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October 14, 2008

The Honourable Justice A. David MacAdam
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord:

**RE: Canadian Sailing Expeditions Inc. – *Companies' Creditors Arrangement Act*
S.H. No. 297999**

I am scheduled to appear before your Lordship on Friday, October 17, 2008 for an application seeking an order approving an extension of a stay of proceedings issued pursuant to an order of Justice Moir on June 27, 2008 (the "Initial Order") pursuant to the *Companies' Creditors Arrangement Act* (the "CCAA").

Filed with this application is the affidavit of Gavin MacDonald attaching the unsworn affidavit of Douglas Prothero, president and director of Canadian Sailing Expeditions Inc. (the "Company"), who is presently travelling but who has approved the attached form of affidavit and will swear it prior to the hearing of this matter. I will cause the sworn affidavit to be filed with the Court when it is available. I am advised by Paul Goodman of BDO Dunwoody Goodman Rosen Inc., in its capacity as Court appointed monitor of the Company, that the monitor has filed its fifth report directly with the Court.

Pursuant to paragraph 42 of the Initial Order, the Company is permitted to apply to this Honourable Court for further relief on 48 hours notice. Additional orders extending the stay have been issued, the most of which was issued by your lordship on September 5, 2008 to extend the Stay Termination Date (as defined in the Initial Order) to October 17, 2008. The Company is now seeking to further extend the Stay Termination Date to and including November 28, 2008.

In your lordship's order of September 5, 2008, you further instructed that the Company should file its plan of arrangement on or before October 15, 2008, or provide suitable

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reasons to the court. As your lordship is aware, the plan of arrangement has not been filed with the Court. However, as referenced in the affidavit of Douglas Prothero, a draft plan has been prepared and it was circulated to counsel and representatives of the parties receiving service of these application documents on October 14, 2008 by e-mail. It was also faxed to a representative of ACOA, a significant unsecured creditor of the Company. It is the Company's submission that filing the plan with the Court prior to the significant creditors having an opportunity to review and comment on the draft is counterproductive. As detailed in Mr. Prothero's affidavit and in the monitor's reports, the Company continues to diligently work to restructure its affairs and those efforts have led to the draft plan. We anticipate that the significant creditors may have comments and that the draft plan may need to be amended to reflect those concerns. The Company submits that filing the plan with the Court prior to addressing those concerns will not advance the process and could damage the Company's ability to restructure its affairs. It is the intention of the Company to file the plan of arrangement as soon as the significant creditors have commented upon it. As noted in Mr. Prothero's affidavit, the current debtor in possession facility provided to the Company will be sufficient for its operations in October but will not be sufficient to take it to the new proposed Stay Termination Date. Therefore, it is the Company's intention to make further application later in October for an order: (i) approving the proposed plan of arrangement; (ii) setting a date for the voting on the plan of arrangement by the creditors; and (iii) approval of increased debtor in possession financing to permit the Company to continue its current level of operations.

Paragraph 11(4) of the CCAA sets out the jurisdiction of the Court to consider the Company's application:

(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,

(a) staying until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection 1;

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

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- (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Pursuant to section 11(6) of the CCAA, the burden of demonstrating to the Court that it is appropriate for it to grant the requested extension rests with the Company. Section 11(6) reads as follows:

- (6) Burden of proof on application – The court shall not make an order under subsection (3) or (4) unless
 - (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
 - (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted and is acting, in good faith and with due diligence.

In your Lordship's recent decision, *Re Federal Gypsum Company* (2007 NSSC 347) at paragraph 16, your Lordship cited Justice Glennie of the New Brunswick Court of Queen's Bench in *Re Cansugar Inc.*, 2004 NBQB 7 in summarizing the requirements to order an extension of a stay termination date as follows:

- (a) the circumstances exist to make the order appropriate;
- (b) that the applicant has acted and continues to act in good faith; and
- (c) that the applicant has acted and continues to act with due diligence.

Justice Farley in *Lehndorff General Partners Ltd., Re*, (1993) 17 CBR (3d) 24 (Ont. Gen. Div. [Commercial List]) in connection with the principles to be reviewed in such applications commented at para 6 as follows:

The CCAA is intended to provide a structured environment for the negotiation of compromises between the debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to

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otherwise deal with its assets but it requires the protection of the court in order to do so *and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA...* [emphasis added]

These comments of Justice Farley were quoted with approval by Justice Glennie of the New Brunswick Court of Queen's Bench in *Re Simpson's Island Salmon Ltd.* 2006 NBQB 6 at para 27.

Justice Glennie further wrote in *Re Cansugar Inc.*, supra at para 9:

In my opinion, the requirements of section 11(6) of the CCAA have been satisfied in this case. The continuation of a stay is supported by the overriding purpose of the CCAA, which is to allow an insolvent company a reasonable period of time to reorganize and propose a plan of arrangement to its creditors and the court, and to prevent manoeuvres for positioning among creditors in the interim.

Your Lordship, in *Re Federal Gypsum Company*, supra, also quoted from *Re San Francisco Gifts Ltd.*, 2005 ABQB 91 at para 28 on the supervisory role of the court in applications to extend stays of proceeding:

The court's role during the stay period has been described as a supervisory one, meant to: "*preserve the status quo and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure.*" That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling creditors meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interest is maintained. [emphasis added]


It is respectfully submitted that the Company requires additional time to receive comments on, revise if necessary and finalize its plan. It has made progress since the time of the last application and a draft plan has now been circulated to the significant creditors. Once those creditors have had an opportunity to review and comment on the plan, the revised plan can then be filed with the Court for preliminary approval prior to a meeting of all creditors.

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Mr. Prothero's affidavit on file notes the efforts made on several fronts to create a plan of reorganization for the Company. The Monitor's reports filed in this proceedings to date and a fifth report, filed in respect of this Application, will provide additional information on the Company's restructuring efforts and validate the evidence submitted. We submit that the Company has made progress in its efforts to restructure its affairs and that it remains too early to draw any conclusions as to whether the Company will succeed or fail in its restructuring. The length of extension sought by the Company is approximately 42 days which is consistent with prior extensions in this matter. Given that once the plan of arrangement is filed, there will need to be sufficient time for notice to the creditors prior to a meeting to vote on the plan, the length of the stay and therefore in our view reasonable.

I will be pleased to respond to any questions the court may have in connection with this application. Mr. Prothero will also be in attendance and will be able to respond to any questions arising from his affidavit.

Respectfully submitted,


for Robert G. MacKeigan
RGM/mer