



This is the 1st Affidavit
of Mark Katz in this case
and was made on 07/Feb/2011

H-110166
No. -
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

1397225 ONTARIO LIMITED

PETITIONER

AND:

682202 B.C. LTD., KINGSWAY ARMS MANAGEMENT
SERVICES INC., KINGSWAY ARMS HOLDINGS INC.,
KINGSWAY ARMS HOLDINGS B.C. LTD., PATRICK BYRNE
also known as PATRICK CHARLES BYRNE, GRAHAM
PARKER also known as GRAHAM M. PARKER also known as
GRAHAM MELTON PARKER, CHAPLIN VENTURES LTD.,
MICHAEL CHAPLIN also known as MICHAEL R. CHAPLIN,
COLTER INVESTMENTS (GP) LTD., COLTER
INVESTMENTS LP also known as COLTER INVESTMENTS
LIMITED PARTNERSHIP, 0780293 B.C. LTD. and HER
MAJESTY THE QUEEN IN RIGHT OF CANADA

RESPONDENTS

AFFIDAVIT

I, Mark Katz, of 5650 Yonge Street, Toronto, Ontario, Businessman, SWEAR (OR AFFIRM)
THAT:

1. I am an authorized representative of the Petitioner in this proceeding, and as such have personal knowledge of the facts and matters herein deposed to save and except where the same are stated to be based on information and belief and where so stated I verily believe the same to be true.
2. I am authorized to swear this Affidavit on behalf of the Petitioner.
3. I have read the Petition. Where not otherwise defined, capitalized terms in this Affidavit have the same meaning as the defined terms in the Petition.

4. The matters referred to in paragraphs 14 to 34 and 37 to 41 of Part 2 of the Petition are true to the best of my knowledge and belief.

5. I know of no facts which would constitute a defence to the claim or part of the claim of the Petitioner against the Respondents.

OVERVIEW

6. Attached as **Exhibit "A"** to this Affidavit is a true copy of a chart showing the corporate structure of a group of companies and the shareholders of same including the Respondents, Kingsway Arms Holdings Inc., Kingsway Arms Management Services Inc., 682202 B.C. Ltd., Patrick Byrne and Graham Parker.

7. The Petitioner loaned the Respondent, 682202 B.C. Ltd. (the "**Borrower**"), in excess of \$29,000,000.00 by means of two non-revolving demand construction loans (the "**Loans**") pursuant to two commitment letters dated October 24, 2006 as amended, modified, restated and assigned from time to time (the "**Loan Agreements**"). The Loan Agreements were initially entered into by Carlisle Capital Structures Corporation ("**Carlisle**") and were later assigned to the Petitioner, as described more fully below.

8. The purpose of the Loans was to assist the Borrower with the construction and development of an independent and assisted living facility referred to as the Cedarbrooke Chateau (the "**Project**") on certain lands and premises owned by the Borrower with a civic address of 32331 – 7th Avenue, Mission, British Columbia and a legal description of:

P.I.D.: 017-490-146

Lot A Section 20 Township 17 New Westminster District Plan LMP1741

(the "**Lands and Premises**").

9. The Project is a mid to upscale five (5) storey retirement residence with 138 units consisting of 12 studios, 90 one bedroom units and 36 two bedroom units. The residence features generous amenity areas including an activity room, lounge areas, a bistro, billiards area, dining room, private dining room, library, multi-purpose/exercise room, beauty salon, medical room, swimming pool with change rooms and massage room. The building was completed in March of 2009.

10. At present, the Project houses 77 tenants, with a total of 47% of the units occupied, and a total occupancy by residents of 52%.

SECURITY

First Loan Agreement

11. On or about October 24, 2006, Carlisle and Kingsway Arms Management Services Inc., Kingsway Arms Holdings Inc., Patrick Byrne, Graham Parker, Chaplin Ventures Ltd. and Colter Investments (GP) Ltd., entered into a commitment letter (the "**First Loan Agreement**") in respect of the establishment of a non-revolving demand construction first

mortgage facility of up to the lesser of \$25,360,000.00 or 80% of the approved Project costs (the "**First Loan**"). Attached as **Exhibit "B"** to this Affidavit is a true copy of the First Loan Agreement.

12. Pursuant to the First Loan Agreement:

- (a) the Borrower was required to be joint venture vehicle controlled by, among others, Kingsway Arms Management Services Inc., Chaplin Ventures Ltd. and Colter Investments (GP) Ltd.;
- (b) Kingsway Arms Management Services Inc., Kingsway Arms Holdings Inc., Chaplin Ventures Ltd., Colter Investments (GP) Ltd., Patrick Byrne, Graham Parker and every other person having an interest in the Borrower are the "**First Loan Covenantors**" and are jointly and severally liable with the Borrower for all covenants and obligations of the Borrower under the First Loan, First Loan Agreement and the required security documents;
- (c) Carlisle would provide the First Loan to the Borrower subject to satisfaction of certain conditions precedent as set out in the First Loan Agreement;
- (d) the Borrower would pay interest to Carlisle on the first day of each month on any portion of the First Loan that remains outstanding at the Prime Rate of the Royal Bank of Canada, as determined from time to time, plus 2% per annum;
- (e) the Borrower would establish an interest reserve account, for the purposes of paying interest as provided for under the First Loan Agreement, with the minimum amount to be held in said account at any time to be the amount equal to two months interest which may otherwise accrue and any failure to fund the said account shall constitute an event of default under the First Loan Agreement;
- (f) the term of the First Loan is the earlier of (i) on demand, (ii) 24 months after substantial completion of the Project and (iii) 48 months after the first advance on the First Loan;
- (g) Carlisle may on demand, without the necessity of an event of default, at any time require the immediate repayment of all amounts outstanding on the First Loan;
- (h) any breach of a term, covenant, condition, representation or warranty under the First Loan Agreement shall constitute an event of default under the Security Documents (as defined in the First Loan Agreement) which shall entitle Carlisle to exercise any of its rights and remedies thereunder, at law or in equity;
- (i) Carlisle may cancel the First Loan Agreement with no further obligation to disburse the First Loan if:
 - (i) the Borrower or the First Loan Covenantors fail to satisfy for any reason any of the provisions or requirements under the First Loan Agreement

with Carlisle not being willing or able to disburse the First Loan prior to June 31, 2009;

- (ii) the Borrower or the First Loan Covenantors are in breach of any term, covenant, condition, representation or warranty under the First Loan Agreement;
 - (iii) in the opinion of Carlisle there is a material adverse change in the position, financial or otherwise, of the Borrower or the First Loan Covenantors;
 - (iv) in the opinion of Carlisle there is a material adverse change in the condition of the Lands and Premises or in the actual or anticipated revenues therefrom; or
 - (v) any situation exists which would constitute a default under the First Loan Agreement or Security Documents (as defined in the First Loan Agreement);
- (j) Carlisle may close out the First Loan at the amount then disbursed if the whole amount of the First Loan has not been disbursed by June 31, 2009;
- (k) the Borrower is not to permit the registration of any charge or other encumbrance against the Lands and Premises without Carlisle's prior written consent;
- (l) the Borrower will have committed an event of default entitling Carlisle to exercise its remedies under the Security Documents (as defined in the First Loan Agreement), including its rights at its option to require the Borrower to immediately pay the entire amount of principal and accrued interest then outstanding upon any of the following occurrences:
- (i) failing to make interest payments on the First Loan for 15 months;
 - (ii) failing to repay the First Loan;
 - (iii) failing to replenish the interest reserve account for the First Loan;
 - (iv) failing to pay the property taxes on the Lands and Premises;
 - (v) allowing the Judgment (as defined below) to be registered against the title to the Lands and Premises without the prior written consent of the Petitioner; and
 - (vi) being in default of one loan to the detriment of the other loan, pursuant to the cross defaults as between the Loans;
- (m) the First Loan, the First Loan Agreement and the Security Documents (as defined in the First Loan Agreement) may be assigned in whole or in part by Carlisle.

The First Assignment

13. Effective January 17, 2007, Carlisle assigned all of its right, title and interest in and to the First Loan Agreement to the Petitioner (the "**First Assignment**") with the acknowledgement and consent of the Covenantors (as defined below). The First Assignment is attached to the back of the First Loan Agreement which is Exhibit "B" to this Affidavit.

The First Mortgage

14. The First Loan Agreement was secured by, amongst other security, the First Mortgage.

15. The First Mortgage consisted of a mortgage and an assignment of rents made between the Petitioner as mortgagee, the Borrower as mortgagor and the Respondents, Kingsway Arms Management Services Inc., Kingsway Arms Holdings Inc., Kingsway Arms Holdings B.C. Ltd., Patrick Byrne, Graham Parker, Chaplin Ventures Ltd., Colter Investments (GP) Ltd., Colter Investments LP and 0780293 B.C. Ltd., as the covenantors (the "**Covenantors**") for \$25,360,000.00 and was registered in the New Westminster Land Title Office on February 7, 2007, under registration numbers BB465267 and BB465268 (the "**First Mortgage**") against the title to the Lands and Premises. Attached as **Exhibit "C"** to this Affidavit is a true copy of the First Mortgage.

16. Under the First Mortgage:

- (a) the Borrower covenants to pay all outstanding principal, interest and other monies that the Borrower owes to the Petitioner, including any and all accrued interest, the payment of which is secured by, amongst other security, the First Mortgage;
- (b) the Borrower shall pay all Taxes (as defined in the First Mortgage), as they fall due and before any penalty attaches for non-payment thereof;
- (c) the Borrower will have committed an event of default if, amongst other things:
 - (i) there is default in payment of any of the principal, interest and other monies due;
 - (ii) there is a breach of any of the Borrower's covenants or other obligations;
 - (iii) the Borrower or the Covenantors become bankrupt or insolvent or makes arrangements for the benefit of creditor;
 - (iv) the Borrower fails to observe or perform any of the provisions of any agreement or the First Loan Agreement pursuant to which any monies secured by the First Mortgage were advanced or there is any default by the Borrower or the Covenantors under any other loan agreement to which the Borrower or the Covenantors is a party with the Petitioner;

- (v) any warranty or representation made by the Borrower or the Covenantors in connection with the loan secured by the First Mortgage is or becomes untrue in any material respect; or
- (vi) there occurs any material change in the financial position of the Borrower or any of the Covenantors;
- (d) upon any event of default, at the option of the Petitioner:
 - (i) the principal, interest and other monies owing to the Petitioner shall forthwith become due and payable and the security constituted by the First Mortgage becomes enforceable without notice as if the Maturity Date had fully come and expired;
 - (ii) the Petitioner shall have possession of the Lands and Premises free and clear from all encumbrances subject only to Permitted Encumbrances (as defined in the First Mortgage);
 - (iii) the Petitioner may exercise any and all remedies, including:
 - A. entering into possession of the Lands and Premises;
 - B. selling and disposing of the Lands and Premises;
 - C. seeking the appointment of a Receiver or a Receiver and Manager of the Lands and Premises who will be an agent of the Borrower and the Borrower shall be responsible for the acts or defaults and for the remuneration and expenses of the Receiver or Receiver and Manager;
 - D. entering upon the Lands and Premises and completing the Project with such changes as the Petitioner may deem appropriate which work will be done at the cost and expense of the Borrower;
 - E. discontinuing at any time any work commenced on the Lands and Premises or changing any course of action taken by the Borrower;
 - F. assuming any of the contracts made by the Borrower and taking over and using all of the labour, material, supplies and equipment contracted by the Borrower;
 - G. engaging builders, contractors, architects, engineers and other staff and trades as may be necessary for the purpose of completing construction of the Project;
 - H. paying, settling or compromising all bills or claims which may become liens against the Lands and Premises;

- (e) any Receiver or Receiver and Manager appointed by virtue of the exercise of the remedy above-stated at paragraph 16(d)(iii)(C), shall have the power to:
 - (i) take possession of and collect rents and profits from the Lands and Premises and for that purpose may take any proceedings be they legal or other proceedings in the name of the Borrower or otherwise;
 - (ii) carry on or concur in carrying on the business which the Borrower is conducting on and from the Lands and Premises and for that purpose with court approval where required borrow money on the security of the Lands and Premises in priority to the First Mortgage; and
 - (iii) lease all or any portion of the Lands and Premises and for that purpose execute contracts in the name of the Borrower which said contracts will be binding upon the Borrower;
- (f) the Borrower shall pay on demand the costs, charges and expenses of the Petitioner, which costs, charges and expenses will bear interest at the Interest Rate (as defined in the First Mortgage) until paid and will form part of the Indebtedness, of and incidental to, amongst other things:
 - (i) the collection, enforcement and realization of the security contained in the First Mortgage;
 - (ii) procuring payment of the Indebtedness (as defined in the First Mortgage) by exercise of the Petitioner's remedies on default, including foreclosure, power of sale or execution proceedings;
 - (iii) the Petitioner having to go into possession of the Lands and Premises to secure, complete or equip the buildings;
 - (iv) the exercise of any powers of Receiver or Receiver and Manager contained in the First Mortgage;
- (g) default by the Borrower under any other loan with the Petitioner will be deemed to be a default under the First Mortgage and the entire balance of the Indebtedness (as defined in the First Mortgage) will at the option of the Petitioner become immediately due and payable;
- (h) default by the Borrower of any of the terms or requirements contained in the First Loan Agreement will constitute a default under the First Mortgage.

17. Under the First Mortgage, the Covenantors agreed on a joint and several basis with the Borrower to pay all outstanding principal, interest and other monies owed by the Borrower to the Petitioner when due, and to perform all of the Borrower's covenants and agreements under the First Mortgage, in each case as primary debtors of the Petitioner.

The First GSA

18. The First Loan Agreement was also secured by a general security agreement dated January 17, 2007 from the Borrower in favour of the Petitioner in respect of all of the Borrower's presently owned or after acquired or held personal property (the "**First GSA**"). Attached as **Exhibit "D"** to this Affidavit is a true copy of the First GSA.

19. The First GSA was registered in the B.C. Personal Property Registry on January 31, 2007 under Base Registration No. 479041D. Attached as **Exhibit "E"** to this Affidavit is a true copy of a search result from the B.C. Personal Property Registry showing the registration of the First GSA against the Borrower. Also attached respectively as **Exhibit "F"** and **Exhibit "G"** to this Affidavit are copies of Personal Property Registry search results in B.C. and Ontario in respect of the resident Covenantors.

Additional Security

20. In addition to the security referenced above, the following collateral security documents were entered into in respect of the First Loan Agreement:

- (a) an Assignment of Rights Under Contracts from the Borrower in favour of the Petitioner in respect of those Rights and Contracts (as defined therein). Attached as **Exhibit "H"** to this Affidavit is a true copy of this document;
- (b) a Deposit Agreement from the Borrower in favour of the Petitioner in respect of the Deposit (as defined therein) held by the Petitioner. Attached as **Exhibit "I"** to this Affidavit is a true copy of this document;
- (c) a Cost Overrun and Completion Agreement from the Borrower and each of the Covenantors in favour of the Petitioner in respect of any Cost Overruns (as defined therein). Attached as **Exhibit "J"** to this Affidavit is a true copy of this document;
- (d) an Assignment of Licences and Health Authority Agreements from the Borrower in favour of the Petitioner in respect of certain Health Authority Agreements (as defined therein). Attached as **Exhibit "K"** to this Affidavit is a true copy of this document;
- (e) an Assignment and Postponement of Claims from each Covenantor and the Respondent, Michael Chaplin, as a share pledgor as one of the shareholders of the Borrower ("**Mr. Chaplin**"), in favour of the Petitioner, in each case assigning and postponing any claims of such Covenantor and Mr. Chaplin against the Borrower to the Petitioner. Attached collectively as **Exhibit "L"** to this Affidavit are true copies of these documents; and
- (f) Share Pledge Agreements from each of 0780293 B.C. Ltd., Colter Investments Limited Partnership, Kingsway Arms Holdings B.C. Ltd. and Mr. Chaplin, of all of their shares in the Borrower in favour of the Petitioner. Attached collectively as **Exhibit "M"** to this Affidavit are true copies of these documents.

Second Loan Agreement

21. On or about October 24, 2006, Carlisle and Kingsway Arms Management Services Inc., Kingsway Arms Holdings Inc., Patrick Byrne, Graham Parker, Chaplin Ventures Ltd. and Colter Investments (GP) Ltd., entered into a commitment letter (the "**Second Loan Agreement**") in respect of the establishment of a non-revolving demand construction second mortgage facility of up to the lesser of \$3,700,000.00 or 12% of the approved Project costs (the "**Second Loan**"). Attached as **Exhibit "N"** to this Affidavit is a true copy of the Second Loan Agreement.

22. Pursuant to the Second Loan Agreement:

- (a) the Borrower was required to be a joint venture vehicle controlled by, among others, Kingsway Arms Management Services Inc., Chaplin Ventures Ltd. and Colter Investments (GP) Ltd.;
- (b) Kingsway Arms Management Services Inc., Kingsway Arms Holdings Inc., Chaplin Ventures Ltd., Colter Investments (GP) Ltd., Patrick Byrne, Graham Parker and every other person having an interest in the Borrower are the "**Second Loan Covenantors**" and are jointly and severally liable with the Borrower for all covenants and obligations of the Borrower under the Second Loan, Second Loan Agreement and the required security documents;
- (c) Carlisle would provide the Second Loan to the Borrower subject to satisfaction of certain conditions precedent as set out in the Second Loan Agreement;
- (d) the Borrower would pay interest to Carlisle on the first day of each month on any portion of the Second Loan that remains outstanding at the rate of 14% per annum;
- (e) the Borrower would establish an interest reserve account, for the purposes of paying interest as provided for under the Second Loan Agreement, with the minimum amount to be held in said account at any time to be the amount equal to two months interest which may otherwise accrue and any failure to fund the said account shall constitute an event of default under the Second Loan Agreement;
- (f) the term of the Second Loan is the earlier of (i) on demand, (ii) 12 months after the term of the Second Loan and (iii) 48 months after the first advance on the Second Loan;
- (g) Carlisle may on demand, without the necessity of an event of default, at any time require the immediate repayment of all amounts outstanding on the Second Loan;
- (h) any breach of a term, covenant, condition, representation or warranty under the Second Loan Agreement shall constitute an event of default under the Security Documents (as defined in the Second Loan Agreement) which shall entitle Carlisle to exercise any of its rights and remedies thereunder, at law or in equity;

- (i) Carlisle may cancel the Second Loan Agreement with no further obligation to disburse the Second Loan if:
 - (i) the Borrower or the Second Loan Covenantors fail to satisfy for any reason any of the provisions or requirements under the Second Loan Agreement with Carlisle not being willing or able to disburse the Second Loan prior to January 31, 2007;
 - (ii) the Borrower or the Second Loan Covenantors are in breach of any term, covenant, condition, representation or warranty under the Second Loan Agreement;
 - (iii) in the opinion of Carlisle there is a material adverse change in the position, financial or otherwise, of the Borrower or the Second Loan Covenantors;
 - (iv) in the opinion of Carlisle there is a material adverse change in the condition of the Lands and Premises or in the actual or anticipated revenues therefrom; or
 - (v) any situation exists which would constitute a default under the Second Loan Agreement or Security Documents (as defined in the Second Loan Agreement);
- (j) Carlisle may close out the Second Loan at the amount then disbursed if the whole amount of the Second Loan has not been disbursed by January 31, 2007;
- (k) the Borrower is not to permit the registration of any charge or other encumbrance against the Lands and Premises without Carlisle's prior written consent;
- (l) the Borrower will have committed an event of default entitling Carlisle to exercise its remedies under the Security Documents (as defined in the Second Loan Agreement), including its rights at its option to require the Borrower to immediately pay the entire amount of principal and accrued interest then outstanding upon any of the following occurrences:
 - (i) failing to make interest payments on the Second Loan for 15 months;
 - (ii) failing to repay the Second Loan;
 - (iii) failing to replenish the interest reserve account for the Second Loan;
 - (iv) failing to pay the property taxes on the Lands and Premises;
 - (v) allowing the Judgment (as defined below) to be registered against the title to the Lands and Premises without the prior written consent of the Petitioner; and

- (vi) being in default of one loan to the detriment of the other loan, pursuant to the cross defaults as between the Loans;
- (m) the Second Loan, the Second Loan Agreement and the Security Documents (as defined in the Second Loan Agreement) may be assigned in whole or in part by Carlisle.

The Second Assignment

23. Effective January 17, 2007, Carlisle assigned the Second Loan Agreement to the Petitioner (the "**Second Assignment**") with the acknowledgement and consent of the Covenantors. The Second Assignment is attached to the back of the Second Loan Agreement which is Exhibit "N" to this Affidavit.

The Second Mortgage

24. The Second Loan Agreement was secured by, amongst other security, the Second Mortgage.

25. The Second Mortgage consisted of a mortgage and an assignment of rents made between the Petitioner as mortgagee, the Borrower as mortgagor and the Covenantors as the covenantors for \$3,700,000.00 and was registered in the New Westminster Land Title Office on February 7, 2007, under registration numbers BB465270 and BB465271 (the "**Second Mortgage**") against the title to the Lands and Premises. Attached as **Exhibit "O"** to this Affidavit is a true copy of the Second Mortgage.

26. Under the Second Mortgage:

- (a) the Borrower covenants to pay all outstanding principal, interest and other monies that the Borrower owes to the Petitioner, including any and all accrued interest, the payment of which is secured by, amongst other security, the Second Mortgage;
- (b) the Borrower shall pay all Taxes (as defined in the Second Mortgage), as they fall due and before any penalty attaches for non-payment thereof;
- (c) the Borrower will have committed an event of default if, amongst other things:
 - (i) there is default in payment of any of the principal, interest and other monies due;
 - (ii) there is a breach of any of the Borrower's covenants or other obligations;
 - (iii) the Borrower or the Covenantors become bankrupt or insolvent or makes arrangements for the benefit of creditor;
 - (iv) the Borrower fails to observe or perform any of the provisions of any agreement or the Second Loan Agreement pursuant to which any monies

secured by the Second Mortgage were advanced or there is any default by the Borrower or the Covenantors under any other loan agreement to which the Borrower or the Covenantors is a party with the Petitioner;

- (v) any warranty or representation made by the Borrower or the Covenantors in connection with the loan secured by the Second Mortgage is or becomes untrue in any material respect; or
 - (vi) there occurs any material change in the financial position of the Borrower or any of the Covenantors;
- (d) upon any event of default, at the option of the Petitioner:
- (i) the principal, interest and other monies owing to the Petitioner shall forthwith become due and payable and the security constituted by the Second Mortgage becomes enforceable without notice as if the Maturity Date had fully come and expired;
 - (ii) the Petitioner shall have possession of the Lands and Premises free and clear from all encumbrances subject only to Permitted Encumbrances (as defined in the Second Mortgage);
 - (iii) the Petitioner may exercise any and all remedies, including:
 - A. entering into possession of the Lands and Premises;
 - B. selling and disposing of the Lands and Premises;
 - C. seeking the appointment of a Receiver or a Receiver and Manager of the Lands and Premises who will be an agent of the Borrower and the Borrower shall be responsible for the acts or defaults and for the remuneration and expenses of the Receiver or Receiver and Manager;
 - D. entering upon the Lands and Premises and completing the Project with such changes as the Petitioner may deem appropriate which work will be done at the cost and expense of the Borrower;
 - E. discontinuing at any time any work commenced on the Lands and Premises or changing any course of action taken by the Borrower;
 - F. assuming any of the contracts made by the Borrower and taking over and using all of the labour, material, supplies and equipment contracted by the Borrower;
 - G. engaging builders, contractors, architects, engineers and other staff and trades as may be necessary for the purpose of completing construction of the Project;

- H. paying, settling or compromising all bills or claims which may become liens against the Lands and Premises;
- (e) any Receiver or Receiver and Manager appointed by virtue of the exercise of the remedy above-stated at paragraph 26(d)(iii)(C) shall have the power to:
 - (i) take possession of and collect rents and profits from the Lands and Premises and for that purpose may take any proceedings be they legal or other proceedings in the name of the Borrower or otherwise;
 - (ii) carry on or concur in carrying on the business which the Borrower is conducting on and from the Lands and Premises and for that purpose with court approval where required borrow money on the security of the Lands and Premises in priority to the Second Mortgage; and
 - (iii) lease all or any portion of the Lands and Premises and for that purpose execute contracts in the name of the Borrower which said contracts will be binding upon the Borrower;
- (f) the Borrower shall pay on demand the costs, charges and expenses of the Petitioner, which costs, charges and expenses will bear interest at the Interest Rate (as defined in the Second Mortgage) until paid and will form part of the Indebtedness, of and incidental to, amongst other things:
 - (i) the collection, enforcement and realization of the security contained in the Second Mortgage;
 - (ii) procuring payment of the Indebtedness (as defined in the Second Mortgage) by exercise of the Petitioner's remedies on default, including foreclosure, power of sale or execution proceedings;
 - (iii) the Petitioner having to go into possession of the Lands and Premises to secure, complete or equip the buildings;
 - (iv) the exercise of any powers of Receiver contained in the Second Mortgage;
- (g) default by the Borrower under any other loan with the Petitioner will be deemed to be a default under the Second Mortgage and the entire balance of the Indebtedness (as defined in the Second Mortgage) will at the option of the Petitioner become immediately due and payable;
- (h) default by the Borrower of any of the terms or requirements contained in the Second Loan Agreement will constitute a default under the Second Mortgage.

27. Under the Second Mortgage, the Covenantors are primary debtors of the Petitioner and did covenant on a joint and several basis with the Borrower to pay all outstanding principal, interest and other monies when due to the Petitioner and to perform all of the Borrower's covenants and agreements under the said Second Mortgage.

The Second GSA

28. The Second Loan Agreement was also secured by a general security agreement dated January 17, 2007 from the Borrower in favour of the Petitioner in respect of all of the Borrower's presently owned or after acquired or held personal property (the "**Second GSA**"). Attached as **Exhibit "P"** to this Affidavit is a true copy of the Second GSA.

29. The Second GSA was registered in the B.C. Personal Property Registry on January 31, 2007 under Base Registration No. 479136D. Attached as **Exhibit "Q"** to this Affidavit is a true copy of a search result from the B.C. Personal Property Registry showing the registration of the Second GSA against the Borrower. Also attached respectively as **Exhibit "R"** and **Exhibit "S"** to this Affidavit are copies of Personal Property Registry search results in B.C. and Ontario in respect of the resident Covenantors.

Additional Security

30. In addition to the security referenced above, the following collateral security documents were entered into in respect of the First Loan Agreement:

- (a) an Assignment of Rights Under Contracts from the Borrower in favour of the Petitioner in respect of those Rights and Contracts (as defined therein). Attached as **Exhibit "T"** to this Affidavit is a true copy of this document;
- (b) a Deposit Agreement from the Borrower in favour of the Petitioner in respect of the Deposit (as defined therein) held by the Petitioner. Attached as **Exhibit "U"** to this Affidavit is a true copy of this document;
- (c) a Cost Overrun and Completion Agreement from the Borrower and each of the Covenantors in favour of the Petitioner in respect of any Cost Overruns (as defined therein). Attached as **Exhibit "V"** to this Affidavit is a true copy of this document;
- (d) an Assignment of Licences and Health Authority Agreements from the Borrower in favour of the Petitioner in respect of certain Health Authority Agreements (as defined therein). Attached as **Exhibit "W"** to this Affidavit is a true copy of this document;
- (e) Assignment and Postponement of Claims from each Covenantor and Mr. Chaplin in favour of the Petitioner, in each case assigning and postponing any claims of such Covenantor and Mr. Chaplin against the Borrower to the Petitioner. Attached collectively as **Exhibit "X"** to this Affidavit are true copies of these documents; and
- (f) Share Pledge Agreements from each of 0780293 B.C. Ltd. Colter Investments Limited Partnership, Kingsway Arms Holdings B.C. Ltd. and Mr. Chaplin, of all of their shares in the Borrower in favour of the Petitioner. Attached collectively as **Exhibit "Y"** to this Affidavit are true copies of these documents.

DEFAULT

31. The Borrower is in default of the Loan Agreements, the First and Second Mortgages and the First and Second GSA's by:

- (a) failing to make interest payments on the First and Second Loans for 15 months;
- (b) failing to repay the First and Second Loans;
- (c) failing to replenish the interest reserve account for the First and Second Loans;
- (d) failing to pay the property taxes on the Lands and Premises;
- (e) allowing the Judgment (as defined below) to be registered against the title to the Lands and Premises without the prior written consent of the Petitioner; and
- (f) being in default of one loan to the detriment of the other loan, pursuant to the cross defaults as between the First and Second Loans.

32. The Covenantors are in default of the covenants contained in the Loan Agreements and the First and Second Mortgages by virtue of being jointly and severally liable with the Borrower to pay all outstanding principal, interest and other monies owed by the Borrower to the Petitioner when due, and to perform all of the Borrower's covenants and agreements under the First and Second Mortgages, in each case as primary debtors of the Petitioner.

33. By virtue of the provisions of the Loan Agreements, the First and Second Mortgages and the First and Second GSA's, upon such default the whole of the principal amount, interest and other monies secured by the said First and Second Mortgages and First and Second GSA's becomes due and payable at the option of the Petitioner and the same is now due and payable but has not been paid.

34. On or about November 15, 2010, the Petitioner delivered Notices of Intention to Enforce Security (the "**Notices**") and demand letters demanding payment from the Borrower and the Covenantors of the whole of the principal amount, interest and other monies outstanding on the Loans secured by the First and Second Mortgages and the First and Second GSA's (the "**Demand Letters**") but the Borrower and the Covenantors have refused, failed or neglected to repay the amount owing. Attached collectively as **Exhibit "Z"** to this Affidavit are true copies of the Demand Letter, Notice and proof of delivery to the Borrower. Attached collectively as **Exhibit "AA"** to this Affidavit are true copies of the Demand Letter, Notice and proof of delivery to the Covenantors.

35. The outstanding amount now due under the First Loan is \$26,780,900.00 as at December 31, 2010, consisting of principal of \$25,252,780.00, interest on the principal of \$1,470,888.00 and expenses to December 31, 2010 of \$57,232.00. The said amount claimed does not include any penalty or bonus.

36. The interest due under the First Loan is at the per diem rate of \$3,459.28.

37. The outstanding amount now due under the Second Loan is \$4,356,950.00 as at December 31, 2010, consisting of principal of \$3,700,000.00, interest on the principal of \$648,564.00 and expenses to December 31, 2010 of \$8,386.00. The said amount claimed does not include any penalty or bonus.

38. The interest due under the Second Loan is at the per diem rate of \$1,419.18.

39. The total amount due and payable by the Borrower and the Covenantors under the Loans is \$31,137,850.00 as at December 31, 2010 with a total per diem interest rate of \$4,878.46. Attached as **Exhibit "BB"** to this Affidavit is a true copy of a payout statement.

MANAGEMENT OF PROJECT

40. Pursuant to a Management Agreement made January 31, 2007 (the "**Management Agreement**") between the Borrower and Kingsway Arms Management (at Cedarbrooke Chateau) Inc. (the "**Manager**"), all management services in respect of the Project are presently being provided by the Manager, which is a subsidiary entity of the developer and promoter of the project, Kingsway Arms Holdings Inc. and an affiliate of the Borrower. The agreement is broad in scope and covers all areas of management of the Project including the provision of staff, all administrative functions and responsibilities, management and oversight of all operations of the facilities, including food services, marketing and sales. A true copy of the Management Agreement is attached as **Exhibit "CC"** to this Affidavit.

41. Pursuant to the Management Agreement, the Manager:

- (a) operates and manages the business of the Project on behalf of and as the agent of the Borrower;
- (b) will exercise its obligations and responsibilities honestly, faithfully and in the best interests of the Borrower and the Project with a degree of prudence, diligence and high skill;
- (c) may employ on-site managerial, contract, consulting and supervisory staff for the buildings, improvements and operating inventory of the Project as is necessary to maintain day to day operations;
- (d) will employ such persons as are necessary for the efficient operation and management of the business of the Project;
- (e) may enter into service contracts for the supply of personnel for the operation and management of the Project;
- (f) will, in order to discharge its obligations as an agent for the Borrower, direct and control the operation and management of the Project, render supervision and control the performance of all services and do or cause to be done all things it can reasonably do for the efficient and proper operation of the Project in accordance with the requirements of the Management Agreement and will:

- (i) hire, promote, discharge and supervise the work of consultants, administrators, assistant administrators, department heads and all operating and supervisory employees performing services in and about the operation and management of the Project and all such other persons as may be necessary to the proper maintenance and operation of the Project; and
 - (ii) take out and maintain at all times during the term of the Management Agreement such insurance coverage on the operation and management of the Project as may be required under the Management Agreement;
- (g) will deposit in a separate bank account (held in trust by the Manager for the Borrower) all Gross Revenue (as defined in the Management Agreement) or monies otherwise received by the Manager from the operation and management of the Project (the "**Bank Accounts**");
- (h) will establish and supervise accounting and internal control systems with all such books of account and other records (the "**Books and Records**") being the property of the Borrower and being available for examination, inspection, audit and copying by the Borrower;
- (i) agrees, upon termination of the Management Agreement, to turn over to the Borrower all Books and Records so as to ensure an orderly continuation of the operation and management of the business of the Project;
- (j) will provide to the Borrower, within approximately 20 days after month end, a copy of a monthly report of income and expenses as well as a copy of the bank statement;
- (k) will supply to the Borrower a copy of the daily reports completed in respect of the Project and such other statements and reports as the Borrower may reasonably require in order to fulfil its commitments to the Borrower's lenders or otherwise;
- (l) will make available to the Accountants (as defined in the Management Agreement) such books, records and internal financial statements as the Accountants may require and access to such computers and other financial services that the Manager utilizes from time to time in the production of financial statements for the operation and management of the Project (the "**Financial Statements**");
- (m) will provide to the Borrower, within 60 days after year end, a copy of the internal year end financial statements as well as its year end working paper file;
- (n) will fully cooperate with the Borrower and any of its respective lenders in connection with any matter associated with the operation and management of the Project or any loans to the Borrower

42. At present, the Bank Accounts, Financial Statements, Books and Records and other pertinent books and records are held by the Respondent, Kingsway Arms Management Services Inc., at Suite 209 - 5409 Eglinton Avenue West, Etobicoke, Ontario M9C 5K6.

43. At present, there are 29 employees of the Manager working at the Project. These are non-unionized employees with no pension plans in place.

44. It is envisioned that some or all of the present employees will continue to help manage and service the Project, together with members of the Receiver and Manager's staff.

OPERATIONAL CASH

45. At present, except for the servicing of the Loan Agreements, the Project is self-funding and able to operate without additional funding.

46. If it becomes necessary to fund additional costs, I understand that the Receiver and Manager has available to it the right to borrow funds based on a form of Receiver's Certificate. If this is required, the Petitioner, or another entity associated with the Petitioner, is prepared to assist with reasonable funding requests, provided they form a priority charge in the assets of the estate behind the Administrative Charge, and are capped at \$250,000.00.

GST OBLIGATIONS

47. The Petitioner recently received notice that the Canada Revenue Agency registered a judgment against the title to the Lands and Premises on November 10, 2010 under registration number BB1293106 in respect of alleged outstanding GST obligations of the Borrower in the amount of \$1,269,975.71 plus penalty and interest at the rate prescribed under the *Excise Tax Act*, R.S.C. 1985, c. E-15, applicable from time to time and compounded daily from August 19, 2010 to the day of payment (the "**Judgment**"). Attached collectively as **Exhibit "DD"** to this Affidavit are true copies of the Judgment, the Certificate and the GST audit documents.

PROPERTY TAX OBLIGATIONS

48. The Petitioner recently received notice that there are outstanding property taxes and interest on same in respect of the Lands and Premises in the amount of \$87.46 for 2009 and \$186,175.01 for 2010. Interest on arrears and delinquent amounts is at the per diem rate of \$0.01 after July 23, 2010. Attached collectively as **Exhibit "EE"** to this Affidavit are true copies of the Property Tax Certificate and the Property Tax Notice.

NEED FOR A RECEIVER AND MANAGER

49. The Project has been operating at below capacity since its opening. The Borrower has been unable to meet its obligations under the Loan Agreements.

50. Given the nature of the Project, as a seniors residence, the Lender wishes to ensure a smooth transition to a receivership to avoid the tenants being concerned as to the future of the Project.

51. I understand from discussions with Roderick G. Dougherty of Carlisle that tenants and current staff at the Project are already very anxious regarding the stability and future of the Project.

52. I understand from discussions with Roderick G. Dougherty of Carlisle that there is at present dissention among the shareholders of the Borrower. Dissention and disputes between shareholders and management has created a circumstance of uncertainty and it appears to have rendered the Borrower incapable of dealing responsibly with the issues relating to the Project. The Petitioner has attempted, for a considerable period of time, to resolve the situation. Numerous efforts have been attempted to work with the Borrower and protect the residents. These efforts have proved fruitless and Roderick G. Dougherty has been advised by the parties to the dispute that they are incapable of coming to a mutually satisfactory solution. This impasse has prevented the Project from developing a proper go forward plan and obtaining any solution to its financial difficulties. In order to protect its investment while maintaining a safe, secure and hospitable home for the residents of Cedarbrooke Chateau on an ongoing basis, the Petitioner feels it has no choice but to take control of the Project, provide proper management and oversight and meet the requirements of its residents.

53. I believe a receivership will help stabilize the operations and offer tenants and staff comfort regarding the near future.

54. I am concerned that without a receivership we will lose critical staff for the Project, as well as present and prospective tenants.

RECEIVER AND MANAGER

55. I understand from discussions with Roderick G. Dougherty that the proposed Receiver and Manager, Alvarez and Marsal Canada Inc. ("A&M"), is experienced in operating similar seniors residences and can offer stability for the residence and the financing of the Project.

56. I understand that A&M is prepared to act as the Receiver and Manager of all of the Borrower's current and future assets, including the Land and Premises and the Project. Attached as **Exhibit "FF"** to this Affidavit is a true copy of a letter from A&M confirming its consent to act as the Receiver and Manager.

SWORN (OR AFFIRMED) BEFORE ME
at Toronto, Ontario, on 7 /Feb/2011

Daniel Alexander Tiberini, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law,
Expires May 5, 2012.

A Commissioner for taking Affidavits for Ontario

[Name of Commissioner (please print)]


MARK KATZ