Court File No.: ____________

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DISCOVERY AIR INC.

APPLICANT

FACTUM OF THE APPLICANT

March 21, 2018

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
Toronto, Ontario M5G 1V2
Fax: 416-597-6477

Mario Forte (LSUC#: 27293F)
Tel: 416.597.6477
Email: forte@gsnh.com

Michael Rotsztain (LSUC#: 17086M)
Tel: 416.597.7870
Email: rotsztain@gsnh.com

Jennifer Stam (LSUC#: #46735J)
Tel: 416.597.5017
Email: stam@gsnh.com

Lawyers for the Applicant

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PART I – NATURE OF THIS APPLICATION

1. This factum is filed in support of an application made by Discovery Air Inc. ("**Discovery**" or the "**Applicant**") for relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the "**CCAA**").

PART II – FACTS

2. The facts supporting this application are set out in full detail in the affidavit of Paul Bernards sworn March 21, 2018 (the "**Bernards Affidavit**"). Capitalized terms used herein and not otherwise defined have the meaning given to them in the Bernards Affidavit.

3. Discovery, through its four wholly-owned subsidiaries (the "**Non-Applicant Subsidiaries**"), Great Slave Helicopters Ltd. ("**GSH**"), Air Tindi Ltd. ("**ATL**"), Discovery Mining Services Ltd. ("**DMS**") and Discovery Air Technical Services Inc. ("**DATS**") (Discovery and the Non-Applicant Subsidiaries are collectively referred to herein as the "**Discovery Air Group**"), provides specialty aviation services and logistics support to governments and natural resource and other business customers, operating across Canada and in select locations internationally,

including the United States, Bolivia, Australia, and Chile. GSH, ATL and DMS are active subsidiaries, while DATS is presently inactive.[1]

4. Until December 2017, Discovery Air Defence Services Inc. ("**DADS**") and its subsidiaries were also subsidiaries of Discovery. As discussed below, as of December 2017, DADS is no longer owned by Discovery (other than a remaining small minority interest). On February 1, 2018, DADS rebranded by changing the name of the company back to its original corporate name, "Top Aces Inc." (together with its subsidiaries, "**Top Aces**") and the former DADS business now carries on business globally under the Top Aces brand.[2]

5. Since 2014, Discovery has consistently experienced losses ranging between $16 million and $29 million annually on a consolidated basis and has not reported a profit. Throughout this time, the businesses have required persistent infusions of capital and significant funding to continue operating. Further, the seasonal nature of Discovery's business has contributed to the need for further capital in the slower winter months. The Northern business (carried out through GSH, ATL and DMS) is highly seasonal with approximately 50% of its gross revenue earned in June to September of each year.[3]

6. As set out in further detail below Discovery is presently facing the imminent or near term maturities of over $92 million secured debt plus the maturity of its Unsecured Listed Debentures (defined below).[4] Discovery has no ability to repay these obligations and is unable to refinance this debt given its current circumstances. Clairvest (defined below) has informed Discovery that it will not extend the maturity of its debt or provide additional financing to pay the other maturing obligations, which may result in cross-defaults and debt acceleration.[5]

7. Discovery intends to effect a series of restructuring transactions principally through a sale solicitation process ("**SSP**"), which will include four stalking horse bids: one for the indirect minority interest in Top Aces, and separate bids for the shares of each of GSH, ATL, and DMS,

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[1] Bernards Affidavit, para. 6.
[2] Bernards Affidavit, para. 7.
[3] Bernards Affidavit, paras. 8 and 9.
[4] Bernards Affidavit, para. 12.
[5] Bernards Affidavit, para. 13.

respectively, and in each case together with various ancillary assets and contracts that are used and required for the ongoing operation of each business. In order to provide stability and certainty to stakeholders, Discovery has negotiated the terms of proposed stalking horse agreements with Clairvest who, through designated purchasers, will act as stalking horse bidders for each of the transactions. [6]

A. Corporate Information and Ownership

8. Discovery was incorporated under the laws of the Province of Ontario (the Ontario *Business Corporations Act,* R.S.O. 1990, c. B.16 as amended) on November 12, 2004, and was continued under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended (the "**CBCA**") on March 27, 2006.[7]

9. Discovery's head office is a leased location in Toronto, near Pearson International Airport.[8]

B. Discovery's Secured Debt

10. A summary of the current secured debt structure of the Discovery Air is set out on Schedule "C" hereto. In total, the Discovery Air Group has over $114 million of outstanding secured debt.

i. Clairvest

11. Since 2011, the Discovery Air Group and Top Aces businesses have been supported and financially sustained directly and indirectly by Clairvest Group Inc. and its affiliates, including certain funds managed by Clairvest Group Inc. (collectively, "**Clairvest**"[9] and references to "**Clairvest**" herein may refer to any or all such affiliates and/or funds, as applicable). Clairvest has provided extensive financial support to the Discovery Air Group (including Top Aces) in the form of loans, guarantees and equity injections.[10] Clairvest has also provided support to the

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[6] Bernards Affidavit, para. 15.

[7] Bernards Affidavit, para. 20.

[8] Bernards Affidvait, para. 21.

[9] As applicable, the term "Clairvest" may also include Mr. G. John Krediet, an individual investor within the Clairvest group.

[10] Bernards Affidavit, paras. 10 and 31.

Discovery Air Group in the form of waivers of covenants, extensions of debt maturity and other amendments and relief relating to these financing transactions.[11]

12. Clairvest is presently the majority shareholder of Discovery and Top Aces (indirectly through Top Aces Holdco, defined below), and is the largest secured creditor of the Discovery Air Group being owed approximately $72.7 million under the secured convertible debentures held by it (the "**CV Secured Debentures**"). Discovery is the borrower of the debt owing to Clairvest. [12] The CV Secured Debentures mature on May 5, 2018.[13]

ii. *Other Secured Indebtedness*

13. In addition to Clairvest, the Discovery Air Group has a number of other significant secured creditors; namely: (a) Canadian Imperial Bank of Commerce ("**CIBC**") – traditional revolving bank facility; (b) Roynat Inc. ("**Roynat**") – aircraft-specific financing; (c) ECN Aviation Inc. ("**ECN**") – aircraft-specific financing; and (d) Textron Financial Corporation ("**Textron**")– aircraft-specific financing.[14]

14. As set out above, Discovery has significant amounts of secured debt owing to each of CIBC, Roynat and ECN totalling over $28 million. Discovery makes regular payments of interest to each of CIBC, Roynat and ECN and also makes regular payments of principal to Roynat. ATL is the borrower under the Textron facility and makes regular payments on that facility. Both the CIBC facility and the Roynat facility mature in April 2018.[15]

15. Each of the Discovery Air Group, Clairvest, CIBC, Textron, ECN and Roynat are party to an Intercreditor Agreement dated March 26, 2012 (as amended and/or restated from time to time, the "**Intercreditor Agreement**"). The Intercreditor Agreement, together with the underlying loan and security documents for each party to the Intercreditor Agreement is detailed and complex.[16]

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[11] Bernards Affidavit, para. 32.

[12] Bernards Affidavit, paras. 30 and 33.

[13] Bernards Affidavit, para. 31.

[14] Bernards Affidavit, para 34.

[15] Bernards Affidavit, paras. 37 and 40.

[16] Bernards Affidavit, para. 48.

The relative priorities agreed upon pursuant to the Intercreditor Agreement are summarized in the table on Schedule "C" attached hereto.

C. The Unsecured Listed Debentures

16. The Unsecured Listed Debentures were issued by Discovery in the principal amount of $34.5 million, pursuant to an indenture dated May 12, 2011 (the "**Unsecured Listed Debentures**"). Other than certain intercompany obligations, the Unsecured Listed Debentures is the largest outstanding unsecured obligation of Discovery and have not been guaranteed by any other member of the Discovery Air Group.[17] To date, Discovery has made the interest payments required for the Unsecured Listed Debentures, including most recently in December of 2017 in the amount of approximately $1.4 million.[18]

17. The Unsecured Listed Debentures mature on June 30, 2018, at which point the principal of $34.5 million plus approximately $1.4 million of interest will be due. As set out above, Discovery does not have the funds to make these payments and Clairvest has said it will not fund them.[19]

D. Discovery Air Group Bank Accounts

18. Banking and operating borrowing facilities of Discovery and the Non-Applicant Subsidiaries are with CIBC and have been set up on a consolidating basis, such that the group's net balance at any point in time is the consolidated balances of all the accounts.[20]

19. The main bank accounts of Discovery are with CIBC in London, Ontario. Discovery also has bank accounts with Royal Bank of Canada in Saskatoon, SK. The Discovery Air Group has accounts in both Canadian dollars and US dollars in the names of Discovery, as well as each of GSH, ATL and DMS. Since the Top Aces Transactions, Top Aces and its subsidiaries are no longer part of the cash management system. [21]

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[17] Bernards Affidavit, para. 49.

[18] Bernards Affidavit, para. 53.

[19] Bernards Affidavit, para. 54.

[20] Bernards Affidavit, para. 58.

[21] Bernards Affidavit, para. 59.

E. The Non-Applicant Subsidiaries

20. The Non-Applicant Subsidiaries are leaders in specialty aviation services, operating across Canada and in select locations internationally, including the United States, Bolivia, Australia, and Chile. As of January 31, 2018, the Discovery Air Group (excluding Top Aces) operates approximately 69 aircraft, employs approximately 460 flight crew, maintenance personnel and support staff, and provides services internationally to governments, airlines, and natural resource and other business customers.[22]

21. Each of the Non-Applicant Subsidiaries are incorporated pursuant to the CBCA. GSH, ATL and DMS all have their head office in Yellowknife, Northwest Territories. DATS is an inactive subsidiary although it is the tenant to the lease of Discovery's head office.[23] Each of GSH, ATL and DMS: (a) is wholly owned by Discovery[24]; (b) are guarantors or co-borrowers under the CV Secured Debentures, CIBC Credit Agreement and Roynat facility and have granted security over all of their assets in connection with such guarantee or co-borrower obligations[25]; and (c) dependent on Discovery for corporate and back office functions that Discovery provides. Additionally, GSH and ATL are highly dependent on Discovery for funding of their operations and working capital on an ongoing basis.[26]

F. Top Aces

22. Top Aces, formerly known as Discovery Air Defence Services Inc. (i.e. DADS), is a CBCA corporation which is wholly owned by Top Aces Holdings Inc. ("**Top Aces Holdco**").[27] Prior to December 2017, Top Aces was wholly owned by Discovery. As a result of the Top Aces Transactions (discussed and defined below), Top Aces Holdco is currently owned by: (a) Clairvest

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[22] Bernards Affidavit, para. 64.

[23] Bernards Affidavit, paras. 65, 73, 83 and 89.

[24] Bernards Affidavit, paras. 65, 73 and 83.

[25] Bernards Affidavit, paras. 71, 81 and 87.

[26] Bernards Affidavit, para. 92.

[27] Bernards Affidavit, para. 94.

(64.7%); (b) a group of arm's length investors led by JP Morgan Asset Management (the "**Investors**") (25.6%); and (c) Discovery (9.7%).[28]

23. The principal business of Top Aces is the supply of airborne training services, which provide the adversary force required to exercise and train a modern, operationally capable, multi-purpose combat force. Top Aces is the primary supplier of contracted airborne training services to the Canadian Department of National Defence, the German Armed Forces and the Australian Defence Force and a supplier of airborne training services to other militaries around the world.[29]

24. Prior to, and during most of 2017, Top Aces had been in a prolonged period of uncertainty with respect to the award of a long term "contracted airborne training services" contract ("**CATS**") by the Canadian government which represents the backbone of its business. Instead it had been operating under "interim" contracts for several years with no certainty that it would be awarded a long term contract. In October 2017, Top Aces was awarded a long term CATS contract by the Canadian government.[30]

25. The award of the CATS contract was essential for Top Aces' continued viability. However, in order to perform under that contract, Discovery determined that Top Aces would require at least an additional $30 million for capital expenditures and other work. At that time, Top Aces was an obligor under the secured debt owing by Discovery and the other members of the Discovery Air Group to Clairvest, as well as under the CIBC Credit Agreement and the ECN facility. As of November 30, 2017, Top Aces also had outstanding gross intercompany debt owing to the Discovery Air Group of approximately $62 million (before taking into consideration the gross intercompany debt owing to Top Aces by members of the Discovery Air Group of approximately $35 million).[31]

26. Culminating in December 2017, Top Aces, Discovery, Clairvest, CIBC and others undertook a series of transactions (the "**Top Aces Transactions**") which achieved three key

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[28] Bernards Affidavit, para. 105(c).

[29] Bernards Affidavit, para. 95.

[30] Bernards Affidavit, paras. 97 and 98.

[31] Bernards Affidavit, para. 103

objectives: (i) deleverage the Top Aces balance sheet to increase the prospects of its long-term viability; (ii) raise additional funding for capital expenditures to perform the CATS contract; and (iii) put in place new bank financing to address the company's working capital requirements.[32]

27. The Top Aces Transactions involved a series of transactions pursuant to which, among other things, (a) Clairvest exercised its contractual rights to convert certain of its secured debt owing by Discovery and Top Aces to shares of Top Aces; (b) Top Aces entered into a new credit facility led by CIBC and The Bank of Nova Scotia; (c) Discovery sold the majority of its remaining shares in Top Aces to the Investors for $25 million; (d) new treasury shares of Top Aces Holdco were issued to the Investors for an additional $25 million; (e) through a series of set off transactions and repayments, the intercompany debt that had previously been owing by Top Aces to Discovery and to other entities in the Discovery Air Group was repaid; and (f) Top Aces was released from its obligations under the CV Secured Debentures, CIBC Credit Agreement and ECN Credit Agreements. The result of the Top Aces Transactions for Top Aces was a financial separation of the Top Aces business from Discovery.[33]

28. As it relates to Discovery, the impact of the Top Aces Transactions resulted in the reduction of over $60 million of secured debt previously on Discovery's balance sheet (and similarly benefitting each of the Non-Applicant Subsidiaries, being guarantors of that debt).[34]

29. Discovery is aware of recent complaints from Randy Durig of Durig Capital Inc., a holder of Unsecured Listed Debentures regarding transactions between the Discovery Air Group and Clairvest, including the Conversion Transactions and the Top Aces Transactions. Discovery believes the allegations made by Mr. Durig are factually incorrect and legally flawed.[35]

30. Discovery is aware of similar complaints and allegations that have been published online in blogs, apparently as part of an attempt by Mr. Durig to organize bondholders.[36]

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[32] Bernards Affidavit, para. 104.

[33] Bernards Affidavit, para. 105.

[34] Bernards Affidavit, para. 106.

[35] Bernards Affidavit, paras. 107 and 108.

[36] Bernards Affidavit, para. 109.

G. The Stalking Horse Agreements and Proposed Sale Process

31. As set out above, the purpose of these proceedings is to allow Discovery to effect a series of restructuring transactions for the sale of its remaining shares in Top Aces as well as its shares in each of GSH, ATL and DMS.

32. If the Initial CCAA Order is granted, it is Discovery's intention to very shortly file a motion (the "**SSP Motion**") seeking approval of, among other things, approval of a sale solicitation process as well as four (4) stalking horse agreements for the sales of Discovery's remaining interest in Top Aces Holdco, as well as its shares of each of GSH, ATL and DMS.[37]

33. Clairvest (through newly incorporated entities) has agreed to act as the stalking horse bidder in connection with each transaction and will be bidding and/or assuming some or all of the remainder of its secured debt (including its debt under the proposed DIP Facility (defined below)) as the purchase price under the Stalking Horse Agreements. The proposed sale of each of the businesses of GSH, ATL and DMS under the Stalking Horse Agreements will be structured as share sales resulting in the continuing operations of the businesses, employment of employees and ongoing servicing of debt (including the cross guaranteed secured debt) at the subsidiary level. The Proposed Monitor has been kept apprised of the negotiation of the Stalking Horse Agreements.[38]

34. If the SSP Motion is approved, it is contemplated that KSV Kofman Inc. (the "**Proposed Monitor**") will conduct, supervise and run the SSP. The allocation of responsibility to the Proposed Monitor will ensure a fair and impartial sale process is conducted and any conflicts of interest will be avoided. It is currently anticipated that the proposed sale process under the SSP would last approximately 90 to 120 days.[39]

PART III – ISSUES AND THE LAW

35. This issues are as follows:

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[37] Bernards Affidavit, para. 117.

[38] Bernards Affidavit, para. 118.

[39] Bernards Affidavit, paras. 119 and 120.

(a) Is the Applicant entitled to seek protection under the CCAA?

(b) Should the following relief be granted:

(ii) Extension of the stay to the Non-Applicant Subsidiaries including their directors and officers;

(iii) Approval of the Administration Charge, Directors' Charge, KERP Charge (all as defined below);

(iv) Approval of the Key Employee Retention Plan ("**KERP**") and sealing the confidential exhibit to the Bernards Affidavit; and

(v) Approval of the Interim Financing and Intercompany Financing and related Charges.

A. The Applicant is entitled to Seek Protection from this Court under the CCAA

36. Section 3(1) of the CCAA states:

> 3 (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.[40]

37. Section 9 of the CCAA states:

> 9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.[41]

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[40] CCAA, s. 3(1).

[41] CCAA, s. 9(1).

38. For the purposes of the CCAA, a "debtor company" includes a company that is "insolvent".[42] The CCAA does not define "insolvent" but looks to the *Bankruptcy and Insolvency Act* which defines "insolvent person" as follows:

> means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;[43]

39. The scope of the definition of "insolvent" was expanded by Justice Farley in *Stelco* who held that the definition should be expanded to give effect to the objectives of the CCAA of allowing the debtor company to obtain some breathing room in order to restructure.

> It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[44]

40. Discovery is a "debtor company" to which the CCAA applies and over which this Court has jurisdiction.

(a) Discovery is a company incorporated under the laws of the province of Ontario and continued under the *Canada Business Corporations Act*.

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[42] CCAA, s. 2.

[43] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, s. 2.

[44] *Re Stelco Inc.*, 2004 CarswellOnt 1211 (Sup Ct) [*Stelco*], leave to appeal to CA refused, 2004 CarswellOnt 2936, leave to appeal to SCC refused, 2004 CarswellOnt 5200, at para. 26, Applicant's Brief of Authorities **Tab 1**.

(b) Discovery's head office is in Toronto.

(c) Discovery has liabilities in excess of $148 million far exceeding the $5 million threshold imposed by the CCAA.

(d) Discovery is insolvent. Discovery is facing the imminent maturities of approximately $92.6 million of secured debt owing to Clairvest, CIBC and Roynat as well as the maturity of the Unsecured Listed Debentures. It does not ability to repay any of those amounts let alone all of them. [45]

(e) Further, as indicated by the 13-week cash flow projection filed by Discovery, absent interim financing to be made available pursuant to the proposed DIP Facility, Discovery will not be able to pay its obligations as they come due. Discovery does not have sufficient liquidity to continue to operate outside of a CCAA proceeding.[46]

B. The Discovery Air Group and their Directors and Officers should be granted a broad stay of proceedings

41. One of the fundamental goals in seeking protection under the CCAA is obtaining a stay of proceedings to allow a debtor company to maintain the *status quo* while a debtor develops a plan.[47]

42. Section 11.02(1) of the CCAA provides that the Court may grant a stay of proceedings:

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

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[45] Bernards Affidavit, para. 12.

[46] Bernards Affidavit, para. 116. A copy of the 13 week cash flow forecast is attached as Exhibit "H" to the Bernards Affidavit.

[47] *Re Lehndorff General Partner Ltd.*, [1993] O.J. No. 14 [*Lehndorff*] at para. 5, Applicant's Brief of Authorities **Tab 2.**

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company. [48]

43. Section 11.03(1) of the CCAA states:

> An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.[49]

44. Courts have also granted an expanded stay of proceedings in favour of directors and officers of an Applicant generally where the debtor company would otherwise have to spend extensive time and effort to defending litigation and cause distraction during the restructuring period.[50]

45. In *Lehndorff*, Justice Farley stated:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.[51]

46. Further, the Court has the inherent jurisdiction to grant a stay of proceedings for non-applicant third parties where it is just and reasonable to do so. Courts have often granted third party

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[48] CCAA, s. 11.02(1)

[49] CCAA, s. 11.03(1)

[50] *Re Nortel Networks Corp.,* 2009 CarswellOnt 4806 at paras. 20, 27 and 36 (Sup Ct) [*Nortel*], Applicant's Brief of Authorities **Tab 3**.

[51] *Lehndorff* at para. 5, Applicant's Brief of Authorities **Tab 2**.

stays where the business operations are heavily intertwined with that of the Applicant but where the third party is not subject to the jurisdiction of the Court or other circumstances dictate that they not become applicants in the filing; or where such third party's exposure to claims could have a detrimental or distracting impact on the debtor company.[52]

47. Although only Discovery is an applicant in this proceeding, the business and operations of Discovery are heavily intertwined with that of the Non-Applicant Subsidiaries. Areas of such inter-connection and inter-dependence within Discovery Air Group include:

(a) numerous common creditors and financing arrangements containing cross-guarantees, cross-defaults and other linkages throughout the Discovery Air Group, as further detailed above;

(b) financial support provided by Discovery to the Non-Applicant Subsidiaries, resulting in significant inter-company obligations owing from the Non-Applicant Subsidiaries to Discovery and umbrella insurance policies covering the entire Discovery Air Group;

(c) Discovery's obligations in respect of the CV Secured Debentures were guaranteed by the other members of the Discovery Air Group, which obligations were secured through a grant of security over all present and after-acquired personal property of Discovery including a pledge of the shares of each of the Non-Applicant Subsidiaries;

(d) common senior management and reporting structures pursuant to which the Non-Applicant Subsidiaries report to Discovery;

(e) centralized decision-making by management of Discovery;

(f) a common back office, including accounting, IT and administration;

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[52] *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299, at paras. 28-30, Applicant's Brief of Authorities, **Tab 4.**

(g) common employee benefit programs;

(h) centralized cash management, treasury and revolving loan facility provided by CIBC; and

(i) provision of finance, treasury, cash management, tax compliance, annual KPMG audit / quarterly KPMG review management, loan compliance, forecasting, budgeting, financial reporting, general accounting support, legal, and information technology support.[53]

48. As noted herein, the principal purpose of these proceedings is to permit an orderly sale of the businesses carried on through the Non-Applicant Subsidiaries and Discovery's interest in Top Aces. It is essential that the businesses of the Non-Applicant Subsidiaries be protected while that sale process is being conducted because, among other things, certain of the contracts at the subsidiary level may have cross defaults which could be triggered as a result of a filing by Discovery. Many of the Non-Applicant Subsidiaries officers and directors are also officers and directors of Discovery.[54]

49. The Applicant is seeking a limited third party stay essentially prohibiting the termination of contracts or commencement of proceedings against the Non-Applicant Subsidiaries (or their officers and directors) as a result of these proceedings or as a result of multi-party contracts or cross-defaults. A limited third party stay in favour of the Non-Applicant Subsidiaries and their officers and directors will allow the status quo of the businesses to continue while the sale process takes place and the restructuring transactions are implemented.[55]

C. The Administration Charge and Directors' Charge Should be Granted

Administration Charge

50. Pursuant to Section 11.52 of the CCAA:

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[53] Bernards Affidavit, para. 92.

[54] Bernards Affidavit, para. 123.

[55] Bernards Affidavit, para. 124.

Court may order security or charge to cover certain costs

- **11.52 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

  (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

  (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

  (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.[56]

51. In considering whether to grant such charges, the Court may consider:

(a) The size and complexity of the business being restructured;

(b) The proposed role of the beneficiaries of the charge;

(c) Whether there is an unwarranted duplication of roles;

(d) Whether the quantum of the proposed charge appears to be fair and reasonable;

(e) The position of the secured creditors likely to be affected by the charge; and

(f) The position of the Monitor.[57]

52. The proposed administration charge of $750,000 (the "**Administration Charge**") is intended to cover: (a) the Monitor and its counsel; and (b) counsel to Discovery.[58] Super priority Administration Charges are routinely granted in CCAA proceedings. The proposed Administration Charge is appropriate in the circumstances for the following reasons:

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[56] CCAA, s. 11.52(1).

[57] *Re Canwest Publishing*, 2010 ONSC 222 [*Canwest Publishing*] at para. 54, Applicant's Brief of Authorities **Tab 5**. These criteria have also been followed in other cases, including *Re Target Canada Co.*, 2015 ONSC 303 [*Target*] at para. 74, Applicant's Brief of Authorities **Tab 6**.

[58] Bernards Affidavit, para. 126.

(a) The Applicant worked with the proposed Monitor to estimate the proposed quantum of the Administration Charge and believes it to be reasonable and appropriate in view of the complexities of Discovery's CCAA proceedings and the services to be provided by the beneficiaries of the Administration Charge;

(b) The anticipated process will require extensive involvement from the Monitor including the execution and supervision of the anticipated SSP process – the involvement of the Monitor in the SSP process is intended to ensure a fair and impartial process;

(c) It is unlikely that the proposed beneficiaries would participate in the CCAA proceedings absent an Administration Charge;

(d) There is no unwarranted duplication of roles between the proposed beneficiaries; and

(e) Clairvest has consented to the Administration Charge.

Directors' Charge

53. Section 11.51 of the CCAA allows for the granting of a charge in favour of directors and officers on a super priority basis for obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings, unless the Court is of the opinion that the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.[59]

54. The purpose of a directors' charge is to retain directors during a restructuring but provide them with protection against personal liabilities that could arise in their role as director or officer during the proceeding.[60] The retention of directors can be crucial to the potential success of a restructuring.

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[59] CCAA, s. 11.51(1), (3)

[60] *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4286 (S.C.J. [Commercial List]) [*Canwest Global*] at para. 48, Applicant's Brief of Authorities **Tab 7**.

55. To ensure the ongoing stability of the Discovery Air Group's business during the CCAA proceeding and to enhance the prospects of a successful restructuring, the Applicant requires the continued participation and guidance of the respective directors and officers of the Discovery Air Group. The directors and officers of the Applicant have indicated that their continued service and involvement is conditional upon the Court granting a charge in favour of the directors and officers of the Applicant in the amount of $100,000 on the assets, property, undertaking and business of the Applicant (the "**Directors' Charge**").[61]

56. The quantum of the proposed Directors' Charge has been discussed with the Proposed Monitor and was calculated by Discovery based on an estimate of the "stub period" liabilities relating to wages, vacation pay and source deductions for Discovery's seven employees. The proposed Directors' Charge, quantum and priority is reasonable in the circumstances.

57. The Applicant maintains an existing insurance policy with respect to directors' and officer's liability. This policy covers an aggregate annual limit of $25,000,000, which covers a variety of circumstances where the Applicant's directors and officers might face claims for liability. Furthermore, in the present circumstances and given the small quantum of the proposed indemnity, it is not practicable to obtain at reasonable cost further coverage that is satisfactory.[62]

58. The proposed Directors' Charge is appropriate in the circumstances for the following reasons:

(a) The Applicant requires the ongoing participation of its directors and officers in its restructuring proceedings.

(b) The scope of the indemnity is limited to post-filing obligations and the quantum of the Directors' Charge was calculated based on a "stub period" of wages, vacation and source deductions and not any severance amounts.

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[61] Bernards Affidavit, paras. 128 and 131.

[62] Bernards Affidavit, para. 130.

(c) The Applicant intends to make all such payments during the course of these proceedings.

(d) The Directors' Charge would only be called upon to the extent the Applicant did not make such a payment and any claim was not otherwise covered by insurance.

D. The KERP and KERP Charge

i. *The KERP and KERP Charge Should be Approved*

59. Discovery is seeking approval of a KERP in respect of six (6) of its employees (the "**KERP Employees**"). The total amount payable under the KERP is approximately $1.55 million. This Court has the jurisdiction to approve the KERP where it believes it is appropriate in the circumstances. KERPs are routinely approved in CCAA proceedings.[63]

60. The factors for the Court to consider in deciding whether to approve a KERP depend on the circumstances of the case.[64] In *Grant Forest*, the Court considered a number of factors including:

(a) whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);

(b) whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;

(c) whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;

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[63] See for instance, *Re US Steel Canada Inc.*, 2014 ONSC 6145 [*US Steel*], at paras. 28-33, Applicant's Brief of Authorities **Tab 8**; *Sears Canada Inc., et al.*, Initial Order, June 22, 2017, CV-17-11846-00CL [*Sears* Initial Order], at paras. 21 and 22, Applicant's Brief of Authorities **Tab 9; ***Canwest Global* at paras. 49 and 50, Applicant's Brief of Authorities **Tab 7**; *Re Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Sup Ct) [*Grant Forest*], Applicant's Brief of Authorities, **Tab 10**; *Re Cinram International Inc.*, 2012 ONSC 3767 [*Cinram*], at paras. 91 to 96, Applicant's Brief of Authorities **Tab 11.**

[64] *Re Walter Energy Holdings Inc.*, 2016 BCSC 107 [*Walter*] at paras. 58 and 59, Applicant's Brief of Authorities **Tab 12.**

(d) the employees' history with and knowledge of the debtor;

(e) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;

(f) whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;

(g) whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and

(h) whether the payments under the KERP are payable upon the completion of the restructuring process.[65]

61. In this case, the following factors are relevant for the Court's consideration in deciding whether to approve the KERP:

(a) Each of the KERP Employees provide legal, financial or key administrative support to Discovery and to the Non-Applicant Subsidiaries (as well as Top Aces to a lesser extent);

(b) Replacement of such services would not be easy and would be costly to Discovery;

(c) The KERP Employees are integral to the conduct and completion of the proposed sale processes;

(d) The proposed KERP payments are in lieu of any entitlement to severance and each employee will provide a release of Discovery, the Non-Applicant Subsidiaries and Top Aces upon receipt of their payment;

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[65] *Grant Forest*, Applicant's Brief of Authorities **Tab 10**; *Cinram*, at para. 91, Applicant's Brief of Authorities **Tab 11**.

(e) The "Payment Date" triggers will ensure, among other things, that the KERP Employees remain with Discovery through the completion of all of the Transactions if he or she is to receive her KERP payment;

(f) The terms of the KERP were considered and approved by the Applicant's Human Resources committee;

(g) Top Aces has agreed to be responsible for approximately 40% of the KERP amount given its ongoing use of the services of the KERP Employees; and

(h) The Monitor has expressed its opinion that the KERP amount is reasonable in the circumstances.

62. As security for the Applicant's obligation under the KERP, the Applicant is seeking a super priority charge (the "**KERP Charge**") up to a maximum of $1.65 million on the Applicant's property to secure its payment and performance obligations under the KERP. The KERP Charge is designed to provide assurance to the KERP Employees that their awards will be paid and not rank as unsecured claims. The granting of a KERP Charge in connection with the approval of KERP is common in CCAA proceedings.[66]

63. The Proposed Monitor has reviewed the amount of the KERP Charge and has indicated that it believes the amount to be reasonable in the circumstances. The approval of the KERP and KERP Charge will benefit all stakeholders in the proceedings as the retention of the KERP Employees will assist in the success of the implementation of the Transactions.

ii. *Confidential Exhibit K Should be Sealed*

64. The Court may make a sealing order where it is satisfied that the principles *of Sierra Club of Canada v. Canada (Minister of Finance)* have been met. First – the Court must be satisfied the order is necessary to prevent serious risk to an important interest, including a commercial interest,

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[66] *Re Nortel Networks Corporation, et al.*, 2009 CarswellOnt 1330, at para. 4, Applicant's Brief of Authorities **Tab 13**; *US Steel*, at paras. 28 to 33, Applicant's Brief of Authorities **Tab 8**; *Re Essar Steel Algoma Inc.*, 2015 ONSC 7656 [*Algoma]* at paras. 10 and 11, Applicant's Brief of Authorities **Tab 14**; *Sears* Initial Order, at paras. 21 and 22, Applicant's Brief of Authorities **Tab 9**.

in the context of litigation because reasonable alternative measures will not prevent the risk. Second – the salutary effects of the order should outweigh its deleterious effects on the right to free expression which includes the public interest in open and accessible court proceedings.[67]

65. Courts have sealed such compensation information in connection with the approval of KERPs in other proceedings.[68] In *Canwest Publishing*, Justice Peppall held that the protection of sensitive personal and compensation information ... was "an important commercial interest that should be protected."[69] Confidential Exhibit K to the Bernards Affidavit contains the detailed compensation and award information directly attributable to the KERP Employees and should be sealed pending further order of this Court.

E. The Proposed Priority of the Administration Charge, Directors' Charge and KERP Charge is appropriate

66. The Applicant is proposing that the Administration Charge, Directors' Charge and KERP Charge be given priority over all other encumbrances granted by the Applicant to any other person other than persons with properly perfected purchase money security interests or super priority statutory deemed trusts for unremitted source deductions.

67. The priority proposed in respect of the Administration Charge, Directors' Charge and KERP Charge is appropriate given:

(a) Priority for charges of these natures is routinely provided for in CCAA proceedings;

(b) The majority of Discovery's assets consists of its shares in Top Aces Holdco and the Non-Applicant Subsidiaries which are subject to the first priority security held by Clairvest (who has consented to these charges) – all other lenders have only subordinated security with respect to those assets; and

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[67] *Re Sierra Club of Canada v. Canada (Minister of Finance),* [2022] 2 S.C.R. 522 at para. 53.

[68] See, for example, *Canwest Global,* at para. 52, Applicant's Brief of Authorities, **Tab 7;** *Canwest Publishing* at para 64 and 65, Applicant's Brief of Authorities, **Tab 5**.

[69] *Canwest Publishing* at para. 65, Applicant's Brief of Authorities, **Tab 5**.

(c) No priority is being sought over properly perfected purchase money security interests or super priority statutory deemed trusts for unremitted source deductions.

F. The DIP Facility and DIP Lender's Charge should be Approved

68. In order to continue to operate during these proceeding, it is apparent from the 13-week cash flow projection that the Applicant requires immediate interim financing ("**Interim Financing**") as there would otherwise be insufficient monies to pay the operating expenses of the Discovery Air Group and costs associated with the CCAA proceedings. The Applicant requires this interim financing to provide an immediate source of cash funding and to provide stability during the CCAA proceeding. As a result, in the lead-up to the CCAA proceeding, Discovery negotiated with CEP IV Co-Investment Limited Partnership (a member of the Clairvest group) (the **"DIP Lender"**) regarding its interest in providing financing to the Applicant that is required in connection with the CCAA proceeding.[70]

69. Pursuant to a DIP term sheet dated as of March 21, 2018 (the "**DIP Term Sheet**") entered into by the Applicant and the DIP Lender, the DIP Lender is prepared to advance interim financing (the "**DIP Facility**") of up to $12.6 million on the terms and conditions set out therein. Advances under the DIP Facility will bear interest of 10% per annum and the obligations will be fully payable on the maturity date which is the earliest of: (a) the occurrence of an event of default; (b) completion of the sale transactions; and (c) December 21, 2018.[71]

70. The Applicant is seeking a charge on its assets, property, undertaking and business to secure the DIP Facility (the "**DIP Charge**"). The DIP Lender has requested that such DIP Charge be granted on a super-priority basis only over the assets over which Clairvest already has first-priority security. Any first priority security held by any other creditor, including the other secured lenders, would continue to take priority even over the DIP Charge.[72]

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[70] Bernards Affidavit, para. 137.

[71] Bernards Affidavit, para. 138.

[72] Bernards Affidavit, para. 139.

71. It is a condition of the DIP Credit Agreement that the Applicant obtain approval of the DIP Credit Agreement and the DIP Charge in the Initial CCAA Order.

72. The Applicant believes that having access to the DIP Facility will provide flexibility and sufficient time to pursue its restructuring objectives. The Applicant consulted with its advisors and the proposed Monitor regarding the DIP Facility, and it anticipates that the DIP Facility will satisfy its funding requirements at this time and for the foreseeable future.[73]

73. Section 11.2 of the CCAA provides for the following:

> **Interim Financing 11.2(1)** – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made
>
> **Priority – Secured Creditors (2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> **Priority — other orders (3)** The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
>
> **Factors to be considered (4)** In deciding whether to make an order, the court is to consider, among other things,
>
> - (a) the period during which the company is expected to be subject to proceedings under this Act;
> - (b) how the company's business and financial affairs are to be managed during the proceedings;
> - (c) whether the company's management has the confidence of its major creditors;

[73] Bernards Affidavit, para. 141.

- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.[74]

74. In the case of Discovery:

(a) The DIP Lender's Charge will not secure any pre-filing obligations nor will it be used to make any payments on the CV Secured Debentures;

(b) The DIP Lender's Charge will preserve the existing priority structure set out in the Intercreditor Agreement and allow the lenders who have priority security to maintain such priority;

(c) The Interim Financing is required for the process – absent financing Discovery will not have sufficient liquidity to continue nor will the Non-Applicant Subsidiaries;

(d) Based on Discovery's cash flow forecast, the Interim Financing will provide sufficient liquidity while it pursues the Transactions;

(e) The entirety of Discovery's property (comprised primarily of its remaining shares in the Non-Applicant Subsidiaries and Top Aces) is already encumbered by security held by Clairvest (as well as others);

(f) The Proposed Monitor has reviewed the Interim Financing terms and has indicated it believes the terms to be at or below market for other recent Interim Financings of similar size;

(g) Given the complex debt structure of Discovery and the Non-Applicant Subsidiaries as well as the proposed structure of the proceedings (which does not include the Non-Applicant Subsidiaries as full applicants), it is highly unlikely that Discovery

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[74] CCAA, s. 11.2(1).

would be able to obtain any other offers for Interim Financing on more favourable terms.[75]

75. Courts have approved DIPs and DIP Charges on an initial filing where it is clear that funds are needed immediately.[76] Discovery is in need of the additional liquidity provided by the DIP immediately. It cannot wait until the comeback hearing to draw on the DIP. Absent the approval of immediate DIP funding Discovery will not be able to continue its restructuring.

76. The proposed priority of the DIP Charge is not prejudicial to any of Discovery's other secured lenders. In fact, the proposed priority of the DIP Charge preserves the existing priority scheme contemplated by the Intercreditor Agreement such that where the other lenders have 1st priority with respect to certain assets, that priority is maintained. The only instance where there could arguably be a "notional" priming would be in respect of the pari passu 3rd priority interest held by certain lenders which is subordinate to Clairvest's 2nd priority security interest in the same assets. As such, it cannot be said that any such lender is prejudiced by the proposed DIP Charge.

Intercompany Advances

77. During the CCAA period, the Non-Applicant Subsidiaries will continue to require funding from Discovery as well as the provision of ongoing corporate and back office services from Discovery in the ordinary course. This will require those Non-Applicant Subsidiaries to access funds in accordance with the pooling arrangements under its existing cash management system and for Discovery to fund those companies from time to time. The proposed Initial CCAA Order allows the use of such accounts to continue without any liability to the Discovery Air Group's operating bank.[77]

78. The funding provided by Discovery to its Non-Applicant Subsidiaries will largely be financed through the provision of the Interim Financing which would not be available to Discovery absent the granting of the DIP Charge. As such, Discovery is also requesting that the advances that it makes to its Non-Applicant Subsidiaries be secured by a court-ordered charge (the

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[75] Pre-Filing Report of KSV Kofman Inc., as proposed CCAA Monitor of Discovery Air Inc., section 5.1.

[76] *US Steel*, paras. 9, 10 and 11, Applicant's Brief of Authorities **Tab 8**.

[77] Bernards Affidavit, para. 145.

"**Intercompany Charge**") resulting in the Non-Applicant Subsidiary receiving any such funds having a secured obligation to repay such funds to Discovery. That intercompany security will also be assigned to Clairvest as part of the security package under the DIP Credit Agreement.[78]

79. The Court has previously granted relief allowing existing intercompany arrangements to continue post filing and grant necessary protections accordingly.[79] Intercompany charges have been granted in other proceedings where it is necessary to maintain the integrity of the debt and security structure for post-filing advances such that the ultimate beneficiary of funding has a secured obligation to repay those amounts and it is not to the detriment of the stakeholders of the "lending" entity.[80] Specifically, in *re Carillion* this Court recently approved an intercompany charge in favour of the applicants for advances made to non-applicant related parties in the file.[81]

80. The granting of the Intercompany Charge to secure advances made to the Non-Applicant Subsidiaries will facilitate the pursuit and completion of the proposed Transactions and is consistent with the proposed structure of the filing and purpose of the proceeding.

PART IV – NATURE OF THE ORDER SOUGHT

81. The Applicant therefore requests an Order substantially in the form of the Proposed Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of March, 2018.

[78] Bernards Affidavit, para. 146.

[79] *Re Performance Sports Group Ltd.*, 2016 ONSC 6800 [*Performance Sports*], at paras 34 and 35, Applicant's Brief of Authorities **Tab 15**; see also *Walter Energy* at paras. 3, 62 and 67, Applicant's Brief of Authorities **Tab 12**; *Carillion Canada Holdings Inc.*, et al., Initial Order, January 25, 2018, CV-18-590812-00CL, [*Carillion* Initial Order], at paras. 13, 37 and 38, Applicant's Brief of Authorities, **Tab 16**.

[80] *Performance Sports*, at paras 34 and 35, Applicant's Brief of Authorities **Tab 15**; see also *Walter Energy* at paras. 3, 62 and 67, Applicant's Brief of Authorities **Tab 12**; *Carillion* Initial Order, at paras. 13, 37 and 38, Applicant's Brief of Authorities, **Tab 16**.

[81] *Carllion* Initial Order, at para. 13, Applicant's Brief of Authorities, **Tab 16**.

SCHEDULE A – LIST OF AUTHORITIES

1. *Stelco Inc.*, 2004 CarswellOnt 1211 (Sup Ct), leave to appeal to Court of Appeal refused, 2004 CarswellOnt 2936, leave to appeal to Supreme Court of Canada refused, 2004 CarswellOnt 5200

2. *Lehndorff General Partner Ltd.*, [1993] O.J. No. 14

3. *Nortel Networks Corp.,* 2009 CarswellOnt 4806 (Sup Ct)

4. *First Leaside Wealth Management Inc.,* 2012 ONSC 1299

5. *Canwest Publishing Inc.*, 2010 ONSC 222

6. *Target Canada Co.,* 2015 ONSC 303

7. *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4286 (S.C.J. [Commercial List])

8. *US Steel Canada Inc.,* 2014 ONSC 6145

9. *Sears Canada Inc.,* et al., Initial Order, June 22, 2017, CV-17-1846-00CL

10. *Grant Forest Products Inc.*, 2009 CarswellOnt 4699 (Sup Ct)

11. *Cinram International Inc.,* 2012 ONSC 3767

12. *Walter Energy Holdings Inc.,* 2016 BCSC 107

13. *Nortel Networks Corp.,* 2009 CarswellOnt 1330 (Sup Ct)

14. *Essar Steel Algoma Inc.,* 2015 ONSC 7656

15. *Sierra Club of Canada v. Canada (Minister of Finance),* [2022] 2 S.C.R. 522

16. *Performance Sports Group Ltd., Re,* 2016 ONSC 6800

17. *Carillion Canada Holdings Inc., et al.*, Initial Order, January 25, 2018, CV-18-590812

SCHEDULE B – RELEVANT STATUTES

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

2 In this Act,

insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36

2 (1) In this Act,

debtor company means any company that

- **(a)** is bankrupt or insolvent,
- **(b)** has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,
- **(c)** has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or
- **(d)** is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent; (*compagnie débitrice*)

Application

- **3 (1)** This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

Jurisdiction of court to receive applications

- **9 (1)** Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in

Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.01 No order made under section 11 or 11.02 has the effect of

- **(a)** prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- **(b)** requiring the further advance of money or credit.

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- **(a)** staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- **(a)** staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- **(b)** restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- **(c)** prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make the order unless

- **(a)** the applicant satisfies the court that circumstances exist that make the order appropriate; and

- **(b)** in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

Security or charge relating to director's indemnification

- **11.51 (1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

- Priority

  (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

- Restriction — indemnification insurance

  (3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Court may order security or charge to cover certain costs

- **11.52 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a

debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

  - **(a)** the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
  - **(b)** any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
  - **(c)** any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

- Priority

  (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

SCHEDULE "C"

Lender	Principal amount Owing as of January 31, 2018 (unless otherwise indicated below)	Maturity	Borrower(s)	Guarantor(s) (within the Discovery Air Group)	Security & Priority (pursuant to Inter-Creditor Agreement)
Clairvest	$72.7 million	May 5, 2018	Discovery	GSH ATL DMS DATS	Security: General security on all property, assets and undertakings of all obligors. Priority: (i) first charge on specific aircraft, real estate, certain capitalized parts and proceeds of foregoing; (ii) first charge via share pledge of the shares of all of the Non-Applicant Subsidiaries and Top Aces Holdco owned by Discovery; (iii) second charge on accounts receivable, all inventory, enumerated capitalized parts (behind CIBC) and proceeds; and (iv) second charge on certain fixed assets and proceeds (behind Roynat, ECN and Textron, as applicable, with respect to their respective priority collateral, but prior to such parties with respect to all other collateral).
CIBC	$14.8 million on operating line as of March 16, 2018	April 30, 2018	Discovery	GSH ATL DMS DATS	Security: General security on all personal property and undertaking of all obligors other than the shares of Top Aces Holdco owned by Discovery. Priority: (i) first charge on accounts receivable, inventory, and GSH / ATL capitalized parts and proceeds; and (ii) a blanket *pari passu* second charge on the Clairvest priority collateral and a blanket *pari passu* third charge on other personal property (behind Clairvest and behind the other lenders with respect to their respective priority collateral only).

Lender	Principal amount Owing as of January 31, 2018 (unless otherwise indicated below)	Maturity	Borrower(s)	Guarantor(s) (within the Discovery Air Group)	Security & Priority (pursuant to Inter-Creditor Agreement)
Roynat	$5.1 million	April 15, 2018	Discovery GSH ATL DMS	Nil	Security: General security on all personal property and undertaking of all obligors other than the shares of Top Aces Holdco owned by Discovery Priority: (i) first charge on specific aircraft financed by Roynat, including engines and related property and proceeds; and (ii) a blanket *pari passu* second charge on the Clairvest priority collateral and a blanket *pari passu* third charge on other personal property (behind Clairvest and behind the other lenders in respect of their respective priority collateral only).
ECN	$0.7 million and $7.9 million	April 1, 2020	Discovery	GSH ATL DMS DATS	Security: General security on all personal property and undertaking of all obligors other than the shares of Top Aces Holdco owned by Discovery Priority: (i) first charge on specific aircraft financed by ECN, including engines and related property; and (ii) a blanket *pari passu* second charge on the Clairvest priority collateral and a blanket *pari passu* third charge on other personal priority (behind Clairvest and behind the other lenders in respect of their respective priority collateral only).
Textron	$13.1 million	April 1, 2023	ATL	Discovery	Security: General security on specific personal property and undertaking of ATL Unsecured guarantee by Discovery Priority: (i) first charge on specific aircraft of ATL financed by Textron, including engines and related property and the reserve account;

Lender	Principal amount Owing as of January 31, 2018 (unless otherwise indicated below)	Maturity	Borrower(s)	Guarantor(s) (within the Discovery Air Group)	Security & Priority (pursuant to Inter-Creditor Agreement)
					and (ii) an unsecured corporate guarantee from Discovery

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DISCOVERY AIR INC.

Court File No:

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced TORONTO

FACTUM OF THE APPLICANT
(returnable March 21, 2018)

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
Toronto, Ontario M5G 1V2
Fax: 416-597-6477

Mario Forte (LSUC#: 27293F)
Tel: 416.597.6477
Email: forte@gsnh.com

Michael Rotsztain (LSUC#: 17086M)
Tel: 416.597.7870
Email: rotsztain@gsnh.com

Jennifer Stam (LSUC#: 46735J)
Tel: 416.597.5017
Email: jstam@gsnh.com

Lawyers for the Applicant