

**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  
ARRANGMENT OF GREAT SLAVE HELICOPTERS LTD.

APPLICANT

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**FACTUM OF THE RESPONDING PARTY GWICH'IN DEVELOPMENT  
CORPORATION,  
(Opposition to Approval and Vesting Order)  
(Returnable November 23, 2018)**

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November 22, 2018

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## **PART I: OVERVIEW**

1. This factum is submitted on behalf of Gwich'in Development Corporation ("**GDC**") in opposition to the motion brought by Great Slave Helicopters Ltd. ("**Great Slave**") for approval of the sale transaction contemplated by an asset purchase agreement dated November 8, 2018, (the "**APA**") between Great Slave and 11088211 Canada Corp. (the "**Purchaser**").
2. Great Slave's motion ignores the rights of first refusal ("**ROFRs**") in favour of Aboriginal groups that attach to many of the assets to be transferred under the APA (the "**Assets**"). Regarding GDC, the sale transaction contemplated under the APA triggers a right of refusal under a unanimous shareholder agreement entered into between GDC and Great Slave. Yet the Monitor failed to obtain an allocation of value as is required to provide a ROFR notice, and the proposed form of Approval and Vesting Order purports to eliminate GDC's ROFR right for this transaction.
3. GDC only received notice of the moving parties' intention to eliminate ROFR rights last Friday, November 16, upon receiving service of the motion record. That information came as a shock, since the Monitor had previously agreed to recognize GDC's ROFR during the course of negotiations concerning GDC's participation in the Sale and Investment Solicitation Process leading up to this approval motion.
4. GDC requests that the terms of the proposed form of Approval and Vesting Order be amended to give effect to its ROFR.

## PART II: FACTS

### A. Joint Venture between GDC and Great Slave

5. GDC is an investment company owned by the Gwich'in Tribal Council, which was created shortly after the signing of the Gwich'in Comprehensive Land Claim Agreement in 1992. GDC's goals are to generate wealth and create opportunities that enrich the lives of the people in the Gwich'in Settlement Area. It does that, in part, through commercial partnerships with experienced companies.<sup>1</sup>

6. GDC and Great Slave, the applicant in this CCAA, are joint venturers in Gwich'in Helicopters Ltd. (“GHL”), which is owned 51% by GDC and 49% by Great Slave. The purpose of GHL is to provide helicopter services to the Gwich'in people and to businesses operating within their territory, using as much as possible local labour and knowledge, and ultimately to assist in the economic, cultural and human needs of the Gwich'in people.<sup>2</sup>

7. GHL is subject to an amended and restated unanimous shareholders agreement (“USA”). Under the terms of the USA, Great Slave is appointed Manager of GHL, which puts it in a fiduciary position regarding GDC. The restated management agreement (the “**Management Agreement**”), provides broad authority and discretion to Great Slave, and the unrestricted right to provide helicopter services in the Gwich'in Settlement Area. By its very nature, and especially in conjunction with the terms of the USA, GDC and GHL are extremely vulnerable to the actions of the Manager. Notably, difficulties have arisen regarding the past operation of GHL by Great Slave, including financial irregularities, failure to register security, difficulty dealing with insurance

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<sup>1</sup> Affidavit of James Thorbourne, sworn November 22, 2018 at paras 1-3 [“**Thorbourne Affidavit**”]: Responding Motion Record of Gwich'in Development Corporation [“**MR**”], Tab 1.

<sup>2</sup> Thorbourne Affidavit at para 4: MR Tab 1.

proceeds and other issues. It is clearly important that GDC has the final say in who will be its joint venture partner and manager.<sup>3</sup>

8. The USA provides security to GDC regarding that issue. Section 7.1 of the USA provides that subject to limited exceptions, shares are non-transferable absent agreement.<sup>4</sup> Furthermore, the USA provides GDC with a ROFR in section 8 as follows:

8.1 Except as otherwise expressly permitted in this Agreement, no Shareholder shall sell, transfer or otherwise dispose or offer to sell, transfer or otherwise dispose of any of its Interest unless that Shareholder (the “Offeror”) first offers by notice in writing (the “Offer”) to the other Shareholder (the “Offeree”) the prior right to purchase, receive or otherwise acquire the same. For the purposes of this Agreement, the term “Interest” means all of the right, title and interest of a Shareholder in and to any of the shares of the Corporation, any Loan and accrued interest thereon and any other right or claim a Shareholder may have against the Corporation as a Shareholder and the Shareholder’s interest in and to this Agreement. For the purposes of this Agreement, “Loan” means at the relevant time any amounts advanced and outstanding by a Shareholder to the Corporation.

8.2 The Offer shall set forth:

- a) the Interest offered for sale (which Interest must represent 100% of the Interest then held by the Offeror);
- b) the sale price expressed only in lawful money of Canada;
- c) the terms and conditions of the sale;
- d) that the Offer shall be either accepted in its entirety or not at all;
- e) that the Offer is open for acceptance for a period of 45 days after receipt of the Offer by the Offeree (the “**45 day period**”); and
- f) the name and residence of any prospective purchaser of the Interest.

8.3 The Offeree shall, within 45 days from receipt of the Offer give notice to the Offeror stating whether or not it accepts the Offer. [Emphasis Added]

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<sup>3</sup> Thorbourne Affidavit at para 7: MR Tab 1.

<sup>4</sup> Thorbourne Affidavit at paras 5-7: MR Tab 1.

**B. Monitor agrees to recognize ROFR**

9. During the course of the Sale and Investment Solicitation Process approved by the Court on September 14, 2018 (“SISP”), the Monitor agreed to recognize GDC’s ROFR.

10. On October 8, 2018, counsel for GDC wrote to counsel for the Monitor and advised that GDC wished to bid on the joint venture interests and agreements, either on its own, or by a collective bid on behalf of all the Aboriginal groups. In this correspondence, the importance of the ROFR to GDC was stressed, and the willingness of GDC to participate in the process was made subject to ensuring participation did not impact its ROFR.<sup>5</sup>

11. On October 10, 2018, counsel for GDC wrote to counsel for the Monitor and made it clear in unequivocal terms that GDC did not wish to be part of the bidding process unless the ROFR was recognized.<sup>6</sup>

12. On October 10, 2018, counsel for the Monitor responded as follows:

...the Monitor has considered these issues further and has discussed the matter further with the Company. In these circumstances, the Monitor is prepared to acknowledge the ROFR, solely on the basis that your client agrees that it has a period of 15 days to respond after it receives a notice suggesting that the Company and the Monitor wish to proceed with a transaction involving the shares in the capital of Gwich’in Helicopters. As you know, time is of the essence in this restructuring.

If this works for your client, please confirm... [Emphasis Added]<sup>7</sup>

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<sup>5</sup> Thorbourne Affidavit at para 13: MR Tab 1.

<sup>6</sup> Thorbourne Affidavit at para 15: MR Tab 1.

<sup>7</sup> Thorbourne Affidavit at para 16: MR Tab 1.

13. The same day, counsel for GDC confirmed in writing that the terms were acceptable.<sup>8</sup> In so agreeing, GDC reduced its contractual right to 45 days' notice, and agreed to waive the shotgun clause, for transactions under the SISP.

**C. The proposed transaction**

14. On November 8, 2018, Great Slave and the Purchaser entered into the APA pursuant to which the Purchaser agreed to purchase substantially all of Great Slave's business, assets and contracts. The Assets to be acquired include Great Slave's interests in 13 joint venture agreements with Aboriginal groups, including its interest in GHL.

15. The proposed form of Approval and Vesting Order fails to stipulate that a ROFR notice will be issued to GDC. Further, the APA provides a closing date of November 23, 2018, which is the return date of this motion, and as such, does not contemplate that Great Slave and/or the Monitor will issue a ROFR notice to GDC.

16. Nor has the purchase price been allocated under the APA, as section 2.7 of the APA provides that "*The Purchase Price will be allocated among the Assets in accordance with Schedule 9.*" An allocation of the purchase price must be performed prior to the issuance of the ROFR notice.

17. Furthermore, as stated in section 4 of the Second Report of the Monitor, the Monitor is aware of the ROFR rights of Aboriginal groups, but is asserting that the proposed transaction will not trigger them:

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<sup>8</sup> Thorbourne Affidavit at para 17: MR Tab 1.



c) Joint Venture Interests: the Purchased Assets include the Company's minority interest in 13 joint venture agreements with Aboriginal groups. The Monitor understands that the Company and the Purchaser are in the process of discussing the Transaction with these joint venture partners, including that it provides for the continuation of helicopter services to remote areas throughout Northern Canada. All of the Company's joint venture partners are being served with the Company's Motion Records. Certain of the joint venture agreements include rights of first refusal that allow the Company's joint venture partner to acquire the Company's interest in the joint venture. It is the Purchaser's hope and intention to simply assume all of the existing obligations of the Company under the various agreements with these joint venture parties, and to not trigger any rights of first refusal mechanisms, but to maintain them going forward, in a fashion which is beneficial for those Aboriginal groups and the communities they serve. [Emphasis Added]<sup>9</sup>

### **PART III: LAW AND ARGUMENT**

18. The issues in this Motion are as follows:

- (a) Whether the sale of the Assets under the APA triggers the ROFR and requires Great Slave/the Monitor to issue a ROFR notice to GDC?
- (b) Whether the Monitor should be allowed to resile from its acknowledgment of the ROFR?

#### **A. Sale of Great Slave's shares in GHL triggers the ROFR**

19. The Assets purchased under the APA include the Joint Venture Interests, including Great Slave's shares in GHL. Section 2.2 of the APA provides that Great Slave will assign certain contracts to the Purchaser:

Subject to the conditions and terms of this Agreement, the Seller will assign to the Buyer all of the Seller's rights, benefits and interests in and to the Contracts and the Buyer will assume the Assumed Obligations. [...]

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<sup>9</sup> Second Report of KSV Kofman Inc. as CCAA Monitor of Great Slave Helicopters Ltd. dated November 16, 2018: Monitor's Report and Compendium, Tab 1, p. 7 of 12.

20. The Contracts as defined in the APA are listed at Schedule 1 and include the USA and the Management Agreement.

21. However, Section 2.2 also states that the APA does not purport to assign any contract that requires consent, absent such consent or a court order.

22. The APA contemplates the sale of Great Slave's shares in GHL and its interest under the USA and triggers the ROFR:

- (a) The ROFR is triggered the moment a "Shareholder [...] sell, transfer or otherwise dispose or offer to sell, transfer or otherwise dispose of any of its Interest."
- (b) "Interests" under section 8 of the USA includes "all of the right, title and interest of a Shareholder in and to any of the shares of the Corporation."
- (c) Further, section 7.1 of the APA specifically provides that all shares issued by GHL are non-transferable and non-assignable except to the extent allowed by the USA or as agreed upon by the parties in writing.

23. The intent of a right of first refusal is to protect each of the joint owners from being forced into joint ownership with a third party against its will. To determine whether a right of first refusal has been triggered, courts will look at the substance, and not the form, of the proposed transaction.<sup>10</sup>

24. GDC's ROFR is not affected by Great Slave CCAA proceedings, as rights of first refusal are commonly accepted to survive insolvency proceedings. For example:

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<sup>10</sup> *Chase Manhattan Bank of Canada v Sunoma Energy Corp*, 2001 ABQB 142 at paras 16-17, affirmed 2002 ABCA 286 [**"Chase Manhattan"**]; Book of Authorities of Gwich'in Development Corporation [**"BOA"**] Tab 2; *GATX Corp v Hawker Siddeley Canada Inc* [1996] OJ No 1462 at paras 39-40: BOA Tab 3.

- (a) In *West End Development Corp v Alyce Holdings Ltd*, the Ontario Court of Appeal recognized a right of first refusal under a co-tenancy agreement. The co-tenant filed for CCAA protection and sought court approval of the sale its interests in a rental apartment complex owned and operated under the co-tenancy agreement.<sup>11</sup>
- (b) In *Chase Manhattan Bank of Canada v Sunoma Energy Corp*, the Alberta Court of Queen’s Bench held in receivership proceedings that a party to a farmout agreement was entitled to a right of first refusal notice, but had received a valid notice from the Receiver.<sup>12</sup>
- (c) In *Alighvest Private Debt Ltd v Surefire Industries Ltd*, the Alberta Court of Queen’s Bench held that a right of first refusal under a unitholders agreement in favour of certain unit holders could be exercised. The interest of the insolvent company in the entity governed by the unitholders agreement was part of the planned liquidation.<sup>13</sup>

25. As a result, the sale transaction contemplated under the APA triggers the ROFR in favour of GDC, and Great Slave ought to issue a ROFR notice to GDC in accordance with the terms of the USA.

**B. Monitor not permitted to resile from agreement to recognize ROFR**

26. GDC is also entitled to rely on the assurance it was provided by the Monitor that its ROFR would be acknowledged in the SISP process.

27. As stated above, the Monitor stated that it was “*prepared to acknowledge the ROFR, solely on the basis that your client agrees that it has a period of 15 days to respond after it receives a*

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<sup>11</sup> *West End Development Corp v Alyce Holdings Ltd*, 1995 CarswellOnt 3240, 59 ACWS (3d) 546: BOA Tab 4.

<sup>12</sup> *Chase Manhattan*, *supra*: BOA Tab 4.

<sup>13</sup> *Alighvest Private Debt Ltd v Surefire Industries Ltd*, 2013 ABQB 729 at para 7: BOA Tab 5.

notice suggesting that the Company and the Monitor wish to proceed with a transaction involving the shares in the capital of Gwich'in Helicopters.” GDC agreed in writing to reduce the notice period to 15 days.<sup>14</sup>

28. Section 25 of the CCAA mandates that monitors are to act honestly and in good faith. That provision adopts a Code of Ethics that also requires that monitors be impartial and that they provide full and accurate information with respect to their engagements.<sup>15</sup>

29. Canadian courts have consistently described a monitor as an officer of the court, with an obligation to act independently and to consider the interests of all stakeholders.<sup>16</sup> Recently, in *Re Winalta Inc*, Justice Topolniski of the Alberta Court of Queen's Bench stated as follows:

A monitor appointed under the CCAA is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.<sup>17</sup>

30. Based on the foregoing, the Monitor should not be allowed to resile from its acknowledgment of the ROFR and should be directed to give a ROFR notice to GDC in accordance with section 8 of the USA.

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<sup>14</sup> Thorbourne Affidavit at para 17: MR Tab 1.

<sup>15</sup> CCAA, section 25 “In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.”: BOA Tab 1.

<sup>16</sup> Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2<sup>nd</sup> ed (Toronto: Thomson Reuters Canada Limited, 2013) at page 587: BOA Tab 6.

<sup>17</sup> *Winalta Inc, Re*, 2011 ABQB 399 at para 67: BOA Tab 7.

**PART IV: ORDER REQUESTED**

31. GDC requests that this Honourable Court:
- (a) amend the proposed form of Approval and Vesting Order to give effect to the ROFR;
  - (b) direct that Great Slave and/or the Monitor reasonably allocate the purchase price among the Assets;
  - (c) direct Great Slave and/or the Monitor to issue a ROFR notice to GDC pursuant to section 8 of the USA; and
  - (d) such other relief as counsel may advise and this Honourable Court may allow.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of November 2018**

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**SCHEDULE A – LIST OF AUTHORITIES**

1. *Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended*
2. *Chase Manhattan Bank of Canada v Sunoma Energy Corp*, 2001 ABQB 142, affirmed 2002 ABCA 286
3. *GATX Corp v Hawker Siddeley Canada Inc* [1996] OJ No 1462
4. *West End Development Corp v Alyce Holdings Ltd*, 1995 CarswellOnt 3240, 59 ACWS (3d) 546
5. *Alignvest Private Debt Ltd v Surefire Industries Ltd*, 2013 ABQB 729
6. Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Thomson Reuters Canada Limited, 2013)
7. *Winalta Inc, Re*, 2011 ABQB 399

**SCHEDULE B – STATUTES AND REGULATIONS**

1. *Companies' Creditors Arrangement Act, RSC 1985, c C-36, s. 25: BOA Tab 1*

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

Court File No. CV-18-604434-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREAT SLAVE  
HELICOPTERS LTD.

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SUPERIOR COURT OF JUSTICE  
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PROCEEDING COMMENCED AT  
TORONTO

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**FACTUM OF THE RESPONDING PARTY  
GWICH'IN DEVELOPMENT CORPORATION**

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