

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST  
(IN BANKRUPTCY AND INSOLVENCY)**

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

**FACTUM**

**(Inspector Eligibility Motion,  
Returnable August 3, 2012)**

August 1, 2012

**McCarthy Tétrault LLP**  
Suite 5300, P.O. Box 48  
Toronto Dominion Bank Tower  
Toronto ON M5K 1E6

**Geoff R. Hall** LSUC#: 347010  
Tel: 416 601-7856  
E-mail: ghall@mccarthy.ca

**Heather L. Meredith** LSUC#: 48354R  
Tel: 416 601-8342  
E-mail: hmeredith@mccarthy.ca

**Kelly D. Peters** LSUC#: 59914W  
Tel: 416 601-8281  
E-mail: kpeters@mccarthy.ca

Fax: 416 868-0673

Lawyers for FTI Consulting Canada Inc., in  
its capacity as Trustee of Skyservice  
Airlines Inc.

TO: Service List

AND TO: Office of the Superintendent  
of Bankruptcy Canada – Division Office  
25 St. Clair Avenue East, 6<sup>th</sup> Floor  
Toronto, ON M4T 1M2

Attention: Mike Cacciavillani

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST  
(IN BANKRUPTCY AND INSOLVENCY)**

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

**FACTUM**

**PART I—OVERVIEW**

1. This is a motion for advice and directions brought by FTI Consulting Canada Inc. (“FTI”) in its capacity as trustee (the “Trustee”) of the bankruptcy estate of Skyservice Airlines Inc. (“Skyservice”) to determine whether Mark Williams, a representative of Sunwing Airlines Inc. and Sunwing Tours Inc. (together, “Sunwing”), is eligible to be appointed as an inspector in the bankruptcy proceeding of Skyservice or whether he is ineligible as a result of section 116(2) of the Bankruptcy and Insolvency Act (Canada) (the “BIA”).
2. The Trustee takes no position on the outcome of this motion. This factum is intended to set out the relevant facts and legal considerations for the Court.

## PART II—FACTS

### Background

3. FTI was appointed as receiver of the assets, undertakings and properties of Skyservice pursuant to an Order of the Honourable Mr. Justice Gans (the “Receivership Order”) on March 31, 2010.<sup>1</sup>

4. On June 16, 2010, an order was obtained lifting the stay of proceedings imposed by the Receivership Order to allow the commencement of a bankruptcy application against Skyservice and to adjourn the hearing of such application *sine die*. The application was commenced for the purpose of establishing the date of the ‘initial bankruptcy event’ for purposes of the BIA and to make available the rights and remedies under the BIA.<sup>2</sup>

5. Skyservice was adjudged bankrupt and FTI was appointed as Trustee of the bankruptcy estate of Skyservice pursuant to an Order of the Honourable Mr. Justice Morawetz granted March 29, 2012 (the “Bankruptcy Order”). The bankruptcy proceedings of Skyservice are hereinafter referred to as the “Bankruptcy Proceedings.”<sup>3</sup>

6. Among other things, the Bankruptcy Order provides that:

- (a) The assets of Skyservice “shall vest in the Trustee subject to the rights, powers and authority of [the Receiver]” pursuant to the Receivership

---

<sup>1</sup> First Report to the Court Submitted by FTI Consulting Canada Inc., in its Capacity as Trustee (the “First Report”), Motion Record of the Trustee (“MRT”), Tab 2, para.1, page 7.

<sup>2</sup> *Ibid*, para. 2, page 8.

<sup>3</sup> *Ibid*, para. 5, page 8.

Order and other Orders made in Court File No. CV-10-8647-00CL (the "Receivership Proceedings");<sup>4</sup>

- (b) The Receiver will "continue to allow, disallow or otherwise adjudicate or settle Claims in accordance with the Claims Procedure Order [dated July 27, 2010], and the final determination of each Claim in accordance with the Claims Procedure Order will be effective and binding in the Bankruptcy Proceedings as if allowed by the Trustee and finally determined in the Bankruptcy Proceedings on such basis;"<sup>5</sup> and,
- (c) All steps taken by the Receiver in the Receivership Proceedings pursuant to any Orders granted therein "(including without limitation soliciting, reviewing, evaluating, allowing and disallowing Claims and sales of the Receivership Property) ... are deemed to be effective against the Trustee and against the creditors of Skyservice as if such steps and actions were taken by the Trustee."<sup>6</sup>

### **The Sunwing Motions**

7. Early in the Receivership Proceedings, Sunwing asserted a claim that, prior to the Date of Receivership, certain funds had been provided by Sunwing to Skyservice, which it claimed were "subject to Sunwing's interest, including without limitation a proprietary or trust interest." Sunwing claimed these amounts "do not form part of the Skyservice estate and are not subject to any court ordered charges or other security" (collectively, the "Sunwing Trust Claim").<sup>7</sup>

---

<sup>4</sup> Bankruptcy Order, paragraph 4, MRT, Tab 2(a), page 16.

<sup>5</sup> Bankruptcy Order, paragraph 5(b), MRT, Tab 2(a), page 17.

<sup>6</sup> Bankruptcy Order, paragraph 7, MRT, Tab 2(a), page 18.

<sup>7</sup> First Report, para 12, MRT, Tab 2, page 10.

8. In response to the Sunwing Trust Claim, the Receiver brought a motion in the Receivership Proceedings for an order that it may spend or distribute all funds in the Skyservice estate without regard to the Sunwing Claim and an order determining that the amounts claimed in the Sunwing Claim are not subject to a proprietary or trust interest as alleged by Sunwing.<sup>8</sup>

9. In response to the Receiver's motion, Sunwing brought a cross-motion alleging that:

- (a) \$2,329,473 was paid by Sunwing to Skyservice prior to the Date of Receivership in respect of flights scheduled for after the Date of Receivership that were not ultimately provided, which funds were segregated by Skyservice and, therefore, such funds were held in an "actual" trust for the benefit of Sunwing; and
- (b) \$3,513,450.08 (which amount includes and is duplicative of the claim for \$2,329,473, described above), is held in a constructive trust for the benefit of Sunwing, with the constructive trust imposed to remedy an alleged unjust enrichment as follows: Skyservice was enriched by receiving these amounts for flight services that it did not provide, Sunwing was correspondingly deprived, and there was no juristic reason for the enrichment due to the appointment of the Receiver and Skyservice's failure "to provide the flights pre-paid for."<sup>9</sup>

---

<sup>8</sup> *Ibid*, para 13, page 10.

<sup>9</sup> *Ibid*, para 14, page 11.

10. Sunwing delivered a motion record in support of its motion on the Sunwing Trust Claim in which it relies on affidavit evidence of Mr. Williams.<sup>10</sup> In the Supplemental Affidavit of Mark Williams, sworn October 11, 2011, Mr. Williams takes issue with a number of facts and statements in the Tenth Report of the Receiver dated June 2, 2011 (the "Tenth Report").<sup>11</sup> He also states, among other things, that "Sunwing suffered numerous and varied damages and loss as a direct result of Skyservice's receivership and corresponding breach of the Commercial Agreement and Charter Agreements, among other things,"<sup>12</sup> and argues, with respect to invoices attached to the Tenth Report, that "Sunwing does not admit the amounts claimed by the Receiver...Sunwing disputes that it owes anything on account of March fuel differential, and disputes these invoices in full."<sup>13</sup>

11. Both the Receiver's motion and Sunwing's cross-motion in relation to the Sunwing Trust Claim are outstanding and continue to be actively litigated by the parties (such proceedings are referred to herein as the "Sunwing Trust Proceedings").<sup>14</sup>

### **The Appointment of Mr. Williams as an Inspector**

12. The First Meeting of Creditors of Skyservice was held on April 19, 2012 (the "Creditors' Meeting").<sup>15</sup>

13. Anticipating that Sunwing was likely to nominate a representative to serve as an inspector in the Bankruptcy, the Trustee consulted with counsel and with the Official

---

<sup>10</sup> *Ibid*, para 15, page 11.

<sup>11</sup> Supplemental Affidavit of Mark Williams, MRT, Tab 2(b)(2), paras. 14, 15, 19, 28 and 34, pages 60, 61, 63 and 65.

<sup>12</sup> *Ibid*, para. 26, page 63.

<sup>13</sup> *Ibid*, para. 34, page 65.

<sup>14</sup> First Report, para 16, MRT, Tab 2, page 11.

<sup>15</sup> *Ibid*, para. 8, page 9.

Receiver prior to the Creditors' Meeting regarding his eligibility to act as an inspector. The Official Receiver informed the Trustee that, in its view, it was unclear whether a Sunwing representative could act as an inspector in the circumstances. The Trustee and Official Receiver determined that, if a Sunwing representative was nominated as an inspector at the Creditors' Meeting, the Trustee would inform the creditors that there was a potential issue (in particular, that since section 116(2) of the BIA prohibits parties who are subject to any contested action or proceedings by or against the estate from being an inspector, Mr. Williams may not be eligible to act as an inspector), and any election of a Sunwing representative would be subject to advice and directions from the Court, which would be sought by the Trustee following the Creditors' Meeting.<sup>16</sup>

14. The Trustee followed that approach at the Creditor's Meeting and, in addition, provided counsel to Sunwing the opportunity to address the Creditors' Meeting and articulate its position that:

- (a) The dispute in the Receivership Proceedings does not constitute a contested action or proceeding against the bankruptcy estate since it is taking place in the Receivership Proceedings;
- (b) The disallowance or other challenge of a creditor's claim by a trustee in bankruptcy is not grounds for disqualification, but rather, only results in that inspector having to refrain from participating in decisions relating to the claim; and

---

<sup>16</sup> *Ibid*, paras. 18 and 19, page 12.



- (c) The existence of a possible action against Sunwing in the future is not grounds for disqualification at this time.<sup>17</sup>

15. Ultimately, three people, including Mr. Mark Williams, were appointed as inspectors, with the appointment of Mr. Williams explicitly subject to the Trustee obtaining confirmation from the Court as to his eligibility to serve as an inspector.<sup>18</sup>

### **PART III—ISSUES**

16. The central issue in this motion is whether the Sunwing Trust Proceedings and related ongoing litigation in the Receivership Proceedings constitute a “contested action or proceedings against the estate of the bankrupt” such that Sunwing’s representative, Mr. Williams, is ineligible to act as an inspector pursuant to section 116(2) of the BIA and/or the Court’s inherent jurisdiction. This gives rise to two sub-issues:

- (a) Are the Sunwing Trust Proceedings contested proceeding against the “bankrupt estate”? and
- (b) Is a party that is subject to contested proceedings against the bankrupt estate “ineligible” to act as an inspector or may they be appointed and simply abstain from related discussions and votes?

### **PART IV—LAW AND ARGUMENT**

17. The role of a bankruptcy inspector has been summarized as follows:

Inspectors are appointed by the creditors. On their behalf, the inspectors supervise the trustee and, thereby, are able to closely control the administration of an estate. ...

---

<sup>17</sup> *Ibid*, paras. 10-21, page 13.

<sup>18</sup> *Ibid*, paras. 22-23, pages 13-14.

...

Inspectors are fiduciaries. They represent all creditors and must perform their duties impartially. They must be entirely disinterested and exercise a general supervision over all operations of the estate and protect the creditors at large. They may not favour the debtor or obtain a personal advantage or benefit at the expense of the creditors. Inspectors must not expose themselves to a conflict between their duties and interest. ...<sup>19</sup>

18. Section 116(2) of the BIA sets out restrictions on eligibility for appointment as an inspector:

No person is eligible to be appointed or to act as an inspector who is a party to any contested action or proceedings by or against the estate of the bankrupt.

19. If the trustee is in doubt about whether or not a person is eligible to act as an inspector, the trustee may apply to the Court for directions pursuant to section 34 of the BIA,<sup>20</sup> which provides:

A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.<sup>21</sup>

20. The prohibition in section 116(2) applies equally to a representative of a corporation engaged in litigation with the bankrupt estate as to an individual engaged in litigation with the estate:

While he personally is not a party to Crown's contested proceeding, I note that *Re Promedia Inc.; Mohon Noiseur v. Rodrigue and Boisvert* (1984), 51 C.B.R. (N.S.) 132 (Que. S.C.) indicated that the prohibition in s.116(2) applies to a representative of the corporation as much as to an individual.<sup>22</sup>

---

<sup>19</sup> John D. Honsberger & Vern Dare, *Bankruptcy in Canada*, 4th ed (Canada Law Book Ltd., 2009) at 69-71, Trustee's Brief of Authorities ("TBA"), Tab 1.

<sup>20</sup> *Maheu c. Rodrigue*, 1984 CarswellQue 33 (Que. S.C., In Bankruptcy), at para. 13 ( *Maheu* ), TBA, Tab 2.

<sup>21</sup> BIA, section 34 (formerly section 16), Schedule "B" hereto.

<sup>22</sup> *Canadian Triton International Ltd., Re*, 1997 CanLII 12412 (ON SC), at para 18 ( *Canadian Triton* ); citing *Maheu*, TBA, Tab 3.

21. In this case, Mr. Williams is a representative of Sunwing and, as the affiant in the Sunwing Trust Claim, he is actively involved in the Sunwing Trust Claim. Accordingly, the question is whether the Sunwing Trust Claim is a “contested action or proceedings by or against the estate of the bankrupt”.

### **Contested Proceedings Against the Bankrupt Estate**

22. Case law interpreting section 116(2) of the BIA is limited and does not appear to provide clear direction as to the type of proceedings that are caught by the term “contested action or proceedings by or against the estate of the bankrupt”. Moreover, the majority of case law in this area considers the removal of an inspector after their appointment and after he or she had acted in that role as opposed to the eligibility of an inspector at first instance.

#### **(i) Are Sunwing Trust Proceedings Against or By the Bankrupt Estate?**

23. Skyservice has been in Receivership since 2010 and the Sunwing Trust Proceedings are currently being litigated by the Receiver in the Receivership Proceedings. Pursuant to section 116(2) of the BIA, a party is ineligible to act as an inspector if they are subject to a contested proceeding by or against “the estate of the bankrupt”. Therefore, the question arises whether the Sunwing Trust Proceedings are proceedings or actions “against or by the bankrupt estate”, since the dispute is not taking place in the Bankruptcy Proceedings.

24. On the one hand, the claim is contested with the Receiver rather than the Trustee and is taking place in the Receivership. It will be the Receiver considering and responding to the Sunwing Trust Proceedings and the inspectors in the Bankruptcy

Proceeding should not have influence over actions or decisions of the Receiver in that regard.

25. Cases in which the Courts have removed inspectors tend to stress the conflict of interest or potential conflict of interest that may arise as a result of the inspector's role as both inspector and participant in a contested proceeding. For instance, in *Re Wimco Steel Sales Company Limited*,<sup>23</sup> Houlden J. revoked the appointment of an inspector<sup>24</sup> who was Vice President of a corporation against which the bankrupt estate had a claim. There was no question that the inspector had acted properly in its role to the date of the motion and the concern raised was due to his role as Vice President of the corporation against which the bankrupt estate had a substantial claim. The Court noted as follows:

...In my opinion, an inspector is as much a trustee of the estate as the trustee and it is inconceivable that a person could act as trustee of a bankrupt estate and, at the same time, be sued by the bankrupt estate for damages.

From the material before me, it appears that there may be a proposal submitted to the trustee. It will be obvious that Mr. Barber, representing the Algoma Steel corporation, will be most anxious that the lawsuit against his company should be disposed of, and I believe this might very well colour his approach to any proposal that is submitted. In my opinion, it is imperative that an order should be made removing Mr. Barber as an inspector of the estate.<sup>25</sup>

26. Similarly, in *Maheu*, the Quebec Superior Court removed the controller of a partnership as inspector where there was litigation pending between the bankrupt and the partnership. The Court noted that the trustee would have to make decisions about

---

<sup>23</sup> 1970 CarswellOnt 84 (Ont. S.C., In Bankruptcy) ("*Wimco*"), TBA Tab 4.

<sup>24</sup> Houlden J. applied section 116(5) [then 82(5)] of the BIA, which states "The creditors may at any meeting and the court may on the application of the trustee or any creditor revoke the appointment of any inspector and appoint another in his stead." It appears that Houlden J. was concerned that section 116(2) [then 82(2)] did not apply to representatives of corporations, noting that "it is unfortunate that s.82(2) does not provide that no person is eligible to be appointed or to act as an inspector who is a party directly or indirectly to any contested action or proceeding by or against the estate". Of note, this case was decided prior to *Canadian Triton* and only one month after *Maheu*, which is not referenced in the decision.

<sup>25</sup> *Wimco*, *supra*, at paras 5-6, TBA Tab 4.

the litigation where the interests of the bankrupt and the partnership were opposed, which resulted in multiple conflicts of interest.<sup>26</sup>

27. The fact that the claims process is taking place in the Receivership Proceedings will limit such conflicts of interest.

28. On the other hand, the Bankruptcy Order provides that the claims process in the Receivership is “effective and binding in the Bankruptcy Proceedings as if allowed by the Trustee.”<sup>27</sup> Therefore, the outcome of the Sunwing Trust Proceedings directly impacts the Skyservice estate and by court order has the *effect* of the being a claim against the bankrupt estate, which appears to trigger the restriction in section 116(2) of the BIA.

29. In addition, inspectors have access to information such as books and records. As a result, inspectors in the Bankruptcy Proceedings may have access to books and records that are relevant to disputes taking place in the Receivership Proceedings. Courts have held that “the Inspectors and the Trustee must not use their access to the books and records of the bankrupt for their own purposes, the purposes of creditors who may have separate actions against third parties who had dealings with the bankrupt or in a way which would conflict with the Trustee’s obligation to pursue all legitimate claims against third parties that may be available to the Trustee and the bankrupt.”<sup>28</sup>

---

<sup>26</sup> *Maheu, supra*, at paras. 2-3 and 9-10 (See also case summary in English), TBA Tab 2.

<sup>27</sup> Bankruptcy Order, paragraph 5(b), MRT, Tab 2(a), page 17.

<sup>28</sup> *Taylor Ventures Ltd., Re*, 1999 CarswellBC 97 (B.C. S.C.), at para 31, TBA Tab 5.

30. The Trustee is not aware of any case law in which the Court considers the appointment of inspectors in circumstances in which there is a disputed proceeding in a receivership, which will have effect in the bankruptcy proceeding. Accordingly, the Trustee seeks direction as to whether the Sunwing Trust Claim is a contested proceeding against the “bankrupt estate” for purposes of section 116(2) of the BIA.

(ii) **Is the Inspector Ineligible or is Absention Sufficient?**

31. Section 116(2) of the BIA provides that a party subject to contested proceedings against the bankrupt estate is not “eligible” to act as an inspector. This language suggests that once it is determined that a person is a party to a contested proceeding against the bankrupt estate, he or she is not entitled to act as an inspector. However, there is case law in which Courts have approved the continued action by inspectors in circumstances in which the inspector removes himself or herself from discussions and voting on issues in which he or she has an interest.

32. In particular, in *Kedzep Ltd. v. Bertrand*<sup>29</sup>, the Quebec Superior Court considered a motion by the trustee to comment on a practice that had developed in the administration of the estate whereby inspectors (who were all professionals (trustees or solicitors) representing creditors) would withdraw from discussions relating to a claim made by the creditor he represented.<sup>30</sup>

---

<sup>29</sup>1981 CarswellQue 46 (Que. S.C., In Bankruptcy) (“*Kedzep*”), TBA Tab 6.

<sup>30</sup> *Ibid*, at paras.1-2 and 4, TBA Tab 6.

33. In that case, the conflict became apparent after the inspectors were appointed and numerous meetings and "serious and important discussions and decisions"<sup>31</sup> had taken place. The Court determined it was sufficient for the inspector to abstain from votes and discussion relating directly or indirectly to the matter in which the creditor he represented has an interest, and noted that "It is clear that it would cause substantial difficulties should it become necessary to replace anyone by someone not having knowledge of the past history of this matter, who would have to be briefed and educated from scratch, and that the administration of the estate would suffer as a result."<sup>32</sup> The Court also reviewed various cases that considered the role of inspectors and, among other things, distinguished case law in which the inspector participated directly in the contested proceedings, which was not the case in *Kedzep*.<sup>33</sup>

34. Comments of a similar nature were made by Farley J. in *Canadian Triton*. In that case, the inspector in question had not been properly served with the motion and, as a result, the Court declined to make any binding decisions; however, Farley J. made the following general comments:

.. I would generally note that if a matter came up before the inspectors and one of them was directly affected by being a creditor or the representative of a creditor whose claim was being contested or affected in some way different from the general body of creditors, then it would be appropriate for that inspector to remove himself from debate and vote on that item. ...<sup>34</sup>

35. Accordingly, there is case law in which the Court permitted having the 'interested' inspector simply remove himself from relevant discussions and votes. In *Kedzep*,

---

<sup>31</sup> *Kedzep, supra* at para. 3, TBA Tab 6.

<sup>32</sup> *Ibid*, at para 3, TBA Tab 6.

<sup>33</sup> *Ibid*, at paras.6 -15 , TBA Tab 6.

<sup>34</sup> *Triton, supra* at para 18, TBA Tab 3.

however, the inspectors in question were not personally involved in the disputed claims (as Mr. Williams is in this case) and the inspectors had been acting in their role for some time such that it would have caused substantial difficulties and prejudiced the administration of the estate to remove such inspectors. Moreover, the observations of Farley J. in *Canadian Triton*, which also appear to support this approach, were comments only as the issue was not decided in that case due to a lack of proper service. Of further note, the issue in *Kedzep* and the language in *Canadian Triton* related to claims filed in the claims process that either had been or may be contested. The Sunwing Trust Proceedings relate to the Sunwing Trust Claim, which is both a disputed claim in the claims process and the subject of a motion and cross-motion in the Receivership Proceedings.

36. Case law in which the inspector was removed from his or her role include *Wimco* and *Maheu*. In those cases, the Court removed inspectors who were employed by entities against which the bankrupt estate had a claim and there was a potential conflict of interest. The Saskatchewan Court of Queen's Bench in *Trends Holdings Ltd. (Trustee of) v. Tilson*<sup>35</sup>, summarized that law as follows: "inspectors who represent a company against whom the bankrupt estate has a substantial claim should not be appointed (or continue to act as) an inspector."<sup>36</sup> This law was not applied in *Trends*, however, since the inspector was an employee of the creditor that had petitioned the debtor into bankruptcy and there was no proceeding pending between the debtor and the petitioning creditor. The Court stated as follows:

---

<sup>35</sup> 2006 SKQB 541 ("*Trends*"), TBA Tab 7.

<sup>36</sup> *Ibid*, at para. 37, TBA Tab 7.



Sections 116 to 120 of the BIA identify the role, duties and obligations of an inspector in the administration of a bankrupt's estate. The appointment of an inspector generally, and the appointment of this inspector specifically, is a decision to be made by the creditors of the bankrupt at a properly convened meeting. If the Trustee disagrees with the inspector appointed or on an application of a creditor, as is now presently before this Court, an application for removal of the inspector can be made. The court must consider whether or not the appointed inspector has acted improperly or alternatively will be unable to perform those duties assigned to inspectors under the provisions of the BIA to which this Court has referred. While it is the case that inspectors who represent a company against whom the bankrupt estate has a substantial claim should not be appointed (or continue to act as) an inspector (See *Wimco Steel Sales Co., Re* (1970), 14 C.B.R. (N.S.) 288 (Ont. S.C.), *Maheu v. Rodrigue* (1984), 51 C.B.R. (N.S.) 132 (Que. S.C.)) nevertheless as has already [been] pointed out, that is not the circumstance presently before the court. If, as and when any action is commenced on behalf of the bankrupt estate against Nexen then this issue may very well be topical and the principles analysed in and applied by the courts in the *Wimco* and *Maheu* cases (*supra*) may apply to support this inspector's removal.<sup>37</sup>

37. Accordingly, while the wording of section 116(2) refers to 'eligibility' of the inspector and appears to disqualify a person from acting if he or she is a party to a contested proceeding against the bankruptcy estate, differing approaches have been taken in the case law and the Trustee seeks directions in the circumstances of this case.

### **Conclusion**

38. The Trustee acknowledges that the Sunwing Trust Claim is proceeding in the Receivership Proceedings, which reduces the likelihood of a conflict of interest arising in this case. However, given the terms of the Bankruptcy Order and the language of section 116(2) of the BIA, the fact that Mr. Williams has actively participated in the Sunwing Trust Proceedings against the estate (both with respect to the disputed claim in the claims process and in the Sunwing Trust Claim motion and cross-motion), the view of the Official Receiver that it was unclear whether a Sunwing representative could

---

<sup>37</sup> *Trends, supra*, at para. 37, TBA Tab 7.

act as an inspector in these circumstances, the access inspectors have to information and records of the bankrupt, and the lack of clear direction in the case law, the Trustee seeks advice and directions regarding the appointment of Mr. Williams as an inspector.

39. As noted in the First Report, in the event the Court determines that Mr. Williams is ineligible to serve as an inspector, the Trustee intends to seek to fill the vacancy in accordance with section 116 of the BIA.

#### **PART V—RELIEF**

40. In light of the varying approaches detailed above, the Trustee seeks the advice and direction of the court to clarify whether Mr. Williams is eligible to be appointed as an inspector of the Skyservice Bankruptcy Proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 1, 2012

  
\_\_\_\_\_  
Geoff R. Hall/Heather L. Meredith/  
By Kelly D. Peters  
**McCarthy Tétrault LLP**

Lawyers for FTI Consulting Canada Inc.,  
in its capacity as Trustee in Bankruptcy of  
Skyservice Airlines Inc.

Tab A

**Schedule "A"**

**LIST OF AUTHORITIES**

1. John D. Honsberger & Vern Dare, *Bankruptcy in Canada*, 4th ed (Canada Law Book Ltd., 2009).
2. *Maheu c. Rodrigue*, 1984 CarswellQue 33 (Que. S.C., In Bankruptcy).
3. *Canadian Triton International Ltd., Re*, 1997 CanLII 12412 (ON SC).
4. *Re Wimco Steel Sales Company Limited*, 1970 CarswellOnt 84 (Ont. S.C., In Bankruptcy).
5. *Taylor Ventures Ltd., Re*, 1999 CarswellBC 97 (B.C. S.C.).
6. *Kedzep Ltd. v. Bertrand*, 1981 CarswellQue 46 (Que. S.C., In Bankruptcy).
7. *Trends Holdings Ltd. (Trustee of) v. Tilson* , 2006 SKQB 541.

**Tab B**

**Schedule "B"**

**RELEVANT STATUTES**

**Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended**

**Trustee may apply to court for directions**

Section 34 (1) A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

**Inspectors**

116. (1) At the first or a subsequent meeting of creditors, the creditors shall, by resolution, appoint up to five inspectors of the estate of the bankrupt or agree not to appoint any inspectors.

(2) No person is eligible to be appointed or to act as an inspector who is a party to any contested action or proceedings by or against the estate of the bankrupt.

(3) The powers of the inspectors may be exercised by a majority of them.

(4) The creditors or inspectors at any meeting may fill any vacancy on the board of inspectors.

(5) The creditors may at any meeting and the court may on the application of the trustee or any creditor revoke the appointment of any inspector and appoint another in his stead.

**IN THE MATTER OF THE BANKRUPTCY OF SKYSERVICE AIRLINES INC. OF THE CITY OF TORONTO  
IN THE PROVINCE OF ONTARIO**

Court File No. 31-OR-207744-T

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST  
(IN BANKRUPTCY AND INSOLVENCY)**

Proceeding Commenced at Toronto

**FACTUM**

**McCarthy Tétrault LLP**  
Suite 5300, P.O. Box 48  
Toronto Dominion Bank Tower  
Toronto ON M5K 1E6

**Geoff R. Hall** LSUC#: 347010  
Tel: 416 601-7856  
E-mail: ghall@mccarthy.ca

**Heather L. Meredith** LSUC#: 48354R  
Tel: 416 601-8342  
E-mail: hmeredith@mccarthy.ca

**Kelly D. Peters** LSUC#: 59914W  
Tel: 416 601-8281  
E-mail: kpeters@mccarthy.ca

Fax: 416 868-0673

Lawyers for FTI Consulting Canada Inc., in  
its capacity as Trustee in Bankruptcy of  
Skyservice Airlines Inc.

#11474097