

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-042345-120

**SUPERIOR COURT
(Commercial Division)**

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

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/Plaintiffs

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

Insolvent Debtor/Plaintiff

vs

CANADIAN NORTH INC.

Respondent/Cross-Plaintiff

and

FTI CONSULTING CANADA INC.

Mis en cause/Monitor

**MOTION BY PETITIONER CANADIAN NORTH INC. TO SPLIT AN ACTION
(Article 273.1 of the Code of Civil Procedure)**

TO THE HONOURABLE JUSTICE MARC SCHRAGER OR TO ONE OF THE HONOURABLE
JUDGES OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR
THE JUDICIAL DISTRICT OF MONTRÉAL, RESPONDENT AND CROSS-PLAINTIFF
RESPECTFULLY SUBMITS THE FOLLOWING:

A. Introduction

1. Insolvent Debtors/Plaintiffs Aveos Fleet Performance Inc./Aveos Performance Aeronautique Inc. and Aero Technical US, Inc. (hereinafter collectively referred to as "**Aveos**") instituted an action against Respondent/Cross-Plaintiff Canadian North Inc.

(Hereinafter: "**Canadian North**") by way of *Motion to recover amounts for goods supplied and services rendered and for other orders*" (hereinafter: the "**Statement of Claim**"), claiming the following orders, summarized as follows:

- a. Payment of an amount of \$1,133,371.19 plus interest and indemnity;
- b. An order declaring that the Termination Notice (Exhibit P-3) issued by Canadian North to Aveos be declared null and void;
- c. Deliver up orders for certain inventory, records and documents (hereinafter: the "**Deliver up orders**");

The whole as more fully appears from the Statement of Claim and the Court record;

2. Canadian North filed a contestation and cross-claim (hereinafter: the "**Cross-Claim**") against the Statement of Claim, whereby:

- a. It admits owing an amount of \$ 1,109,746.79, the remaining difference of \$23,624.40 is contested;
- b. It maintains that the Termination Notice was validly issued on the one hand, and if not, then the parties acted as if the B737 Agreement was effectively terminated, on the other;
- c. It denies having to deliver-up the alleged inventory, records and documents. In any event, this issue may have become moot since said inventory records and documents have not been claimed by the party to which the related assets have been sold;
- d. And in Cross-Claim, seeking payment from Aveos of an amount of \$1,592,558.91 and claiming the right to effect legal or contractual compensation or set off of said amount against Aveos' claim;

The whole, as more fully appears from the Cross-Claim filed into the Court record;

3. Aveos filed an answer to the contestation and an inscription for proof and hearing on or about January 2, 2013;
4. Canadian North filed a preliminary Expert Report to support the relevancy of Aveos' DRA to establish a claim based on services paid in advance but not rendered. However, said Report does not confirm Canadian North's restatement calculations of Aveos' DRA and for this reason Canadian North intends to file an additional Expert Report, specifically on the quantum its claim;
5. By means of this motion, Canadian North seeks to split the issues of the quantum of its Cross-claim from the issue of Canadian North's right to a claim in the circumstances, and the right to effect legal or contractual compensation or set off of its claim against Aveos' claim and if necessary, from the inventory / documents / records issues;

6. More precisely, Canadian North seeks to have the issues of termination and of its right to set off its claim against Aveos' claim decided first by this Honourable Court, and the issues relating to the quantum of "damages" decided second;
7. As of the date of writing of this motion, the examinations before plea have been held, undertakings transmitted, and Aveos' response to Canadian North's plea and cross-claim and the inscription for proof and hearing have been filed

B. Reasons Justifying the Splitting of the Action

i) Canadian North's Claim

8. Aveos, in the Statement of Claim, alleges that:

"Under the B737 Agreement, Canadian North was to pay Aveos a fixed fee per hour of flight operation. The payment of the PBH¹ rate was not linked to the performance of a specific volume of maintenance by Aveos" (par. 6 of the Statement of Claim)

9. Canadian North contests this allegation and alleges, in its Cross-claim, rather that:

"Canadian North denies as drafted paragraph 6 of the Motion and adds that the payment was linked to a specific volume of maintenance by Aveos as it was an underlying principal consideration of the B737 Agreement (as defined in the Motion) for the reasons mentioned in further contestation hereafter;" (par. 6 of the Cross-Claim)

10. Further to this, Canadian North alleges that it paid for services that were ultimately not rendered by Aveos at the time of the issuance of the Initial Order and estimates that such overpayment or services paid in advance are for an amount of \$1,592,558.91 and asks in Cross-Claim the set-off of an amount equal to Aveos' claim (\$1,133,371.19) from Aveos (See paragraphs 75 and following of the Cross-Claim);
11. In its answer to Canadian North's plea and cross-claim, Aveos denies owing any sums of money to Canadian North following the termination of the B737 Agreement and denies that Canadian North may have a legitimate claim to make against Aveos;

ii) Legal Right to effect Compensation or Set-Off

12. Canadian North will argue its right to effect compensation or set off according to Law of its claim against Aveos' claim, as provided by section 21 of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, which reads:

"The law of set-off or compensation applies to all claims made against debtor company and to all actions instituted by it for recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be";

¹ As the defined in the Statement of Claim ("Power by the Hour rate")

13. Articles 1672 and following of the Québec Civil Code are therefore applicable to the situation between the parties, and the fact that Aveos' monetary claim is admitted to in large part by Canadian North while the latter's counter-claim needs to be judicially liquidated is not a bar to having the issue decided in the context of the same litigation if there is connexity between the claims (*Henderson v. Vegpro International*, 2009 QCCA 238);

iii) Contractual Right to Effect Compensation or Set Off

14. Section 5.6 of the B737 Agreement reads as follows:

"At the termination of this Agreement, any amounts owed by one Party to the other Party will first be set-off against outstanding invoices or credits with any balance remaining payable within thirty (30) days of the termination of the Agreement"

(Emphasis added)

15. As more amply detailed in the Statement of Claim and the Cross-Claim, Canadian North issued a Termination Notice of the B737 Agreement on Sunday March 18, 2012 (exhibit P-3);
16. Canadian North further alleges in its cross-claim that prior to the issuance of the Termination Notice, the parties had agreed to such termination, and pursuant to the issuance of said Termination Notice, the parties acted in such a way as to acknowledge de facto the termination of the B737 Agreement;
17. Aveos contests the validity of the Termination Notice, seeking from this Honourable court that it be declared null and void, as appears from the Statement of Claim;
18. The purpose of Aveos' position on the issue of the validity of the Termination Notice is to specifically attempt to avoid the consequences of the application of section 5.6 of the B737 Agreement;
19. Moreover, Aveos alleges in its response to Canadian North's plea and cross claim that *"the B737 Agreement does not provide that, at its natural end or early termination by the parties, adjustment payments will be made by either CN or Aveos in consideration of the number of engine overhauls, paint jobs or other scheduled maintenance events performed versus what was anticipated by the parties for the term of the Agreement"* (par. 32 of the answer to the contestation);
20. It is Canadian North's position that the issue of its right to effect compensation or set off, whether on a legal or contractual basis, should be decided first, and before the parties begin to assess the quantum of Canadian North's Cross-claim, for the following reasons:

iv) **The Quantum of Canadian North's Cross-Claim**

21. The estimated² value of PBH maintenance services³ paid in advance by Canadian North but not rendered by Aveos at the time of issuance of the Initial Order is for an amount of \$1,592,558.91 (see paragraph 83 of the Cross-Claim), which amount should have been in Aveos' Deferred Revenue Account ("DRA"), according to Canadian North;
22. However, according to Aveos (as alleged in the Cross-Claim), the balance of the DRA at the time of the issuance of the Initial Order was only \$471,796.41;
23. Canadian North further alleges that the difference between the two numbers is due to "*certain irregularities in Aveos' accounting*" (par. 82 of the Cross-Claim), and that a re-statement of the DRA is necessary;
24. In order for Canadian North to achieve such a re-statement and prove its allegations on the merits as to the impact of these alleged irregularities in the accounting related to the DRA, an complementary forensic accounting expertise will need to be prepared and filed, to which Aveos will have the right to respond or contest;
25. It is foreseeable that the costs, time, effort and trial time to be expanded by the parties and the judicial system in order to properly hear and debate this issue (the correct balance of the DRA at the time of the issuance of the Initial Order) will equal or exceed what is foreseeable to debate all the other issues combined;
26. However, this entire issue becomes moot if Canadian North does not have the mere right to claim as alleged by Aveos or does not have the right to exercise legal or contractual compensation or set off of its claim against Aveos' claim in the circumstances ;
27. It is therefore in the interest of the parties and the judicial system to debate these issues first;
28. The debate on the existence of Canadian North's claim and its right to effect legal or contractual compensation or set off in the circumstances can be done, without excessive costs and time spent by the parties and without undue usage of judicial resources, given that the questions at issue are mainly (but not exclusively) of Law, and as for the facts that are relevant, these are mainly bound in time from about March 14, 2012 to March 19, 2012 (see paragraphs 48 to 46 of the Cross-Claim) and subsequent behaviour of the parties regarding the B737 Agreement, and does not require additional expert evidence to be adduced on the quantum of Canadian North's Cross-claim;
29. More specifically, the questions that should be decided first and before the assessment of the quantum of damages are:
 - a. Does Canadian North have a claim against Aveos based on Aveos' DRA and/or services paid twice by Canadian North?

² As estimated by Canadian North at the time of writing of the Cross-Claim;

³ As defined in the Statement of Claim and the Cross-Claim;

The debate on this issue is mostly a question of Law and contractual interpretation and can be done relatively quickly, and should the Court agree with Aveos on the issue, then the Cross-Claim becomes moot;

- b. Does Canadian North have a right to effect legal compensation of its claim against Aveos' claim within the context of Aveos' CCAA filing?

The debate on this issue is mostly a question of Law and can be done relatively quickly, and should the Court agree with Canadian North's position on the issue, it is not necessary to examine the next question at sub-paragraph 28 c) hereafter;

- c. If not, does Canadian North have the right to effect contractual compensation or set off in the circumstances as provided by section 5.6 of the B737 Agreement?


The debate on this issue is of Law and fact, given that the court must also answer the question of whether the B737 Agreement was validly terminated by Canadian North or if such termination is null and void, and whether the behaviour of the parties subsequent to the termination showed that the B737 Agreement was de facto terminated.

30. Should this Court agree with Canadian North's position regarding the existence of its claim and its right to effect compensation in the circumstances, the parties will then proceed towards the remaining issues, including the preparation of complementary and/or additional forensic expertises relevant to the establishing of the quantum of the Cross-Claim, without the court file being unduly delayed;
31. Such a decision might even encourage the parties to try and negotiate an out of court settlement that settles all issues;
32. However, should this Court disagree with Canadian North on its right to effect compensation in the circumstances, then there are potentially significant benefits to the parties and to the judicial process as a whole to be gained, in that:
- a. Chances for a full or partial settlement of this case would be much better, given that the remaining contested amount is only \$23,624.40 (Canadian North reminds this Court that it admits owing an amount of \$1,109,746.79 subject to its set-off right);
 - b. Costs for the parties could be significantly reduced;
 - c. The use of judicial resources could be significantly reduced, given that the parties will not have to debate potential interlocutory motions related possibly to objections to communication of documents or access to documents relevant to complete the expertise reports, for example, nor would the court and the parties have to sit through and debate and consider potentially conflicting expert reports and expert testimony on the matter, all of which will undoubtedly reduce the ultimate trial time and date at which the file will be set for proof and hearing;
33. Moreover, splitting the action at this point and in the manner asked for by Canadian North does not cause any prejudice to Aveos and is made in the interest of justice, the parties and the judicial process;

FOR THESE REASONS, MAY IT PLEASE THIS HONOURABLE COURT TO:

- [A] **GRANT** this Motion to split an action;
- [B] **ORDER** the splitting of the action instituted by Insolvent Debtors/Plaintiffs Aveos Fleet Performance Inc./Aveos Performance Aéronautique Inc. and Aero Technical US, Inc. against Respondent/Cross-Plaintiff Canadian North Inc. by way of *Motion to recover amounts for goods supplied and services rendered and for other orders*" dated July 16, 2012 in the court file number 500-11-042345-120;
- [C] **ORDER** that the following questions be heard on the merits and decided upon by the Court first:
- a. Does Canadian North have a claim against Aveos?
 - b. Does Canadian North have a right to effect legal compensation of its claim against Aveos' claim within the context of Aveos' CCAA filing?
 - c. If not, was the B737 Agreement validly terminated and?
 - d. Does Canadian North have the right to effect contractual compensation or set off in the circumstances as provided by section 5.6 of the B737 Agreement?
 - e. If necessary, the determination of the inventory / Records / documents issues
- [D] **ORDER** that the remaining issue of the quantum of Canadian North Inc.'s Cross-Claim on the merits of this file be heard second, after a decision has been rendered by this Court on the questions listed at paragraph [C] of this order, if necessary;
- [E] **THE WHOLE** without costs, unless contested by Insolvent Debtors/Plaintiffs.

MONTREAL, February 8, 2013


MILLER THOMSON POULIOT LLP
Attorneys for the Respondent/Cross Plaintiff

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No: 500-11-042345-120

1. **SUPERIOR COURT**
(Commercial Division)
(Sitting as a court designated pursuant to the
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R.S.C. 1985, c. C-36)

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/Plaintiffs

AVEOS FLEET PERFORMANCE INC. /
AVEOS PERFORMANCE AÉRONAUTIQUE INC.
Insolvent Debtor/Plaintiff

vs

CANADIAN NORTH INC.
Respondent/Cross-Plaintiff
and

FTI CONSULTING CANADA INC.
Mis en cause/Monitor

ATTESTATION D'AUTHENTICITÉ
Selon l'article 82.1 du C.p.c.

J'atteste que la copie du formulaire de l'affidavit est conforme au fac-similé de cet acte reçu par télécopieur :

Nature du document :	Affidavit de Steve Hankirk
Numéro de Cour :	500-11-042345-120
Nom de l'expéditeur :	Margaret Mackay
Numéro du télécopieur émetteur :	1-403-250-2019

Lieu de la transmission : Calgary
Date de la transmission : 8 février 2013
Heure de transmission : 1h22 (heure de Calgary)

Montréal, le 8 février 2013




Stéphane Hébert,
Miller Thomson Pouliot, sncrl

AFFIDAVIT

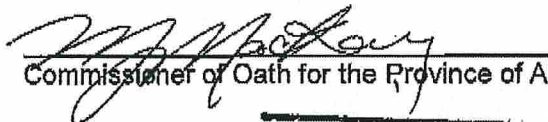
I, the undersigned, **Steve Hankrik**, President of the Respondent/Cross-Plaintiff, Canadian North Inc., in the present matter, domiciled, for the purposes hereof, at 200, 580 Palmer Road NE, Calgary, AB, T2E 7R3, do solemnly declare:

1. I am President of the Respondent/Cross-Plaintiff, Canadian North Inc.;
2. All the facts alleged in the present Motion by Petitioner Canadian North Inc. to Split an Action are true;

AND I HAVE SIGNED


Steve Hankrik

Solemnly declare before me at
Calgary, this 8th day of February 2013


Commissioner of Oath for the Province of Alberta

Margaret Mackay
*Commissioner for Oaths in and
for the Province of Alberta*
Appointee #0764010
Expiry Date: 07 JULY 14



Margaret Mackay
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TO: Stephane Hebert, Miller Thomson
DATE: February 8, 2013
FAX NO: 514 875-4308
RE: Affidavit

As requested, please find a copy of the sworn affidavit attached. A copy will also be scanned and sent to you directly.

Regards,

/mvm

NOTICE OF PRESENTATION

TO:

Me Roger P. Simard
Fraser Milner Casgrain
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Me Sylvain Rigaud
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1, Place Ville-Marie, Suite 2500
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TAKE NOTICE that the present Motion by Petitioner Canadian North Inc. to Split and Action will be presented before the honourable judge Mark Schrager of the Superior Court sitting in the district of Montréal, in room **16.12** of the Montréal Courthouse located at 1, Notre-Dame Street East, on **February 28, 2013**, at **9:00 am**.

Montreal, February 8, 2013.



MILLER THOMSON POULIOT LLP
Attorneys for the Respondent/Cross Plaintiff

N° 500-11-042345-120

COURT **SUPERIOR**
(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/Petitioners

AVEOS FLEET PERFORMANCE INC./
AVEOS PERFORMANCE AÉRONAUTIQUE INC.

Insolvent Debtor/Plaintiff

vs

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Respondent/Cross-Plaintiff

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FTI CONSULTING CANADA INC.

Mis-en-cause/Monitor

MOTION BY PETITIONER CANADIAN NORTH INC. TO SPLIT AN
ACTION (ARTICLE 273.1 OF THE CODE OF CIVIL PROCEDURE)
AND "ATTESTATION D'AUTHENTICITÉ"

ORIGINAL

REF.: ME STÉPHANE HÉBERT 144370-0003

BP / 0363

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