C A N A D A **S U P E R I O R C O U R T**

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/Petitioners

and

FTI CONSULTING CANADA INC.

Monitor

BRIEF OF ARGUMENTS IN SUPPORT OF PETITIONERS' MOTION FOR THE ISSUANCE OF AN AMENDED AND RESTATED INITIAL ORDER

I. THE WIDE DISCRETION OF THE COURT IN CCAA MATTERS

1. It is trite law that the Courts have wide discretion in matters submitted to them pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**").

2. Section 11 of the CCAA provides as follows:

- *Companies' Creditors Arrangement Act*, RSC 1985, c C-36

> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances. (emphasis added)

3. It is submitted that the complexity of the present matter and the specific circumstances at play serve to justify the amendments and restatements sought. The Supreme Court of

Canada has described as follows the flexibility, efficacy and utility of the CCAA for the purposes of addressing complex and rapidly evolving situations, as follows:

- *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379

> [14] […] [T]he 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.

4. It is indeed a rather frequent occurrence for the Courts to issue amended and restated initial orders under the CCAA, and the Courts increasingly exercise their discretion to address the need for such amendments and restatements where warranted.

- *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379

> [58] *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).
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> [60] Judicial decision making under the CCAA takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the status quo while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can*. 1990 CanLII 529 (BC CA), (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp*., Re, 2000 ABQB 442 (CanLII), 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, per Paperny J. (as she then was); *Air Canada, Re* 2003 CanLII 64269 (ON SC), (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (ON SC), 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, per Farley J.; Sarra, Creditor Rights, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge*, Re 2000 CanLII 22488 (ON SC), (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, per Blair J. (as he then was); Sarra, Creditor Rights, at pp. 195-214).
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> [61] When large companies encounter difficulty, reorganizations become increasingly complex. CCAA courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been

> asked to sanction measures for which there is no explicit authority in the CCAA. Without exhaustively cataloguing the various measures taken under the authority of the CCAA, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

II. THE LEGAL CHARACTERIZATION OF THE GST AND QST IN AN INSOLVENCY CONTEXT

5. The Courts have addressed the issues upon which the restatements sought are predicated on several occasions.

6. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379, one of the debtor's outstanding debts at the commencement of its reorganization under the CCAA was unremitted Goods and Services Tax ("GST"). When the debtor's reorganization attempts failed and it made an assignment in bankruptcy, the Crown moved for payment of the outstanding GST, claiming that a deemed trust existed over the debt, pursuant to the Excise Tax Act. However, the Supreme Court of Canada ultimately concluded that the provisions of the CCAA which nullify statutory deemed trusts in favour of the Crown should prevail over the provisions of the Excise Tax Act.

7. The relevant provision in the CCAA reads as follows:

- *Companies' Creditors Arrangement Act*, RSC 1985, c C-36

> 37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

8. If Parliament had intended deemed trusts to remain as regards GST, it would have created an exception in the law:

- *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379

> [45] […] Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law [with s. 37 (1)]. […] Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the CCAA and s. 67(3) of the BIA expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The CCAA and BIA are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. […]

9. The considerations that should be borne in mind when decisions are rendered pursuant to the CCAA are a function of its underlying objectives and its ultimate remedial purpose:

- *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 SCR 379

> [70] […] [T]he requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. […]

10. In *Leblond, Buzzetti et Associés ltée c. Québec (Sous-ministre du Revenu)*, the Court of Appeal dismissed the taxation authorities' position according to which their claims were not affected by the proposal, due to having arisen prior thereto. The Superior Court ruled that the debt arose as the debtor earned revenue, thereby subjecting it to the protection of the *BIA,* and that it was merely the ability to claim payment (*"l'éxgibilité"*) of the debt that arose later. The Court of Appeal cites the trial judge as follows:

- *Leblond, Buzzetti et Associés ltée c. Québec (Sous-ministre du Revenu)*, 2000 CanLII 8800 (QC CA)

> [13] Selon lui, la dette fiscale d'un contribuable existe dès que le revenu est gagné puisqu'il s'agit d'une «obligation successive imposée par la Loi aux citoyens» et «ce n'est que l'exigibilité de la créance qui est reportée alors, qu'en fait, la dette est là soumise, cependant, aux ajustements possibles prévus à la Loi».

11. The Court of Appeal confirmed this ruling:

- *Leblond, Buzzetti et Associés ltée c. Québec (Sous-ministre du Revenu)*, 2000 CanLII 8800 (QC CA)

> [44] Cette conclusion paraît également plus conforme avec les objectifs de la Loi sur la faillite et l'insolvabilité. Le législateur cherche avant tout la réhabilitation financière du débiteur et le traitement équitable de tous les créanciers. Si on exclut les dettes de nature fiscale, on contrevient à ces objectifs d'une part en rendant plus difficile la réhabilitation du débiteur et d'autre part en favorisant le fisc au détriment des autres créanciers.
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> [45] Mais, il y a plus. […]:
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> > La Loi sur la faillite et l'insolvabilité favorise le redressement d'entreprise et, par le fait même, favorise l'intervention d'une entente entre un débiteur et ses créanciers afin de lui éviter la faillite, par le biais du mécanisme de la proposition concordataire.
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> > En interprétant la Loi sur les impôts de façon à exclure l'assujettissement d'une créance du sous-ministre du Revenu pour l'année de la proposition, cela créerait une situation contraire à l'économie de la Loi sur la faillite et l'insolvabilité. En effet, il serait alors plus avantageux pour un contribuable de faire faillite que de faire une proposition puisque dans le dernier cas il

> ne serait pas libéré des dettes fiscales de l'année au cours de laquelle il a déposé sa proposition. La proposition concordataire n'aurait alors pas l'effet préventif qui doit lui être consacré.
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> De plus, en excluant la créance du débiteur fiscal pour l'année d'imposition au cours de laquelle il a déposé une proposition, le créancier fiscal bénéficierait d'un avantage sur les autres créanciers. Cette interprétation irait à l'encontre de la Loi sur la faillite et l'insolvabilité puisque le mécanisme de la proposition, tout comme celui de la faillite, vise à assurer l'égalité entre les créanciers.
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> Qui plus est, un contribuable pourrait faire une proposition le 30 décembre d'une année et ses dettes fiscales de l'année visée ne seraient pas assujetties à cette même proposition, alors que celui qui ferait une proposition le 31 décembre verrait telles dettes incluses dans sa proposition.

12. On the specific matter of GST and QST, the Supreme Court of Canada has confirmed that the tax authorities do not own GST and QST amounts that have been collected but not remitted, or, that are collectible at the time of bankruptcy. Instead, they have an unsecured claim.

13. The Supreme Court summarized the tax authorities' position as follows prior to dismissing same:

- *Quebec (Revenue) v. Caisse populaire Desjardins*, [2009] 3 SCR 286

> [18] The tax authorities do not dispute the clear terms of the statutory provisions. Rather, they argue that those provisions do not apply to the GST and the QST and that the Crown is not a creditor, but the owner of the tax amounts. Thus, the amounts collected or collectible at the time of the bankruptcy in respect of the GST or the QST do not form part of the bankrupt's patrimony. As a result, they are not included in the property that is to be liquidated in accordance with the order of priority established in the *BIA*. It will therefore be necessary to resolve the issue of the legal characterization of the Crown's rights with respect to the GST and QST amounts. The characterization of those rights will essentially resolve the dispute before this Court.
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> [...]
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> [29] Canadian tax authorities are bound by the choice of legislative policy now expressed in the *BIA*. The order of priority established in the *BIA* is also binding on the Quebec tax authorities, even though the *AMR* is silent on what happens to the deemed trust established in s. 20 thereof in the event of bankruptcy. The appellants' arguments conflict with both the words of the statutory provisions in question and their underlying legislative intent, and cannot be accepted.

14. The Sales Taxes amounts at issue which were collected prior to filing but were to be remitted on March 30, 2012 are similarly subjected to the effects of the filing in all respects, and it is respectfully submitted that the filing date constitutes the determining demarcation point for the purposes of qualifying those debts.

CONCLUSION

15. It is respectfully submitted that the remedial purpose and underlying objectives of the CCAA are such that the Court has wide discretion to grant the Motion and restate the Initial Order as requested.

16. There is substantial precedent for using this wide judicial discretion to ensure that the debtor's insolvency is managed in the most equitable and efficient manner for all the stakeholders.

17. The Motion before this Honourable Court seeks conclusions that are wholly consistent with the provisions of the CCAA, it's intent and spirit.

18. The courts have consistently attributed great importance to the effect that the filing itself has on Sales Taxes, in view of characterizing all accrued and collected sales taxes, whether *éxigibles* or not, as ordinary claims not immune to the legal effects of said filing.

Montréal, March 29, 2012

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