2) The Director shall not dissolve a corporation under this section unless he has

- (a) sent by ordinary mail notice of his decision to dissolve the corporation to the corporation at its registered office or to its mailing address as indicated in the records of the Director, and

(b) published notice of his decision to dissolve the corporation in *The Royal Gazette*.

139 (2.1) Publication in *The Royal Gazette* of the notice of the Director's decision to dissolve a corporation shall be deemed to be notice to the corporation.

139 (2.2) Sixty days after the notice of the Director's decision to dissolve a corporation is published in *The Royal Gazette*, the Director may dissolve the corporation.

139 (3) Unless cause to the contrary has been shown or an order has been made by the Court under section 144, the Director may, after the expiry of the period referred to in subsection (2.2), issue a certificate of dissolution.

139 (4) The corporation ceases to exist on the date shown in the certificate of dissolution.

Business Corporations Act, S.N.B. 1981, c. B-9.1: Section 152

152 (1) In this section "shareholder" includes the heirs and legal representatives of a shareholder.

152 (2) Notwithstanding the dissolution of a corporation under this Act,

(a) a civil, criminal or administrative action or proceeding commenced by or against the corporation before its dissolution may be continued as if the corporation had not been dissolved;

(b) a civil, criminal or administrative action or proceeding may be brought against the corporation within two years after its dissolution as if the corporation had not been dissolved; and

(c) any property distributed to shareholders that would otherwise have been available to satisfy any judgment or order if the corporation had not been dissolved remains available for such purpose.

152 (3) Service of a document on a corporation after its dissolution may be effected by serving the document upon a person shown in the last notice filed under section 64 or 71.

152 (4) Notwithstanding the dissolution of a corporation, a shareholder to whom any of its property has been distributed is liable to any person claiming under subsection (2) to the extent of the amount received by that shareholder upon such distribution, and an action to enforce such liability may be brought within two years after the date of the dissolution of the corporation.

152 (5) A Court may order an action referred to in subsection (4) to be brought against the persons who were shareholders as a class, subject to such conditions as the Court

thinks fit and, if the plaintiff establishes his claim, the Court may refer the proceedings to a referee or other officer of the Court who may

- (a) add as a party to the proceedings before him each person found by the plaintiff who was a shareholder;
- (b) determine, subject to a subsection (4), the amount that each person who was a shareholder shall contribute towards satisfaction of the plaintiff's claim; and
- (c) direct payment of the amounts so determined.

Business Corporations Act, S.N.B. 1981, c. B-9.1: Section 153

153 (1) Upon the dissolution of a corporation, the portion of the property distributable to a creditor or shareholder who cannot be found shall be either converted into money and paid to the Minister of Finance or transferred, delivered or conveyed to Her Majesty in right of New Brunswick.

153 (2) A payment under subsection (1) shall be deemed to be in satisfaction of a debt or claim of such creditor or shareholder.

153 (3) If at any time a person establishes that he is entitled to any money paid to the Minister of Finance under this section, the Minister of Finance shall pay an equivalent amount to him out of the Consolidated Fund.

Business Corporations Act, S.N.B. 1981, c. B-9.1: Section 154

154 (1) Subject to subsection 152(2) and section 153, property of a corporation that has not been disposed of at the date of its dissolution vests in Her Majesty in right of New Brunswick.

154 (2) If a corporation is revived under section 136, any property other than money that vested in Her Majesty pursuant to subsection (1) and that has not been disposed of shall be returned to the corporation and there shall be paid to the corporation out of the Consolidated Fund

- (a) an amount equal to any money received by Her Majesty pursuant to subsection (1); and
- (b) where property other than money vested in Her Majesty pursuant to subsection (1) and that property has been disposed of, an amount equal to the lesser of

- (i) the value of any such property at the date it vested in Her Majesty, and

(ii) the amount realized by Her Majesty from the disposition of that property.

154 (3) When a corporation is revived under section 136, any property other than money to be returned to the corporation in accordance with subsection (2) shall vest in the corporation without any deed, bill of sale or other document from the Crown or any action by the Crown.

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

Injunctions and receivers

(1) 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.

Terms

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

Courts of Justice Act, R.S.O. 1990, c. C.43: Section 131

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.

Crown costs

(2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

Courts of Justice Act, R.S.O. 1990, c. C.43: Rule 10.01

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.

Order Binds Represented Persons

- (2) Where an appointment is made under subrule (1), an order in the proceeding is binding on a person or class so represented, subject to rule 10.03.

Settlement Affecting Persons who are not Parties

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

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

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

the judge, if satisfied that the settlement will be for the benefit of the interested persons who are not parties and that to require service on them would cause undue expense or delay, may approve the settlement on behalf of those persons.

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

Courts of Justice Act, R.S.O. 1990, c. C.43: Rule 12.07

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.

APPLICATION UNDER SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED, AND SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3 AS AMENDED

Court File No: CV-16-11573-00CL

JCF CAPITAL ULC and Talon International Inc. et al.
Applicant Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

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(Appointment of Receiver)

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