

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/Petitioners

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.

Insolvent Debtor/Plaintiff

vs

CANADIAN NORTH INC., a duly constituted
corporation pursuant to the *Canada Business
Corporations Act*, having a registered office at
4902 - 49 Street, PO Box 939, in the city of
Yellowknife, in the Northwest Territories,
X1A 2N7

Respondent

and

FTI CONSULTING CANADA INC.

Mis en Cause/Monitor

**AMENDED MOTION TO RECOVER AMOUNTS DUE FOR GOODS SUPPLIED AND SERVICES
RENDERED AND FOR OTHER ORDERS**
(Sections 9 and 11 of the *Companies' Creditors Arrangement Act* R.C.S. 1985 c. C-36)

TO THE HONOURABLE JUSTICE MARK SCHRAGER OR TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTRÉAL, THE PETITIONER RESPECTFULLY SUBMITS THE FOLLOWING:

1. On December 19, 2008, the Plaintiff, Aveos Fleet Performance Inc./Aveos Performance Aéronautique Inc. ("**Aveos**"), entered into a seven-year *General Terms Agreement for B737 Technical Services* effective January 1, 2009 (the "**B737 Agreement**"), **Exhibit P-1**, with the Defendant, Canadian North Inc. ("**Canadian North**");
2. Sections 23.1 and 23.2 of the B737 Agreement provide that said agreement is subject to the laws applicable in and jurisdiction of the courts of the Province of Québec;
3. In the context of the application of the *Companies' Creditors Arrangement Act* (the "**CCAA**") to Aveos, as more fully explained in paragraph 11 of the present Motion, Aveos respectfully submits this matter to the jurisdiction of this honourable Court;
4. Under the B737 Agreement, Aveos provided parts and materials and serviced aircraft and equipment for aircraft operated by Canadian North. Namely, Aveos performed Heavy Airframe Maintenance Services, Engine and Auxiliary Power Unit (APU) Maintenance Services, Component Maintenance Services, Line Maintenance Services and Fleet Management Services;
5. Except for heavy maintenance work known as "C" checks which was to be performed at specified rates, the remuneration under the B737 Agreement was based on a "Power By The Hour" ("**PBH**") approach where the customer pays a fixed fee for each hour the asset is operated, which covers agreed upon criteria (including, but not limited to maintenance, repairs, components, engineering, etc.);
6. Under the B737 Agreement, Canadian North was to pay Aveos a fixed fee per hour of flight operation. The payment of this PBH rate was not linked to the performance of a specific volume of maintenance by Aveos;
7. In return, and separate and apart from Canadian North's obligations under the contract, Aveos agreed that it would perform maintenance as specified in the scope of the B737 Agreement, as it was required by the operations of Canadian North. This maintenance was to take place regardless of whether it was forecasted at that time or not. Despite the quality of a maintenance forecast, there can be a large variance between the forecasted requirement and the actual requirement in any given time period;
8. The benefits and main reasons that airlines enter into PBH contracts with suppliers, and the benefits and main reasons that Canadian North entered into the B737 Agreement with Aveos, include:

- (a) PBH contracts act as a cash management tool, providing predictable cash flow and transferring the risk of unpredictability from the customer to the vendor;
 - (b) Maintenance is done as needed, without disruption to the customer. This comes at a cost to the vendor, as it must always be able to accommodate the customer; and
 - (c) The contract effectively acts as an insurance policy for the customer;
9. Under this type of arrangement, the obligations of the parties are not interdependent. In other words, a monthly payment by the customer is not a function of the amount of services actually rendered during a given period, as the market value of the services may either exceed or not be as high as the amount of payment;
10. On November 5, 2010, Aveos and Canadian North entered into a five-year *License and Support Services Agreement* (the “**License Agreement**”), **Exhibit P-2**, pursuant to which Aveos granted Canadian North the right to use Aveos’ aircraft maintenance planning and management software known as SMART, and has also provided training and support services to facilitate the use of said software;
- 10.1 On November 5, 2010, the parties executed a Fleet Management Services Agreement for Boeing B737-300 aircraft, **Exhibit P-9**;
- 10.2 On November 8, 2010, the parties executed Supplement 2 to the B737 Agreement which provided the PBH rate for Boeing B737-300 aircraft, **Exhibit P-10**;
- 10.3 The B737 Agreement was also amended three times to reflect changes in Canadian North’s usage of its aircraft and to modify the PBH rate to be paid to Aveos, as appears from the First Amendment Agreement dated May 28, 2009, **Exhibit P-11**, the Second Amendment Agreement dated November 18, 2009, **Exhibit P-12**, and the Third Amendment Agreement dated December 13, 2010, **Exhibit P-13**;
11. On March 19, 2012, this Honourable Court issued an Initial Order (as amended on March 30, 2012, April 5, 2012 and May 4, 2012, the “**Initial Order**”), pursuant to the CCAA in respect of Aveos;
12. Pursuant to the Initial Order, a monitor was appointed to Aveos and a stay of proceedings until April 5, 2012 was ordered. Pursuant to an Order made on April 5, 2012 in response to Aveos’ First Motion for an Order to Extend the Stay Period, the stay of proceedings was extended until May 4, 2012. Finally, pursuant to the Amended and Restated Initial Order made on May 4, 2012 in response to Aveos’ Second Motion for an Order to Extend the Stay Period, the stay of proceedings was extended until July 20, 2012, as appears from the Court record;

13. On Sunday March 18, 2012, the day before the issuance of the Initial Order and not a business day, Canadian North e-mailed Aveos a Notice of Termination of Agreement regarding the B737 Agreement (the "Termination Notice"), Exhibits P-3 *en liasse*;
14. Canadian North purported to terminate the B737 Agreement for no other reason than the alleged insolvency of Aveos. Yet, on the Termination Notice date, Aveos had duly performed and was duly performing all of its obligations under the B737 Agreement without any complaints whatsoever from Canadian North with regard to the services provided;
15. Concurrent with the issuance of the Initial Order, Aveos ceased its regular operations;
16. Following the sending of the Termination Notice P-3, representatives of Aveos and Canadian North had discussions and agreed that the sum owed by Canadian North to Aveos as of May 2012 pursuant to the B737 Agreement and as of March 2012 pursuant to the License Agreement would be reduced and settled at \$1,109,746.19 (the "Debt"), as appears from the statement of account dated May 3, 2012, Exhibit P-4;
17. Aveos compromised on the amount originally owed by Canadian North under both Agreements only because of the Canadian North commitment to pay the Debt immediately after its final amount was agreed upon;
18. However, once the amount of the Debt had been established and settled, Canadian North refused to pay it, acting therefore in bad faith with regard to the agreement reached by the parties;
19. On June 1, 2012, Aveos served Canadian North with a demand letter, Exhibit P-5, requiring payment of the Debt as well as the additional amounts owed for the use after the issuance of the Initial Order, by Canadian North, of Aveos inventory in possession of Canadian North after the issuance of the Initial Order. As appears from the inventory statement, Exhibit P-6, fair market value of Aveos for such inventory is \$69,050;
20. In the demand letter, P-5, Aveos also informed Canadian North that it would terminate the License Agreement P-2 within fifteen (15) days;
21. On the same date, Canadian North responded to the demand letter admitting owing the Debt and acknowledging its obligation to compensate Aveos for the use of its inventory, as appears from Canadian North's letter dated June 1, 2012, Exhibit P-7;
22. On June 11, 2012, a representative of Canadian North e-mailed Aveos the Canadian North bid for the Aveos 737-200 and 737-300 parts and tooling, Exhibit P-8 *en liasse*, in which Canadian North offers to unconditionally release from its counsel trust account and pay in favour of Aveos the amount of the Debt, thereby admitting once more that it owed this sum;

23. Since the Initial Order and until June 26, 2012, Aveos continued to provide Canadian North with full access to SMART software in spite of non-payment by Canadian North of License Agreement fees;
24. On or about June 26, 2012, Aveos effectively terminated Canadian North's access to write new information to the SMART software under the License Agreement in view of the continuing defaults of Canadian North. However, Aveos has allowed, up to the date of the present Motion, without any obligation on the part of Aveos, Canadian North to continue to access and read maintenance information entered prior to June 26, 2012 from the SMART software;
25. To date, Canadian North has neglected, omitted or refused to pay the Debt, and the outstanding sum of \$23,625, owed to Aveos under the License Agreement for April, May and June 2012, despite Canadian North having no valid claim against Aveos regarding any liquid and exigible debt as of the date of the Initial Order;
- 25.1 On or around February 15, 2013, while Aveos' Chief Restructuring Officer and his team were preparing the file for trial, an error was detected in the statement of account P-4 with respect to a credit for March 2012 flying hours on invoice number 04-8603-12-I which was prepared post-filing;
- 25.2 The error was discovered when the Chief Restructuring Officer of Aveos questioned the reasons for the March 2012 billing being in a negative position, as appears from Exhibit P-4;
- 25.3 In effect, Aveos incorrectly provided Canadian North with a credit note for the sum of \$435,160.90 in the midst of the post-filing frenzy and disruption of day-to-day business, which included termination of accounting employees who had knowledge of the Canadian North file;
- 25.4 The PBH amount for March 2012 should have been added to the total amount owed by Canadian North and no credit should have been applied to the February 2012 PBH amount;
- 25.5 Aveos therefore files in support of its claim Exhibit P-4(h), a statement of account dated February 15, 2013, to correct the amount owed by Canadian North to the global sum of \$2,229,282.20;
- 25.6 Canadian North knew or should have known of the error made by Aveos in its statement of account P-4;
- 25.7 However, Canadian North chose not to disclose the error in the course of its negotiations with Aveos and in the context of the present proceedings, showing its bad faith;

25.8 In support of the statement of account, Aveos also files:

- (a) Exhibit P-4(a), an invoice dated February 6, 2012, bearing number 02-8606-12-I, issued as per Supplemental PBH Agreement to cover the B737-300 (FIN 590 and 591) aircraft for January 2012 flying hours;
 - (b) Exhibit P-4(b), an invoice dated March 5, 2012, bearing number 03-8604-12-I, issued as per Supplemental PBH Agreement to cover the B737-300 (FIN 590, 591 and 592) aircraft for February 2012 flying hours;
 - (c) Exhibit P-4(c), an invoice dated February 3, 2012, bearing number 02-8605-12-I, issued to cover the seven B737-200 aircraft for the month of January 2012 based on actual flying hours, as per the Maintenance Services Agreement effective January 1st, 2009 and Amendment effective as of January 1st, 2010;
 - (d) Exhibit P-4(d), an invoice dated March 5, 2012, bearing number 03-8603-12-I, issued to cover the seven B737-200 aircraft for the month of February 2012 based on actual flying hours, as per the Maintenance Services Agreement effective January 1st, 2009 and Amendment effective as of January 1st, 2010;
 - (e) Exhibit P-4(e), an invoice dated April 18, 2012, bearing number 04-8603-12-I, issued to cover the seven B737-200 and 300 aircraft for the period of March 1st, 2012 to March 18, 2012 based on actual flying hours, which has incorrectly credited the February 2012 PBH amount from Canadian North's statement of account;
 - (f) Exhibit P-4(f), an invoice dated February 15, 2013, bearing number 02-7000-13-CR, being a credit invoice issued to negate invoice 04-8603-12-I (Exhibit P-4(e) which incorrectly credited the February 2012 PBH amount for the B737-200 and 300 aircraft;
 - (g) Exhibit P-4(g), an invoice dated February 15, 2013, bearing number 02-7001-13-F, issued to cover the B737-200 and 300 aircraft for March 2012 based on actual flying hours;
26. Aveos is therefore entitled to claim from Canadian North the global amount of \$2,229,282.20, plus interest at the legal rate, as well as the additional indemnity provided for by Article 1619 of the *Civil Code of Quebec* from June 1st, 2012;
27. Aveos also prays this honourable Court to declare that the Termination Notice is null and void according to the Initial Order which forbids parties to terminate agreements entered into with Aveos by reason of insolvency;
28. In fact, pursuant to Section 15 of the B737 Agreement, the effective date of termination of the agreement for insolvency of a party is the date of receipt of notice by the insolvent party;

29. Pursuant to Section 29 of the B737 Agreement, the closest effective date of a notice, if transmitted by fax, is the business day following its communication. It should be noted that email, used by Canadian North to send the Termination Notice, is not mentioned in the B737 Agreement as a valid means of communication;
30. Thus, the Termination Notice sent by e-mail on March 18, 2012 is deemed to have been received, and was therefore only effective, on March 19, 2012 at the earliest, after the Effective Time of the Initial Order, i.e. 12.01 a.m. Consequently, the Termination Notice is null and void;
31. Also, Aveos prays this honourable Court to order that inventory listed in the inventory statement, P-6, currently in the possession of and being used by Canadian North, be returned to Aveos within 10 days of the judgement to be rendered on the present Motion, together with all pertaining records, including traceability records and non-incident statement for each item within 10 days of the Order to be rendered herein;
32. Finally, Canadian North and Aveos exchanged engines under Section 3.3 of Annex B-2 of the B737 Agreement, P-1, but Canadian North failed to deliver to Aveos the documents required by transport regulations including maintenance documents, back-to-birth records for life limited parts and non-incident statements for the period operated by Canadian North for the five following engines: ESN 674234, ESN 696751, ESN 709511, ESN 709491 and ESN 688588;
33. Thus, Aveos prays this honourable Court to order Canadian North to deliver to Aveos the documents required by transport regulations including maintenance documents, back-to-birth records for life limited parts and non-incident statements for the period operated by Canadian North for the five following engines: ESN 674234, ESN 696751, ESN 709511, ESN 709491 and ESN 688588;
34. The present Motion is well-founded both in fact and in law.

WHEREFORE, MAY IT PLEASE THIS HONOURABLE COURT TO:

GRANT the present Motion;

CONDEMN Defendant, Canadian North Inc., to pay to Plaintiff, Aveos Fleet Performance Inc./Aveos Performance Aéronautique Inc., the sum of \$2,229,282.20, plus the interest at the legal rate, as well as the additional indemnity provided for by Article 1619 of the *Civil Code of Quebec* since June 1st, 2012;

DECLARE that the Termination Notice, Exhibit P-3, of the *General Terms Agreement for B737 Technical Services* is null and void in accordance with the Initial Order;

ORDER Defendant, Canadian North Inc., to deliver to Plaintiff, Aveos Fleet Performance Inc./Aveos Performance Aéronautique Inc., the inventory listed in the inventory statement, Exhibit P-6, together with all pertaining records, including

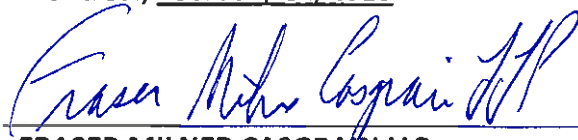
traceability records and non-incident statement for each item within 10 days of the Order to be rendered herein;

ORDER Defendant, Canadian North Inc., to deliver to Plaintiff, Aveos Fleet Performance Inc./Aveos Performance Aéronautique Inc. the documents required by transport regulations including maintenance documents, back-to-birth records for life limited parts and non-incident statements for the period operated by Canadian North for the five following engines: ESN 674234, ESN 696751, ESN 709511, ESN 709491 and ESN 688588;

REQUEST the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court of administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of any judgment rendered in this matter;

THE WHOLE with costs, on a solicitor-client basis.

Montréal, February 21, 2013

A handwritten signature in blue ink, appearing to read "Fraser Milner Casgrain LLP", is written over a horizontal line.

FRASER MILNER CASGRAIN LLP

Attorneys for the Petitioners

AFFIDAVIT

I, the undersigned, **JONATHAN SOLURSH**, Chief Restructuring Officer of the Petitioners in the present matter, domiciled, for the purposes hereof, at 7171 Côte Vertu Boulevard, in the City and district of Montreal, Province of Quebec, do solemnly declare:

1. I am the Chief Restructuring Officer of the Petitioners in the present matter;
2. All of the facts alleged in the present Amended Motion to Recover Amounts Due for Goods Supplied and Services Rendered and for Other Orders are true.

AND I HAVE SIGNED:

JONATHAN SOLURSH

SOLEMNLY DECLARED before me at Montreal,
this 21st day of February 2013

COMMISSIONER OF OATHS FOR QUEBEC

NATALIA GRACOVETSKY Notary for the
Province of Quebec, District of Montreal,
CANADA. # 61494.



No. 500-11-042345-120

SUPERIOR COURT
Commercial Division
DISTRICT OF MONTRÉAL

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

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

**And
AERO TECHNICAL US, INC.**

Insolvent Debtors/Petitioners

**vs
CANADIAN NORTH INC.**

Respondent

**And
FTI CONSULTING CANADA INC.**

Mis en cause/Monitor

Roger P. Simard

File: 548731-1

**AMENDED MOTION TO RECOVER AMOUNTS DUE FOR
GOODS SUPPLIED AND SERVICES RENDERED AND FOR
OTHER ORDERS**

**(Sections 9 and 11 of the *Companies' Creditors
Arrangement Act* R.C.S. 1985 c. C-36)**

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