

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

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

BETWEEN:

**THOMAS COOK CANADA INC.**

Applicant

**-and-**

**SKYSERVICE AIRLINES INC.**

Respondent

**COMPENDIUM OF DOCUMENTS**

(Motion regarding the Sunwing Trust Claim, returnable February 13, 2012)

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ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST

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, Chapter 20, as amended (Application by NAV Canada)

AFFIDAVIT OF MARK WILLIAMS

Sworn April 27, 2010

I, Mark Williams, of the Town of Oakville, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

I. I am the President of Sunwing Airlines Inc., a wholly owned subsidiary of Sunwing Travel Group Inc. ("Sunwing Group"), which is also the 100% shareholder of Sunwing Tours Inc. ("Sunwing") and, as such, have knowledge of the matters hereinafter deposed to, except where such knowledge is based on information and belief in which case I verily believe it to be true.

2. I have read the Affidavit of Thomas Chandler, filed in connection with these proceedings (the "**Chandler Affidavit**").

**A. Sunwing Tours Inc.**

3. Sunwing is a corporation organized under the laws of Ontario, carrying on business at 27 Fasken Drive, Etobicoke, Ontario.

4. TUI Canada Holdings Inc. ("**TUI Canada**") (an indirect wholly-owned subsidiary of TUI Travel PLC ("**TUI Travel**")) owns a 25% voting interest and 49% economic interest in Sunwing Group. Sunwing therefore shares an indirect common equity holder with Thomson Airways Limited ("**Thomson**"), which is also a wholly owned subsidiary of TUI Travel.

5. Sunwing was formed, effective February 5, 2010, as a result of an amalgamation of First Choice Canada Inc. ("**First Choice**") and Red Seal Tours Inc. Sunwing's divisions include "Signature Vacations" and "Sell Off Vacations," which were formerly divisions of First Choice.

6. At all material times, Sunwing carried on business as an operator of package tours and charter flights and a retail travel business in Canada, and was in that capacity a customer of Skyservice Airlines Inc. ("**Skyservice**"). Sunwing supplies package holidays (comprised of flights, accommodations and ground transportation, with the option to purchase other rated services) from 30 cities in Canada to over 42 destinations in Mexico, the Dominican Republic, Cuba, the Caribbean and Central America. Sunwing also provides various travel agency services for leisure and business travellers.

**B. Sunwing's & Thomson's Relationship with Skyservice**

7. Skyservice and Sunwing are party to a commercial agreement dated June 11, 2006, (as amended, including amendments dated November 21, 2008, November 25, 2008 and December 1, 2008, the "**Commercial Agreement**"), and First Choice Airways Limited and Skyservice are



party to an agreement dated August 28, 2006, (as amended and novated from time to time, the "FCA Commercial Agreement"). Pursuant to a novation agreement, dated September 30, 2008, between First Choice Airways limited and Thomson (formerly, Thomsonfly Limited) all rights and obligations of First Choice Airways Limited under the FCA Commercial Agreement were novated to Thomson.

8. The Commercial Agreement sets out the terms and conditions pursuant to which Sunwing and Skyservice enter into individual agreements (such agreements, the "Charter Agreements") for the charter of flight services during the term of the Commercial Agreement. The Commercial Agreement and the Charter Agreements are not attached to this Affidavit, however they will be made available to the Court and the other parties to these proceedings upon request, together with a request from Sunwing that such agreements be sealed and kept confidential

9. In November 2008, the parties agreed to an amendment to the Commercial Agreement, effective November 1, 2008, which extended the term of the Commercial Agreement until October 31, 2013.

10. Pursuant to the Charter Agreements, Sunwing agrees to charter a fleet of aircraft from Skyservice for a specified time period, and Skyservice agrees to operate the chartered aircraft.

11. Pursuant to the Commercial Agreement and the Charter Agreement, the charters are a cost-plus arrangement under which Sunwing pre-pays Skyservice a "Charter Fee" that includes "Overhead Charges", "Operating Costs" and "Profit Charges."

12. Clause 5.1.2 of the Commercial Agreement provides:

The Charter Fee applicable to each Charter Agreement in any Holiday Year shall be calculated in accordance with a Budget for such Holiday Year agreed between the Parties pursuant to Clause 11.4 and invoiced weekly in advance on a fixed and a perseat mile

basis as set out in Appendix 8 according to the planned flying programme set out in the relevant Charter Agreement (the "Tariff") subject to [reconciliation].

13. The "Operating Costs" that Sunwing prepays to Skyservice include:

(a) Aircraft lease costs, including without limitation:

- Rental;
- Maintenance reserves (to the extent that these are not recovered at the end of the lease term);
- Insurance;
- Taxes and indemnities payable by Skyservice pursuant to the lease; and
- All charges associated with the return of the Aircraft in accordance with the lease terms;

(b) Aircraft maintenance and repair costs;

(c) Fuel and oil costs;

(d) Ground handling costs, including without limitation:

- Aircraft, passenger, baggage and cargo handling;
- De-icing;
- Aircraft cleaning and catering;
- Security;

(e) Airport, government and navigation fees;

(f) Flight and cabin crew salaries and expenses; and

(g) Irregular operations, welfare costs and sub-chartering of replacement aircraft (irregular operations and subservice)

Collectively, the "Operating Costs".

14. Both the Commercial Agreement (at section 15.1(e)) and the Charter Agreements (at section 5.1(e)) contain representations from Skyservice that for the term of the respective agreements, Skyservice will have the financial resources, management and technical expertise and the human resources to carry out and perform the services contemplated in the respective agreements.

**B. Skyservices' "Cost-Plus" Funding Structure**

**(i) Ordinary Course Funding**

15. In the ordinary course of business, Skyservice would submit invoices to Sunwing reflecting the aggregate overhead and Operating Costs, plus the profit charges, for scheduled charter flights. These invoices would typically cover flight services for a weekly period, and the amount charged would generally be in accordance with an annual budget negotiated between Skyservice and Sunwing.

16. Accordingly, before Skyservice incurs a cost to any of the Airport Authorities (as defined below), Sunwing has already paid Skyservice an amount to fund the liability.

**(ii) Irregular Funding**

17. Sunwing also provides Skyservice with funds for Operating Costs apart from the amounts regularly invoiced by Skyservice, such as for certain deposits required by fuel suppliers, airport authorities or other third party suppliers and service providers.

18. For example, on October 7, 2009, Percy Guyara, Controller of Skyservice, requested CDN\$678,000 for a deposit and prepayment of airport improvement fees, landing fees and general terminal charges incurred in connection with the operation of Skyservice aircraft to the Greater Toronto Airport Authority (the "GTAA"). The email request, sent to Jolanta Bialy, Sunwing Group's Vice President, Finance, attached a letter dated March 20, 2009, from the GTAA to Skyservice advising that the GTAA was "implementing new financial security requirements in respect of airport improvement fees ("AIF"), landing fees and general terminal charges ... to reduce the financial risk to the GTAA and to the air carriers operating at Toronto Pearson." The letter required that Skyservice provide a prepayment of an estimate of the fees, or a provision of a security deposit to the GTAA, and indicated that such prepayments were due

five business days before each successive 30 day period for AIF and 15 day period for landing fees and general terminal charges. A copy of the GTAA's letter and the email from Percy Guyara to Jolanta Bialy, together with proof of payment of the amount to Skyservice by wire transfer, are attached hereto as Exhibit A.

**C. Prepayments made by Sunwing**

**(i) Prepayments on Account of "Claimed Unpaid Amounts"**

19. As discussed in detail in the Chandler Affidavit, the GTAA, the Ottawa MacDonald-Cartier International Airport Authority, the Winnipeg Airports Authority and NAV Canada (collectively, the "Airport Authorities") have made claims against Skyservice for amounts charged in respect of certain leased aircraft, including aircraft leased by Skyservice from Thomson. These claims are referred to in the Thomson Affidavit as the "Claimed Unpaid Amounts", and I understand from the Chandler Affidavit that the Claimed Unpaid Amounts are with respect to Skyservice operations in February and March.

20. Sunwing has paid Skyservice CDN\$34,943,732.70 since January 22, 2010, on account of February and March charter flights. I do not have a breakdown of what proportion of this amount can be allocated to Skyservice liabilities incurred to the Airport Authorities, however by virtue of the Commercial Agreement and Charter Agreements, all Skyservice liabilities incurred to the Airport Authorities in relation to Sunwing-chartered flights were paid in advance by Sunwing. Accordingly, any Claimed Unpaid Amounts allocated to aircraft operated by Skyservice to provide Sunwing chartered flights have already been paid by Sunwing to Skyservice.

21. Sunwing did not receive any notice or information from Skyservice or the Airport Authorities that Skyservice had failed to pay any amount owing to the Airport Authorities. This is notwithstanding that Sunwing obtained a covenant from Skyservice at section 4.2 of the

Charter Agreements that Skyservice would “pay its debts in connection with the operation of the Aircraft, including applicable surcharges and departure taxes, on a timely basis.”

**(ii) Prepayments for Services Not Provided**

22. As set out in the Chandler Affidavit, on March 31, 2010, the Ontario Superior Court of Justice granted an Order (the “**Receivership Order**”) appointing FTI Consulting Canada Inc. as National Receiver (the “**Receiver**”) of Skyservice and all assets, undertakings and properties, and imposing a blanket stay of proceedings in respect of Skyservice. As a result of the Receivership Order, Skyservice ceased all operations as of March 31, 2010.

23. Sunwing did not receive any notice or information from Skyservice that Skyservice would not be operating after March 31, 2010, nor did it receive any notice or warning from Thomas Cook Canada Inc. (“**Thomas Cook**”), the company that brought the application for the Receivership Order.

24. Indeed, Skyservice invoiced Sunwing on March 17, 2010 for flights for the period of March 27 to April 2, 2010 (Invoice number REV-005130), and invoiced Sunwing on March 23, 2010 for flights for the period of April 3 to 9, 2010. The aggregate amount prepaid by Sunwing pursuant to the Commercial Agreement and Charter Agreements prior to Skyservice’s March 31, 2010 receivership for flights that Skyservice was chartered to provide after March 31, 2010 is approximately CDN\$3,500,000.

25. Invoice number REV-005130, dated March 17, 2010, is for the amount of CDN\$3,189,731.34, representing flights for the period of March 27, 2010 to April 2, 2010. CDN\$1,064,367.04 of this amount is on account of prepayment for flight services that Skyservice was required, but failed, to provide from March 31, 2010 to April 2, 2010, taking into

account a credit note issued by Skyservice for this period. A copy of Invoice REV-005130 and the Credit Note are attached hereto as Exhibit B.

26. Invoice REV-005130 was paid in full by wire transfer, and to the best of my knowledge, following my inquiry of Sunwing staff involved with accounts payable, at no time before or after payment was made did anyone from Skyservice advise that the flights pre-paid for would not be provided.

27. Invoice number REV-005146, dated March 23, 2010, is for the amount of CDN\$2,449,083.04, representing flights for the period of April 3, 2010 to April 9, 2010. Skyservice did not provide any of the services for which this invoice was issued. A copy of Invoice REV-005146 is attached hereto as Exhibit C.

28. Invoice REV-005146 was paid in full by wire transfer on March 26, 2010, and to the best of my knowledge, following my inquiry of Sunwing staff involved with accounts payable, at no time before or after payment was made did anyone from Skyservice advise that the flights pre-paid for would not be provided.

**D. Negotiations between Skyservice and Sunwing, Thomson & TUI Travel**

29. Since on or around at least January, 2010 and continuing until March 2010, Sunwing, Thomson, TUI Travel and Skyservice have been involved in negotiations and discussions in order to reach a mutually agreeable settlement of certain pending litigation initiated by Skyservice against Sunwing and others, and in order to come to terms and schedule of termination of the Commercial Agreement, the FCA Commercial Agreement and certain other agreements among the parties. I have been the primary representative of Sunwing, Thomson and TUI Travel in these negotiations.

30. I have met with representatives of Skyservice numerous times face to face, had numerous discussions over the telephone and exchanged a number of emails in connection with these negotiations.

31. Any terms of settlement would have confirmed the continuation of the Thomson Lease Agreements (as defined in the Chandler Affidavit) to their contractual termination dates, and provided for the termination of the Commercial Agreement and FCA Commercial Agreement according to a schedule that would have minimized the service disruption and financial harm to all parties involved. Managing the termination of the arrangements between Sunwing, Thomson and Skyservice requires the cooperation of all parties to effect an orderly, scheduled wind down, which was rendered impossible by Skyservice's abrupt receivership.

32. At no time during the ongoing negotiations did Skyservice indicate to me that it would be unable to do perform services or obligations consistent with continuing the Thomson Lease Agreements, the Commercial Agreement and Charter Agreements, and at no time was I given any indication that Skyservice was or was close to becoming insolvent or that it had been advised that Thomas Cook intended to appoint a receiver. Neither was I advised that Thomas Cook intended to return all of its aircraft previously leased to Skyservice to Europe on or before March 31, 2010 (as detailed in the Chandler Affidavit).

33. Indeed, given that Skyservice operates a "cost-plus" business in which all of its expenses are paid in advance by its customers (as discussed above), its insolvency was a complete surprise when I learned of it after Thomas Cook's receivership application.

34. As a result of the affidavit of Karim Nensi, Chief Financial Officer for Thomas Cook, sworn March 31, 2010 and filed together with Thomas Cook's receivership application (the "Nensi Affidavit"), I am now aware that the Amended and Restated Credit Agreement between

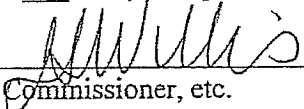
Skyservice and Thomas Cook dated February 12, 2010 (Exhibit C to the Nensi Affidavit),  
provided:

... The Borrower [Skyservice] agrees that it will advise the Lender [Thomas Cook] of any action taken by or on behalf of the Borrower, directly or indirectly, to encourage, initiate or engage in discussions or negotiations with, or provide any information to Tui [which is defined as including Sunwing], or any affiliate of Tui, concerning the business or affairs of the Borrower other than in the ordinary course of business.

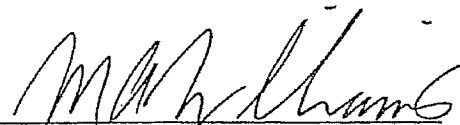
35. Prior to receiving the Nensi Affidavit, I was not aware that Skyservice had agreed with Thomas Cook to advise the latter of negotiations with them. Indeed, I understood that our negotiations with Skyservice were confidential, and I explicitly requested that our conversations not be recorded. I was also not aware that Skyservice had agreed with Thomas Cook not to provide to TUI Travel, Thomson or Sunwing any information concerning its business or affairs outside the ordinary course of business without first advising Thomas Cook.

36. Had Sunwing been notified of Skyservice's inability to perform the obligations contemplated in the settlement discussions, including an orderly, scheduled wind down of the arrangements between Sunwing and Skyservice, Sunwing would have taken steps to minimize its losses, both financially and operationally, including by way of limiting its outlay of the prepayments to Skyservice for charter flights that would not be provided.

SWORN BEFORE ME at the )  
City of Etobicoke, in the Province of Ontario, )  
this 27th day of April, 2010 )

  
A Commissioner, etc. )

JENNIFER SHANNON WILLIS,  
A COMMISSIONER, ETC.,  
PROVINCE OF ONTARIO,  
WHILE A STUDENT-AT-LAW.  
EXPIRES APRIL 16, 2011.

  
Mark Williams