

**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

BETWEEN:

THOMAS COOK CANADA INC.

Applicant

-and-

SKYSERVICE AIRLINES INC.

Respondent

**FACTUM OF SUNWING TOURS INC.
(Motion to Lift Stay of Proceedings)**

PART I – OVERVIEW

1. The Applicant, Sunwing Tours Inc. (“**Sunwing**”) seeks an Order lifting the stay of proceedings in respect of Skyservice Airlines Inc. (“**Skyservice**”) granted by the Honourable Mr. Justice Gans on March 31, 2010, for the sole purpose of filing an application for a bankruptcy order against Skyservice (the “**Bankruptcy Application**”).
2. Skyservice’s Receiver, FTI Consulting Canada Inc. (“**FTI**”) does not oppose the lifting of the stay of proceedings and has agreed to act as trustee in bankruptcy in the bankruptcy of Skyservice.
3. Sunwing respectfully submits that lifting the stay of proceedings to enable Sunwing to file a bankruptcy application is appropriate as:

- (i) it benefits all of Skyservice's unsecured creditors and does not prejudice its secured creditors; and
- (ii) it preserves certain rights and remedies contingent on the review periods set out in the *Bankruptcy and Insolvency Act* ("BIA") with respect to preferential payments and transfers at undervalue.

PART II – THE FACTS

4. Sunwing is an Ontario corporation, 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.¹

5. 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. 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.²

A. Sunwing's Relationship with Skyservice

6. Skyservice and Sunwing were party to a commercial agreement (the "**Commercial Agreement**"), which set out the terms and conditions pursuant to which Sunwing and Skyservice entered into individual agreements (such agreements, the "**Charter Agreements**") for the charter of flight services during the term of the Commercial Agreement.³

7. Pursuant to the Charter Agreements, Sunwing agreed to charter a fleet of aircraft from Skyservice for a specified time period, and Skyservice agreed to operate the chartered aircraft. The charters were a "cost-plus" arrangement under which Sunwing pre-

¹ Affidavit of Mark Williams, sworn April 26, 2010 ("**April 26 Williams Affidavit**") at paras. 3 and 5.

² April 26 Williams Affidavit, at para. 6.

³ April 26 Williams Affidavit, at paras 7 and 8.

paid Skyservice a “Charter Fee” that included “Overhead Charges”, “Operating Costs” and “Profit Charges.”⁴

8. In the ordinary course of business, Skyservice would submit invoices to Sunwing reflecting the aggregate overhead and operating costs, plus a profit charge, for scheduled charter flights.⁵ Sunwing also provided 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.⁶

B. Payments made by Sunwing for Flights Not Provided

9. On March 31, 2010, the Ontario Superior Court of Justice granted an Order (the “**Receivership Order**”) appointing FTI as National Receiver (the “**Receiver**”) of Skyservice. As a result of the Receivership Order, Skyservice ceased all operations as of March 31, 2010.⁷

10. Despite being engaged in ongoing negotiations with Skyservice, Sunwing did not receive any notice or warning from Skyservice or any other party that Skyservice would not be operating after March 31, 2010.⁸

11. Indeed, Skyservice invoiced Sunwing on March 17, 2010 for flights for the period of March 27 to April 2, 2010, 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 for flights that Skyservice was chartered to provide after March 31, 2010 is approximately CDN\$3,500,000.⁹

12. 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

⁴ April 26 Williams Affidavit, at paras. 10 and 11.

⁵ April 26 Williams Affidavit, at para. 15.

⁶ April 26 Williams Affidavit, at para. 17.

⁷ April 26 Williams Affidavit, at para. 22.

⁸ April 26 Williams Affidavit, at para. 23.

⁹ April 26 Williams Affidavit, at para. 24.

its losses, both financially and operationally, including by way of limiting its prepayments to Skyservice for charter flights that would not be provided.¹⁰

C. Skyservice's Receivership

13. As set out in section 3(d) of the Receivership Order, the Receiver is empowered to wind down but not operate Skyservice's business; the Skyservice receivership is explicitly a liquidation.¹¹

14. In addition to certain trust or proprietary claims that Sunwing has asserted against Skyservice and in the receivership, resulting from the prepayments discussed above, Skyservice is indebted to Sunwing in an amount exceeding \$4.9 million for costs and damages incurred as a result of Skyservice's receivership and its consequent failure to provide certain charter flight services to Sunwing.¹²

15. These costs and damages include, without limitation, costs of securing flight services from other carriers on very short notice, Skyservice inventory write-offs, customer protection and compensation costs, loss of revenue and other costs. In addition to the losses occasioned by Sunwing as a direct or indirect result of Skyservice's failure to provide flight services, Sunwing has incurred significant costs in mitigating its losses.¹³

16. Sunwing does not hold any security in respect of these claims and is accordingly an unsecured creditor for these amounts.

D. Pre- Receivership Activities

17. The Receiver has acknowledged in its Pre-appointment Report dated March 31, 2010 that its review of various secured parties' security was subject to the usual

¹⁰ April 26 Williams Affidavit, at para. 36.

¹¹ Affidavit of Mark Williams, sworn June 14, 2010 ("June 14 Williams Affidavit"), at para. 5.

¹² June 14 Williams Affidavit, at para. 6.

¹³ June 14 Williams Affidavit, at para. 6.

assumptions and qualifications with respect to preferences and other forms of impeachable transactions and therefore, such review has not been undertaken.¹⁴

18. On March 30, 2010, the day before the Receivership Order was made, Skyservice paid approximately \$7.1 million to one of its secured creditors, and an additional \$1.6 million was released to that creditor by a law firm on account of Skyservice.¹⁵

19. Further, on March 25, 2010, Skyservice paid \$7.4 million to its legal counsel to be held in trust for amounts that may be owing to employees, amounts that may be owing pursuant to the *Workers Compensation Act* (Manitoba) and amounts that may be owing in respect of the Air Travellers Security Charge.¹⁶

20. In the event that a trustee in bankruptcy is appointed over Skyservice, all of Skyservice's pre-receivership activities could be carefully reviewed, including the payments listed above. At this time, however, the commencement of the Bankruptcy Application is solely for the purpose of establishing the initial date of bankruptcy and the hearing of the bankruptcy application is to be deferred.¹⁷

PART III – THE LAW AND ARGUMENT

A. Fixing the date of the initial bankruptcy event

21. The relief for creditors against reviewable transactions provided for in the *Bankruptcy and Insolvency Act* (Canada) (the “BIA”) is premised on periods of review, triggered by the “date of the initial bankruptcy event”.¹⁸

22. “Date of the initial bankruptcy event” is defined in the BIA to include “the application in respect of which a bankruptcy order is made...”.¹⁹ It does not include the appointment of a receiver.

¹⁴ Pre-Appointment Report to the Court Submitted by FT Consulting Canada Inc., in its Capacity as Proposed Receiver, dated March 31, 2010 (the “Pre-Appointment Report”) at paras. 29 and 34.

¹⁵ Pre-Appointment Report at para. 18.

¹⁶ Second Report of the Receiver, dated June 10, 2010, at para. 13.

¹⁷ June 14 Williams Affidavit, at para. 7.

¹⁸ BIA ss. 95 and 96

¹⁹ BIA s. 2, “date of the initial bankruptcy event”

23. Accordingly, by filing the Bankruptcy Application, Sunwing will establish the Skyservice date of initial bankruptcy event, and thereby fix in time the review periods set out in the BIA prohibitions against preferential payments and transfers at undervalue.

24. Sunwing gets no special or unfair advantage over other unsecured creditors by making the Bankruptcy Application. Establishing the date of the initial bankruptcy event is as much to the benefit of all of Skyservice's unsecured creditors as it is to the benefit of Sunwing.

25. At this time, Sunwing does not seek to go any further than fixing the date of initial bankruptcy event and thus will not proceed with obtaining a bankruptcy order without the prior consent of the Receiver or further order of this Court.

B. The Stay of Proceedings

26. The blanket stay of proceedings imposed by the Receivership Order is explicitly subject to the variance by court order or consent of the Receiver.²⁰

[8] THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any an all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

[9] THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court...

27. In *Canadian Airlines Corp., Re*, Justice Paperny set out six situations in the context of a proceeding under the *Companies' Creditors Arrangement Act* ("CCAA") in which the court will lift the stay of proceedings, including where (a) the applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the

²⁰ Order of the Honourable Mr. Justice Gans, dated March 31, 2010

debtor company or position of the creditors, and (b) [lifting the stay] is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time.²¹

28. Sunwing, along with all of Skyservices' unsecured creditors, would be prejudiced by being unable to fix the date of initial bankruptcy event with regards to reviewable transactions conducted by Skyservice prior to its receivership, while conversely filing the Bankruptcy Application causes no prejudice to any stakeholders of Skyservice.

29. Further, lifting the stay is necessary to permit Sunwing to fix the date of the initial bankruptcy event, which freezes in time the period of review for a bankruptcy trustee. Should the date not be fixed, transactions that today could be subject to a bankruptcy trustee's scrutiny under the BIA may not be subject to such scrutiny as time passes.

30. In *994814 Ontario Inc. v. RSL Canada Inc.*, the Honourable Mr. Justice Ground granted an order lifting the stay of proceedings in a receivership to permit the issuance of a bankruptcy application, on the basis that it is not appropriate for a receiver to be ordered to conduct the kinds of investigations that a bankruptcy trustee would normally conduct at the request of single creditors.²²

31. Orders lifting stays of proceedings in receivership to permit the filing of bankruptcy applications have also been granted where the explicit purpose of the bankruptcy was to reverse priorities for statutory liens,²³ and stays of proceedings in CCAA proceedings have been lifted in order to fix a date of the initial bankruptcy event.²⁴

²¹ *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1 (AB QB) at para. 20

²² *994814 Ontario Inc. v. RSL Canada Inc.* (2005), 11 C.B.R. (5th) 324 (Ont. S.C.J.) at paras. 2 and 3

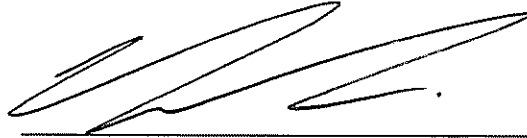
²³ See e.g. *Bank of Nova Scotia v. Huronia Precision Plastics Inc.* (2009), 50 C.B.R. (5th) 58 (Ont. S.C.J. [Commercial List]) at paras. 19 and 20

²⁴ See e.g. *Jetsgo Corp., Re* 2005 CarswellQue 3345 (Q.S.C.).

PART IV – RELIEF REQUESTED

32. Sunwing therefore requests that this motion be granted and that the stay of proceedings granted by Order of the Honourable Mr. Justice Gans in respect of Skyservice be lifted in order that Sunwing may file the bankruptcy application, and that the hearing of the bankruptcy application be adjourned *sine die*.

All of which is respectfully submitted,



Steven J. Weisz/Katherine McEachern/Chris Burr of
Counsel for the Sunwing Tours Inc.

SCHEDULE "A"

AUTHORITIES REFERRED TO

1. *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1 (AB QB)
2. *994814 Ontario Inc. v. RSL Canada Inc.* (2005), 11 C.B.R. (5th) 324 (Ont. S.C.J.)
3. *Bank of Nova Scotia v. Huronia Precision Plastics Inc.* (2009), 50 C.B.R. (5th) 58 (Ont. S.C.J. [Commercial List])
4. *Jetsgo Corp., Re* 2005 CarswellQue 3345 (Q.S.C.)

SCHEDULE “B”

LEGISLATION

Bankruptcy and Insolvency Act (Canada)

S. 2

“date of the initial bankruptcy event”, in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

- (a) an assignment by or in respect of the person,
- (b) a proposal by or in respect of the person,
- (c) a notice of intention by the person,
- (d) the first application for a bankruptcy order against the person, in any case
 - (i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or
 - (ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,
- (e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d), or
- (f) proceedings under the Companies’ Creditors Arrangement Act;

S. 95.

(1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

- (a) in favour of a creditor who is dealing at arm’s length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
- (b) in favour of a creditor who is not dealing at arm’s length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12

months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

(2.1) Subsection (2) does not apply, and the parties are deemed to be dealing with each other at arm's length, in respect of the following:

(a) a margin deposit made by a clearing member with a clearing house; or

(b) a transfer, charge or payment made in connection with financial collateral and in accordance with the provisions of an eligible financial contract.

S. 96

(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it,
or

(B) the debtor intended to defraud, defeat or delay a creditor.

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this section are, in the absence of evidence to the contrary, the values stated by the trustee.

(3) In this section, a "person who is privy" means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding Commenced at Toronto

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