

FEDERAL COURT

ADMIRALTY ACTION *IN PERSONAM*

BETWEEN:

OCEAN NAVIGATION INC.

Plaintiff

and

ABITIBI-CONSOLIDATED INC.

and

CNA CANADA also operating as
CONTINENTAL CASUALTY COMPANY

and

THE ST. PAUL FIRE AND MARINE INSURANCE COMPANY
also operating as ST. PAUL TRAVELERS

and

ROYAL & SUNALLIANCE DU CANADA

and

ALLIANZ INSURANCE COMPANY OF CANADA

Defendants

MOTION RECORD OF THE DEFENDANT ABITIBI-CONSOLIDATED INC.
FOR AN ORDER TO RECOGNIZE AND ENFORCE A STAY OF PROCEEDINGS IN
THE FEDERAL COURT

(Section 50 *Federal Courts Act* and Rules 3, 4, 53, 54,
and 385 of the *Federal Courts Rules*)

STIKEMAN ELLIOTT LLP
Joseph Reynaud
Solicitors for ABITIBI-CONSOLIDATED
INC. in the CCAA proceedings
1155 René Lévesque Blvd. West
Suite 4000
Montreal, Quebec, H3B 3V2
Phone: (514) 397-3019
Telecopier: (514) 397-3616

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NO. T-2227-06

FEDERAL COURT

ADMIRALTY ACTION *IN PERSONAM*

BETWEEN:

OCEAN NAVIGATION INC.

Plaintiff

and

ABITIBI-CONSOLIDATED INC.

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CNA CANADA also operating as
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and

THE ST. PAUL FIRE AND MARINE INSURANCE COMPANY
also operating as ST. PAUL TRAVELLERS

and

ROYAL & SUNALLIANCE DL CANADA

and

ALLIANZ INSURANCE COMPANY OF CANADA

Defendants

NOTICE OF MOTION

(Rule 359)

TAKE NOTICE THAT the Defendant ABITIBI-CONSOLIDATED INC. will make a motion to the Court on Monday, October 26, 2009 at 9h30 o'clock a.m. or so soon thereafter as the motion can be heard, at the Federal Court of Montreal, 30 McGill Street, Montreal, Quebec. The estimated duration of the hearing of the motion is 40 minutes;

THE MOTION IS FOR:

1. An Order recognizing and enforcing, in Federal Court file number T-2227-06, a stay of proceedings issued on April 17, 2009 by the Honourable Justice Gascon of the Superior Court of Quebec under the *Companies' Creditors Arrangement Act* in respect of Defendant ABITIBI-CONSOLIDATED INC.; and
2. Such other or further order as this Honourable Court might deem appropriate in these circumstances; and
3. Costs of this motion.

THE GROUNDS FOR THE MOTION ARE THE FOLLOWING:

1. On December 19, 2006, Plaintiff Ocean Navigation Inc. filed a *Statement of Claim* against Defendant Abitibi-Consolidated Inc. ("ACI") in Federal Court file number T-2227-06 (the "**Federal Court Proceedings**") claiming, *inter alia*, a general average contribution from ACI in the capital amount of CDN \$443,929.56 plus interest and costs, as appears from the Court record;
2. On April 17, 2009, the Superior Court of Quebec, Commercial Division (the "**CCAA Court**") issued an Order (as subsequently amended and restated from time to time, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**" and "**CCAA Proceedings**") in respect of (i) Abitibi-Consolidated Inc. ("ACI") and subsidiaries thereof (collectively, the "**Abitibi Petitioners**");¹ (ii) Bowater Canadian Holdings Inc. and subsidiaries thereof (collectively, the "**Bowater Petitioners**")² and (iii) certain partnerships;³

¹ The Abitibi Petitioners are Abitibi-Consolidated Inc., Abitibi-Consolidated Company of Canada, 3224112 Nova Scotia Limited, Marketing Donohue Inc., Abitibi-Consolidated Canadian Office Products Holdings Inc., 3994326 Canada Inc., 6159678 Canada Incorporated, 4042140 Canada Inc., Donohue Recycling Inc., 1562756 Ontario Inc., 4217925 Nova Scotia Company, La Tuque Forest Products Inc., Abitibi-Consolidated Nova Scotia Incorporated, Saguenay Forest Products Inc., Terra Nova Explorations Ltd., The Jangoups Pulp Company, The International Bridge and Terminal Company, Sorelville Mining Ltd. and 9159-3825 Québec Inc.

² The Bowater Petitioners are Bowater Canadian Holdings Incorporated, Bowater Canada Finance Corporation, Bowater Canadian Limited, 3291378 Nova Scotia Company, AbitibiBowater Canada Inc., Bowater Canada Treasury Corporation, Bowater Canadian Forest Products Inc., Bowater Shelburne Corporation, Bowater LeHavre Corporation, St. Maurice Lever Drive Company Limited, Bowater Treated Wood Inc., Canaval Hardboard Inc., 9048 9850 Québec Inc., Alliance Forest Products (PMA) Inc., Bowater Bellefleur Sawmill Inc., Bowater Millines Inc., Bowater Mills Inc., Bowater Guérin Inc. and Bowater Co. d'amer inc.

³ The partnerships are Bowater Canada Finance Limited Partnership, Bowater Pulp and Paper Canada Holdings Limited Partnership and Abitibi-Consolidated Finance LP.

3. On April 16, 2009, AbitibiBowater Inc. ("ABH"), Bowater Inc. and certain of their U.S. and Canadian subsidiaries filed voluntary petitions for relief under Chapter 11 of the *U.S. Bankruptcy Code* in the United States Bankruptcy Court for the District of Delaware and on April 17, 2009, ABH and certain petitioners (collectively with ABH, the "18.6 Petitioners")⁴ obtained orders under s. 18.6 of the CCAA in respect of the Chapter 11 Proceedings (the 18.6 Petitioners, the Abitibi Petitioners and the Bowater Petitioners being collectively referred to as the "Petitioners");
4. The Initial Order appointed Ernst & Young Inc. as monitor, (the "Monitor"), of the Petitioners and a stay of proceedings (the "Stay of Proceedings") was issued pursuant to which, *inter alia*, no right, legal or conventional, may be exercised against the Petitioners (including ACI) and any proceedings already commenced by anyone against the Petitioners were stayed and suspended until May 14, 2009, or until such later date as the CCAA Court may order (the "Stay Period");
5. The Stay Period was extended twice by Order of the CCAA Court, first until September 4, 2009 and a second time until December 15, 2009;
6. The Initial Order explicitly requests, *inter alia*, the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian Federal Court or administrative body to give effect to the Initial Order and to assist the Petitioners and the Monitor in carrying out the terms of the Initial Order;
7. The Initial Order also provides that the Petitioners and the Monitor are authorized and empowered to apply to any court for the recognition of the Initial Order;
8. On May 14, 2009, ACI counsel Fernandes Hearn LLP wrote to counsel for Plaintiff and to the Federal Court Administrator, informing them that ACI had filed for relief under the CCAA and under Chapter 11 in the United States and sending them a copy of the Initial Order;

⁴ The 18.6 Petitioners are AbitibiBowater Inc., AbitibiBowater US Holding 1 Corp., Bowater Ventures Inc., Bowater Incorporated, Bowater Norway Inc., Bowater Norway Mid-State Inc., Calaveras Property Holdings LLC, Bowater Finance Company Inc., Bowater South American Holdings Incorporated, Bowater America Inc., Lake Superior Forest Products Inc., Bowater Newsprint South LLC, Bowater Newsprint South Operations LLC, Bowater Finance II, LLC, Bowater Alabama LLC and Costa Pinas Golf Club Holdings LLC.

9. Plaintiff thereafter contested that the Stay of Proceedings applied in the Federal Court Proceedings and on September 10, 2009, Prothonotary Richard Morneau issued an Order that if the Defendant ACI wishes to stay the present file, it shall serve and file, on or before October 13, 2009, a motion to that effect;
10. Defendant ACI respectfully requests the aid and recognition of this Honourable Court in enforcing the Stay of Proceedings issued by the Superior Court in connection with the CCAA Proceedings;
11. Defendant ACI relies on Section 50 of the *Federal Courts Act* and the *Federal Courts Rules*, and in particular Rules 3, 4, 53, 54 and 385.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

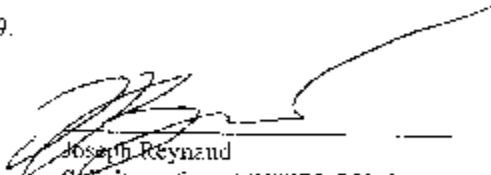
1. Affidavit of Sophie Rossignol dated October 9, 2009;
2. The Court Record herein; and
3. Such further and other evidence as counsel may advise and this Honourable Court may permit.

THE FOLLOWING JURISPRUDENCE will be relied upon by the Defendant ABITIBI-CONSOLIDATED INC.:

1. *Blue Range Resources Corp., Re* (2000), 20 C.B.R. (4th) 187 (Alta. C.A.);
2. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C 36 (the "CCAA"), s. 11;
3. *Hong Kong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.);
4. *Always Travel v. Air Canada* [2003] F.C.J. No. 933;
5. *Campeau v. Olympia & York Developments Limited* (1992), 4 C.B.R. (3d) 303 (Ont. Gen. Div.);
6. *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 50;
7. *Morguard Investments Ltd. v. De Savoye* [1990] 3 S.C.R. 1077;
8. *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007) 33 C.B.R. (5th) 50;

9. *Hawkair Aviation Services Ltd.* (2006) 22 C.B.R. (5th) 11;
10. *Nortel Networks Corporation (Re)*, 2009 CanLII 43427 (ON S.C.);

Montreal, this 9th day of October, 2009.


Joseph Reynaud
Solicitor for ABITIBI-CONSOLIDATED
INC. in the CCAA proceedings
STIKEMAN ELLIOTT LLP
155 René Lévesque Blvd. West
Suite 4000
Montreal, Quebec, Canada
H3B 3V2
Phone: (514) 397-3019
Telecopier: (514) 397-3616

TO: Louis Buteau
ROBINSON SHEPPARD SHAPIRO LLP
800 Place Victoria, Suite 4600
Montreal, Quebec H4Z 1H6
Tel: (514) 393-7491
Fax: (514) 878 1865
Solicitor for the Plaintiff

And to:
Fred Fischer and Rui M. Fernandes
FERNANDES HEARN LLP
155 University Avenue, Suite 700
Toronto, Ontario M5H 3B7
Tel: (416) 203-9505
Fax: (416) 203-9444
Solicitors for the Defendant Abitibi-Consolidated Inc.

NO. T-2227-06

FEDERAL COURT

ADMIRALTY ACTION *IN PERSONAM*

BETWEEN:

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ROYAL & SUNALLANCE DU CANADA

and

ALLIANZ INSURANCE COMPANY OF CANADA

Defendant

AFFIDAVIT OF SOPHIE ROSSIGNOL

(Rule 80)

I, SOPHIE ROSSIGNOL, lawyer, of the City of l'Assomption, in the Province of Quebec,
SOLEMNLY AFFIRM THAT:

1. I am the in house legal counsel for ABITIBI-CONSOLIDATED INC. and, as such, I have knowledge of the matters hereinafter deposed to,
2. On December 19, 2006, Plaintiff Ocean Navigation Inc. filed a *Statement of Claim* against Defendant Abitibi-Consolidated Inc. ("ACI") in Federal Court file number T-2227-06 (the "**Federal Court Proceedings**") claiming, *inter alia*, a general average

contribution from ACI in the capital amount of CDN \$443,929.56 plus interest and costs, as appears from the Court record;

3. On April 17, 2009, the Superior Court of Quebec, Commercial Division (the "**CCAA Court**") issued an order (as subsequently amended and restated from time to time, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**" and "**CCAA Proceedings**") in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries thereof (collectively, the "**Abitibi Petitioners**"), (ii) Bowater Canadian Holdings Inc. and subsidiaries thereof (collectively, the "**Bowater Petitioners**") and (iii) certain partnerships. A copy of the Initial Order is attached hereto as **Exhibit "A"** to this my Affidavit;
4. On April 16, 2009, AbitibiBowater Inc. ("**ABH**"), Bowater Inc. and certain of their U.S. and Canadian subsidiaries filed voluntary petitions for relief under Chapter 11 of the *U.S. Bankruptcy Code* in the United States Bankruptcy Court for the District of Delaware and on April 17, 2009, ABH and certain petitioners (collectively with ABH, the "**18.6 Petitioners**") obtained orders under s. 18.6 of the CCAA in respect of the Chapter 11 Proceedings (the 18.6 Petitioners, the Abitibi Petitioners and the Bowater Petitioners being collectively referred to as the "**Petitioners**");
5. The Initial Order (**Exhibit "A"**) appointed Ernst & Young Inc. as monitor (the "**Monitor**") of the Petitioners and a stay of proceedings (the "**Stay of Proceedings**") was issued pursuant to which, *inter alia*, no right, legal or conventional, may be exercised against the Petitioners (including ACI) and any proceedings already commenced by anyone against the Petitioners were stayed and suspended until May 14, 2009, or until such later date as the CCAA Court may order (the "**Stay Period**"), the whole as appears from paragraph 10 of the Initial Order, **Exhibit "A"**;
6. The Stay Period was extended twice by Order of the CCAA Court, first until September 4, 2009 and a second time until December 15, 2009, the whole as more fully appears from the *First Stay Period Extension Order* dated May 14, 2009 and the *Second Extension Order* dated September 4, 2009, copies of which are produced herewith respectively as **Exhibit "B"** and **Exhibit "C"** to this my Affidavit;

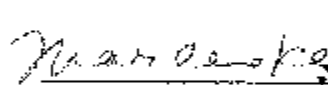
7. The Initial Order explicitly requests, *inter alia*, the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian Federal Court or administrative body to give effect to the Initial Order and to assist the Petitioners and the Monitor in carrying out the terms of the Initial Order, as appears from paragraph 106 of the Initial Order, **Exhibit "A"**;
8. The Initial Order also provides that the Petitioners and the Monitor are authorized and empowered to apply to any court for the recognition of the Initial Order, as appears from paragraph 107 of the Initial Order, **Exhibit "A"**;
9. On May 14, 2009, ACI counsel Fernandes Hearn LLP wrote to counsel for Plaintiff and to the Federal Court Administrator, informing them that ACI had filed for relief under the CCAA and under Chapter 11 in the United States and sending them a copy of the Initial Order, the whole as more fully appears from two letters from Rui Fernandes, dated May 14, 2009, copies of which are produced herewith together as **Exhibit "D"** to this my Affidavit;
10. Plaintiff thereafter contested that the Stay of Proceedings applied in the Federal Court Proceedings and on September 10, 2009, Prothonotary Richard Morneau issued an Order that if the Defendant ACI wishes to stay the present file, it shall serve and file, on or before October 13, 2009, a motion to that effect, the whole as more fully appears from a copy of the said Order which is attached hereto as **Exhibit "E"** to this my Affidavit;
11. Meanwhile, on August 26, 2009, the CCAA Court had issued a **Claims Procedure Order** ordering, *inter alia*, the Monitor to mail claims packages to all known creditors of the Petitioners and ordering the parties with known claims against the Petitioners to file their claims with the Monitor on or before the claims bar date of November 13, 2009, the whole as more fully appears from the Claims Procedure Order, a copy of which is produced herewith as **Exhibit "F"** to this my Affidavit;
12. On September 14, 2009, Plaintiff amended its Statement of Claim in this action in order to add four parties as Defendants alongside ACI: (1) CAN Canada (Continental Casualty Company); (2) the St-Paul Fire and Marine Insurance Company (St. Paul

Travelers); (3) Royal & Sun Alliance du Canada; and (4) Allianz Insurance Company of Canada, the whole as appears from the Court record herein;

13. Defendant ACI respectfully requests the aid and recognition of this Honourable Court in enforcing the Stay of Proceedings issued by the Superior Court in connection with the CCAA Proceedings, the whole in accordance with paragraphs 106 and 107 of the Initial Order, **Exhibit "A"**;

14. Defendant ACI adds that Plaintiff's general average claim against ACI should be adjudicated in the CCAA claims process in the same manner as all other claims made against the Petitioners by the Petitioners' numerous other creditors, and that pursuant to the Claims Procedure Order, **Exhibit "F"**, Plaintiff should file its claim with the Monitor before the November 13, 2009 claims bar date.

Solemnly affirmed before me at
Montreal, Province of Québec on
this 9th day of October, 2009


Commissioner for Taking Affidavits




Sophie Rossignol

WRITTEN REPRESENTATIONS

IN SUPPORT OF ITS MOTION, THE DEFENDANT ARBITBI-CONSOLIDATED INC. STATES AS FOLLOWS:

1. Defendant ACI submits that the Stay of Proceedings issued by Justice Gauthier on April 17, 2009 under section 11(3)(b) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") should be recognized and enforced in this Honourable Court. Such recognition would further the very purpose of the stay and would enable this Court to comply with its duty to give effect to judgments from sister courts when duly called upon to do so, in accordance with the principle of comity.
2. In the alternative, should this Honourable Court deem that the CCAA Stay of Proceedings should not be recognized and enforced, Section 50 of the *Federal Courts Act* grants this Court the power to stay proceedings in any cause or matter where it is in the interest of justice that the proceedings be stayed. It is respectfully submitted that the circumstances of the present case warrant that a stay of proceedings be granted in this action as against Defendant ACI.

Purpose of a CCAA Stay

3. The CCAA is a federal legislation designed to facilitate the making of a plan of compromise or arrangement between an insolvent debtor company and its creditors, in order for the company to be able to continue in business.

4. In order to affect this purpose, the CCAA grants broad powers to the courts to facilitate such arrangements and protect the insolvent company so as to permit the negotiation of a plan of compromise or arrangement. The CCAA thus provides a "structured environment" for consideration of a plan or compromise.

➤ Ref: *Blue Range Resources Corp.*, Re (2000), 20 C.B.R. (4th) 187 (Alta. C.A.), Tab G, at para. 6:

"The CCAA [...] provides a structured environment in which large insolvent companies continue to carry on business and retain control over their assets while their creditors, shareholders and the court consider a plan or compromise."

5. A stay of proceedings, itself a key feature of this "structured environment", is granted in insolvency proceedings under section 11(3)(b) of the CCAA with respect to initial orders and under section 11(4)(b) of the CCAA for subsequent orders. These provisions grant provincial superior courts the power to stay "any action or proceedings".

➤ Ref: CCAA, s. 11, Tab H:

11. (3) Initial application court orders - A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days, [...]

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and [...]

(4) Other than initial application court orders - A court may, on an application in respect of a company other than an initial application make an order on such terms as it may impose, [...]

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and [...]

6. On April 17, 2009, the CCAA Court, acting pursuant to the jurisdiction conferred by section 11(3)(b) of the CCAA, issued an order specifying that any and all proceedings already commenced against the Petitioners, including ACI, are stayed and suspended.

➤ Ref: Initial Order, para. 10, Exhibit "A" to the Affidavit of Sophie Rossignol, Tab A;

7. In so doing the CCAA Court sought to achieve the following objectives:

(a) to permit a structured environment in which ACI could continue to carry on business and retain control of its assets while its creditors, shareholders and the Court consider a plan of arrangement or compromise;

(b) to hold ACI's creditors at bay in order to allow the plan or compromise to be successful; and

(c) to allow ACI to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement.

➤ Ref: *Hong Kong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.), Tab I;

➤ Ref: *Always Travel v. Air Canada* [2003] F.C.J. No. 933, at paras. 14 and 16, Tab J;

8. An important objective sought by the issuance of a stay of proceedings is to offer the debtor company a "*respite from the litigious and other rights being exercised by creditors*". In the present case, involving ACI in the litigation of the general average instituted by Plaintiff would run against this objective.

➤ Ref: *Campeau v. Olympia & York Developments Limited* (1992), 4 C.B.R. (3d) 303 (Ont. Gen. Div.) at paras. 17, 19, Tab K;

Recognition of a CCAA stay of proceedings in Federal Court

9. Defendant ACI submits that the Stay of Proceedings should be recognized and enforced by the Federal Court, or alternatively, that it is in the interest of justice that the proceedings be stayed pursuant to Section 50 of the *Federal Courts Act*

➤ Ref: Federal Courts Act, R.S.C. 1985, c. F-7, s. 50, Tab L;

10. The issue as to whether a CCAA stay of proceedings stays proceedings pending in Federal Court was addressed by Justice Hugessen in *Always Travel*, where a proposed class action suit which was brought in Federal Court against Air Canada, then a debtor company under CCAA protection.

➤ Ref: Always Travel v. Air Canada [2003] F.C.J. No. 933 ("*Always Travel*"); Tab J.;

11. In *Always Travel*, Justice Hugessen, was of the view that express statutory language would be required for a Superior Court to have jurisdiction to stay proceedings in another Superior Court and thus, that an order under sections 11.3 and 11.4 of the CCAA does not have the effect of automatically staying proceedings in Federal Court.

➤ Ref: Always Travel, paras. 5 and 9, Tab J;

12. On the other hand, Justice Hugessen also clearly stated in *Always Travel* that upon an application to enforce a CCAA stay order in Federal Court, such an application will be granted in "*virtually every case*" where the Initial Order contains a request for the Federal Court's aid.

➤ Ref: Always Travel, para. 11, Tab J;

"[...] it is my view that the proper attitude of respectful cooperation which this Court should have and does have to judgments of the Ontario Superior Court of Justice will require that, as a matter of course, in virtually every case where an order is given by a provincial superior court in the exercise of its CCAA jurisdiction, and that order requests this Court's aid, this Court will give such aid on proper application being made."

(our emphasis)

13. The Initial Order issued in connection with ACT's CCAA Proceedings is similar to that found in *Always Travel* and contains a specific request to the Federal Court for its "aid and recognition" to give effect to the Initial Order.

➤ Ref: Initial Order, para. 106, Exhibit "A" to the
Affidavit of Sophie Rossignol, Tab A;

14. In *Always Travel*, Justice Hugessen also stated that a party applying to enforce a CCAA stay in Federal Court does not need to meet the three-part test which would normally apply to determine whether a stay is justified, nor does that party need to present any evidence to justify such a request.

➤ Ref: *Always Travel*, para. 11, Tab J:

"It has been said to me this morning that I should not grant a stay order based on Justice Farley's orders because I have no evidence before me and second because there has been no attempt to justify a stay in the terms of the classic three part test originally enunciated by the Supreme Court in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. [...]. To that I say that this is not an ordinary stay and that a stay granted in comity does not need to meet the requirements of that test and does not need evidence [...]"

(our emphasis)

15. As a result, ACI is entitled to request that this Court recognize and enforce the Stay of Proceedings issued by the CCAA Court without further formalities and without providing evidence as to why the stay was issued in the first place.

16. In fact, the burden is clearly on the party who opposes the recognition of a CCAA stay in Federal Court, in this case the Plaintiff, to demonstrate that in the present circumstances, there are good reasons for this Court to refuse to give effect to the order of its sister court.

➤ Ref: *Always Travel*, para. 12, Tab J:

"[...] The burden is on a person seeking in this Court to avoid the consequences of this Court acting in aid of a provincial superior court exercising its jurisdiction under the CCAA. The burden is on that person to show this Court that it should not act in aid."

(our emphasis)

17. The Federal Court's reasoning in *Always Travel* is consistent with the notion of "comity", the need for Canadian courts to accord "full faith and credit" to one another's decisions and the fact that both the Superior Court and the Federal Court are engaged in a single legal system in the administration of Canadian justice. As the Supreme Court stated in *Morguard*, the considerations underlying comity apply with even greater force between the units of a federal state than they do internationally:

➤ Re: Morguard Investments Ltd. v. De Savoye [1990] 3 S.C.R. 1077 at p. 1098, 1ab M:

"[...] The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already adverted. Whatever nomenclature is used, our courts have not hesitated to cooperate with courts of other provinces where necessary to meet the ends of justice [...]"

(our emphasis)

18. As appears from the Affidavit of Sophie Rossignol, the creditors of ACI and the other Petitioners in the context of the ongoing CCAA Proceedings will have access to a process for the determination and adjudication of claims (the "Claims Process"). The Claims Process, which was ordered by the CCAA Court and will be supervised by the Monitor, is designed to apply to all creditors of ACI. The CCAA Court strives to treat all creditors fairly and in an even-handed manner: for the ACI creditors who have filed an action in the Federal Court to be exempted from that process and permitted to continue their litigation would run counter to that objective.

➤ Re: Claims Procedure Order, Exhibit "F" to the Affidavit of Sophie Rossignol, Tab F;

Arguments in favour of lifting the stay

19. Plaintiff has announced that it will raise an argument to the effect that the proceedings against the insurers should move forward despite the Stay of Proceedings issued by Justice Gascon on April 17, 2009. The main justification for that argument

appears to be that the case could move forward against ACI's insurers without affecting ACI itself;

20. Such an argument attempts to establish a motive to support a motion to lift the stay of proceedings. However, it is not a valid justification to oppose a motion for recognition and enforcement of the Stay of Proceedings in this matter in the Federal Court.
21. The Court's authority to lift a Stay of Proceedings granted under the CCAA is a discretionary power. Although the CCAA does not provide any specific test for the lifting of a Stay of Proceedings, courts have issued several criteria which can serve as a guide, including the balance of convenience, the relative prejudice suffered by the parties and the merits of the proposed action.

➤ Ref: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007) 33 C.B.R. (5th) 50 at para. 68, Tab N:

"68. In determining what constitutes "sound reasons", much is left to the discretion of the judge. However, previous decisions on this point provides some guidance as to factors that may be considered :

(a) the balance of convenience;

(b) the relative prejudice to the parties;

(c) the merits of the proposed action, where they are relevant to the issue of whether there are "sound reasons" for lifting the stay (i.e. as was said in Ma, Re, if the action has little chance of success, it may be harder to establish "sound reasons" for allowing it to proceed)

The supervising CCAA judge should also consider the good faith and due diligence of the debtor company as referenced in s. 11 (6). Ultimately, it is in the discretion of the supervising CCAA judge as to whether the proposed action ought to be allowed to proceed in the face of the stay."

➤ Ref: See also *Hawkair Aviation Services Ltd.* (2006) 22 C.B.R. (5th) 11 at para. 33, Tab Q;

- In *Nortel Networks Corporation (Re)*, in deciding whether a stay of proceedings should be lifted to permit a litigation to continue, Justice Morawetz analysed the situation of the parties and applied the criteria of the balance of convenience :
- Ref: *Nortel Networks Corporation (Re)*, 2009 CanLII 43427 (ON S.C.) at para.36, Tab P: :

*"[36] In my view, the Nortel restructuring is at a critical stage and the energies and activities of the Board should be directed towards the restructuring. I accept the argument of Mr. Barnes on this point. To permit the ERISA litigation to continue at that time would, in my view, result in a significant distraction and diversion of resources at a time when that can be least afforded. It is necessary in considering whether to lift the stay, to weigh the interests of the Applicants against the interests of those who will be affected by the stay. Where the benefits to be achieved by the applicant outweighs the prejudice to affected parties, a stay will be granted. (See *Woodwards Limited (Re)*, (1993) 11 C.B.R. (3d) 236 (B.C.S.C.).)"*

(our emphasis)

22. Defendant ACI respectfully submits that in light of its knowledge of ACI's progress in its restructuring, only the Superior Court is competent to analyze the above criteria and lift the Stay of Proceedings in the present case. As Justice Hugessen rightly recognized in *Always Travel*, the determination as to whether the debtor company should be allowed to concentrate its efforts on the reorganization without being distracted by the defence of other claims is indeed best left to the Superior Court.

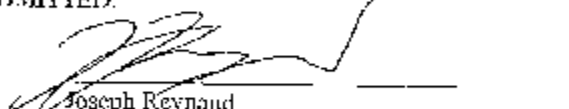
- Ref: *Always Travel*, para. 16:

"There is, however, one matter on which I think that only Justice Farley can decide and that is the third basis for the stay order which is to allow the company to concentrate its efforts on the reorganization and not to be distracted by the defence of other claims. That is a matter on which I have no information at all and on which I suspect Justice Farley has or will have in due course ample information."

(our emphasis)

23. In the light of the above, it is therefore incumbent on the Plaintiff, once the Stay of Proceedings has been recognized and enforced by this Honourable Court, to bring a motion to the Superior Court in order to lift the Stay of Proceedings. In the meantime, it is in the interests of justice that the Stay of Proceedings be recognized and enforced by this Honourable Court in this action.

THE WHOLE, RESPECTFULLY SUBMITTED.



Joseph Reynaud
Solicitor for ABITIBI-CONSOLIDATED
INC. in the CCAA proceedings
STIKEMAN ELLIOTT LLP
1155 René Lévesque Blvd. West
Suite 4000
Montreal, Quebec, H3B 3V2
Phone: (514) 397-3019
Telecopier: (514) 397-3616

No.: T-2227-06

FEDERAL COURT

BETWEEN:

OCEAN NAVIGATION INC.

Plaintiff

- and -

ABITIBI-CONSOLIDATED INC. ET AL

DEFENDANTS

BS0350

File: 041053-1170

MOUON RECORD OF THE DEFENDANT
ABITIBI-CONSOLIDATED INC.
FOR AN ORDER TO RECOGNIZE AND
ENFORCE A STAY OF PROCEEDINGS IN THE
FEDERAL COURT

(Section 50 *Federal Courts Act*
and Rules 3, 4, 53, 54 and 385
of the *Federal Courts Rules*)

Joseph Reynaud
(514) 397-3019
STIKEMAN, ELLIOTT LLP
AVOCATS/BARRISTERS & SOLICITORS
40TH FLOOR
1155 René-Lévesque Blvd. West
Montréal, Canada H3B 3V2