CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

SUPERIOR COURT

Commercial Division
(Sitting as a Court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36)

NO.: 500-11-042345-120

IN THE MATTER OF THE PROPOSED PLAN OF COMPROMISE AND ARRANGEMENT:

AVEOS FLEET PERFORMANCE INC. / AVEOS PERFORMANCE AÉRONAUTIQUE INC.

and

AERO TECHNICAL US, INC.

Insolvent Debtors/Petitioners

and

FTI CONSULTING CANADA INC.

Monitor

and

REGISTRAR OF THE PERSONAL AND MOVEABLE REAL RIGHTS REGISTRY OFFICE

Mise en cause

BRIEF OF ARGUMENTS IN SUPPORT OF THE MOTION FOR TERMINATION OF THE CCAA PROCEEDINGS AND FOR THE ISSUANCE OF OTHER ORDERS

I. PREAMBLE

1. It is trite law that, pursuant to s. 11 of the *Companies' Creditors Arrangement Act* ("**CCAA**") and as part of the residual authority under its inherent and equitable jurisdiction, the Superior Court is vested with a wide range of discretionary powers.

   - *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60, [2010] 3 S.C.R. 379, paras. 57 et seq. **[TAB 1]:**

     > In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making

> explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

- See also Richard H. McLaren, *Canadian Commercial Reorganization, Preventing Bankruptcy* (Toronto: Thomson Reuters, 2013), at para 2.2200 **[TAB 2]**;

> The powers conferred by the Act may be exercised by a single judge either in chambers during term or in vacation. Courts with the appropriate jurisdiction have a wide range of discretionary powers.

II. TERMINATION OF THE CCAA PROCEEDINGS

2. Given the circumstances alleged in the *Motion for Termination of CCAA Proceedings and the Issuance of Other Orders*, namely the fact that there is no prospect of a plan of arrangement, a termination of the CCAA Proceedings is the only appropriate remedy:

- *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60, [2010] 3 S.C.R. 379, para. 71 **[TAB 1]**:

> It is well established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* 1992 CanLII 2174 (BC CA), (1992), 9 C.B.R. (3d) 25 (B.C.C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA*'s purposes, the ability to make it is within the discretion of a *CCAA* court.

3. There is no mechanism contemplated in the CCAA for formally declaring the termination of any CCAA Proceedings.

4. In the following sampling of recent cases, applications were made to specifically declare the termination of the CCAA proceedings and the Courts granted said applications, formally declaring the termination of proceedings.

- *Re Extreme Fitness, Inc.*, July 11, 2013, OSCJ **[TAB 3]**;
- *Re Great Basin Gold Ltd.*, June 28, 2013, SCBC **[TAB 4]**;
- *Re NFC Acquisition GP Inc, NFC Acquisition Corp., and NFC Land Holdings Corp.*, April 9, 2013, OSCJ **[TAB 5]**;
- *Re First Leaside Inc.*,December 7, 2012, OSCJ **[TAB 6]**;
- *Re Priszm Income Fund, Priszm Canadian Operating Trust, Priszm Inc. and Kit Finance Inc.*, September 14. 2011, OSCJ **[TAB 7]**;
- *Re Interwind Corp.*, October 15, 2010, OSCJ **[TAB 8]**;

- *Re Cover-All Holding Corp., Cover-All Building Systems Inc. and others*, April 23, 2010, ACQB **[TAB 9]**;

- *Re Nexinnovations Inc.*, April 8, 2008, OSCJ, at para 2 **[TAB 10]**;

- *Re Autoliv ASP, Inc. and Greening Donald Co. Ltd. and 1548735 Ontario Limited*, April 15, 2007, OSCJ **[TAB 11]**;

III. DISCHARGING THE CCAA CHARGES

5. In these proceedings involving Aveos Fleet Performance Inc. and Aero Technical US, Inc. (collectively "**Aveos**"), as is common in CCAA proceedings, certain charges were established for specific purposes and to benefit certain parties. These charges no longer have any *raison d'être* and it is appropriate, therefore, to remove them.

6. In fact, this Court (per the Honourable Mark Schrager, j.s.c.), in the context of a Motion presented by the former directors of Aveos Fleet Performance Inc. in May 2012, even entertained the notion of eliminating the Directors' Charge altogether. In that context, the Court reiterated the purpose and objective of directors' charges in the context of CCAA proceedings:

- *Aveos Fleet Performance Inc. /Aveos Performance aéronautique inc. (Arrangement relatif à)* ,2012 QCCS 1910, at para 20-21 **[TAB 12]**:

  > [11] The Supreme Court of Canada has stated that the purpose of the CCAA is "to permit the Debtor to continue to carry on business and where possible avoid the social and economic costs of liquidating its assets."
  >
  > [12] Other purposes have been articulated by the courts such as permitting the broad balancing of stakeholder interests in the insolvency and permitting a sale, winding-up, or liquidation of a debtor company and its assets, in appropriate circumstances.
  > [13] The rationale of the D&O charge is to encourage directors and officers to continue to occupy their positions during the restructuring of an insolvent company by providing an assurance that the company will ultimately be able to hold directors harmless for any personal liability incurred by continuing to act as a director after the insolvency.
  > [...]
  > [16] The D&O charge is only available to protect against liability incurred by directors and officers after the initial filing (section 11.51(1) CCAA). [Emphasis added]

7. The purpose of the charge is therefore to ensure that directors are protected during the restructuring and during a period of enhanced risk of liability. It is not in order to provide a group of stakeholders with an elevated priority that does not otherwise exist against the company. This benefit is no longer necessary in order to facilitate a restructuring. Indeed, the prospect of restructuring is absent:

- *General Publishing Ltd. (Re) (In Bankruptcy)*, 2003 CanLII 7787 (ON SC), at para. 8 **[TAB 13]**

> [8] In any event, it seems to me that the court, in a CCAA proceeding, should interfere with existing priority rights only to the extent necessary in order for the CCAA proceedings to continue and to provide the company with an opportunity to work out a restructuring or arrangement.

8. In the case at bar, there no longer are any directors or officers of Aveos and there is no prospect of an arrangement.

9. In the context of the aforementioned Motion filed by the former directors of Aveos in May 2012, the Honourable Schrager, j.s.c., decided to reduce the amount of the Directors' Charge in these proceedings:

- *Aveos Fleet Performance Inc. /Aveos Performance aéronautique inc. (Arrangement relatif à)* ,2012 QCCS 1910, at para 20-21 **[TAB 12]**:

> [20] The process of reducing the D&O charge and the directors motion were instigated by comments from the undersigned at the first comeback hearing following the events of March 19 and 20, 2012 as described above. The Court was sensitive to the precedent and the appearance of a $5 million D&O charge where directors were only in place for a few hours following the creation of the charge in the initial order. This state of affairs seemed conspicuous and out of step with the primary policy reason for D&O charges. On the other hand sufficient arguments have been brought to bear to maintain the D&O charge and the Court is particularly sensitive to the arguments that the charge may enhance employee recovery. Also, the Monitor testified that the $2 million amount suggested in the directors' motion was a compromise number arrived at after discussion between the directors, the Debtors (through the CRO), the Monitor and the secured creditors, following the Court's comments at the first comeback hearing. Communication and compromise between stakeholders in a CCAA file is to be encouraged.
>
> [21] For all of the above reasons the undersigned granted the directors' motion to amend the initial order by reducing the D&O charge from $5 million to $2 million.

10. The fact that there is insurance in place to cover the very type of potential liability which the Directors' Charge is meant to address is sufficient reason for the Court to do away with this redundant and inappropriate charge. This insurance coverage—to borrow this Court's words pertaining to the purpose of the Directors' Charge—"will ultimately be able to hold directors harmless for any personal liability incurred by continuing to act as a director after the insolvency."

11. It is worth highlighting, just as this Court pointed out in the aforementioned judgment, that the Initial Order states that the:

> [...] Directors shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts for which the Directors are entitled to be indemnified in accordance with paragraph [29] of [the Initial] Order.

12. In a recent decision of the Superior Court, the Honourable Martin Castonguay, j.s.c., ostensibly on the basis of the discretionary powers granted to the Court, limited the scope and nature of the stay of proceedings as against the directors of the insolvent debtor. The Court considered the relevance and impact of an existing insurance policy for the purposes of the issuance of the Initial Order and the stay of proceedings.

13.

- *Montréal, Main & Atlantique Canada Co. (Arrangement relatif à)*, 2013 QCCS 4039, at para 54-55 **[TAB 14]**:

> [54] À la lumière de ces faits, le Tribunal conclut que les administrateurs de MMA n'ont pas démontré une bonne foi justifiant de leur accorder une suspension des recours ou encore une charge prioritaire pour les protéger des réclamations de leurs employés.
>
> [55] Cela étant et encore une fois, pour éviter un chaos judiciaire, le Tribunal accordera la suspension des recours à l'égard des administrateurs, seulement quant à la responsabilité découlant du déraillement, et ce, pour l'unique raison qu'ils sont également des assurés au terme de la police d'assurance-responsabilité civile. [Emphasis added].

14. Maintaining any of the charges that were established at the outset of these CCAA Proceedings pursuant to the Initial Order, even as these proceedings are terminated, is incongruous: a judicially created charge would linger within a judicial vacuum devoid of the very framework for which and by virtue of which said charge was created in the first place.

15. The potential beneficiaries of the charge—the Directors—are not opposing its removal. Any other indirect and subsequent beneficiaries of the charge would not enjoy any more protection from the existence of the Directors' Charge than they would under the insurance policy in place. Any relief sought by such indirect "third-party" beneficiaries would entail the same judicial process of proving liability.

16. In fact, invoking and realizing on the Directors' Charge would be less practical, more cumbersome and more costly than merely seeking an indemnity payment under an insurance policy. The Directors Charge will only become relevant if those ultimate third-party beneficiaries succeed in having their claim recognized by a Court and exhaust all other means of executing such a decision prior, after which they may resort to realizing on said Charge.

IV. ASSIGNMENT IN BANKRUPTCY

17. In the case at bar, an assignment in bankruptcy is the most logical and seamless manner for Aveos to exit the CCAA Proceedings.

18. The Honourable Deschamps, J., writing for the majority in *Century Services Inc. v. Canada (Attorney General),* in reviewing the history of bankruptcy and insolvency legislation wrote:

- *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60, [2010] 3 S.C.R. 379, para. 71 **[TAB 1]**:

> [14] [...] There are three ways of exiting CCAA proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the CCAA process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the CCAAproceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the BIA or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the BIA and the CCAA is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.
>
> [15] As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules. [Emphasis added].

19. The third type of exit from the CCAA Proceedings enumerated by Justice Deschamps is the one sought herein, and is indeed the only exit strategy available to Aveos.

20. A transition into bankruptcy was specifically ordered, for example, in *Re Nexinnovations Inc.*:

- *Re Nexinnovations Inc.*, April 8, 2008, OSCJ, at para 2 **[TAB 10]**;

> [2] THIS COURT ORDERS that effective upon issuance of the Bankruptcy Order dated April 8, 2008 in Court File Number 31-OR-207514-T (the "Bankruptcy Order"), the CCAA proceedings herein and the Stay Period (as defined in the Initial Order dated October 2, 2007) shall terminate.

V. APPOINTMENT OF A RECEIVER

21. It is not uncommon for the courts to order the termination of the CCAA proceedings upon the appointment of a receiver. See for example:

- *Re Great Basin Gold Ltd.*, June 28, 2013, SCBC **[TAB 4]**;
- *Re First Leaside Inc.*, December 7, 2012, OSCJ **[TAB 6];**
- *Re Priszm Income Fund, Priszm Canadian Operating Trust, Priszm Inc. and Kit Finance Inc.*, September 14. 2011, OSCJ **[TAB 7];**
- *Re Autoliv ASP, Inc. and Greening Donald Co. Ltd. and 1548735 Ontario Limited*, April 15, 2007, OSCJ **[TAB 11]**;

VI. DISCHARGING THE MONITOR AND THE CRO

22. The Courts have sometimes expressed a certain reticence towards granting releases that are unduly broad or redundant.

- See Janis P. Sarra, *Rescue!: the Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2013) at p 574 **[TAB 15]**:
- See also *Chantiers Davie Inc. (Arrangement relatif à)*, 2010 QCCS 2643, at para 45-48 **[TAB 16]**:

23. The nature, wording and extent of the conclusions sought by Aveos is in line with the standard conclusions granted by the Courts and serve to reaffirm the protections already conferred by prior orders of this Court. This is consistent even with Justice Gascon's restrictive approach as to the appropriate language to adopt in such orders:

- *Mecachrome international inc. (Arrangement relatif à)*, 2010 QCCS 2683, at para 2 **[TAB 17]**,

> [18] Ces commentaires faits, le Tribunal est d'avis qu'une demande de libération d'un contrôleur devrait se limiter uniquement à ce qui est réellement requis, soit une confirmation de sa libération, avec mention que les protections conférées par les ordonnances prononcées continuent d'avoir leur effet en sa faveur. À cela s'ajoutent bien sûr les protections que lui octroie la *LACC* et qu'un tribunal n'a pas à répéter dans le cadre d'un jugement. [Emphasis added]

24. It is common practice for Courts to incorporate, in the orders terminating CCAA Proceedings, specific language ensuring a comprehensive and unequivocal discharge of the CRO and the Monitor.

- *Re Extreme Fitness, Inc.*, July 11, 2013, OSCJ, at para 9-11 **[TAB 3]**;
- *Re Great Basin Gold Ltd.*, June 28, 2013, SCBC, at para 5-9 **[TAB 4]**;

- *Re NFC Acquisition GP Inc., NFC Acquisition Corp., and NFC Land Holdings Corp.*, April 9, 2013, OSCJ, at para 8-10 **[TAB 5]**;
- *Re First Leaside Inc.*, December 7, 2012, OSCJ at para 12-13 **[TAB 6]**;
- *Re Priszm Income Fund, Priszm Canadian Operating Trust, Priszm Inc. and Kit Finance Inc.*, September 14. 2011, OSCJ, at para 8-11 **[TAB 7]**;
- *Re Interwind Corp.*, October 15, 2010, OSCJ, at para 7-9 **[TAB 8]**;
- *Re Cover-All Holding Corp., Cover-All Building Systems Inc. and others,* April 23, 2010, ACQB at para 7-8 **[TAB 9]**;
- *Re Nexinnovations Inc.*, April 8, 2008, OSCJ, at para 3, 16 **[TAB 10]**;
- *Re Autoliv ASP, Inc. and Greening Donald Co. Ltd. and 1548735 Ontario Limited,* April 15, 2007, OSCJ, at para 9 **[TAB 11]**;

Montréal, November 21, 2013

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