

**SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL
OF SKYGREECE AIRLINES S.A., AN INSOLVENT PERSON, PURSUANT TO
SECTION 50.4(1) THE
*BANKRUPTCY AND INSOLVENCY ACT ("BIA")***

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SKYGREECE AIRLINES S.A.**

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APPLICANT’S FACTUM

PART I – OVERVIEW

1. SkyGreece Airlines S.A. (“SkyGreece”) is insolvent. It has ceased operations and lacks the cash flow necessary to meet its obligations to its stakeholders, including its obligations to passengers. As a result, SkyGreece has commenced these restructuring proceedings, through which it hopes to be able to pay stakeholders something better than what they will recover in a liquidation.
2. However, on-going regulatory proceedings, which serve regulatory purpose in the circumstances, threaten to undermine SkyGreece’s restructuring efforts.
3. There are two issues raised by this motion:
 - (i) Are regulatory proceedings commenced by or before the Canadian Transportation Agency (“CTA”), bearing Case Nos.15-03972 and 15-03912 (“CTA Proceedings”), which assert claims that would have the effect of imposing monetary consequences on SkyGreece, subject to the automatic statutory stay prescribed by section 69(1) of the *Bankruptcy and*

Insolvency Act (“BIA”); and,

- (ii) Regardless of whether or not the CTA Proceedings are automatically stayed by operation of law, should they and any other proceedings against SkyGreece commenced at the CTA as a result of its suspension of flights on or after August 27, 2015, be stayed by order of this court.

4. Applying the reasoning of the Supreme Court of Canada in the leading case of *Newfoundland and Labrador v. AbitibiBowater Inc.*,¹ SkyGreece submits that the substance of the CTA Proceedings is to assert a claim, and that, as a result, the CTA Proceedings are stayed.

5. More importantly, however, SkyGreece submits that regardless of whether the CTA Proceedings are stayed by operation of law, this court should stay them and any other proceedings brought before the CTA as a result of its suspension of operations.

6. SkyGreece is currently without funds and cannot comply with its obligations to passengers at this time, even if ordered to do so. Requiring SkyGreece to engage in formal regulatory proceedings will undermine its ability to restructure by forcing it to allocate scarce resources to unproductive uses.

7. The stay of the regulatory proceedings is not contrary to the public interest. SkyGreece is no longer operating and so the safety of the travelling public is not a concern. The issue at this time is compensation to customers and other stakeholders,

¹ *Newfoundland and Labrador v. AbitibiBowater Inc.* [2012] 3 SCR 443 [“Abitibi”] (Book of Authorities, Tab 1).

and that issue is being addressed through these *B/A* proceedings. Indeed, the likelihood of compensation increases with the success of these proceedings.

PART II – FACTS

A. Background

8. SkyGreece is an international airline, based out of Greece, which offers air travel between Athens, Toronto, Montreal, Budapest, Zagreb, and New York. SkyGreece was founded in 2013.²

9. On Thursday, August 27, 2015, SkyGreece announced its decision to temporarily suspend flights owing to financial difficulties. SkyGreece's financial difficulties arose in 2015 as a direct consequence of the broader Greek financial crisis and the inability of SkyGreece to access and maintain sufficient levels of financing to continue its operations.³

10. At the time it suspended its operations, SkyGreece expected that it would begin a restructuring process and attempt to source new financing in order to resume its operations.⁴

B. CTA Proceedings

11. Since suspending its operations, approximately six flights have been cancelled by SkyGreece. As a result of the cancellation of flights, SkyGreece has been overwhelmed by a deluge of regulatory proceedings.⁵

² Affidavit of Brooks Pickering dated September 4, 2015 ("Pickering Affidavit"), at para. 2 (**Motion Record, Tab 2**).

³ Pickering Affidavit, at para. 3.

⁴ Pickering Affidavit, at para. 4.

12. In particular, on Friday, August 28, 2015, Gabor Lukacs commenced an application at CTA. Mr. Lukacs appears to be a consumer rights advocate, operating under the banner of “Air Passenger Rights” and representing that “Airlines think you have no rights. We prove them wrong. Watch us.” Mr. Lukacs does not appear to be a customer of SkyGreece.⁶

13. In his application, Mr. Lukacs sought to have SkyGreece post security of \$8.7 million in order to compensate for passenger claims, and to arrange and pay for new transportation for passengers whose flights were cancelled.⁷

14. At the request of Mr. Lukacs, SkyGreece was directed by the CTA to respond to Mr. Lukacs’ request for an expedited process by Monday, August 31, 2015, by 5:00 p.m. At the time, the CTA advised that, in the event that the request for expedited process was granted, SkyGreece would be required to respond to the merits of Mr. Lukacs’ application by 5:00 p.m. on September 2, 2015, in less than a week’s time.⁸

15. As a result of the CTA’s order, SkyGreece took immediate steps to retain and instruct counsel. On August 31, 2015, SkyGreece delivered to the CTA its response with respect to the request for an expedited process.⁹

⁵ Pickering Affidavit, at para. 5. **Note:** We have since been advised by SkyGreece that: the exact number of flights cancelled is nine (9) (this may include multiple stops, i.e., Zagreb, Montreal, Toronto); the total number of flights cancelled from the start of delays on August 25, until the time when the Pickering Affidavit was sworn is believed to be thirteen (13); and, the total number of flights cancelled or that will be cancelled from August 25 to the end of SkyGreece’s scheduled season (October 12), assuming that SkyGreece does not resume operations, is forty (40) flights.

⁶ Pickering Affidavit, at para. 6.

⁷ Pickering Affidavit, at para. 7.

⁸ Pickering Affidavit, at para. 8.

⁹ Pickering Affidavit, at para. 9.

16. In the midst of responding to Mr. Lukacs' request for an expedited process, Mr. Lukacs also served a further request on SkyGreece for extensive document and information production, for which he sought production from SkyGreece by September 2, 2015.¹⁰

17. At approximately 10:45 p.m. on August 31, 2015, Mr. Lukacs served his reply to SkyGreece's response to the expedited process request, following which SkyGreece filed further submissions to the CTA on the issue of Mr. Lukacs' standing.¹¹

18. On September 1, 2015, having reviewed the materials filed by the parties, the CTA denied Mr. Lukacs' request for expedited process. Specifically, the CTA accepted SkyGreece's submission that the issues raised in Mr. Lukacs' application were complex and that SkyGreece would require sufficient time to respond to the merits of the application in a careful and a comprehensive way. As a result, SkyGreece was granted until September 21, 2015, to provide its response.¹²

19. Notwithstanding its decision on September 1, in which CTA recognized the complexity of SkyGreece's restructuring efforts, the CTA issued a further direction on September 2, 2015, on its own application (Case No. 15-03972) requiring SkyGreece to respond to "show cause" order as to why the CTA should not issue an adverse order, requiring SkyGreece to do the following:

¹⁰ Pickering Affidavit, at para. 10.

¹¹ Pickering Affidavit, at para. 11.

¹² Pickering Affidavit, at para. 12.

- take immediate corrective measures to properly apply its international tariff for all passengers affected by schedule irregularities, including:
 - Informing passengers of their options and providing them with a copy of the tariff;
 - Implementing forthwith the options chosen by passengers;
 - Establishing a 1-800 help line where passengers can be directed to a person who can accept and address their claim; and
 - Updating its website to fully explain the measure put in place to address the situation;
- Report to the Agency, within 5 business days, on the evolution of its situation and the measures taken by SkyGreece to comply with its international tariff applicable to this situation and with this Order.¹³

20. An excerpt of SkyGreece's International Passenger Rules and Fare Tariff ("Tariff") was appended to the CTA's show cause order. Among other things, the Tariff provides that, on delay or cancellation of flights, SkyGreece is potentially liable to refund passengers their airfare and/or pay to reroute passengers to their destinations on an alternate airline.¹⁴

¹³ Pickering Affidavit, at para. 13.

¹⁴ Pickering Affidavit, at paras. 14-15.

21. Following delivery of its show cause order to SkyGreece on September 2, 2015, the CTA posted the show cause order to its Twitter feed, with a message that, "We've ordered #SkyGreece to prove it is applying its tariff and respecting passenger rights."¹⁵

22. On September 3, 2014, SkyGreece filed a Notice of Intention to make a Proposal under section 50.4(1) of the *BIA*. On filing of the Notice of Intention, SkyGreece's lawyers forwarded the Notice of Intention to the CTA, in which the CTA was advised that, as a consequence of the Notice of Intention being filed, the "show cause" proceeding was stayed under section 69(1) of the *BIA*.¹⁶

23. Following receipt of SkyGreece's Notice of Intention, the CTA advised SkyGreece's lawyers, via a voicemail message, that it took the position that the *BIA* stay did not apply to its "investigation" under section 69.6 of the *BIA*.¹⁷

24. By email dated September 3, 2015, the CTA was further advised that SkyGreece disagreed with the CTA's interpretation of the *BIA* and, if required, counsel would recommend that SkyGreece apply for additional relief under section 69.6(3).¹⁸

25. SkyGreece continued to be served with materials regarding the CTA Proceedings, notwithstanding having expressed the position that the proceedings are stayed. In particular, Mr. Lukacs has provided submissions on implications the *BIA* stay. The CTA has also issued decisions regarding Mr. Lukacs' standing and his allegations of a breach of procedural fairness, in which the CTA specifically issued in

¹⁵ Pickering Affidavit, at para. 16.

¹⁶ Pickering Affidavit, at paras. 17-19.

¹⁷ Pickering Affidavit, at para. 20.

¹⁸ Pickering Affidavit, at para. 21 and Exhibit "L".

the decision that the CTA Proceedings are not stayed by application of 69(1) of the *BIA*.¹⁹

PART III – ISSUES AND THE LAW

D. Issues on the Motion

26. There are two issues to be determined on this motion:

- (i) Are the CTA Proceedings, which assert claims that would have the effect of imposing monetary consequences on SkyGreece, subject to the automatic statutory stay prescribed by section 69(1) of the *Bankruptcy and Insolvency Act* (“*BIA*”); and,
- (ii) Regardless of whether or not the CTA Proceedings are automatically stayed by operation of law, should they and any other proceedings against SkyGreece commenced at the CTA as a result of its suspension of flights on or after August 27, 2015, be stayed by order of this court.

27. It is SkyGreece’s submission that the CTA Proceedings are stayed, given the nature of the CTA Proceedings and the monetary consequences to SkyGreece that could also affect creditor claims in the *BIA* proceedings. However, because of the second issue raised may be the less contentious one, we address it first.

E. The CTA Proceedings Should Be Stayed Under Section 69.6(3)

28. Section 69.6(3) of the *BIA* provides that:

¹⁹ Pickering Affidavit, at para. 22.

On application by the insolvent person and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

- (a) a viable proposal could not be made in respect of the insolvent person if that subsection were to apply; and
- (b) it is not contrary to the public interest that the regulatory body be affected by the stay provided by section 69 or 69.1.²⁰

29. The continuation proceedings before the CTA will undermine SkyGreece's efforts to restructure, with a view to being able to provide compensation to its creditors, including its passengers.²¹

30. As set out in the affidavit of Brooks Pickering, SkyGreece's Chief Restructuring Officer, the corporation currently has no available cash. Funds that would ordinarily be available to it are being withheld by third party payment processors on account of anticipated chargebacks. Third party sources have funded professional fees on an interim basis to the extent of approximately \$250,000 and the company is attempting to negotiate interim financing for the restructuring. These funds will be needed to finance the development of an operational and financial restructuring plan, and the search for exit financing to fund that plan.²²

31. Over the past week, SkyGreece has had to expend considerable financial and human resources responding to the CTA Proceedings and it does not have the

²⁰ *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 ("BIA"), at s. 69.6(3).

²¹ Pickering Affidavit, *supra* note 2, at paras. 23.

²² Pickering Affidavit, *supra* note 2, at para. 24-25.

resources to allow it to continue to prioritize the CTA Proceedings at this time.²³ As a result, SkyGreece's attempts to restructure are at risk, under the weight of litigation, to the potential prejudice of all of its stakeholders, including passengers.²⁴

32. Conversely, there is no prejudice to the public interest that would result from the stay of the CTA Proceedings, in light of the fact that:

- (a) SkyGreece's ability to provide compensation to passengers as contemplated by the various CTA proceedings depends on the success of these restructuring proceedings.
- (b) SkyGreece is not currently flying. It has only one plane, and that plane is currently under seizure by its financier, and is presently grounded at Pearson International Airport in Toronto. As a result, there are no passengers in the air.
- (c) SkyGreece has, through its Proposal Trustee, implemented a conduit for the exchange of information with its stakeholders, including its passengers.
- (d) SkyGreece will, as part of these proceedings, be required to identify its universe of creditors (including passengers) and assess their claims.²⁵

F. The CTA Proceedings Are Stayed by Operation of *BIA* Section 69(1)

33. Section 69(1)(a) of the *BIA* provides:

²³ Pickering Affidavit, *supra* note 2, at para. 25.

²⁴ Pickering Affidavit, *supra* note 2, at para. 25.

²⁵ Pickering Affidavit, *supra* note 2, at para. 26.

Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy [Emphasis added].²⁶

34. It is the CTA's position that its "investigation" proceedings do not fall within the scope of statutory stay of proceedings set out section 69(1).²⁷ In its decision dated September 4, 2015, the CTA stated:

The current proceeding is not a proceeding by a creditor; it is an "own motion" investigation on statutory compliance by a regulator. Pursuant to subsection 69.6(1) of the *BIA*, SkyGreece cannot invoke bankruptcy to avoid compliance with a statutory obligation, unless otherwise specified in the *BIA*. In light of the above, the Agency finds that the notice does not have the effect of automatically staying this proceeding pursuant to subsection 69(1) of the *BIA*.²⁸

35. While the CTA may take the position that SkyGreece's Notice of Intention does not bar continuation of its proceedings under section 69.6(1), the *BIA* expressly and specifically carves out in section 69.6(2) enforcement "of a payment ordered by the regulator":

Subject to subsection (3), no stay provided by section 69 or 69.1 affects a regulatory body's investigation in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory

²⁶ *BIA*, *supra* note 20, s. 69(1)(a).

²⁷ Pickering Affidavit, *supra* note 2, at paras. 20-22.

²⁸ *Ibid.*, Exhibit "P".

body, other than the enforcement of a payment ordered by the regulatory body or the court.²⁹ [Emphasis added]

36. The Supreme Court of Canada held in *Abitibi* that courts should take a substantive, rather than a formalistic approach to construing a regulator's order.³⁰ There are circumstances in which enforcement action by a regulatory body is captured by the stay imposed by insolvency proceedings. Specifically, where a regulator makes an order that explicitly or implicitly asserts a monetary claim, those proceedings will fall within the scope of the stay:

Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the CCAA. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim.

In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the CCAA if the order does not require the debtor to make a payment. I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding. In the environmental context, the CCAA court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A CCAA court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the

²⁹ *BIA*, *supra* note 20, at s. 69.6(2).

³⁰ *Abitibi*, *supra* note 1, at para. 19.

court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.³¹

37. In *Abitibi*, the Supreme Court set out three requirements for determining when an order by a regulator should be seen as asserting a “claim”:

- (a) there must be a debt, liability or obligation to the creditor;
- (b) the debt, liability or obligation must be incurred before the debtor becomes bankrupt;
- (c) it must be possible to attach a monetary value to the debt, liability or obligation.³²

38. In subsequent cases applying *Abitibi*, the disposition largely turned on whether the Court was satisfied that, if they were “sufficiently certain”, ongoing obligations could be reduced to a monetary claim. For example, in *Northstar Aerospace*, the Ontario Court of Appeal upheld a decision to stay proceedings against a debtor on the basis that, in the context of regulatory action for an environmental claim, it was “sufficiently certain” that the regulator would seek reimbursement from the debtor. Consequently, the regulator’s orders were, in substance, a claim provable in bankruptcy.³³

39. The *Abitibi* criteria are easily satisfied in this case.

³¹ *Abitibi*, *supra* note 1, at paras. 2-3.

³² *Ibid.*, at para. 26.

³³ *Northstar Aerospace Inc., Re*, 2013 ONCA 600 [“*Northstar*”] at paras. 10, 14 and 22 (**Book of Authorities, Tab 2**). Also see: *Nortel Networks Corp., Re* 2013 ONCA 599 [“*Nortel*”] (**Book of Authorities, Tab 3**) and *Terrance Bay Pulp Inc., Re*, 2013 ONSC 5111 [“*Terrance Bay*”] (**Book of Authorities, Tab 4**) where the courts reached different conclusions based on the facts.

40. As the Ontario Court of Appeal stated in *Nortel*, the requirement for “debt, liability or obligation to a creditor” is satisfied simply by a regulatory agency exercising its enforcement powers against a debtor.³⁴

41. In the CTA’s show cause order dated September 2, 2015, the CTA indicated that it had reached a preliminary decision that SkyGreece has failed to properly apply its obligations under the Tariff.³⁵ It then ordered SkyGreece to demonstrate by the following day, on September 3, 2015 at 5:00 p.m., why the CTA should not issue an order to this effect.³⁶

42. The net effect of the CTA’s order is the imposition of a monetary liability on SkyGreece, tantamount to a civil judgment, as the order would impose an obligation on SkyGreece to honour its Tariff and compensate passengers for damages and costs arising from cancelled flights. Considering the substance of that order, the order would have the effect of prioritizing passenger claims, which are, in substance, claims that are to be proven in the *BIA* proceedings.³⁷

43. This conclusion is consistent with the Supreme Court’s reasoning in *Abitibi* where the Court stated that the substance of the order prevails over its form:

What the Province is actually arguing is that courts should consider the form of an order rather than its substance. I see no reason why the Province’s choice of order should not be scrutinized to determine whether the form chosen is consistent with the order’s true purpose as revealed by the Province’s own actions. If the Province’s actions indicate

³⁴ *Nortel*, *supra* note 32, at para. 16.

³⁵ Pickering Affidavit, *supra* note 2, at paras. 13-14.

³⁶ *Ibid.*

³⁷ *Northstar*, *supra* note 32, at para. 22.

that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process. Environmental claims do not have a higher priority than is provided for in the CCAA. Considering substance over form prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation. This Court recognized long ago that a province cannot disturb the priority scheme established by the federal insolvency legislation (*Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 S.C.R. 453). Environmental claims are given a specific, and limited, priority under the CCAA. To exempt orders which are in fact monetary claims from the CCAA proceedings would amount to conferring upon provinces a priority higher than the one provided for in the CCAA.³⁸

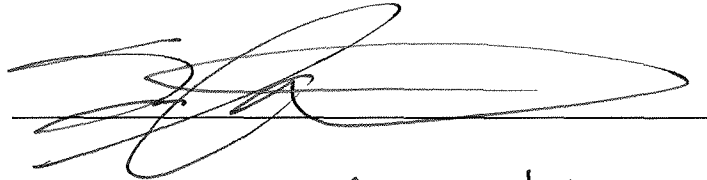
PART V – ORDER REQUESTED

44. SkyGreece respectfully requests an order as follows:

- (a) An order applying the stay under section 69(1) of the *BIA* pursuant to section 69.6(3) of the *BIA* to any and all proceedings against SkyGreece commenced at the CTA as a result of its suspension of flights on or after August 27, 2015, including Case Nos.15-03972 and 15-03912.
- (b) If necessary, an order pursuant to section 69.6(4) of the *BIA* declaring that the stay of proceedings prescribed by section 69(1) applies to the proceedings against SkyGreece commenced at the CTA as a result of its suspension of flights on or after August 27, 2015, bearing Case Nos.15-03972 and 15-03912.

³⁸ *Abitibi*, *supra* note 1, at para. 19.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a horizontal line.

M. STARINO of counsel to
Sky GREECE AIRLINES S.A.

SCHEDULE "A" – CASES

Newfoundland and Labrador v. AbitibiBowater Inc. [2012] 3 SCR 443

Northstar Aerospace Inc., Re, 2013 ONCA

Nortel Networks Corp., Re 2013 ONCA 599

Terrance Bay Pulp Inc., Re, 2013 ONSC 5111

SCHEDULE "B" – STATUTES

69. (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

(a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy,

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

until the filing of a proposal under subsection 62(1) in respect of the insolvent person or the bankruptcy of the insolvent person.

69.6 (1) In this section, "regulatory body" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act

(2) Subject to subsection (3), no stay provided by section 69 or 69.1 affects a regulatory body's investigation in respect of an insolvent person or an action, suit or proceeding that is taken in respect of the insolvent person by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court

(3) On application by the insolvent person and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable proposal could not be made in respect of the insolvent person if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the stay provided by section 69 or 69.1

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the insolvent person and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.