

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

IN THE MATTER OF THE BANKRUPTCY OF
SKYSERVICE AIRLINES INC.

**FACTUM OF SUNWING TOURS INC.
(Re: Inspector Eligibility Motion)
(Returnable August 3, 2012)**

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario M5L 1A9

Katherine McEachern, LSUC #38345M
Tel: 416-863-2566
Fax: 416-863-2653
Email: katherine.mceachern@blakes.com

Lawyers for Sunwing Tours Inc.

TO: MCCARTHY TETRAULT LLP
Suite 5300, P.O. Box 48
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

James D. Gage
Tel: (416) 601-7539
Email: jgage@mccarthy.ca

Geoff Hall
Tel: (416) 601-7856
Email: ghall@mccarthy.ca

Heather L. Meredith
Tel: (416) 601-8342
Email: hmeredith@mccarthy.ca
Fax: (416) 868-0673

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

**AND TO: THE SERVICE LIST ATTACHED TO
THE RESPONDING MOTION RECORD
OF SUNWING TOURS, INC. (Returnable
August 3, 2012)**

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FACTUM OF SUNWING TOURS INC.

PART I - OVERVIEW

1. By order of this Honourable Court granted on March 31, 2010 (the “**Receivership Order**”), FTI Consulting Canada Inc. was appointed as receiver (in such capacity, the “**Receiver**”) of all of the assets, undertakings and property of Skyservice Airlines Inc. (“**Skyservice**”).
2. Following the granting of the Receivership Order, a further order was granted by this Honourable Court on June 16, 2010 allowing for the filing of a bankruptcy application with respect to Skyservice (the “**Bankruptcy Application**”). The Bankruptcy Application was adjourned *sine die* such that the administration of the Skyservice estate could be continued in the receivership proceeding of Skyservice (the “**Receivership Proceedings**”).
3. Pursuant to a further Order of this Honourable Court granted on March 29, 2012 (the “**Bankruptcy Order**”), Skyservice was adjudged bankrupt and FTI Consulting Canada Inc. was appointed as trustee (in such capacity, the “**Trustee**”) of the bankrupt estate of Skyservice. The Bankruptcy Order was sought as of that date to make certain rights and remedies available under the *Bankruptcy and Insolvency Act* (the “**BIA**”), including the preservation of certain limitation periods.
4. The Trustee has brought a motion (the “**Inspector Motion**”) for advice and directions with respect to whether Mr. Mark Williams, President of Sunwing Airlines Inc., an

affiliate of Sunwing Tours Inc. (“**Sunwing**”) is eligible to be appointed as an inspector (in such capacity, an “**Inspector**”) in the bankruptcy proceedings of Skyservice (the “**Bankruptcy Proceedings**”), as a result of a trust claim filed by Sunwing in the Receivership Proceedings that has been disputed by the Receiver.

5. This factum is filed by Sunwing in response to the Inspector Motion. It is the position of Sunwing that there are no grounds for disqualifying Mr. Williams from acting as an inspector of the Skyservice bankruptcy estate.

PART II - FACTS

The Sunwing Claim

6. By Order dated July 27, 2010, the Court approved a procedure for the determination of claims in the Receivership Proceedings (the “**Claims Procedure Order**”). From the time of the Bankruptcy Application, the Receiver has conducted, and is continuing to conduct, a claims process (the “**Claims Process**”) pursuant to the Claims Procedure Order.

7. The terms of the Bankruptcy Order provide that the Receiver is to continue to allow, disallow or otherwise adjudicate or settle claims in accordance with the Claims Procedure Order and the final determination of each claim made therein is to be effective and binding in the Bankruptcy Proceedings as if allowed by the Trustee and finally determined in the Bankruptcy Proceedings on that basis. As such, claims will not be determined by the Trustee.

- First Report of the Trustee dated July 20, 2012 (the “**Trustee’s Report**”) at Appendix “A”, Trustee’s Motion Record, Tab 2.

8. Sunwing has submitted a trust claim pursuant to the Claims Process as follows:

- (a) \$2,329,473.00, pursuant to an actual trust; and
- (b) \$3,513,450.08, pursuant to a constructive trust (including the above amount).

(the “**Sunwing Claim**”)

- Trustee’s Report at para. 14, Trustee’s Motion Record, Tab 2.

9. The Sunwing Claim relates to funds which were advanced by Sunwing to Skyservice immediately prior to the granting of the Receivership Order. These funds were advanced as prepayments for flights not actually provided by Skyservice as a result of the commencement of the Receivership Proceedings.

- Trustee's Report at para. 14, Trustee's Motion Record, Tab 2.

10. The Receiver has brought a motion in the Receivership Proceedings seeking an order determining, amongst others, that the amounts subject to the Sunwing Claim are not subject to a trust (the "**Receiver Motion**").

- Trustee's Report at para. 13, Trustee's Motion Record, Tab 2.

11. Sunwing has brought a cross-motion in the Receivership Proceedings seeking an order confirming the validity of the Sunwing Claim (the "**Sunwing Motion**").

- Trustee's Report at para. 14, Trustee's Motion Record, Tab 2.

12. To date, the Receiver Motion and the Sunwing Motion (collectively, the "**Trust Claim Motions**") remain outstanding.

- Trustee's Report at para. 16, Trustee's Motion Record, Tab 2.

The Bankruptcy and the Creditor's Meeting

13. Following the granting of the Bankruptcy Order, the first meeting of the creditors of Skyservice was held on April 19, 2012 (the "**Creditors' Meeting**").

- Affidavit of Mark Williams sworn July 31, 2012 (the "**Williams Affidavit**") at para. 4., Responding Motion Record, Tab 1.

14. During the course of the Creditors' Meeting, Mr. Mark Williams was appointed as Inspector. However, Mr. Williams' appointment as Inspector was made subject to the Trustee obtaining confirmation from this Honourable Court as to his eligibility to serve as Inspector. The concern of the Trustee arose as a result of the fact that the Trust Claim Motions remain outstanding.

- Williams Affidavit at para. 4, Responding Motion Record, Tab 1.

15. An inspectors' meeting has not been held since the Creditors' Meeting.

- Williams Affidavit at para. 5, Responding Motion Record, Tab 1.

PART III - ISSUES, LAW AND ARGUMENT

16. The issue to be determined is whether, as a result of the provisions of section 116(2) of the BIA, Mr. Williams is eligible to serve as Inspector, given the existence of the Trust Claim Motions.

(i) The Relevancy of s. 116(2)

17. Section 116(2) of the BIA states as follows:

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. [Emphasis added]

- BIA at s.116(2).

18. 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 is a decision to be made by the creditors of a bankrupt at a properly convened meeting. On an application for the removal of an inspector, 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.

- *Trends Holdings Ltd. (Trustee of) v. Tilson* (2006), 30 C.B.R. (5th) 110 (Sask. Q.B.) ; 1991 CarswellSask 808, at para. 37. Book of Authorities, Tab 1.

19. The Claims Process was commenced by the Receiver as part of the Receivership Proceedings. The Bankruptcy Application and Bankruptcy Order both recognize this fact and, notwithstanding the onset of the Bankruptcy Proceedings, allow the Receiver to continue to allow, disallow or otherwise adjudicate or settle claims in accordance with the Claims Procedure Order.

20. As such, the hearing and adjudication of the Trust Claim Motions do not involve the Trustee or the bankrupt estate of Skyservice. No decisions will be made in respect of those motions by the Trustee, and therefore there will be no reason to call on the inspectors of the bankruptcy estate to provide any direction in respect of that litigation. There is therefore no occasion in which any conflict could arise in the Bankruptcy Proceedings that would interfere with Mr. Williams' ability to perform his duties as inspector, or where Mr. Williams' independence could be called into question.

21. In *Tilson v. Trends Holdings Ltd (Trustee of)*, the Saskatchewan Court of Queen's Bench considered a situation where the principals of the bankrupt had brought an action against a creditor of the bankrupt, and subsequently sought the removal of an inspector who was a representative of that creditor. In reaching its decision the Court stated as follows:

The removal of the inspector would only be necessary if Nexen Marketing were being sued by the trustee. As the action against Nexen Marketing will be carried by the applicants without reference to the trustee, the independence of the inspector should not be compromised.

- *Trends Holdings Ltd. (Trustee of) v. Tilson* (2007), 30 C.B.R. (5th) 230 (Sask. Q.B.); 2007 CarswellSask 84 at para. 8, Book of Authorities, Tab 2; see also *Trends Holdings Ltd. (Trustee of) v. Tilson* (2006), 30 C.B.R. (5th) 110 (Sask. Q.B.); 1991 CarswellSask 808. at para. 37.

22. Accordingly, Sunwing respectfully submits that it is proper to confirm Mr. Williams as Inspector as there is no contested action or proceeding which has been brought by or against the bankrupt estate of Skyservice to which either Sunwing or Mr. Williams is party.

(ii) The Sunwing Claim

23. Even if it could be considered to a claim in the bankruptcy estate, the mere existence of the disputed Sunwing Claim does not disqualify Mr. Williams from acting as Inspector.

24. Jurisprudence has considered situations where the eligibility of an individual representing a creditor whose claim may be or has been contested by the trustee to be appointed as inspector of the bankrupt estate has been challenged.

... no inspector in the present estate is automatically disqualified as such under s. 94(2) merely because he represents or is the solicitor for a creditor of the estate whose claim has been or may be contested by the trustee; ...

- *Kedzep Ltd. v. Bertrand* (1981), 41 C.B.R. (N.S.) 40 (Que. Sup. Ct. Bank. & Ins. Div.); 1981 CarswellQue 46. at para. 16, Book of Authorities, Tab 3.

25. Rather, to be disqualified as an inspector pursuant to section 116(2), it is submitted that the individual, or the corporation represented by the individual, must be adverse in interest to the trustee with respect to something other than that creditor's disputed claim, which is to be allowed or disallowed by the trustee at first instance. For example, in *Re Wimco Steel Sales Co.*, the bankruptcy estate had commenced a claim for damages against a creditor whose representative was an inspector. The Court stated:

... 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.

- *Re Wimco Steel Sales Co.*, (1970), 14 C.B.R. (N.S.) 288 (Ont. S.C. in Bank.); 1970 CarswellOnt 84 at para. 5, Book of Authorities, Tab 4.

26. It is submitted that an inspector who represents a creditor whose claim may be or has been disputed by the trustee is eligible to continue as inspector. However, in order to guard against conflicts of interest, the ability of such an inspector to continue in that role has been qualified in the following manner:

... if a matter came up before the inspectors and one of them is 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.

- *Re Canadian Triton International Ltd.* (1997), 49 C.B.R. (3d) 192 (Ont. Ct. J. Gen. Div. in Bank.); 1997 CarswellOnt 3745 at para. 18, Book of Authorities, Tab 5.

27. As such, Mr. Williams has undertaken to recuse himself from any meetings or discussions that may consider anything related to the Trust Claim Motions.

(iii) Conclusion

28. At present, Sunwing is not adverse in interest to the Trustee with respect to any ongoing action or proceeding. The Sunwing Claim involves a dispute between the Receiver and Sunwing in the Receivership Proceedings as to the value and validity of that claim. It does not involve the Trustee or the Bankruptcy Proceedings. No decision will be made by the Trustee in respect of the Trust Claim Motions. Accordingly, this dispute is not properly characterized as a contested action or proceeding for the purpose of section 116(2).

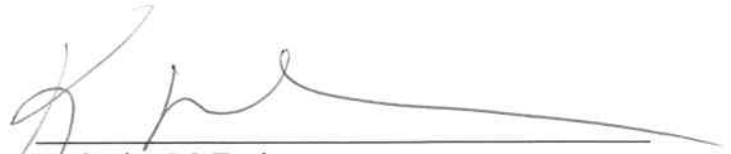
29. In any event, the mere fact of a disputed claim in the bankruptcy does not disqualify an inspector from remaining in office. To the extent that the Trust Claim Motions are considered to be disputed claims in the bankruptcy estate, they do not give rise to a conflict that would require disqualification, but would only give rise to an obligation of Mr. Williams to recuse himself from discussions or decisions regarding those motions.

30. As such, Sunwing respectfully submits that Mr. Williams is eligible to act as Inspector, which appointment should be confirmed by this Honourable Court subject to Mr. Williams not taking part in any meeting or discussion relating, directly or indirectly, to the Trust Claim Motions or relating to any matter, directly or indirectly, in which the Sunwing has an interest, and not participating in any decision or vote relating to any such matters.

PART IV - RELIEF REQUESTED

31. For the foregoing reasons, Sunwing respectfully requests that this Honourable Court grant an order, among other things, confirming the appointment of Mr. Williams as Inspector.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
this 31st day of July, 2012

A handwritten signature in black ink, appearing to read 'K McEachern', written over a horizontal line.

Katherine McEachern
Lawyers for Sunwing Tours Inc.

SCHEDULE "A"

LIST OF AUTHORITIES

Tab	Cases
1.	<i>Trends Holdings Ltd. (Trustee of) v. Tilson</i> (2006), 30 C.B.R. (5 th) 110 (Sask. Q.B.); 1991 CarswellSask 808.
2.	<i>Trends Holdings Ltd. (Trustee of) v. Tilson</i> (2007), 30 C.B.R. (5 th) 230 (Sask. Q.B.); 2007 CarswellSask 84.
3.	<i>Kedzep Ltd. v. Bertrand</i> (1981), 41 C.B.R. (N.S.) 40 (Que. Sup. Ct. Bank. & Ins. Div.); 1981 CarswellQue 46.
4.	<i>Re Wimco Steel Sales Co.</i> , (1970), 14 C.B.R. (N.S.) 288 (Ont. S.C. in Bank.); 1970 CarswellOnt 84.
5.	<i>Re Canadian Triton International Ltd.</i> (1997), 49 C.B.R. (3d) 192 (Ont. Ct. J. Gen. Div. in Bank.); 1997 CarswellOnt 3745.

SCHEDULE "B"

RELEVANT STATUTES

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

Persons not eligible

116 (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.

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Proceeding Commenced at Toronto

FACTUM OF SUNWING TOURS INC.

BLAKE, CASSELS & GRAYDON LLP
Barristers and Solicitors
199 Bay Street
Suite 4000, Commerce Court West
Toronto, Ontario M5L 1A9

Katherine McEachern, LSUC #38345M
Tel: 416-863-2566
Fax: 416-863-2653
Email: katherine.mceachern@blakes.com

Lawyers for Sunwing Tours Inc.