

**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**

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**FACTUM OF THE APPLICANT  
(Sale Approval)  
(Motion Returnable March 16, 2020)**

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March 12, 2020

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**IN THE MATTER OF THE NOTICE OF INTENTION  
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**FACTUM OF THE APPLICANT  
(Sale Approval)**

**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,
  - (a) Approving an agreement of purchase and sale dated as of March 9, 2020 (the “**Sale Agreement**”) between AGL and 2746904 Ontario Inc. (the “**Purchaser**”);
  - (b) Vesting all of AGL’s right, title and interest in and to the Purchased Assets (as defined below) in the Purchaser;
  - (c) Extending the time for filing a proposal in the NOI Proceedings (defined below) from March 16, 2020 to April 17, 2020 (the “**Extension Date**”);
  - (d) Increasing the maximum borrowing available in Post-Filing Advances (as defined the Order of this Court dated February 26, 2020, the “**February 26 Order**”) from \$800,000 to \$2 million;
  - (e) Sealing certain confidential appendices to the Second Report (defined below); and

- (f) Approving the first report of the Proposal Trustee (defined below) dated February 23, 2020 (the “**First Report**”) and the second report of the Proposal Trustee dated March 12, 2020 (the “**Second Report**”) and the activities of the Proposal Trustee described therein.

## PART II – FACTS

2. The facts supporting this motion are set out in full detail in the affidavit of Eric Edmondson sworn March 9, 2020 (the “**AGL Affidavit**”)¹. 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. The Company’s board consists of John Binder (“**Binder**”) and Dan Revell². 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.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.⁴
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**”). KPMG Inc. has been named as proposal trustee (the “**Proposal Trustee**”).⁵

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¹ Affidavit of Eric Edmondson sworn March 9, 2020 (the “**AGL Affidavit**”), Motion Record of Air Georgian Limited returnable March 16, 2020 (the “**Motion Record**”), Tab 2.

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

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

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

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

6. On February 26, 2020, the Company brought a motion seeking, among other things, an order extending the time by which it had to file a proposal to March 13, 2020 and authorizing certain post-filing borrowing by the Company from the Company's existing secured lender, 2229275 Alberta Ltd. ("**222**").<sup>6</sup> 222 took assignment of the Company's secured debt facility from ATB Financial ("**ATB**") on or about January 24, 2020.<sup>7</sup> 222 is owned by Binder's son.<sup>8</sup>

7. The Court granted an order (the "**February 26 Order**") approving the Company's motion, extending the time by which the Company had to file a proposal to March 16, 2020 (given Court availability) and authorizing post-filing advances ("**Post-Filing Advances**") of up to \$800,000 on certain terms and conditions set out in a letter agreement dated February 22, 2020 (the "**February 22 Letter Agreement**") between 222 and Company and the February 26 Order itself.<sup>9</sup>

8. At the time of the February 26 motion, the Company advised that it was pursuing a sale transaction with a related party (the "**Potential Sale**") and that if successful, it intended to return to Court to seek approval of such transaction.<sup>10</sup>

9. Since the granting of the February 26 Order, the Company has focused on, among other things, finalizing the terms of the Potential Sale. The Company has now entered into the Sale Agreement for the sale of its business (the "**Transaction**")<sup>11</sup> and is seeking approval of the Sale Agreement as well as an extension of time to file a proposal in order to complete the transaction and authorization for additional financing to fund the extension period.

### *Marketing and Sale Efforts*

10. Although the Company has not run a formal sale process within these NOI Proceedings, prior to the filing of the NOI, the Company's senior management has spent a great deal of time seeking new buyers, investors and alternative business for the Company. In particular, last year,

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

<sup>7</sup> Affidavit of Eric Edmondson, sworn February 22, 2020 ("**AGL February 22 Affidavit**"), Second Report of the Proposal Trustee, KPMG Inc., dated March 12, 2020 (the "**Second Report**"), Appendix B, para. 15.

<sup>8</sup> AGL Affidavit, Motion Record, Tab 2, para 21.

<sup>9</sup> Order dated February 26, 2020 ("**February 26 Order**"), Second Report, Appendix A.

<sup>10</sup> AGL February 22 Affidavit, Second Report, Appendix B, para. 6.

<sup>11</sup> AGL Affidavit, Motion Record, Tab 2, paras. 7 and 8.

the Company's senior management team identified several potentially interested parties who it knew to be looking for an airline with the Company's operating experience, industry leading safety record and large volume regional airline capabilities. The airline industry is relatively small in Canada and the Company's senior management team was able to readily identify those who were most likely interested and able to complete a sale.<sup>12</sup> The list was compiled based on management's extensive experience in the industry. Subsequently:

- (a) Management spoke, corresponded or met with over ten parties who are potential investors or buyers, for the business.
- (b) Five parties signed nondisclosure agreements ("NDAs") and conducted some level of due diligence; and
- (c) Three primary parties attending several site and/or management meetings.<sup>13</sup>

11. The Company also identified two potential partners, one a large airline and the other a US airline investor ("**Potential Partners**"), who had potential interest in partnering with the Company.<sup>14</sup>

12. In January 2020, the Company entered into extensive and intensive negotiations with a potential buyer. Ultimately the buyer's board did not approve the transaction.<sup>15</sup>

13. Additionally a small number of parties have contacted the Proposal Trustee since the filing date to inquire about the opportunity to purchase or otherwise invest in the Company's business and/or certain of its assets, but have declined to execute non-disclosure agreements.<sup>16</sup>

14. Although the Company's management believes significant interest remains in the Company's business including the Potential Partners, all parties (other than the Purchaser) have

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<sup>12</sup> AGL Affidavit, Motion Record, Tab 2, para. 15.

<sup>13</sup> AGL Affidavit, Motion Record, Tab 2, para. 16.

<sup>14</sup> AGL Affidavit, Motion Record, Tab 2, paras. 17 and 18.

<sup>15</sup> AGL Affidavit, Motion Record, Tab 2, para. 19.

<sup>16</sup> Second Report, para. 25.

indicated they are not interested in buying the business absent a restructuring or guaranteed future revenue.<sup>17</sup>

*The Sale Agreement*<sup>18</sup>

15. The Company and the Purchaser have now agreed upon terms of the Sale Agreement. Certain of the key terms of the Sale Agreement are summarized below:<sup>19</sup>

- (a) Purchaser: 2746904 Ontario Inc. The Purchaser is owned directly or indirectly by Binder. Binder is also related to 222, which is owned by Binder's son.
- (b) Purchased Assets: Substantially all of the property, assets and undertakings of the Seller including, without limitation, all cash on hand (other than NOI Funding) and accounts receivable.
- (c) Purchase Price: Assumption of all outstanding amounts owing to 222 including under the Post-Filing Advances (the "**222 Secured Debt**"), Assumed Obligations including payment of any Cure Costs and the funds used in the Wind-Down Budget.
- (d) As is Where is: Purchased Assets will be transferred on an "as is where is" basis.
- (e) Employees: The Purchaser has identified approximately 27 employees to whom it wishes to make employment offers. The Purchaser not agreed in the Sale Agreement to assume any historical obligations related to any employee's employment.
- (f) Conditions: The closing of the Transaction is subject to a number of conditions including certain regulatory approvals for the transfer or re-issue of the Company's

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<sup>17</sup> AGL Affidavit, Motion Record, Tab 2, para. 20.

<sup>18</sup> The description provided herein is for information purposes only. The reader should refer to the Sale Agreement for complete terms and conditions. Any inconsistency between the description of the Sale Agreement and the Transaction described herein and the Sale Agreement itself shall be governed by the Sale Agreement. A redacted copy of the Sale Agreement is provided as Exhibit "A" to the AGL Affidavit, Motion Record, Tab 2. An unredacted copy of the Sale Agreement is provided as Confidential Appendix 1 to the Second Report.

<sup>19</sup> Capitalized terms used in this section and not otherwise defined have the meanings given to them in the Sale Agreement.

various licenses, the assignment of key contracts and the acceptance of employment offers by key employees as well as approval of the Court.

- (g) Wind Down Budget: The Purchaser has agreed to fund a wind down budget which will provide for the payment of priority payables, professional costs and other amounts on which the Purchaser, Company and Proposal Trustee may agree.
- (h) Closing: The target closing date is March 31 but may be extended on the agreement of the parties up to April 17, 2020.

### *Funding*

16. As the Company continues to incur significant expenses in these proceedings and is not generating revenue it will require additional funding for the period between March 16 and closing including with respect to payroll and other critical matters.<sup>20</sup>

17. As such, the Company requires dedicated funding at least until the projected closing date of March 31, 2020. In the event that closing is delayed on the consent of all parties, further funding would be required for that extension period.<sup>21</sup>

18. 222 has agreed to increase the maximum Post-Filing Advances available to the Company from \$800,000 to a maximum of \$2 million to be drawn in accordance with the revised Cash Flow.<sup>22</sup> The 222 and the Company have now entered into a first amending agreement dated as of March 11, 2020 (the “**March 11 Letter Agreement**”) to reflect 222’s agreement to make the additional Post-Filing Advances available to the Company. 222’s obligation to fund is conditional upon approval of the Court of the additional Post-Filing Advances including confirmation that such advances will be covered by the DIP Lender’s Charge.<sup>23</sup>

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<sup>20</sup> AGL Affidavit, Motion Record, Tab 2, para. 28.

<sup>21</sup> AGL Affidavit, Motion Record, Tab 2, para. 29.

<sup>22</sup> AGL Affidavit, Motion Record, Tab 2, para. 30.

<sup>23</sup> Second Report, para. 54; First Amending Agreement dated as of March 11, 2020 (“**March 11 Letter Agreement**”), Second Report, Appendix F.

**PART III – ISSUE AND THE LAW**

19. The issues addressed in this factum are whether the Court should approve (a) the Sale Agreement and vesting order; (b) the requested increase in Post-Filing Advances; (c) the request for an extension of time to file a proposal; (d) sealing the confidential appendices to the Second Report; and (e) approval of the First Report and Second Report and the activities of the Proposal Trustee set out therein.

*The Sale Agreement Should Be Approved and the Vesting Order Should Be Granted*

20. This Court has authority and jurisdiction, pursuant to subsections 65.13(1) and (7) of the BIA to grant approval and vesting orders.<sup>24</sup>

21. Section 65.13(4) of the BIA provides a non-exhaustive list of criteria for the Court to consider:<sup>25</sup>

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the trustee approved the process leading to the proposed sale or disposition;
- (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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<sup>24</sup> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “BIA”), section 65.13(1) and (7)

<sup>25</sup> BIA, section 65.13(4).



22. In *Royal Bank of Canada v Soundair Corp.* (“*Soundair*”),<sup>26</sup> before BIA s. 65.13 was enacted, the Ontario Court of Appeal set the following criteria for approving a sale of an insolvent person or entity’s assets generally:

- (a) whether a sufficient effort was made to get the best price and whether the parties acted improvidently,
- (b) the interests of all parties,
- (c) the efficacy and integrity of the process by which offers are obtained, and
- (d) whether there has been unfairness in the process.

23. It is clear based on the case law that the Court has the jurisdiction to approve a sale transaction within a BIA proposal proceeding in the absence of a proposal.<sup>27</sup> Such Orders may be made if the Court is satisfied that the criteria set out in Section 65.13(4) have been satisfied.

24. In this instance, the approval and vesting order should be granted. Although there has been no formal sale process within the NOI Proceedings, the uniqueness of this case warrants in favour of approving the Transaction and thus preserving a going concern and a number of jobs including the potential for significantly more jobs in the future. Among other things:

- (a) The Company is in the unusual situation of having a turn key operation but little revenue – although there remains going concern value at this time, it is likely any buyer will have to make significant investment to turn the business around and attract new revenue;<sup>28</sup>
- (b) At the time of the assignment of the secured debt from ATB to 222, the Company’s liquidity was severely constrained given the limits that ATB has put on the Company’s borrowing availability – this was alleviated by the assignment to 222

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<sup>26</sup> *Royal Bank of Canada v Soundair Corp.* [1991] O.J. No. 1137 (ON CA), Commercial List Authorities Book, page 8 and 9.

<sup>27</sup> *Komtech Inc. (Re)*, 2011 ONSC 3230 (CanLII), Book of Authorities of Air Georgian Limited (“*BOA*”), Tab 1, para. 33; *Karrys Bros. Ltd. (Re)*, 2014 ONSC 7465, *BOA*, Tab 2, para. 11.

<sup>28</sup> AGL Affidavit, Motion Record, Tab 2, para. 26(a).

who has made funds available since filing but otherwise it is unlikely the Company would continue to be a going concern at this stage<sup>29</sup>;

- (c) The Company's ability to remain a going concern much longer is questionable given its limited funding and lack of operations – in particular, certain assets and employees are required in order to maintain the Company's operating licenses which are considerable expenses;<sup>30</sup>
- (d) The Company has made extensive efforts to seek investors or buyers including since the commencement of these NOI Proceedings – the market of potential strategic buyers is small and most have done diligence – although interest remains, all parties have said they require the business to be more financially stable before it will consider partnerships or other business – this is unlikely to change if a sale process is conducted;<sup>31</sup>
- (e) The Company has been transparent about its intention to complete a sale with a related party and disclosed its intention of the same in connection with the February 26 motion;<sup>32</sup>
- (f) The airline industry is currently facing an immediate crisis overall as a result of the coronavirus which would likely eliminate any resources that third parties might put to a sale process even if were available;<sup>33</sup>
- (g) The Company continues to burn cash given its ongoing expenses and lack of revenue – it does not have any source of funding to remain in a proceeding to run a sale process;<sup>34</sup> and

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<sup>29</sup> First Report of KPMG Inc. dated February 23, 2020 (the “**First Report**”) paras. 18 and 31, Appendix C to the Second Report.

<sup>30</sup> AGL Affidavit, Motion Record, Tab 2, para. 26(b).

<sup>31</sup> AGL Affidavit, Motion Record, Tab 2, para. 26(c).

<sup>32</sup> AGL February 26 Affidavit, Second Report, Appendix B, para. 6.

<sup>33</sup> AGL Affidavit, Motion Record, Tab 2, para. 26(d).

<sup>34</sup> AGL Affidavit, Motion Record, Tab 2, para. 26(e).

- (h) The Proposal Trustee believes the Transaction to be reasonable in the circumstances including for the reasons set out below.<sup>35</sup>

25. The Proposal Trustee has considered what, if any, alternative options there are for the Company and have concluded that the only viable alternative to the Transaction is a liquidation of Company's assets through a receivership or a bankruptcy. The Proposal Trustee has consulted with a liquidator specializing in aircraft and aircraft parts and although the Proposal Trustee did not solicit a formal liquidation proposal, the Proposal Trustee prepared a schedule comparing a range of potential recoveries in a liquidation scenario to the 222 Secured Debt (which is to be assumed pursuant to the Purchase Agreement) (the "**Liquidation Analysis**"). The Liquidation Analysis indicates that while net realizations could exceed the amount of 222 Secured Debt depending on the scenario achieved, the time period of recovery is anticipated to be lengthy and to result in significant professional costs, thus it is more likely that the net realizations would be lower than the amount of the 222 Secured Debt. As a result, unsecured creditors are unlikely to realize any recoveries on their claims in a liquidation scenario.<sup>36</sup>

*The Sale to the Purchaser, a "Related Person", is appropriate*

26. Section 65.13(5) provides that if the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that:<sup>37</sup>

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

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<sup>35</sup> Second Report, para 32.

<sup>36</sup> Second Report, paras. 29-31.

<sup>37</sup> BIA, section 65.13(5).

27. In this case, the Purchaser is likely a “related person” under Section 65.13(6) given that Binder is a director of the Company and he is the owner of the Purchaser.<sup>38</sup>

28. Courts have been reluctant to approve sales to related persons where there is not sufficient evidence that “good faith” efforts to sell the assets exist and where the policy reasons behind the proposal provisions of the BIA are being defeated.<sup>39</sup> However, the Court has acknowledged that where evidence of sufficient good faith efforts are shown, it may approve a sale to a related person.<sup>40</sup>

29. As set out above,

- (a) The Company’s management has spent extensive good faith efforts to find a buyer, investor or partner for the business since the termination of the Commercial Agreement was announced;<sup>41</sup>
- (b) Extensive time and resources have been put into solicitation, meetings, making available due diligence and negotiation of offers;<sup>42</sup>
- (c) There is no reason to believe that any further efforts would yield a different outcome;<sup>43</sup> and
- (d) As set out in the Second Report and above, it appears unlikely that there will be any value to unsecured creditors in a liquidation scenario. Any potential recovery of the maximum value of the outstanding receivables are subject to significant risk and time delay. As such, no person is harmed by the approval of the transaction to

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<sup>38</sup> AGL Affidavit, Motion Record, Tab 2 paras. 9 and 21.

<sup>39</sup> *Hypnotic Clubs. Inc. (Re)*, 2010 ONSC 2987 (CanLII) (“*Hypnotic*”), BOA, Tab 3.

<sup>40</sup> *Hypnotic*, BOA, Tab 3; and *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009 (CanLII), BOA Tab 4, para. 45.

<sup>41</sup> AGL Affidavit, Motion Record, Tab 2, paras. 15 to 20.

<sup>42</sup> AGL Affidavit, Motion Record, Tab 2, paras. 15 to 20.

<sup>43</sup> AGL Affidavit, Motion Record, Tab 2, para. 25.

a related party and the policy reasons behind the BIA are not being defeated in this circumstance.<sup>44</sup>

30. It is appropriate in this circumstance to grant the approval and vesting order for this transaction with the Purchaser, a related person, even though a formal sale process within the NOI Proceedings has not been conducted.

*Priority Amounts will be Funded in the Wind Down Budget*

31. The requirement in Section 65.13(8) of the BIA<sup>45</sup> which requires employers to make certain payments available is satisfied by virtue of the inclusion of the Wind-Down Budget that will be paid by the Purchaser on Closing.<sup>46</sup>

*The Increase in Post-Filing Advances Should be Approved*

32. Pursuant to the February 26 Order, the Court authorized the Company to borrow Post-Filing Advances from 222 up to a maximum of \$800,000 to fund its cash flow.<sup>47</sup> The Post-Filing Advances were needed to fund post-filing expenses incurred including for payroll and professional fees.<sup>48</sup> Also pursuant to the February 26 Order, the Court granted a charge (the “**DIP Lender’s Charge**”) securing the Post-Filing Advances (and related amounts) on a priority basis other than over validly perfected purchase money security interests with priority over the advances already made under the debt owing to 222.<sup>49</sup> Based on the cash flow that was filed by the Company at the time, it was going to require the full \$800,000 to fund the period up to March 16, 2020.<sup>50</sup>

33. Given the Company’s lack of revenue, it requires additional borrowings in order to fund its cash flow for the period between March 16 and closing. If the Transaction is approved, the Company and the Purchaser plan to work towards a March 31 closing, however there is a

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<sup>44</sup> Second Report, para. 32.

<sup>45</sup> BIA, section 65.13(8).

<sup>46</sup> AGL Affidavit, Motion Record, Tab 2, para. 21.

<sup>47</sup> February 26 Order, Second Report, Appendix A.

<sup>48</sup> AGL February 26 Affidavit, Second Report, Appendix B, para. 24.

<sup>49</sup> February 26 Order, Second Report, Appendix A.

<sup>50</sup> First Report, para. 32, Appendix C to the Second Report.

possibility the parties may agree to delay closing if not all conditions are satisfied or waived by March 31. As such, pursuant to the March 11 Letter Agreement, 222 has agreed to provide additional funding for the period March 16 to April 17 to fund the NOI proceedings until closing.<sup>51</sup> Based on the Company's cash flow projection, as attached to the Second Report, the Company is projected to require an additional \$1.2 million of funding to April 17, 2020.<sup>52</sup>

34. It is a condition of the March 11 Letter Agreement that the increase in the Post-Filing Advances be approved by the Court and be secured by the DIP Lender's Charge.<sup>53</sup>

35. Section 50.6(1) of the BIA<sup>54</sup> 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)<sup>55</sup> provides that the charge may rank in priority over the claim of any secured creditor of the debtor.

36. In deciding whether to approve post-filing funding, the Court should consider, among other things the following factors:<sup>56</sup>

- (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;

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<sup>51</sup> AGL Affidavit, Motion Record, Tab 2, paras. 28 to 30.

<sup>52</sup> Second Report, para. 42; Cash Flow Projections, Second Report, Appendix E.

<sup>53</sup> March 11 Letter Agreement, Second Report, Appendix F, para 4.

<sup>54</sup> BIA, section 50.6(1).

<sup>55</sup> BIA, section 50.6(3).

<sup>56</sup> BIA, section 50.6(5).

- (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.
37. The approval of the additional Post-Filing Advances and application of the DIP Lender's Charge to such amounts is appropriate for the following reasons:<sup>57</sup>
- (a) The Court has already approved the Post-Filing Advances and the terms on which such advances are being made up to \$800,000;
  - (b) The additional Post-Filing Advances will be made on the same terms;
  - (c) Absent the additional funding, the Company will not be able to fund its operations including payroll for the period to closing;
  - (d) The cash flow appended to the Second Report indicates a requirement for the additional Post-Filing Advances to be made; and
  - (e) No creditor is likely to be materially prejudiced as a result of the funding.

*The Extension should Be Granted*

38. The Company is seeking an extension of the time in which it must file a proposal from March 16, 2020 to April 17, 2020.

39. Section 50.4(9) of the BIA<sup>58</sup> provides that the Court may extend the time in which the Company can file a proposal if the Court is satisfied of the following:

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

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<sup>57</sup> AGL Affidavit, Motion Record, Tab 2, para. 28; Second Report, paras. 54 and 55.

<sup>58</sup> BIA, section 50.4(9).

- (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.

40. 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.<sup>59</sup>

41. In this case:

- (a) The Company is acting in good faith and with due diligence.<sup>60</sup>
- (b) The extension required is to allow the Transaction to close. The Transaction provides significant benefits include clear and committed funding for priority amounts and administration of a bankruptcy.<sup>61</sup> If the Company were in *Companies' Creditors Arrangement* proceedings, there would be no question it would be able to seek an extension of the stay under that Act. There is ample caselaw that suggests that unless there is a reason otherwise, insolvency statutes should be interpreted to minimize inconsistencies.<sup>62</sup> It would be non-sensical for this Court to approve the Transaction and not afford the Company an extension in order for the closing to occur.
- (c) The Proposal Trustee supports the Company's request for the extension.<sup>63</sup>
- (d) The Company does not believe any creditor will be materially prejudiced if the extension is granted.<sup>64</sup>

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<sup>59</sup> BIA, section 50.4(9).

<sup>60</sup> AGL Affidavit, Motion Record, Tab 2, para. 32.

<sup>61</sup> AGL Affidavit, Motion Record, Tab 2, para. 23.

<sup>62</sup> *Century Services Inc. v. Canada* (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379, BOA, Tab 5.

<sup>63</sup> Second Report, para. 48.

<sup>64</sup> AGL Affidavit, Motion Record, Tab 2, para. 32.



*The Sealing Order Should be Granted*

42. Pursuant to Section 137(2) of the *Courts of Justice Act*,<sup>65</sup> the Court may seal documents. The test for sealing documents as set out in *Sierra Club of Canada v. Canada (Minister of Finance)* is as follows: (a) the order is necessary to prevent risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and (b) the salutary effects of the order outweigh the deleterious effects.<sup>66</sup>

43. The Confidential Appendices to the Second Report contain sensitive personal employee information and other commercially sensitive information regarding the contracts which could impact the assignment negotiation as well as information related to the Proposal Trustee's liquidation analysis. This information is commercially sensitive in nature and should be sealed. No party will be prejudiced by virtue of the sealing of the information.<sup>67</sup>

*The First And Second Report and the Activities of the Proposal Trustee Therein should be Approved*

44. Court officers routinely seek approval of their reports and the activities described in those reports.<sup>68</sup> The Court has recognized that there are good policy and practical reasons for such approvals.

45. The Proposal Trustee's First Report and Second Report and its activities described therein are consistent with its statutory mandate and are lawful and proper in the circumstances.

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<sup>65</sup> *Courts of Justice Act*, R.S.O. 1990, c. C.43, section 137(2).

<sup>66</sup> *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, Commercial List Authorities Book.

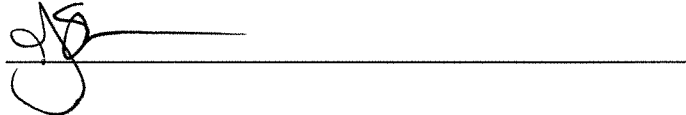
<sup>67</sup> AGL Affidavit, Motion Record, Tab 2, para. 27.

<sup>68</sup> *Target Canada Co. (Re)*, 2015 ONSC 7574 (CanLII), BOA Tab 6, para. 32.

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

46. The Company therefore requests Orders substantially in the forms filed with its motion record.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 12<sup>th</sup> day of March 2020.

A handwritten signature, appearing to be 'J.S.', is written above a horizontal line that extends across the page.

## SCHEDULE A – LIST OF AUTHORITIES

1. *Royal Bank of Canada v Soundair Corp.* [1991] O.J. No. 1137 (ON CA)
2. *Komtech Inc. (Re)*, 2011 ONSC 3230 (CanLII)
3. *Karrys Bros. Ltd. (Re)*, 2014 ONSC 7465
4. *Hypnotic Clubs. Inc. (Re)*, 2010 ONSC 2987 (CanLII)
5. *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009 (CanLII)
6. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379
7. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522
8. *Target Canada Co. (Re)*, 2015 ONSC 7574 (CanLII)

## SCHEDULE B – RELEVANT STATUTES

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

#### **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**

**(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**

- (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.

### **Restriction on disposition of assets**

**65.13 (1)** An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

### **Notice to secured creditors**

**(3)** An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

### **Factors to be considered**

- (4)** In deciding whether to grant the authorization, the court is to consider, among other things,
- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
  - (b) whether the trustee approved the process leading to the proposed sale or disposition;
  - (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
  - (d) the extent to which the creditors were consulted;
  - (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
  - (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

**Additional factors — related persons**

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

**Related persons**

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

- (a) a director or officer of the insolvent person;
- (b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and
- (c) a person who is related to a person described in paragraph (a) or (b).

**Assets may be disposed of free and clear**

(7) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the insolvent person or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

**Restriction — employers**

(8) The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

***Courts of Justice Act, RSO 1990, c C.43***

**Sealing documents**

**137 (2)** A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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

Estate No.: 32-2613323

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**COMMERCIAL LIST**

**Proceeding commenced TORONTO**

**FACTUM OF THE APPLICANT**  
**(Sale Approval)**  
**(Motion returnable March 16, 2020)**

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