

**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

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**FACTUM OF THE APPLICANT  
(Reporting Requirements and Other Relief)  
(Motion returnable April 18, 2018)**

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April 11, 2018

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**FACTUM OF THE APPLICANT**

**PART I – NATURE OF THIS APPLICATION**

1. This factum is filed in support of a motion made by Discovery Air Inc. (“**Discovery**” or the “**Applicant**”) for, among other things, an order relieving the Applicant from any obligation to comply with any applicable reporting or disclosure requirements (as set out in more detail below) during the pendency of the CCAA Proceedings; providing that neither the Applicant nor the Monitor nor any of their respective officers, directors, employees or other representatives shall have any liability for any such non-compliance; and to the extent necessary, lifting the stay of proceedings in these CCAA Proceedings for the sole purpose of permitting the Ontario Securities Commission (“**OSC**”) and any other securities regulatory authority in any province or territory in Canada to issue Cease Trade Orders (defined below) if any when required pursuant to applicable securities law.

**PART II – FACTS**

**A. Background**

2. The facts supporting this motion are set out in full detail in the affidavit of Paul Bernards sworn April 11, 2018 (the “**Bernards Affidavit**”). Capitalized terms used herein and not otherwise defined have the meaning given to them in the Bernards Affidavit.

3. On March 21, 2018, Discovery obtained an initial order (the “**Initial Order**”) under the *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the “**CCAA**”). Pursuant to the terms of the Initial Order, KSV Kofman Inc. was appointed as monitor (the “**Monitor**”) in these proceedings.<sup>1</sup>

4. On April 4, 2018, this Court granted Orders approving: (a) a sale solicitation process (“**SSP**”) for the sale of Discovery’s remaining interest in its three (3) operating subsidiaries, Great Slave Helicopters Ltd. (“**GSH**”), Air Tindi Ltd. (“**ATL**”) and Discovery Mining Services Ltd. (“**DMS**”) and its remaining 9.7% minority interest in Top Aces Holdings Ltd. (“**TA Holdings**”), the parent of Top Aces Inc. (“**Top Aces**”); and (b) four (4) stalking horse agreements each dated as of March 21, 2018 (the “**Stalking Horse Agreements**”) related to the sales of each of GSH, ATL, DMS and TA Holdings for the sole purposes of acting as stalking horse agreements in the SSP; and (c) an extension of the stay of proceedings (the “**Stay**”) to and including June 30, 2018.<sup>2</sup>

5. The SSP is now being carried out by the Monitor in accordance with its terms.<sup>3</sup> Upon the completion of the transactions under the SSP, Discovery will have no remaining assets.<sup>4</sup>

## **B. Public Reporting Requirements**

6. The shares of Discovery were listed on the Toronto Stock Exchange (“**TSX**”) until May 2017, at which time Discovery completed a going private transaction. The shares of Discovery have been privately held since that time.<sup>5</sup>

7. Discovery remains a “reporting issuer” in respect of its unsecured listed debentures (the “**Unsecured Listed Debentures**”) pursuant to an indenture dated May 12, 2011. The Unsecured Listed Debentures are listed on the TSX although trading has been suspended since the Filing Date.<sup>6</sup>

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<sup>1</sup> Affidavit of Paul Bernards, sworn April 11, 2018 (“**Bernards Affidavit**”), para. 3, Motion Record of the Applicant (“**Motion Record**”), Tab 2.

<sup>2</sup> Bernards Affidavit, para. 6, Motion Record, Tab 2.

<sup>3</sup> Second Report of KSV Kofman Inc. in its capacity as Monitor, dated April 11, 2018.

<sup>4</sup> Bernards Affidavit, para. 10, Motion Record, Tab 2.

<sup>5</sup> Bernards Affidavit, para. 7, Motion Record, Tab 2.

<sup>6</sup> Bernards Affidavit, para. 7, Motion Record, Tab 2.

8. Discovery is required to make timely and periodic disclosure under applicable securities laws. Discovery's timely disclosure includes, among other things, the requirement to file an annual information form ("AIF"), management discussion and analysis ("MD&A"), audited financial statements and CEO/CFO certifications thereof ("FS") within 90 days of Discovery's financial year end, which is January 31<sup>st</sup>. Discovery's next filing deadline for its AIF, MD&A and FS is April 30, 2018.<sup>7</sup>

9. The cost and time associated with the preparation of an AIF, MD&A and the FS is significant. It requires substantial time to be expended by members of management, as well as outside professionals, namely auditors and external counsel. Discovery is operating with a skeleton staff of only six (6) employees who have been retained to assist the Monitor to complete the SSP, which is their primary focus. Further, prior to filing, one of the employees key to the FS process resigned, making it even more difficult for Discovery to complete this process. Discovery is no longer a going concern for financial reporting purposes and, as such, its auditors have advised that a complete restatement of the financial reports using fair value accounting would be necessary in order to obtain an audit opinion. This significant change will result in additional costs, consume a considerable amount of management time and cannot be completed within the reporting deadline of April 30, 2018.<sup>8</sup>

10. The Applicant estimates that the cost of audit and other fees for preparing these documents is \$300,000 to \$400,000. These costs were not contemplated in any DIP budgets supporting the Court approved DIP facility.<sup>9</sup>

11. Trading of the Unsecured Listed Debentures was suspended upon the CCAA filing on March 21, 2018 and continues to remain suspended. On March 27, 2018, Discovery received a letter from the TSX confirming that the TSX had determined to delist Discovery's securities as of

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<sup>7</sup> Bernards Affidavit, para. 8, Motion Record, Tab 2.

<sup>8</sup> Bernards Affidavit, para. 9, Motion Record, Tab 2.

<sup>9</sup> Bernards Affidavit, para. 9, Motion Record, Tab 2.

the close of market on April 27, 2018. The TSX also confirmed that trading would remain suspended.<sup>10</sup>

12. The OSC has advised it does not object to the relief being sought in this motion. Discovery anticipates that, as a result of such failure to comply, the OSC and other securities regulatory authorities in Canada may issue cease trade orders for failure to make its upcoming filings (“**Cease Trade Orders**”). Discovery does not intend to object to the issuance of such Cease Trade Orders.<sup>11</sup>

### **PART III – ISSUES AND THE LAW**

13. This issue on this motion is whether the Court should grant the relief exempting the Applicant from its public reporting requirements during the pendency of these CCAA Proceedings and the related relief.

14. Sections 11 and 11.3(1) of the CCAA provide the Court with the jurisdiction to approve the Applicant’s request that it not be obligated to comply with its reporting requirements during the CCAA Proceedings. Those sections state:

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.<sup>12</sup>

11.1(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court’s opinion

**(a)** a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

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<sup>10</sup> Bernards Affidavit, para. 11, Motion Record, Tab 2.

<sup>11</sup> Bernards Affidavit, para. 13, Motion Record, Tab 2.

<sup>12</sup> CCAA, s. 11

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.<sup>13</sup>

15. The question of the Court's jurisdiction to grant exemptive relief for making securities filings was directly addressed in 2005 in the decision of *Richtree Inc. (Re)* ("*Richtree*"). In that instance, Justice Lax denied the request of the company to exempt it from its public filing requirements on the basis that the Court did not have the jurisdiction to grant the exemption sought.<sup>14</sup> Although the *Richtree* decision has not been overturned, it should be noted that (a) that decision was granted prior to the incorporation of Section 11.1(3) which specifically provides this Court with the jurisdiction to stay regulatory proceedings; (b) the company in *Richtree* had already sought similar relief from the OSC which was denied; and (c) the OSC objected to the motion brought by *Richtree*.<sup>15</sup>

16. There have not been many decisions since the *Richtree* decision which have considered this issue directly. However, Courts routinely grant relief suspending the obligation of a debtor company to hold an annual general meeting.<sup>16</sup> Further, in the case of *Old PSG Wind-down Ltd. et al.*, this Court granted an order exempting the applicants from compliance with reporting requirements under securities laws in similar circumstances.<sup>17</sup>

17. As set out above, Discovery is facing an imminent deadline of April 30 for the filing of its next AIF, MD&A and FS. Discovery does not have the funds, bandwidth or other resources required to comply with its upcoming filing deadline.<sup>18</sup> Moreover, the factual circumstances make it clear that there is no public policy concern and there will be no undue prejudice to any party in the granting of this relief including for the following reasons:

- (a) Trading of the Unsecured Listed Debentures is currently suspended by the TSX and the Unsecured Listed Debentures will be delisted by the TSX on April 27, 2018<sup>19</sup>;

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<sup>13</sup> CCAA, s. 11.1(3).

<sup>14</sup> *Re Richtree Inc.* [2005] O.J. No. 251 at paras. 8-10 [*Richtree*]

<sup>15</sup> *Richtree*, paras. 4 and 19.

<sup>16</sup> *Re Canwest Global Communications Corp.*, 2009 CanLii 55114 (ON SC), at para. 54.

<sup>17</sup> *Re Old PSG Wind-Down Ltd. et al* Court File No. CV-16-11582-00CL, CCAA Approval Order, para. 12

<sup>18</sup> Bernards Affidavit, para. 9, Motion Record, Tab 2.

<sup>19</sup> Bernards Affidavit, para. 11, Motion Record, Tab 2.

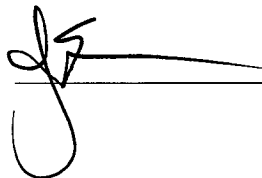
- (b) The Ontario Securities Commission (“OSC”) does not object to the relief being sought<sup>20</sup>; and
- (c) Extensive information as to Discovery’s financial status has been and will continue to be disclosed in connection with the CCAA proceedings by both the Applicant and the Monitor on a more current basis than any information that would be contained in the AIF, MD&A or FS<sup>21</sup>.

18. If the relief is granted, the Applicant anticipates that the OSC and other securities regulatory authorities may issue Cease Trade Orders. Discovery does not intend to object to the issuance of any Cease Trade Orders.<sup>22</sup> To the extent necessary and in order to avoid any jurisdictional confusion, Discovery is requesting a lifting of the Stay to allow any such Cease Trade Orders to be issued. Similar relief has been granted in other CCAA proceedings.<sup>23</sup>

#### **PART IV – NATURE OF THE ORDER SOUGHT**

19. The Applicant therefore requests an Order substantially in the form filed with its motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 11<sup>th</sup> day of April 2018.



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<sup>20</sup> Bernards Affidavit, para. 13, Motion Record, Tab 2.

<sup>21</sup> Bernards Affidavit, para. 10, Motion Record, Tab 2.

<sup>22</sup> Bernards Affidavit, para. 13, Motion Record, Tab 2.

<sup>23</sup> See, for example, *Nortel Networks Corp., et al.* Court File No.: 09-CL-7950, Order dated November 23, 2012, para. 3.

## SCHEDULE A – LIST OF AUTHORITIES

1. *Richtree Inc.* [2005] O.J. No. 251
2. *Canwest Global Communications Corp.*, 2009 CanLii 55114 (ON SC)
3. *Old PSG Wind-Down Ltd. et. al* Court File No. CV-16-11582-00CL, CCAA Approval Order
4. *Nortel Networks Corporation, et. al* Court File No.: 09-CL-7950, Order dated November 23, 2012



## SCHEDULE B – RELEVANT STATUTES

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

#### 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.

**11.1 (3)** On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

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Court File No: CV-18-594380-00CL

**ONTARIO**

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COMMERCIAL LIST**

Proceeding commenced TORONTO

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