

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE NOTICE OF INTENTION
TO MAKE A PROPOSAL OF AIR GEORGIAN LIMITED,
A CORPORATION INCORPORATED UNDER
THE LAWS OF ONTARIO**

**FACTUM OF THE APPLICANT
(Motion Returnable February 26, 2020)**

February 24, 2020

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

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

Lawyers for the Applicant, Air Georgian Limited

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PART I – NATURE OF THIS MOTION

1. This factum is filed in support of a motion made by Air Georgian Limited (“AGL” or the “Company”), for, among other things, (i) approval to extend the time for filing a proposal in the Company’s NOI Proceedings (defined below) to March 13, 2020; (ii) approval of an Administration Charge (defined below); and (iii) authorizing the Company to borrow funds from 2229275 Alberta Ltd. (“222”) and granting the DIP Lender’s Charge (defined below) to 222.

PART II – FACTS

2. The facts supporting this motion are set out in full detail in the affidavit of Eric Edmondson sworn February 22, 2020 (the “AGL Affidavit”). Capitalized terms used herein and not otherwise defined have the meaning given to them in the AGL Affidavit.

3. AGL is a privately owned airline based in Mississauga, Ontario. Until January 31, 2020, AGL was a regional operator for Air Canada pursuant to a longstanding Commercial Agreement (defined and discussed below). The Company has no other sources of revenue of any substance.¹

¹ Affidavit of Eric Edmondson sworn February 22, 2020 (the “AGL Affidavit”), Motion Record of Air Georgian Limited returnable February 26, 2020 (the “Motion Record”), Tab 2, para. 3.

4. On February 1, 2019 Air Canada gave notice to AGL that it was terminating the Commercial Agreement effective January 31, 2020 (the “**Termination Date**”). The parties entered into a Transition Agreement (defined and discussed in further detail below) to address the remaining period under the Commercial Agreement.²

5. On January 31, 2020, the term under the Transition Agreement ended. On that date, the Company commenced these proceedings (the “**NOI Proceedings**”) by filing a notice of intention (“**NOI**”) to make a proposal pursuant to Section 50.4(1) the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”). A copy of the certificate of filing, as amended, is attached hereto as Exhibit “A”. KPMG Inc. has been named proposal trustee (the “**Proposal Trustee**”).³

6. At this time, the Company’s main focus has been on the following⁴:

- (a) Assessing its potential restructuring alternatives including a potential sale to a related party which may be implemented in the near future – the Company has maintained its status as an operating airline and its regulatory licenses which allow it to operate. Its license, along with the quality and experience of its employees, its IT infrastructure and intellectual property make up a turn key operation which could be utilized by a third party and potentially leveraged into a larger turnaround in the longer term; and
- (b) Working with Air Canada to facilitate the return of its remaining aircraft and related issues for which Air Canada has agreed to provide up front funding to fund these costs which the Company would not otherwise be able to incur.

7. The Company requires additional funding to fund the proposed extension period. In particular, if approval of additional funding is not obtained at this motion, the Company may not be able to fund its February 28, 2020 payroll.⁵

² AGL Affidavit, Motion Record, Tab 2, para. 4.

³ AGL Affidavit, Motion Record, Tab 2, para. 5.

⁴ AGL Affidavit, Motion Record, Tab 2, para. 21.

⁵ AGL Affidavit, Motion Record, Tab 2, para. 24.

8. 222, the Company's existing secured lender, has agreed to lend up to \$800,000 to the Company under the existing ATB Commitment Letter with certain amendments set out in a letter agreement dated February 22, 2020 (the "**February 22 Letter Agreement**"). These changes include an amendment to the process for making post-filing advances and an increase in the interest rate to 12%.⁶ As set out below, the Company is requesting approval of a "charge" (the "**DIP Lender's Charge**") to secure the advances made post-filing by 222. The proposed priority of the DIP Lender's Charge is discussed below.

9. The Company is seeking approval of an administration charge (the "**Administration Charge**") and together with the DIP Lender's Charge, the "**Charges**") to secure the fees and disbursements of its legal counsel as well as the Proposal Trustee and its legal counsel. The proposed Administration Charge is limited to \$200,000.⁷

10. As set out above, the Company requires immediate access to funding including to fund its upcoming payroll.⁸ The proposed DIP Lender's Charge would rank second behind the Administration Charge and otherwise have the same priorities as afforded to the Administration Charge.⁹

PART III – ISSUE AND THE LAW

11. The issues addressed in this factum are (a) the request for an extension of time to file a proposal and (b) the appropriateness of and proposed priorities of the Charges.

The Extension should Be Granted

12. Section 50.4(9) of the BIA¹⁰ provides that the Court may extend the time in which the Company can file a proposal. Extensions may be granted for a period of up to 45 days for a total period of not more than 6 months. An extension need not be for the full 45 day period.

⁶ The First Report of the Proposal Trustee, KPMG Inc., dated February 23, 2020 (the "**First Report**"), paras. 34 and 35(c).

⁷ AGL Affidavit, Motion Record, Tab 2, para. 27.

⁸ AGL Affidavit, Motion Record, Tab 2, para. 24.

⁹ AGL Affidavit, Motion Record, Tab 2, para. 30.

¹⁰ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, section 50.4(9).

13. The Company is acting in good faith and with due diligence. It requires a short extension to March 13, 2020 to determine whether the Potential Sale can be achieved and to continue its return process with Air Canada.¹¹ The Proposal Trustee supports the Company's request for the extension.¹² The Company does not believe any creditor will be materially prejudiced if the extension is granted.¹³

The Administration Charge Should be Granted

14. Administration Charges are routinely approved in BIA proposal proceedings, where, as in the present case, the participation of insolvency professionals is necessary to ensure a successful proceeding under the BIA and are provided for in Section 64.2 of the BIA¹⁴. The proposed Administration Charge is limited to a maximum of \$200,000 and intended to secure the fees and disbursement of the Proposal Trustee, its counsel and counsel to the Company.¹⁵

The DIP Lender's Charge Should be Granted

15. The Company requires funding for its current proceeding. The Company currently has no revenue of any substance and is operating at a loss. In these circumstances, absent funding, the Company will not be able to continue through the proposed extension period. Further, given the Company's circumstances, attracting outside funding is virtually impossible.¹⁶

16. Section 50.6(1) of the BIA¹⁷ provides for the granting of a charge for funding provided post-filing with regard to the debtor's cash flow statement. Section 50.6(3)¹⁸ provides that the charge may rank in priority over the claim of any secured creditor of the debtor.

¹¹ AGL Affidavit, Motion Record, Tab 2, para. 31.

¹² First Report, para. 52

¹³ AGL Affidavit, Motion Record, Tab 2, para. 33.

¹⁴ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, section 64.2.

¹⁵ AGL Affidavit, Motion Record, Tab 2, para. 27.

¹⁶ AGL Affidavit, Motion Record, Tab 2, paras. 24 and 25.

¹⁷ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, section 50.6(1).

¹⁸ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, section 50.6(3).

17. In deciding whether to approve post-filing funding, the Court should consider, among other things the following factors¹⁹:

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b) of the BIA, as the case may be.

18. The proposed funding pursuant to the February 22 Letter Agreement is appropriate for the following reasons²⁰:

- (a) The proposed funding is for a limited period of time to determine whether the Company can complete the Potential Sale;
- (b) Absent the funding, the Company would not be able to fund its operations including its upcoming payroll or continue in its restructuring and would go bankrupt;
- (c) The terms of the funding are not onerous;

¹⁹ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, section 50.6(5).

²⁰ First Report, para. 37(a) to (d).

- (d) It is unlikely any other funding would be available to the Company on more favourable terms (if at all); and
- (e) No creditor is likely to be materially prejudiced as a result of the funding.

The Proposed Priority of the Charges is Appropriate

- 19. Pursuant to Sections 50.6(3) and 64.2(2) of the BIA, the Court may grant orders providing priority to the Charges over all existing security interests²¹.
- 20. The Company is proposing that the Charges be given priority over all encumbrances granted by the Company other than properly perfected purchase money security interests or super priority amounts under 14.06(7) of the BIA or 81.3(1) of the BIA which provide for super-priority amounts under those sections.²²
- 21. The Company has given notice to those PPSA registrants who it believes will be impacted by the proposed priority of the charges. The Company continues to pay wages and provide benefits for its ongoing employees as reflected in the cash flow.²³

PART IV – NATURE OF THE ORDER SOUGHT

- 22. The Company therefore requests Orders substantially in the form filed with its motion record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of February 2020.

Goldman Sachs North: Haber LLP

²¹ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, section 50.6(3) and 64.2(3)

²² *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3, section 14.06(7) and 81.3(1)

²³ First Report, para. 48(c).

SCHEDULE A – LIST OF AUTHORITIES

N/A

SCHEDULE B – RELEVANT STATUTES

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

Priority of claims

14.06 (7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Extension of time for filing proposal

50.4 (9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the

debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

Priority

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

Factors to be considered

50.6 (5) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the debtor is expected to be subject to proceedings under this Act;
- (b) how the debtor's business and financial affairs are to be managed during the proceedings;
- (c) whether the debtor's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;
- (e) the nature and value of the debtor's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Court may order security or charge to cover certain costs

64.2 (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 person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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 trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
- (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; 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 the effective participation of that person in proceedings under this Division.

Priority

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

Security for unpaid wages, etc. — bankruptcy

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of \$2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

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Proceeding commenced TORONTO

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GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
Toronto ON M5G 1V2
Fax: 416-597-3370

Jennifer Stam (LSO #46735J)
Tel: 416-597-5017
Email: stam@gsnh.com

Lawyers for the Debtor, Air Georgian Limited