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JUDICIAL CENTRE

CALGARY

IN THE MATTER OF THE COMPANIES'  
CREDITORS ARRANGEMENT ACT, R.S.C. 1985,  
c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF  
COMPROMISE OR ARRANGEMENT OF LYNX AIR  
HOLDINGS CORPORATION and 1263343  
ALBERTA INC. dba LYNX AIR

DOCUMENT

**BENCH BRIEF OF DELTA AIR LINES, INC.**

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**Bench Brief of Delta Air Lines, Inc.**

**Application before the Honourable Justice Whitling at 10:00 a.m. on March 1, 2024**

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## I. INTRODUCTION

1. This Bench Brief is submitted on behalf of Delta Air Lines, Inc. (“**Delta**”), a creditor of the applicants, Lynx Air Holdings Corporation (“**Lynx Holdings**”) and 1263343 Alberta Inc. dba Lynx Air. (“**Lynx Air**”, along with Lynx Holding are collectively, the “**Applicants**”). Delta seeks to clarify, in part, the order granted by the Honourable Justice Gill in the within proceedings on February 22, 2024 (the “**Initial Order**”), and as may be amended pursuant to the proposed Amended and Restated Initial Order (the “**ARIO**”), if granted by this Honourable Court.
2. Capitalized terms not otherwise defined herein shall have the meaning given to them in the Initial Order.
3. The purpose of this Bench Brief is to set out the apparent ambiguity in the operation of the proposed ARIO, specifically with respect to the proposed carveout of aircraft lessor or financiers from the Charges, while a similar carveout has not been afforded to potential lien claimants who arguably have a greater interest in the interests being carveout.
4. This Bench Brief is not intended to address the merits of any claims at this stage or discuss in detail any possessory lien rights Delta may have under the *Garage Keepers’ Lien Act*, R.S.A. 2000, c. G-2 (“**GKLA**”) or under the *Possessory Liens Act*, RSA 2000, c P-19 (the “**PLA**”).

## II. DISCUSSION

### A. Initial Order and ARIO

5. The Initial Order granted standard CCAA priority charges, specifically, the Administrative Charge, the Interim Lender’s Charge and the Director’s Charge. Paragraph 40 of the Initial Order sets out of ranking of the priority charges as against other secured parties. The language in paragraph 40 has been carried over to the ARIO now sought by the Applicants, and is set out in paragraph 45, which provides:

Each of the Administration Charge, the Interim Lender’s Charge, the Directors’ Charge, and the KERP Charge (each as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA the Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, “Encumbrances”) in favour of any Person. Without limiting the generality of the foregoing, and subject to further Order of this Court, **the Charges shall not rank in priority to the interests of any aircraft lessor or financier as described**

**in paragraphs 70 and 71 of the First Woodward Affidavit. [Emphasis added].**

Proposed Amended and Restated Initial Order, to be filed, at para 45.

6. The basis for the priority carve out in favour of the aircraft lessors and financiers listed in paragraphs 70 and 71 of the First Woodward Affidavit (hereafter referred to as the “**Lessors and Financers**”) appear to be due to the fact that all obligations of the Applicants under the applicable aircraft leases are: (i) guaranteed; and (ii) secured and such security interests and international interests having been registered pursuant to the Alberta Personal Property Security Registry and the International Registry (as such term is defined in *An Act to implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, S.C. 2005, c. 3).

Affidavit of Affidavit of Michael Woodward sworn February 22, 2024, at para 72 [First Woodward Affidavit].

7. The priority carveout stipulated in paragraph 45 of the ARIO is hereby referred to as the “**Priority Carve Out**”.

### **III. ISSUES**

8. The issue to be determined by this Honourable Court is whether, it is fair and reasonable, in the circumstances allow the Priority Carve Out to apply to a party which may be subordinated in interest, pursuant to the GKLA, PLA and/or the *Convention on International Interests in Mobile Equipment*, 16 November 2001, UNTS Vol 2307, I-41143 at 285 (the “**Convention**”) and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, 16 November 2001, UNTS Vol 2367, I-41143 at 517 (the “**Aircraft Protocol**”) together with the Convention are referred to as the “**Cape Town Convention**”) but not to a party which may have a superior interest pursuant to a non-consensual right or interest under Canadian law.
9. In the alternative, is it inappropriate in the circumstances, for this Honourable Court to impede on Delta’s possessory lien rights in the context of a liquidating CCAA of a non-operating entity.

### **IV. LAW AND ARGUMENT**

#### **A. Lien Claims asserted by Delta**

10. Delta’s right to its specific lien claims is a question of fact to be determined later, either within these proceedings, or otherwise. Delta reserves the right, if necessary, to make a further application in

these proceedings for an amendment to Initial Order, or the ARIO, if granted by this Honourable Court in the current form.

11. Delta may assert lien claims pursuant to: (i) the GKLA (ii) common law; and (iii) and under the PLA.

**a. GKLA Lien**

12. Section 2(1) of the GKLA provides:

2(1) In addition to every other remedy that a garage keeper has for the recovery of money owing to the garage keeper for

(a) the storage, repair or maintenance of a motor vehicle or a farm vehicle or of any part of a motor vehicle or farm vehicle, or

(b) the price of accessories or parts furnished for a motor vehicle, farm vehicle or part of a motor vehicle or farm vehicle,

a garage keeper who is entitled to payment of a sum for the storage, repair or maintenance or the price of accessories or parts furnished, has a lien on the motor vehicle or part of it or the farm vehicle or part of it for the sum to which the garage keeper is entitled.

*Garage Keepers' Lien Act, R.S.A. 2000, c. G-2, at s. 2(1) [GKLA].*

13. Garage keeper is defined in section 1(d) of the GKLA as "a person who keeps a place of business for the housing, storage or repair of a motor vehicle or farm vehicle and who receives compensation for that housing, storage or repair".

*GKLA at s. 1(d).*

14. A motor vehicle for the purpose of the GKLA is defined in section 1(e) of the GKLA as "a vehicle propelled by any power other than muscular power, and includes an airplane..."

*GKLA at s. 1(e).*

15. In order to be entitled to a lien under the GKLA, section 2(3) provides that the garage keeper must either: (i) retain possession of the motor vehicle or farm vehicle; or (ii) obtains an acknowledgement or indebtedness by way of signed invoice or statement of account.

*GKLA at s. 2(3).*

16. Section 3 of the GKLA provides that a lien under the GKLA terminates on the 21<sup>st</sup> day after the day: (i) on which possession is surrendered to the owner; (ii) on which repairs were completed if the vehicle was not in possession of the garage keeper at the time of repair; or (iii) after the accessories

or parts to the motor vehicle or farm vehicle were furnished, unless prior to such time, the garage keeper registers a financing statement in the Alberta Personal Property Registry.

**GKLA at s. 3.**

**b. Common Law General Lien**

17. The GKLA specifically preserves any additional rights that a “garage keeper” may have under common law or statute. Particularly, section 2(1) provides that the lien available under the GKLA is “In addition to every other remedy that a garage keeper has for the recovery of money owing to the garage keeper”.
18. A summary of the common law lien is set out in Macklem and Bristow, *Construction and Mechanic’s Liens in Canada* (5th Ed.), (The Carswell Company Limited: Toronto), 1985, the authors state:

The common law recognizes two classes of liens, the general and the particular lien.

The general lien is founded either upon custom or specific contract and is a lien upon any personal property for a general debt or account due to the person claiming it. It operates as a form of floating charge upon any of the personal property of the person who owes the account which is in the hands of the lien claimant. A general lien may be exercised by a banker or a lawyer, for example, upon all of the client’s or customer’s papers in his hands and he is not bound to give them up until payment of the owner’s indebtedness has been made to him. The actual papers or securities retained by the claimant may not have any connection with the account for which he claims payment but so long as they are in his possession, he has the right to retain them under his general lien.

In contrast, the particular lien attaches only to the actual property of the debtor upon which the labour and materials have been expended and attaches only so long as the article remains in the lien claimant’s possession. This lien is the lien of an artisan which arises upon his bestowing skill, labour or money upon personal property with the express or implied authority of the owner. [citations omitted]

**Macklem and Bristow, *Construction and Mechanic’s Liens in Canada* (5th Ed.), (The Carswell Company Limited: Toronto), 1985, as cited in *In the Bankruptcy of Merrill Engineering Ltd.*, 2004 BCSC 493, at para 28.**

19. A general lien pertains to claims related to property as well as intangibles, whereas a particular lien is limited to property.

***Cansearch Resources Ltd v Regent Resources Ltd*, 2017 ABQB 535, at para 50 [Cansearch Resources].**

20. General liens arise either from express contract or from a general trade usage or custom.

*Holowach v. Hunt* (1992), 1992 CarswellAlta 378, [1992] A.W.L.D. 723, at paras 6-11 [*Holowach*].

21. In *Holowach v. Hunt*, (1992), 1992 CanLII 14166 (AB KB), 4 P.P.S.A.C. (2d) 1 (Alta. Q.B.), Master Quinn states:

To establish a general lien arising by usage in a particular case, for instance in a particular locality, the usage must be certain and reasonable and so universally acquiesced in that everyone in the trade knew of, or on inquiry could have ascertained, its existence. To establish a general lien of this nature there must be satisfactory evidence of numerous and important instances of its exercise; if the evidence is sufficient to establish the usage, the parties are presumed to be aware of, and are bound by, the usage. The question whether the lien exists is one of fact.

*Holowach*, at para 11.

### c. Possessory Lien under PLA

22. The PLA codifies the common law possessory lien, as summarized by Justice in *Pigeon Lake Golf Club (1991) Holdings Ltd v Greene*:

The Possessory Liens Act, does not create liens. It creates a statutory means for the enforcement of liens which arise at common law. At common law a lien holder did not have the right to sell the property subject to the lien. It had only the right to keep the property until the debt was paid. The Possessory Liens Act gives holders of common law liens the right to sell the property to enforce the debt in respect of which the lien arises.

*Pigeon Lake Golf Club (1991) Holdings Ltd v Greene*, 2019 ABQB 718, at para 15.

23. A possessory lien under the PLA is considered a particular lien.

*Cansearch Resources*, at para 50.

24. The relevant legal test to establish an entitlement to a possessory lien in this instance is outlined in sections 2, 5, and 6 of the PLA:

Lien on chattels

2 A person has a particular lien for the payment of the person's debt on a chattel on which the person has expended the person's money, labour or skill at the request of the owner of it and in so doing enhanced its value.

...

Possession of property

5 Actual or constructive and continued possession of the property that is the subject-matter of the debt is essential to the existence of the lien.

Extent of lien

6 A lien extends over all the property on which the lienholder has expended the lienholder's money, labour or skill, but no lien arises on account of a general balance due from the owner of the property to the lienholder.

*Possessory Liens Act, RSA 2000, c P-19, at s. 2, 5 and 6.*

#### **B. Delta's Lien rights, if proven would likely have priority to the Lessors and Financiers**

25. Section 32 of the *Personal Property Security Act*, RSA 2000, c P-7 (the "**PPSA**") provides that Delta's lien rights would have priority over perfected and unperfected security interests. Particularly, section 32 of the PPSA provides:

Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that the person has with respect to the materials or services has priority over a perfected or unperfected security interest in the goods unless the lien is given by an Act that provides that the lien does not have the priority.

26. So long as the lien under the GKLA has not been terminated pursuant to section 3 of GKLA as summarized above, the priority rules of section 32 of the PPSA will apply.
27. As such the liens asserted by Delta, either under the GKLA, or the common law would be provided priority with respect to perfect and unperfected secured creditors.

#### **C. Priority under the Cape Town Convention**

28. Pursuant to the declarations made under the Cape Town Convention, Canada has preserved domestic non-possessory rights including liens, and any priority they may have in domestic law over secured creditor.
29. Canada ratified the Convention on December 21, 2012. The Cape Town Convention was then implemented into federal through *An Act to implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment*, SC 2005, c 3 (the "**Federal Act**") and also implemented into Alberta law through *the International Interests in Mobile Aircraft Equipment Act*, SA 2006, c I-6.5 (the "**Alberta Act**").



**An Act to implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, SC 2005, c 3;  
International Interests in Mobile Aircraft Equipment Act, SA 2006, c I-6.5**

30. In ratifying the Cape Town Convention, Canada chose to alter the application of Article 29 which sets out the priority of competing interest, by making a declaration pursuant to Article 39.
31. Under Article 39 of the Convention, Canada made the following declaration:

The Government of Canada declares, in accordance with Article 39(1)(a) of the Convention, that any non-consensual right or interest under Canadian law existing at the date of this declaration or created after that date, that has priority over an interest in an object equivalent to that of the holder of a registered international interest, shall have priority to the same extent over such registered international interest, whether in or outside insolvency proceedings.

**Declarations Lodged By Canada Under the Cape Town Convention, online: International Institute for the Unification of Private Law <<https://www.unidroit.org/instruments/security-interests/cape-town-convention/states-parties/d-canada-ct>>**

**D. Delta should be included in the Priority Carve Out**

32. One of the fundamental tenants of insolvency law is that all creditors are treated fairly.
- Nortel Networks Corporation (Re)*, 2015 ONCA 681, at para 34.**
33. The Priority Carve Out, as it is currently drafted has the undesired effect of subordinating Delta's lien interests to the priority charges contained in the Initial Order, while at the same time relieving the Lessors and Financers and the assets subject to their security from the application of the priming charges. As such, the Lessors and Financers would be free to enforce on their security without being encumbered by the priming charges, while any recovery from enforcement by Delta on their lien claim will be encumbered by the priming charges.
34. As summarized above, Delta's lien claim would rank in priority to the security interests of the Lessors and Financers. As such they should be treated, at a minimum, equally to the Lessors and Financers. Delta therefore submits that it is fair and reasonable in the circumstances to include Delta in the Priority Carve Out.

**E. The ARIO inappropriately deprives Delta of its possessory lien rights**

35. In the alternative, the ARIO as drafted inappropriately prevents Delta from asserting and exercising on its possessory lien right. In the circumstances of a liquidating CCAA of a non-operating business, such denial of Delta's lien rights is improper and should be rectified.

**V. CONCLUSION**

36. For the reasons set out above, Delta requests that this Honourable Court include Delta in the Priority Carve Out and not improperly prevent it from exercising a possessory lien right. Accordingly, it is respectfully submitted that the following changes be made to the ARIO:

- (a) Para 16(d) of the proposed AIRO should be revised to read:

"(d) prevent the preservation or registration of a claim for lien;"

- (b) Para 45 of the proposed AIRO should be revised to include the following at end of the paragraph:

"or any Peron with a lien interest in priority thereto."

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** at Calgary, Alberta this 1<sup>st</sup> day of March 2024.

Estimated time for argument: 20 minutes

**DENTONS CANADA LLP**

Per:

  
\_\_\_\_\_  
Afshan Naveed, counsel to Delta Air Lines,  
Inc.