

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

**BRIEF OF LAW
(ECN Aviation)**

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BRIEF OF LAW

1. ECN Aviation Inc. (“ECN”) is a secured creditor of Great Slave Helicopters Ltd. (“GSH”) and certain affiliated companies.
2. ECN has first-ranking security over 8 helicopters owned and/or operated by GSH (the “ECN/GSH Helicopters”).
3. GSH is seeking an Initial Order under the *Companies’ Creditors Arrangement Act* (the “CCAA”) that would, among other things: (a) stay ECN’s rights to enforce its security over the ECH/GSH Helicopters; and (b) grant charges over the ECN/GSH Helicopters.
4. In previous proceedings under the CCAA in respect of GSH’s former parent, Discovery Air Inc. (“DA”), the Court stayed ECN’s rights to enforce its security over the ECN/GSH Helicopters.
5. ECN’s security over the ECN/GSH Helicopters constitutes a “registered interest” within the meaning of the Convention on International Interests in Mobile Equipment (the “Cape Town Convention”) and the related Protocol to the Convention on International Interest in Mobile Equipment on Matters Specific to Aircraft Equipment (the “Aircraft Protocol”). The commencement of CCAA proceedings in respect of GSH (and before that DA) constitutes an “insolvency-related event” under the Aircraft Protocol.
6. The Cape Town Convention is an international treaty developed by UNDRUIT that standardizes transactions involving security interests in high-value movable property such as aircraft and helicopters. Three equipment-specific protocols to the Cape Town Convention have been adopted, including one that is specific to “aircraft objects”—the Aircraft Protocol. The Aircraft Protocol includes specific rules that are applicable in insolvency proceedings. Those provisions of the Aircraft Protocol provide persons with security over aircraft objects with enhanced rights in insolvency proceedings that may not be available to other secured creditors.
7. Canada has ratified and adopted the Cape Town Convention and the Aircraft Protocol such that they both have the direct force of law in Canada. [*International Interests in Mobile Equipment (aircraft equipment) Act*, S.C. 2005, c.3 as amended (the “Cape Town Convention Act”), s. 4(1)].

8. Legislation has also been passed to give the Cape Town Convention and the Aircraft Protocol direct force of law Provinces and Territories. [See for example *International Interests in Mobile Equipment Act (Aircraft Equipment), 2002, SO 2002, c 18, Sch B*]
9. The Aircraft Protocol applies to fixed-wing aircraft that are capable of carrying at least 8 or more passengers (including crew) or 2750 kilograms of cargo and helicopters that are capable of carrying at least 5 passengers (including the crew) or goods in excess of 450 kilograms together with all installed, incorporated or attached accessories, parts and equipment (including rotors), and all related data, manuals and records. [**Aircraft Protocol, Art 1.2**] The ECN Helicopters fall under the Aircraft Protocol.
10. The Cape Town Convention and Aircraft Protocol are intended, among other things, to provide secured creditors like ECN with security over aircraft objects—the ECH/GHS Helicopters—with assurance that they will be able to recover their in a timely manner in cases where a borrower such as GSH becomes insolvent. To the extent that there are inconsistencies between the provisions of the Cape Town Convention and the Aircraft Protocol and the CCAA, the provisions of the Cape Town Convention take precedence over the CCAA. [**Cape Town Convention Act, s. 6**]
11. A key part of the Aircraft Protocol relates to the exercise of remedies by a secured creditor in the event of the happening of an “insolvency-related event”. The Aircraft Protocol defines an “insolvency-related event” broadly to include the commencement of insolvency proceedings and “the declared intention to suspend or actual suspension of payments by the debtor where the creditor’s right to institute insolvency proceedings against the debtor or to exercise remedies under the [Cape Town Convention] is prevented or suspended by law...” [**Aircraft Protocol, Art 1.2**]
12. Where there is an “insolvency-related event”:
 1. The insolvency administrator or the debtor, as applicable, must give possession of the aircraft object to the secured creditor no later than the earlier of:
 - (a) the end of the waiting period-which Canada has defined as being 60 calendar days; and
 - (b) the date on which the secured creditor would otherwise be entitled to possession of the aircraft object. [**Aircraft Protocol, Art XI.2**]

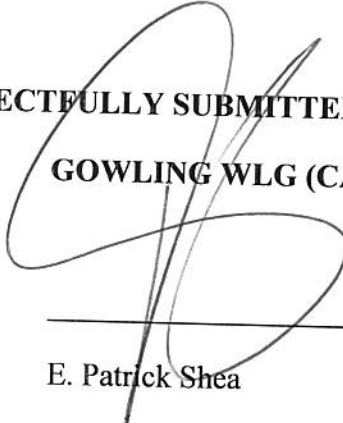
2. No exercise of remedies permitted by the Cape Town Convention or the Aircraft Protocol may be prevented or delayed after the 60-day period has expired. [**Aircraft Protocol, Art XI.9**]
 3. If the insolvency administrator or the debtor wishes to retain the aircraft object for longer than 60 days it must cure all defaults, other than a default constituted by the commencement of the insolvency proceeding, and to perform all future obligations under the relevant agreement(s). [**Aircraft Protocol, Art XI.7**]
 4. Unless and until the secured creditor is given the opportunity to take possession of the aircraft object, the insolvency administrator or the debtor may make use of the aircraft object, but must preserve the aircraft object and maintain it and its value in accordance with the relevant agreement(s). [**Aircraft Protocol, Art XI.5**]
 5. No rights or interests, except for non-consensual rights or interests of a category covered by a declaration made by Canada under the Cape Town Convention, may be granted priority over a secured creditor in the insolvency proceedings. [**Aircraft Protocol, Art XI.12**]
13. According to the Explanatory Report and Commentary prepared by UNIDROIT, Article XI “restricts the operation of the relevant insolvency law by precluding any order or action which prevents or delays the exercise of remedies after expiry of the waiting period or would modify the obligations of the debtor without the creditor’s consent. Accordingly ... it would not, for example, be open to the insolvency courts of a Contracting State [such as Canada] to suspend the enforcement of a security interest over an aircraft object.....The underlying rationale is to give aircraft object financiers and lessors the assurance of a clear and unqualified rule.”
14. The Aircraft Protocol contemplates that ECN may be prevented or stayed from exercising its rights over the ECN/GSH Helicopters for only a single 60-day period. [**Aircraft Protocol, Art XI.7 and XI.9**] Subject to this 60-day restriction, ECN does not require leave of the Court to exercise the remedies afforded to it by the Cape Town Convention and/or the Aircraft Protocol except in those circumstances where the Cape Town Convention or the Aircraft Protocol themselves require that ECN obtain leave. [**Cape Town Convention, Art 54**]

15. The Cape Town Convention has its own priority regime. [**Cape Town Convention, Art 29, 30, 39 and 40**] To the extent that these priority rules are inconsistent with provincial personal property security legislation, the Cape Town Convention priority regime govern. [**See, *International Interests in Mobile Equipment Act (Aircraft Equipment)*, 2002, SO 2002, c 18, Sch B, s. 3.**]
16. The Cape Town Convention does not include the concept of a “purchase money” security interest. It treats all security interests of mobile equipment in the same manner and has only one fundamental priority rule—first in time is first in right.
17. As noted above, no rights or interests, except for non-consensual rights or interests of a category covered by a declaration made by Canada under the Cape Town Convention, may be granted priority over a secured creditor in the insolvency proceedings. [**Aircraft Protocol, Art XI.12**]. This is not dissimilar to how “financial collateral” is treated in Canadian insolvency proceedings. [**See CCAA, s. 34(11)**]
18. The grant of a Court-ordered charge over aircraft objects in an insolvency proceeding would render the enforcement rights granted by the Cape Town Convention and the Aircraft Protocol largely meaningless. The existence of a Court-ordered charge would, for example, run contrary to the ability of a secured creditor to procure the de-registration and export of an aircraft or to sell an aircraft object “free and clear”. [**See Aircraft Protocol, Art XIII and XIV**]
19. The grant of a Court-ordered charge over aircraft objects in an insolvency proceeding would also make it impossible for a debtor to comply with its obligations under Article XI of the Aircraft Protocol should it wish to retain an aircraft object for longer than 60 days insofar as curing all defaults would involve securing a discharge of any unauthorized charges. [**See Aircraft Protocol, Art XI.A.7**] The existence of a Court-ordered charge would, for example, constitute a default under the Aircraft Loan Agreement that would have to be “cured” for GSH to retain the ECN/GSH Helicopters for longer than 60 days (assuming that the 60-day period contemplated by Art IX.A of the Aircraft Protocol has not already expired).
20. There are numerous persons whose interests are, for various policy reasons, protected in insolvency proceedings under the CCAA and the BIA. Collective agreements cannot, for example, be disclaimed [**CCAA, s. 32(9)**], certain Crown claims can be compromised only with Her Majesty’s

consent [CCAA, s. 6(3)], member of the Canadian Payments Association cannot be forced to act as a clearing agent [CCAA, s. 11.06] and counter-parties to contracts that are assigned are entitled to be paid any pre-filing obligations in priority to other creditors [CCAA, s11.3(4)]. For sound policy reasons, Canada—together with most of its major trading partners—has chosen to ratify the Cape Town Convention and the Aircraft Protocol, and to adopt Alternative A—typically referred to as the “hard” alternative—in Article XI of the Aircraft Protocol and thereby provide secured creditors such as ECN with rights that are not provided to other secured creditors. The Cape Town Convention and the Aircraft Protocol do not prevent debtors such as GSH from reorganizing, they simply, for policy reasons, alter the negotiating landscape and constrain what may be achieved by Clairvest and GSH on a non-consensual basis. The fact that Clairvest or GSH might not wish, or might find it difficult, to negotiate a business arrangement with ECN, does not provide a basis for the Court to exercise its jurisdiction to alter the landscape established by the Cape Town Convention and the Aircraft Protocol to force ECN to accede to Clairvest’s or GSH’s wishes. Stakeholders enter into financing arrangements on the basis of the protections afforded, and the limitations imposed, by the Cape Town Convention and the Aircraft Protocol.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of September 2018

GOWLING WLG (CANADA) LLP



E. Patrick Shea

Schedule A

International Interests in Mobile Equipment (Aircraft Equipment) Act, SC 2005, c 3

2 (1) The following definitions apply in this Act.

“aircraft objects” has the same meaning as in Article I(2)(c) of the Aircraft Protocol.

“Aircraft Protocol means the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment set out in Schedule 2.

“Convention” means the Convention on International Interests in Mobile Equipment set out in Schedule 1.

“declaration” means a declaration or designation made by Canada under the Convention or the Aircraft Protocol.

(2) Unless a contrary intention appears, words and expressions used in this Act have the same meaning as in the Convention and the Aircraft Protocol.

(3) In interpreting the Convention and the Aircraft Protocol, recourse may be had to

(a) the Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment, as approved for distribution by the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT); and

(b) the Consolidated Text of the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment set out in Schedule 3.

4 (1) Subject to subsection (2), to the extent that they apply to Canada as described in declarations, the Convention and the Aircraft Protocol have the force of law with respect to aircraft objects during the period that the Aircraft Protocol is, by its terms, in force in respect of Canada.

(2) Subsection (1) does not apply in respect of Articles 47 to 62 of the Convention and Articles XXVI to XXXVII of the Aircraft Protocol.

6 (1) Subject to subsection (2), a provision of this Act or of the regulations, or a provision of the Convention or Aircraft Protocol given force of law by section 4, that is inconsistent with any other law prevails over the other law to the extent of the inconsistency.

(2) A provision referred to in any of the following paragraphs (a) to (f) that is inconsistent with a provision of this Act or of the regulations, or with a provision of the Convention or Aircraft Protocol given force of law by section 4, prevails over the provision of this Act, the regulations, the Convention or the Aircraft Protocol to the extent of the inconsistency:

- (a) a provision of the *Controlled Drugs and Substances Act*;
- (b) a provision of Part II.1 or XII.2 or any of sections 487 to 490.01 and 490.1 to 490.9 of the *Criminal Code*;
- (c) a provision of the *Export and Import Permits Act*;
- (d) a provision of the *Special Economic Measures Act*;
- (e) a provision of the *United Nations Act*;
- (f) a provision of any regulations made for the purposes of a provision referred to in any of paragraphs (a) to (e).

7 The superior courts of the provinces are courts of competent jurisdiction for the purpose of the enforcement of the provisions of this Act, including provisions given force of law by section 4

9.1 Article XI of the Aircraft Protocol does not apply to an insolvency-related event that occurs before the day on which subsection 4(1) comes into force. **Note: Section 4 came into force on 1 April 2013: SI/2013-26.**

SCHEDULE 1

Convention on International Interests in Mobile Equipment

Article 1 Definitions

In this Convention, except where the context otherwise requires, the following terms are employed with the meanings set out below:

- (a) agreement means a security agreement, a title reservation agreement or a leasing agreement;
- (d) commencement of the insolvency proceedings means the time at which the insolvency proceedings are deemed to commence under the applicable insolvency law;
- (h) court means a court of law or an administrative or arbitral tribunal established by a Contracting State;
- (i) creditor means a chargee under a security agreement, a conditional seller under a title reservation agreement or a lessor under a leasing agreement;
- (j) debtor means a chargor under a security agreement, a conditional buyer under a title reservation agreement, a lessee under a leasing agreement or a person whose interest in an object is burdened by a registrable non-consensual right or interest;

- (k) insolvency administrator means a person authorised to administer the reorganisation or liquidation, including one authorised on an interim basis, and includes a debtor in possession if permitted by the applicable insolvency law;
- (l) insolvency proceedings means bankruptcy, liquidation or other collective judicial or administrative proceedings, including interim proceedings, in which the assets and affairs of the debtor are subject to control or supervision by a court for the purposes of reorganisation or liquidation;
- (o) international interest means an interest held by a creditor to which Article 2 applies;
- (p) International Registry means the international registration facilities established for the purposes of this Convention or the Protocol;
- (r) national interest means an interest held by a creditor in an object and created by an internal transaction covered by a declaration under Article 50(1);
- (s) non-consensual right or interest means a right or interest conferred under the law of a Contracting State which has made a declaration under Article 39 to secure the performance of an obligation, including an obligation to a State, State entity or an intergovernmental or private organisation;
- (u) object means an object of a category to which Article 2 applies;
- (aa) Protocol means, in respect of any category of object and associated rights to which this Convention applies, the Protocol in respect of that category of object and associated rights;
- (bb) registered means registered in the International Registry pursuant to Chapter V;
- (cc) registered interest means an international interest, a registrable non-consensual right or interest or a national interest specified in a notice of a national interest registered pursuant to Chapter V;
- (dd) registrable non-consensual right or interest means a non-consensual right or interest registrable pursuant to a declaration deposited under Article 40;
- (ee) Registrar means, in respect of the Protocol, the person or body designated by that Protocol or appointed under Article 17(2)(b);
- (ii) security agreement means an agreement by which a chargor grants or agrees to grant to a chargee an interest (including an ownership interest) in or over an object to secure the performance of any existing or future obligation of the chargor or a third person;

- (mm) unregistered interest means a consensual interest or non-consensual right or interest (other than an interest to which Article 39 applies) which has not been registered, whether or not it is registrable under this Convention; and
- (nn) writing means a record of information (including information communicated by teletransmission) which is in tangible or other form and is capable of being reproduced in tangible form on a subsequent occasion and which indicates by reasonable means a person's approval of the record.

Article 2

The international interest

1 This Convention provides for the constitution and effects of an international interest in certain categories of mobile equipment and associated rights.

2 For the purposes of this Convention, an international interest in mobile equipment is an interest, constituted under Article 7, in a uniquely identifiable object of a category of such objects listed in paragraph 3 and designated in the Protocol:

- (a) granted by the chargor under a security agreement;
- (b) vested in a person who is the conditional seller under a title reservation agreement; or
- (c) vested in a person who is the lessor under a leasing agreement.

An interest falling within sub-paragraph (a) does not also fall within sub-paragraph (b) or (c).

3 The categories referred to in the preceding paragraphs are:

- (a) airframes, aircraft engines and helicopters;
- (b) railway rolling stock; and
- (c) space assets.

4 The applicable law determines whether an interest to which paragraph 2 applies falls within subparagraph (a), (b) or (c) of that paragraph.

5 An international interest in an object extends to proceeds of that object.

Article 3

Sphere of application

1 This Convention applies when, at the time of the conclusion of the agreement creating or providing for the international interest, the debtor is situated in a Contracting State.

2 The fact that the creditor is situated in a non-Contracting State does not affect the applicability of this Convention.

Article 5

Interpretation and applicable law

1 In the interpretation of this Convention, regard is to be had to its purposes as set forth in the preamble, to its international character and to the need to promote uniformity and predictability in its application.

2 Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the applicable law.

3 References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.

4 Where a State comprises several territorial units, each of which has its own rules of law in respect of the matter to be decided, and where there is no indication of the relevant territorial unit, the law of that State decides which is the territorial unit whose rules shall govern. In the absence of any such rule, the law of the territorial unit with which the case is most closely connected shall apply.

Article 6

Relationship Between the Convention and the Protocol

1 This Convention and the Protocol shall be read and interpreted together as a single instrument.

2 To the extent of any inconsistency between this Convention and the Protocol, the Protocol shall prevail.

Article 7

Formal Requirements

An interest is constituted as an international interest under this Convention where the agreement creating or providing for the interest:

- (a) is in writing;
- (b) relates to an object of which the chargor, conditional seller or lessor has power to dispose;
- (c) enables the object to be identified in conformity with the Protocol; and

- (d) in the case of a security agreement, enables the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

Article 8

Remedies of Chargee

1 In the event of default as provided in Article 11, the chargee may, to the extent that the chargor has at any time so agreed and subject to any declaration that may be made by a Contracting State under Article 54, exercise any one or more of the following remedies:

- (a) take possession or control of any object charged to it;
- (b) sell or grant a lease of any such object;
- (c) collect or receive any income or profits arising from the management or use of any such object.

2 The chargee may alternatively apply for a court order authorising or directing any of the acts referred to in the preceding paragraph.

Article 11

Meaning of Default

1 The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies specified in Articles 8 to 10 and 13.

2 Where the debtor and the creditor have not so agreed, “default” for the purposes of Articles 8 to 10 and 13 means a default which substantially deprives the creditor of what it is entitled to expect under the agreement.

Article 29

Priority of competing interests

1 A registered interest has priority over any other interest subsequently registered and over an unregistered interest.

2 The priority of the first-mentioned interest under the preceding paragraph applies:

- (a) even if the first-mentioned interest was acquired or registered with actual knowledge of the other interest; and
- (b) even as regards value given by the holder of the first-mentioned interest with such knowledge.

5 The priority of competing interests or rights under this Article may be varied by agreement between the holders of those interests, but an assignee of a subordinated interest is not bound by an agreement to subordinate that interest unless at the time of the assignment a subordination had been registered relating to that agreement.

6 Any priority given by this Article to an interest in an object extends to proceeds.

Article 30 **Effects of insolvency**

1 In insolvency proceedings against the debtor an international interest is effective if prior to the commencement of the insolvency proceedings that interest was registered in conformity with this Convention.

2 Nothing in this Article impairs the effectiveness of an international interest in the insolvency proceedings where that interest is effective under the applicable law.

3 Nothing in this Article affects:

- (a) any rules of law applicable in insolvency proceedings relating to the avoidance of a transaction as a preference or a transfer in fraud of creditors; or
- (b) any rules of procedure relating to the enforcement of rights to property which is under the control or supervision of the insolvency administrator.

Article 39 **Rights Having Priority Without Registration**

1 A Contracting State may at any time, in a declaration deposited with the Depositary of the Protocol declare, generally or specifically:

- (a) those categories of non-consensual right or interest (other than a right or interest to which Article 40 applies) which under that State's law have priority over an interest in an object equivalent to that of the holder of a registered international interest and which shall have priority over a registered international interest, whether in or outside insolvency proceedings; and
- (b) that nothing in this Convention shall affect the right of a State or State entity, intergovernmental organisation or other private provider of public services to arrest or detain an object under the laws of that State for payment of amounts owed to such entity, organisation or provider directly relating to those services in respect of that object or another object.

The Government of Canada declares, in accordance with Article 39(1)(a) of the Convention, that any non-consensual right or interest under Canadian law existing at the

date of this declaration or created after that date, that has priority over an interest in an object equivalent to that of the holder of a registered international interest, shall have priority to the same extent over such registered international interest, whether in or outside insolvency proceedings.

The Government of Canada also declares, in accordance with Article 39(1)(a) of the Convention, that a legal hypothec under the law of the Province of Quebec existing at the date of this declaration or created after that date, that is registered in the register of personal and movable real rights of that Province, shall have priority over an international interest subsequently registered in the international Registry established under the Convention and the Protocol, whether in or outside insolvency proceedings.

The Government of Canada also declares, in accordance with Article 39(1)(a) of the Convention, that a prior claim to which the law of the Province of Quebec, existing at the date of this declaration, or created after that date, attaches the right of the creditor to be preferred over the other creditors, shall have priority over an international interest registered in the international Registry established under the Convention and the Protocol, whether in or outside insolvency proceedings.

The Government of Canada also declares, in accordance with Article 39 of the Convention, that nothing in the Convention shall affect the right of the Government of Canada or of a province or territory of Canada, a governmental entity, intergovernmental organization or other private provider of public services to arrest or detain an object under the laws of Canada for payment of amounts owed to that government, entity, organization or provider directly relating to those services in respect of that object or another object.

2 A declaration made under the preceding paragraph may be expressed to cover categories that are created after the deposit of that declaration.

3 A non-consensual right or interest has priority over an international interest if and only if the former is of a category covered by a declaration deposited prior to the registration of the international interest.

4 Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under sub-paragraph (a) of paragraph 1 shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession.

The Government of Canada declares, in accordance with Article 39(4) of the Convention, that a right or interest referred to in a declaration made pursuant to Article 39(1)(a) of the Convention shall have priority over an international interest registered prior to the date of deposit of Canada's instrument of ratification.

Article 40 **Registrable Non-consensual Rights or Interests**

A Contracting State may at any time in a declaration deposited with the Depositary of the Protocol list the categories of non-consensual right or interest which shall be registrable under this Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly. Such a declaration may be modified from time to time.

No declaration(s) by Canada.

Article 50

Internal transactions

1 A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that this Convention shall not apply to a transaction which is an internal transaction in relation to that State with regard to all types of objects or some of them.

2 Notwithstanding the preceding paragraph, the provisions of Articles 8(4), 9(1), 16, Chapter V, Article 29, and any provisions of this Convention relating to registered interests shall apply to an internal transaction.

3 Where notice of a national interest has been registered in the International Registry, the priority of the holder of that interest under Article 29 shall not be affected by the fact that such interest has become vested in another person by assignment or subrogation under the applicable law.

No declaration(s) by Canada.

Article 53

Determination of Courts

A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare the relevant “court” or “courts” for the purposes of Article 1 and Chapter XII of this Convention.

The Government of Canada declares, in accordance with Article 53 of the Convention, that for all matters within federal jurisdiction, the superior courts of the provinces and territories are the relevant courts for the purposes of Article 1 and Chapter XII of the Convention.

The Government of Canada also declares, in accordance with Article 53 of the Convention, that the following courts are the relevant courts for all matters within provincial and territorial jurisdiction for the purposes of Article 1 and Chapter XII of the Convention: ...in Ontario – the Superior Court of Justice...

Article 54

Declarations Regarding Remedies

1 A Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that while the charged object is situated within, or controlled from its territory the chargee shall not grant a lease of the object in that territory.

2 A Contracting State shall, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare whether or not any remedy available to the creditor under any provision of this Convention which is not there expressed to require application to the court may be exercised only with leave of the court.

The Government of Canada declares, in accordance with Article 54 of the Convention, that any remedy available to a creditor under any provision of the Convention, the exercise of which does not thereby require application to the court, may be exercised without leave of the court.

SCHEDULE 2

Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment

Article I

Defined Terms

1 In this Protocol, except where the context otherwise requires, terms used in it have the meanings set out in the Convention.

2 In this Protocol the following terms are employed with the meanings set out below:

- (a) aircraft means aircraft as defined for the purposes of the Chicago Convention which are either airframes with aircraft engines installed thereon or helicopters;
- (b) aircraft engines means aircraft engines (other than those used in military, customs or police services) powered by jet propulsion or turbine or piston technology and:
 - (i) in the case of jet propulsion aircraft engines, have at least 1750 lb of thrust or its equivalent; and
 - (ii) in the case of turbine-powered or piston-powered aircraft engines, have at least 550 rated take-off shaft horsepower or its equivalent,

together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto;

- (c) aircraft objects means airframes, aircraft engines and helicopters;
- (d) aircraft register means a register maintained by a State or a common mark registering authority for the purposes of the Chicago Convention;
- (e) airframes means airframes (other than those used in military, customs or police services) that, when appropriate aircraft engines are installed thereon, are type certified by the competent aviation authority to transport:

- (i) at least eight (8) persons including crew; or
- (ii) goods in excess of 2750 kilograms,

together with all installed, incorporated or attached accessories, parts and equipment (other than aircraft engines), and all data, manuals and records relating thereto;

- (l) helicopters means heavier-than-air machines (other than those used in military, customs or police services) supported in flight chiefly by the reactions of the air on one or more power-driven rotors on substantially vertical axes and which are type certified by the competent aviation authority to transport:

- (i) at least five (5) persons including crew; or

- (ii) goods in excess of 450 kilograms,

together with all installed, incorporated or attached accessories, parts and equipment (including rotors), and all data, manuals and records relating thereto;

- (m) insolvency-related event means:

- (i) the commencement of the insolvency proceedings; or
 - (ii) the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Convention is prevented or suspended by law or State action;

Article II

Application of Convention as Regards Aircraft Objects

1 The Convention shall apply in relation to aircraft objects as provided by the terms of this Protocol.

Article IX

Modification of default remedies provisions

1 In addition to the remedies specified in Chapter III of the Convention, the creditor may, to the extent that the debtor has at any time so agreed and in the circumstances specified in that Chapter:

- (a) procure the de-registration of the aircraft; and
- (b) procure the export and physical transfer of the aircraft object from the territory in which it is situated.

Article XI

Remedies on Insolvency

1 This Article applies only where a Contracting State that is the primary insolvency jurisdiction has made a declaration pursuant to Article XXX(3).

The Government of Canada declares, in accordance with Article XXX of the Protocol, that it will apply Article XI, Alternative A of the Protocol in its entirety to all types of insolvency proceedings and all insolvency-related events and that the waiting period of the purposes of Article XI(3), Alternative A shall be sixty (60) calendar days.

Alternative A

2 Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, shall, subject to paragraph 7, give possession of the aircraft object to the creditor no later than the earlier of:

- (a) the end of the waiting period; and
- (b) the date on which the creditor would be entitled to possession of the aircraft object if this Article did not apply.

3 For the purposes of this Article, the “waiting period” shall be the period specified in a declaration of the Contracting State which is the primary insolvency jurisdiction. **Note: Canada has declared that the waiting period is 60 calendar days.**

4 References in this Article to the “insolvency administrator” shall be to that person in its official, not in its personal, capacity.

5 Unless and until the creditor is given the opportunity to take possession under paragraph 2:

- (a) the insolvency administrator or the debtor, as applicable, shall preserve the aircraft object and maintain it and its value in accordance with the agreement; and
- (b) the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

6 Sub-paragraph (a) of the preceding paragraph shall not preclude the use of the aircraft object under arrangements designed to preserve the aircraft object and maintain it and its value.

7 The insolvency administrator or the debtor, as applicable, may retain possession of the aircraft object where, by the time specified in paragraph 2, it has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement. A second waiting period shall not apply in respect of a default in the performance of such future obligations.

8 With regard to the remedies in Article IX(1):

- (a) they shall be made available by the registry authority and the administrative authorities in a Contracting State, as applicable, no later than five working days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention; and
- (b) the applicable authorities shall expeditiously co-operate with and assist the creditor in the exercise of such remedies in conformity with the applicable aviation safety laws and regulations.

9 No exercise of remedies permitted by the Convention or this Protocol may be prevented or delayed after the date specified in paragraph 2.

10 No obligations of the debtor under the agreement may be modified without the consent of the creditor.

11 Nothing in the preceding paragraph shall be construed to affect the authority, if any, of the insolvency administrator under the applicable law to terminate the agreement.

12 No rights or interests, except for non-consensual rights or interests of a category covered by a declaration pursuant to Article 39(1), shall have priority in insolvency proceedings over registered interests.

Alternative B

2 *Upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor, as applicable, upon the request of the creditor, shall give notice to the creditor within the time specified in a declaration of a Contracting State pursuant to Article XXX(3) whether it will:*

(a) cure all defaults other than a default constituted by the opening of insolvency proceedings and agree to perform all future obligations, under the agreement and related transaction documents; or

(b) give the creditor the opportunity to take possession of the aircraft object, in accordance with the applicable law.

3 *The applicable law referred to in sub-paragraph (b) of the preceding paragraph may permit the court to require the taking of any additional step or the provision of any additional guarantee.*

4 *The creditor shall provide evidence of its claims and proof that its international interest has been registered.*

5 *If the insolvency administrator or the debtor, as applicable, does not give notice in conformity with paragraph 2, or when the insolvency administrator or the debtor has declared that it will give the creditor the opportunity to take possession of the aircraft object but fails to do so, the court may permit the creditor to take possession of the aircraft object upon such terms as the court may order and may require the taking of any additional step or the provision of any additional guarantee.*

6 *The aircraft object shall not be sold pending a decision by a court regarding the claim and the international interest.*

Article XIII

De-registration and export request authorisation

1 This Article applies only where a Contracting State has made a declaration pursuant to Article XXX(1).

2 Where the debtor has issued an irrevocable de-registration and export request authorisation substantially in the form annexed to this Protocol and has submitted such authorisation for recordation to the registry authority, that authorisation shall be so recorded.

3 The person in whose favour the authorisation has been issued (the “authorised party”) or its certified designee shall be the sole person entitled to exercise the remedies specified in Article IX(1) and may do so only in accordance with the authorisation and applicable aviation safety laws and regulations. Such authorisation may not be revoked by the debtor without the consent in writing of the authorised party. The registry authority shall remove an authorisation from the registry at the request of the authorised party.

4. The registry authority and other administrative authorities in Contracting States shall expeditiously co-operate with and assist the authorised party in the exercise of the remedies specified in Article IX.

The Government of Canada declares, in accordance with Article XXX of the Protocol, that it will apply Article XIII of the Protocol.

Article XIV

Modification of priority provisions

1 A buyer of an aircraft object under a registered sale acquires its interest in that object free from an interest subsequently registered and from an unregistered interest, even if the buyer has actual knowledge of the unregistered interest.

2 A buyer of an aircraft object acquires its interest in that object subject to an interest registered at the time of its acquisition.

3 Ownership of or another right or interest in an aircraft engine shall not be affected by its installation on or removal from an aircraft.

4 Article 29(7) of the Convention applies to an item, other than an object, installed on an airframe, aircraft engine or helicopter.

International Interests in Mobile Equipment Act (Aircraft Equipment), 2002, SO 2002, c 18, Sch B

1 (1) In this Act,

“Aircraft Protocol” means the Protocol to the Convention on International Interests in Mobile Equipment in Matters Specific to Aircraft Equipment that was opened for signature at Cape Town on November 16, 2001, the text of which is set out in Schedule 2;

“Convention” means the Convention on International Interests in Mobile Equipment that was opened for signature at Cape Town on November 16, 2001, the text of which is set out in Schedule 1.

3 In the event of any inconsistency between this Act and any other law, this Act prevails to the extent of the inconsistency.

4 The purpose of the Act is to implement the provisions of the Convention and the Aircraft Protocol with regard to aircraft equipment.

10 (1) The Convention, other than Articles 49 to 59, 61 and 62, and the Aircraft Protocol, other than paragraphs 1 and 2 of Article IX, paragraphs 1 and 2 of Article X and Articles XIII and XXVI to XXXVII, have the force of law in Ontario.

Companies' Creditors Arrangement Act, RSC 1985, c C-36

2 (1) In this Act,

financial collateral means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

- (a) cash or cash equivalents, including negotiable instruments and demand deposits,
- (b) securities, a securities account, a securities entitlement or a right to acquire securities, or
- (c) a futures agreement or a futures account;

6 (3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under.....

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.

11.06 No order may be made under this Act that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the Canadian Payments Act or the by-laws or rules of that Association.

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

32 (1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act....

(6) If the company has granted a right to use intellectual property to a party to an agreement, the disclaimer or resiliation does not affect the party's right to use the intellectual property — including the party's right to enforce an exclusive use — during the term of the agreement, including any period for which the party extends the agreement as of right, as long as the party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

(9) This section does not apply in respect of

(a) an eligible financial contract;

(b) a collective agreement;

(c) a financing agreement if the company is the borrower; or

(d) a lease of real property or of an immovable if the company is the lessor.

33 (1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

34 (11) No order may be made under this Act if the order would have the effect of subordinating financial collateral.

....

XII. – THE AIRCRAFT EQUIPMENT PROTOCOL

Space does not allow for more than a brief mention of the Aircraft Equipment Protocol provisions. This Protocol extends the provisions of the Convention, so far as applicable, to outright sales, thereby enabling buyers to avail themselves of the registration facilities and priority provisions. In consequence, Article 29(3) of the Convention, which protects the outright buyer, is disapplied, for the buyer of an aircraft object can protect itself by registration. The parties can choose the law which is to govern their contractual rights and obligations. The default remedies are extended to cover de-registration and export, and sale and the application of the proceeds of sale are designated as an additional form of interim relief under Article 13, though only if the debtor and the creditor specifically agree. Perhaps the most significant provision is Article XI, which lays down two alternative regimes for remedies on insolvency, dependent on a declaration by a Contracting State, which may adopt either alternative, though only in its entirety, or may make no declaration at all, and thus apply its own insolvency rules. Alternative A is the so-called hard version which requires the insolvency administrator, within whatever is specified by a Contracting State as the waiting period, to cure all defaults and agree to perform all future obligations, failing which the administrator must give the creditor the opportunity to take possession of the aircraft object. Under this alternative the court has no powers of intervention, so that Article 30(3)(b) of the Convention, which preserves the power of the court to stay enforcement (e.g. to facilitate a reorganisation of an insolvent debtor), is disapplied. Alternative B is the so called soft option. If the insolvency administrator does not within the waiting period give the creditor the opportunity to take possession or cure all defaults and agree to perform future obligations the court may permit the creditor to take possession upon such terms, including the provision of a guarantee, as the court may order. **[Emphasis added. Footnotes removed.]**

Court File No.:

**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.**

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at TORONTO

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