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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

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

MOVING PARTIES' MOTION RECORD

November 4, 2016

LEVINE, SHERKIN, BOUSSIDAN
A Professional Corporation of Barristers
23 Lesmill Road, Suite 300
Toronto, ON M3B 3P6

Mitchell Wine (LSUC# 23941V)

Tel: (416) 224-2400
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Lawyers for the Moving Parties
Sarbjit Singh et al.

INDEX

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NOTICE OF MOTION

THE MOVING PARTIES will make a motion before the Honourable Justice Hainey on Wednesday, November 9th, 2016 at 10:00 a.m. or soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. Abridging the time for service of this Notice of Motion;
2. An Order lifting the stay of the 19 actions set out in Schedule "**A**" to this Notice of Motion as ordered by this Court by Order dated November 2, 2016;
3. An Order appointing Levine Sherkin Boussidan P.C. as counsel for the condominium owners of suites 1202, 1402 and 2305 in the Trump International Hotel and Tower Toronto and an Order ordering the Applicant to set aside a reasonable portion of the funds set aside for legal counsel for condominium unit owners for Levine Sherkin Boussidan P.C.
4. Costs of these proceedings on a partial indemnity basis; and
5. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THIS MOTION ARE:

1. On October 13, 2016 the Court of Appeal issued its reasons in *Singh/Lee v. Talon International Inc. et al.* wherein the Court ordered rescission of the Agreement of Purchase and Sale (the "**APS**") of the Appellant Sarbjit Singh ("**Singh**") and damages to be paid by Talon International Inc. ("**Talon**") to the Appellant Se Na Lee ("**Lee**").
2. Both Singh and Lee were purchasers of hotel condominium units (the "**Hotel Units**") in the hotel portion of the Trump International Hotel and Tower Toronto (the "**Trump Tower**").
3. Singh's case and Lee's case were "test" cases for 20 other actions commenced against the same Defendants. Singh did not close his transaction to purchase his Hotel Unit. Lee

did. 18 of the other actions involve Plaintiffs who did not close their transactions. Two involve Plaintiffs who did take title to their Hotel Units.

4. The Court of Appeal found that the Respondent Talon International Inc. ("**Talon**") had made misrepresentations to the Appellants entitling them to relief.

19 Actions Seeking the Return of Deposits

5. With respect to Singh, the Court not only ordered that his APS be rescinded but it also made a finding of the total amount of damages owing to him, $248,064.58, of which $173,400 was the deposit Singh had provided Talon when signing the APS.
6. The 19 actions with Plaintiffs similarly situated to Singh also seek the return of deposits. The deposits are not Talon's property. They are being held in trust by Talon's law firm, Harris Sheaffer.
7. In addition to Singh's deposit, the other 19 actions involve deposits of $4,843,646.32.
8. As a result of the Court of Appeal decision, Singh may demand the return of his $173,400 deposit immediately.
9. The other Plaintiffs in the 19 other actions may make a similar demand once judgment has been entered on their behalf.
10. The deposits are no longer being held by Harris, Sheaffer. They were released to Talon. Under the provisions of the *Condominium Act, 1998*[1] a developer may receive funds held in trust if it arranges for a policy of insurance to insure its obligations with respect to the trust monies.
11. Talon did put such a policy of insurance in place with Lombard Insurance (now Northridge Insurance).

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[1] S.O. 1998, c. 19

12. Counsel for Northridge has confirmed that if a Court judgment is issued for the repayment by Talon of a deposit for a Hotel Unit and the deposit is no longer being held by Harris Sheaffer in trust, Northridge will pay the amount owing.
13. Currently, neither the receiver appointed by this Court on November 2nd nor the 19 Plaintiffs (other than Singh) who seek the return of their deposits are entitled to the deposits.
14. A determination by the Court is required before entitlement to the deposit funds may be decided. While the Court has made its determination with respect to Singh, it has not done so with respect to the Plaintiffs in the other 19 actions.
15. It is in the receiver's interest for that determination to be made to determine whether this substantial amount of money forms part of Talon's estate.
16. The Plaintiffs wish to schedule motions for judgment expeditiously to determine this issue. Once determined, appeals, if any, may proceed immediately.
17. Counsel submits a Court Order to lift the stay with respect to these 19 actions will not impede the receiver in selling the Trump Hotel. Different counsel are dealing with these actions and the receivership. As well, the current officers at Talon needed for the sale of the Trump Hotel are not the same individuals whose evidence may be required to deal with these actions.
18. Talon has had most of these Plaintiffs' money for well over ten years. For the most part, the Plaintiffs are not wealthy people and the early return of their deposits is important to them.

19. If the Plaintiffs can obtain their judgments from the Court, according to the provisions of the Lombard/Northridge policy and the Condominium Act, 1998, the Plaintiffs will make an immediate demand for payment from Northridge.

Three Actions of Current Unit Owners

20. Three of the Plaintiffs' actions concern Hotel Units currently owned by Plaintiffs.
21. The Applicant has set aside $100,000 in funding for all Trump Tower unit owners to have one firm, Chaitons, represent them. The three Hotel Unit owners who took action against Talon wish to have their current counsel continue to represent them.
22. The Applicant agrees to this carve-out of representation but does not agree that counsel for these three Hotel Unit owners should receive a reasonable share of the funding set aside for counsel.
23. These owners have been through a difficult few years enforcing their rights against Talon (as opposed to the other 47 Hotel Unit owners who chose not to commence action against Talon).
24. It is reasonable that they would want to be represented by counsel who have been working with them for several years and who have detailed knowledge of the facts surrounding the Trump Hotel. This knowledge will also benefit the receiver and the Court.
25. If it is appropriate that current counsel be able to represent these Hotel Unit owners, these owners also feel it is appropriate they be treated similarly to other Hotel Unit owners and have counsel's fees paid as part of the process.

26. It is also possible that the position of the three Hotel Unit owners who commenced litigation may be different on some issues than the position of the other 47 unit owners. In that case, it is appropriate that the two groups have separate representation.

27. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE RELIED UPON:

1. Affidavit of Kevin D. Sherkin sworn November 4, 2016.
2. Such further and other evidence as counsel may advise and this Honourable Court may permit.

November 4, 2016

LEVINE, SHERKIN, BOUSSIDAN
A Professional Corporation of Barristers
23 Lesmill Road, Suite 300
Toronto, ON M3B 3P6

MITCHELL WINE - LSUC #23941V

Tel: (416) 224-2400
Fax: (416) 224-2408
Lawyers for the Moving Party

TO: THE ATTACHED SERVICE LIST

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN:

JCF CAPITAL ULC

Applicants

- 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

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SERVICE LIST AS OF NOVEMBER 1, 2016

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PROVINCE OF NEW BRUNSWICK Legal Services Branch Office of the Attorney General Province of New Brunswick PO Box 6000, Chancery Place 675 King Street Fredericton, NB E3B 5H1 Attention: Philippe Thériault Tel: 506-453-3275 Email: philippe.theriault2@gnb.ca	

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WITH A COURTESY COPY TO:

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	SCHEDULE "A"	
1.	Singh	CV-12-469042
2.	Ajmeri	CV-12-470040
3.	Ashraf	CV-12-469267
4.	Chung	CV-12-468931
5.	Crockett	CV-12-469375
6.	Cubuk	CV-12-470256
7.	Fuhrmann	CV-12-469918
8.	Hong	CV-12-469021
9.	Jari	CV-12-469376
10.	Jiwa/Cousens	CV-12-470134
11.	I. Kim	CV-12-468175
12.	P. Kim	CV-12-472664
13.	M. Park	CV-12-468175
14.	NH. Park	CV-12-468175
15.	Patel (NY)	CV-13-487596
16.	Radev	CV-12-469916
17.	Rainbow Pties.	CV-12-469929
18.	J. Kim	CV-15-521436
19.	Shah/Patel	CV-14-505147

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PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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Lawyers for the Moving Parties, Sarbjit J. Singh et al

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AFFIDAVIT OF KEVIN D. SHERKIN

I, KEVIN D. SHERKIN, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY as follows:

1. I am one of the lawyers for the Appellants in the recently decided unanimous decision in the Court of Appeal wherein the Court ordered rescission of the Agreement of Purchase and Sale (the "**APS**") of the Appellant Sarbjit Singh ("**Singh**") and damages to be paid to the Appellant Se Na Lee ("**Lee**"). I, therefore, have knowledge of the matters to which I herein depose.

2. As confirmed by Perell, J. in the Court below, Singh's case and Lee's case were "test" cases by agreement of counsel.[1] There are 18 other actions with Plaintiffs similarly situated to Singh. There are two other actions with Plaintiffs similarly situated to Lee. All actions combined concern 27 Hotel Units in the Trump Hotel.
3. The Court of Appeal found that the Respondent Talon International Inc. ("**Talon**") had made misrepresentations to the Appellants entitling them to relief. The Reasons of the Court of Appeal are attached as Exhibit "**A**" to my Affidavit.
4. With respect to Singh, the Court not only ordered that his APS be rescinded but it also made a finding of the total amount of damages owing to him, $248,064.58, of which $173,400 was the deposit Singh had provided Talon when signing the APS.[2]

Overview

5. The following facts were taken from the Court of Appeal decision.
6. The actions concern the sale of hotel condominium units (the "**Hotel Units**") in the hotel portion (the "**Trump Hotel**") of the Trump International Hotel and Tower Toronto (the "**Trump Tower**").
7. Talon was the developer of the Trump Tower.
8. The Hotel Units were to be part of a pool of hotel rooms to be rented to the public under a program (the "**Reservation Program**") offered to purchasers and managed by one of the Trump Defendants in the litigation.
9. The availability of the Reservation Program most likely made the sale of the Hotel Units a sale of securities governed by the provisions of the Ontario *Securities Act*, R.S.O. 1990, c. S-5 (the "**Act**"). This required Talon to register with the Ontario Securities

[1] 2015 ONSC 4461 (CanLII), para. 2
[2] Reasons of the Court of Appeal, Exhibit "A", para. 62

Commission (the "**OSC**") as a dealer (section 25) and file and distribute a prospectus (section 53). Talon sought an exemption from these provisions under section 74 of the Act.

10. In seeking its exemption, Talon made a number of representations to the OSC. Two key representations were that the Hotel Units would not "be marketed or structured as investments for profit or gain" and Talon would not provide "rental or cash flow forecasts" or "financial projections" to prospective purchasers. Based upon Talon's representations, the OSC granted the exemption on May 25, 2004 (the "**Ruling**").

11. The two representations made by Talon were incorporated in the Ruling at paragraphs 23, 24, 28 and 29.

12. Sales of Hotel Units commenced after the Ruling was issued. Notwithstanding the Ruling and the representations made to the OSC, Talon gave prospective purchasers forecasts/projections with the heading Estimated Return on Investment (the "**Estimates**"). The Estimates set out the revenue, expenses, net income and return on investment the Hotel Units would earn.

13. Singh and Lee purchased Hotel Units in 2006 and 2007 respectively. They relied heavily on the information contained in the Estimates in making their purchase decision.

14. Singh and Lee were given interim occupancy of their Hotel Units in February, 2012. Both lost significant amounts of money. The period of interim occupancy lasted from February 24th to December 12th, 2012. All purchasers who took interim occupancy lost significant amounts of money.

15. Singh (and the Plaintiffs in the other 18 similar actions) did not close their transactions in December of 2012. As a result of Talon's breach of the Ruling and misrepresentations,

they claimed rescission of their APS', return of their deposits and other damages suffered as a result of their purchase (including losses suffered during interim occupancy).

16. Lee (and the Plaintiffs in the other two similar actions) did close their transactions in or after December 2012. They also sued for rescission of their APS', return of their deposits and other damages suffered as a result of their purchase (including losses suffered during interim occupancy). Given that Lee had closed her transaction, the Court of Appeal did not rescind the APS' and ordered that damages be paid for her losses.

17. The Court of Appeal's held as follows:

    a) By handing out the Estimates, Talon provided forecasts and projections contrary to its representations at paragraphs 24 and 28 of the Ruling;[3]

    b) In using the Estimates to sell the Hotel Units, Talon emphasized the profit and gain purchasers would earn contrary to its representations at paragraphs 23 and 29 of the Ruling;[4]

    c) All purchasers, including Singh and Lee, saw the Estimates;[5]

    d) Singh and Lee relied reasonably upon the Estimates;[6] and

    e) The Estimates were so poorly prepared that they constituted a negligent misrepresentation. In fact, the finding in the Court below (which was not appealed) was that the Estimates were "deceptive" documents.[7]

18. Madam Justice Janet Wilson has been case managing this litigation since 2013. An appointment had been scheduled to meet with her on November 2nd to discuss the other 20 actions not decided by the Court of Appeal. It was hoped that the Court of Appeal

[3] Reasons of the Court of Appeal, Exhibit "A", paras. 123, 127
[4] Reasons of the Court of Appeal, Exhibit "A", paras. 123, 125-6, 128
[5] Reasons of Perell, J., paras. 59, 61 (not appealed)
[6] Reasons of the Court of Appeal, Exhibit "A", paras. 83, 93, 108
[7] Reasons of the Court of Appeal, Exhibit "A", para. 81

decision on the "test" cases would lead Talon to concede the decision applied to the other cases. If not, counsel for the Plaintiffs planned to request that immediate motions for judgment be scheduled.

19. In light of this Court's interim stay Order on November 1st, Madam Justice Wilson postponed the case conference to await the decision of this Court with respect to the stays of the actions.

20. At present, the damages portion of any judgments against Talon will have to await the efforts of the receiver to determine if Talon will have any assets to satisfy those judgments. However, the deposits claimed in the 19 actions are not Talon's property. They are being held in trust by Talon's law firm, Harris Sheaffer.

21. In addition to Singh's deposit of $173,400, the other 19 actions involve deposits of $4,843,646.32. Attached as Exhibit "**B**" is a list of all deposits. These amounts have been confirmed as the correct amounts held in trust by Harris Sheaffer.

22. As a result of the Court of Appeal decision, Singh is entitled to the return of his $173,400 deposit immediately.

23. The other Plaintiffs in the 19 other actions may make a similar demand once judgment has been entered on their behalf.

24. From information received from Harris Sheaffer, it appears that most of the deposits held in their trust account in the 19 actions at issue herein were substantially released and paid to Talon (see Exhibit "**B**").

25. Talon did put such a policy of insurance in place with Lombard Insurance (now Northridge Insurance). Each of our clients is an insured under the policy.

26. Under the provisions of the *Condominium Act, 1998*[8] a developer may receive funds held in trust if it arranges for a policy of insurance to insure its obligations with respect to the trust monies. Section 21 of Regulation 48/01 of the *Condominium Act, 1998* states with respect to insurance policies:

> 21. (2) The trustee or the declarant's solicitor, as the case may be, shall hold the policy in trust for the beneficiary until the insurer is no longer liable under it in accordance with subsection (8). O. Reg. 48/01, s. 21 (2).
>
> .....
>
> (7) An insurer that receives written notice of a claim under subsection (6) shall pay the beneficiary within 60 days after the right of the beneficiary to payment under the policy has been established. O. Reg. 48/01, s. 21 (7).

22. I am advised by Mitchell Wine and believe that he had a telephone conversation with counsel for Northridge, Dom Michaud, on October 17, 2016. During the call Mr. Michaud confirmed that if a Court judgment is issued for the repayment by Talon of a deposit for a Hotel Unit and the deposit is no longer being held by Harris Sheaffer in trust, Northridge will pay the amount owing.

Position of the Plaintiffs in the 19 Actions Who Claim the Return of their Deposits

23. Currently, neither the receiver appointed by this Court on November 2nd nor the 19 Plaintiffs (other than Singh) who seek the return of their deposits are entitled to the deposits.

24. A Court Order of rescission of the APS' is required before entitlement to the deposit funds may be decided. While the Court has made its determination with respect to Singh, it has not done so with respect to the Plaintiffs in the other 19 actions.

---

[8] S.O. 1998, c. 19

25. It is certainly in the Plaintiffs' interest for that determination to be made but the receiver should also want to know whether this substantial amount of money forms part of Talon's estate for it to administer.
26. Unless Talon concedes the Singh decision in the Court of Appeal is binding with respect to the other 19 actions, Justice Wilson is prepared to schedule motions for judgment expeditiously to determine this issue.
27. Once determined, appeals, if any, may proceed immediately.
28. In our view, a Court Order to lift the stay with respect to these 19 actions will not impede the receiver in selling the Trump Hotel. Different counsel are dealing with these actions and the receivership. As well, the current officers at Talon needed for the sale of the Trump Hotel are not the same individuals whose evidence may be required to deal with these actions.
29. As can be seen from the list of deposits in Exhibit "**B**", Talon has had most of these Plaintiffs' money for well over ten years. For the most part, the Plaintiffs are not wealthy people and the early return of their deposits is important to them. They have been waiting a long time for the return of their money.
30. If the Plaintiffs can obtain their judgments from the Court, according to the provisions of the Lombard/Northridge policy and the *Condominium Act, 1998*, in my view, the Plaintiffs may make an immediate demand for payment from Northridge.

Position of the Plaintiffs in the Three Actions Who Closed their Transactions

31. As there are no deposit funds available to these Plaintiffs, there is no objection to a continued stay of their actions.

32. However, the Applicant has set aside funding for all Hotel Unit owners to have separate representation by counsel. These owners wish to have their current counsel continue to represent them.
33. The Applicant agrees to this carve-out of representation but does not agree that counsel for these three Hotel Unit owners should receive a reasonable share of the funding set aside for counsel.
34. These owners have been through a difficult few years enforcing their rights against Talon (as opposed to the other 47 Hotel Unit owners who chose not to commence action against Talon).
35. It is reasonable that they would want to be represented by counsel who have been working with them for several years and who have detailed knowledge of the facts surrounding the Trump Hotel. This knowledge will also benefit the receiver and the Court.
36. If it is appropriate that current counsel be able to represent these Hotel Unit owners, these owners also feel it is appropriate they be treated similarly to other Hotel Unit owners and have counsel's fees paid as part of the process.
37. It is also possible that the position of the three Hotel Unit owners who commenced litigation may be different on some issues than the position of the other 47 unit owners. In that case, it is appropriate that the two groups have separate representation.
38. This Affidavit is sworn in support of the motions brought by these Moving Parties and for no improper purpose.

SWORN BEFORE ME in the City of Toronto, in the Province of Ontario on November 4, 2016

A Commissioner for Taking Affidavits
Mitchell Wine

KEVIN D. SHERKIN

This **Exhibit "A"** referred to
in the Affidavit of Kevin D. Sherkin
sworn before me this 4th
day of November, 2016

A Commissioner for taking Affidavits
Mitchell Wine

COURT OF APPEAL FOR ONTARIO

CITATION: Singh v. Trump, 2016 ONCA 747
DATE: 20161013
DOCKET: C60787

Rouleau, van Rensburg and Benotto JJ.A.

BETWEEN

Sarbjit Singh

Plaintiff (Appellant)

and

Donald John Trump Sr., Trump Toronto Hotel Management Corp., Trump Marks Toronto LP, Talon International Inc., Talon International Development Inc., Val Levitan, Alex Shnaider and Toronto Standard Condominium Corporation No. 2267

Defendants (Respondents)

AND BETWEEN

Se Na Lee

Plaintiff (Appellant)

and

Donald John Trump Sr., Trump Toronto Hotel Management Corp., Trump Marks Toronto LP, Talon International Inc., Talon International Development Inc., Val Levitan, Alex Shnaider and Toronto Standard Condominium Corporation No. 2267

Defendants (Respondents)

Mitchell Wine and Kevin D. Sherkin, for the appellants

Symon Zucker, Melvyn L. Solmon and Nancy J. Tourgis, for the respondents

Heard: June 23, 2016

On appeal from the orders of Justice Paul M. Perell of the Ontario Superior Court of Justice, dated July 10, 2015, with reasons reported at 2015 ONSC 4461, 47 B.L.R. (5th) 269.

Rouleau J.A.:

[1] In the mid-2000s, Sarbjit Singh and Se Na Lee each bought a Hotel Unit in the Trump International Hotel, a five-star building to be built in Toronto's financial district. Mr. Singh and Mrs. Lee were both middle-class residents of the Greater Toronto Area and had no intention of occupying the Hotel Units themselves. Instead, they bought the units as investments, expecting that they would profit by participating in the hotel's "Reservation Program".

[2] Under the Reservation Program, owners of individual Hotel Units could place their units in a common pool of rooms to be rented out at luxury rates by the hotel's operator. Their expectation was that high occupancy and rental rates at the one-of-a-kind Trump International Hotel would provide healthy returns, even after deducting monthly expenses such as property tax, mortgage payments and housekeeping.

[3] Neither Mr. Singh nor Mrs. Lee were sophisticated investors, in real estate or otherwise. Both had to borrow heavily from family to finance their purchases.

Both believed that buying into the Trump project would be an excellent investment. And in time, both came to realize that they were wrong.

[4] In separate but similar actions, Mr. Singh and Mrs. Lee sued for rescission and damages, claiming they were misled by marketing materials that projected impressive profit margins for purchasers who participated in the Reservation Program. They brought motions for partial summary judgment against the respondents Talon International Inc. ("Talon"), Donald John Trump Sr. ("Trump"), Val Levitan and Alex Shnaider. The motions judge dismissed the motions and, in addition, dismissed the claims against Trump, Levitan and Shnaider in their entirety. This is an appeal from that decision.

A. BACKGROUND

[5] The motions judge exhaustively reviewed the factual background in his lengthy reasons. I will focus on the details necessary to decide the appeal.

(1) The Trump International Hotel project

[6] In the early 2000s, Talon International Development Inc. and its parent Talon launched plans to develop a luxury hotel and condominium in downtown Toronto. At that time, Alex Shnaider was a Director and the Chairman of Talon. Val Levitan was a Director and the Chief Executive Officer and President of Talon. Mr. Levitan had no previous experience in construction, hotel management, or operations.

[7] Talon joined forces on the project with Donald J. Trump Sr., the New York-based developer, reality television personality and now presidential candidate. It entered into a licence agreement with Trump Marks Toronto LP to use the Trump name and trademarks for the building, which would be called Trump International Hotel & Tower. Talon also entered into an agreement with Trump Toronto Hotel Management Corp. to operate the Trump International Hotel.

[8] The Trump International Hotel & Tower was intended to be, and was ultimately built as, a 70-storey mixed-use complex at the corner of Bay and Adelaide Streets in Toronto's downtown core. The building would contain two condominiums, one composed of residential condominium units and the other composed of full-service luxury hotel guestroom condominium units. Talon proposed to market and sell both types of units to the general public.

[9] Persons who bought Hotel Units would have to participate in a maintenance and operation program to cover expenses related to the upkeep of the hotel. Crucially for purposes of these actions, they would also be given the option of participating in the hotel's Reservation Program. Under the Reservation Program, the hotel would rent the purchasers' units out through its own system when the purchasers themselves or their guests were not occupying them. After the hotel deducted the expenses related to the Reservation Program, it would remit the rental income to the Hotel Unit purchasers. The Hotel Unit purchasers

would use the profits from the room rentals to offset the carrying costs of the condominiums and to generate income.

(2) The Ontario Securities Commission ruling

[10] In 2004, Talon's then-lawyers wrote to the Ontario Securities Commission ("OSC") seeking a ruling under s. 74(1) of the *Securities Act*, R.S.O. 1990, c. S.5, which would exempt the sale of the Hotel Units from the dealer registration and prospectus requirements of ss. 25 and 53 of the Act.

[11] Talon's lawyers sought this exemption because, under s. 1(1) of the *Securities Act*, the definition of "security" includes "any investment contract". Without conceding the point, Talon's lawyers explained in its application for the exemption that there was "a risk that a Hotel Unit could be considered an investment contract" for purposes of the Act. If so, without an exemption the units could not be sold or resold by real estate brokers, and any sale or resale would have to comply with the dealer registration and prospectus requirements of the Act.

[12] In other words, Talon wanted the Hotel Units to be treated as real estate, not as securities.

[13] In their application letter to the OSC, Talon's lawyers correctly explained that the test for what constitutes an "investment contract"—which makes it a

"security"—is contextual. Generally, an investment contract is found to exist where:

(a) a person invests his or her money;

(b) in a common enterprise;

(c) with the expectation of profits;

(d) solely, primarily or significantly attributable to the efforts of others.

See *SEC v. W.J. Howey Co.* (1946), 328 U.S. 293; *State Commissioner of Securities v. Hawaii Market Centre Inc.* (1971), 485P 2d 105; *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112.

[14] Talon's lawyers acknowledged that, upon applying these criteria, the Hotel Units "could be considered investment contracts because they must provide accommodation for gain or profit by being part of a Reservation Program". "Notwithstanding this interpretation," the lawyers went on, Talon should be exempt from the registration and prospectus requirements of the Act "because of the way in which the Hotel Units will be structured."

[15] In particular, Talon's lawyers represented that the units would "not be marketed or structured as investments for profit or gain". They would be "marketed as luxury hotel condominium units entailing exclusive occupancy rights, coupled with an opportunity to defray related ownership expenses in

connection with periods of non-occupancy through voluntary participation in the Reservation Program." Neither Talon nor the sales agents would "make any representation that any Hotel Unit will be able to be rented at any particular rate, or for any particular period of time".

[16] Talon's lawyers explained that:

> In keeping with this marketing approach of emphasizing the predominance of the luxury transient hotel occupancy features of Hotel Units, prospective purchasers of Hotel Units will not be provided with rental or cash flow forecasts or guarantees or any other form of financial projection or commitment on the part of [Talon].

[17] In a ruling dated May 25, 2004 (the "OSC Ruling"), the OSC granted Talon the exemption it requested. The key passages state:

> UPON the application of Talon International Inc. (the "Applicant") to the Ontario Securities Commission (the "Commission") for a ruling pursuant to s. 74(1) of the Act (the "Application") that the sale by the Applicant of hotel condominium units within a certain building to be known as Trump International Hotel & Tower ... will not be subject to sections 25 and 53 of the Act;
>
> AND UPON considering the Application and the recommendation of the staff of the Commission;
>
> AND UPON the Applicant having represented to the Commission as follows:
>
> ...
>
> 23. Hotel Units will be marketed primarily as first-class luxury hotel condominium units to be used for short-term transient hotel occupancy or for longer term

> occupancy. The Reservation Program is merely a secondary feature which offers participating purchasers a means to defray related ownership expenses, as opposed to an investment vehicle for making a gain or profit.
>
> 24. Prospective purchasers of Hotel Units will not be provided with rental or cash flow forecasts or guarantees or any other form of financial projection or commitment on the part of the Applicant.
>
> ...
>
> 29. The economic value of a luxury hotel condominium of this type will be attributable primarily to its real estate component because Hotel Units will be marketed as luxury transient occupancy hotel condominium properties and will not be offered and sold with an emphasis on the expected economic benefits of the Reservation Program and the Reservation Program Agreement. [Emphasis added.]

[18] The ruling was clear: Talon was not to market the Hotel Units by emphasizing that prospective purchasers could profit through the Reservation Program. The Reservation Program was "merely secondary" to the primary marketing pitch that prospective purchasers could own a luxury Hotel Unit for their personal use. Any participation in the voluntary Reservation Program would simply allow purchasers to "defray" their expenses. And Talon was prohibited from providing prospective purchasers with "forecasts or guarantees or any other form of financial projection or commitment" related to the Reservation Program.

[19] The OSC Ruling also required that before entering into an agreement of purchase and sale with a prospective purchaser, Talon would deliver an offering

memorandum in the form of a disclosure statement required under the *Condominium Act, 1998*, S.O. 1998, c. 19. This Disclosure Document would include information about "the risk factors that make the offering of Hotel Units a risk or speculation" and explain that prospective purchasers would have a statutory right of action for misrepresentation in the offering memorandum under s. 130.1 of the *Securities Act*. Prospective purchasers would also be informed of their right under the *Condominium Act* to rescind an agreement of purchase and sale within ten days of receiving the Disclosure Document or a material amendment to the Disclosure Document.

(3) Marketing of the Hotel Units and the Estimates

[20] Following the OSC Ruling, Talon began marketing the Hotel Units. It set up a sales centre on the building site and put ads in newspapers, magazines and other media. Visitors to the sales centre and to the Trump Tower website could watch a PowerPoint presentation that opened with a smiling Mr. Trump proclaiming: "It's going to be the most elegant building there is. There won't be a building to even compete with it. We're going to do something very special in Toronto."

[21] Adina Zak was one of Talon's sales representatives who met with prospective purchasers at the sales centre. She deposed, and the motions judge accepted, that the Hotel Units were sold on the basis of the hotel's location, the

fact that it was a turn-key operation, and on the strength of the Trump brand. The pitch was successful: of the 261 available Hotel Units, contracts for sale were entered into for 206 units.

[22] Ms. Zak denied that the Hotel Units were marketed as investments but the motions judge rejected that evidence. He found as a fact that the Hotel Units "were sold as an investment with a potential for capital gain and with ongoing income gains that would more than cover expenses." The motions judge explained, at para. 59:

> I do not accept Ms. Zak's evidence that that she never spoke to prospective purchasers about the subject of revenues or mortgages, nor that she did not ever sell the Hotel Units based upon the room rates or occupancy rates. She said she did not discuss with the purchasers the income they might earn or the estimated return on investment, but I do not believe her. These matters were all discussed with potential purchasers. [Emphasis added.]

[23] The plaintiffs Mr. Singh and Mrs. Lee both visited the sales centre and met with Ms. Zak in December 2006 and April 2007, respectively. Mr. Singh had heard about the Trump project from a friend and Mrs. Lee's husband Andrew had seen an ad for it in the newspaper.

[24] The cornerstone of the plaintiffs' claims is a document that Ms. Zak presented to each of them when they met with her to discuss buying a unit in the Trump International Hotel: the "Estimated Return on Investment". I will refer to this document as "the Estimates" in the balance of these reasons.

[25] As the motions judge explained, the Trump International Hotel marketing materials, including the PowerPoint presentation, showed four different versions of the Estimates reflecting various expenses and revenues scenarios from four different types of hotel suites. Ms. Zak also prepared customized versions of the Estimates for prospective purchasers who visited the sales centre based on the type of unit they were interested in purchasing.

[26] The Estimates contained in the PowerPoint presentation set out different sample units. The units were described in the PowerPoint presentation with the following information:

- the purchase price of the unit, ranging from $784,000 to $843,000;
- monthly common expense fees, ranging from $1,827 to $2,081;
- property taxes, estimated to be at 2% of the purchase price;
- mortgage interest, estimated to be at a 6% interest rate;
- a daily occupancy (housekeeping) fee of $60;
- the average occupancy rate of the hotel, ranging from 55% to 75%;
- the estimated daily room rental rate, ranging from $550 to $600;
- the yearly return earned by an investor in the hotel unit, which, depending on the unit and occupancy rate range from $18,144.41 to $63,627.70;
- a bottom line, bolded annual "return on cash invested", ranging from 6.46% to 21.57%; and

- the percentage amount of the purchase price to be mortgaged.

[27] The Estimates had two disclaimers. At the top of the page in capital letters it read: "FOR DISCUSSION PURPOSES ONLY". At the bottom of the page in bold, it read: "**Please note: This is not a guaranteed investment program**".

[28] Mr. Singh's Estimate looked like this:

ESTIMATED RETURN ON INVESTMENT

December 12, 2006

FOR DISCUSSION PURPOSES ONLY

Please note: All figures are in Canadian Dollars.

Suite	2202
Suite Type	1C+Studio
Purchase Price	$804,000.00
Monthly Common Expense Fee	$1,825.00
Estimated Daily Rental Rate	$550.00
Daily Occupancy Fee (Housekeeping)	$60.00
Amount of Purchase Price to be Financed	75%

Based on an Occupancy Rate of:	75%	65%	55%
Yearly Expenses			
Common Expense Fees	$21,900.00	$21,900.00	$21,900.00
Occupancy Fees (Housekeeping)	$16,425.00	$14,235.00	$12,045.00
Estimated Property Taxes (2% per annum)	$16,080.00	$16,080.00	$16,080.00
Mortgage (6% interest) P+I	$46,621.55	$46,621.55	$46,621.55
Total Expenses	$101,026.55	$98,836.55	$96,646.55
Yearly Revenue			
Revenue from Suite Rental	$150,562.50	$130,487.50	$110,412.50
Summary			
Yearly Return (Revenue - Expenses)	$49,535.95	$31,650.95	$13,765.95
Cash Invested	$201,000.00	$201,000.00	$201,000.00
Return on Cash Invested	24.64%	15.75%	6.85%

Please note: This is not a guaranteed investment program.

[29] When Mr. Singh asked Ms. Zak if the $550 per night room rate was high, she said no because the hotel was a Trump property and would be a five-star hotel. When he asked about the occupancy rates of between 55% and 75%, she replied that since the Trump Hotel would be new and the "buzz" about it would be great, the hotel would be fully occupied.

[30] Mrs. Lee's Estimate was similarly promising. Based on a unit which cost $857,000 and would rent out at $600, Mrs. Lee's annual "return on cash invested" ranged from 7.75% at a 55% occupancy rate to 20.90% at a 75% occupancy rate. Her Estimate looked like this:

ESTIMATED RETURN ON INVESTMENT April 10, 2007

FOR DISCUSSION PURPOSES ONLY

Please note: All figures are in Canadian Dollars.

Suite	[redacted]
Suite Type	[redacted]
Purchase Price	[redacted]
Monthly Common Expense Fee	[redacted]
Estimated Daily Rental Rate	[redacted]
Daily Occupancy Fee (Housekeeping)	[redacted]
Amount of Purchase Price to be Financed	[redacted]

$ 171,400 Total
now $85,700
Oct 07 42,850
April 08 42,850
- name
- passport, Social Ins.
- DOB
- contact info

Based on an Occupancy Rate of:	[redacted]	[redacted]	[redacted]
Yearly Expenses			
Common Expense Fees	$24,936.00	$24,936.00	$24,936.00
Occupancy Fees (Housekeeping)	$16,425.00	$14,235.00	$12,045.00
Estimated Property Taxes (2% per annum)	$17,140.00	$17,140.00	$17,140.00
Mortgage (6% interest)	$43,068.88	$43,068.88	$43,068.88
Total Expenses	$101,569.88	$99,379.88	$97,189.88
Yearly Revenue			
Revenue from Suite Rental	$164,250.00	$142,350.00	$120,450.00
Summary			
Yearly Return (Revenue - Expenses)	$62,680.12	$42,970.12	$23,260.12
Cash Invested	$299,950.00	$299,950.00	$299,950.00
Return on Cash Invested	20.90%	14.33%	7.75%

Please note: This is not a guaranteed investment program.

[31] Ms. Zak told the Lees that the unit would carry itself even at the 55% occupancy rate, but that in any event 55% occupancy was a worst-case scenario because of the Trump name.

[32] Both Mr. Singh and Mrs. Lee decided to buy.

[33] Mr. Singh had been discharged from bankruptcy three years earlier and was earning approximately $55,000 a year as a warehouse supervisor. He did not have enough money for the deposit. His father, a retired welder, agreed to help and took out a line of credit on his own home to finance the loan.

[34] Mrs. Lee was a homemaker and her husband worked as a mortgage underwriter. Mrs. Lee's parents loaned her the money for the deposit. Although the Lees' unit was put in Mrs. Lee's name, her husband took the lead throughout the events leading to this litigation.

[35] Mr. Singh deposed that he relied "heavily" on the information Ms. Zak gave him. He agreed in cross-examination that there was no "guarantee" about the occupancy rates reflected in the Estimates, but explained:

> [S]he was telling us that this is what they have estimated, and this is what the month...daily rent would be for the property through whatever channels that they got their information from. So to me, I relied heavily on this, because knowing that her words were, "This is like having an extra income to your home," that you could actually do that.... The way I looked at this is I took the lowest amount, 55 percent. With that yearly return, I said even if it did a lot less than that, I would still even break even to that point.

[36] Mrs. Lee also deposed that she relied on the Estimates in deciding to buy a Hotel Unit. She said:

> The Estimate was very important to me in my consideration of a purchase. We could not afford to purchase a unit without any income as we did not even

> [have] the money for the down payment let alone for the annual carrying costs. The Estimate gave me confidence that our purchase of a Hotel Unit would be a good investment for our children.

[37] As it turned out, the Estimates bore no relation to financial reality. The motions judge found as a fact that the Estimates were "deceptive documents" and "replete with misrepresentations of commission, of omission, and of half-truth": at para. 212.

[38] Contrary to Mr. Singh's belief that the Estimates were based on "whatever channels that they got their information from", the motions judge found that the figures in the Estimates were merely hypotheticals dreamed up by Talon's principal Mr. Levitan who, it will be recalled, had no previous experience in the hotel business. The motions judge found, at para. 213:

> The Estimates' specifications of hotel rates and occupancy rates, which emanated from Mr. Levitan's mind, were, at best, just opinions or forecasts. However, they were uninformed and ill-informed opinions, and his figures were essentially just pick-a-number speculation about what might be charged and what might happen in the marketplace.

(4) The Disclosure Documents

[39] Both Mr. Singh and Mrs. Lee signed agreements of purchase and sale within days of visiting Ms. Zak at the sales office. (Mr. Singh deposed that Ms. Zak had told him that the units were selling very quickly and he had to decide in the next day or so whether to buy.) Talon sent back a fully executed

agreement of purchase and sale along with the Disclosure Document required by the OSC Ruling. Both plaintiffs deposed that the Disclosure Document was very thick (it was approximately 300 pages in length) and hard to understand. Neither read the Document in any detail. Mr. Singh handed the Document over to his lawyer.

(5) The closing and the Statement of Adjustments

[40] In November 2008, Talon wrote to its purchasers advising that the closing had been extended from March 2009 to November 2010. In August 2010, Talon wrote again, requesting a further extension of the closing from November 2010 to as late as December 2011. Talon later requested three additional extensions of the closing.

[41] The motions judge described the choice Talon set out in these letters, at para. 152: "Talon framed the choice for purchasers as whether they wished to take interim occupancy earlier and pay fees but not have any offsetting hotel revenue (since the Trump Hotel was not to open until January 31st, 2012) or to sign the amendment and align interim occupancy with the opening of the hotel."

[42] Both Mr. Singh and Mrs. Lee deposed that they agreed to the extensions because they didn't think they had any choice. Both said that if they had known they could withdraw from their agreements of purchase and sale, they would have. They weren't alone: all the purchasers agreed to the extensions.

[43] The Trump International Hotel opened on January 31, 2012. On February 17, 2012, Talon provided purchasers with the interim occupancy closing documents, for a February 24 closing.

[44] The closing documents included an Interim Statement of Adjustments setting out the fees purchasers would have to pay during interim occupancy. The figures were markedly different from those set out in the Estimates.

[45] Mr. Singh's monthly fee statement totalled $8,306.13, broken down as follows:

Estimated Total Common Expenses:	$2,931.98
Estimated Realty Taxes:	$2,389.75
Interest on Deferred Purchase Monies:	$2,028.83
HST on Occupancy Fee:	$955.57
Total	$8,306.13

[46] The combined common expense and realty tax numbers shown were $2,156.73—or 68%—higher than the common expense and realty tax numbers ($1,825 and $1,340, respectively) set out in his original Estimate. Fees of $955.57 for HST, reflected in the Interim Statement of Adjustments, were not even listed in the Estimate originally given to Mr. Singh. Mrs. Lee got a similarly unpleasant surprise: her combined monthly fees for common expenses and

realty taxes were $5,291.77, which is $1,785.44—or 51%—higher than the monthly common expenses and realty taxes described in her original Estimate ($2,078 and $1,428.33, respectively).[1] An amount of $947.89 for HST also appeared for the first time.

[47] Talon also sent purchasers a Maintenance Agreement containing expenses that had never been disclosed before: an annual management fee of between 3% to 3.25% of the Hotel Unit revenue; and a furniture, fixtures and equipment fund, which would be 2% of Hotel Unit revenue for 2013, 3% for 2014, and 4% for 2015. The Maintenance Agreement also listed a per use occupancy fee and, although it had been set out in the Estimates, the amount was now higher.

[48] Finally, Talon revealed for the first time that Hotel Unit purchasers would have to pay a $48 fee for every night their units were rented out. This information appears in a document called "Reservation Program Frequently Asked Questions" that Talon emailed to purchasers four days before the interim occupancy closing.

[49] Mr. Singh and Mrs. Lee signed all the required documents and took interim occupancy.

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[1] The motions judge's reasons show Mrs. Lee's increase to be $2,156.73 or 62% (at para. 165). Those figures appear to be in error and I have used the correct figures.

(6) The interim occupancy period

[50] The Reservation Program provided purchasers with quarterly operating statements approximately 30 days after the end of each quarter. During the interim occupancy period, purchasers received statements for the period of February 24 to September 30, 2012.

[51] As the motions judge found, all the purchasers lost substantial amounts of money in all three of the start-up quarters. As an illustration, Mr. Singh's losses during the interim occupancy period totalled $29,113.62, an average loss of about $4,000 per month:

Date	Revenue	Occ. %	Avg. Rate	Per Use	Res. Fee	HST	Net Pmt.*	Occ. Fee**	Gain/Loss
Feb.24-Mar.31	$4,210.00	18.92%	$601.43	$455.00	$336.00	$102.83	$3,863.47	$10,024.64	-$6,161.17
Apr.1-June 30	15,875.65	46.15%	377.99	2,795.00	1,968.00	619.19	10,493.46	24,918.39	-14,424.93
July1-Sept.30	11,149.30	26.09%	464.55	1,560.00	1,152.00	352.56	8,084.74	16,612.26	-8,527.52
Total	$31,234.95	33.18%	$427.88	$4,810.00	$3,456.00	$1,074.58	$22,441.67	$51,555.29	-$29,113.62

* Payment to Owner in Q1 includes one-time HST payment of $547.30
** Singh did not pay September Occupancy Fee of $8,306.13

[52] As this table shows, the occupancy rates during this period ranged from just under 19% to just over 45% – well below the "worst-case scenario" of 55% that was in Mr. Singh's Estimate. The room rental rates started at a promising $601.43 per night, but then dipped to below $400 per night before rising to $464.55 – again, far lower than the $550 rate listed in Mr. Singh's Estimate. At the same time, the occupancy fees, which included common expenses, realty taxes, interest on deferred purchase monies and HST, were far higher than the

amounts listed in the Estimate. The combination of much lower than expected revenue and much higher than expected expenses wiped out any possibility of profit.

[53] Mrs. Lee fared even worse. She lost $36,288.16, an average loss of about $5,000 per month:

Date	Revenue	Occ. %	Avg. Rate	Per Use	Res. Fee	HST	Net Pmt.*	Occ. Fee	Gain/Loss
Feb.24-Mar.31	$5,040.00	29.73%	$458.18	$715.00	$528.00	$161.59	$4,290.61	$9,944.02	-$5,653.41
Apr.1-June 30	16,806.50	54.95%	336.13	3,250.00	2,400.00	734.50	10,422.00	24,717.99	-14,295.99
July1-Sept.30	12,593.00	35.87%	381.61	2,145.00	1,584.00	484.77	8,379.23	24,717.99	-16,338.76
Total	$34,439.50	42.73%	$366.38	$6,110.00	$4,512.00	$1,380.86	$23,091.84	$59,380.00	-$36,288.16

(7) Final closing and the complaint to the OSC

[54] On October 22, 2012, the Trump Hotel Condominium was registered in the Land Registry Office for the Land Titles Division of Toronto. This created Toronto Standard Condominium Corporation No. 2267. At the end of October 2012, Talon advised the purchasers that final closing would be on November 29, 2012.

[55] By that time, the Toronto business press began reporting on the hotel's poor performance. Messrs. Shnaider and Levitan issued a public statement reassuring purchasers and the public that the losses were growing pains and that investors had to expect it would take some time to "ramp up" and "stabilize".

[56] In November 2012, a lawyer retained by the plaintiffs wrote to the OSC and asked that it investigate possible breaches of the OSC Ruling. The letter

argued that Talon had provided prospective purchasers with prohibited "financial projections" in the form of the Estimates. It also argued that Talon and its agents "made oral representations to prospective purchasers which emphasized the Reservation Program as an investment vehicle. The Reservation Program became the principal feature of the hotel operation and investment."

[57] The OSC asked Talon to delay final closing and asked for it to respond to several questions about how the Hotel Units were marketed and sold.

[58] In its response, Talon represented that it complied with the OSC Ruling. It stated that while it had not had time to undertake a "comprehensive assessment" of how the Estimates were presented to prospective purchasers, based on the "best recollection" of Talon's management, the information in the Estimates "was presented to purchasers as nothing more than an illustration or example. The illustration was provided to prospective purchasers as simply one component of the materials made available to them."

[59] In any event, Talon submitted that the Estimates did not constitute a rental or cash flow forecast, a guarantee, a financial projection or a commitment of the type prohibited by the OSC Ruling. Instead, the Estimates were "simply illustrative of certain scenarios in respect of a particular Hotel Unit to assist prospective purchasers in making an informed investment decision."

[60] On December 4, 2012, the OSC advised that it would not be pursuing regulatory action against Talon. No reasons were provided.

[61] On December 14, 2012, the Hotel Units finally closed. Only 50 of the 206 purchasers opted to close on the sale.

[62] Mr. Singh was one of the 156 who backed out. His losses as of December 2014 (which included ongoing interest on the loan to his father) totaled $248,064.58. He commenced his action on November 30, 2012. Mrs. Lee was one of the 50 who closed.

[63] About ten months after closing, Talon convened a meeting of the owners and advised them that it would take approximately five years for the hotel to become profitable.

[64] Mrs. Lee stuck it out and suffered substantial losses in every quarter from December 2012 to March 2015. Her total losses as of December 2014 were $991,576.92. Mrs. Lee commenced her action in February 2015.

B. THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT

[65] The plaintiffs' motions for partial summary judgment proceeded only against Talon, Shnaider, Levitan and Trump and were with respect to the alleged breach of the OSC Ruling and the misrepresentation by Talon. There were three lines of attack pursued before the motions judge, all of which focused on the Estimates.

(1) The claim against Shnaider, Levitan and Trump.

[66] At the outset of his reasons, the motions judge dismissed the plaintiffs' motions as against Shnaider, Levitan and Trump. The plaintiffs were not attempting to pierce the corporate veil and, in the motions judge's view, there was no conduct on the part of these defendants that was outside of their role in the corporations. Further, the simple fact that Trump's name was associated with the project did not attract personal liability.

[67] Despite the absence of a cross-motion for summary judgment, the motions judge considered it appropriate to dismiss the actions in their entirety as against all three individual defendants.

(2) The claim against Talon

(a) First allegation: Talon violated the OSC Ruling

[68] The motions judge considered and rejected the defendant's submission that issue estoppel applied against the plaintiffs as a result of the OSC's public statement of December 4, 2012 that it would not be pursuing regulatory action against Talon. In his view, the OSC's review and public statement was not a binding determination as to whether the OSC Ruling had not been breached. Moreover, he held that the plaintiffs should not be bound by a decision made in a proceeding in which they did not have an opportunity to participate. That ruling was not challenged on appeal.

[69] The plaintiffs argued that Talon violated the OSC Ruling in two ways. They claimed that the resulting agreements of purchase and sale were illegal contracts and that they were entitled to rescission as a private law remedy.

[70] First, the plaintiffs submitted, Talon marketed the Hotel Units as "investment contracts" by emphasizing the Reservation Program as a vehicle for regular profits. This was contrary to paras. 23 and 29 of the OSC Ruling, which mandated that the units would be marketed "primarily" for the purchasers' own use, and that the Reservation Program was "merely secondary" and simply offered a way to "defray" ownership expenses.

[71] The motions judge rejected this argument. He held that "Talon marketed the Hotel Units precisely in the way that it undertook to do in its application": at para. 98.

[72] He explained, at para. 100: "The Reservation Program was an integral part of the marketing of the Hotel Units, but it did make the selling of Hotel Units, the selling of an investment contract." I pause here to note that the respondents say that this sentence contains a typo and should read: "The Reservation Program was an integral part of the marketing of the Hotel Units, but it did [not] make the selling of Hotel Units, the selling of an investment contract."

[73] The motions judge continued, at paras. 100 and 104:

> There is an excruciating subtle point here because the Hotel Units were likely investment contracts. The point,

> however, is not whether Talon had investment contracts to sell, which is a debatable point, the point being made by the OSC's ruling is that whatever Talon had to sell, it should not sell it as an investment contract.
>
> ...
>
> [I]n the case at bar, it is not necessary to actually determine whether Talon had an investment contract to sell. The point is that whatever it had to sell, it could not and should not be sold as an investment contract. I find as a fact that Talon did not sell whatever it had to sell as an investment contract.

[74] The motions judge explained that when the OSC issued its ruling in 2004, it knew that a purchaser was buying a hotel condominium unit and that it was "very likely" the purchaser would participate in the Reservation Program. It also knew that a purchaser would receive financial information and budgets with respect to the operation of the condominium corporation and the hotel. "In other words," the motions judge held, "the OSC knew and anticipated and even directed that purchasers would receive financial information about the operation of the Reservation Program and of the hotel.... [T]he OSC would not have intended to prohibit a manner of sale that was inevitable": at paras. 105-107.

[75] Second, the plaintiffs argued that the Estimates breached para. 24 of the OSC Ruling, which prohibited Talon from providing "rental or cash flow forecasts or guarantees or any other form of financial projection or commitment". The parties agreed that the Estimates were not rental guarantees, cash flow guarantees or a type of financial commitment. But the plaintiffs maintained that

the Estimates were rental or cash flow forecasts or a form of financial projection. Although Talon agreed that the OSC Ruling prohibited providing prospective purchasers with either forecasts or projections, it argued that the Estimates were not forecasts or projections. They were simply illustrations of how the Reservation Program might function.

[76] The motions judge took a different approach. He did not agree that para. 24 of the ruling prevented Talon from providing forecasts or estimates. He interpreted para. 24 "just to exclude financial commitments or guarantees by Talon of the financial returns of the hotel through the Reservations Program." He explained: "Another way to approach the interpretation of the OSC's ruling is that the adjectives are to be read as modifying or describing one type of commitment": at para. 114.

[77] The motions judge held, at para. 115: "[O]nce the Plaintiffs conceded that the Estimate was not a guarantee or financial commitment on the part of Talon, which it clearly was not, it lost the debate about whether the OSC's ruling was breached".

(b) Second allegation: misrepresentation in the offering memorandum under s. 130.1 of the *Securities Act*

[78] The plaintiffs argued that the Estimates constituted misrepresentations. As such, they had a statutory cause of action under s. 130.1 of the *Securities Act*,

which provides a remedy for purchasers where there is a misrepresentation in an offering memorandum.

[79] The motions judge rejected this argument. He held that, because the Estimates "came before and [were] extraneous to" the offering memorandum or Disclosure Documents directed by the OSC, they were outside of the scope of the Act.

(c) Third allegation: misrepresentation in the Estimates

[80] Finally, the plaintiffs claimed that Talon, Shnaider, Levitan and Trump were liable for the misrepresentations contained in the Estimates. Although the plaintiffs argued the misrepresentations could be viewed as fraudulent in nature, the motions judge determined that the fraudulent misrepresentation claim had not been pleaded. As a result, he made no findings and said little in respect to that ground. He then turned to the claim for negligent misrepresentation and agreed that two misrepresentations had been made out:

1. Talon misrepresented that the Estimates were done based on the best available information to Talon to forecast potential revenue, expenses and net income, when in truth, the Estimates overstated revenue and understated expenses; and
2. Talon misrepresented that the Hotel Units would be profitable immediately when the Trump Hotel opened for business.

[81] The motions judge was satisfied the plaintiffs had established four out of the five elements required to prove a claim of negligent misrepresentation, as set out in *Queen v. Cognos*, [1993] 1 S.C.R. 87: (1) the defendants owed them a duty of care; (2) the defendants made an untrue, inaccurate or misleading representation; (3) the defendants did so negligently; and (4) the plaintiffs suffered damage as a result. It was in this context that the motions judge described the Estimates as "deceptive documents" that were "replete with misrepresentations of commission, of omission, and of half-truth". He explained, at para. 215: "Mr. Levitan had no training, experience, or justification from actual research to make any projections about the revenue streams for the new hotel in Toronto. What actually happened shows how inaccurate Mr. Levitan's guesswork was."

[82] Despite these strong words, the motions judge held that the plaintiffs failed to establish the fifth required element: that they reasonably relied on the misrepresentation.

[83] The motions judge accepted the plaintiffs' evidence that they had relied on the Estimates in making their decision to buy the Hotel Units. He went on to explain, however, that while the plaintiffs would not have known that the Estimates constituted misrepresentations:

> ... nevertheless, they would and should have known that it would be unreasonable for a prospective

> purchaser to rely on the Estimates or to be induced by the Estimates to enter into their Agreements of Purchase and Sale. Although Mr. Singh and Mrs. Lee may have subjectively relied on the Estimates in deciding to purchase the Hotel Units, their subjective reliance was objectively unreasonable.

[84] The motions judge noted that the Estimates were "for discussion purposes" and were not "a guaranteed investment program". Mr. Singh and Mrs. Lee knew that all investments are risky and those risks were pointed out to them repeatedly in the Disclosure Documents. They knew they had a statutory cooling-off period under the *Condominium Act*, and they had an opportunity to conduct their own due diligence.

[85] Further, the motions judge explained that around the time of the interim closings, the plaintiffs came to learn that the Estimates contained "misrepresentations of commission, omission and half-truths" about the quantum of expenses they would be liable to pay. Although the plaintiffs would not have known at that point about the misrepresentations regarding rental and occupancy rates, the motions judge considered that their going ahead with the interim closings "suggests that they were never reasonably relying on the Estimates as the inducement to enter into the Agreements": at para. 229. Rather, they were relying on "their rights and remedies associated with the documents required to be disclosed under the ruling of the OSC and pursuant to the provisions of the *Condominium Act*, 1998."

[86] The motions judge went on to hold that, in any event, the plaintiffs' negligent misrepresentation claim was defeated by the "entire agreement clause and the other exculpatory provisions of the Agreement of Purchase and Sale and the related contracts": at para. 235.

[87] The entire agreement clause in the agreement of purchase and sale reads as follows:

> 31. The Vendor and the Purchaser agree that there is no representation, warranty, collateral agreement or condition affecting this Agreement or the Property or supported hereby other than as expressed herein in writing.

[88] The Disclosure Document contained various exculpatory statements such as:

> Purchasers are advised that no representations are made with respect to expected or projected rental income. There is no assurance that Hotel Units will be able to be rented at any particular rate or for any particular period of time and the rates and the total income from each Hotel Unit will be affected by, among other things, competitions from other luxury hotels, guest preferences, economic conditions...

[89] The Reservation Program agreement contained similar exculpatory statements as well as an entire agreement clause providing that the agreement "supersedes and replaces all prior negotiations and/or agreements made between the parties hereto, whether oral or written, and contains the entire understanding between the parties with respect to the subject matter hereof."

[90] The motions judge held, without further analysis, that "there is no unconscionability or public policy reason to justify not enforcing" the clause: at para. 239.

[91] Finally, although it was not pleaded, the motions judge dismissed Mrs. Lee's claim as time-barred. He held that she ought to have known about the misrepresentation claims around the time of interim closing in 2012, but she did not commence her action until 2015, which was beyond the statutory two-year limitation period: at para. 242.

C. DISCUSSION

(1) Overview

[92] The plaintiffs appeal the motions judge's decision to dismiss the motions as against Talon on all three grounds they raised in the court below. They also appeal the dismissal of the claims against Shnaider, Levitan and Trump.

[93] In my view, the appeal as against Talon can be decided on the basis that the motions judge, having found that four of the five elements for a claim of negligent misrepresentation were made out, erred in holding that the plaintiffs failed to establish the fifth element, reasonable reliance.

[94] I would also hold that the motions judge erred in enforcing the entire agreement and other exculpatory clauses to bar the plaintiffs' actions. In light of

the circumstances and context in which the clauses were entered into, it would be unconscionable to enforce those clauses to bar the plaintiffs' claims.

[95] In addition, I would set aside the motions judge's dismissal of Mrs. Lee's claim as time-barred. Although they raised limitation provisions in the *Securities Act* and the *Condominium Act* in their statement of defence, the defendants did not plead the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B., nor did they seek leave to amend to do so. Further, they failed to raise a *Limitations Act* defence in their written submissions on the motions for summary judgment. In these circumstances, it was not appropriate for the motions judge to invoke the *Limitations Act* to dismiss Mrs. Lee's claim.

[96] I also disagree with the motions judge's conclusion that fraudulent misrepresentation had not been pleaded. Although the statement of claim does not use the words "fraudulent misrepresentation", all of the elements and materials facts for such a claim are pleaded and the claim was brought to the respondents' attention in the factum filed on the summary judgment motions. Because the motions judge did not make the necessary factual findings, this claim should simply be remitted to be determined on a subsequent motion or at trial.

[97] With respect to the action against Shnaider, Levitan and Trump, I agree that the claims that were the subject of the motions for summary judgment were

properly dismissed. In my view, however, the motions judge erred in dismissing the claims against the three individual defendants that were not properly before him.

[98] I will elaborate on each point below.

(2) Reasonable reliance

[99] As the motions judge indicated, the five elements of a claim for negligent misrepresentation are: (1) a duty of care based on a "special relationship"; (2) a misleading representation; (3) negligence in making the misrepresentation; (4) reasonable reliance on the representation; and (5) damage caused by the reliance: *Queen v. Cognos*, at p. 110. Only the "reasonable reliance" factor is at issue here.

[100] Whether a plaintiff reasonably relied on a defendant's misrepresentations is a question of fact: *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (C.A.), at para. 81, leave to appeal refused, [2000] S.C.C.A. No. 96.

[101] As I have just explained, the motions judge accepted that Mr. Singh and Mrs. Lee "subjectively relied" on the Estimates, but held that "their subjective reliance was objectively unreasonable" because:

1. The Estimates were "for discussion purposes only" and "not a guaranteed investment program". The plaintiffs were given various warnings, protections and rights, and as a result, it would not have been objectively

reasonable for them to rely on the Estimates for what they knew was a "risky financial investment"; and

2. Once the plaintiffs learned of higher than expected expenses at the time of interim closing, they did not try to back out of their agreements of purchase and sale.

[102] On the first point, the fact that the Estimates were "for discussion purposes only" and "not a guaranteed investment program" does not inevitably lead to the conclusion that it would be unreasonable for the plaintiffs to rely upon them. Earlier in his reasons, the motions judge rejected Ms. Zak's evidence that she did not sell the Hotel Units based on room rates and occupancy rates—the very information set out in the Estimates. Instead, he found as a fact that "the Hotel Units were sold as an investment with a potential for capital gain and with ongoing income gains that would more than cover expenses": at para. 59. This information came directly from the Estimates.

[103] The motions judge does not explain how his finding that Talon sold the Hotel Units as investments based on the information contained in the Estimates can be reconciled with his finding that the plaintiffs' reliance on those Estimates was unreasonable. In other words, if the basis of the sale was the unit's value as an investment as expressed in the Estimates, why was reliance on that information unreasonable?

[104] Further, although I agree with the motions judge's finding that the plaintiffs were warned about the risks of their investment, it does not follow that it was unreasonable for the plaintiffs to rely on the Estimates. The risks acknowledged and accepted were the risks that market conditions could change, that rental rates and occupancy rates could fluctuate, and that their expenses might go up. Those are known, expected risks and the disclaimers in the documentation clearly disclose their existence. It would have been unreasonable for the plaintiffs to rely on representations that these risks did not exist.

[105] The actionable misrepresentations, however, were not that risks such as market conditions and fluctuations in rental and occupancy rates did not exist. The misrepresentations were: (1) that the figures in the Estimates were based on the best available information; and (2) that the hotel would be immediately profitable. On the motions judge's own findings, both misrepresentations were established. He found that the figures in the Estimates were based not on hard numbers but on Mr. Levitan's "uninformed and ill-informed opinions". Many known expenses were not disclosed or were grossly understated. Moreover, he found that when both Mr. Singh and Mr. Lee pressed Ms. Zak about the high occupancy and rental rates in the Estimates, she assured them that the hotel would be fully booked because it was new and would attract "buzz".

[106] I agree with the motions judge that it would have been unreasonable for the plaintiffs to rely on a representation that the Estimates were a guarantee that

their investments would pan out exactly as they had hoped. They knew or ought to have known that the Estimates were not a guarantee that the investment would be profitable. They assumed the risk that room and occupancy rates would fluctuate and that they might earn less profit than they originally anticipated. It is unreasonable, however, to conclude that the plaintiffs assumed the risk that the Estimates upon which they decided to invest were simply made up in the first place and that known expenses were either not disclosed or were grossly understated.

[107] On the second point, the fact that the plaintiffs learned in 2012 that their expenses would be higher does nothing to undermine the reasonableness of their reliance on the Estimates in 2006 and 2007. Ms. Zak sold the units as an investment using estimates that understated expenses and overstated revenue. She told prospective purchasers that the 55% occupancy rate set out in the Estimates was a worst-case scenario, and that even at that rate the hotel would be profitable. Even after it was revealed to purchasers for the first time at interim closing that expenses had been understated, the plaintiffs had yet to discover that revenue was overstated. Specifically, the room rental rates and occupancy rates set out in the Estimates were unrealistically high and were based on uninformed and ill-informed opinions. As Mr. Singh testified, he was nervous after hearing of the high occupancy fees but he thought he had no choice. He took

comfort from the Estimate that indicated that his annual revenue would be more than enough to offset the fees.

[108] The motions judge's conclusion that the plaintiffs' reliance on the Estimates was objectively unreasonable is clearly in error and cannot stand. The plaintiffs' reliance on the Estimates was objectively reasonable.

(3) The entire agreement and other exclusionary clauses

[109] As noted earlier, the agreement of purchase and sale, the Disclosure Document and the Reservation Program agreement contained various entire agreement and exclusionary provisions. Those clauses, examples of which I have quoted earlier, advised purchasers that they should only rely on the agreements expressed in writing, that no representations were being made as to the projected income from the rental of the Hotel Units and that there were risks that income would not be as projected.

[110] Unless inapplicable, unenforceable, or otherwise invalid, contractual provisions such as entire agreement clauses may limit a party's right to sue in tort: *BG Checo International Ltd. v. British Colombia Hydro & Power Authority*, [1993] 1 S.C.R. 12, at p. 30. That is because duties based in tort "must yield to the parties' superior right to arrange their rights and duties in a different way": *BG Checo*, at p. 27.

[111] In *Tercon Contractors Ltd v. British Colombia* (Transportation and Highways), 2010 SCC 4, [2010] 1 S.C.R. 69, Binnie J. (dissenting but supported by a unanimous court on this point) set out the following analytic approach to be used in deciding whether to enforce such clauses, at paras. 122-23:

> The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
>
> If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[112] In his reasons the motions judge referenced *Tercon* and the analytical approach described therein. His analysis and application to the facts of this case, however, are contained in their entirety in para. 239 of his reasons:

> [T]he entire agreement and other exculpatory provisions included in the Disclosure Documents or Statements apply and stands in the way of the success of the Plaintiffs' misrepresentation claims. As a matter of interpretation the clauses apply, and there is no

> unconscionability or public policy reason to justify not enforcing the exculpatory provisions.

[113] In my view, the motions judge erred in concluding, without analysis, that it was not unconscionable to enforce the exculpatory provisions. Unconscionability provides that despite the general principle that parties should be held to the bargains that they have made, there are some parties that must be protected and some bargains that should not be enforced: see A. Swan and J. Adamski, *Canadian Contract Law*, 3d ed. (Markham, Ont.: Lexis Nexis, 2012) at para. 9.99.

[114] In *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461, at para. 82, LeBel and Deschamps JJ. described the doctrine of unconscionability in the context of limitation clauses, a type of clause similar in nature to exclusion or entire agreement clauses:

> Under the doctrine of unconscionability, a limitation of liability clause will be unenforceable where one party to the contract has abused its negotiating power to take undue advantage of the other. This doctrine is generally applied in the context of a consumer contract or contract of adhesion.

[115] In *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (3d) 55, the British Columbia Court of Appeal declined to enforce an entire agreement clause to preclude a claim based on a misrepresentation made to a franchisee. The franchisor had made misleading statements about estimated gross sales, expenses, and profits to induce the franchisee to enter an agreement. In rejecting

the enforcement of these clauses, Lambert J.A. expressed the following view, at para. 45:

> A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the attention of that party, or by being specifically acknowledged by that party, or in some other way.

[116] In the present case, the entire agreement clause functioned as a trap to these unsurprisingly unwary purchasers. Neither the Singhs nor the Lees had anything more than minimal investing experience. Their real estate experience was limited to the purchase of their family homes, although Mr. Lee worked as a mortgage agent (as did Ms. Singh beginning in 2008). They would have known little or nothing regarding luxury hotel rental rates and occupancy. And both the Singhs and the Lees signed the agreements of purchase and sale without consulting with a lawyer.

[117] The entire agreement clause was well hidden within the agreement of purchase and sale. The agreement of purchase and sale is almost 17 pages long including schedules, with 49 articles that often include sub-clauses of their own. The entire agreement clause is found on page seven, the third of twelve articles under the heading 'General'. Nothing distinguishes this article from the other rectangles of dense black ink nearby. Ms. Zak, the sales representative for both

the Singhs and the Lees, acknowledged in her evidence that she never reviewed the entire agreement clause with the plaintiffs.

[118] The relevant portion of the entire agreement clause simply states: "The Vendor and the Purchaser agree that there is no representation ... affecting this Agreement or the Property or supported hereby other than as expressed herein in writing." Such a clause would mean nothing to the Singhs or Lees. They gave evidence accordingly. They could not have reasonably been expected to have understood that this meant that the respondents were exempting themselves from any liability flowing from their misrepresentations that induced the Singhs and Lees to sign the contract in the first place.

[119] The Disclosure Document stands on even more unstable ground. Notably, it was not provided to either the Singhs or the Lees until after they had signed the agreements of purchase and sale.

[120] Even if the exculpatory provisions in the Disclosure Documents should be considered, many of the same factors supporting a finding of unconscionability apply. Although bolded in all-caps, the main exculpatory provision was found about ten pages into a roughly 300-page document. Other than the capitalization and bolding, nothing was done to draw the Singhs' or Lees' attention to the significance of such a clause.

[121] Moreover, such a disclaimer comes too late to be of any assistance to the purchaser who has already been induced to enter into an agreement. As Professor McCamus explains with respect to such subsequent disclaimers, "[t]he trap has already been set and triggered. If the contract contains a disclaimer clause, it is simply a better trap": John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012), at p. 365.

[122] It would be grossly unfair to enforce these clauses to deny Talon's tort duty not to make negligent misrepresentations to the plaintiffs.

[123] Although the above considerations should be sufficient to found a decision declining enforcement of those clauses, further support can be found when the context of the contract formation is considered. As I will explain, I would find that Talon breached and evaded the protections of *Securities Act* by both the marketing of the Hotel Units as investment contracts with emphasis on the Reservation Program as a vehicle for regular profits and the providing of rental and cash flow forecasts or projections that were contrary to the OSC Ruling.

[124] In my view, the motions judge erred in concluding otherwise.

[125] With respect to the marketing of the Hotel Units, it is to be recalled that Talon's lawyers represented that the Units would "not be marketed or structured as investments for profit or gain" but would rather be marketed "as luxury hotel condominium units entailing exclusive occupancy rights, coupled with an

opportunity to defray related ownership expenses in connection with periods of non-occupancy through voluntary participation in the Reservation Program". The motions judge found that Talon marketed the Hotel Units "precisely in the way that it undertook to do in its application" to the OSC (at para. 98) and that "Talon did not sell whatever it had to sell as an investment contract" (at para. 104). He does not explain how this is to be reconciled with his earlier findings. Those findings were that "the Hotel Units were sold as an investment with a potential for capital gain and with ongoing income that would more than cover expenses", and that Ms. Zak "discuss[ed] with the purchasers the income they might earn or the estimated return on investment": at para. 59.

[126] Similarly, the motions judge's description of the Reservation Program as "an integral part of the marketing of the Hotel Units" appears on its face to acknowledge that Talon breached the OSC Ruling, which provided in para. 23 that the Reservation Program would be marketed as "merely a secondary feature" to defray ownership expenses, as opposed to an investment vehicle.

[127] With respect to the Estimates, the motions judge found that providing financial projections and rental or cash flow forecasts to prospective purchasers of Hotel Units did not contravene the OSC's prohibition against providing "rental or cash flow forecasts or guarantees or any other form of financial projection or commitment". In my view the motions judge's interpretation is simply unreasonable and cannot stand (*H.L. v. Canada (Attorney General)*, 2005 SCC

25, [2005] 1 S.C.R. 401, at paras. 55-56, 110). The reasonable reading of this provision is that it prevents both the giving of guarantees and commitments and the giving of financial projections and rental or cash flow forecasts. The motions judge's reading of the provision effectively reads out key terms and renders their inclusion meaningless.

[128] As to the motions judge's suggestion that the Estimates do no more than give effect to the OSC's implicit assumption that Talon would explain how the Reservation Program functioned, it is apparent from even a cursory review of the Estimates provided to the plaintiffs that they went well beyond such a purpose. The carrying costs of the units as set out in the Estimates have nothing to do with the operation of the Reservation Program. The title "estimated return on investment", the layout of the document and the setting out of annualized rates of return on cash invested all show the document to be much more than what the motions judge characterized as "information about the operation of the Reservation Program and of the hotel".

[129] In my view, it would be unconscionable and would shock the conscience to allow a party to use an entire agreement or other exculpatory clause to escape liability for misrepresentations made in breach of the OSC's terms for granting an exemption from the *Securities Act* requirements. The entire agreement and other exculpatory clauses would operate to negate a negligent misrepresentation claim and the misrepresentation itself was only possible in this case because Talon

evaded protective requirements under the *Securities Act* by obtaining the exemption and then breaching that exemption.

(4) The limitations issue

[130] The motions judge found that Mrs. Lee's negligent misrepresentation claim was barred by the *Limitations Act*. He did so despite the fact that the defendants had not pled the *Limitations Act* and had not sought to amend their pleading to include such a plea. Although they raised the issue in oral submissions, the defendants had not raised it in the factum filed on the summary judgment motions.

[131] In his reasons the motions judge neither refers to the fact that it was not pleaded nor does he explain why, in the absence of such a plea, he should nonetheless invoke the Act.

[132] This court has consistently held that "[t]he expiry of a limitation period is a defence to an action that must be pleaded in a statement of defence": *Collins v. Cortez*, 2014 ONCA 685, [2014] O.J. No. 4753, at para. 10, per van Rensburg J.A. (citing *S. (W.E.) v. P. (M.M.)* (2000), 50 O.R. (3d) 70 (C.A.), at paras. 37-38, leave to appeal to S.C.C. refused, [2001] 149 O.A.C. 397). This requirement is embodied in rule 25.07(4) of the *Rules of Civil Procedure*, which Ontario courts have consistently held "applies to pleadings relating to limitations that might bar an action": *S. (W.E.) v. P. (M.M.)*, at para. 37. Rule 25.07(4) provides as follows:

> In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading.

[133] Justice Cronk explained the rationale behind the requirement that a party specifically plead a limitation period defence in *Hav-A-Kar Leasing Ltd. v. Vekselshtein*, 2012 ONCA 826, 225 A.C.W.S. (3d) 237, at para. 69:

> The failure to raise substantive responses to a plaintiff's claims until trial or, worse, until the close of trial, is contrary to the spirit and requirements of the Rules of Civil Procedure and the goal of fair contest that underlies those Rules. Such a failure also undermines the important principle that the parties to a civil lawsuit are entitled to have their differences resolved on the basis of the issues joined in the pleadings.

[134] In *S. (W.E.) v. P. (M.M.),* MacPherson J.A. confirmed that Ontario courts "have consistently held that rule 25.07(4) applies to pleadings relating to limitations that might bar an action": at para. 37. He went on to explain that even though in that case the trial judge had given counsel time to prepare submissions on the issue after he raised it during closing arguments, it did not remove the potential prejudice to P:

> If S had raised the issue in his pleadings, P might have tried to settle, or even have abandoned, her counterclaim. Either decision might have had costs consequences. Another potential source of prejudice arises from the fact that counsel for P might have adopted different tactics at trial. In particular, counsel might have called different or additional evidence to

> support an argument that the discoverability principle applied (at para. 38).

[135] MacPherson J.A. also noted that at no time during trial, including during closing arguments when the trial judge raised the limitation issue, did S seek to amend his pleadings. Nor did he seek such an amendment during the appeal hearing.

[136] In my view, the defendants' failure, in this case, to plead a *Limitations Act* defence or even to seek an amendment to their pleading to do so is, as it was in *S. (W.E.) v. P. (M.M.)*, fatal.

(5) The fraudulent misrepresentation pleading

[137] The motions judge stated at para. 201 that "because the fraudulent misrepresentation claim was not pleaded I shall say little about it." The reasons, however, contain no analysis of the statements of claim nor an explanation of how he reached this conclusion.

[138] While the factum filed by the plaintiffs on the summary judgment motions focused principally on negligent misrepresentation, it did refer to fraud. For example, the factum stated as follows at para. 351:

> If this Court determines (particularly in the case of Levitan) that the misrepresentation can be characterized as fraudulent then the individual liability of the employee is easier to establish since his actions take on the character of an individual and separate tort. [Footnote omitted.]

[139] In response, the defendants' summary judgment factum acknowledged that the plaintiffs claimed Levitan's actions met the test for fraudulent misrepresentation, but then simply stated that the plaintiffs did not specifically plead fraudulent misrepresentation. No specific deficiency in the pleadings was identified, nor was any prejudice claimed.

[140] On appeal the respondents again maintain that the pleadings were deficient and, specifically, they argue that the appellants' pleadings do not assert that the defendants knew that the statements were false or were indifferent to their truth or falsity. They further argue that there was no pleading that there was an intention that the appellants would act on the false representations.

[141] Although it is not clear from the case law that an intention that the false representation be acted on is a necessary element of a fraudulent misrepresentation claim (see *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21, and *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 88), the pleadings of both Mrs. Lee and Mr. Singh assert that the defendants knew the statements were false (Mrs. Lee's statement of claim at para. 76; Mr. Singh's at paras. 114-116) and that there was an intention that they would be acted upon (Mrs. Lee's statement of claim paras. 97-98; Mr. Singh's at para. 112).

[142] The pleadings could certainly have been clearer and the absence of a specific statement that a fraudulent misrepresentation claim was being advanced is of concern. This having been said, the respondents do not argue that they have been taken by surprise or prejudiced. Provided that the particulars and material facts relied upon for a fraudulent misrepresentation claim are pleaded it is not essential that the word "fraud" or "fraudulent" be used: see *Shoppers Drug Mart Inc. v. 6470360 Canada Inc.*, 2014 ONCA 85, 372 D.L.R. (4th) 90, at para. 54.

[143] As a result, I would set aside the motions judge's dismissal of the fraudulent misrepresentation claim. In setting aside the dismissal I should not be taken as finding that the claim has merit. I am simply not prepared to rule on the merits of the claim. Contrary to the appellants' contention, I do not consider the motions judge's findings, such as the finding at para. 213 that some of the information contained in the Estimates "emanated from Mr. Levitan's mind", to be dispositive. While the motions judge was clearly unimpressed with Mr. Levitan's process for coming up with the projections, he never concluded that the misrepresentations were made with knowledge of their falsity or with recklessness as to whether they were true.

[144] As a result, because necessary factual findings regarding this claim were not made, I would remit the issue to be decided on a further motion for summary judgment or at trial. In light of the disposition of the appeal, the appellants may

well decide not to proceed with the fraudulent misrepresentation claim. Should the appellants choose to proceed with that claim, however, and should they succeed in proving fraudulent misrepresentation, different or additional remedies may be available to them.

(6) The dismissal of the actions against Shnaider, Levitan and Trump

[145] The appellants argue that the motions judge erred in dismissing the actions against Shnaider, Levitan and Trump. They contend that, although it was open to the motions judge to dismiss those claims that were the subject of the summary judgment motions, it was unfair for him to have dismissed the causes of action pled but not encompassed in the motions before him.

[146] I agree.

[147] The motions judge correctly noted that on a motion for summary judgment the judge may grant judgment in favour of a responding party, even in the absence of a cross-motion for such relief: *Baig v. Meridian Credit Union*, 2016 ONCA 150, 394 D.L.R. (4th) 601, at para. 17; *King Lofts Toronto I Ltd. v. Emmons*, 2014 ONCA 215, 40 R.P.R. (5th) 26, at paras. 14-16; *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONCA 922, 124 O.R. (3d) 171, at paras. 50-52.

[148] However, a motion judge may not grant or dismiss a claim on a motion for summary judgment that is not within the scope of the motion before him or her. Doing so would deny procedural fairness and natural justice.

[149] A fair hearing requires that a party have notice of the matters that will be at issue at the hearing and of how that party may be affected by the hearing's outcome: see *Québec (Commission des relations ouvrières) v. Alliance des professeurs catholiques de Montréal*, [1953] 2 S.C.R. 140.

[150] In the present case, the grounds set out in the notices of motion are that the plaintiffs were seeking "damages from Talon and the other Defendants for breaches set out in [the] Statement of Claim and mov[ing] for summary judgment on the basis of the following claims" (emphasis added). The claims that follow in the notices of motion are those concerning the OSC Ruling and misrepresentations by Talon. They did not include any of the plaintiffs' other claims, such as those based on oppression, collusion, or breach of fiduciary duties.

[151] The parties' summary judgment factums were consistent with motions for partial summary judgment limited to the OSC Ruling claims and claims of misrepresentation. The plaintiffs' factum stated that "[t]he legal issues to be determined are as follows: a) Did Talon breach the terms of the Ruling and, if so, what remedy is available to the Plaintiffs; and b) Did these Defendants make any

actionable misrepresentations and, if so, what remedy is available to the Plaintiffs."

[152] The defendants' summary judgment factum suggested that they understood the limited scope of the motions for summary judgment. Their law and argument section addressed two categories of claims: those arising out of the OSC Ruling and the misrepresentation claims. The response of Trump, Levitan, and Shnaider was limited to arguing that no misrepresentations were made or that, in any event, they were not misrepresentations that would attract personal liability.

[153] In their factum the respondents submitted that, if they were successful on the OSC or misrepresentation claims, those causes of action should be dismissed. Their requested order was for "the Motion for Summary Judgment [to] be dismissed, and that the causes of action based upon the breach of the OSC Ruling and misrepresentation be dismissed, with costs" (emphasis added).

[154] For these reasons, I would set aside the motions judge's dismissal of the causes of action against Shnaider, Levitan and Trump that fall outside the scope of the motions for partial summary judgment.

(7) Remedy

[155] The appellants argue that the appropriate remedy is to order rescission or, in the alternative, damages.

[156] I agree that Mr. Singh, as a party to an executory agreement that never closed, is entitled to rescission. This court has long held that "[r]escission is available in the case of an executory contract where a material misrepresentation that was an inducement to enter into the contract is established": *Panzer v. Zeifman* (1978), 20 O.R. (2d) 502. Elaborating on this point, the motions judge correctly stated that rescission may be obtained on the basis of a non-fraudulent misrepresentation where the defendant has made a false statement that was material and that induced the plaintiff to enter the contract, and where the innocent party has sought rescission before the closing of the transaction. Having determined that the elements of negligent misrepresentation are made out, and that these misrepresentations were material and induced Mr. Singh to enter the agreement of purchase and sale that he refused to close in 2012, I find that Mr. Singh is entitled to rescission.

[157] The same, however, cannot be said for Mrs. Lee who completed the purchase of the unit. Absent a finding of fraud, in the context of real estate transactions induced by misrepresentation, execution of the agreement has typically been held to constitute a barrier to rescission: *Redican v. Nesbitt*, [1924] S.C.R. 135; *Shortt v. MacLennan*, [1959] S.C.R. 3; *Kingu v. Walmar Ventures Ltd.* (1986), 10 B.C.L.R. (2d) 15 (C.A.). The appellants have referred the court to more recent judicial support for the view that execution is a relevant but not decisive factor in determining whether rescission is available, at least in some

limited contexts: *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.*, [1994] B.C.J. No. 598 (C.A.); see also McCamus, at pp. 354-355, and S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at para. 424.

[158] Even assuming without deciding that rescission could be a remedy available to Mrs. Lee after having executed her transaction, I would nevertheless not grant rescission in the circumstances of this case. It is not apparent from the record what effect rescission would have on innocent third parties such as Mrs. Lee's mortgagor, who was not made a party to these proceedings. Further, the claim was issued more than two years after she closed the transaction. In these circumstances I view the award of damages as constituting the appropriate remedy for Mrs. Lee.

D. DISPOSITION

[159] For these reasons I would set aside the motions judge's order and substitute an order:

1. rescinding Mr. Singh's agreement of purchase and sale;
2. awarding damages to Mrs. Lee as against Talon for negligent misrepresentation;
3. as against Shnaider, Levitan and Trump, dismissing only those of the appellant's claims that were advanced for breach of the OSC Ruling and for misrepresentations;

4. remitting the claim for fraudulent misrepresentation to be decided on a further motion for summary judgment or at trial before the Superior Court;
5. awarding pre and post-judgment interest on the damage awards; and
6. for costs of the appeal on a partial indemnity basis to the appellants as against Talon fixed in the amount of $35,000, inclusive of disbursements and applicable taxes.

[160] As the matter is continuing in the Superior Court, I leave that court to decide how Mrs. Lee's damages are to be calculated and fixed as well as to determine what is necessary to implement the order rescinding Mr. Singh's agreement of purchase and sale.

[161] If the parties are unable to agree on the costs of the original motions, the appellants shall provide brief written submissions not to exceed three pages within 21 days of the release of these reasons and the respondents are to provide their response not to exceed three pages within 14 days thereafter.

Released: OCT 13 2016

"Paul Rouleau J.A."

"I agree. K. van Rumsg JA"

"I agree: M.L. Benotto J.A."

This **Exhibit "B"** referred to
in the Affidavit of Kevin D. Sherkin
sworn before me this 4th
day of November, 2016

A Commissioner for taking Affidavits
Mitchell Wine

TRUMP / TALON LITIGATION

DEPOSITS PAID / UNIT OWNERS

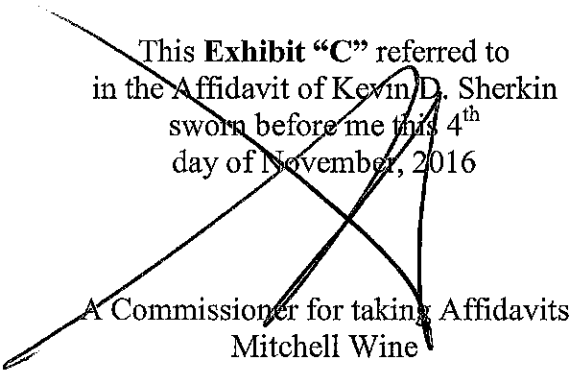
Deposits Paid

	Client	Unit #	APS YR.	Action #	Deposit	Deposit Held by Harris/Sheaffer
1.	Singh	2102	2006	CV-12-469042	$173,400.00	$0.00
2.	Ajmeri	2107	2004	CV-12-470040	67,300.00	1,174.42
3.	Ashraf	2003	2007	CV-12-469267	165,600.00	0.00
4.	Chung	2407	2011	CV-12-468931	375,010.00	0.00
5.	Crockett	2301	2005	CV-12-469375	180,800.00	0.00
6.	Cubuk	2113	2005	CV-12-470256	153,860.00	0.00
	Cubuk	3002			228,928.00	0.00
7.	Fuhrmann	1411	2005	CV-12-469918	172,000.00	30.00
8.	Hong	2410	2006	CV-12-469021	175,000.00	0.00
9.	Jari	1608	2005	CV-12-469376	189,000.00	15.20
10.	Jiwa/Cousens	1206	2005	CV-12-470134	133,400.00	0.00
	Jiwa/Cousens	1405			133,800.00	0.00
11.	I. Kim	2002	2007	CV-12-468175	173,410.00	43,360.00
12.	P. Kim	2313	2007	CV-12-472664	338,100.00	0.00
	P. Kim	2504			265,776.00	0.00
13.	M. Park	2106	2011	CV-12-468175	139,748.00	0.00
14.	NH. Park	1712	2011	CV-12-468175	151,890.00	10.00
	NH. Park	2507			220,750.00	0.00
15.	Patel (NY)	2012	2004	CV-13-487596	207,750.00	6.51
16.	Radev	1902	2006	CV-12-469916	166,320.00	0.00
17.	Rainbow Pties.	2611	2006	CV-12-469929	178,600.00	0.00
18.	J. Kim	3001	2004	CV-15-521436	382,167.00	0.00
	J. Kim	3004			329,667.00	0.00
19.	Shah/Patel	1415	2012	CV-14-505147	314,770.32	0.00
	Total				**$5,017,046.32**	**$44,596.13**

Unit Owners

1.	Lee	1402	2007	CV-14-514579	N/A	0.00
2.	Patel (UK)	2305	2005	CV-12-470040	N/A	0.00
3.	Zaidi	1202	2010	CV-15-522055	N/A	97,300.00

This **Exhibit "C"** referred to
in the Affidavit of Kevin D. Sherkin
sworn before me this 4th
day of November, 2016



A Commissioner for taking Affidavits
Mitchell Wine

Lombard Canada®

Lombard Canada Ltd.
105 Adelaide Street West
Toronto, Ontario M5H 1P9

VENDOR: TALON INTERNATIONAL INC. POLICY NO.: 3500371

This Policy shall only become effective on the date that it is duly executed by Authorized Representatives of Lombard General Insurance Company of Canada (the "Surety").

INSURED: Each of the unit purchasers, for the Deposits and Upgrade Monies (as defined on the reverse hereof) noted in the attached schedule or schedules, which may be amended, updated or added to from time to time by the Surety.

CONDOMINIUM PROJECT: Trump International Hotel
Bay Street and Adelaide Street West
Toronto, Ontario

Dated: October 15th, 2007

TALON INTERNATIONAL INC.

Per: _____
Val Levitan – President
I have the authority to bind the corporation

INSURANCE AGREEMENT

In consideration of the Vendor's undertaking to pay to the Surety, on behalf of the Insured, the premium for this Policy and subject to the terms and conditions hereof (including the Conditions set forth on the reverse hereof), the Surety hereby insures the Insured in respect of the Deposits and interest thereon (as defined on the reverse hereof) and any Upgrade Monies (as defined on the reverse hereof), which shall become owing by the Vendor to the Insured upon due termination of the Purchase Agreement and which the Vendor shall fail to pay to the Insured in accordance with the terms of the Purchase Agreement.

In witness whereof the Surety has duly executed this Policy on the 17th day of September, 2007.

LOMBARD GENERAL INSURANCE COMPANY OF CANADA

_____
R.A. Ewen, Vice President

_____
Authorized Signatory

DEPOSIT INSURANCE POLICY (ONTARIO)

CONDITIONS

1. INTERPRETATION

1.1 Definitions - In this Policy, unless the context otherwise requires, the following expressions shall have the following meanings:

(a) "Act" means the Condominium Act, S.O. 1998, c.19 as amended and supplemented from time to time and any reference herein to any section or subsection thereof shall be deemed to be a reference to the section or subsection as at the time in question amended or supplemented or to the successor thereof if the same has been repealed.

(b) "Deposits" means all money received, by the trustee or Vendor's solicitor from each Insured on account of the Purchase Agreement or with respect to reserving a right to enter into a Purchase Agreement before the Registration Date, other than:

(i) money paid thereunder as rent or as an occupancy charge, and
(ii) money credited against the purchase price pursuant to subsection (2) of section 81 of the Act.

(c) "Insured" means the Insured identified or referenced on the face hereof and includes his or their heirs, executors, administrators, other personal representatives, assigns and successors.

(d) "Interest" means the interest, at the rate or rates prescribed under the Act, which is required by the Act to be paid by the Vendor to the Insured on the Deposits.

(e) "Policy", "hereto", "herein", "hereby" and similar expressions mean or refer to this policy and any schedule(s), endorsement or other instrument supplemental or ancillary hereto.

(f) "Purchase Agreement" means the agreement between the Vendor and the Insured, described as such on the face hereof, as amended and supplemented from time to time.

(g) "Registration Date" means the date on which the declaration and description required by the Act are duly registered in the proper land registry office.

(h) "Upgrade Monies" means all monies received by the trustee or Vendor's solicitor from the Insured on account of the Purchase Agreement or by way of a separate agreement for upgrades or extras, which monies are not considered to be Deposits, nor on which monies is interest required to be paid under the Act.

(i) "Vendor" means the person named as such on the face hereof and includes its successors and assigns.

1.2 Extended Meanings - Words importing the singular number include the plural and vice versa and words importing the masculine gender include the feminine and neuter genders.

1.3 Headings - The insertion of headings is for convenience of reference only and shall not affect the construction or interpretation of this Policy.

2. TERM OF POLICY AND EXECUTION THEREOF

This Policy shall become effective on the date it is duly executed by the Surety and executed by the Vendor as provided on the face hereof and has been delivered to the trustee or Vendor's solicitor holding the money for which the Policy is being provided as security and shall remain in full force and effect, subject to the provisions of paragraph 6 hereof.

It is expressly acknowledged and agreed that the execution of this Policy may be made or manifested by way of an electronic signature (as such term is defined in The Electronic Commerce Act 2000, S.O. 2000, as amended), undertaken by or through a computer program or any other electronic means, as expressly provided or contemplated by (and in accordance with the provisions of) The Electronic Commerce Act 2000, S.O. 2000, as amended.

Each of the parties hereto further acknowledges and agrees that this Policy may be executed via telefax transmission (and the execution of a telefaxed version hereof by any or all of the parties hereto shall have the same force and effect as if same were originally executed), and that a photocopy or telefaxed copy of this executed Policy may be relied upon by all of the parties hereto and the Insured to the same extent as if it were an original executed version addressed specifically to each of them.

3. DEPOSITS &UPGRADE MONIES

It is acknowledged and agreed that this Policy shall extend and apply only to the portion of the Deposits and Upgrade Monies actually received by the trustee or Vendor's solicitor as shown on the face hereof or schedule(s) hereto before the Registration Date, notwithstanding that Deposits and Upgrade Monies may exceed the amounts shown on the face hereof.

4. CLAIMS

4.1 Notice of Default and Proof of Loss - If the Deposits and Interest thereon and Upgrade Monies shall become properly owing by the Vendor to the Insured upon due termination of the Purchase Agreement and if the Vendor shall fail to pay the same to the Insured in accordance with the terms of the Purchase Agreement, the Insured shall give prompt written notice thereof to the Surety referring to this Policy by number, identifying the Condominium Project and briefly describing the nature of the default by the Vendor. The Surety, immediately upon receipt of such notice, shall furnish to the Insured forms upon which to make the proof of loss hereunder.

4.2 Disputes Between Vendor and Insured - In the event of any dispute between the Vendor and Insured as to the liability of the Vendor to pay any Deposits herein mentioned and/or Interest thereon and Upgrade Monies, resulting in the withholding by the Vendor of any payment on account of Deposits or Interest thereon or Upgrade Monies or resulting in the Vendor claiming set-off or similar legal right, no claim by the Insured shall be paid hereunder unless and until such dispute shall have been finally resolved.

4.3 Payment of Claims - Subject to the provisions of paragraph 4.2, any claim by the Insured hereunder shall be paid by the Surety within sixty days after proof of loss has been submitted to and accepted by the Surety. Such proof of loss shall consist of such evidence as the Surety may reasonably require as to the payment of Deposits by the Insured under the Purchase Agreement, the payment by the Insured of Upgrade Monies and the termination of the Purchase Agreement, as well as the failure of the Vendor to pay the Deposits and Interest thereon and Upgrade Monies to the Insured and the amount thereof in default.

5. RIGHTS OF SUBROGATION

Upon payment by the Surety of any claim hereunder, the Surety shall be subrogated to all rights of the Insured against the Vendor for recovery thereof and the Insured shall execute and deliver such instruments and do such acts and things as may be necessary or desirable to give effect thereto.

6. CESSATION OF LIABILITY

The Surety shall cease to be liable under this Policy from and after:

(a) the delivery to the Insured of a registrable deed or transfer of the unit(s) being purchased under the Purchase Agreement;

(b) the termination of the Purchase Agreement and the payment to or on behalf of the Insured of the Deposits and Interest thereon and Upgrade Monies due to him;

(c) the payment by the Surety of the Deposits and Interest thereon and Upgrade Monies due under any claim arising from any default by the Vendor, written notice of which is given as required by paragraph 4.1.;

(d) the Insured acknowledges in writing that he is not entitled to payment of Deposits and Interest thereon and Upgrade Monies;

(e) the Insured acknowledges in writing that the Surety is no longer liable under the policy; or

(f) a court of competent jurisdiction has made a final determination that the Insured is not entitled to the Deposits and Interest thereon and Upgrade Monies in respect of the unit being purchased under the Purchase Agreement.

NOTICES

All notices required or permitted to be given hereunder to the Surety or the Insured shall be sufficiently given if sent by prepaid ordinary mail or by facsimile addressed to the address shown on the face of this Policy for such party or to such other address as such party may from time to time designate by notice in writing to the other. Every notice so mailed shall be conclusively deemed to have been given on the first business day following the date of such mailing.

JCF CAPITAL ULC

Applicant

-and-

TALON INTERNATIONAL INC. et al.

Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF KEVIN D. SHERKIN

LEVINE, SHERKIN, BOUSSIDAN PC
Barristers
23 Lesmill Road, Suite 300
Toronto, ON M3B 3P6

MITCHELL WINE - LSUC 23941V
Tel: 416-224-2400
Fax: 416-224-2408

Lawyers for the Moving Parties, Sarbjit J. Singh et al

JCF CAPITAL ULC

Applicant

-and-

TALON INTERNATIONAL INC. et al.

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PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD

LEVINE, SHERKIN, BOUSSIDAN PC
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Toronto, ON M3B 3P6

MITCHELL WINE - LSUC 23941V
Tel: 416-224-2400
Fax: 416-224-2408

Lawyers for the Moving Parties, Sarbjit J. Singh et al