

Court of Appeal File No.: C53721
Court File No.: 10-8647-00CL
Court File No.: 10-8651-00CL
Court File No.: 10-8657-00CL
Court File No.: 10-8658-00CL

COURT OF APPEAL FOR ONTARIO

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 9 of the
Airport Transfer (Miscellaneous Matters) Act, S.C. 1992, c. 5 (Application by the
Ottawa MacDonald-Cartier International Airport 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)

**JOINT FACTUM OF THE RESPONDENTS, GREATER TORONTO AIRPORTS
AUTHORITY AND OTTAWA MACDONALD-CARTIER INTERNATIONAL AIRPORT
AUTHORITY**

August 9, 2011

OSLER, HOSKIN & HARCOURT LLP
P. O. Box 50, 1 First Canadian Place
Toronto ON M5X 1B8

Allan D. Coleman (LSUC#: 42007W)
Tel.: (416) 862-4941
acoleman@osler.com

Rupert H. Chartrand (LSUC#: 14013K)
Tel: (416) 862-6575
rchartrand@osler.com

Shawn T. Irving (LSUC#: 50035U)
Tel: (416) 862-4733
sirving@osler.com

Fax: (416) 862-6666

Lawyers for GTAA and OMCIAA

TO: **GOWLING LLP**
1 First Canadian Place
100 King Street West
Suite 1600
Toronto, ON M5X 1G5

Clifton P. Prophet/Patrick Shea/Frank Lamie
Tel: (416) 862-3509/3609
Fax: (416) 862-7661

Lawyers for NAV CANADA

AND TO: **MCCARTHY TETRAULT LLP**
Toronto-Dominion Bank Tower
66 Wellington Street West
Suite 5300
Toronto, ON M5K 1E6

James D. Gage/Heather Meredith/Geoff Hall
Tel: (416) 601-7539/8342
Fax: (416) 868-0673

Lawyers for FTI Consulting Canada Inc.

AND TO: **FTI CONSULTING CANADA INC.**
TD Waterhouse Tower
79 Wellington Street West
Suite 2010, P.O. Box 104
Toronto, Ontario
M5K 1G8

Nigel D. Meakin/Jamie Engen/Jodi Porepa
Tel: (416) 649-8100
Fax: (416) 649-8101

AND TO: **BLAKE, CASSEL & GRAYDON LLP**
199 Bay Street
Suite 2800, Commerce Court West
Toronto, ON M5L 1A9

Pamela L.J. Huff
Tel: (416) 863-2958
Fax: (416) 863-2653

Lawyers for CIT Leasing Corporation

AND TO: BLAKE, CASSELS & GRAYDON LLP

199 Bay Street
Suite 2800, Commerce Court West
Toronto, ON M5L 1A9

Linc Rogers/Steven Weisz/ Catherine Beagan Flood
Tel: (416) 863-4168/2616
Fax: (416) 863-2653

Lawyers for Sunwing Tours Inc. and Thomson
Airways Limited

AND TO: BLAKE, CASSELS & GRAYDON LLP

199 Bay Street
Suite 2800, Commerce Court West
Toronto, ON M5L 1A9

Donald G. Gray/Auriol Marasco
Tel: (416) 863-2750/2788
Fax: (416) 863-2653

MCAP Europe Limited, GE Capital Aviation Air
Services; IAI V, Inc., and Celestial Aviation Trading
23 Limited.

AND TO: FRASER, MILNER CASGRAIN LLP

1 First Canadian Place
39th Floor, 100 King Street West
Toronto, ON M5X 1B2

Jane Dietrich/Dan Dowdall/Kate Stigler
Tel: (416) 863-4467/4700
Fax: (416) 862-4592

Lawyers for International Lease Finance Corp.

AND TO: OSLER, HOSKIN & HARCOURT LLP

P.O. Box 50
1 First Canadian Place
Toronto, ON M5X 1B8

Steven Golick/John MacDonald/Mary Paterson
Tel: (416) 362-2111
Fax: (416) 862-6666

Lawyers for Thomas Cook Canada Inc.

AND TO: CHAITONS LLP

5000 Yonge Street
10th Floor
Toronto, ON M2N 7E9

Harvey Chaiton/Doug Bourassa
Tel: (416) 218-1129
Fax: (416) 218-1849

Ontario Lawyers for Winnipeg Airports Authority Inc.

AND TO: AIKINS, MACAULAY & THORVALDSON LLP

360 Main Street
30th Floor
Winnipeg, MA R3C 4G1

J.J. Burnell/Allan F. Foran
Tel: (204) 957-4663
Fax: (204) 957-4285

Manitoba Lawyers for Winnipeg Airports Authority
Inc.

AND TO: BENNETT JONES LLP

One First Canadian Place
Suite 3400
100 King Street West, P.O. Box 130
Toronto, ON M5K 1A4

Mark S. Laugesen
Tel: (416) 777-4802
Fax: (416) 863-1716

Lawyers for Gibralt Capital Corporation

At the time of the Receivership Order and the Status Quo Order, Skyservice was in possession of the Aircraft. 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, 2011, 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.

Endorsement of Morawetz J. dated April 6, 2011, paragraph 96.

PART I: OVERVIEW

1. This joint factum is filed on behalf of the respondents, Greater Toronto Airports Authority (“GTAA”) and Ottawa MacDonal-Cartier International Airport Authority (“OMCIAA”), in response to the appeal of three aircraft lessors from the Order of the Honourable Justice Morawetz dated April 6, 2011 (the “Seizure Order”).¹ The Seizure Order authorized GTAA and OMCIAA to seize and detain certain aircraft owned or operated by Skyservice Airlines Inc. (“Skyservice”) pursuant to section 9 of the *Airport Transfer (Miscellaneous Matters) Act*² (the “*Airport Transfer Act*”).

2. The Appellants allege that Justice Morawetz’s 33-page written endorsement is replete with errors of fact and law. This is not so. Justice Morawetz simply followed and applied the principles established by the Supreme Court of Canada in *NAV Canada v. Wilmington Trust Co.*³ (“*Canada 3000*”) and the Alberta Court of Appeal in *Calgary Airport Authority et al. v. Zoom Airlines Inc.*⁴ (“*Zoom*”) to the evidence before him. He made no error of law nor any palpable or overriding error

¹ The Appellant lessors are Celestial Aviation Trading 23 Limited (“CAT 23”), IAI V., Inc. (“IAI”) and MCAP Europe Limited (“MCAP”, and together with CAT 23 and IAI, the “Appellants”). Certain other lessors of aircraft to Skyservice subject to the Seizure Order (namely, International Lease Finance Corporation, Thomson Airways Limited, Sunwing Tours Inc. and CIT Leasing Corporation) opposed the granting of the Seizure Order but did not appeal.

² R.S.C. 1992, c. 5.

³ [2006] 1 S.C.R. 865.

⁴ *Calgary Airport Authority et al. v. Zoom Airlines Inc.*, unreported, dated September 5, 2008 [the “*Zoom Chambers Decision*”]; appeal to Alberta Court of Appeal dismissed 2009 ABCA 306; leave to appeal to the Supreme Court of Canada dismissed 2010 CarswellAlta 483.

of fact in doing so. Indeed, given the close parallels between the material facts of this case and those before the Supreme Court in *Canada 3000*, GTAA and OMCIAA submit that Justice Morawetz reached the only conclusion that he could have – that GTAA and OMCIAA were entitled to the Seizure Order.

3. In reality, in this appeal, the Appellants are not asking this Court to overturn the Seizure Order because of any reversible error on the part of Justice Morawetz; rather, the Appellants want this Court to rewrite the principles established by the Supreme Court in *Canada 3000* in a manner that is more favourable to aircraft lessors generally, ignoring the admonition of Justice Binnie in *Canada 3000* that the seizure and detention remedy “...cannot be circumvented...by the expedient of the leasing arrangements made between the airlines and the aircraft lessors...”, as well as his finding that Parliament cannot “...be taken to have intended a remedy that is least effective when it is most needed... and, as a consequence, full effect must be given to 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...”. The proper avenue for the policy change which the Appellants seek is Parliament, not this Court.

4. GTAA and OMCIAA request that this appeal be dismissed, with costs.

PART II: FACTS

5. GTAA is the operator of Pearson Airport and is a designated airport authority under the *Airport Transfer Act*.⁵ OMCIAA is the operator of the Ottawa MacDonal-Cartier International

⁵ Endorsement of Justice Morawetz dated April 6, 2011 (the “Endorsement”), Appeal Book and Compendium (“Appeal Book”), Tab 3, Vol. 1, pp. 17, at para. 15.

Airport and is a designated airport authority under the *Airport Transfer Act*.⁶

The Aircraft

6. Skyservice was a Canadian airline, headquartered in Toronto and incorporated pursuant to the laws of Canada. Skyservice offered charter flight air service both domestically and internationally. Skyservice operated a fleet of twenty aircraft. A number of these aircraft were flown in and out of Pearson Airport and the Ottawa Airport on a regular basis.⁷ The Aircraft that were subject to the seizure and detention applications before Justice Morawetz (the “Seizure Applications”) consisted of the following:⁸

Aircraft Type	Serial Number	Mark Number	Model	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

7. The leases in respect of the Aircraft were “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.⁹

⁶ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 17, at para. 15.

⁷ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 16, para. 10-12.

⁸ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 16, para. 13. In addition to the applications brought by GTAA and OMCIAA, similar applications were also brought on behalf of NAV Canada and the Winnipeg Airport Authority.

⁹ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 16, para. 12.

Amounts Owning by Skyservice to GTAA and OMCIAA

8. As of March 31, 2010, Skyservice owed: (i) GTAA the amount of \$268,600.16 in respect of landing fees, general terminal fees or other charges related to its use of Pearson Airport, and (ii) OMCIAA the amount of \$223,913.93 in landing fees, general terminal fees or other charges related to its use of the Ottawa Airport.¹⁰

The Receivership Order

9. On the morning of March 31, 2010, Thomas Cook, a creditor of Skyservice, brought an *ex parte* application pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (“BIA”) and sections 101 and 106 of the *Courts of Justice Act* for an order (the “Receivership Order”), *inter alia*, appointing a receiver over the assets, undertakings and properties of Skyservice (the “Skyservice Property”). Gans J. granted the Receivership Order at approximately 11:00 a.m. that morning. Under the Receivership Order, FTI Consulting Canada Inc. was appointed as Receiver of Skyservice and over the Skyservice Property and a stay of proceedings (the “Stay”) was imposed in respect of Skyservice and the Skyservice Property.¹¹

10. Upon the issuance of the Receivership Order, the Receiver took steps to secure possession and control over all of the property of Skyservice, other than the Aircraft.¹² The Receiver did not take any steps to take possession of the Aircraft Log Books (the “Log Books”) or the Aircraft Certificates of Airworthiness or Certificates of Registration (the “Aircraft Certificates”).¹³

¹⁰ Endorsement, Appeal Book, Tab 3, Vol. 1, pp. 17-18, paras. 16-17. These amounts are not disputed by the Appellants.

¹¹ Endorsement, Appeal Book, Tab 3, Vol. 1, pp. 21-22, paras. 32-33.

¹² First Report of the Receiver dated April 14, 2010 (“First Report of the Receiver”), Appeal Book, Tab 19(E), Vol. 2, p. 512, para. 7.

¹³ Third Report of the Receiver dated June 30, 2010 (“Third Report of the Receiver”), Joint Compendium of the Respondents (“Respondents’ Compendium”), Tab E, pp. 14-22. As discussed below, the Court of Appeal in *Zoom* held that a lessor is required to secure the Log Books and Certificates in order to take possession of the subject aircraft.

Attempted Termination of Leases

11. At 1:00 p.m. on March 31, 2010, IAI instructed its counsel to ensure that a pre-signed termination of its lease of C-GTSJ that was then held in escrow be released from escrow and dated March 31, 2010. This pre-signed lease termination was subsequently delivered to Skyservice at 4:39 p.m. on March 31, 2010 (*i.e.*, after the issuance of the Receivership Order). Justice Morawetz found that delivery of this confirmation of lease termination did not result in any change of possession of that Aircraft and that IAI did not take possession or control of C-GTSJ.¹⁴

12. At 6:21 on March 31, 2010, MCAP purported to terminate the lease in respect of C-FRAA by delivering a confirmation of lease termination to Skyservice. Justice Morawetz found, as a finding of fact, that MCAP did not take physical possession or control of C-FRAA on March 31, 2010.¹⁵

The Initial Hearing of the Seizure Application

13. At approximately 3:00 p.m. on the afternoon of March 31, 2010, GTAA issued a notice of application seeking an order authorizing it to seize and detain the Aircraft owned and operated by Skyservice that were then on the ground at Pearson Airport.¹⁶

14. The initial hearing of GTAA's application commenced at approximately 5:00 p.m. that afternoon. Although GTAA initially brought its application *ex parte*, the Receiver and its counsel, as well as counsel for the lessors of the Aircraft, including the Appellants, and counsel for NAV Canada were in attendance and made submissions.¹⁷

15. At approximately 6:30 p.m. on March 31, 2010, after hearing submissions from counsel, Justice Morawetz granted an order (the "Status Quo Order") which, among other things, provided

¹⁴ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 23, para. 41.

¹⁵ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 23, para. 42.

¹⁶ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 24, para. 45.

¹⁷ Endorsement, Appeal Book, Tab 3, Vol. 1, pp. 24-25, paras. 46-47.

that no person, including the Receiver, would be permitted to take, or cause any steps to be taken, to possess or repossess the aircraft or to dispossess Skyservice of the Aircraft, pending the hearing and determination of the Seizure Applications.¹⁸

16. Following the granting of the Status Quo Order, the parties negotiated a protocol for the release by GTAA, OMCIAA, Winnipeg Airport Authority 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 by the court pursuant to an Order of Justice Morawetz dated April 9, 2010.¹⁹

17. On April 15, 2010, the Court approved the entering into of a series of agreements (the “Aircraft Return Agreements”) for the transfer of possession and custody and control of the Aircraft from Skyservice to the Lessors.²⁰

Information from the Receiver

18. Subsequent to the hearing of the Seizure Applications on June 1, 2010 and June 16, 2010, but before the granting of the Seizure Order, the Receiver was asked by Justice Morawetz to provide the Court with additional information with respect to the status of the books and records of the Aircraft on the date of the Receivership Order. The Receiver’s information was set out in the Third Report of the Receiver. Among other things, the Receiver noted the following:²¹

- (a) between approximately noon and 3 p.m. on March 31, 2010 (*i.e.* after the Receivership Order had been granted), two employees of Skyservice (the “Skyservice Employees”)

¹⁸ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 25, para. 49. See also Status Quo Order, Respondents’ Compendium, Tab A, pp. 1-4. OMCIAA brought its application for a seizure and detention order under section 9 of the *Airport Transfer Act* on April 5, 2010 (Notice of Application dated April 5, 2010, Appeal Book, Vol. 1, Tab 5, pp. 74-81; Endorsement, Appeal Book, Tab 3, Vol. 1, p. 41, para. 96).

¹⁹ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 26, para. 52; See also Order of Morawetz J. dated April 9, 2010, Appeal Book, Tab 19(B), p. 480.

²⁰ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 26, para. 53.

²¹ Third Report of the Receiver, Respondents’ Compendium, Tab E, pp. 14-22, paras. 9-22.

removed the Log Books and Flight Operations Document Folder (“FODF”), which contained the Certificates, from the following four Aircraft: C-FRAA, C-GTDP, C-GTSJ, C-GTBB. During this timeframe, the Skyservice Employees also removed one additional Log Book from either C-GTDH or C-GTDG;

- (b) the Skyservice Employees placed all of the documents that they removed from the Aircraft in a locked office located at the Skyservice hangar;
- (c) prior to their departure from work on March 31, 2010, the Skyservice Employees were told that they would continue to be employed by Skyservice²²;
- (d) early in the morning of April 1, 2010, the Skyservice Employees removed the Log Books and FODFs from the following two Aircraft: C-GMYH and C-FLEU;
- (e) having already removed the Log Book from either C-GTDH or C-GTDG on March 31, 2010, the Skyservice Employees removed the Log Book from the other Aircraft on April 1, 2010; and
- (f) the Skyservice Employees placed the documents recovered on April 1, 2010 in the same locked office at the Skyservice hangar. The Log Books and FODFs remained secured in the locked office until after the Aircraft Return Agreements were signed.

²² Paragraph 13 of the Receivership Order provides that employees of Skyservice shall remain the employees of Skyservice until such time as the Receiver, on Skyservice’s behalf, may terminate the employment of any or all of such employees (Receivership Order, Appeal Book, Tab 10(C), Vol. 1, p. 286).

PART III: LAW AND ARGUMENT

Standard of Review

19. The order under appeal is a thoroughly reasoned decision of an experienced judge of the Commercial List, applying well-established principles of law to findings of fact. In *Housen v. Nikolaisen*,²³ the Supreme Court of Canada held that the appropriate standard of appellate review in respect of such an order is at the highest end of the deference scale – for an appellate court to interfere, a “palpable and overriding error” must be shown.²⁴

20. This Court in *Waxman v. Waxman*²⁵ provided the following guidance with respect to the “palpable and overriding” standard:

The ‘palpable and overriding’ standard addresses both the nature of the factual error and its impact on the result. A ‘palpable’ error is one that is obvious, plain to see or clear. ... An ‘overriding’ error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a ‘palpable’ error does not automatically mean that the error is also ‘overriding’. The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error.²⁶

The proper interpretation and application of section 9 of the Airport Transfer Act was determined by the Supreme Court of Canada in Canada 3000

21. Section 9(1) of the *Airport Transfer Act* provides that, if an amount is owing to an airport authority by an airline in respect of fees or charges related to the use of the airport it operates, that airport authority may apply to a court in a province “in which any aircraft owned or operated by the person liable to pay the amount is situated” for an order authorizing it to “seize and detain aircraft”. The full text of section 9(1) is reproduced below:

²³ [2002] 2 S.C.R. 235, paras. 8, 10, 37.

²⁴ In *Zoom*, the Alberta Court of Appeal held that the issue of whether the aircraft lessor had legal custody or control over the subject aircraft was a question of mixed fact and law that was therefore reviewable only for a palpable and overriding error (*Zoom, supra*, at paras. 31 & 40).

²⁵ (2004), 186 O.A.C. 201.

²⁶ *Ibid.*, at 267.

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.

22. Subsection 9(3) of the *Airport Transfer Act* further provides that an airport authority “is not required to release from detention an aircraft seized [...] unless the amount in respect of which the seizure was made is paid”.²⁷

23. As Justice Morawetz found, the proper interpretation and application of section 9 of the *Airport Transfer Act* in the context of an airline that is insolvent was definitively determined by the Supreme Court of Canada in *Canada 3000*.²⁸ In that case, the two major questions before the Supreme Court were:

- (a) whether the legal titleholders of the applicable aircraft were, as lessors, liable for the amounts owing to the relevant airport authorities and NAV Canada by two failed airline operators – Canada 3000 Airlines Ltd. and Inter-Canadian; and
- (b) if the lessors were not so liable, whether the aircraft to which they held legal title should be subject to seizure and detention orders issued under section 9 of the *Airport Transfer Act* and section 56 of the *Civil Air Navigation Services Commercialization Act*²⁹ (“CANSICA”) to answer for the unpaid fees and charges incurred by Canada 3000 and Inter-Canadian.³⁰

²⁷ Subsection 9(4) of the *Airport Transfer Act* requires an airport authority to release a seized aircraft from detention if security in a form satisfactory to the authority is deposited with the authority.

²⁸ Endorsement, Appeal Book, Tab 3, Vol. 1, pp. 27-36, paras. 55, 59, 60 and 76.

²⁹ R.S.C. 1996, c. 20.

³⁰ *Canada 3000*, *supra* at para. 40.

24. The facts in *Canada 3000* were almost identical to the facts at issue in the Seizure Applications: On November 8, 2001, Canada 3000 Airlines Ltd. filed for protection under the *Companies' Creditors Arrangement Act* ("CCAA"). An initial order was granted on that date which stayed all proceedings by creditors pending the filing of a plan of arrangement. Two days later, the directors and officers of Canada 3000 resigned and the company was put in bankruptcy by order of Ground J. dated November 10, 2001. Motions were subsequently 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 over the relevant aircraft until all outstanding fees owing to them were paid. Cross motions were brought by various aircraft lessors seeking declarations that the airport authorities and NAV Canada were not entitled to seize and detain the aircraft.

25. At first instance, the motions judge held that the aircraft lessors were not jointly and severally liable for the charges owing to the airport authorities and NAV Canada. The decision of the motions judge was upheld by the Ontario Court of Appeal, with Juriansz J. (then ad hoc, now J.A.) dissenting. On appeal, the Supreme Court of Canada unanimously held that, while the lessors were not jointly and severally liable for the amounts owing to the airport authorities and NAV Canada by the airlines, each of the airport authorities and NAV Canada were entitled to seizure and detention orders against those aircraft which Canada 3000 and Inter-Canadian "owned or operated" at the commencement of the seizure and detention applications:

On the other hand, the conclusion of Juriansz J., dissenting in part, 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".³¹

³¹ *Canada 3000, supra*, at para. 74.

26. Writing for the court, Binnie J. explained why this conclusion was consistent with the purpose of section 9 of the *Airport Transfer Act*. Airport authorities, he said, are required by law to allow aircraft to land, even when the airport authority is owed money by the airline seeking to make use of the airport. In exchange, Parliament gave the airport authorities the ability to seize aircraft when fees are owing:

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 airports 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 obligated by law to provide.

[...]

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. 4.5.³²

27. In the Endorsement, Justice Morawetz noted that the issue determined by the Supreme Court in *Canada 3000* was, in many respects, the same issue that was before the court in the *Seizure Applications*.³³

No Error in finding that GTAA and OMClAA are entitled to the Seizure Order

28. In their factum, the Appellants allege that Justice Morawetz erred by finding that the Aircraft were “owned” or “operated” by Skyservice when the Status Quo Order was issued at 6:30 p.m. on March 31, 2010. The Appellants argue that Justice Morawetz misapplied the “test” under the *Airport Transfer Act* by holding that, in order for the Airport Authorities to be denied a

³² *Ibid.* at paras. 3 and 5.

³³ Endorsement, Appeal Book, Tab 1, Vol. 1, p. 36, para. 76.

detention order, the Lessors had to show that “they regained physical possession of the Aircraft” prior to the Receivership Order.

29. GTAA and OMCIAA submit that these arguments are misguided. Justice Morawetz considered the proper statute (section 9 of the *Airport Transfer Act*), determined how the statute had been interpreted by the Supreme Court of Canada in *Canada 3000* and, subsequently, by the Alberta Court of Appeal in *Zoom*, and applied the law to the facts at issue (which closely paralleled the facts in *Canada 3000* and were clearly distinguishable from the facts in *Zoom*). In so doing, Justice Morawetz concluded that Skyservice was the “owner” and “operator” of the Aircraft at the time of the Status Quo Order.

30. In articulating the “test” in the manner that he did, Justice Morawetz was merely reiterating the following words of Binnie J. in *Canada 3000*:

[70] The CARs, adopted pursuant to the Aeronautics Act, provides that an “operator” in respect of an aircraft “means the person that has possession of the aircraft as owner, lessee or otherwise” (s. 101.01(1)). At the dates of the applications for seizure and detention orders, *Canada 3000* and *Inter-Canadian* were still the registered 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* (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). [Emphasis in the Endorsement]³⁴

And the words of the Alberta Court of Appeal in *Zoom*:

[35] Based on our reading of para. 70 of the *Canada 3000* decision, we are of the view that the Supreme Court of Canada has made an exception to the airport authorities’ detention remedy in cases where the title holders have already repossessed the aircraft prior to an order under section 9 of the Airports Act...

[36] 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

³⁴ *Canada 3000, supra*, at para. 70.

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 seizure 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. [Emphasis Added.]³⁵

31. Accordingly, Justice Morawetz held that if *Canada 3000* is taken to be binding authority and if it is to have any practical effect, the Lessors must show that “they regained physical possession of the Aircraft” prior to the Receivership Order in order to establish that the Airport Authorities and NAV Canada were not entitled to the relief sought. There was no error of law in making this finding.

A) Skyservice was the “owner” of the Aircraft at the time of the Status Quo Order

32. The terms “owned” and “operated” are not defined in the *Airport Transfer Act*. Furthermore, “owned” or “operated” are not defined in the *Aeronautics Act*.³⁶ However, the words are defined in the *Canadian Aviation Regulations*³⁷ (the “CARs”) promulgated under the *Aeronautics Act*.

33. Under the CARs, “owner” is defined as “the person who has legal custody and control of the aircraft”.³⁸ As Binnie J. noted in *Canada 3000*, the policy and practice throughout the federal aircraft regulatory scheme is to use the term “owner” to refer to the person in legal custody and control of the aircraft, not the legal titleholder:

It is common ground that, by virtue of ss. 202.15, 202.16 and 202.17 of the *CARs*, an aircraft may only be registered in the Canadian Civil Aircraft Register by the “owner” of the aircraft as that term is defined under s. 101.01(1) of the *CARs*, and that person is the entity having legal custody and control of the aircraft. Thus an airline operating aircraft in Canada under a long-term lease is named on the Certificate of Registration as “owner” of the aircraft, notwithstanding that title is

³⁵ *Zoom, supra*, at paras. 35 and 36.

³⁶ R.S.C. 1985, c. A-2. Under section 9(5) of the *Airports Transfer Act*, “words and expressions used in [section 9]... have the same meaning as in the *Aeronautics Act*”.

³⁷ SOR/96-433.

³⁸ *CARs*, s. 101.01(1) (“owner”).

actually held by the lessor; see D.H. Bunker, *Canadian Aviation Finance Legislation* (1989), at p. 764.³⁹

34. While the “owner” of an aircraft may also be its “operator”, that is not always the case. Under the CARs, the “operator” of an aircraft is defined as “the person that has possession of the aircraft as owner, lessee or otherwise”⁴⁰ Therefore, whether an airline is the “operator” of an aircraft depends on whether it possesses the aircraft rather than whether it has “legal custody or control” of the aircraft.

35. In the Endorsement, Justice Morawetz held, as a finding of fact, that Skyservice was the “registered owner” of the Aircraft at the time of the Receivership Order and the Status Quo Order.⁴¹ This is consistent with the records of the Canadian Civil Aircraft Register which identified Skyservice as the registered owner of all of the Aircraft as of March 31, 2010.⁴² Under the CARs, only a person who has legal custody and control of an aircraft may be a registered owner.⁴³

36. Furthermore, it is uncontroverted that Skyservice was also in possession of the Certificates for each of the Aircraft at the time the Status Quo Order was issued.⁴⁴ Section 3(1) of the *Aeronautics Act* defines “registered owner” as the person to whom a Certificate of Registration has been issued.⁴⁵

37. At paragraph 27 of their factum, the Appellants assert that Skyservice somehow

³⁹ *Re Canada 3000*, *supra* at para. 56.

⁴⁰ CARs, s. 101.01(1) (“operator”).

⁴¹ Endorsement, Appeal Book, Tab 1, Vol. 1, p. 41, para. 96.

⁴² Exhibit “B” to the Affidavit of Jason Boyd, Application Record of GTAA, Respondents’ Compendium, Tab F, p. 24. Section 202.69(1) of the *CARs*, *supra* provides that the Minister shall establish, maintain and publish a register of aircraft, to be known as the Canadian Civil Aircraft Register, in which there shall be entered, in respect of each Canadian aircraft for which a continuing or temporary certificate of registration has been issued, (a) the name and address of the registered owner.

⁴³ *Canada 3000*, *supra* at para. 55.

⁴⁴ As noted above, the Skyservice Employees removed the Certificates from the Aircraft located at Pearson Airport on the afternoon of March 31, 2010 and morning of April 1, 2010 (Third Report of the Receiver, Respondents’ Compendium, Tab E, pp. 14-22, paras. 10-19. See also Endorsement, Appeal Book, Tab 1, Vol. 1, p. 41, para. 97).

⁴⁵ *Aeronautics Act*, *supra* at section 3(1).

“relinquished” its legal custody and control of the Aircraft prior to the issuance of the Status Quo Order, such that it could no longer be the “owner” of the Aircraft. In support of this argument, the Appellants rely on the following: (i) the resignation of Skyservice’s officers and directors on March 30, 2010; (ii) Skyservice’s announcement on that date that it would cease operations; (iii) Skyservice’s consent to the appointment of a Receiver on March 31, 2010; and (iv) the suspension by Transport Canada of Skyservice’s Air Operator Certificate on March 31, 2010.

38. These arguments are without merit. In *Canada 3000*, seizure and detention orders were granted to the airport authorities notwithstanding that their applications were brought after the board of directors and officers of Canada 3000 had resigned, after Canada 3000 had ceased operations and been put into bankruptcy, after the entire fleet of aircraft had been grounded, and after a trustee-in-bankruptcy had been appointed.⁴⁶ Nevertheless, the Supreme Court of Canada found that Canada 3000 remained the “owner” and “operator” of the aircraft in question at the time the airport authorities commenced their applications.

39. Moreover, the evidence before Justice Morawetz on the Seizure Applications revealed that two Aircraft (operated by Skyservice and carrying passengers) (C-FRAA and C-FLEU) landed at Pearson Airport on March 31, 2010 after the date at which the Appellants allege Skyservice first “relinquished” custody and control of the Aircraft:⁴⁷

40. Furthermore, whether or not Skyservice’s Air Operator Certificate was suspended by Transport Canada shortly before the issuance of the Status Quo Order is completely irrelevant to the question of whether Skyservice was the “owner” of the Aircraft within the meaning of section 9 of

⁴⁶ *Canada 3000, supra*, at paras. 13-18. Contrary to the submissions of the Appellants, the seizure and detention orders issued in *Canada 3000* were not issued in the context of a restructuring but as part of a full liquidation.

⁴⁷ C-FRAA landed at 1:53 a.m. on March 31, 2010 and C-FLEU landed at 9:51 a.m. on March 31, 2010 (Airline Charge Detail Report generated for Invoice No. 10003699, Responses to Written Interrogatories of GTAA, Respondents’ Compendium, Tab B, p. 11).

the *Airport Transfer Act*. Under the CARs, an Air Operator Certificate is required for a person to operate an “air transport service”, not for it to be the “registered owner” of an aircraft. The CARs define an “air transport service” to mean a commercial air service that is operated for the purpose of transporting persons, personal belongings, baggage, goods or cargo in an aircraft between two points.⁴⁸

41. The suspension of an Air Operator Certificate does not have any impact on the status and/or legality of the Certificates of Registration which were in the name of Skyservice – the Certificates remain valid notwithstanding the suspension of an Air Operator Certificate.⁴⁹ In fact, to have an aircraft registered in one’s name does not require an Air Operator Certificate. There are hundreds of persons in Canada named as the registered owners of aircraft that do not hold an Air Operator Certificate.⁵⁰

42. Accordingly, Skyservice was the “owner” of the Aircraft at the time of the Status Quo Order.

B) Skyservice was the “operator” of the Aircraft at the time of the Status Quo Order

43. At paragraph 38 of their factum, the Appellants argue that Skyservice was not the “operator” of the Aircraft within the meaning of the *Airport Transfer Act* at the time of the Status Quo Order as it had surrendered and was deprived of control and possession of the Aircraft. In support of this argument, the Appellants assert, erroneously, that the Receiver had custody of the Aircraft and the authority to control or take possession of the Aircraft and that the Receiver took possession and

⁴⁸ CARs, ss. 101.01(1) and 700.02(1).

⁴⁹ At the Seizure Applications, the Lessors admitted that Transport Canada suspended Skyservice’s Air Operator Certificate because the commercial air service in respect of which the Air Operator Certificate had been issued was discontinued. The Lessors further admitted that the suspension did not, in and of itself, cause the cancellation of the Certificate of Registration for the Aircraft (Joint Request to Admit and Admission, Respondents’ Compendium, Tab G, pp. 25-28).

⁵⁰ The CARs define the holder of an Air Operator Certificate as an “air operator” not an “aircraft” operator or even an “operator” – there is a separate definition of “operator” in the CARs.

control of all aircraft records and equipment.

44. This argument is without merit. First, Justice Morawetz found, as a finding of fact, that Skyservice was in possession of the Aircraft at the time of the Status Quo Order. He stated:

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” and “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 they evolved with the Airport Authorities and NAV Canada was identical to that in Canada 3000.⁵¹ [Emphasis Added.]

45. The issue of when an airline relinquishes possession of an aircraft and therefore ceases to be the “operator” of the aircraft for the purposes of section 9 of the *Airport Transfer Act* was addressed by the Alberta Court of Appeal in *Zoom* – a decision cited by Justice Morawetz in the Endorsement.

46. In that case, Zoom Airlines Incorporated leased an aircraft from AerCap. Although AerCap held legal title to the aircraft, as the lessee, Zoom was listed as the registered owner of the aircraft with Transport Canada. In August 2008, Zoom was in default of its lease payments to AerCap. As a result, on August 26, 2008, AerCap gave Zoom written notice that it was terminating the lease and that, upon termination, Zoom was required to cease flying the aircraft immediately. Under the terms of the lease, AerCap was entitled to take possession of the aircraft upon termination. When the notice of termination was received by Zoom, the aircraft was en route from Paris to Vancouver with a scheduled stop-over in Calgary. The aircraft landed at the Calgary airport at approximately 2:00 p.m. on August 27, 2008. At approximately 2:23 p.m., an agent for AerCap boarded the aircraft and informed the pilot that he was taking possession of the aircraft. The agent for AerCap collected the certificate of airworthiness, the certificate of registration and the logbooks. At approximately 4:00

⁵¹ Endorsement, Appeal Book, Tab 1, Vol. 1, p. 41, para. 96.

pm that same day, unaware of the agent's actions, the Calgary Airport Authority obtained an *ex parte* order seizing and detaining the aircraft pursuant to section 9 of the *Airport Transfer Act*.

47. AerCap subsequently moved to set aside the seizure and detention order. The chambers judge granted the relief sought, holding that Zoom had transferred legal custody or control of the aircraft to AerCap at 2:30 pm on August 27, 2008 when the agent for AerCap entered the aircraft and took possession of the Certificates and Log Books.⁵² In placing emphasis on the act of "possession", the chambers judge noted that she was guided by the words of Binnie J. in *Canada 3000*, wherein he stated that the seizure and detention remedies were available to the airport authorities against the aircraft of Canada 3000 "except any aircraft already repossessed by the titleholder prior to the CCAA application".⁵³ [Emphasis Added.]

48. The Alberta Court of Appeal dismissed the appeal by the Calgary Airport Authority, stating that the taking of the certificates and the log books transferred legal custody and control to the lessor and that AerCap became the operator of the aircraft when it was repossessed by its agent:

Once Skyservice, as agent for AerCap, entered GZUM, taking the certificate of airworthiness, certificate of registration and the log books, Zoom, as the registered owner, transferred legal custody and control over GZUM pursuant to section 202.35 of the CARs. This cancelled Zoom's registered ownership status and allowed AerCap to become [sic] the owner of GZUM by taking complete responsibility for the operation and maintenance of the aircraft pursuant to sections 101.01 and 202.35(3) of the CARs. Further, AerCap became the operator of GZUM, when it was repossessed through Skyservice. Therefore, at the time of the detention order, Zoom no longer "owned or operated" GZUM.⁵⁴

49. In the present case, Justice Morawetz made no palpable or overriding error in concluding that Skyservice was in possession of the Aircraft at all times prior to the issuance of the Status Quo

⁵² *Zoom Chambers Decision, supra*, at pp. 8-9.

⁵³ *Ibid.*, at p. 8.

⁵⁴ *Zoom, supra*, at para. 31.

Order.⁵⁵ In fact, it was the only conclusion that he could have drawn from the evidence before him. When the Status Quo Order was issued, Skyservice remained in possession of the Certificates and all of the Log Books for the Aircraft.⁵⁶ In stark contrast to the facts in *Zoom*, none of the Lessors nor their agents had entered any of the Aircraft prior to the issuance of the Status Quo Order in order to repossess the Aircraft. In fact, and as noted above, the Receiver confirmed in its Third Report that the Skyservice Employees boarded the Aircraft located at Pearson Airport on March 31, 2010 and April 1, 2010 and obtained the Log Books and the Certificates and secured them in a locked office within the Skyservice hangar.⁵⁷

50. At various points throughout their factum, the Appellants suggest that Skyservice was no longer “eligible” to be the registered “owner” or “operator” of the Aircraft because it had lost responsibility for the operation and maintenance of the Aircraft and therefore had no “power” or “dominance” or “control” over the Aircraft. In support of this argument, the Appellants point to the fact that (i) certain of the Lessors purported to deliver notices of lease termination prior to the issuance of the Status Quo Order, (ii) certain of the Aircraft were left sitting on the tarmac at Pearson Airport, (iii) the Lessors agreed to be responsible for the maintenance of the Aircraft following the issuance of the Status Quo Order, and (iv) the Receiver was appointed.⁵⁸

⁵⁵ As described above, two Aircraft (operated by Skyservice and carrying passengers) (C-FRAA and C-FLEU) landed at Pearson Airport on March 31, 2010 after the date at which the Appellants allege Skyservice ceased being the “operator” of the Aircraft.

⁵⁶ Third Report of the Receiver, paras. 5-6, Respondents’ Compendium, Tab E, pp. 16-17.

⁵⁷ Third Report of the Receiver, paras. 10-19, Respondents’ Compendium, Tab E, pp. 18-20. In the Endorsement, Justice Morawetz noted that “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.” (Endorsement, Appeal Book, Tab 1, Vol. 1, p. 41, para. 97).

⁵⁸ The Appellants cite s. 202.35(3) of the CARs for the proposition that “legal custody and control” means “complete responsibility for the operation and maintenance of the aircraft”. However, the Appellants fail to note that s. 202.35(3) is prefaced with the words “For the purposes of this Division,...”, meaning that the definition is restricted to that specific section of the CARs.

51. First, as Justice Morawetz expressly noted in the Endorsement, by virtue of the Stay, the delivery of the lease terminations did not deprive Skyservice of “control” over the Aircraft. He stated:

[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 against Skyservice was stayed.⁵⁹ [Emphasis Added.]

52. Even if this Court were to disagree and conclude that the Lessors were not stayed from terminating the leases at the time of the Receivership Order, the various Aircraft leases themselves evidence the fact that Skyservice continued to be in possession of the Aircraft following the delivery of the lease terminations, and therefore remained the “operator” of the Aircraft. While each had slightly different termination provisions, the leases consistently provided that the act of possession or repossession by the Lessor was a separate step that would occur only after termination of the subject lease. For example, the agreement governing the Aircraft leased to Skyservice by MCAP (C-FRAA) (the “MCAP Lease”) provided, among other things, that the owner may retake possession of the Aircraft or require Skyservice to redeliver possession of the Aircraft following the occurrence of a Termination Event (as defined therein), provided that notice is first given to

⁵⁹ Endorsement, Appeal Book, Tab 1, Vol. 1, p. 40, paras. 90-93.

Skyservice:

24.1 Lessor's Rights following Termination Event

At any time after the occurrence of any Termination Event Lessor shall be entitled to treat such event as a repudiation by Lessee of its obligations under this Agreement and the other Operative Documents and may, by notice to Lessee:

[...]

24.1.2: terminate the Lease Term with respect to the Aircraft on the termination date specified in such notice and retake (as permitted under applicable law) or allow Owner to retake possession of the Aircraft, and the Lessee agrees that Lessor or Owner may by its servants or agents for this purpose enter upon Lessee's premises where the Aircraft may be located or cause the same to be redelivered to Lessor at the Redelivery Location (or such other location as Lessor may require), and Lessor shall be entitled, if and to the extent such action is lawful in the relevant jurisdiction, to act as attorney for Lessee in causing such redelivery to said airport for redelivery thereof to Lessor and shall have all the powers and authorizations legally necessary for taking such action (at Lessor's election); and/or

[...]

24.1.7: require Lessee to redeliver possession of the Aircraft to Lessor or Owner at the Redelivery Location.⁶⁰ [Emphasis Added.]

53. The fact that certain of the Aircraft were left on the tarmac at Pearson Airport was also irrelevant to the determination that Justice Morawetz was required to make, as to whether Skyservice was the "owner or operator" of the Aircraft. Indeed, in *Canada 3000*, Binnie J. noted that the subject aircraft were "legitimate targets of the detention remedies as they were still sitting on a Canadian airport tarmac and were still "owned or operated" (within the meaning of the relevant statutes) by the airlines at the relevant date".⁶¹

54. Furthermore, the fact is that, in this case, Skyservice was still responsible for the operation and maintenance of the Aircraft following the resignation of its officers and employees and the announced cessation of its business. Specifically, the leases governing the Aircraft leased to

⁶⁰ MCAP Lease, section 24.1, Respondents' Compendium, Tab H, pp. 29-35.

⁶¹ *Canada 3000*, *supra*, at para. 77.

Skyservice by the Lessors, including the Appellants, required Skyservice to “maintain and repair” the Aircraft until the aircraft had been returned to the Lessors in the condition required by the leases. Therefore, although the Lessors retrospectively assumed responsibility for the operation and maintenance of the Aircraft after the issuance of the Order approving the Aircraft Return Agreements, as of the time of the Status Quo Order they were not so responsible.⁶²

55. Finally, contrary to the submission of the Appellants, the appointment of the Receiver did not result in a transfer of legal custody or control or possession of the Aircraft to the Receiver. Indeed, as described above, the Receiver expressly disavows having taken possession of the Aircraft.⁶³ Again, in *Canada 3000*, the Supreme Court of Canada held that Canada 3000 remained the “owner” and “operator” of the relevant aircraft at the time of the commencement of the applications for seizure and detention orders, notwithstanding that those applications were commenced after a trustee-in-bankruptcy had been appointed over Canada 3000.

Policy Considerations

56. At paragraphs 50 to 62 of their factum, the Appellants assert that Justice Morawetz erred in finding that *Canada 3000* stands for the principle that “policy demands that the risk of default be shifted from the Air Authorities onto independent private sector titleholders who are better positioned to protect themselves from default” and by ignoring certain limitations on airport authorities purportedly outlined in *Zoom*.

⁶² Aircraft Return Order, Appeal Book, Tab 19(F), Vol. 2, p. 666. The Status Quo Order specifically provided that neither the Maintenance of the Aircraft by the Lessors, nor any Maintenance Relocation by the Lessors, nor any other Relocation, shall constitute or be deemed to constitute the exercise of custody or control or possession in respect of the Aircraft (Status Quo Order, Respondents’ Compendium, Tab A, pp. 1-4).

⁶³ First Report of the Receiver, Appeal Book, Tab 19(E), Vol. 2, p. 512 at para. 7.

57. A review of the Supreme Court of Canada's decision in *Canada 3000* reveals the opposite to be true – Justice Morawetz accurately summarized the policy considerations that are relevant to a seizure and detention application. In *Canada 3000*, Binnie J. stated as follows:

[37] ...I should add that I agree with Jurianz 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.

[38] Part of the important context is the commercial reality of the marketplace where a statute is intended to function. Here the privatized appellants provide services on the basis of a cost-based tariff fixed by regulation. Prior to *CANSCA* and the *Airports Act*, civil air navigation and airport services were provided by the federal government. Central to the statutory scheme is the fact that these service providers are self-funded and intended to be financially viable and independent; see *CANSCA* ss. 7-8; House of Commons Debates (March 25, 1996, at pp. 1152-54). The privatized service providers do not possess the financial resources of the Crown. The statutory remedies are clearly intended to promote financial viability within a risky business environment and to make privatization attractive and practicable to potential investors.

[39] Another important commercial fact is that not only are NAV Canada and the airport authorities required to provide services according to a cost-based tariff, but they cannot withhold services from even an obviously failing airline. Pursuant to the lease agreement between Transport Canada and the Airport Authorities, the airports cannot limit the access of aircraft to their facilities except in cases of bad weather or emergency conditions...⁶⁴ [Emphasis Added.]

58. And later in the decision:

[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.⁶⁵ [Emphasis Added.]

59. This is but another instance of the Appellants true objective: to re-litigate *Canada 3000* and

⁶⁴ *Canada 3000, supra*, at paras. 37-39.

⁶⁵ *Ibid.*, at 72.

have the principles established by the Supreme Court therein be rewritten in a manner more favourable to them. Moreover, the Appellants' suggestion at paragraph 59 of their factum that the Airport Authorities "sat on their rights to the prejudice of the Aircraft Lessors" by not making use of their remedies to secure payment is completely false. The evidence before Justice Morawetz was that GTAA had, in fact, been requiring Skyservice to make prepayments of its estimated fees and charges since June 1, 2009 based on the monthly operational schedule that had been submitted by Skyservice. The reason for the shortfall was that the actual flights taken by Skyservice differed from the number of planned flights that Skyservice had submitted to GTAA.⁶⁶

60. Similarly, the evidence before Justice Morawetz was that OMCIAA obtained a \$40,000 security deposit from Skyservice, based on a proposed flight schedule submitted by Skyservice and on OMCIAA's past experience with collections for the airline.⁶⁷ Additional security was not sought because "Skyservice was keeping current with payments against its account and there were no other indications of Skyservice's inability to make payments".⁶⁸ A schedule detailing Skyservice's payment history confirmed that Skyservice was current on all payments owing to OMCIAA at all times prior to March 2010.⁶⁹

61. More importantly, however, the seizure and detention remedy provided under section 9 of the *Airport Transfer Act* specifically provides that an airport authority may obtain an order authorizing it to seize and detain aircraft, irrespective of whether there are any other remedies available for the collection of the amounts owing:

⁶⁶ Responses to Supplementary Written Interrogatories of GTAA delivered on May 24, 2010, answer to question 8A, Respondents' Compendium, Tab C, p. 12.

⁶⁷ Responses to the Written Interrogatories of OMCIAA, answer to question 8, Appeal Book, Tab 18, Vol. 2, p. 455.

⁶⁸ Responses to the Written Interrogatories of OMCIAA, answer to question 9, Appeal Book, Tab 18, Vol. 2, p. 455.

⁶⁹ Responses to the Written Interrogatories of OMCIAA delivered on May 20, 2010, Tab A, Respondents' Compendium, Tab D, p. 13.

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. [Emphasis Added.]

62. Taken to its logical conclusion, the position put forward by the Appellants would render the seizure and detention remedy meaningless, in that, if the failure of airport authorities to obtain security for amounts that may be owed to them by an airline is, in and of itself, a sufficient ground for the court to refuse to grant a seizure and detention order, no such orders will ever be granted, as it is precisely when such security has proven to be inadequate that the airport authorities are required to invoke the seizure and detention remedy. This is precisely what Binnie J. meant when he stated in *Canada 3000* that Parliament cannot “...be taken to have intended a remedy that is least effective when it is most needed...”⁷⁰

63. Finally, at paragraph 59 of their factum, the Appellants assert that if the Airport Authorities had been more “conscientious” in taking security from Skyservice then it would have been unnecessary for the Airport Authorities to ask the Court to exercise its discretion to “protect” them while they “sat on their rights”. However, in advancing this argument, the Appellants completely ignore the finding of Justice Morawetz at paragraph 107 of the Endorsement – namely, that section 9 of the *Airport Transfer Act* does not confer a discretion on the court with respect to whether or not a seizure order should be granted⁷¹.

⁷⁰ *Canada 3000*, *supra* at para. 37.

⁷¹ Morawetz J. held “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.” (Endorsement, Appeal Book, Tab 1, Vol. 1, p. 43, para. 107).

Effect of the Stay of Proceedings

64. In their factum, the Appellants allege that Justice Morawetz erred by holding that: (i) a stay in the receivership context can be equated with stays under the CCAA or Part III of the BIA; and (ii) the Stay set out in the Receivership Order prohibited the Appellants from exercising their remedies against Skyservice whereas the Stay did not prohibit the Airport Authorities and NAV Canada from obtaining relief under the *Airport Transfer Act* and CANSCA.

65. GTAA and OMCIAA submit that these arguments are also groundless. With respect to the first point, the Appellants have misstated what Justice Morawetz actually stated in the Endorsement. Justice Morawetz did not state that a stay in the receivership context can be equated with stays under the CCAA or Part III of the BIA. He merely stated that it is the language of the Receivership Order, and not the receivership context, generally, which defines the parameters of the Stay.⁷² This is an elementary principle of law in the receivership context.

66. With respect to the second point, GTAA and OMCIAA submit that Justice Morawetz correctly applied the Stay in accordance with the language in the Receivership Order. Section 9 of the Receivership Order provided that all rights and remedies against Skyservice, the Receiver or affecting the “Property” are stayed and suspended except with the consent of the Receiver or leave of the court.⁷³

67. In this case, Justice Morawetz held that the attempt by the Lessors to terminate their leases was an attempt to enforce a right or remedy against Skyservice and therefore was expressly prohibited by the Stay:

⁷² Endorsement, Appeal Book, Tab 3, Vol. 1, p. 37, para. 77.

⁷³ Receivership Order, Appeal Book, Tab 10(C), Vol. 1, p. 285. The Receivership Order defined Skyservice as the “Debtor”. The “Property” was defined as “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”.

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 section 9 of the Receivership Order. No written consent of the Receiver was provided and no leave of the Court was granted.⁷⁴

68. On the other hand, it was held that the Airport Authorities and NAV Canada were not affected by the Stay because their remedy was as against the Aircraft and, because the Aircraft were all the subject of true leases, at no time did the Aircraft form part of Skyservice Property.⁷⁵

69. This interpretation is entirely consistent with *Canada 3000*. In that case, at first instance, Ground J. addressed whether the airport authorities were precluded from seeking to obtain seizure and detention orders by virtue of a stay of proceedings which had been granted under section 69.3 of the *BIA*. All but two of the aircraft that the airport authorities sought to seize and detain in *Canada 3000* were subject to true leases, with the remaining aircraft subject to financing leases. Ground J. held that the aircraft that were subject to true leases were not the property of the bankrupts and therefore did not form part of their estate. Accordingly, the stay of proceedings that had been imposed under the *BIA* had no application and there was therefore no need for an order lifting the stay for the court to issue seizure and detention orders in respect of those aircraft:

With respect to the proceedings under the BIA, as indicated above, I am of the view that the aircraft subject to the 37 leases, which appear to be true leases as opposed to financing leases, are not the property of the Bankrupts and are not subject to BIA proceedings and that, whether or not the leases have been formally terminated, they are irredeemably in default and the leasehold interests of the Bankrupts in those leases are of no value and form no part of the estates of the Bankrupts.

...

As the 37 aircraft which are the subject of the true leases are not the property of the Bankrupts and do not form part of the Bankrupt estates and as the leasehold interests of the Bankrupts in those aircraft would appear to be of no value, I am of the view that the detention rights of the Airports and NAV Canada are not affected by the stay provisions of section 69.3 of the BIA and that no lifting of the stay would be required for this court to issue seizure orders.⁷⁶ [Emphasis Added.]

⁷⁴ Endorsement, Appeal Book, Tab 3, Vol. 1, p. 39, para. 89.

⁷⁵ Endorsement, Appeal Book, Tab 3, Vol. 1, pp. 41-42 and 44, para. 99 and 113.

⁷⁶ (2002), 33 C.B.R. (4th) 184 (Ont. S.C.J.) at paras. 66 and 68.

70. The finding that the aircraft that were subject to true leases did not form part of the property of the bankrupts and the finding that the stay imposed under the *BIA* did not apply were not challenged on appeal. However, the Supreme Court of Canada, in granting the seizure and detention orders, reiterated that the detention remedy was a remedy against the aircraft. As Binnie J. stated:

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.⁷⁷ [Emphasis Added.]

The fact that GTAA initially brought the application ex parte is irrelevant

71. At paragraphs 66 to 68 of their Factum, the Appellants suggest that Justice Morawetz erred in granting the Seizure Order because GTAA was not entitled to *ex parte* relief under the *Airport Transfer Act*, as was no risk that the Aircraft would leave Canada. This argument must fail for two reasons. First, while GTAA's application was initially commenced on an *ex parte* basis, counsel for the Lessors, NAV Canada and the Receiver were all in attendance and made submissions.⁷⁸ The result of these submissions was the Status Quo Order. Second, the Appellants fail to appreciate that the very purpose of the Status Quo Order was to allow the various applications for seizure and detention orders to be heard on notice and that was the basis on which they were decided.⁷⁹

OMCIIA was equally entitled to the Seizure Order

72. At paragraph 69 of their Factum, the Appellants assert that, because OMCIIA did not commence its application until April 5, 2010, it should not have been entitled to the Seizure Order.⁸⁰ This argument was specifically raised by the Appellants during the Seizure Applications and rejected by Justice Morawetz. As Skyservice remained the "owner" or "operator" of the Aircraft at

⁷⁷ *Canada 3000, supra*, at paras. 9 and 68. Binnie J. also stated that the aircraft did not become part of the bankrupts' estate because ultimate ownership remained with the legal titleholder (para. 77). See also Ontario Court of Appeal decision in *Canada 3000* at (2004), 183 O.A.C. 201 (C.A.) at para. 264.

⁷⁸ Endorsement, Appeal Book, Tab 3, Vol. 1, pp. 24-25, paras. 46-47.

⁷⁹ Status Quo Order, para. 2, Respondents' Compendium, Tab A, p. 2.

⁸⁰ *Ibid.* at para. 108.

the time of the Status Quo Order, by virtue of the operation of the Status Quo Order, it was also the “owner” and “operator” as of April 5, 2010 when the OMCIAA commenced its application.⁸¹

The IAI Aircraft was the subject of the requested Seizure Order

73. At paragraph 70 of their Factum, the Appellants suggest that because the Aircraft leased by Skyservice from IAI was not identified in the initial Notice of Application issued by GTAA, it should not have been subject to seizure and detention. The Appellants do not dispute that this Aircraft was located at Pearson Airport as of the time of the Status Quo Order, was subject to the Status Quo Order, and that GTAA had amended its notice of application to expressly refer to this Aircraft.⁸² The position of Appellants is therefore devoid of merit.

Position of the Appellants would render the Airport Transfer Act meaningless

74. If the position of the Appellants were to be accepted and Skyservice is found to have ceased to have “owned or operated” the Aircraft without the Lessors having ever gained legal custody or control or repossessed the Aircraft, the recourse provided by Parliament in section 9 of the *Aircraft Transfer Act* for the benefit of airport authorities will be rendered meaningless. As Binnie J. stated in *Canada 3000*, “the detention remedy cannot be circumvented...by the expedient of leasing arrangements made between the airlines and the aircraft lessors”.⁸³ It cannot be right to say that Parliament intended to create a remedy that ceases to have application upon the automatic termination of a lease because, if that were true, a lessor could simply include a provision in the lease which provides for its termination upon such an application being brought. If that were to be effective to deprive the airport authorities of their rights under section 9 of the *Airport Transfer Act*, “Parliament would be taken to have intended a remedy that is least effective when it is most

⁸¹ Status Quo Order, para. 2, Respondents’ Compendium, Tab A, p. 2. In *Canada 3000*, GTAA initially moved for an order authorizing it to seize and detain the aircraft under s. 9 of the *Airports Transfer Act* on November 12, 2001. All of the other airport authorities moved for the same relief at a later date (see Court of Appeal decision at (2004) 235 D.L.R. (4th) 618 at para. 11).

⁸² Amended Notice of Application of GTAA issued on April 5, 2010, Appeal Book, Tab 4, Vol. 1, p. 52.

⁸³ *Canada 3000*, *supra* at para. 9.

needed”.⁸⁴ As Justice Binnie concluded, this cannot have been the intention of Parliament when the statute was enacted.

PART IV: ADDITIONAL ISSUES

75. There are no additional issues.

PART V: ORDER REQUESTED

76. It is requested that the appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Allan D. Coleman

Rupert H. Chartrand

Shawn T. Irving

Counsel for GTAA and OMCIAA

⁸⁴ *Ibid.*, at para. 37.

CERTIFICATE

I certify that an order under subrule 61.09(2) (original record and exhibits) is not required.

Counsel for GTAA and OMCIAA estimates that they will require 0.65 hours for the argument on this appeal.

Dated at Toronto, Ontario, this 9th day of August, 2011.

Shawn T. Irving

SCHEDULE “A” – Statutory References

Airport Transfer (Miscellaneous Matters) Act
R.S.C. 1992, c. 5

Seizure and detention for fees and charges

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.

Idem

(2) Where the amount of any fees, charges and interest referred to in subsection (1) has not been paid and the designated airport authority has reason to believe that the person liable to pay the amount is about to leave Canada or take from Canada any aircraft owned or operated by the person, 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 ex parte application to the superior court of the province in which any aircraft owned or operated by the person 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.

Release on payment

(3) Subject to subsection (4), except where otherwise directed by an order of a court, a designated airport authority is not required to release from detention an aircraft seized under subsection (1) or (2) unless the amount in respect of which the seizure was made is paid.

Release on security

(4) A designated airport authority shall release from detention an aircraft seized under subsection (1) or (2) if a bond, suretyship or other security in a form satisfactory to the authority for the amount in respect of which the aircraft was seized is deposited with the authority.

Same meaning

(5) Words and expressions used in this section and section 10 have the same meaning as in the Aeronautics Act.

Civil Air Navigation Services Commercialization Act
R.S.C. 1996, c. 20

Seizure and detention of aircraft

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.

Application may be ex parte

(2) An application for an order referred to in subsection (1) may be made ex parte if the Corporation has reason to believe that the person liable to pay the charge is about to leave Canada or take from Canada any aircraft owned or operated by the person.

Release

(3) The Corporation shall release from detention an aircraft seized under this section if

(a) the amount in respect of which the seizure was made is paid;

(b) a bond or other security in a form satisfactory to the Corporation for the amount in respect of which the seizure was made is deposited with the Corporation; or

(c) an order of a court directs the Corporation to do so.

Exempt aircraft

57. (1) An order under section 56 does not apply if the aircraft is exempt from seizure under the laws of the province in which the court that issued the order is situated.

State aircraft are exempt

(2) State aircraft are exempt from seizure and detention under an order issued under section 56.

Aeronautics Act
R.S.C., 1985, c. A-2

Definitions

3. (1) In this Act,

[...]

“registered owner”, in respect of an aircraft, means the person to whom a certificate of registration for the aircraft has been issued by the Minister under Part I or in respect of whom the aircraft has been registered by the Minister under that Part;

Canadian Aviation Regulations
Regulations Respecting Aviation and Activities Relating to Aeronautics
SOR/96-433

101.01(1) In these Regulations,

“operator”, in respect of an aircraft, means the person that has possession of the aircraft as owner, lessee or otherwise; (utilisateur)

“owner”, in respect of an aircraft, means the person who has legal custody and control of the aircraft; (propriétaire)

[...]

Division IV — Transfer of Legal Custody and Control

General

202.35 (1) Subject to Subpart 3, where the registered owner of a Canadian aircraft transfers any part of the legal custody and control of the aircraft, the certificate of registration of the aircraft is cancelled.

(2) Where the registered owner of a Canadian aircraft transfers any part of the legal custody and control of the aircraft, the registered owner shall, by not later than seven days after the transfer, notify the Minister of the transfer in writing.

(3) For the purposes of this Division, an owner has legal custody and control of a Canadian aircraft when the owner has complete responsibility for the operation and maintenance of the aircraft.

[...]

Division IX — Canadian Civil Aircraft Register

Publication of Register

202.69 (1) The Minister shall establish, maintain and publish a register of aircraft, to be known as the Canadian Civil Aircraft Register, in which there shall be entered, in respect of each Canadian aircraft for which a continuing or temporary certificate of registration has been issued,

- (a) the name and address of each registered owner;
- (b) the registration mark issued pursuant to section 202.02; and
- (c) such other particulars concerning the aircraft as the Minister considers necessary for registration, inspection and certification purposes.

[...]

Requirements for Air Operator Certificate

700.02 (1) No person shall operate an air transport service unless the person holds and complies with the provisions of an air operator certificate that authorizes the person to operate that service.

(2) Subject to subsections (3) and (4), no person shall, unless the person holds and complies with the provisions of an air operator certificate that authorizes the person to do so, operate an aeroplane or helicopter to conduct aerial work involving

- (a) the carriage on board of persons other than flight crew members;
- (b) the carriage of helicopter Class B, C or D external loads;
- (c) the towing of objects; or
- (d) the dispersal of products.

(3) A person who does not hold an air operator certificate may conduct aerial work involving the dispersal of products if

- (a) the person is a farmer;
- (b) the person owns the aircraft that is used to disperse the products;
- (c) the products are dispersed for agricultural purposes; and
- (d) the dispersal of the products takes place within 25 miles of the centre of the person's farm.

(4) A person who does not hold an air operator certificate may conduct aerial work involving the carriage of persons other than flight crew members on board a single-engined aircraft if

- (a) the person holds a flight training unit operator certificate;

- (b) the pilot-in-command is the holder of a valid flight instructor rating in the appropriate category of aircraft;
- (c) the aircraft is operated in day VFR flight;
- (d) there are no more than nine passengers on board; and
- (e) the flight is conducted for the purpose of sightseeing operations.

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

Court may appoint receiver

243. (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Courts of Justice Act
R.S.O. 1990, c. C.43

Injunctions and receivers

101.(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

[...]

Stay of proceedings

106. A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.

SCHEDULE “B” – List of Authorities

1. *Calgary Airport Authority et al. v. Zoom Airlines Inc.*, unreported, dated September 5, 2008; appeal to Alberta Court of Appeal dismissed 2009 ABCA 306; leave to appeal to the Supreme Court of Canada dismissed 2010 CarswellAlta 483
2. *Housen v. Nikolaisen* [2002] 2 S.C.R. 235 (S.C.C.)
3. *NAV Canada v. Wilmington Trust Co.* (2002), 33 C.B.R. (4th) 184, appeal to the Court of Appeal dismissed (2004), 69 O.R. (3d) 1 (C.A.), appeal to Supreme Court of Canada granted [2006] 1 S.C.R. 865
4. *Waxman v. Waxman* (2004), 186 O.A.C. 201