# SUPERIOR COURT
## (Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-042345-120

DATE: May 8, 2012

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**PRESIDING: THE HONOURABLE MARK SCHRAGER, J.S.C.**

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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

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**REASONS FOR JUDGMENT**

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**Introduction**

[1] Following are the reasons for the judgment and amended order issued on May 4, 2012 with regard to the directors' and officers' («D&O») charge.

JS 1319

[2] The initial order under the Companies' Creditors Arrangement Act[1] («CCAA») was issued by the undersigned on March 19, 2012. The order included a $5 million D&O charge pursuant to section 11.51 CCAA.

[3] On the evening of March 19, 2012 and, after the filing, all of the directors but one resigned. The remaining director signed an affidavit in support of the motion to name a chief restructuring officer («CRO»), which was presented to and granted by the undersigned on March 20, 2012.

[4] The operations of Aveos remaining as at the issuance of the initial order on March 19 were shut down as of 1 PM on March 20, 2012. This shutdown included the termination of the remaining employees but for a limited number (approximately 82) retained to assist in the liquidation of the Debtors' assets. (The airframes division was closed just before the filing under the CCAA. The employees working in that division were terminated on March 18, 2012.)

[5] The facts as presented to this Court by the Debtors in support of the motion to name the CRO were that, faced with the inability to obtain accommodations requested from Air Canada and daily expenses of $500,000, it was deemed impossible by the Directors for Aveos to pursue its business operations.

[6] At the initial hearing, it was reported that the D&O liability insurance would expire on May 1, 2012. No details were provided to the Court of the coverage. On March 19, 2012, the Debtor's ability to pay any renewal premium was doubtful given the liquidity crisis.

[7] Against this factual context and given the principles for establishing a D&O charge, the undersigned suggested at the initial comeback hearing that the amount of the D&O charge was, in the circumstances, exaggerated or the very existence of a D&O charge was no longer justified so that in either event the matter should be re-visited. To this end counsel for the Debtors and the Monitor informed the former directors and it was agreed that the matter would be addressed at the hearing scheduled for the continuation of the stay order on May 4, 2012.

[8] The directors have presented a motion seeking that the charge in their favour be reduced to $2 million.

[9] The Court was informed at the hearing of the directors' motion that the policy period has been extended until April 30, 2013 and that the coverage limit under the D&O liability insurance policy is $100 million. No documents have been produced so that the Court is unaware of the extent of the coverage or exclusions nor of any other particulars.

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[1] R.S.C., 1985, c.C-36.

## ISSUE

[10] The issue before the Court is whether the amount of the D&O charge created in the initial order should be reduced or if, in the circumstances described above, the charge should be eliminated.

## DISCUSSION

[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».[2]

[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.[3]

[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 filing.[4]

[14] The Monitor and counsel for the union suggest another purpose underpinning the D&O charge, namely the ultimate benefit of the employees. Directors are personally liable for certain employee claims. The recourse of employees against directors for various statutory liabilities does not guarantee recovery. Thus, creating security in favour of directors for sums in respect of which they are liable to employees but for which the company is ultimately liable, enhances the employees' chances of recovery by in effect creating security for their claims.

[15] In the present case, realistically, there will be no continuation of the business by the Debtors. A sales process has been approved by this Court and initiated by Aveos under the guidance of the CRO and the Monitor. Hopefully this will result in a sale to one or more persons of all or parts of the assets and business enterprise of Aveos in the best interests of all stakeholders. The rationale behind maintaining the CCAA legal framework after the shutdown on March 20 and allowing Aveos to avoid a bankruptcy liquidation was the speed and flexibility of realization under the CCAA while maintaining the critical mass and enterprise value of Aveos so as to maximize the value of the assets and hopefully retain, in some measure, the business enterprise, again for the benefit of all stakeholders, including particularly employees. Although Aveos will no longer carry on the business, hopefully somebody else will do so.

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[2] *Century Services Inc.* v. *AG Canada*, [2010] 3 SCR 379, para. 15.
[3] Houlden & Morewetz, «The 2011 Annoted Bankruptcy and Insolvency Act, Carswell, 2001, p. 1066.
[4] *Mecachrome International Inc.*, [2009] QCCS 1575, para. 58, Gascon, j.c.s.

[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). After the filing, the directors were only in their positions for a few hours. They do not appear to have been directors when the post filing layoffs occurred on or around 1 PM on March 20, 2000. However counsel for the union suggested that the facts of those final hours may require closer scrutiny to see whether and when directors' liability was triggered by those post-filing layoffs.

[17] The second report of the Monitor indicates by way of rough estimate, post filing liability to employees of approximately $10 million per month (excluding severence). In any event the potential liability appears within the insurance coverage stated by the parties to be $100 million. Section 11.51(3) CCAA provides that where insurance coverage "could" be obtained, the D&O charge should not be granted. The initial order under the CCAA provides in paragraph 31 that the charge only has effect to the extent that the insurance coverage is not available or is insufficient. The parties urged that the Court not adhere to a literal reading of section 11.51(3) CCAA. Moreover as counsel for the union points out, the Court does not have the particulars of any exclusions in the D&O insurance policy. There may be uninsured liability that the D&O charge could satisfy.

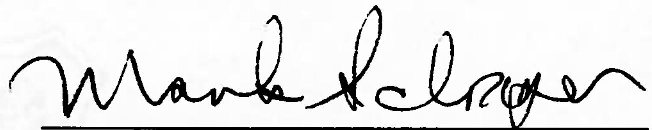
[18] The employees would like to retain the $5 million D&O charge as they feel, as set forth above, that the charge could only help them recover against directors and thus counsel for the union requested that the D&O charge be maintained at $5 million .

[19] From the record as it stands, it appears that Credit Suisse, the agent for the banking syndicate has valid security for a debt of $205 million. The Monitor's counsel is preparing a formal opinion but does indicate at this time that the security appears to be valid. Credit Suisse supports the directors' motion to reduce the charge to $2 million. Though nobody knows ultimately what the recovery on assets will be, the banking syndicate does have the initial if not most significant economic interest in any charge or security that primes the rank of the lenders' security. As such, the submission of Credit Suisse should be respected in this instance.

[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.



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Date of hearing: May 4, 2012

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