

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 GREAT SLAVE HELICOPTERS LTD.

APPLICANT

**FACTUM OF THE APPLICANT
(Initial Application)**

September 2, 2018

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PART I – NATURE OF THIS APPLICATION

1. This factum is filed in support of an application made by Great Slave Helicopters Ltd, (“**GSH**” 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 Alasdair Martin sworn August 31, 2018 (the “**Martin Affidavit**”). Capitalized terms used herein and not otherwise defined have the meaning given to them in the Martin Affidavit.

A. Overview

3. The Applicant, along with Air Tindi Ltd. (“**ATL**”), Discovery Mining Services Ltd. (“**DMS**”) and its parent, 10671541 Canada Inc. (“**Acquireco**” and together with ATL, DMS and the Applicant, the “**Group**”) provides specialty aviation services and logistics support to

governments and natural resource and other customers, operating across Canada and in select locations internationally, including the United States and Chile.¹

4. For the past several years, GSH has experienced losses exceeding \$5 million annually, before considering capital expenditures. The stresses affecting its business have included many external and internal factors including a slowdown of the oil and gas and mining sectors, significant capital expenditures required for ongoing maintenance and a depression in the helicopter charter services markets globally. GSH's business is highly seasonal with a significant percentage of its gross revenue earned in June to September of each year while requiring ongoing significant funding for maintenance and other operating expenses throughout the entirety of the year. Because of its seasonality, the GSH business will incur losses commencing in October and will require significant funding until its next busy season which starts next June.²

5. Until recently, GSH was wholly owned by Discovery Air Inc. ("**DAI**"). DAI filed for protection pursuant to the CCAA on March 21, 2018, as a result, in part, to the then imminent maturity of over \$127 million of debt including over \$93 million of secured debt which had been guaranteed by GSH and the other members of the Group. The background to DAI's CCAA proceedings is set out in the affidavit of Paul Bernards, DAI's Chief Financial Officer, sworn March 21, 2018 (the "**Bernards Affidavit**").³

6. Currently, GSH is in default of its existing obligations under its secured guarantee in favour of Clairvest Group Inc. and its affiliates, including certain funds managed by Clairvest Group Inc. (collectively, "**Clairvest**"⁴ and references to "**Clairvest**" herein may refer to any or all such affiliates and/or funds, as applicable) under the CV Secured Debentures (as defined in the Bernards Affidavit) and under its obligations to ECN Aviation Inc ("**ECN**"). In addition to ECN, two additional lenders have secured claims against GSH, whether as principal debtor or guarantor; namely, Canadian Imperial Bank of Commerce ("**CIBC**") and Roynat Inc. ("**Roynat**"). The

¹ Affidavit of Alasdair Martin, sworn August 31, 2018 (the "**Martin Affidavit**"), para. 3, Application Record, Tab 2.

² Martin Affidavit, para. 4, Application Record, Tab 2.

³ Martin Affidavit, para. 5, Application Record, Tab 2.

⁴ As applicable, the term "Clairvest" may also include Mr. G. John Krediet, an individual investor within the Clairvest group.

commencement of these proceedings and the declaration of insolvency by GSH will constitute defaults under the various loan and security agreements in favour of each of these lenders.⁵

7. GSH, together with Clairvest, has been engaged for some time in efforts to restructure GSH's business and operations in order to be viable on a long-term basis. However, based on the persistently difficult financial condition of GSH, its anticipated continued need for additional funding in order to continue its business and Clairvest's unwillingness to continue to provide such further funding to cover operating losses, as well as other factors, GSH has concluded that a restructuring or sale of its business and/or assets in an orderly manner is best facilitated through court-supervised proceedings under the CCAA.⁶

B. Purpose of this CCAA Proceeding

8. As a result of the foregoing, GSH is now seeking protection under the CCAA. The purpose of the proceedings will be to provide GSH with a stable environment in which to continue to operate, including to service its fire suppression contracts with the Provinces of Ontario and Alberta and joint ventures with certain First Nations groups, while a sale and investment solicitation process ("**SISP**") is conducted by KSV Kofman Inc., the proposed monitor ("**KSV**" or the "**Proposed Monitor**"), for the sale or restructuring of GSH's business and/or assets. The SISP will seek going concern offers for all or any parts of GSH's business and property (including liquidation proposals), as well as investment proposals. If the Initial CCAA Order is granted, it is anticipated that GSH will serve motion materials with respect to the SISP shortly thereafter.⁷

9. Concurrently, GSH will be considering its next steps for its Chilean operations. It is not presently anticipated that any proceedings will be commenced outside of Canada.⁸

10. GSH employs approximately 200 non-unionized personnel. This does not include approximately 55 individuals employed by DA Chile.⁹

⁵ Martin Affidavit, para. 6, Application Record, Tab 2.

⁶ Martin Affidavit, para. 7, Application Record, Tab 2.

⁷ Martin Affidavit, para. 8, Application Record, Tab 2.

⁸ Martin Affidavit, para. 9, Application Record, Tab 2.

⁹ Martin Affidavit, para. 13, Application Record, Tab 2.

C. GSH's Business

11. GSH is one of the largest onshore helicopter operators in Canada and conducts operations through most parts of western and northern Canada, as well as internationally. GSH's main base of operations is in Yellowknife, Northwest Territories. It has sub-bases placed strategically throughout northern and western Canada and in Ontario to help support its aircrew and maintenance personnel in the challenging environments and locations where many of GSH's customers require services. GSH also has a leased hangar and office facilities in Springbank, Alberta, Kelowna, British Columbia, as well as a Chilean subsidiary which operates out of a facility in Rancagua, Chile.¹⁰

12. GSH generates its revenue from mineral and gas exploration support, forest fire suppression services and the provision of services to government agencies and support for infrastructure work such as power line construction.¹¹

13. GSH's fleet is comprised of approximately 51 light, intermediate and medium sized rotary wing aircraft, of which 34 are owned and 17 are leased. Several lenders have security against the aircraft, including ECN (eight helicopters) and Roynat (four helicopters). Certain of the aircraft used by GSH in connection with its first nations joint ventures are owned by the joint venture and leased to GSH for use.¹²

14. GSH does not maintain a registered pension plan for its employees.¹³

15. Seasonal forest fire suppression services in Chile peak from December to March, while its northern Canadian seasonal work peaks from May through September. In April 2018, GSH was awarded a number of fire suppression contracts by the Province of Ontario for essential fire suppression support. The seasonal operating commitment for these contracts ends at the end of September 2018. The services provided under these contracts are critical and GSH intends to continue to provide these services to the end of the current season. GSH also has ongoing fire

¹⁰ Martin Affidavit, para. 14, Application Record, Tab 2.

¹¹ Martin Affidavit, para. 15, Application Record, Tab 2.

¹² Martin Affidavit, para. 16, Application Record, Tab 2.

¹³ Martin Affidavit, para. 17, Application Record, Tab 2.

suppression contracts with the Province of Alberta and the Government of the Northwest Territories which it intends to service through at least the end of September 2018.¹⁴

D. GSH's Financial Position

16. Audited financial statements have historically been prepared at the DAI level on a consolidated basis. As such, GSH does not have stand-alone audited financial statements.¹⁵

17. GSH has incurred losses over the last two fiscal years totalling approximately \$13.7 million, with those losses increasing on a year over year basis. Revenue has also declined in that two year period. GSH has also continued to experience losses through the first six months of the current fiscal year.¹⁶

18. Forecasts for GSH indicate that GSH will not be profitable in its present state for the foreseeable future and cannot continue as a going concern without ongoing financial support and/or a material restructuring of both its balance sheet and operating cost base. If GSH were to continue to operate in the normal course, it would require significant liquidity in the coming months.¹⁷

E. The Sale Transactions

19. As discussed above, in March 2018, DAI, the holding company for the Group at that time, filed for protection under the CCAA. The purpose of DAI's proceeding was, among other things, to sell its shares in GSH, ATL and DMS. In connection with the DAI sale process, Clairvest, through Acquireco, entered into stalking horse agreements (the "**APAs**") for sale transactions (the "**Sale Transactions**") of each of GSH, ATL and DMS for the assignment and assumption of a portion of the secured debt owing to Clairvest under the CV Secured Debentures (as defined in the Bernards Affidavit) plus the assumption of DAI's other secured liabilities owing to CIBC and Roynat.¹⁸

¹⁴ Martin Affidavit, para. 18, Application Record, Tab 2.

¹⁵ Martin Affidavit, para. 20, Application Record, Tab 2.

¹⁶ Martin Affidavit, para. 21, Application Record, Tab 2.

¹⁷ Martin Affidavit, para. 22, Application Record, Tab 2.

¹⁸ Martin Affidavit, para. 23, Application Record, Tab 2.

20. The Sale Transactions under the APAs closed on August 14, 2018. In connection with the Sale Transactions, Acquireco entered into assumption agreements with Clairvest, CIBC and Roynat and the Group affirmed their guarantees and security granted to Clairvest, CIBC and Roynat thereunder (the “**Assumptions and Acknowledgements**”). The parties were unable to reach agreement on terms of an assumption with ECN. In connection with the closing of the Sale Transactions, each of CIBC, Textron and Roynat waived any defaults associated with, among other things, the DAI proceedings and the Sale Transactions. The ongoing defaults existing under the CV Secured Debentures and the ECN Loan Agreement were not waived.¹⁹

F. Overview of GSH’s Debt

21. As discussed above, GSH is a guarantor of all of the secured obligations owing to Clairvest, ECN and Roynat, which obligations, in total, amount to approximately \$83.4 million as of August 30, 2018. GSH is also a guarantor of the secured obligations owing to CIBC. The balance owing on the operating line and outstanding letters of credit owing to CIBC as of August 30, 2018 is approximately \$15.2 million.²⁰

22. In addition to the matters noted above, as of June 30, 2018 GSH has unsecured obligations of approximately \$8.5 million, before considering intercompany obligations and off- balance sheet obligations, including severance and contingent liabilities. GSH’s unsecured obligations consist primarily of unpaid trade obligations and certain amounts owing to first nations groups in connection with GSH’s joint ventures. GSH’s deteriorating financial performance necessitated borrowings from its former parent, DAI. As a result, GSH’s intercompany obligation as at June 30, 2018 totaled approximately \$154 million, which was assigned to Acquireco by DAI as part of the Sale Transactions completed in DAI’s CCAA proceedings.²¹

¹⁹ Martin Affidavit, paras. 24 and 25, Application Record, Tab 2.

²⁰ Martin Affidavit, para. 27, Application Record, Tab 2.

²¹ Martin Affidavit, para. 28, Application Record, Tab 2.

G. Group Bank Accounts

23. Banking and operating borrowing facilities of the Group 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.²²

24. The main bank accounts of the Group are with CIBC in Toronto, Ontario. All of the Group's CIBC bank accounts are pooled into a consolidated cash pooling arrangement used by the Group as a whole. The Group has accounts in both Canadian dollars and US dollars in the names of each of GSH, ATL and DMS. The Group also has bank accounts with Royal Bank of Canada in Saskatoon, SK.²³

25. The Applicant is seeking relief allowing it to continue with its existing cash management system during the CCAA proceedings including an intercompany charge to secure advances made by Acquireco to GSH during the proceedings.²⁴

PART III – ISSUES AND THE LAW

26. This issues are as follows:

- (a) Is the Applicant entitled to seek protection under the CCAA?
- (b) Should the following relief be granted:
 - (ii) the extension of the stay to the other members of the Group including their directors and officers; and
 - (iii) approval of the Administration Charge, Directors' Charge and Intercompany Charge.

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

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

²² Martin Affidavit, para. 29, Application Record, Tab 2.

²³ Martin Affidavit, para. 30, Application Record, Tab 2.

²⁴ Martin Affidavit, para. 31, Application Record, Tab 2.

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.²⁵

28. 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.²⁶

29. For the purposes of the CCAA, a “debtor company” includes a company that is “insolvent”.²⁷ 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;²⁸

30. 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

²⁵ *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended (the “CCAA”), s. 3(1).

²⁶ CCAA, s. 9(1).

²⁷ CCAA, s. 2.

²⁸ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, s. 2.

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.²⁹

31. GSH is a “debtor company” to which the CCAA applies and over which this Court has jurisdiction.

- (a) GSH is a company incorporated under the laws of the *Canada Business Corporations Act*.³⁰
- (b) Although GSH’s operating headquarters are located in the Northwest Territories, GSH’s principal secured creditors, including Clairvest, CIBC and Roynat and their legal counsel are all situated in Toronto, its sole director is located in Ontario and it is presently performing fire suppression services pursuant to a substantial contract with Ontario Ministry of Natural Resources.³¹
- (c) The recently completed proceedings of GSH’s former parent, DAI were conducted under the supervision of this Court.³²
- (d) GSH has liabilities in excess of \$100 million far exceeding the \$5 million threshold imposed by the CCAA.³³
- (e) GSH is insolvent. GSH is in default of its obligations under the CV Secured Debentures and the ECN Loan Agreement. It does not have the funds necessary to repay those obligations.³⁴

²⁹ *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.

³⁰ Martin Affidavit, para. 10, Application Record, Tab 2.

³¹ Martin Affidavit, para. 11, Application Record, Tab 2

³² Martin Affidavit, paras. 5 and 26, Application Record, Tab 2.

³³ Martin Affidavit, paras. 27 and 28, Application Record, Tab 2.

³⁴ Martin Affidavit, para. 6 and 34, Application Record, Tab 2.

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

32. 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.³⁵

33. 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
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.³⁶

34. 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.³⁷

35. 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

³⁵ *Re Lehndorff General Partner Ltd.*, [1993] O.J. No. 14 [*Lehndorff*] at para. 5, Applicant's Brief of Authorities Tab 2.

³⁶ CCAA, s. 11.02(1)

³⁷ CCAA, s. 11.03(1)

extensive time and effort to defending litigation and cause distraction during the restructuring period.³⁸

36. 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 an 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.³⁹

37. 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 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.⁴⁰

38. Although only GSH is an applicant in this proceeding, the business and operations of the other members of the Group are related to GSH including:

- (a) Common creditors including common secured lenders who have cross-defaults and guarantees or direct borrowing obligations from other members of the Group;⁴¹

³⁸ *Re Nortel Networks Corp.*, 2009 CarswellOnt 4806 at paras. 20, 27 and 36 (Sup Ct), Applicant's Brief of Authorities Tab 3.

³⁹ *Lehndorff* at para. 5, Applicant's Brief of Authorities Tab 2.

⁴⁰ *Re First Leaside Wealth Management Inc.*, 2012 ONSC 1299, at paras. 28-30, Applicant's Brief of Authorities, Tab 4.

⁴¹ Martin Affidavit, para. 39, Application Record, Tab 2.

- (b) centralized cash management, treasury and revolving loan facility provided by CIBC;⁴² and
- (c) overlapping relationships with certain first nations groups which allow the Group to operate in the North.⁴³

39. It is essential that the Group be protected while that SISP is being conducted because, among other things, certain of the contracts including under the CV Secured Debentures, ECN Loan Agreement (which, as noted above, is currently in default), the CIBC loan facilities and the Roynat credit facility have cross defaults which could be triggered as a result of a filing by GSH.⁴⁴

40. A limited third party stay in favour of the entire Group 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.

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

Administration Charge

41. Pursuant to Section 11.52 of the CCAA:

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

⁴² Martin Affidavit, para. 47, Application Record, Tab 2.

⁴³ The pre-filing report of KSV Kofman Inc. as proposed CCAA Monitor of the Applicant, dated August 31, 2018, para. 5(e).

⁴⁴ Martin Affidavit, para. 39, Application Record, Tab 2.

(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.⁴⁵

42. 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.⁴⁶

43. The proposed administration charge of \$750,000 (the “**Administration Charge**”) is intended to cover: (a) the Monitor and its counsel; and (b) counsel to GSH.⁴⁷ Super priority Administration Charges are routinely granted in CCAA proceedings. The proposed Administration Charge is appropriate in the circumstances for the following reasons:

- (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 GSH’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 SISP process – the

⁴⁵ CCAA, s. 11.52(1).

⁴⁶ *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.

⁴⁷ Martin Affidavit, para. 40, Application Record, Tab 2.

involvement of the Monitor in the SISP 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

44. 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.⁴⁸

45. 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.⁴⁹ The retention of directors can be crucial to the potential success of a restructuring.

46. To ensure the ongoing stability of the 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 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

⁴⁸ CCAA, s. 11.51(1), (3)

⁴⁹ *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.

amount of \$850,000 on the assets, property, undertaking and business of the Applicant (the “**Directors’ Charge**”).⁵⁰

47. The quantum of the proposed Directors’ Charge has been discussed with the Proposed Monitor and was calculated based on an estimate of the “stub period” liabilities relating to wages, vacation pay and source deductions for GSH’s employees. The proposed Directors’ Charge, quantum and priority is reasonable in the circumstances.⁵¹

48. 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.

49. 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.
- (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.

⁵⁰ Martin Affidavit, paras. 42 and 45, Application Record, Tab 2.

⁵¹ Martin Affidavit, para. 46, Application Record, Tab 2.

D. Intercompany Charge

50. During the CCAA period, it is anticipated that the existing cash pooling arrangement with CIBC will continue to operate in the ordinary course. The proposed Initial Order allows GSH to continue to use the existing cash management system without any change. As such, Acquireco, as borrower under that facility will make funds available to GSH through the operation of the cash management system.⁵²

51. In order to ensure GSH's borrowings from Acquireco are accounted for, the Applicant is requesting that such advances be secured by a court-ordered charge (the "**Intercompany Charge**") in favour of Acquireco.⁵³

52. The Court has previously granted relief allowing existing intercompany arrangements to continue post filing and grant necessary protections accordingly. 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.⁵⁴

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

53. The Applicant is proposing that the Administration Charge, Directors' Charge and Intercompany 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.

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

⁵² Martin Affidavit, para. 46, Application Record, Tab 2.

⁵³ Martin Affidavit, para. 46, Application Record, Tab 2.

⁵⁴ *Re Performance Sports Group Ltd.*, 2016 ONSC 6800 [*Performance Sports*], at paras 34 and 35, Applicant's Brief of Authorities Tab 8;

- (a) Priority for charges of these natures is routinely provided for in CCAA proceedings;
- (b) Neither Clairvest nor CIBC are opposed to the priority of the Charges;
- (c) No priority is being sought over properly perfected purchase money security interests or super priority statutory deemed trusts for unremitted source deductions.

PART IV – NATURE OF THE ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of September, 2018.



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

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.

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 GREAT SLAVE HELICOPTERS LTD.

Court File No:

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced TORONTO

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(Initial Application)**

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