CITATION: Skyservice Airlines Inc. (Re), 2011 ONSC 703
COURT FILE NO.: CV-10-8647-00CL
DATE: 20110406

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE RECEIVERSHIP** OF SKYSERVICE AIRLINES INC., OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 9 OF THE *AIRPORT TRANSFER (MISCELLANEOUS MATTERS) ACT*, S.C. 1992, c.5 (APPLICATION BY THE GREATER TORONTO AIRPORTS AUTHORITY)

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 56 OF THE *CIVIL AIR NAVIGATION SERVICES COMMERCIALIZATION ACT*, S.C. 1996, c.20, AS AMENDED (Application by NAV Canada)

BEFORE: MORAWETZ J.

COUNSEL: Harvey Chaiton, for the Winnipeg Airports Authority

Clifton Prophet and Patrick Shea, for NAV Canada

Heather Meredith, for the Receiver, FTI Consulting Inc.

Donald G. Gray, Deborah S. Grieve and Auriol Marasco, for IAI V, Inc. and MCAP Europe Limited

Steven Weisz and Chris Burr, for Thomson Airways Limited and Sunwing Tours Inc.

Jane Dietrich, for International Lease Finance Corporation

Mary Paterson, for Thomas Cook Canada, Inc.

Allan D. Coleman and Shaun T. Irving, for Greater Toronto Airports Authority and Ottawa MacDonald-Cartier International Airport Authority

Pamela L.J. Huff for C.I.T. Leasing Corporation

ENDORSEMENT

I OVERVIEW

[1] On March 31, 2010, Thomas Cook Canada, Inc. ("TCCI") applied for an order pursuant to s. 243 (1) of the *Bankruptcy and Insolvency Act* (the "BIA") and s. 101 of the *Courts of Justice Act* (the "CJA") appointing FTI Consulting Canada Inc. (the "Receiver") as receiver of the assets, undertakings and properties of Skyservice Airlines Inc. ("Skyservice"). At 11:00 a.m. on March 31, 2010, Gans J. granted the receivership order (the "Receivership Order").

[2] Priority disputes immediately arose involving the Greater Toronto Airports Authority ("GTAA"), the Ottawa MacDonald-Cartier International Airport Authority ("OMCIAA"), Winnipeg Airports Authority Inc. ("WAA") (collectively, the "Airport Authorities"), and NAV Canada on one side and International Lease Finance Corporation ("ILFC"), Thomson Airways Limited ("Thomson"), Sunwing Tours Inc. ("Sunwing"), IAI V. Inc. ("IAI") and MCAP Europe Limited ("MCAP") on the other side.

[3] In the hours after the granting of the Receivership Order, GTAA brought its application, in this Court, for aircraft seizure and detention orders and WAA brought an application for an aircraft seizure and detention order in the Court of Queen's Bench for Manitoba. NAV Canada verbally gave notice of its intention to bring an application for similar relief and formally brought its application on April 6, 2010. On April 6, 2010, OMCIAA brought an application, in this Court, for an aircraft seizure and detention order.

[4] The Airport Authorities and NAV Canada respectively ground their applications in s. 9 of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c.5 (the "*Airport Transfer Act*") and s. 56 of *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("CANSCA")

[5] Section 9(1) of the *Airport Transfer Act* reads:

> 9 (1) Where the amount of any landing fees, general terminal fees or other charges related to the use of an airport, and interest thereon, set by a designated airport authority in respect of an airport operated by the authority has not been paid, the authority may, in addition to any other remedy available for the collection of the amount and whether or not a judgment for the collection of the amount has been obtained, on application to the superior court of the province in which any aircraft owned or operated by the person liable to pay the amount is situated, obtain an order of the court, issued on such terms as the court considers necessary, authorizing the authority to seize and detain aircraft.

[6] Section 56(1) of CANSCA reads:

> 56 (1) In addition to any other remedy available for the collection of an unpaid and overdue charge imposed by the Corporation for air navigation services, and whether or not a judgment for the collection of the charge has been obtained, the Corporation may apply to the superior court of the province in which any aircraft owned or operated by the person liable to pay the charge is situated for an order, issued on such terms as the court considers appropriate, authorizing the Corporation to seize and detain any such aircraft until the charge is paid or a bond or other security for the unpaid and overdue amount in a form satisfactory to the Corporation is deposited with the Corporation.

[7] The aircraft lessors, ILFC, Thomson, Sunwing, IAI and MCAP, brought motions seeking declarations, among other things, that none of NAV Canada, GTAA, OMCIAA and WAA were entitled to seize or detain various aircraft for any amounts alleged to be owing by Skyservice to any of the Airport Authorities or to NAV Canada.

[8] There is no dispute that prior to the Receivership Order, Skyservice operated commercial aircraft that landed at the various airports and used the facilities and services provided by the Airport Authorities and NAV Canada. Nor is it disputed that, as a consequence, Skyservice owes GTAA, OMCIAA and WAA for landing fees, general terminal fees, airport improvement fees and/or other charges related to the use of the airports and, further, that Skyservice owes monies to NAV Canada for air navigation services provided by NAV Canada.

[9] The Airport Authorities and NAV Canada are attempting to recover amounts due to them from Skyservice by enforcing their rights as against the aircraft formerly used by Skyservice and

which had been leased from the various lessors. The lessors take the position that circumstances are such that the Airport Authorities and NAV Canada do not have the right to seize and detain such aircraft and that the aircraft should be returned to the lessors without payment to the Airport Authorities and NAV Canada.

II PARTIES

A. Skyservice

[10] Skyservice was a Canadian airline, headquartered in Toronto and incorporated pursuant to the laws of Canada, that offered charter flight air service both domestically and internationally.

[11] Prior to the granting of the Receivership Order, Skyservice operated a fleet of 20 aircraft. A number of these aircraft were flown in and out of Toronto Pearson Airport and the Ottawa Airport on a regular basis. Aircraft also flew in and out of Winnipeg International Airport.

[12] Ten of these aircraft were utilized for flight services provided by Skyservice primarily to TCCI. These aircraft had been returned to the lessors of those aircraft shortly before the Receivership Order was granted. The other ten aircraft, being the aircraft that are the subject of the applications (the "Aircraft"), were utilized for flight services provided by Skyservice, primarily to Sunwing. It is acknowledged by all parties that the leases in respect of the Aircraft are "true" leases pursuant to which Skyservice had, subject to the terms of the applicable leases, the right to possess and use the Aircraft but not legal title.

[13] The Aircraft that are the subject of this application, each of which was on the ground at either Pearson Airport or Winnipeg International Airport at the time the *Status Quo* Order (defined below) was granted, consist of the following:

Aircraft Type	Serial Number	Mark Model Number	Aircraft Lessor	Location
Airbus A320	1605	C-GTDH	Thomson	Toronto
Airbus A320	1571	C-GTDG	Thomson	Toronto
Airbus A320	1411	C-FRAA	MCAP	Toronto
Airbus A320	1780	C-GTDP	ILFC	Toronto
Boeing 757	29941	C-FLEU	Thomson	Toronto
Boeing 757	25053	C-GMYH	CIT	Toronto
Boeing 757	32447	C-GTBB	Thomson	Toronto
Boeing 757	24772	C-GTSJ	IAI	Toronto
Boeing 757	26158	C-FLOX	Thomson	Winnipeg
Boeing 757	29944	C-FOBH	Thomson	Winnipeg

[14] On March 31, 2010, and until some days thereafter, the Aircraft were all registered in the name of Skyservice.

B. The Airport Authorities and NAV Canada

i. GTAA and OMCIAA

[15] GTAA is the operator of Pearson Airport and is a designated airport authority under the *Airport Transfer Act*. OMCIAA is the operator of the Ottawa Airport and is a designated airport authority under the *Airport Transfer Act*.

[16] As of March 31, 2010, Skyservice owed GTAA $268,600.16 in respect of fees and charges related to its use of Pearson Airport. The largest portion of the amount owing to the GTAA by Skyservice is for Airport Improvement Fees ("AIF") collected by Skyservice from passengers on flights operated by Skyservice that departed from Pearson Airport during the months of February and March 2010. The AIF were collected by Skyservice on behalf of the GTAA. In addition, Skyservice owes an amount to the GTAA for aeronautical fees (*e.g.*, landing fees, general terminal charges and aircraft parking fees) related to its use of Pearson Airport in the month of March 2010.

[17] As of March 31, 2010, Skyservice owed OMCIAA $223,913.93, related to its use of the Ottawa Airport. A portion of the amount owing to OMCIAA by Skyservice relates to the collection of AIF by Skyservice from passengers travelling on flights operated by Skyservice that departed from the Ottawa Airport in March 2010. The AIF were collected by Skyservice on behalf of the OMCIAA. The remaining amount owing to the OMCIAA is for aeronautical fees for the month of March 2010.

ii. WAA

[18] The Receivership Order was obtained without notice to the WAA. On March 31, 2010, the WAA brought an application for an order lifting the stay and for the seizure and detention of the two aircraft located at the Winnipeg International Airport (the "Winnipeg Aircraft") pursuant to the *Airport Transfer Act*.

[19] The application proceeded on an *ex parte* basis before the Manitoba Court of Queen's Bench on the afternoon of March 31, 2010. The WAA obtained the requested relief (the "Winnipeg Seizure Order") and proceeded to seize and detain the Winnipeg Aircraft.

[20] After the granting of the WAA Seizure Order and the *Status Quo* Order, the Receiver and parties established a court-approved Release Protocol (defined below), providing, *inter alia*, that:

(a) If either of the GTAA or the OMCIAA seizure applications are successful, the WAA Seizure Order shall be considered a final seizure order, subject to any disputes concerning the quantum of the debt owed to WAA by Skyservice;

(b) Any dispute of the quantum of the WAA debt shall be determined in the Manitoba proceeding;

(c) In the event both GTAA and OMCIAA are unsuccessful, the Receiver and/or Thomson are permitted to proceed with their motions to set aside the WAA Seizure Order in Manitoba.

[21] As a result of the Release Protocol, this Court has not been asked to determine whether WAA was entitled to the Winnipeg Seizure Order. WAA's agreed role in this proceeding is to support the applications brought by the GTAA, OMCIAA and NAV Canada.

iii. NAV Canada

[22] NAV Canada is a private, not-for-profit corporation operating under CANSCA. NAV Canada owns and operates Canada's civil air navigation service and co-ordinates the safe and efficient movement of aircraft in Canadian domestic airspace and international airspace assigned to Canadian control by providing air traffic control, flight information, weather briefings, aeronautical information, airport advisory services, and electronic aids to navigation.

[23] NAV Canada provided civil air navigation services in relation to the Aircraft and other aircraft owned or operated by Skyservice, and Skyservice incurred charges for these services, which have not been paid.

[24] Skyservice owes NAV Canada $1,100,561.67, plus applicable interest, for civil air navigation services provided to Skyservice. On March 2, 2010, NAV Canada issued invoice number CS098164 in the amount of $558,786.47 to Skyservice for flights flown in February 2010. Skyservice has not paid the February 2010 invoice. On March 31, 2010, NAV Canada issued invoice number CS099563 in the amount of $540,607.44 to Skyservice for flights in March 2010. In addition to these two invoices, NAV Canada is owed $1,167.76 for flights which took place on March 31, 2010.

C. The Lessors

i. Thomson

[25] Four of the Aircraft, bearing Canadian Registration Marks C-FLOX, C-FLEU, C-FOBH, and C-GTDG were leased to Skyservice by Thomson. The leases for these four aircraft are governed by an Aircraft Common Terms Agreement between Thomson and Skyservice, the terms of which are incorporated into each lease agreement for these aircraft. Under the terms of these leases, Skyservice has the right to possess and use the aircraft, subject to the terms of the leases, but Thomson remains the legal titleholder.

[26] Thomson also arranged for Skyservice to lease from ORIX Aviation System Limited ("Orix") an aircraft bearing Canadian Registration Mark C-GTDH and to lease from Celestial Aviation Trading 23 Limited ("Celestial") an aircraft bearing Canadian Registration Mark C-GTBB. In both of these cases, Thomson provided an indemnity to the legal titleholder. As a result, Thomson is functionally in the same economic position in respect of these aircraft as in respect of the four aircraft it leased to Skyservice directly. Since Skyservice's collapse, Thomson has been dealing directly with Skyservice and the Receiver in respect of these two aircraft. Celestial and Orix have assigned to Thomson certain of their rights against Skyservice in respect of the lease of these aircraft.

ii. MCAP/IAI

[27] MCAP is a subsidiary of Mitsubishi Corporation and is the owner and legal and beneficial titleholder of one Airbus A320-200 aircraft, bearing manufacturer's serial number 1411 and formerly bearing Canadian registration marks C-FRAA. Skyservice and MCAP entered into a Novated Lease Agreement, dated September 28, 2000, as novated, supplemented, amended and restated on December 20, 2007 in respect of the MCAP Aircraft.

[28] IAI is a subsidiary of Jetscape Inc. and is the owner and legal and beneficial titleholder of one Boeing 757-236 aircraft, bearing manufacturer's serial number 24772 and formerly bearing Canadian registration marks C-GTSJ. Skyservice and IAI entered into an Aircraft Lease Agreement, dated August 4, 2009 in respect of the IAI Aircraft.

iii. ILFC/CIT

[29] ILFC and CIT are each lessors of one Aircraft to Skyservice. ILFC entered into an Aircraft Lease Agreement, dated January 11, 2001 as amended in respect of one Airbus A320-200 aircraft, bearing manufacturer's serial number 1780 and Canadian registration mark C-GTDP. CIT entered into an Aircraft Lease Agreement dated as of April 5, 2004, as supplemented and amended, in respect of one Boeing 757-236 aircraft, bearing manufacturer's serial number 25053 and Canadian registration mark C-GMYH.

III FACTS

A. Skyservice Insolvency, Cessation of Business, and Receivership

[30] On March 30, 2010, at approximately 5:30 p.m. all of Skyservice's officers and directors resigned.

[31] Skyservice's directors and officers caused Skyservice to pay all statutory priority payables out of concern that it would not continue to operate after March 30, 2010.

[32] On the morning of March 31, 2010, TCCI brought an *ex parte* application pursuant to section 243(1) of the BIA and s. 101 of the CJA for an order, *inter alia*, appointing a receiver over the assets, undertakings and properties of Skyservice.

[33] At approximately 11:00 a.m., Gans J. granted the Receivership Order, appointing the Receiver of Skyservice and its assets, undertakings and properties, and imposing a stay of proceedings in respect of Skyservice.

[34] The purpose of the Receivership Order was to wind-up Skyservice.

[35] For the purposes of this application, the relevant portions of the Receivership Order are reproduced at Appendix "A".

[36] The Receivership Order authorized the Receiver "to take possession of and exercise control over the Property" and to "permit any owner or lessor of, or person with an interest in, any such Aircraft Objects to take possession or control thereof", whether the Receiver has or has not taken prior possession or until thereof, on such terms (if any) as the receiver considers appropriate.

[37] The Receivership Order did not allow either the "Receiver or Skyservice to carry on any business". The Receivership Order authorized, but did not obligate, the Receiver only "to wind down but not operate the business" of Skyservice.

[38] On the morning of March 31, 2010, Skyservice issued a press release stating that it was ceasing operations.

[39] A representative of Transport Canada, the airline's regulator, attended at the executive offices of Skyservice at or about the time of the Receivership Order and delivered a letter suspending the air operator certificate and aircraft maintenance organization licenses and authorities held by Skyservice under s. 103.07 (d) of the *Canadian Aviation Regulations*, SOR/96-433 (the "CARs") and s. 7.1(1)(b) of the *Aeronautics Act*, R.S.C. 1985, c. A-2, because

Skyservice had ceased business and could no longer meet the requirements of its Air Operator Certificate, including possessing or having the authority or capacity to maintain or operate aircraft.

B. Termination of Leases, Seizure Applications and the *Status Quo* Order

[40] Skyservice's cessation of business and the appointment of the Receiver constituted events of default under the various leases for the Aircraft and that, subject to the provisions in Receivership Order, those defaults would have permitted the legal titleholders to exercise remedies under the applicable leases.

[41] At 1:00 p.m. on March 31, 2010, IAI instructed that the pre-signed termination of its lease that had been delivered to IAI by Skyservice when the lease was signed, be dated March 31, 2010, and, subsequently, delivered a confirmation of such termination to Skyservice at 4:39 p.m. on that day. Delivery of this confirmation of termination did not, however, result in any change of physical position, and IAI did not take physical possession or control of C-GTSJ.

[42] Notwithstanding the Receivership Order, MCAP purported to terminate the lease for C-FRAA on March 31, 2010. MCAP did not take physical possession or control of C-FRAA.

[43] There is no dispute that (a) only MCAP and IAI purported to terminate the leases in respect of Aircraft; and (b) none of the legal titleholders took physical possession of Aircraft, save and except after in accordance with the Release Protocol (defined below). Of all the lessors, MCAP and IAI took the most substantial and earliest action in seeking to repossess their aircraft.

[44] It is also not disputed that Skyservice's cessation of business and the appointment of the Receiver constituted Events of Default under the Thomson Lease Agreements. Immediately

upon being informed of the Receivership Order, Thomson attempted to contact the Receiver and was able to reach it by phone prior to 4:00 p.m. on March 31. The Receiver advised Thomson that it had neither the intention nor the power to take possession of the Thomson Aircraft. The Receiver agreed to assist Thomson in effecting the orderly return of the Thomson Aircraft and to assist Thomson in any way possible. Thomson referenced this conversation and sought additional information and confirmation concerning the security of the Thomson Aircraft in an email sent 6:12 p.m. Toronto time. There is no evidence that the Receiver provided its written consent to the actions of Thomson.

[45] On the afternoon of March 31, 2010, at approximately 3:00 p.m. and four hours after the Receivership Order, GTAA issued its notice of application seeking an order authorizing it to seize and detain certain aircraft owned and operated by Skyservice then on the ground at the Pearson Airport. The initial hearing of the application commenced at approximately 5:00 p.m. on March 31, 2010.

[46] Immediately upon becoming aware of the *ex parte* GTAA application and after the Receivership Order, solicitors for the lessors of the Aircraft attended in court to advise that the lessors of the Aircraft had issued, or were in the process of serving, terminations and/or confirmations of terminations of their leases. Counsel to the various lessors verbally requested the court to recognize such terminations and, if necessary, to lift any applicable stay of proceedings to allow the lessors of the Aircraft to protect their interests in the Aircraft, with appropriate evidence to be filed as soon as available. No order was made prior to the *Status Quo* Order. The lessors of the Aircraft subsequently filed their written motion on April 5, 2010.

[47] Although GTAA's application was brought *ex parte*, counsel for the lessors of the Aircraft attended the first hearing. Counsel for NAV Canada also attended and verbally requested similar relief to that sought by the GTAA.

[48] On April 6, 2010, NAV Canada served materials for its application pursuant to s. 56 of CANSCA seeking an order permitting it to seize and detain the Aircraft. While NAV Canada's Application was issued on April 6, 2010, NAV Canada had sought from the Court an order under s. 56 of the CANSCA on March 31, 2010, and the *Status Quo* Order refers to NAV Canada's application under s. 56 of CANSCA.

[49] Under discussion during the afternoon of March 31, 2010 and fully anticipated by the parties during the afternoon, the *Status Quo* Order was granted, effective as of 6:30 p.m. on March 31, 2010. The *Status Quo* Order provided, among other things, that pending the hearing and determination of the GTAA and NAV Canada applications, no applications and no person, including the Receiver, would be permitted to take steps, or cause any steps to be taken, to possess or repossess the aircraft or to dispossess Skyservice of the Aircraft:

> 2. THIS COURT ORDERS that pending the hearing and determination of the Applications or further order of the Court obtained on notice to the Interested Parties, no person, including the Receiver, shall take or cause any steps to be taken to possess or repossess the Ontario Aircraft or any other aircraft owned or operated by the Debtor (with the Ontario Aircraft, the "Aircraft") or to dispossess the Debtor of the Aircraft, including, without limitation, the giving of any notice of termination under applicable leases, the seizure or taking control of any log books, certificates of registration or certificates of air worthiness, the changing of the registration of any Aircraft or the deregistration of any Aircraft.

[50] Under the terms of the *Status Quo* Order, the lessors of the aircraft were permitted to take limited measures to protect and maintain the aircraft.

[51] As indicated above, on March 31, 2010, the WAA also brought an application for an order lifting the stay and for the seizure and detention in respect of two of the Thomson Aircraft, which were at that time grounded at the Winnipeg International Airport. The application proceeded on an *ex parte* basis before the Manitoba Court of Queen's Bench on the afternoon of March 31, 2010. The Winnipeg Seizure Order was granted on March 31, 2010. The WAA proceeded to seize and detain the Winnipeg Aircraft, and both Thomson and the Receiver subsequently brought an application to have this order set aside.

[52] Following the granting of the *Status Quo* Order, the parties negotiated a protocol for the release by GTAA, OMCIAA, WAA and NAV Canada of their claims against the Aircraft upon the lessors posting cash security with the Receiver for the amounts claimed to be owing to the various authorities by Skyservice (the "Release Protocol"). The Release Protocol was approved pursuant to an order dated April 9, 2010. The endorsement specifically provides:

> Notwithstanding the cessation of the application of the provisions of the *Status Quo* Order to the Aircraft referenced above, the Seizure Application shall be determined based on facts and legal circumstances as they existed at 6:30 p.m. (Toronto time) on March 31, 2010, being the effective date of the *Status Quo* Order.

[53] As part of the release of the Aircraft to the lessors contemplated by the Protocol Order, the Receiver sought and obtained court approval to enter into, *inter alia*, Return Agreements with the Lessors in the form specified in the Order dated April 15, 2010. The Aircraft Return Agreements specified the terms and conditions upon which Skyservice would transfer possession and custody and control of the Aircraft to the lessors.

[54] The Lessors did not obtain possession and control of the Aircraft until after the issuance of the Aircraft Return Order on April 15, 2010.

IV LAW

A. *Canada 3000*

[55] Issues similar, if not identical, to those involved in this dispute have been the subject of extensive litigation. The Supreme Court of Canada addressed the issue in *NAV Canada c. Wilmington Trust Co.*, [2006] 1 S.C.R. 865 ("*Canada 3000*"). In that case, the issue arose as a result of the collapse of Inter-Canadian (1991) Inc. Airline in 1999 and, in 2001, of Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000 Airlines").

[56] In *Canada 3000*, Canada 3000 Airlines brought an application under the *Companies' Creditors Arrangement Act* ("CCAA"). An initial order was granted that stayed all proceedings by creditors pending the filing of a plan of arrangement. Motions were brought by various airport authorities for orders lifting the stay of proceedings and/or declarations that the stay did not affect them and for seizure and detention orders until all outstanding fees owed to the authorities had been paid. NAV Canada also brought a motion to lift the stay to allow it to make an application to seize and detain the aircraft and to lift the stay pursuant to s. 69.4 of the BIA and an order that the assignments in bankruptcy made by Canada 3000 Airlines was without prejudice to NAV Canada's statutory payment, seizure and detention rights. Cross motions were brought by various aircraft lessors seeking orders for declarations that the airport authorities and NAV Canada were not entitled to seize or detain the aircraft owned by them.

[57] The lower court decisions of *Canada 3000* are reported at 2002 CarswellOnt 1598 (Sup. Ct. J.) and 2004 CarswellOnt 148 (C.A.).

[58] Justice Binnie in *Canada 3000* set out the question considered by the Supreme Court of Canada:

1. When an airline collapses leaving unpaid bills for airport charges and air navigation services, the question becomes who takes the financial loss (or, as it is sometimes said, "the haircut"), the people who ultimately own the aircraft or the people who were obliged to (and did) provide the airport and navigation services?

2. The question lands before the court because of the collapse of Inter-Canadian (1991) Inc. Airline in 1999 and, in 2001, of Canada 3000 Airlines Ltd. and Royal Aviation Inc. (collectively "Canada 3000"). The answer depends on the statutory interpretation to be given to provisions of the *Airport Transfer (Miscellaneous Matters) Act*. S. C. 1992, C.5 ("Airports Act"), and the *Civil Air Navigation Services Commercialization Act*, S. C. 1996, C.20 ("CANSCA"). The important context for this interpretation is the unusual nature of the modern airline business.

[59] In the course of his reasons, Justice Binnie addressed the detention remedy with words that, if applicable, are of direct relevance to the present matter:

> 73. I agree with Cronk J.A. (at para. 133) that the detention remedy under the statutes is subject to several constraints: (i) the remedy is not automatic and requires prior court authorization; (ii) the remedy is discretionary and may be subject to such terms as the court considers necessary; (iii) under s. 9(3) of the *Airports Act*, and s. 56(3) (s) of *CANSCA*, the court also has a discretion to limit the duration of the remedy by requiring the applicable authority to release a detained aircraft from detention prior to payment of the amount with respect to which the seizure was made; ...
>
> 74. On the other hand, the conclusion of Juriansz J., dissenting, was correct that the "wording of the detention provisions makes apparent that aircraft may be seized and detained without regard to the property interests of persons who are neither the registered owners nor the operators of the aircraft under the legislation. As long as the aircraft is owned or operated by a person liable to pay the outstanding charges, it may be the subject of an application to seize and detain it. The fact that there may be other persons, who are not liable to pay the outstanding charges but have property interests in the aircraft, is of no consequence.

[60] It seems to me that, given that this case will be determined by the applicability of *Canada 3000*, it is appropriate to reproduce the paragraphs of *Canada 3000* which are, in my view, most relevant to this case:

> 3. After decades of financial turbulence, an airline in the modern era may consist of little more than a name, with its aircraft leased, its suppliers on week to week contracts and even its reservation and yield management systems outsourced to one of the global service providers such as Sabre or Galileo. Start-ups are

relatively easy, balance sheets are often thin, and failure can be quick and (to outsiders) unexpected, as the history of Canada 3000 illustrates. When a financial collapse occurs (and these have been frequent in Canada and elsewhere in the past decade), there is little meat on the corporate bones for unsecured creditors. Doing business with such airline operators carries significant financial risks, yet the appellant Canadian airports operating under government supervision are obliged by statute to allow financially troubled airlines to make use of their services (and sometimes the airport will not know if an airline is in financial trouble or not). Airport costs are largely recovered through landing fees. If these and other fees go unpaid, the airport is out of pocket for the cost of the service it was obliged by law to provide.

...

5. When Parliament adopted its policy of privatizing major airports and navigation services in the early 1990s putting such services on a commercial footing, potential investors were expected to insist on some assurance that they would in fact be financially viable serving the chronically unstable aviation business. Thus, Parliament decided to extend to the private operators of airport and navigation services a statutory power to apply to a superior court judge for an order to seize and detain aircraft until outstanding charges are paid, similar to the power Parliament had earlier conferred on the Crown in pre-privatization days under the *Aeronautics Act*, R.S.C. 1985, c. A-2, s. 4.5.

...

9. In my view, the appellants are entitled to obtain judicially-authorized seize and detain orders (hereinafter sometimes collectively referred to as the detention remedy) to be exercised against the security posted in substitution for the aircraft. The matters should be remitted to the motions judges to work out the details of the orders. Considered in the context in which the detention remedy was intended by Parliament to operate, the detention remedy cannot be circumvented as suggested by the respondents by the expedient of leasing arrangements made between the airlines and the aircraft lessors. The detention remedy is purely statutory and Parliament's intention to create an effective collection mechanism against the aircraft itself owned or operated by the person liable to pay the amount or charge must be given full effect.

...

17. The termination provisions varied somewhat from lease to lease. Under some, the leases came to an end and the lessors became entitled to repossession upon the granting of the *CCAA* order, under others by the cessation of operations, and under the rest by the assignment in bankruptcy. The CCAA stay operated, in effect, as an interim bar to repossession (see s. 11.31 CCAA). At the time the detention remedy was sought, the aircraft sought to be seized were grounded at

the Canadian airports listed in the style of cause of the various proceedings. (emphasis added)

...

37. As this Court noted in 1915, part of the context is "the condition of things existent at the time of the enactment": *Grant Trunk Railway v. Hepworth Silica Pressed Brick Co.* (1915), 51 S.C.R. 81 (S.C.C.), at p. 88. At the time the measures in question here were enacted, airlines insolvencies and bankruptcies had become a fact of life throughout the airlines industry. Many of the planes flown in and out of and across Canada were leased to, and flown by, airlines in, or close to, bankruptcy protection. Under the interpretation offered by the respondents and the majority decisions of the Courts of Appeal, the detention remedy would be opposable to everybody but the titleholder, whose aircraft is often the only asset to survive the financial wreckage. Parliament would be taken to have intended a remedy that is least effective when it is most needed. It is more likely that Parliament fully appreciated that in dealing with aircraft flown in and out of jurisdictions under complex leasing arrangements, the only effective collection scheme is to render the aircraft themselves available for seizure, and thereafter to let those interested in them, including legal titleholders, registered owners, sublessors and operators, to resolve their dispute about where the money is to come from to pay the debts due to the service providers. I should add that I agree with Juriansz J. that the legal titleholders are not without benefit from the services provided, although the benefit is indirect. Without the day to day flight operations the legal titleholders would have no business. They lease the aircraft intending them to be used in the very activities for which the services are provided. By and large, the legal titleholders are sophisticated corporations. They are knowledgeable about the ways of the industry in which they have chosen to participate.

...

62. If the legal titleholders are not directly liable for the charges due to the service providers, they argue that it would be unfair and contradictory to hold their aircraft hostage for the payment. Section 56 of *CANSCA* and s. 9 of the *Airports Act* should be interpreted consistently with s. 55(1) of *CANSCA*, the legal titleholders argue, and their right to repossess the aircraft on termination of the lease should take priority over the statutory remedy.

63. On the other hand, Nuss J.A., dissenting the Quebec Court of Appeal, put the contrary position:

> If the titleholder could obtain release of the seized aircraft without the payment of the outstanding charges or providing security, the intention and purpose of the Detention Provisions enacted by Parliament would be defeated. This is so because the debt is constituted of

> charges incurred by the operator of the aircraft (who is often, as in this case, the registered owner) and not by the titleholder. Thus, if the contention of [the titleholders] were to prevail, the titleholder, who is neither the operator nor the "owner" within the meaning of the statutes, could always obtain release of the aircraft and the charges would not be paid. The recourse provided by Parliament would, inevitable, be of not avail. [para. 126]

I believe that Nuss J.A. is correct on this point.

...

69. The legal titleholders argue that the claim of NAV Canada and the airport authorities to detain the aircraft must yield to their right under their respective leases to repossession. They liken the seizure and detention remedies to a *Mareva* injunction, in which the assets are frozen while various parties work out their respective entitlements; see *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 (S.C.C.). However, in my view, there is no need to resort to analogies, especially loose analogies (e.g. *Mareva* injunctions are interlocutory, whereas the detention remedy is available whether or not a judgment for the collection of the charge or amount has been obtained. Moreover, *Mareva* injunctions are directed at persons (*Aetna Financial Services*, at pp. 25-26), whereas the seizure and detention remedy targets the aircraft itself).

70. The *CARs*, adopted pursuant to the *Aeronautics Act*, provides that an "operator" in respect of an aircraft "<u>means the person that has possession of the aircraft as owner, lessee or otherwise</u>" (s. 101.01(1)). At the dates of the applications for seizure and detention orders, Canada 3000 and Inter-Canadian were still the <u>registered</u> owners of the aircraft. Accordingly, if the Court is to read the words of the detention remedy in the context of the realities of this industry previously discussed, it seems to me that those remedies must be available against the aircraft of Canada 3000 (<u>except any aircraft already repossessed by the titleholder prior to the *CCAA* application on November 2, 2001) and Inter-Canadian. (Once a titleholder reclaims possession, it becomes an operator in possession within s. 55(1) of *CANSCA*. However, as its possession post-dates the charges, no personal liability is incurred on that account</u>). (emphasis added)

...

72. The legal titleholders are in a better position to protect themselves against this type of loss than are the airport authorities and NAV Canada. The legal titleholders can select which airlines they are prepared to deal with and negotiate appropriate security arrangements as part of their lease transactions with the airlines. In the case of aircraft at issue in these appeals, many if not all of the leases provided for substantial security deposits. For example, the total amount posted by Canada 3000 to the ILFC as security deposits for airport fees and

charges was approximately $15,305,500. It is unnecessary to catalogue all of the possible security arrangements, but these deposits demonstrate a legal titleholder's ability to negotiate protection at a time when the airline is solvent to cover the amounts in overdue charges that the airline may eventually be required to pay to the statutory service providers.

...

85. The titleholders argue that it would be extremely unfair that one titleholder's aircraft, however recently leased, may ultimately be held hostage for all of the unpaid user charges of the airline that flew it. They contend that if (which they deny) the titleholders must pay charges in order to recover an aircraft, they should only be required to pay the charges incurred by the individual aircraft sought to be released as opposed to the charges outstanding in relation to the whole fleet of the defaulting airlines.

86. However, the statute says that an aircraft operated by the person liable to pay the amount can be seized and, absent further court order, need not be released until the entire amount owed by that *operator* has been paid. This point is made clearly by the release provisions in s. 9(3) of the *Airports Act* and s. 56(3) of *CANSCA*. The authorities must only release the aircraft if "the amount in respect of which the seizure was made is paid". Since s. 9(1) and s. 56(1) do not distinguish between the amounts accumulated by specific aircraft operated by a defaulting owner or operator, it seems clear that the amount in respect of which the seizure was made is the entire amount owned by that registered owner or operator. (emphasis in original)

[61] *Canada 3000* stands for two important principles. The first is that the right to the detention remedy is subject to any stay that is in place. The second is that policy demands that the risk of default be shifted from airport authorities and NAV Canada onto independent private sector titleholders who are better positioned to protect themselves from default and, as a result, the CARs must be interpreted on terms favourable to airport authorities and to NAV Canada. For this reason, the term "operator" was defined by possession and repossession of the aircraft. If *Canada 3000* is taken to be the binding authority, the lessors must show that they regained physical possession of the aircraft prior the Receivership Order.

B. *Zoom Airlines*

[62] Priority issues as between airport authorities, NAV Canada and aircraft lessors were again addressed in *Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.) ("*Zoom*").

[63] In *Zoom*, the lessor's agent actually boarded the aircraft in question and informed the pilot he was taking possession of the aircraft and took possession of the certificate of airworthiness, the certificate of registration and the log books. Subsequent to and unaware of the agent's actions, the airport authority obtained an *ex parte* order seizing and detaining the aircraft. Only after *both* of these actions took place did Zoom filed a Notice of Intention under the BIA. The lessor then moved to set aside the seizure and detention order.

[64] The decision of the Court of Appeal for Alberta, in considering *Canada 3000*, was that the Supreme Court of Canada made an exception to the airport authorities' detention remedy in cases where the titleholders repossessed aircraft prior to the issuance of an order under s. 9 of the *Airport Transfer Act*. The fact that the precedent in *Canada 3000* involved the CCAA did not prevent the application of the exception. At paragraph 36, Phillips J.A. and O'Brien J.A. stated:

> What distinguishes this case from *Canada 3000* is that both Canada 3000 and Inter-Canadian, the lessees and debtors, still owned their aircraft at the time the detention order was granted. More particularly, with respect to *Canada 3000*, the lessors had sought to reclaim possession of the aircraft after the CCAA stay had been imposed and after the airport authorities had applied for seizures orders. In this case, at the time of the detention order, unlike in *Canada 3000*, AERCAP had already taken active steps to obtain legal control and custody. In fact, it had repossessed GZUM and was, therefore, its owner, thus falling into the exception contemplated by Binnie J. at paragraph 70.

[65] The majority went on to provide further comment on a submission made by the airport authority to the effect that the detention remedy is not a race to repossess the aircraft. At paragraph 37, the Court stated:

> The authority raises concerns, on the basis of policy, whereby holding AERCAP's termination of the lease changed the ownership of GZUM, and precluded the authority's detention remedy from operating, the court has recreated a race to repossess the aircraft. This suggestion overstates the situation. No race will take place if the authority has taken the precaution of obtaining prior security. Failing that, the authority will be aware that its detention claim will be limited if a lessor has repossessed the aircraft prior to an order authorizing its seizure and detainment. The statute does not require that the lessor provide notice to the authority prior to repossessing the aircraft...

IV ISSUES

[66] From the foregoing discussion, it seems to me that the following questions will be dispositive of the applications and motions:

1. Can the case at bar be distinguished from *Canada 3000*?

2. If *Canada 3000* cannot be distinguished, it becomes the controlling authority, and the sole question is whether any of the lessors repossessed the Aircraft prior to the Receivership Order and thus regained their status as owners and operators?

V THE PARTIES' SUBMISSIONS

[67] The Lessors argued that there are sufficient factual differences such that *Canada 3000* principles should not apply. The Airport Authorities and NAV Canada take the opposite position, submitting that the *Canada 3000* decision applies equally to the issues raised in this case.

[68] MCAP and IAI oppose the applications of the Airport Authorities and NAV Canada for detention orders on the grounds that Skyservice was not the "owner" or "operator" of the leased aircraft at the time of the *Status Quo* Order was issued.

[69] Counsel to MCAP and IAI submits that the principal issues to be decided are as follows:

(a) Were the Airport Authorities and NAV Canada entitled to Detention Orders over the leased aircraft at the critical time?

(i) Was Skyservice the "owner" at the critical time?

(ii) Was Skyservice the "operator" at the critical time?

(iii) Were the Airport Authorities and NAV Canada in a better position to protect themselves than were the aircraft Lessors?

(iv) Were the procedural requirements for the Detention Orders met?

(v) Does the Receivership Order stay the Airport Authorities and NAV Canada' proceedings?

(b) Were the Lease Terminations valid?

(i) Did the Receivership Orders stay the termination of the aircraft leases?

(ii) In the alternative, should this court lift the stay to allow termination *nunc pro tunc*?

[70] Counsel to MCAP and IAI submit that paragraph 11 of the Receivership Order restrained suppliers from terminating the supply of such goods or services "as may be required by the Receiver". Pursuant to the Receivership Order, the Receiver and Skyservice were prevented from carrying on business. Counsel further submits that the Receiver had indicated that it would not take possession of the aircraft. Consequently, since the leased aircraft were not "required by the Receiver", the termination of the Aircraft Leases was not restrained.

[71] Alternatively, counsel submits that if the Receivership Order restrained the right of the lessors to terminate the aircraft leases, MCAP and IAI requested that the court lift the stay to authorize and ratify the lease terminations issued by them, *nunc pro tunc*, prior to the determination of any potential detention order against any aircraft.

[72] Counsel also argues that it is not the intention of receivership proceedings to deprive creditors or other stakeholders of their property or rights.

[73] Further, counsel submits that in restructuring proceedings under Part III of the BIA or the CCAA, a broad stay is required to grant a debtor significant protection from creditors so as to enable it to stabilize operations and formulate a plan. In bankruptcy, by contrast, counsel submits that the protection is much more limited: creditors with claims provable in bankruptcy are stayed from enforcing remedies against the bankrupt or its property, and property not owned by the bankrupt is returned to its proper owner. In this case, where the purpose is to liquidate Skyservice, counsel submits that this proceeding is very similar to a bankruptcy.

[74] Counsel further submits that any stay in these proceedings should not operate so as to prejudice the owners of assets such as the lessors and, in particular, the stay should not apply to prevent the lessors from protecting their rights in the Aircraft as against other stakeholders such as the Airport Authorities and NAV Canada.

[75] Having identified the issue above as the application of *Canada 3000*, it seems to me that a number of the submissions of the lessors are miscast and need not be considered fully. The critical issue to be addressed is whether there was a repossession of the aircraft within the meaning of *Canada 3000* and *Zoom*.

VI ANALYSIS

[76] The *Canada 3000* and *Zoom* decisions both involved insolvent air carriers. Skyservice was also insolvent. The priority issue determined in *Canada 3000* and *Zoom* is, in many respects, the same issue that is placed before the court in this case.

[77] I am required to address, as a preliminary matter, the lessors' argument that a stay in the receivership context cannot be equated with stays under the CCAA or Part III of the BIA because, unlike a receivership, the stays in the CCAA and Part III of the BIA demand that the debtor receive broad protection. It is sufficient to dispose of this submission by demonstrating that it is the language of the Receivership Order, and not the receivership context, generally, that defines its parameters.

[78] The Receivership Order established a structured court-appointed process to wind up the affairs of Skyservice, as well as the role of the Receiver in that process. It also sets out control mechanisms that have the intent and effect of stabilizing the transition from an operating business to a wind-up of an operating business.

[79] The combined effect of paragraphs 2 and 3 of the Receivership Order is that the Receiver has a role to play. The Receiver is empowered and authorized, but not obligated, to permit a lessor of Aircraft Objects (defined at paragraph 3(c) of the Receivership Order as "airframes, aircraft engines and related accessories, parts, equipment, manuals, records and other property") to take possession and control of the Aircraft Objects. While this provision does not obligate the Receiver to take action, it also does not permit the lessors to take unlimited or unsupervised action to obtain possession and control of the Aircraft Objects. Paragraph 3 is specifically addressed to the Receiver. In my view, the Receiver has to be involved and has to take certain steps to communicate to the lessor that it is entitled to take possession and control of the Aircraft Objects.

[80] The role of the Receiver, in this respect, is consistent with accepted practice. Generally speaking, the situation at the time a receivership application is heard can be somewhat uncertain

– even chaotic. The Receiver is called upon, as a court officer, to ensure that the rights and remedies of creditors and stakeholders are controlled and supervised to the degree required and to ensure that the rights and priorities of all creditors and stakeholders are respected in accordance with their relative rights and priorities. This includes, in my view, providing the Receiver with the opportunity to determine whether security is properly registered and perfected, or, in the case of an equipment lessor, to determine, in addition to registration, whether the lease is a true lease or a financing lease.

[81] It is desirable, if not necessary, for the Receiver to be in control of the situation. The alternative is to create a situation where chaos will govern and a premium will be placed on self-help remedies with victory going to those who take swift action.

[82] In order to preserve a degree of control, it is common for a receivership order to include control provisions to restrain creditors and stakeholders from taking self-help remedies absent the consent of the Receiver or leave of the Court.

[83] In this case, such control provisions are outlined in paragraphs 7-11 and 13. The critical control point is set out in paragraph 9. Paragraph 9 is a stay of proceedings against the Debtor or the Property. It restricts the exercise of all rights and remedies against the Debtor, the Receiver, or affecting the Property. Rights and remedies are stayed and suspended except with the written consent of the Receiver or leave of the Court. The provision has certain exceptions that are not applicable here.

[84] Even if it is accepted that the Receiver has no involvement in Aircraft Objects despite paragraph 3 (a position that I reject), the effect of paragraph 9 is to halt any action of the lessors to enforce remedies against Skyservice, including termination of leases.

[85] The announcement on the afternoon of March 30, 2010 gave rise to certain events of default in respect of certain leases, but that, in itself, does not amount to a repossession of the aircraft within the context of *Canada 3000* and *Zoom*. As of the end of March 30, 2010, the Aircraft had not been repossessed.

[86] Certain lessors had embarked on a course of action which, absent the control provisions in the Receivership Order may have led to a repossession of the Aircraft. The required steps to terminate the lease and to repossess the Aircraft had not been completed by the time the Receivership Order was granted. There is no evidence that any lessor terminated an Aircraft lease prior to the Receivership Order.

[87] The two lessors who were further advanced, namely, MCAP and IAI, had taken steps to deliver pre-signed notices of termination to the lessors, but as of the relevant time – 11:00 a.m. on March 31, 2010 – they had yet to repossess the aircraft or the critical log books. Default by Skyservice alone does not constitute a repossession.

[88] Upon the granting of the Receivership Order, the aforementioned control provisions were engaged.

[89] Any action taken to terminate an Aircraft lease with Skyservice after the granting of the Receivership Order is the enforcement of a remedy against Skyservice, which, absent the written consent of the Receiver or leave of the Court, is expressly prohibited under paragraph 9 of the Receivership Order. No written consent of the Receiver was provided and no leave of the Court was granted.

[90] It is acknowledged that MCAP and IAI delivered notices of termination to Skyservice after the Receivership Order came into effect. The delivery of the notices of termination to Skyservice was, in my view, a step taken by them to enforce rights and remedies against Skyservice. The ultimate goal was to obtain possession of their asset but, in doing so, the lessors acted in a manner that required consent of the Receiver or leave of the Court, which, as noted, did not occur.

[91] In this case, the Receiver did not participate or sign-off on the return of any equipment until April 15, 2010, long after the granting of the *Status Quo* Order and long after the applications had been filed by the Airport Authorities and NAV Canada.

[92] I have no doubt that the lessors, being aware of the stay and the state of the law, took these steps in an effort to put forth the position that the leases had been terminated, that they were entitled to repossess the Aircraft, and that the effect was such that Skyservice lost control of the airplanes and was not the owner or operator of the airplanes in question.

[93] The fundamental difficulty and fatal flaw with this position was that proceedings to enforce any remedy as against Skyservice were stayed.

[94] Parties do not have an unfettered right to do as they please once receivership has been engaged. In my view, *Canada 3000* addresses all of the arguments put forth by the aircraft lessors and it is a complete answer to the position put forth by the aircraft lessors.

[95] The outcome is, in my view, clear. There was no repossession of Aircraft prior to the Receivership Order. Repossession could not occur after the granting of the Receivership Order, absent consent of the Receiver or leave of the court, neither of which occurred. Therefore, at the

time that the *Status Quo* Order was granted, no lessor had completed repossession in the manner set out in *Zoom*. In fact, no repossession took place until the order of April 15, 2010.

[96] At the time of the Receivership Order and the *Status Quo* Order, Skyservice was in possession of the airplanes. It was still the registered owner. It may not have had the ability to operate the Aircraft but, within the context of the principles set out in *Canada 3000*, it was, in my view, the "owner" or "operator" of the Aircraft. It remained "owner" or "operator" of the Aircraft as of April 6, 2010, by which time GTAA had amended its application, OMCIAA had formally commenced its application and NAV Canada had formally commenced its application. The priority dispute that then evolved with the Airport Authorities and NAV Canada was identical to that in *Canada 3000*.

[97] This is not the scenario that occurred in *Zoom*, where specific steps were taken by the lessor that were clear and final and which were outside of a court process or a BIA process. In *Zoom*, it was not until the aircraft was repossessed that the Notice of Intention to file a proposal was filed under the BIA. That is not the situation in this case, which is, therefore, distinguishable on this basis, among others.

[98] The Aircraft Authorities and NAV Canada take the position that they are not affected by the stay, as the Aircraft are not Property of Skyservice and they took no action as against Skyservice.

[99] Any remedy that the Aircraft Authorities and NAV Canada have against Skyservice is as a creditor and the Aircraft Authorities and NAV Canada are stayed from exercising such remedies. However, the remedy that they have as against the Aircraft is based in the *Airport*

Transfer Act or the CANSCA and can be exercised provided that Skyservice is the "owner" or "operator" of the Aircraft, and such remedy is unaffected by the stay.

[100] The lessors take the position that the Aircraft were the subject of true leases as between the lessors and Skyservice. As such, the Aircraft do not form part of the Property of Skyservice, as it is their own. It follows, they argue, that they were, from the outset of the Receivership, not constrained from exercising their remedies under their various leases. I disagree. I have already determined that regardless of their position with respect to the stay, the lessors, by virtue of paragraph 9 of the Receivership Order, had not completed repossession prior to the *Status Quo* Order.

[101] The functional result is that at the time of the *Status Quo* Order, the application of the Aircraft Authorities and NAV Canada had not been determined and neither had the demands of the lessors.

[102] The period following the granting of the *Status Quo* Order was, in my view, equivalent to the position of the parties that were before the court in *Canada 3000*. I must follow the same result.

[103] The law, set out in *Canada 3000,* as applied to the facts of this case require me to recognize the priority of the Aircraft Authorities, namely, GTAA and OMCIAA (as they brought applications prior to repossession) and WAA (by virtue of their protocol agreement) and by NAV Canada.

[104] To hold otherwise, would provide the lessors with a remedy that the Supreme Court of Canada clearly indicated they do not have. Absent a completed repossession, priority goes to the Aircraft Authorities.

[105] The final issue for consideration is whether s. 56 of the CANSCA s. 9 of the *Airport Transfer Act* afford the Court the discretion to refuse the granting of a seizure order where the statutory prerequisites have been satisfied.

[106] The lessors submit that there is such a discretion and it should be exercised in this case so as to avoid the result sought by the Airport Authorities and NAV Canada.

[107] On this issue, I am in agreement with the argument of counsel to WAA, who submits that the wording in s. 9 of the *Airport Act* does not explicitly confer a discretion on the court with respect to whether or not a seizure order should be granted (s. 56 of the CANSCA has the same provision.) The statute does not provide that the court "may issue an order". The statute only speaks to the court's discretion with respect to the terms of the seizure order.

[108] The court's role is to determine whether the statutory prerequisites have been met, and, in this case. I have determined they have been. Based on the analysis in *Canada 3000*, which is applicable in this case, the Airport Authorities have satisfied the prerequisites under s. 9 of the *Airport Transfer Act* and NAV Canada has satisfied the prerequisites under s. 56 of CANSCA.

[109] It seems clear that, having made this determination, the seizure order must issue, subject to such terms as the court considers necessary.

[110] Guidance on the appropriate terms is provided by Binnie J. in *Canada 3000*, at paragraphs 91 and 92, specifically that the judge can work out the terms. "provided that the object and purpose of the remedy (to ensure the unpaid user fees are paid) is fulfilled."

[111] As counsel to WAA points out, the comments of Binnie J. taken as a whole, do not afford the court discretion to refuse to grant a seizure order where the statutory prerequisites have been satisfied. Rather. the court is to grant the order and fashion the terms to ensure payment of unpaid fees. To do otherwise would frustrate the intent of the statutory provision.

[112] In the alternative. if there is a discretion conferred by statute not to grant a seizure order. I would decline to exercise such discretion in favour of the lessors for two reasons. First. I am satisfied that the conduct of the Airport Authorities and NAV Canada was not improper and. secondly, the denial of an effective remedy would run counter to the opinion of the Supreme Court of Canada as set out in *Canada 3000.*

VII DISPOSITION

[113] The Applications of the GTAA. OMCIAA and NAV Canada for aircraft seizure and detention orders are not affected by the stay, are granted and are to be enforceable up to the full amount owing to GTAA. OMCIAA and NAV Canada.

[114] The motions brought by the Aircraft lessors for the requested declaration in respect of the entitlements of the Airport Authorities and NAV Canada are dismissed.

[115] Issues relating to quantum can be addressed at a 9:30 a.m. appointment. if necessary.

[116] If the parties are unable to reach agreement in costs, written submissions to a maximum of four pages may be filed within 30 days by the parties.

MORAWETZ J.

Date: *April 6, 2011*

APPENDIX "A"

EXCERPTS OF JUSTICE GANS' MARCH 31, 2010 RECEIVERSHIP ORDER

Appointment

2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, FTI Consulting Canada Inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtor acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (the "Property").

Receiver's Powers

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property in respect of the preservation, protection, collection and realization thereof and, without in any way limiting the generality of the foregoing (but subject to the limitations in clause (d) below), the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect the Property, or any part of parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) in the case of Property consisting of airframes, aircraft engines and related accessories, parts, equipment, manuals, records and other property ("Aircraft Objects"), to permit any owner or lessor of, or other person with an interest in, any such Aircraft Objects to take possession or control thereof, whether the Receiver has or has not taken prior possession or control thereof, on such terms (if any) as the receiver considers appropriate;

...

(l) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

...

(t) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

...

No Proceedings Against the Receiver

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continue against the Receiver except with the written consent of the Receiver or with leave of this Court.

No Proceedings Against the Debtor or the Property

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

No Exercise of Rights or Remedies

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA to the same extent that counterparties are entitled to exercise remedies thereunder pursuant to section 65.1 of the BIA in proposal proceedings, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

No Interference with the Receiver

10. THIS COURT ORDERS that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

Continuation of Services

11. THIS COURT ORDERS that all Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal price or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

...

Employees

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of any or all such employees. In this regard, the Receiver may confirm the continuation of the employment, by the Debtor, of the employees pursuant to a letter from the Receiver on behalf of the Debtor. The Receiver shall not be liable for any employee-related liabilities, including any successor or other employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay on behalf of the Debtor, or in respect of its obligations under section 81.4(5) or 61.6(3) of the BIA or under the Wage Earner Protection Program Act.