

CANADA

SUPERIOR COURT

PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

**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 OF:

**AVEOS FLEET PERFORMANCE INC./  
AVEOS PERFORMANCE AÉRONAUTIQUE INC.  
and  
AERO TECHNICAL US, INC.**

**Insolvent Debtors/Respondents**

and

**FTI CONSULTING CANADA INC.**

**Monitor**

and

**THE SUPERINTENDENT OF FINANCIAL  
INSTITUTIONS**

**Petitioner**

and

**CRÉDIT SUISSE AG, CAYMAN ISLAND BRANCH,  
as Fondé de Pouvoir**

and

**WELLS FARGO BANK NATIONAL  
ASSOCIATION, as Fondé de Pouvoir**

and

**AVEOS HOLDING COMPANY as Fondé de  
Pouvoir**

and

**BREOF/BELMONT BAN L.P.**

and

**AON HEWITT, as administrator of the Aveos  
Fleet Performance Inc. pension plans**

and

**The former retired employees of Aveos Fleet  
Performance Inc.**

**Mis en cause**

---

**BRIEF OF ARGUMENTS OF AVEOS FLEET PERFORMANCE INC.  
(ON THE MOTION FOR A DECLARATORY JUDGMENT  
OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS)**

---

1. There is no provision of the *Pension Benefits and Standards Act*, 1985, RSC 1985, c. 32 (2<sup>nd</sup> Supp) (the “**PBSA**”) that indicates how and where payments must be applied by an employer as among different types of debts or payments that are to be made.

2. The parties have not explicitly indicated in any agreement or otherwise (other than in the context of these proceedings) how the payments at issue should be characterized or where they wish to have them imputed.

3. Given the absence of specific guidance by Parliament as to the manner in which payments are to be ascribed as among various types of payments under the PBSA, the law of the Province of Quebec must be considered in interpreting the PBSA and adjudicating this matter. Accordingly, the Civil Code of Quebec (“**C.C.Q.**”) applies.

➤ *Interpretation Act*, RSC, C I-21 [TAB 1]:

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province’s rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

➤ *Federal Law—Civil Law Harmonization Act*, No. 1 (S.C. 2001, c. 4) [TAB 2]:

**WHEREAS** the harmonious interaction of federal legislation and provincial legislation is essential and lies in an interpretation of federal legislation that is compatible with the common law or civil law traditions, as the case may be;

[...]

**WHEREAS** the provincial law, in relation to property and civil rights, is the law that completes federal legislation when applied in a province, unless otherwise provided by law;

**WHEREAS** the objective of the Government of Canada is to facilitate access to federal legislation that takes into account the common law and civil law traditions, in its English and French versions;

➤ See also *Dans l’affaire de la faillite de : Boutique André Bibeau inc. v Ernst & Whinney*, 1987 QCCA 746 [TAB 3] :

4. Article 1569(1) C.C.Q. sets out the general principle applicable to imputation of payments:

1569: When making payment, a debtor who owes several debts has the right to impute payment to the debt he intends to pay.

5. This principle was recognized more than a century ago by the Supreme Court of Canada in *Agricultural Insurance Co. v Sargeant*, 1896 CanLII 4 (SCC) at p 36 [TAB 4]:

[...] For what is that rule? It is laid down thus in *City Discount Co. v McLean* by Blackburn J., and expressed by Lord Selborne in *Re Sherry*, in somewhat similar language:

It has been considered a general rule since Clayton's case that when a debtor makes a payment he may appropriate it to any debt he pleases and the creditor must apply it accordingly. If the debtor does not appropriate it the creditor has a right to do so to any debt he pleases and that not only at the instant of payment but up to the very last moment as was decided in *Mills v. Fowkes*.

6. Article 1569 C.C.Q sets out the exceptions to this general rule. In the present circumstances, none of the legal restrictions to the general rule apply, such that the overarching principle should remain applicable. Accordingly, to the extent that the imputation of the payment at issue can be left to any party's discretion, this discretion should belong to Aveos.

➤ *Dupuis v Magog (Cité)*, 1980 AZ-80021107 (CS) at pp 5-6 [TAB 5]:

Il y a lieu de se rappeler que l'imputation appartient en premier lieu au débiteur. S'il fait défaut de le faire ou d'indiquer son intention, ce n'est que là et alors que la loi de l'imputation passe au créancier qui l'appliquera suivant les règles établies au code civil. Ce n'est que si ni l'un ni l'autre des deux ne juge à propos de le faire que la loi intervient.

Lorsqu'un paiement doit donner lieu à une imputation, le débiteur a le privilège de le faire comme il le juge à propos. Ce n'est que s'il néglige d'indiquer son intention que ce privilège passe au créancier ou encore que la loi intervient.

Il ne faut pas s'éloigner du principe que la Loi dispose toujours en faveur du débiteur. (our emphasis)

7. In the absence of explicit direction by the parties or directions from this Honourable Court, the Civil Code of Quebec contemplates three methods of determining how payments should be imputed.

1572. In the absence of imputation by the parties, payment is imputed first to the debt that is due.

Where several debts are due, payment is imputed to the debt which the debtor has the greatest interest in paying.

Where the debtor has the same interest in paying several debts, payment is imputed to the debt that became due first; if all of the debts became due at the same time, however, payment is imputed proportionately.

8. In the case at bar, the first rule (Art. 1572(1) C.C.Q.) is of no guidance, since all parties acknowledge that all of the “competing” debts are now due.

9. The second rule provides that it is the debtor’s interests which must prevail. Where several debts are due, the debt which is most onerous to the debtor should be discharged.

➤ *Kraut v Karasik*, 1982 AZ-82011199 (CA) at p 4 [TAB 6]:

In so far as the partial payment of \$ 2,250\$ is concerned, since the receipt makes no special imputation the payment must be imputed in accordance with article 1161 of the Civil code which requires imputation and discharge of the debt actually payable which the debtor has at the time the greatest interest in paying. I have no hesitation in saying that the debtor, in the present instance, had the greatest interest in paying the amount claimed as taxable costs. Her contestation of the action referred to bears this out. (our emphasis)

➤ *Gingras v Groupe Déluré Inc.*, 2011 QCCS 1879 at para 39, 40 and 42 [TAB 7]:

[39] Les défendeurs ont donc imputé leurs paiements de façon systématique sur le crédit-bail prioritairement au paiement du loyer. L'article 1572 C.c.Q. énonce que «entre plusieurs dettes échues, l'imputation se fait sur celle que le débiteur a, pour lors, le plus d'intérêt à acquitter».

[40] Dans leur ouvrage *Les obligations*, les auteurs écrivent:

**657 - Importance de la dette** - Si toutes les dettes sont également échues et exigibles, en règle générale l'imputation se fait par préférence sur celle que le débiteur avait le plus d'intérêt à acquitter. Il s'agit là d'une question de fait qui varie selon les circonstances. Ainsi, on imputera paiement sur une dette qui produit des intérêts, plutôt que sur celle qui n'en produit pas, sur une dette hypothécaire plutôt que sur une dette non garantie, etc.

[42] Le demandeur avait intérêt à appliquer tous les paiements sur le loyer laissant le crédit-bail non payé et en défaut. Mais ce n'est pas l'intérêt du demandeur qu'il faut ici considérer, c'est l'intérêt des défendeurs à acquitter une dette donnée entre les deux dettes échues et exigibles. (our emphasis)

➤ *Diamantopoulos v Montreal (Ville)*, 2004 QCCQ 27534 at para 18-19 [TAB 8]:

[18] Cela dit, la question la plus déterminante en l'instance est plutôt à l'effet de savoir si la Ville était justifiée d'appliquer ce paiement au pro-rata des trois immeubles. Dans les faits, on se retrouve avec un débiteur (monsieur Diamantopoulos) et un créancier (Ville de Montréal) face à trois dettes dues au même moment. En l'absence d'expression de la volonté des parties, l'article 1572 du Code civil du Québec traite de l'imputation du paiement : [...]

[19] Dans la mesure où les dettes sont toutes trois échues au même moment, il faut donc rechercher celle que le débiteur avait le plus d'intérêt à acquitter, eu égard aux circonstances de la présente affaire. [...] (our emphasis)

10. Finally, Article 1572 (3) C.C.Q. provides that where the debtor has the same interest in paying several debts, payment is imputed to the debt that became due first.

11. In the case at bar, Aveos believes that to impute the payment of the sums at issue to the actuarial deficit at large rather than specifically onto the special payments is contrary to the debtor's interests.

12. The special payments are the payments which the debtor has identified as being the ones it intends to pay. They also represent the debt which the debtor has the most interest in paying, and in any event, constitute the first payments that became due.

13. Regardless of the qualification of Aveos' obligations and role as trustee in this context, it remains that Aveos is the debtor which has the obligation to pay those sums. Even where a debtor holds those funds in a capacity as trustee, the Court should consider—for the purposes of imputation—the interests of the debtor who has the obligation to pay, where those interests and the manner of imputation are not inconsistent with the purpose of the trust.

14. Aveos is the debtor and payor of the obligations at issue, both according to the common and usual meaning of those terms, and within the meaning of the Civil Code of Quebec. Indeed, Art. 1553 C.C.Q. defines "payment" in a broader sense, namely as the act of performing an obligation:

1553: Payment means not only the turning over of a sum of money in satisfaction of an obligation, but also the actual performance of whatever forms the object of the obligation.

15. In the case at bar, Aveos, as the debtor with the obligation to turn over a sum of money (regardless of the qualification of these moneys as trust funds and Aveos' capacity as a trustee), is entitled to have its interests considered for the purposes of determining how this payment is to be imputed.

16. The special payments represent not only the debt which Aveos (whether *qua* debtor or *qua* trustee) has the most interest in paying, but also the debt which the estate as a whole should have the most interest in discharging, since it is the most onerous one taking into account the interests of Aveos' stakeholders as a whole.

17. These rules and this same reasoning apply in the context of an insolvency or bankruptcy; the debtor, or a trustee ("stepping in his shoes"), has the right to impute payment to the debt it intends to pay. Failing such indication, the debt which the insolvent debtor has the most interest in paying, or alternatively, the earliest debt, should be paid.

18. In *Re: Boutique André Bibeau inc. v Ernst & Whinney*, 1987 QCCA 746 [TAB 3], the facts at hand precluded the Court from concluding that the debtor, and, by extension, the trustee, had more interest in paying one debt over another. Still, the Court of Appeal applied the same rules as to imputation of payment, even in a bankruptcy context, and ultimately concluded that the payment ought to have been ascribed to the earliest debt.

19. Finally, given that the payment will be made pursuant to a Court Order, the intent of Aveos (whether *qua* debtor or *qua* trustee) may be irrelevant. Given that the Order itself does not provide for the imputation of the payment, the general rules of the Civil Code of Quebec should be applied by the "creditor" receiving the funds, i.e. the Plan. These rules bind the Plan to impute the payment to the special payments due and owing for February, March and April 2012.

**THE WHOLE BEING RESPECTFULLY SUBMITTED**

Montréal, October 18, 2013

  
\_\_\_\_\_  
**DENTONS CANADA LLP**  
ATTORNEYS FOR AVEOS FLEET PERFORMANCE INC.

CANADA

SUPERIOR COURT

PROVINCE OF QUÉBEC  
DISTRICT OF MONTRÉAL

**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 OF:

**AVEOS FLEET PERFORMANCE INC./  
AVEOS PERFORMANCE AÉRONAUTIQUE INC.  
and  
AERO TECHNICAL US, INC.**

**Insolvent Debtors/Respondents**

and

**FTI CONSULTING CANADA INC.**

**Monitor**

and

**THE SUPERINTENDENT OF FINANCIAL  
INSTITUTIONS**

**Petitioner**

and

**CRÉDIT SUISSE AG, CAYMAN ISLAND BRANCH,  
as Fondé de Pouvoir**

and

**WELLS FARGO BANK NATIONAL  
ASSOCIATION, as Fondé de Pouvoir**

and

**AVEOS HOLDING COMPANY as Fondé de  
Pouvoir**

and

**BREOF/BELMONT BAN L.P.**

and

**AON HEWITT, as administrator of the Aveos  
Fleet Performance Inc. pension plans**

and

**The former retired employees of Aveos Fleet  
Performance inc.**

**Mis en cause**

---

**AUTORITIES OF AVEOS FLEET PERFORMANCE INC.**

**TAB**

<i>Interpretation Act</i> , RSC, C I-21	1.
<i>Federal Law—Civil Law Harmonization Act</i> , No. 1 (S.C. 2001, c. 4)	2.
<i>Dans l'affaire de la faillite de : Boutique André Bibeau inc. v Ernst &amp; Whinney</i> , 1987 QCCA 746	3.
<i>Agricultural Insurance Co. v Sargeant</i> , 1896 CanLII 4 (SCC)	4.
<i>Dupuis v Magog (Cité)</i> , 1980 AZ-80021107 (CS)	5.
<i>Kraut v Karasik</i> , 1982 AZ-82011199 (CA)	6.
<i>Gingras v Groupe Déluré Inc.</i> , 2011 QCCS 1879	7.
<i>Diamantopoulos v Montreal (Ville)</i> , 2004 QCCQ 27534	8.



**SUPERIOR COURT**  
Commercial Division  
DISTRICT OF MONTRÉAL

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

**AVEOS FLEET PERFORMANCE INC. / AVEOS PERFORMANCE  
AÉRONAUTIQUE INC.**

And  
**AERO TECHNICAL US, INC.** Insolvent Debtors/Respondents

And  
**FTI CONSULTING CANADA INC.**

Monitor

And  
**THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS**

Petitioner

And  
**CRÉDIT SUISSE AG, CAYMAN ISLAND BRANCH, as Fondé de Pouvoir**

and  
**WELLS FARGO BANK NATIONAL ASSOCIATION, as Fondé de Pouvoir**

and  
**AVEOS HOLDING COMPANY as Fondé de Pouvoir**

Respondents

And  
**BRECO/BELMONT BAN L.P. and**

**AON HEWITT, as administrator of the Aveos Fleet Performance Inc.  
pension plans**

and

**The former and retired employees of Aveos Fleet Performance Inc.**

Mis en cause

Roger P. Simard

File: 548731-1

**BRIEF OF ARGUMENTS OF AVEOS FLEET PERFORMANCE  
INC. (ON THE MOTION FOR A DECLARATORY JUDGMENT  
OF THE SUPERINTENDENT OF FINANCIAL INSTITUTIONS)**

ORIGINAL



Dentons Canada LP  
1 Place Ville Marie, Suite 3900  
Montréal QC H3B 4M7  
Tel. : 514 878 8800  
Fax : 514 866 2241

dentons.com  
880822