

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

**IN THE MATTER OF THE RECEIVERSHIP OF
SKYSERVICE AIRLINES INC.**

BETWEEN:

THOMAS COOK CANADA INC.

Applicant

- and -

SKYSERVICE AIRLINES INC.

Respondent

FACTUM OF THE RECEIVER

**(motion for substituted service of a summons to witness on Rob Giguere,
returnable March 27, 2012)**

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capacity as court-appointed receiver of
Skyservice Airlines Inc.

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PART I—OVERVIEW

1. This is a motion for substituted service of a summons to witness on Rob Giguere. It appears that Mr. Giguere is evading service, and the proposed method of service will bring the summons to witness to his attention.

PART II—THE FACTS

Background

2. On March 31, 2010, FTI Consulting Inc. was appointed Receiver of all of the assets and property of Skyservice Airlines Inc. (“Skyservice”). Prior to the Receivership, Skyservice

transferred certain funds (the “**Funds**”) received from Sunwing Tours Inc. (“**Sunwing**”) from its general bank account to another Skyservice account.¹

3. Shortly after the receivership commenced, Sunwing advised the Receiver that it was asserting a property claim over the Funds, on the grounds of an actual and/or constructive trust, among other bases. The Receiver subsequently brought a motion for a declaration that Sunwing has no property interest in the Funds and Sunwing brought a cross-motion for an order that it was entitled to the recovery of the Funds (the “**Motions**”).²

4. On February 13, 2012, the parties appeared before the Honourable Mr. Justice Morawetz for the hearing of the Motions. At that time, Mr. Justice Morawetz adjourned the hearing until May 14, 2012, and issued an endorsement which noted the following:

“It became apparent at the outset of the hearing that evidence on certain points will be required in order to determine the points at issue in this motion. In this regard, it would be helpful if Mr. Rob Giguere...could meet with counsel to determine a process by which evidence could be provided.”³

5. Rob Giguere was the President of Skyservice from October 17, 2007 until March 31, 2010 and was involved in the decision to transfer the Funds into a separate back account prior to Receivership.⁴

¹ Affidavit of Heather Meredith sworn March 23, 2012 at para. 2-3 (the “**Meredith Affidavit**”), Receiver’s Motion Record, Tab 2

² Meredith Affidavit at paras. 3-4, Receiver’s Motion Record, Tab 2

³ Endorsement of the Honourable Mr. Justice Morawetz dated February 13, 2012 (the “**Endorsement**”), Meredith Affidavit, Exhibit “D”, Receiver’s Motion Record, Tab 2-C

⁴ Meredith Affidavit at paras. 6-7, Receiver’s Motion Record, Tab 2

The Receiver's initial communications with Mr. Giguere

6. Prior to the adjournment of the Motions, the Receiver had been in contact with Mr. Giguere and had requested that he swear an affidavit setting out his knowledge with respect to the reason why the Funds had been transferred. Although Mr. Giguere initially agreed to provide an affidavit, the Receiver was subsequently unable to contact him to finalize the swearing of the affidavit.⁵

Counsel for the Receiver's attempts to obtain the evidence of Mr. Giguere

7. Counsel for the receiver made multiple attempts to contact Mr. Giguere in advance of the Motions, by both telephone and email, in order to obtain his evidence. On February 10, 2012, counsel for the Receiver was able to speak with Mr. Giguere and email him the text of a draft affidavit.⁶

8. However, upon speaking with him later that day, Mr. Giguere indicated that he did not wish to be in the middle of this dispute and took issue with the Receiver's suggestion that it may subpoena him if he refused to swear an affidavit.⁷

9. After this discussion, counsel for the Receiver emailed Mr. Giguere and asked if he had made a decision as to whether he would swear an affidavit. Despite repeated email correspondence earlier that day, Mr. Giguere never responded.⁸

⁵ Meredith Affidavit at para. 7, Receiver's Motion Record, Tab 2

⁶ Meredith Affidavit at para. 9-11, Receiver's Motion Record, Tab 2

⁷ Meredith Affidavit at para. 11, Receiver's Motion Record, Tab 2

⁸ Meredith Affidavit at para. 12, Receiver's Motion Record, Tab 2

10. After the adjournment of the hearing on February 13, 2012, counsel for the Receiver made multiple additional attempts to contact Mr. Giguere, including by:

- (a) e-mailing Mr. Giguere on February 13, 2012 requesting that he contact counsel for the Receiver and attaching the Endorsement;⁹
- (b) calling Mr. Giguere on February 13, 2012 and leaving a voicemail describing the Endorsement and requesting that Mr. Giguere contact counsel for the Receiver to set up a meeting;¹⁰
- (c) sending a letter to Mr. Giguere on February 15, 2012 requesting that Mr. Giguere contact counsel for the Receiver to set up a meeting and enclosing a copy of the Endorsement.¹¹

11. Mr. Giguere did not respond to any of the above attempts to contact him.¹²

Attempts to serve Mr. Giguere with a Summons to Witness

12. After multiple failed attempts to contact Mr. Giguere, a summons to witness was issued on March 7, 2012 compelling Mr. Giguere to attend at the hearing of the Motions on May 14, 2012 at 10:00 am (the “**Summons to Witness**”).¹³

13. On March 8, 2012, a process server attended at Mr. Giguere’s residence and attempted to serve him with the Summons to Witness. The process server spoke to Mr. Giguere’s wife and daughter who indicated that he was out of town and would be returning on March 14, 2012.¹⁴

⁹ Meredith Affidavit at para. 14, Receiver’s Motion Record, Tab 2

¹⁰ Meredith Affidavit at para. 14, Receiver’s Motion Record, Tab 2

¹¹ Meredith Affidavit at para. 15, Receiver’s Motion Record, Tab 2

¹² Meredith Affidavit at paras. 14, 16, Receiver’s Motion Record, Tab 2

¹³ Summons to Witness issued March 7, 2012, Meredith Affidavit, Exhibit “H”, Receiver’s Motion Record, Tab 2-H

14. On March 14, 2012, the process server again attended at Mr. Giguere's residence and spoke with Mr. Giguere's wife, who indicated that Mr. Giguere had returned the night before but had already left again for China. Mr. Giguere's wife indicated that Mr. Giguere would be returning in two weeks; but she could not say exactly when.¹⁵

15. To date, counsel for the Receiver has been unable to personally serve Mr. Giguere with the Summons.

PART III— THE LAW AND ARGUMENT

16. Rule 34.04(4) requires a summons to witness to be served personally, and not by an alternative to personal service.¹⁶

17. Pursuant to Rule 16.04 of the *Rules of Civil Procedure*, the court may make an order for substituted service where it appears to be impracticable for any reason to effect prompt service.

Rule 16.04 reads:

“Where it appears to the court that it is impracticable for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.”¹⁷

18. To obtain an order under this Rule, the moving party must demonstrate that it is unable to carry out prompt personal service.¹⁸

¹⁴ Affidavit of Attempted Service of Leo Pereira sworn March 19, 2012 at para 2 [the “Pereira Affidavit”], Receiver's Motion Record, Tab 3

¹⁵ Pereira Affidavit at para. 3, Receiver's Motion Record, Tab 3

¹⁶ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 34.04(4)

¹⁷ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 16.04

¹⁸ *Laframboise v. Woodward* (2002), 59 O.R. (3d) 338 (S.C.J) at para. 9 (“*Laframboise*”), Receiver's Brief of Authorities, Tab 1

19. A party is unable to carry out prompt personal service if it has taken all reasonable steps to locate and serve the defendant but, despite its reasonable efforts, it is still unable to effect personal service. What is reasonable will depend on the nature of the case, the relief claimed, the amount involved and the surrounding circumstances.¹⁹

20. In this case, Mr. Giguere is not the subject of any legal proceeding nor are any allegations being made against him. Rather, all that is sought from him is his evidence with respect to issues relevant to the Motions. Mr. Giguere is fully aware of this as he has spoken with the Receiver, as well as counsel for the Receiver, on multiple occasions about it, as described in the affidavit of Heather Meredith sworn March 23, 2012.²⁰

21. In fact, Mr. Giguere was specifically warned that if he did not voluntarily provide his evidence with respect to the Motions that a subpoena would be issued compelling him to provide evidence. Mr. Giguere took exception to this suggestion and indicated that he did want to be in the middle of this dispute.²¹ After communicating this to counsel for the Receiver on February 10, 2012, he became totally unresponsive.²²

22. He has not responded to emails. He had not responded to letters. He had not returned voicemails. When a process server attempted to serve the Summons to Witness on him at his residence, his wife and daughter claimed he was out of the country. When the process server returned again at the time that his wife and daughter had indicated he would be back, his wife claimed that the process server had just missed him and that he was out of the country again.²³

¹⁹ *Laframboise, supra* at para. 10, Brief of Authorities of the Receiver, Tab 1

²⁰ Motion Record of the Receiver, Tab 2

²¹ Meredith Affidavit at para. 11, Receiver's Motion Record, Tab 2

²² Meredith Affidavit at para. 12, Receiver's Motion Record, Tab 2

²³ Pereira Affidavit at paras. 2-3, Receiver's Motion Record, Tab 3

23. In these circumstances, personal service of the Summons to Witness is impracticable.

24. In order to obtain an order for substituted service, the moving party must show that the proposed method of substituted service will have "some likelihood" or a "reasonable possibility" of bringing the document in question to the attention of the person sought to be served.²⁴

25. The proposed method of substituted service is certain to bring the Summons to Witness to the attention of Mr. Giguere.

26. When the process server attended at 1203 Greenoaks Drive, Mississauga, Ontario (the "Residence") on March 14, 2012, Mr. Giguere's wife indicated that he had been there the night before but that he had already left for China on that day with their son.²⁵ Notably, she did not indicate that he no longer resided there or that she was not in contact with him. Rather, the fact that she claimed to know of his whereabouts, and that she indicated that he was present at the residence on the previous evening suggests that he does still reside there and that she is in contact with him.

27. Further, the address that the process server attended at is the address in the Receiver's records, and it was the address on Mr. Giguere's proof of claim filed in the Skyservice claims process.²⁶

28. By leaving a copy of the Summons, in a sealed envelope addressed to Mr. Giguere, with an adult member of the Residence, and by mailing a copy of the Summons to the Residence, it is likely that the Summons to Witness will come to the attention of Mr. Giguere.

²⁴ *Laframboise, supra* at para.14, Receiver's Brief of Authorities, Tab 1; *Babineau v. Babineau*, [1983] O.J. No. 2187 (H.C.J.) at para. 3 ("*Babineau*"), Receiver's Brief of Authorities, Tab 2

²⁵ Pereira Affidavit, at para. 3, Receiver's Motion Record, Tab 3

²⁶ Meredith Affidavit, at para. 20, Receiver's Motion Record, 2

29. In addition, as set out in her affidavit, Ms. Meredith communicated with Mr. Giguere at his email address at robertgiguere@rogers.com up until February 10, 2012 when he took exception to the suggestion that a subpoena could be issued if he refused to swear an affidavit and indicated to her that he did not want to be involved in the middle of this dispute, after which he became unresponsive.²⁷

30. Given that he was previously able to be contacted through this email address, it is likely that delivery of a copy of the Summons to Witness to this email address will bring the Summons to Witness to his attention. Combined with the delivery and mailing of the Summons to the Residence, it is almost certain that the proposed method of substituted service will bring the Summons to Witness to his attention.

PART IV— ORDER SOUGHT

31. For the above reasons, the Receiver requests an order granting leave to effect substituted service of the Summons to Witness, in the form contained in the Motion Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 23RD DAY OF MARCH, 2012.

Geoff R. Hall

Counsel to FTI Consulting Canada Inc.,
in its capacity as court-appointed
receiver of Skyservice Airlines Inc.

²⁷ Meredith Affidavit at para. 11, 21, Receiver's Motion Record, Tab 2

SCHEDULE "A" – AUTHORITIES REFERRED TO

1. *Laframboise v. Woodward* (2002), 59 O.R. (3d) 338 (S.C.J.)
2. *Babineau v. Babineau*, [1983] O.J. No. 2187 (H.C.J.)

SCHEDULE "B" – LEGISLATION

1. Rules of Civil Procedure, R.R.O. 1990, Reg. 194

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where Order May be Made

16.04 (1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service under these rules, the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service. R.R.O. 1990, Reg. 194, r. 16.04 (1).

Effective Date of Service

(2) In an order for substituted service, the court shall specify when service in accordance with the order is effective. R.R.O. 1990, Reg. 194, r. 16.04 (2).

(3) Where an order is made dispensing with service of a document, the document shall be deemed to have been served on the date of the order for the purpose of the computation of time under these rules. R.R.O. 1990, Reg. 194, r. 16.04 (3).

.....

HOW ATTENDANCE REQUIRED

Party

34.04 (1) Where the person to be examined is a party to the proceeding, a notice of examination (Form 34A) shall be served,

- (a) on the party's lawyer of record; or
- (b) where the party acts in person, on the party, personally or by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (1); O. Reg. 739/94, s. 2 (1); O. Reg. 575/07, s. 20 (1).

Person Examined on Behalf or in Place of Party

(2) Where a person is to be examined for discovery or in aid of execution on behalf or in place of a party, a notice of examination shall be served,

- (a) on the party's lawyer of record; or
- (b) on the person to be examined, personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (2); O. Reg. 575/07, s. 20 (2).

Deponent of Affidavit

(3) Where a person is to be cross-examined on an affidavit, a notice of examination shall be served,

(a) on the lawyer for the party who filed the affidavit; or

(b) where the party who filed the affidavit acts in person, on the person to be cross-examined, personally and not by an alternative to personal service.

R.R.O. 1990, Reg. 194, r. 34.04 (3); O. Reg. 739/94, s. 2 (2); O. Reg. 575/07, s. 1.

Others

(4) Where the person to be examined,

(a) is neither a party nor a person referred to in subrule (2) or (3); and

(b) resides in Ontario,

the person shall be served with a summons to witness (Form 34B), personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (4).

Attendance Money

(5) When a summons to witness is served on a witness, attendance money calculated in accordance with Tariff A shall be paid or tendered to the witness at the same time. R.R.O. 1990, Reg. 194, r. 34.04 (5).

Summons may be Issued in Blank

(6) On the request of a party or a lawyer and on payment of the prescribed fee, a registrar shall sign, seal and issue a blank summons to witness and the party or lawyer may complete the summons and insert the names of any number of witnesses. R.R.O. 1990, Reg. 194, r. 34.04 (6); O. Reg. 575/07, s. 1.

Person Outside Ontario

(7) Rule 53.05 (summons to a witness outside Ontario) applies to the securing of the attendance for examination of a person outside Ontario and the attendance money paid or tendered to the person shall be calculated in accordance with the *Interprovincial Summonses Act*. R.R.O. 1990, Reg. 194, r. 34.04 (7).

Person in Custody

(8) Rule 53.06 (compelling attendance of witness in custody) applies to the securing of the attendance for examination of a person in custody. R.R.O. 1990, Reg. 194, r. 34.04 (8).

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ETWEN:

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- and -

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Court File No. CV-10-8647-00CL

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COMMERCIAL LIST**

Proceeding Commenced at Toronto

FACTUM

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