Court File No. CV-14-10417-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

GLOBAL RESOURCE FUND

Applicant

- and -

TAMERLANE VENTURES INC. and PINE POINT HOLDING CORP.

Respondents

APPLICATION UNDER section 243 of *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended and section 101 of the *Courts of Justice Act*, RSO 1990, c C.43

FACTUM OF THE APPLICANT, GLOBAL RESOURCE FUND

January 28, 2014

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

John N. Birch LSUC #: 38968U
Tel: 416.860.5225
Fax: 416.640.3057
jbirch@casselsbrock.com

Joseph J. Bellissimo LSUC #: 46555R
Tel: 416.860.6572
Fax: 416.642.7150
jbelissimo@casselsbrock.com

Lawyers for the applicant

TO: **BENNETT JONES LLP**
Barristers and Solicitors
1 First Canadian Place
Suite 3400
P.O. Box 130
Toronto, ON
M5X 1A4

Sean Zweig
Tel: 416.777.6254
Fax: 416.863.1716

Lawyers for the respondents

AND TO: **GOODMANS LLP**
Bay Adelaide Centre
333 Bay Street
Suite 3400
Toronto, ON M5H 2S7

Melaney Wagner
Email: mwagner@goodmans.ca
Tel: 416-597-4258

Logan Willis
Email: lwillis@goodmans.ca
Tel: 416-597-6299

Lawyers for the Monitor and Proposed Receiver

AND TO: **DUFF & PHELPS CANADA RESTRUCTURING INC.**
Bay Adelaide Centre
333 Bay Street
14th Floor
Toronto, ON M5H 2R2

Bobby Kofman
Email: bobby.kofman@duffandphelps.com
Tel: 416-932-6228

Noah Goldstein
Email: Noah.Goldstein@duffandphelps.com
Tel: 416-932-6207

The Monitor and Proposed Receiver

AND TO: **PRICEWATERHOUSECOOPERS LLP**
PwC Tower, 18 York Street
Suite 2600
Toronto ON M5J OB2

Greg Prince
E-mail: gregory.n.prince@ca.pwc.com
Tel: 416-814-5752

Eric Castonguay
E-mail: eric.castonguay@ca.pwc.com
Tel: 416-815-5094

Stephen R. Mullowney CA
E-mail: stephen.r.mullowney@ca.pwc.com
Tel: (416) 687-8511

Financial Advisor

AND TO: **MINISTRY OF FINANCE**
PO Box 9445 Stn Prov Govt
Victoria, BC V8W 9V5

Rob Kovacs
E-mail: Rob.Kovacs@gov.bc.ca
Tel: 250-387-0583

AND TO: **NATIONAL BANK OF CANADA**
555 Burrard Street, Suite 200
Vancouver, BC V7X 1M7

Edgar Groom, Manager Commercial Lending
E-mail: edgar.groom@nbc.ca
Tel: 604-661-5500

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FACTUM OF THE APPLICANT

PART I - OVERVIEW

1. Global Resource Fund ("**Global**") is the senior secured creditor of the Respondents, Tamerlane Ventures Inc. ("**Tamerlane**") and Pine Point Holding Corp. ("**Pine Point**"), through a loan facility provided by Global to Tamerlane, which is guaranteed by Pine Point and certain other subsidiaries of Tamerlane.

2. Global holds general security over all assets and undertaking of the Respondents.

3. The Respondents are in default of their obligations to Global.

4. On August 23, 2013, the Respondents sought and obtained protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**"). Global consented to this relief as part of an overall forbearance arrangement with the Respondents, pursuant to which (among other things) Global agreed to provide debtor-in-possession financing (the "**DIP**

Loan") to the Respondents and give the Respondents until January 7, 2014 (later extended until January 31, 2014) to sell their assets and pay off all indebtedness to Global. In turn, the Respondents irrevocably agreed that if they did not repay Global's indebtedness by that time, a Receiver would be appointed.

5. The terms of the forbearance arrangement were confirmed in the order of Justice Newbould dated August 23, 2013 which, among other things, directed that (subject to court discretion) the CCAA proceedings would terminate and a Receiver would be appointed if the indebtedness to Global was not paid by January 7, 2014 (later extended on consent to January 31, 2014).

6. Since the Respondents will not be able to repay the indebtedness to Global by January 31, 2014, and Global is not prepared to further extend this deadline, the Respondents have brought a motion to terminate the CCAA proceedings, approve the conduct of Duff & Phelps Canada Restructuring Inc. ("**Duff & Phelps**") in its capacity as monitor (the "**Monitor**"), and discharge the Monitor. In turn, Global has brought this concurrent application for the appointment of Duff & Phelps as Receiver. Global's intention is that, if appointed, Duff & Phelps will continue the existing process to sell the Respondents' assets in order to realize proceeds for the benefit of creditors.

7. The appointment of the Receiver is just and convenient in the circumstances.

PART II - SUMMARY OF FACTS

8. Global is a provider of bridge financing to resource companies and projects worldwide.

Affidavit of David Lewis sworn January 24, 2014 [*Lewis Affidavit*] at para. 3, Applicant's Motion Record dated January 24, 2014 [*Motion Record*], Tab 2

9. Tamerlane is a holding company that, through certain subsidiaries, is engaged in the exploration and development of base metals projects in Canada and Peru.

Lewis Affidavit at para. 4, Motion Record, Tab 2

10. Pine Point is a wholly-owned subsidiary of Tamerlane that holds an interest in, and other property relating to, a mining project in the Northwest Territories south of Great Slave Lake.

Lewis Affidavit at para. 5, Motion Record, Tab 2

11. On December 16, 2010, Global and Tamerlane entered into a credit agreement, which was subsequently amended on several occasions (collectively, the "**Credit Agreement**"), pursuant to which Global established for Tamerlane a non-revolving bridge loan facility in the principal amount of USD $5 million as well as a USD $5 million standby credit facility (collectively, the "**Loans**"). The Loans have been fully advanced.

Lewis Affidavit at paras. 5 and 6, Motion Record, Tab 2

12. Tamerlane entered into a General Security Agreement with Global.

Lewis Affidavit at para. 15, Motion Record, Tab 2

13. Pine Point and Tamerlane Ventures USA, Inc. (another wholly owned subsidiary of Tamerlane) ("**Tamerlane USA**" and collectively with Pine Point and Tamerlane, the "**Debtors**") executed guarantees of Tamerlane's indebtedness under the Credit Agreement (the "**Guarantees**") and also gave general security in favour of Global in

support of the Guarantees (together with the General Security Agreement, the "**Security Documents**").

Lewis Affidavit at paras. 17- 19, Motion Record, Tab 2

14. The Security Documents provide for the appointment of a receiver as a remedy available to Global upon default by the Debtors.

Exhibits "D" and "G" to the Lewis Affidavit, Motion Record, Tab 2 (d) and (g)

15. Since the Credit Agreement was entered into in December 2010, numerous defaults under the Credit Agreement occurred, including payment defaults. These defaults led to the Respondents entering into a number of forbearance agreements that partially restructured the indebtedness.

Lewis Affidavit at para. 21, Motion Record, Tab 2

16. Despite restructuring of the Loans through the forbearance agreements, Tamerlane still committed defaults under the Credit Agreement.

Lewis Affidavit at para. 22, Motion Record, Tab 2

17. On May 29, 2013, Global made formal payment demand under the Credit Agreement and Guarantees and concurrently delivered to the Respondents a notice of intention to enforce security ("**NITES**") pursuant to section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**") and a Notice of Intention to Dispose of Collateral under the *Personal Property Security Act* ("**PPSA Notice**").

Lewis Affidavit at para. 23, Motion Record, Tab 2

18. Global and the Debtors subsequently entered into a forbearance agreement dated June 10, 2013 which required, among other things, that Tamerlane continue making monthly interest payments during the forbearance period. The Debtors made the interest payment due on June 25, 2013 on a timely basis but then failed to make the interest payment due on July 25, 2013. As such, the Credit Agreement went back into default on July 26, 2013.

Lewis Affidavit at para. 24, Motion Record, Tab 2

19. On July 26, 2013, Global reissued a new demand for payment by the Debtors, together with a new NITES and PPSA Notice.

Lewis Affidavit at para. 25, Motion Record, Tab 2

20. Following the July 26 demand, Global made it clear that it intended to seek the appointment of a receiver to sell the assets of Tamerlane and Pine Point. In response, Tamerlane advised that it was prepared to seek CCAA protection—over the objections of Global—if that became necessary.

Lewis Affidavit at para. 27, Motion Record, Tab 2

21. Global and the Debtors ultimately entered into a forbearance arrangement dated August 22, 2013 (the "**Current Forbearance Arrangement**") under which Global would forbear from exercising its rights until after January 7, 2014 (the "**Outside Date**") and the Respondents would market and attempt to sell their assets during the course of a CCAA proceeding. The Current Forbearance Arrangement provides for the following, in relevant part:

(a) Global would consent to the Respondents' application under the CCAA so long as no stay extension beyond the Outside Date was sought or obtained without the consent of Global and the Monitor;

(b) Global would agree to provide debtor-in-possession financing (the "**DIP Loan**") on specified terms;

(c) The Debtors were required to re-pay the indebtedness relating to both (i) the Credit Agreement and (ii) the DIP Loan (collectively, the "**Indebtedness**") by no later than the Outside Date (which date was initially fixed at January 7, 2014);

(d) No extension of the CCAA stay or Outside Date beyond January 7, 2014 would be sought or obtained by the Respondents unless (i) the Indebtedness was paid in full or (ii) such date was extended on consent of Global and Duff & Phelps, as proposed CCAA Monitor;

(e) The Respondents would undertake a Sale and Investment Solicitation Process ("**SISP**") with the assistance of a financial advisor to generate proceeds to re-pay the Indebtedness; and

(f) If the Respondents did not re-pay the Indebtedness by the Outside Date and Global and the Monitor did not consent to the extension of such date, the CCAA proceedings would terminate and, upon application by Global, a Receivership order in the form consented to by the Respondents would issue (subject to the discretion of this Court).

Lewis Affidavit at para. 28, Motion Record, Tab 2

22. Tamerlane and Pine Point executed and delivered to Global an irrevocable consent to the appointment of a receiver in support of their obligations under the Current Forbearance Arrangement.

Lewis Affidavit at para. 30, Motion Record, Tab 2

23. The above-noted terms of the Current Forbearance Arrangement were incorporated into the court order of Mr. Justice Newbould dated August 23, 2013 (the "**Initial Order**") and a subsequent order of Mr. Justice Morawetz dated September 17, 2013 (the latter of which extended the CCAA stay from September 22, 2013 to January 7, 2014). Duff & Phelps was appointed as Monitor.

Lewis Affidavit at paras. 31 - 35, Motion Record, Tab 2

24. Paragraphs 50 and 51 of the Initial Order establish restrictions on extension of the CCAA proceedings (emphasis added):

> RESTRICTIONS ON EXTENSION OF CCAA PROCEEDINGS
>
> 50. THIS COURT ORDERS that, notwithstanding any other provision of this Order, the Applicants may not seek or obtain any extension of the Stay Period beyond 11:59 p.m. (Toronto time) on January 7, 2014, unless it has repaid both the DIP Lender and the Secured Lender in full or received the prior written consent of the Secured Lender and the Monitor prior to such date (such date beyond which the Applicants may not seek or obtain any extension of the Stay Period, if any, being the "Outside Date"). Immediately following the Outside Date and with automatic effect: (i) these proceedings shall terminate (the "Termination"), (ii) the Monitor shall be released and discharged, and (iii) this Order (except for paragraphs 22, 23, 31, 34, 35, 36 and 41 hereof) shall be of no further force or effect **[...]**
>
> 51. THIS COURT ORDERS that, immediately upon the Termination, and subject in all respects to the discretion of the Court: (i) a receiver selected by the Secured Lender shall hereby be appointed, without security, over all assets and

> undertakings of the Applicants pursuant to section 243 of the *Bankruptcy and Insolvency Act* and section 101 of the *Courts of Justice Act*; and (ii) a receivership order substantially in the form of Schedule "A" (the "Receivership Order") shall issue immediately upon the Secured Lender filing with the Court a written consent of a licensed bankruptcy trustee, selected by the Secured Lender, to act as receiver. The Secured Lender may attend before the Commercial List as soon as practicable after the Termination for the purpose of the Receivership Order, which the Applicants have irrevocably consented to.
>
> Initial Order of the Honourable Mr. Justice Newbould dated August 23, 2013 at paras. 50 and 51, Exhibit "L" to the Lewis Affidavit, Motion Record, Tab 2 (I)

25. In his written endorsement which accompanied the Initial Order (the "**Newbould Endorsement**"), Newbould J. made reference to the parties' negotiations leading to the consensual CCAA filing, including the fact that the terms of the proposed CCAA stay contemplated the appointment of a receiver upon the termination of proceedings:

> [27] During the negotiations leading to this consensual CCAA application, Global Resource Fund, the secured lender, expressed a willingness to negotiate with the applicants but firmly stated that as a key term of consenting to any CCAA initial order, it required (i) a fixed "sunset date" of January 7, 2014 for the CCAA proceeding beyond which stay extensions could not be sought without the *[sic]* its consent and the consent of the Monitor unless both the outstanding secured debt and the DIP loan had been repaid in full, and a provision in the initial order directing that a receiver selected by Global Resource Fund would be appointed after that date.
>
> [28] The Initial Order as drafted contains language preventing the applicants from seeking or obtaining any extension of the stay period beyond January 7, 2014 unless it has repaid the outstanding secured debt and the DIP loan or received the consent of Global Resource Fund and the Monitor, and that immediately following January 7, 2013 (i) the CCAA proceedings shall terminate, (ii) the Monitor shall be discharged, (iii) the Initial Order (with some exceptions) shall be of no force and effect and (iv) a receiver selected by Global Resource Fund shall be appointed.
>
> Endorsement of the Honourable Mr. Justice Newbould dated August 28, 2013 [*Newbould Endorsement*] at para. 27-28, Exhibit "M" to the Lewis Affidavit, Motion Record, Tab 2 (m)

26. In considering whether to approve the terms requested, Newbould J. acknowledged at paragraph 32 of the Newbould Endorsement that "The fact that the board of directors of the applicants exercised their business judgment in agreeing to the

terms imposed by Global Resource Fund in order to achieve a consensual outcome is a factor I can and do take into account."

> Newbould Endorsement at para. 32, Exhibit "M" to the Lewis Affidavit, Motion Record, Tab 2 (m)

27. Newbould J. further considered the fact that, outside of the CCAA, a receivership would likely have been inevitable:

> [33] It is apparent from looking at the history of the matter that Global Resource Fund had every intention of exercising its rights under its security to apply to court to have a receiver appointed, and with the passage of time during which there were defaults, including defaults in forbearance agreements, the result would likely have been inevitable. See *Bank of Montreal v. Carnival National Leasing Ltd.* (2011), 74 C.B.R. (5th) 300 and the authorities therein discussed. Thus it is understandable that the directors agreed to the terms required by Global Resource Fund. If Global Resource Fund had refused to fund the DIP facility or had refused to agree to any further extension for payment of the secured loan, the prospects of financing the payout of Global Resource Fund through a SISP process would in all likelihood not been available to the applicants or its stakeholders.
>
> Newbould Endorsement at para. 33, Exhibit "M" to the Lewis Affidavit, Motion Record, Tab 2 (m)

28. Newbould J. approved the terms negotiated and agreed to by the parties and granted the Initial Order. In doing so, Newbould J. expressly preserved the Court's inherent discretion to do what it considers appropriate: paragraph 51 of the Initial Order (reproduced above) provides that the appointment of the receiver if and when requested by Global remains subject to the discretion of the Court.

29. After the Initial Order was granted, the Respondents undertook the SISP. That process generated interest from a number of prospective purchasers. However, it became apparent that it would not be possible to complete the SISP and close a transaction by January 7, 2014 so that the Indebtedness could be paid by that date. Because the Respondents, Global, and the Monitor wanted to permit additional time to

continue the SISP, Global and the Monitor consented to an extension of the CCAA stay period and the Outside Date to January 31, 2014. Global also agreed to increase the authorized amount of the DIP Loan by approximately USD$118,000, so that the Respondents and Tamerlane USA would have sufficient operating funds for the extended stay period.

Lewis Affidavit at para. 36, Motion Record, Tab 2

30. It is now apparent that the Respondents will not be able to complete the SISP or repay the Indebtedness by January 31, 2014 and Global is not prepared to consent to further extensions of the Outside Date or the CCAA stay.

Lewis Affidavit at paras. 38 - 39, Motion Record, Tab 2

31. As such, the CCAA proceedings cannot continue beyond January 31, 2014 and Global intends to seek the appointment of Duff & Phelps as Receiver as contemplated by paragraph 51 of the Initial Order. The intention is to have the Receiver continue the marketing of the Respondents' assets with a view to completing a transaction (subject, of course, to further court approval) that will yield proceeds to pay creditors.

Lewis Affidavit at para. 39, Motion Record, Tab 2

PART III - ISSUE TO BE DETERMINED

32. The sole issue on this application is whether the appointment of a receiver over the assets of the Respondents is appropriate.

33. Global submits that

(a) the Court should appoint a Receiver as contemplated by paragraph 51 of the Initial Order; and

(b) in any event, the usual statutory and common law test for the appointment of a receiver has been met.

PART IV - THE LAW

The Court should Exercise its Discretion to Approve the Appointment as Contemplated by Initial Order

34. Paragraph 51 of the Initial Order provides that, subject to the discretion of the Court, a Receiver shall be appointed over the Respondents upon the termination of the CCAA proceedings.

35. A Receiver should be appointed, as contemplated in the Initial Order, for the following reasons:

(a) Global has acted reasonably both before and during the CCAA proceedings, including by

(i) accommodating the Debtors' efforts to restructure their affairs and sell their assets to repay the Indebtedness, as evidenced by the Current Forbearance Arrangement;

(ii) agreeing to an extension of the Outside Date to January 31, 2014 to allow the Respondents further time to pursue the SISP; and

(iii) increasing the credit available under the DIP Loan to allow the Debtors to continue operating while pursuing the SISP until January 31, 2014;

(b) It is apparent that the SISP will not be completed before January 31, 2014 and the Debtors will not be able to repay the Indebtedness by that date; and

(c) Global is not prepared to consent to further extensions of the Outside Date or the CCAA stay.

The Test Has Been Met in Any Event

36. Global submits that the Court may appoint a Receiver purely based on the terms of the Initial Order, which provides for such appointment immediately after the CCAA proceedings terminate.

37. However, even apart from the terms of the Initial Order, it is apparent that Global has met the usual test for the appointment of a Receiver.

38. Section 243(1) and (1.1) of the BIA provide for the appointment of a receiver when it is "just and convenient" to do so:

> Court may appoint receiver
>
> **243.** (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.

Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3, as amended; Schedule "B"

39. Section 101 of the *Courts of Justice Act*, R.S.O. 1990, C. C-43, as amended, similarly provides for the appointment of a receiver when it is "just or convenient" to do so:

Injunctions and receivers

101.(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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2)An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Courts of Justice Act, R.S.O. 1990, c. C-43, as amended; Schedule "B", s. 101.

40. It is clear in the circumstances that Global is a secured creditor entitled to make an application under Section 243 of the BIA.

41. The Receiver's powers that Global requests are within the scope of those listed in Section 243 of the BIA and are consistent with the powers generally granted by the Court.

42. Global has sent the NITES required under section 244 of the BIA, which NITES expired prior to the commencement of the CCAA proceedings.

43. As paragraph 19 of the Newbould Endorsement concluded, there is no doubt that the Respondents are "insolvent persons" under the BIA. They sought protection under the CCAA. They have ceased paying their current obligations as they generally become

due. The aggregate value of the Respondents' property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient, to enable payment of all of the Respondents' obligations due and accruing.

Exhibit "M" of the Lewis Affidavit, Motion Record, Tab 2 (m)

44. The only remaining question is whether the appointment of a receiver is just and/or convenient in the circumstances. Authorities on this matter suggest that factors to consider in the determination of whether it is just and/or convenient to appoint a receiver include

(a) the fact that the creditor has the right to appoint a receiver under its loan or security documents;

(b) the effect on the parties of appointing the receiver. This includes potential costs and the likelihood of maximizing return on and preserving the subject property; and

(c) the goal of facilitating the duties of the receiver.

Business Development Bank of Canada v. Pine Tree Resorts Inc., 2003 ONSC 1911 at para. 22; Book of Authorities, Tab 1

Houlden, Lloyd W., Morawetz, Geoffrey B., and Sarra, Janis P. The 2013 – 2014 Annotated Bankruptcy and Insolvency Act. (Toronto: Carswell, 2013) at 1018, Book of Authorities, Tab 4

45. The facts of the current case fall squarely within the types of circumstances where it would be just and/or convenient to appoint a receiver.

(A) Global has the Right to appoint a Receiver under its Security Agreements

46. Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties.

> *Bank of Montreal v. Carnival National Leasing Limited and Carnival Automobiles Limited*, 2011 ONSC 1007, [2011] O.J. No. 671 at para. 27 (referring to Blair J. in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 at paras. 11 and 12), Book of Authorities, Tab 2
>
> *Canadian Tire Corp. v. Healy*, 2011 ONSC 4616, [2011] O.J. No. 34989 at para. 18, Book of Authorities, Tab 3

47. The Respondents have defaulted on their obligations. Such defaults are continuing and have not been remedied. This has given rise to Global's rights under the Security Documents to appoint a receiver by instrument in writing and to institute court proceedings for the appointment of a receiver.

48. Global is not requesting an extraordinary equitable remedy; it is simply seeking to enforce an express term of relief provided for in the Security Documents.

(B) The Balance of Convenience: The Effect of the Order on the Parties

49. No legitimate rights of any party are prejudiced by the appointment of a receiver. The overwhelming economic interest at stake in a receivership is that of Global, the

primary secured creditor. The Respondents have irrevocably consented to the form of Receivership Order sought. All interested parties before this Court have consented to and support the application.

50. Given the current state of the business and assets and the Respondents' inability to complete a sale through the SISP or repay the indebtedness by January 31, 2014, a court-appointed Receiver is necessary to take control of the assets of the Debtors' business and to continue the ongoing sale process.

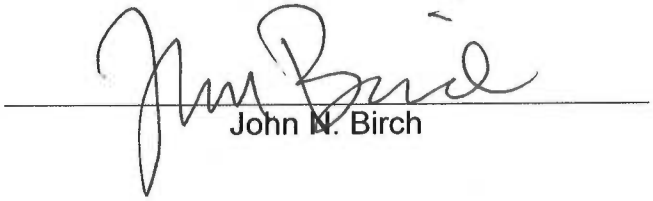
(C) Goal of Facilitating the Duties of the Receiver

51. Appointing Duff & Phelps is the best way to facilitate the work and duties of the Receiver because Duff & Phelps, in its current role as Monitor, is familiar with the Respondents' business and operations.

PART V - RELIEF REQUESTED

52. Global seeks a receivership order in the form found at Tab 3 of the Application Record. The form of this order is substantially the same as the form of order appended as a schedule to the Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of January, 2014.



John N. Birch

CASSELS BROCK & BLACKWELL LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

John N. Birch LSUC #: 38968U
Tel: 416.860.5225
Fax: 416.640.3057
jbirch@casselsbrock.com

Joseph J. Bellissimo LSUC #: 46555R
Tel: 416.860.6572
Fax: 416.642.7150
jbelissimo@casselsbrock.com

Lawyers for the applicant

SCHEDULE "A"

LIST OF AUTHORITIES

Authorities

Business Development Bank of Canada v. Pine Tree Resorts Inc., 2003 ONSC (S.C.J. [Commercial List])

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

Canadian Tire Corp. v. Healy, 2011 ONSC 4616, [2011] O.J. No. 34989 (S.C.J. [Commercial List])

Houlden, Lloyd W., Morawetz, Geoffrey B., and Sarra, Janis P. *The 2013 -2014 Annotated Bankruptcy and Insolvency Act.* (Toronto: Carswell, 2013-2014)

SCHEDULE "B"

LEGISLATION

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

243(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 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 sued 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 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.

Courts of Justice Act, R.S.O. 1990, C. C-43, as amended

101 (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.

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

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Court File No. CV-14-10417-00CL

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PROCEEDING COMMENCED AT
TORONTO

FACTUM

Cassels Brock & Blackwell LLP
2100 Scotia Plaza
40 King Street West
Toronto, ON M5H 3C2

John N. Birch LSUC #: 38968U
Tel: 416.860.5225
Fax: 416.640.3057
jbirch@casselsbrock.com

Joseph J. Bellissimo LSUC #: 46555R
Tel: 416.860.6572
Fax: 416.642.7150
jbelissimo@casselsbrock.com

Lawyers for the applicant