

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

**ONTARIO
COURT OF APPEAL**

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

B E T W E E N:

NAV CANADA

Applicant

FACTUM OF THE RESPONDENT

9 August 2011

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NAV CANADA'S FACTUM

PART I – OVERVIEW

1. NAV CANADA brought an application pursuant to s. 56 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, Chap 20 (the “**CANSCA**”) seeking to detain certain aircraft (the “**Aircraft**”) owned and/or operated by Skyservice Airlines Inc./Lignes Aeriennes Skyservice Inc. (“**Skyservice**”) for non-payment of fees. NAV CANADA’s Application was opposed by the parties who leased the Aircraft to Skyservice (the “**Legal Titleholders**”).
2. Pursuant to an Endorsement released on 6 April 2011 (the “**Endorsement**”), The Honourable Mr. Justice Morawetz granted NAV CANADA’s application and permitted NAV CANADA to detain the Aircraft.
3. Three of the Legal Titleholders, Celestial Aviation Trading 23 Limited (“**CAT**”), IAI V Inc. (“**IAI**”) and MCAP Europe Limited (“**MCAP**” and, together with CAT and IAI, the “**Appellants**”), have appealed Mr. Justice Morawetz’s Order.

PART II – THE FACTS

4. Skyservice was a Canadian airline company that offered charter flight air service both domestically and internationally¹.
5. NAV CANADA is a private, not-for-profit corporation, operating under CANSCA. The company owns and operates Canada’s civil air navigation service and charges fees to the users of the air navigation services, including Skyservice².

¹Affidavit of Louise M. Patenaude sworn April 5, 2010, Appeal Book & Compendium (“**Appeal Book**”), Tab 6(A), Vol. 1, p.108 at para 3.

²Affidavit of Louise M. Patenaude sworn April 5, 2010, Appeal Book, Tab 6(A), Vol. 1, p.107 at para 2.

6. NAV CANADA provided civil air navigation services in relation to the Aircraft and other aircraft owned or operated by Skyservice. Skyservice incurred charges for these services. As of 31 March 2010 Skyservice owed NAV CANADA over \$1 million for civil air navigation services provided to Skyservice³.
7. On March 31, 2010, Thomas Cook Canada, Inc. applied for an Order (the “**Appointment Order**”) pursuant to s. 243 (1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the “**BIA**”) and s. 101 of the *Courts of Justice Act* R.S.O. 1990, c. C.43 (the “**CJA**”), appointing FTI Consulting Canada Inc. (the “**Receiver**”) as receiver of the assets, undertakings and properties of Skyservice⁴.
8. Aside from appointing the Receiver, the Appointment Order:
 - (a) stayed the commencement or continuation of all proceedings or enforcement processes as against Skyservice, except with the consent of the Receiver or leave of the Court;
 - (b) stayed the exercise of contractual rights and remedies against Skyservice or affecting the Aircraft, except with the consent of the Receiver or leave of the Court;
 - (c) obliged, subject to certain conditions, the Legal Titleholders to continue to allow Skyservice to use the Aircraft; and
 - (d) empowered, but did not oblige the Receiver to take possession of Skyservice’s assets and property⁵.

³Affidavit of Louise M. Patenaude sworn April 5, 2010, Appeal Book, Tab 6(A), Vol. 1, pp. 108-109 at paras. 5 and 7 - 9.

⁴Appointment Order, Appeal Book, Tab 10(C), Vol. 1, pp. 277.

⁵Appointment Order, Appeal Book, Tab 10(C), Vol. 1, at paras. 3, 8, 9 and 11.

9. On 31 March 2010, aircraft owned or operated by Skyservice, including the Aircraft, were located at, *inter alia*, Toronto's Pearson International Airport⁶.
10. On 31 March 31, 2010 (and until they left Canada in April of 2010), the Aircraft were all registered in the name of Skyservice⁷.
11. MCAP and IAI purported to terminate leases for the Aircraft on 31 March 2010, but did not take physical possession or control of the Aircraft they leased to Skyservice⁸.
12. The other Legal Titleholders aside from MCAP and IAI did not purport to terminate their leases or take steps to take possession of the Aircraft they leased to Skyservice⁹.
13. Pursuant to the Order of the Honourable Justice Morawetz dated 31 March 2010 (the "**Status Quo Order**"):
 - (a) no person, including the Receiver, was permitted to take or cause any steps to be taken to possess or repossess the Aircraft including, *inter alia*, giving notice of termination, seizing or taking control of log books, certificates of registration or airworthiness, etc.; and
 - (b) the Legal Titleholders were permitted to take certain limited steps to move, reposition, inspect, protect and preserve the aircraft, provided that those steps

⁶Affidavit of Shingeru Kizawa sworn April 26, 2010, Appeal Book, Tab 8(A), Vol. 1, p.134 at para 3; Affidavit of Mario Schuler sworn April 26, 2010, Appeal Book, Tab 8(B), Vol. 1, p. 140 at para 3; Affidavit of Serge G. Avakian sworn April 23, 2010, Appeal Book, Tab 7(A), Vol. 1, p. 119 at para 2; Affidavit of Thomas Edward Chandler sworn April 27, 2010, Appeal Book, Tab 9(A), Vol. 1, pp. 157-162 at paras. 4 – 9, 13 and 21;

Affidavit of Ira Finkelson sworn April 26, 2010, Appeal Book, Tab 7(B), Vol. 1, p. 123 at para 3; and First Report to the Court of the Receiver dated April 14, 2010 (the "**First Report**"), Appeal Book, Tab 19(E), Vol. 2, p. 519-520 at para 34.

⁷Affidavit of Ray Butler sworn April 5, 2010, Appeal Book, Tab 5(A), Vol. 1, pp.83-84 at para. 4.

⁸Affidavit of Shingeru Kizawa sworn April 26, 2010, Appeal Book, Tab 8(A), Vol. 1, p.136 at para 11 and Affidavit of Mario Schuler sworn April 26, 2010, Appeal Book, Tab 8(B), Vol. 1, p. 141 at para 11.

⁹Affidavit of Thomas Edward Chandler sworn April 27, 2010, Appeal Book, Tab 9(A), Vol. 1, p.174 at paras 66 and 67.

were deemed not to constitute the exercise of custody, control or possession of the Aircraft¹⁰.

14. NAV CANADA disputes the characterization of the argument in paragraph 14 of the Appellants' factum dated 10 June 2011 as a "fact". The making of the Status Quo Order is a fact, but the argument with respect to the purpose of that Order is argument.
15. Skyservice ceased to carry on business on 31 March 2010, but the Receiver did not take possession or control of any of the Aircraft; Skyservice retained physical possession of the Aircraft. In paragraph 47(g) of their factum, the Appellants incorrectly state that the Receiver "took possession and control of all aircraft documents and records..." The Receiver's Third Report dated 30 June 2010 (the "**Third Report**") provides a proper description of the steps taken by Skyservice to preserve aircraft documents and records¹¹.
16. Upon being appointed, the Receiver secured possession and control of all of Skyservices' property, except the Aircraft and related documents – the Receiver only took possession of books and records that were located in Skyservice's hanger and did not take possession of the log books, Certificates of Registration or Certificates of Airworthiness for the Aircraft¹².
17. Subsequent to the making of the Appointment Order, Skyservice's engineering staff, on their own initiative, took steps to secure the documentation necessary to fly the Aircraft¹³.

¹⁰Status Quo Order, Joint Compendium of the Respondents NAV CANADA, GTAA, and OMCIAA ("**Joint Compendium**"), Tab A, pp.2-3 at paras 2 and 4 to 6.

¹¹Affidavit of Louise M. Patenaude sworn April 5, 2010, Appeal Book, Tab 6(A), Vol. 1, p. 109 at para 10; First Report, para 11 and Third Report.

¹²First Report, Appeal Book, Tab 19(E), Vol. 2, p. 513 at para 11 and Third Report, Joint Compendium, Tab E at para 5.

¹³The actions of Skyservices's engineering staff was precipitated by the knowledge that after an insolvency certain assets tended to "disappear".

They removed and secured the log books and other key documents from a number of the Aircraft¹⁴.

18. Skyservice continued to employ two aircraft maintenance engineers subsequent to the appointment of the Receiver¹⁵.
19. Subsequent to the making of the Appointment Order and the Status Quo Order, NAV CANADA, the Greater Toronto Airport Authority, the Ottawa MacDonald-Cartier International Airport Authority, the Winnipeg Airports Authority and the Legal Titleholders negotiated a protocol that provided for the Aircraft to be turned over to the Legal Titleholders upon the posting of cash security (the “**Protocol**”). The Protocol was approved pursuant to an Order dated 9 April 2010 (the “**Protocol Order**”)¹⁶.
20. The Legal Titleholders then entered into aircraft return agreements with the Receiver to secure the return of the Aircraft, which agreements were approved pursuant to an Order dated 15 April 2010 (the “**Aircraft Return Order**”)¹⁷.
21. The Legal Titleholders did not obtain possession and control of the Aircraft until after the issuance of the Aircraft Return Order¹⁸.
22. On 31 May 2010, the parties reached an agreement that provided that, inter alia: (a) the parties would agree that Transport Canada terminated Skyservice’s Air Operator Certificate (“**AOC**”) because the commercial air service in respect of which the AOC had

¹⁴Third Report, Joint Compendium, Tab E at paras 8 – 12, 18 – 20 and 22 - 24.

¹⁵Third Report, Joint Compendium, Tab E, p.19 at para 15.

¹⁶Affidavit of Thomas Edward Chandler sworn April 27, 2010, Appeal Book, Tab 9(A), Vol. 1, pp. 166-167 at paras 36 – 41 and Protocol Order, Appeal Book, Tab 19(B), Vol. 2.

¹⁷Order dated April 15, 2010, Appeal Book, Tab 19(F), Vol. 2; and First Report, Appendix B, Appeal Book, Tab 19(E), Vol. 2, p. 537.

¹⁸First Report, Appendix B, Appeal Book, Tab 19(E), Vol. 2, p. 537.

been issued had been discontinued; and (b) the termination of the AOC did not, in and of itself, cause the cancellation of the Certificates of Registration for the Aircraft.¹⁹

23. NAV CANADA's application seeking an Order seizing and detaining the Aircraft was heard and Mr. Justice Morawetz released the Endorsement granting the relief sought by NAV CANADA on 6 April 2011.
24. NAV CANADA does not dispute the Appellants' summary description of the facts found by Mr. Justice Morawetz and set out in the Endorsement, except that the Appellants' summary is not complete. In their factum, the Legal Titleholders omit Mr. Justice Morawetz findings that:
 - (a) it was not disputed that only IAI and MCAP purported to terminate leases of Aircraft²⁰ and none of the Legal Titleholders took physical possession of any of the Aircraft;
 - (b) one Legal Titleholder advised the Receiver that it had neither the intention nor the power to take possession of the Aircraft it had leased to Skyservice;
 - (c) the Status Quo Order provided that, *inter alia*, no person, including the Receiver, would be permitted to take steps, or cause any steps to be taken, to possess or repossess the aircraft or to dispossess Skyservice of the Aircraft; and
 - (d) the Legal Titleholders did not obtain possession or control of the Aircraft until after 15 April 2010.

PART III – NAV CANADA'S POSITION

¹⁹ E-mail dated 31 May 2010, Joint Compendium, Tab G.

²⁰ The stay of proceeding imposed by the Appointment Order stayed the termination of agreements with Skyservice, including the leases for the Aircraft.

A. Were the requirements for NAV CANADA to obtain a seizure order satisfied as at 31 March 2010?

25. Pursuant to s. 56 of CANSCA, NAV CANADA was entitled to a detention order in respect of the Aircraft on 31 March 2010 because: (a) Skyservice owed fees to NAV CANADA; and (b) Skyservice was, at 1830 on 31 March 2010²¹, either the “owner” or the “operator” of the Aircraft²².

26. Pursuant to CANSCA, aircraft may be detained without regard to the property interests of the Legal Titleholders. 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 under 56. 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 consequence²³.

i. Were fees owing by Skyservice to NAV CANADA as at 31 March 2010?

27. There is no dispute among the parties that Skyservice owed fees to NAV CANADA as at 31 March 2010²⁴.

ii. Was Skyservice the “owner” of the Aircraft as at 1830 on 31 March 2010?

28. In paragraphs 19 and 20 of their factum, the Appellants mistakenly argue that:

- (a) the definition of “owner” for the purposes of CANSCA is contained in the *Canadian Aviation Regulations*, SOR/96-433 (the “CARs”); and

²¹ This is the time and date of the Status Quo Order.

²² CANSCA, s. 56, *NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), para 67 and *Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.). A subsequent change in the owner or operator of an aircraft subject to an application under s. 56 cannot defeat NAV CANADA’s rights under s. 56 of CANSCA to seize and detain the aircraft: *Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.), para 36.

²³ *NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), para 74.

²⁴ Reasons to the Endorsement, Appeal Book, Tab 3, Vol. 1, p.15 at para. 8.

- (b) “owner” for the purposes of CANSCA means **only** the registered owner of the Aircraft.
29. The CARs are not regulations passed under CANSCA. Rather, the CARs are passed under the *Aeronautics Act*, R.S.C. 1985, c A-2 (the “**Aeronautics Act**”). The cases that rely on the CARs definition of “owner” in connection with a detention remedy²⁵ do so in connection with the detention remedy given to airport authorities by s. 9 the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c. 5 (the “**ATA**”), because the ATA does not have its own definition of “owner” and s. 9(5) of the ATA specifically refers to the *Aeronautics Act* with respect to the meaning of terms used in s. 9²⁶.
30. CANSCA references the *Aeronautics Act* (and the CARs) for definitions only where there is no specific definition in CANSCA²⁷. CANSCA does contain a definition of “owner” that should be applied in connection with s. 56.
31. The term “owner” is defined by CANSCA to include:
- (a) the person in whose name the aircraft is **registered**; or
- (b) a person in **possession** of the aircraft under a *bona fide* lease or agreement of hire²⁸ (emphasis added).
32. Skyservice was, as at 31 March 2010, the “owner” of the Aircraft within the meaning of CANSCA insofar as: (a) the Aircraft were registered to Skyservice as at 1830 on 31 March 2010; and (b) Skyservice was in possession of each of the Aircraft under a *bona fide* lease as at 1830 on 31 March 2010.

²⁵See *Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.) where the only applicants were the Calgary and Vancouver airport authorities.

²⁶CARs, s. 101.01(1) and ATA, s. 9.

²⁷CANSCA, s. 2(2).

33. For the purposes of CANSCA, “owner” is defined to include the person in whose name an aircraft is registered. There is no need to look to definition of “registered owner” in the *Aeronautics Act* or the definition of “owner” in the CARs. Whether Skyservice was the “owner” of the Aircraft on 31 March 2010 is a question of fact to be answered by the aircraft registry maintained by Transport Canada.
34. The Aircraft Registry reflects the fact that Skyservice was the person in whose name the Aircraft were registered on 31 March 2010.
35. In *NAV Canada v. Wilmington Trust Company* the Supreme Court of Canada was clear that so long as an aircraft is registered in the name of the person owing charges to NAV CANADA, the remedy under s. 56 of CANSCA is available in respect of that aircraft:

*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 8, 2001) and Inter-Canadian. (Once a titleholder reclaims possession, it becomes an operator in possession within s. 56(1) of CANSCA...)*²⁹.

36. The CARs provide that no person may operate an aircraft in Canada unless the aircraft has a valid Certificate of Registration and that Certificate of Registration is carried onboard the aircraft³⁰.
37. At paragraphs 22 to 26 of their factum, the Appellants attempt to make the argument that the Certificates of Registration for the Aircraft registered in Skyservice’s name were cancelled on 31 March 2010 and, as such, Skyservice could not have been the registered

²⁸CANSCA, ss. 2(2) and 55(2).

²⁹*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), paras 38 and 70.

³⁰CARs, ss. 202.25 and 202.26.

owner. There is support in the CARs for the proposition that, if custody – possession – and control of an Aircraft is voluntarily **transferred**, the Certificates of Registration are cancelled by operation of law³¹.

38. The definition of “owner” relied upon by the Appellants for the purposes of the argument made in paragraphs 22 to 26 is applicable strictly to Subpart 2, Division IV of the CARs and not CANSCA, which has its own definition of “owner”, or the CARs generally. Section 202.35(3) of the CARs defines “owner” as the person having complete responsibility for the operation and maintenance of an aircraft **for the purposes of the particular subpart and division of the CARs in which the definition is found:**

***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 aircraft³².*

39. Subpart 2, Division IV of the CARs deals with the transfer of aircraft – the Division is titled “Transfer of Custody and Control” – and provides only for what happens where a person voluntarily transfers responsibility for the operation and maintenance of the aircraft to another person³³.
40. Subpart 2, Division IV of the CARs applies only where there is a voluntary transfer of the responsibility for the operation and maintenance of an aircraft. In these circumstances, in the name of the transferor is, by operation of s. 202.35(1) of the CARs, cancelled³⁴.
41. In *Zoom Airlines* the Court relied on the fact that Zoom had voluntarily agreed to permit the legal titleholder to take possession of the aircraft in issue and the legal titleholder had repossessed the aircraft:

³¹CARs, s. 202.35.

³²CARs, s. 202.35(2).

³³CARs, ss. 202.35(2) and 202.36(1).

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 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 CARs³⁵.

42. Skyservice did not transfer responsibility for the operation or maintenance of the Aircraft to anyone. The evidence in the Receiver's First Report and Third Report are clear in this regard – no one took over from Skyservice the responsibility for the operation and maintenance of the Aircraft prior to 1830 on 31 March 2010.
43. None of the facts listed in paragraph 27 of the Appellants factum constitute a “transfer” of responsibility for the maintenance and operation of the Aircraft.
44. The Appellants do not deny that Skyservice was the registered owner of the Aircraft on 31 March 2010 and that Skyservice continued to be the registered owner of the Aircraft up until the Aircraft were removed from Canada.
45. The Appellants are caught in a difficult position. To defeat NAV CANADA's application under s. 56 of CANSCA they are forced to argue that Skyservice ceased, by operation of s. 202.35(1) of the CARs, to be the registered owner of the Aircraft on 31 March 2010. In contrast, to remove the Aircraft from Canada the Appellants required that Skyservice remain the registered owner of the Aircraft³⁶. If the Appellants are correct concerning the operation of s. 202.35(1), they would have been required to address the fact that the Aircraft, if Certificates of Registration were cancelled by operation of s.

³⁴See, *Billings Family Enterprises Ltd. v. Canada (Minister of Transport)*, [2008] F.C.J. No. 17 (F.C.).

³⁵*Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.), paras 31 and 35 and *NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), para 70.

³⁶The Appellants were not entitled to have the Aircraft registered in their names. The CAR's require that the owner of an aircraft registered in Canada be Canadian: CARs, s. 202.15(1).

202.35(1), could no longer be flown from Canada³⁷ and returned to them without the Legal Titleholders taking steps to have the Aircraft re-registered.

46. The argument in paragraph 26 of the Appellants' factum concerning the effect of a lessee losing responsibility for the operation and maintenance of a leased aircraft is also based on the faulty premise that the leases in respect of the Aircraft had been terminated prior to 1830 on 31 March 2010.
47. The Appointment Order stayed Legal Titleholders from terminating the leases for the Aircraft and required that they continue to allow Skyservice to use Aircraft.
48. It is worth noting that the CARs include provisions that deal with the effect of the termination of a lease on the registration for the leased aircraft. Subsection 202.57(2) of the CARs provides:

202.57 (2) Where the document pursuant to which a registered owner of an aircraft has legal custody and control of the aircraft ceases to be in effect, the certificate of registration of the aircraft is cancelled unless the registered owner

- (a) retains legal custody and control of the aircraft after the document ceases to be in effect; and*
- (b) submits to the Minister, within seven days after the day on which the document ceases to be in effect,*
 - (i) notification of the fact that the document is no longer in effect, specifying the day on which it ceased to be in effect, and*
 - (ii) a copy of the new document under which the registered owner retains legal custody and control of the aircraft³⁸.*

49. Section 202.57(2) of the CARs does not assist the Legal Titleholders, since the applicable leases could not have been terminated in view of the stays arising under the Appointment Order. Pursuant to the Appointment Order, Skyservice retained legal custody and control

³⁷ CARs, ss. 202.13 and 202.26 prohibit, subject to certain limited exceptions, an aircraft from being operated unless a valid the Certificate of Registration is on board the aircraft.

³⁸CARs, s. 202.57(2).

of the Aircraft and the rights of the Legal Titleholders to take custody or control of the Aircraft was stayed.

50. NAV CANADA notes that in *Zoom Airlines*, a Temporary Certificate of Registration was issued by Transport Canada registering the aircraft in the name of the legal titleholder's agent – Skyservice.
51. In *NAV Canada v. Wilmington Trust Company* the Supreme Court based the application of s. 56 of CANSCA to aircraft leased to Canada 3000 and Inter-Canadian on the fact that, at the time NAV CANADA commenced its applications under s. 56, the aircraft in question were registered in the name of Canada 3000 and Inter-Canadian³⁹.
52. In November of 1999, Inter-Canadian ceased conducting flight operations and NAV CANADA subsequently applied to seize and detain a number of Inter-Canadian's leased aircraft under s. 56 of CANSCA. Before NAV CANADA's application was commenced, one of the legal titleholders of the aircraft purported to terminate an aircraft lease. Notwithstanding the termination, the legal titleholder did not take possession of the leased aircraft. The Supreme Court permitted NAV Canada's the right to seize and detain the aircraft on the basis that, *inter alia*, Inter-Canadian continued to be the registered owner of the leased aircraft⁴⁰.
53. On November 8, 2001, Canada 3000 applied for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). Although the Initial Order made in respect of Canada 3000 contemplated the continuation of flight operations, hours after that Order was made Canada 3000 stopped carrying on business and the next

³⁹*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), paras 38 and 70.

⁴⁰*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), paras 20 and 70.

day an order was made grounding Canada 3000's fleet of aircraft. On 9 November 2001, NAV CANADA brought an application under s. 56 of CANSCA and on 10 November 2001, all of the directors and officers of Canada 3000 resigned. Canada 3000 became bankrupt on November 11, 2001⁴¹.

54. The fact that Skyservice ceased to carry on flight operations is not determinative of the issue as to whether Skyservice continued to be the operator of the Aircraft. In *NAV Canada v. Wilmington Trust Company*, the Supreme Court found that Inter-Canadian and Canada 3000 had both ceased to conduct flight operations prior to NAV CANADA bringing its application under s. 56 of CANSCA⁴².

iii. Was Skyservice the “operator” of the Aircraft as at 1830 on 31 March 2010?

55. In contrast to its provisions concerning the term “owner”, CANSCA does not contain a definition of “operator”. Accordingly, the definition of “operator” in s. 101.01(1) of the CARs is applicable to determine whether a person is an “operator” of an aircraft for the purposes of s. 56 of CANSCA⁴³.
56. Subsection 101.01(1) of the CARs defines “operator” as the person that has possession of the aircraft as owner, lessee or otherwise⁴⁴.
57. Possession for the purposes of the CARs and s. 56 of CANSCA means physical possession. In this regard, *Zoom Airlines* and *NAV Canada v. Wilmington Trust Company* are clear that some positive change of possession of the aircraft must have taken place to defeat NAV CANADA's ability to seize and detain aircraft under s. 56:

⁴¹*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), paras 13-16 and 70.

⁴²*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), paras 13-16 and 20.

⁴³CANSCA, s. 2(2), *NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.) and *Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.).

[W]e 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 Act⁴⁵.

58. The fact that the Receiver was appointed over Skyservice's assets and property did not result in a change in possession of the Aircraft. The Receiver is clear in its First and Third Reports that it did not take possession of the Aircraft prior to 1830 on March 31, 2010 and was prohibited by the Status Quo Order from doing so thereafter.
59. As at 1830 on 31 March 2010, Skyservice had possession of the Aircraft as owner, lessee or otherwise. The Aircraft were leased to Skyservice and the leases in respect of the Aircraft had not been effectively terminated. Skyservice maintained possession of the Aircraft pursuant to the Appointment Order, which stayed the exercise by the Legal Titleholders of their remedies, and the Status Quo Order. Mr. Justice Morawetz found that possession and control of the Aircraft was transferred to the Legal Titleholders **AFTER** 31 March 2010⁴⁶.
60. It is not necessary for a person to be flying the aircraft or carrying on active business using the aircraft to be the "operator" of an aircraft. All that is necessary for a person to be the "operator" is that the person be in possession of the aircraft.
61. In *NAV Canada v. Wilmington Trust Company*, the Supreme Court considered the situation involving the failure of Inter-Canadian Airlines and Canada 3000 and NAV CANADA's applications under s. 56 of CANSCA in respect of aircraft leased to these airlines. In the result, the Court determined that NAV CANADA was entitled to an Order under s. 56 in respect of the leased aircraft.

⁴⁴CARs, s.101.01(1).

⁴⁵*Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.), paras 35.

⁴⁶Endorsement, Appeal Book, Vol. 1 at paras 53 and 54.

62. At the time that the application under s. 56 of CANSCA was initiated in respect of aircraft leased to Inter-Canadian Airlines, the company was no longer carrying on business as an airline. On 7 November 1999, Inter-Canadian Airlines ceased operations and laid off 90 percent of its employees. NAV CANADA's Applications under s. 56 in respect of the aircraft leased to Inter-Canadian Airlines were commenced in December of 1999, well after Inter-Canadian Airlines had ceased to operate⁴⁷.
63. In the case of Inter-Canadian Airlines, the legal titleholders of one of the aircraft in issue had purported to terminate its lease with Inter-Canadian Airlines and the aircraft was on the tarmac at Dorval Airport. The Supreme Court found that the termination of the lease did not defeat NAV CANADA's rights under s. 56 of CANSCA with respect to that aircraft⁴⁸.
64. For a legal titleholder to displace Skyservice as the "operator" of the Aircraft and thereby defeat NAV CANADA's rights under s. 56 of CANSCA, the legal titleholder would have had to have done more than just terminate the lease for that Aircraft. The legal titleholder would have had to have taken physical possession and control of the Aircraft. In *Zoom Airlines*, the legal titleholder's position, which was accepted by the Court of Appeal, was that when the legal titleholder took possession of the aircraft it became the "operator" of the aircraft – the legal titleholder did not argue that termination of the lease in and of itself resulted in the legal titleholder becoming the "operator" of the aircraft⁴⁹.
65. In *Zoom Airlines* the legal titleholder of the aircraft in issue, AeroCap Group Services Inc. ("**AeroCap**"), terminated the lease on 26 August 2008 and, on 27 August 2008, the

⁴⁷*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), paras 19 and 20.

⁴⁸*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), para 20.

⁴⁹*Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.), para 26.

legal titleholder's agent – Skyservice ironically – repossessed the aircraft by taking physical possession and control of C-GZUM. Skyservice, *inter alia*: (a) boarded C-GZUM and informed the pilot he was taking possession of the aircraft; (b) collected the Certificate of Airworthiness, the Certificate of Registration and the logbooks for C-GZUM; and (c) surrendered the Certificate of Airworthiness and the Certificate of Registration to Transport Canada, advising that the lease of GZUM had been terminated⁵⁰.

66. In the present case, none of the Legal Titleholders had taken physical possession of the Aircraft or any of the other repossession steps taken in *Zoom Airlines* as at 1830 on 31 March 2010, and the Appointment Order and the Status Quo Order prevented any of the Legal Titleholders from doing so subsequent to 1830 on 31 March 2010.
67. The argument in paragraph 38 of the Appellants' factum that the Receiver had custody of the Aircraft is not correct. The First and Third Reports are clear that the Receiver did not take custody of the Aircraft pursuant to the Appointment Order and that Skyservice continued to exercise effective control over the Aircraft until after 1830 on 31 March 2010. The Status Quo Order maintained that status quo as at 1830 on 31 March 2010.
68. In arguing that Skyservice was no longer the "operator" of the Aircraft, at the relevant time, the Appellants base their position on the suspension of the AOC issued to Skyservice pursuant to Part VII of the CARs. This argument is based on a misconception of the concepts of "operator" and "air operator" under the CARs.
69. Whether Skyservice had an AOC is relevant only to whether Skyservice could continue to carry on business as a air transport service – whether it could operate a commercial air

⁵⁰*Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.), paras 6 and 8.

service – and not whether Skyservice was the “operator” of the Aircraft for the purposes of the detention remedy provided by s. 56 of CANSCA:

101.01 (1) In this Regulations,

“air operator” means the holder of an air operator certificate;

“air operator certificate” means a certificate issued under Part VII that authorizes the holder of the certificate to operate a commercial air service;

...

“operator”, in respect of an aircraft, means the person that has possession of the aircraft as owner, lessee or otherwise⁵¹;

70. An AOC is not determinative as to whether a person is the “operator” of an aircraft for the purposes of s. 56 of CANSCA. An AOC provides the holder with a “license” to conduct business operating a commercial air service using aircraft and specifies, *inter alia*: (a) the legal name, trade name and address of the air operator; and (b) specific conditions with respect to: (i) the areas of operation authorized, (ii) the types of service authorized, and (iii) the types of aircraft authorized and, if applicable, their registration numbers⁵².
71. Skyservice could continue to own and operate the Aircraft without an AOC, so long as it did not carry on business as a commercial air service using the Aircraft⁵³.
72. The parties agree that Skyservice’s AOC was suspended because the commercial air service being operated by Skyservice was discontinued and that this did not impact the registrations for the Aircraft⁵⁴.
73. *Aviation 2000 Inc. v. Minister of Transport*, TATC File No. Q-3199-41 (12 June 2006), is illustrative of the distinction between being the “operator” of an aircraft and being an

⁵¹CARs, s. 101.01(1).

⁵²CARs, s. 702.08.

⁵³ CARs, s. 700.02.

“air operator”. Aviation 2000 Inc. (“**Aviation 2000**”) was the owner and operator of a Cessna 180H aircraft registered as C-FSGB and other aircraft. Aviation 2000 held a AOC that authorized the company to carry on an commercial air transportation service, including sightseeing, using specific aircraft types, not including the Cessna 180H⁵⁵. The company used C-FSGB to carry passengers on a sightseeing flight. Aviation 2000 was fined by Transport Canada for contravening its AOC by carrying on business using an aircraft type that was not authorized by its AOC – the assertion was that the company had taken a passenger for a sightseeing flight in C-FSGB. There was no issue that Aviation 2000 was the operator (and owner) of C-FSGB – it was in legal custody and control of the aircraft and had possession of the aircraft – and didn’t need an AOC to be the operator of that aircraft. The issue in the case was whether Aviation 2000 carried on its business using C-FSGB. On review, the Transportation Appeal Tribunal of Canada found that the Minister of Transport had not established there was a violation for the CARs. Clearly, Aviation 2000 could be an operator of the Cessna, which it continued to be, without being an air operator⁵⁶.

74. In *Minister of Transport v. Tomassini*, TATC File No. Q-2520-33 (29 August 2003), the respondent, Mr. Bruno Tomassini, was assessed a monetary penalty for operating an air transport service without holding an AOC. Mr. Tomassini owned an aircraft registered as C-FUIM, but did not hold an AOC. He advertised a fly-in hunting/fishing trip and used C-FUIM to provide that service and was fined for operating an air transport service without an AOC. The issue was whether Mr. Tomassini required an AOC to carry on his

⁵⁴ E-mail dated 31 May 2010, Joint Compendium, Tab G.

⁵⁵ Cessna 180’s and, specifically, C-FSGB were later added to the company’s AOC so as to permit the company to carry on business using C-FSGB.

⁵⁶ *Aviation 2000 Inc. v. Minister of Transport*, TATC File No. Q-3199-41 (12 June 2006).

business. There was no suggestion that Mr. Tomassini needed the AOC to operate the aircraft. The only question was whether he carried on an “air transport service” and thus needed an AOC ⁵⁷.

75. The AOC is required to ensure that commercial operations are carried out in a manner that is safe for, *inter alia*, clients and the general public. It is not intended to define who an “operator” of aircraft is for the purposes of CANSCA or alter the definition of “operator” in the CARs ⁵⁸.
76. In their factum, the Appellants reference s. 8.4(2) of the *Aeronautics Act* for the broad proposition that the term “possession” for the purposes of the Canadian aviation regulatory regime means control of the aircraft and not physical possession of the aircraft. As indicated above, this is contrary to the Supreme Court’s decision in *NAV Canada v. Wilmington Trust Company*. Subsection 8.4(2) of the *Aeronautics Act* does not establish that proposition. Subsection 8.4(2) is instead focused on establishing vicarious liability for the aircraft operator in respect of offences committed by its employees ⁵⁹.
77. When quoting s. 705.02 of the CAR’s in paragraph 33 their factum, the Appellants deleted the key words from the section. Section 705.02 reads:
- 705.02 No air operator shall operate an aircraft **under this Subpart** unless the air operator complies with the conditions and operations specifications in an air operator certificate issued to that operator by the Minister pursuant to section 705.07 ⁶⁰.*
78. Section 705.01 of the CARs has no relevance to whether Skyservice was the “operator” of the Aircraft as at 1830 on 31 March 2010. Subpart 705 of the CARs applies only in

⁵⁷*Minister of Transport v. Tomassini*, TATC File No.. Q-2520-33 (29 August 2003). See also *Rubbert Aerial Spraying Inc. v. Minister of Transport*, TATC File No. C-3335-41 (6 November 2009).

⁵⁸*Rubbert Aerial Spraying Inc. v. Minister of Transport*, TATC File No. C-3335-41 (6 November 2009), para 89.

respect of the operation of aircraft by a Canadian air operator of an air transport service or in aerial work involving sightseeing operations ⁶¹.

B. Did the Court properly apply and distinguish *Zoom Airlines and Canada 3000*?

79. In *Zoom Airlines*, Zoom voluntarily transferred responsibility for the operation and maintenance of the aircraft in issue in that case to the legal titleholders prior to the airport authority taking steps to seize the aircraft:

- (a) On 25 August 2008, at 1505 MDT, AerCap faxed a notice of default to Zoom stating that if the default was not remedied AerCap would terminate the lease and take possession of the aircraft in issue – C-GZUM.
- (b) On 26 August 2008, at 1702 MDT, AerCap gave Zoom, Zoom’s insurer, and Transport Canada written notice of lease termination for C-GZUM, via e-mail.
- (c) On 27 August 2008, at about 1400 MDT, Zoom flew C-GZUM into the Calgary airport. Earlier that day, Zoom had requested reinstatement of the lease upon payment of arrears. AerCap confirmed its termination, refused to allow Zoom to finish the flight from Calgary to Vancouver, and advised that it required possession of the aircraft and payment of all outstanding arrears before it would provide a new lease for C-GZUM.
- (d) On 27 August 2008, Zoom acknowledged to AerCap that C-GZUM would be grounded in Calgary, advised that it would see that the aircraft’s records would be

⁵⁹See, for example, *Air Mikisew Ltd. v. Canada (Minister of Transport)*, 2009 TATCE 21 (Operator of aircraft found not liable for failure of employee to make an maintenance entry in an aircraft’s journey log book.)

⁶⁰CARs, s. 705.02.

⁶¹CARs, s. 705.01.

made available to AerCap and that it would apply an “all stop” when the aircraft arrived.

- (e) AerCap retained Skyservice Airlines Inc. as agent to repossess C-GZUM upon arrival in Calgary. At approximately 1430 MDT, on 27 August 2008, a Skyservice representative boarded the aircraft and informed the pilot he was taking possession of the aircraft. Kendrick collected the Certificate of Airworthiness, the Certificate of Registration and the logbooks, and the pilot and passengers departed the aircraft. This process was completed by about 1430 MDT. Significantly, at the time of the foregoing events, no insolvency proceedings had been commenced in respect of Zoom and no stays had arisen⁶².

80. On the facts of the present case, the most that the Legal Titleholders can argue is that certain Aircraft were “left behind” by Skyservice. In *Canada 3000*, certain aircraft in issue were also “left behind”. The Supreme Court found that NAV CANADA had the right to obtain these aircraft. Aside from the specific insolvency proceedings (e.g. liquidating CCAA versus receivership), which is not a basis for distinction, the facts of this case are indistinguishable from the facts in *Canada 3000*.

C. Are there policy grounds raised by the Appellants relevant to this appeal?

81. This appeal involves the interpretation of s. 56 of CANSCA and, in particular, whether Mr. Justice Morawetz correctly decided that Skyservice was the “owner” and “operator” of the Aircraft as at 1830 on 31 March 2010. The policy issues raised by the Appellants in their factum are not relevant. Any “findings” by Mr. Justice Morawetz were *in obiter*.

⁶²*Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.), paras 1 to 6. Zoom did not commence proceedings under the BIA until 1630 MDT on 27 August

82. Central to the statutory scheme and any consideration of the equities is the fact that NAV CANADA is intended to be financially viable and independent. Section 56 of CANSCA is clearly intended to promote financial viability within a risky business environment and to make privatization attractive and practicable to potential investors⁶³.
83. The financial impact on the legal titleholders resulting from the making of an order under s. 56 is not a basis to deny the order. The Supreme Court was clear that, under s. 56 of CANSCA, 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 legislation⁶⁴.
84. Both the Supreme Court and the Alberta Court of Appeal have adopted the dissenting opinion of Nuss J.A. of Quebec Court of Appeal:

If the titleholder could obtain release of the seized aircraft without the payment of the outstanding charges or providing security, the intention and purpose of the Detention Provisions enacted by Parliament would be defeated. This is so because the debt is constituted of charges incurred by the operator of the aircraft (who is often, as in this case, the registered owner) and not by the titleholder. Thus, if the contention of [the titleholders] were to prevail, the titleholder, who is neither the operator nor the “owner” within the meaning of the statutes, could always obtain release of the aircraft and the charges would not be paid. The recourse provided by Parliament would, inevitably, be of no avail⁶⁵.

85. There is no issue that s. 56 of CANSCA, as interpreted by the Courts *NAV Canada v. Wilmington Trust Company* and *Zoom Airlines*, creates a “race to the swiftest” as between NAV CANADA and the Legal Titleholders in what can only be described as a “winner-takes-all contest”. **Both** NAV CANADA and the Legal Titleholders have the ability to mitigate the potential harm that may be caused should they not win that race,

⁶³*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), paras 38 and 39.

⁶⁴*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), para 74.

⁶⁵*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), para 67 and *Calgary Airport*

but whether or not they have taken steps to mitigate is not directly relevant to whether NAV CANADA ought to be granted an Order under s. 56 of CANSCA⁶⁶.

86. The Supreme Court was clear that the discretion given to the Court *vis a vis* the exercise of the seizure and detention remedy under s. 56 of CANSCA was limited and could not be exercised so as to leave amounts owing to NAV CANADA unpaid:

*The Parliament has left the door open for the motions judge to work out an arrangement that is fair and reasonable to all concerned, **provided that the object and purpose of the remedy (to ensure the unpaid user fees are paid) is fulfilled.** It would be open to a judge on a detention remedy hearing to determine an allocation amongst the titleholders that reflected such factors as the number of seized aircraft, the amount of charges in relation to a particular aircraft or the short duration of an aircraft's life spent in the doomed fleet. The judge need not make each aircraft hostage for the full amount of the unpaid charges, **provided the result is that the authority is paid in full**⁶⁷.*

87. The argument that NAV CANADA is in a better position to know whether an aircraft owner or operator is in arrears of charges and that this provides NAV CANADA with a “competitive advantage” is a red herring.
88. There is nothing whatsoever that prevents the Legal Titleholders from requiring that their customers provide them with the information necessary to determine the amounts owing to NAV CANADA from time-to-time.
89. There is simply no merit to the argument made by MCAP and IAI to the effect that if NAV CANADA had been “more assertive” in the exercise of the remedies available as against Skyservice, the resort of s. 56 would not have been relevant.

Authority v. Zoom Airlines Inc., 2009 CarswellAlta 1427 (C.A.), para 32.

⁶⁶*Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.), para 37.

⁶⁷*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), para 92 and *Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.), para 37.

90. NAV CANADA is not required to exercise the other remedies available to it to collect unpaid or overdue charges prior to seeking an Order pursuant to s. 56 of CANSCA. Section 56 provides a remedy that stands on its own and that may be exercised by NAV CANADA without the necessity to exhaust other remedies. Subsection 56(1) of CANSCA provides that, **in addition to any other remedy available for the collection of an unpaid and overdue charge imposed by the NAV CANADA,** NAV CANADA may apply for an order authorizing NAV CANADA to seize and detain any such aircraft⁶⁸.
91. Whether NAV CANADA could, assuming it had information that gave rise to concerns with respect to Skyservice's ability to pay charges, have exercised other remedies as against Skyservice is not relevant to the determination as to whether an order should be made under s. 56 of CANSCA.

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 effect⁶⁹.

D. Did the actions of the Legal Titleholders or Skyservice result in NAV Canada's rights being limited?

92. *Zoom Airlines* and *Canada 3000* are clear that more than just the purported termination of a lease must take place. There must be a voluntary surrender of physical possession of the aircraft to the legal titleholder or the legal titleholder must seize possession of the aircraft.
93. The facts referenced in paragraph 46 of the Appellants' factum took place **AFTER** 31 March 2010. These actions were taken pursuant, and subject, to the Status Quo Order⁷⁰.

⁶⁸CANSCA, s. 56(1).

⁶⁹*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), para 9.

⁷⁰ In paragraph 50 of his Endorsement, Mr. Justice Morawetz references the fact that the Status Quo Order permitted the legal Titleholders to take steps *vis-à-vis* the Aircraft.

94. The facts referenced in paragraph 47 of the Appellants' factum are not sufficient to constitute voluntary transfer of possession or control of the Aircraft.

95. Many of the facts relied upon by the Legal Titleholders existed in *Canada 3000*.

E. Is Leave Required for NAV CANADA's Application under CANSCA?

96. The Appointment Order prohibits the commencement or continuation of proceedings or enforcement processes as against Skyservice or the assets, undertaking and properties owned by Skyservice acquired for or used by Skyservice in relation to a business carried out by Skyservice, except with the consent of the Receiver or leave of the Court ⁷¹.

97. The Appointment Order also stays and suspends the exercise of remedies as against Skyservice or the assets, undertaking and properties owned by Skyservice acquired for or used in relation to a business carried out by Skyservice, except with the consent of the Receiver or leave of the Court ⁷².

98. It is acknowledged by all of the parties that the leases in respect of the Aircraft are "true" leases pursuant to which Skyservice has, subject to the terms of the applicable lease, the right to use the Aircraft, but does not have legal title to the Aircraft. As a result, the Aircraft are not assets, undertaking and properties of Skyservice in that Skyservice is not the legal titleholder of the Aircraft⁷³.

99. While NAV CANADA's right to pursue a claim against Skyservice was stayed by the Appointment Order, NAV CANADA's detention remedy is not a remedy against assets,

⁷¹Appointment Order, Appeal Book, Tab 10(C), Vol. 1, pp.284-285 at para 8.

⁷²Appointment Order, Appeal Book, Tab 10(C), Vol. 1, p. 285 at para 9.

⁷³Notwithstanding that Skyservice was not the legal titleholder of the Aircraft, it was the "owner" of the Aircraft at the relevant time on March 31, 2010, within the meaning and for the purposes of the seizure and detention provisions of CANSCA. Indeed, in *NAV CANADA v. Wilmington Trust Company*, the Supreme Court of Canada

undertaking and properties owned by Skyservice. NAV CANADA's rights *vis a vis* the Aircraft are *in rem* statutory rights against the Aircraft and not *in persona* contractual rights as against Skyservice.

F. Is the purpose of the stay in a receivership different that in a BIA or CCAA proceedings?

100. The purpose of the stay in an insolvency proceeding is to preserve the status quo, subject to the terms of the stay.
101. Mr. Justice Morawetz found correctly that the scope of the stay in a receivership is determined based on the wording of the Order imposing the stay. The Legal Titleholders did not appeal or seek to vary the stay in the Appointment Order.
102. The argument in the Appellants' factum that the interests of legal titleholders of leased aircraft are not impacted by a bankruptcy is a red herring: (a) the rights of legal titleholders as secured creditors can be suspended in a bankruptcy⁷⁴; and (b) this case does not involve a bankruptcy, but the appointment of a receiver under the BIA and the CJA.

PART IV – ADDITIONAL ISSUES

A. Did the appointment of the Receiver result in a change in the “owner” or “operator” of aircraft?

103. As a matter of law, a company which is placed into receivership retains its corporate existence and its legal capacity, except to the extent that its assets become subject to

ruled that a titleholder that is not in possession and control of an aircraft is not an “owner”, within the meaning of the statute.

⁷⁴BIA, ss. 69.3(2) and (3).

Court ordered control by a Receiver. As such, any assets over which the Receiver does not exert control, remain in the possession of the insolvent company⁷⁵.

104. The appointment of the Receiver pursuant to the Appointment Order did not have the effect of depriving Skyservice of possession and control of the Aircraft in the circumstances. The Receiver was not obliged to take possession of the Aircraft and as a factual matter, did not do so⁷⁶.
105. In the circumstances, Skyservice remained in possession and control of the Aircraft notwithstanding its insolvency and thus remained the “owner” and “operator” of the Aircraft. Indeed, any other result would fly in the face of the ruling and observations of the Supreme Court of Canada *NAV CANADA v. Wilmington Trust Company*. In particular, Justice Binnie had the following observations concerning the effect of insolvency on NAV CANADA’s remedies:

In Ontario, the detention remedies were applied for while the CCAA stay was in effect and Canada 3000 remained a registered owner of the aircraft in question. In neither case did the aircraft become part of the bankrupt estate (because ultimate ownership was in the legal title holder). The aircraft were nevertheless 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 date⁷⁷.

106. The issue is, simply put, whether, as at 1830 on 31 March 2010: (a) possession and control of the Aircraft was transferred by Skyservice; or (b) any person had taken

⁷⁵ *1231640 Ontario Inc. (Re)*, 2007 CarswellOnt 7595 (C.A.), paras. 27 and 28.

⁷⁶ First Report, Appeal Book, Tab 19(E), Vol. 1 and Third Report, Joint Compendium, Tab E.

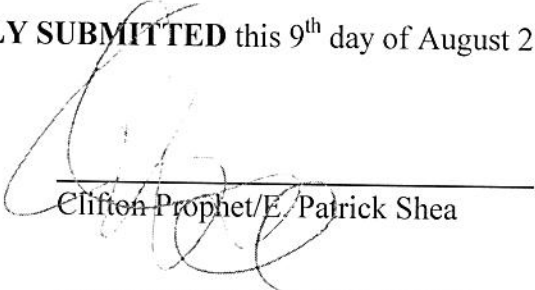
⁷⁷ *NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.), para 77.

complete possession and control of the Aircraft from Skyservice. For the reasons set out above, both these questions must be answered in the negative – at the relevant time Skyservice had not transferred possession and control of the aircraft and no other person had taken possession and control away from Skyservice⁷⁸.

PART V – ORDER SOUGHT

107. NAV CANADA seeks an Order dismissing the Appellants appeal with costs payable to NAV CANADA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of August 2011.



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⁷⁸*NAV Canada v. Wilmington Trust Company*, 2006 CarswellQue 4890 (S.C.C.) and *Calgary Airport Authority v. Zoom Airlines Inc.*, 2009 CarswellAlta 1427 (C.A.).

Schedule A

NAV Canada v. Wilmington Trust Company, 2006 CarswellQue 4890 (S.C.C.).

Calgary Airport Authority v. Zoom Airlines Inc., 2009 CarswellAlta 1427 (C.A.).

Billings Family Enterprises Ltd. v. Canada (Minister of Transport), [2008] F.C.J. No. 17 (F.C.)

Aviation 2000 Inc. v. Minister of Transport, TATC File No. Q-3199-41 (12 June 2006).

Minister of Transport v. Tomassini, TATC File No.. Q-2520-33 (29 August 2003).

Rubbert Aerial Spraying Inc. v. Minister of Transport, TATC File No. C-3335-41 (6 November 2009).

Air Mikisew Ltd. v. Canada (Minister of Transport), 2009 TATCE 21.

1231640 Ontario Inc. (Re), 2007 CarswellOnt 7595 (C.A.).

Schedule B

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

69.3 (2) Subject to subsection (3), sections 79 and 127 to 135 and subsection 248(1), the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his or her security in the same manner as he or she would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his or her security, except as follows:

(a) in the case of a security for a debt that is due at the date the bankrupt became bankrupt or that becomes due not later than six months thereafter, that right shall not be postponed for more than six months from that date; and

(b) in the case of a security for a debt that does not become due until more than six months after the date the bankrupt became bankrupt, that right shall not be postponed for more than six months from that date, unless all instalments of interest that are more than six months in arrears are paid and all other defaults of more than six months standing are cured, and then only so long as no instalment of interest remains in arrears or defaults remain uncured for more than six months, but, in any event, not beyond the date at which the debt secured by the security becomes payable under the instrument or law creating the security.

Secured creditors — aircraft objects

(3) If a secured creditor who holds security on aircraft objects under an agreement with the bankrupt is postponed from realizing or otherwise dealing with that security, the order under which the postponement is made is terminated

(a) if, after the order is made, the trustee defaults in protecting or maintaining the aircraft objects in accordance with the agreement;

(b) 60 days after the day on which the order is made unless, during that period, the trustee

(i) remedied the default of every other obligation under the agreement, other than a default constituted by the commencement of proceedings under this Act or the breach of a provision in the agreement relating to the bankrupt's financial condition, and

(ii) agreed to perform the obligations under the agreement, other than the bankrupt's obligation not to become insolvent or an obligation relating to the bankrupt's financial condition, until the day on which the secured creditor is able to realize or otherwise deal with his or her security; or

(c) if, during the period that begins 60 days after the day on which the order is made and ends on the day on which the secured creditor is able to realize or otherwise deal with his or her

security, the trustee defaults in performing an obligation under the agreement, other than the bankrupt's obligation not to become insolvent or an obligation relating to the bankrupt's financial condition.

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. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Airport Transfer (Miscellaneous Matters) Act, 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*.

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

3. (1) Definitions. 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;

Operator of aircraft may be found liable

8.4(2) The operator of an aircraft may be proceeded against in respect of and found to have committed an offence under this Part in relation to the aircraft for which another person is subject to be proceeded against unless, at the time of the offence, the aircraft was in the possession of a person other than the operator without the operator’s consent and, where found to have committed the offence, the operator is liable to the penalty provided as punishment therefor.

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

2. (2) Same meaning as Aeronautics Act. Unless a contrary intention appears, words and expressions used in this Act have the same meaning as in subsection 3(1) of the Aeronautics Act.

55. (1) Joint and several liability. The owner and operator of an aircraft are jointly and severally liable for the payment of any charge for air navigation services imposed by the Corporation in respect of the aircraft.

(2) Meaning of “owner”. In subsection (1), “owner”, in respect of an aircraft, includes

- (a) the person in whose name the aircraft is registered;
- (b) a person in possession of an aircraft as purchaser under a conditional sale or hire-purchase agreement that reserves to the vendor the title to the aircraft until payment of the purchase price or the performance of certain conditions;
- (c) a person in possession of the aircraft as chattel mortgagor under a chattel mortgage; and
- (d) a person in possession of the aircraft under a bona fide lease or agreement of hire.

56. (1) Seizure and detention of aircraft. 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.

(2) Application may be ex parte. 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.

(3) Release. 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.

Canadian Aviation Regulations, SOR/96-433.

101.01 (1) In these Regulations,

“air operator” - means the holder of an air operator certificate;

“air operator certificate” - means a certificate issued under Part VII that authorizes the holder of the certificate to operate a commercial air service;

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

...

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

Division II — Aircraft Registration

Registration of Aircraft — General

202.13 (1) This section does not apply in respect of an aircraft that is

(a) a hang glider; or

(b) a parachute.

(2) Except as otherwise authorized under subsection 202.14(1) or 202.43(1), no person shall operate an aircraft in Canada unless it is registered in Canada, in a contracting state or in a foreign state that has an agreement in force with Canada that allows an aircraft that is registered in that foreign state to be operated in Canada.

Qualifications to Be Registered Owner of a Canadian Aircraft

202.15 (1) Subject to subsection (2), any Canadian is qualified to be the registered owner of a Canadian aircraft.

Division III — Certificates of Registration
Issuance of a Certificate of Registration

202.25 (1) Where the Minister registers an aircraft, the Minister shall issue to the registered owner of the aircraft

(a) a provisional certificate of registration if the aircraft has a provisional registration;

(b) a temporary certificate of registration if

(i) the documentation, record entries and other administrative steps necessary to issue a continuing registration cannot be completed immediately, or

(ii) the Minister intends to replace a continuing certificate of registration pursuant to section 202.27 or amend or replace a certificate of registration pursuant to subsection 202.28(1), but the documentation, record entries and other administrative steps necessary to amend or replace the certificate cannot be completed immediately;

(c) an interim certificate of registration if the aircraft is deemed to be registered with an interim registration pursuant to subsection 202.36(1) or (4); or

(d) except in the circumstances described in subparagraph (b)(ii), a continuing certificate of registration if the aircraft has a continuing registration.

(2) Where the Minister issues a temporary certificate of registration, the Minister may specify in the temporary certificate of registration a date on which the temporary registration expires.

(3) A temporary certificate of registration expires or is cancelled, as the case may be, on the earliest of

(a) the date specified in the temporary certificate of registration,

(b) the last day of the three-month period following the day on which the temporary certificate of registration was issued,

(c) the day on which there is a change in the legal custody and control of the aircraft, and

(d) the day on which a continuing certificate of registration is issued in respect of the aircraft.

Carrying Certificate of Registration on Board the Aircraft

202.26 No person shall operate an aircraft in Canada, other than an aircraft referred to in subsection 202.43(1), or a Canadian aircraft outside Canada unless the certificate of registration issued in respect of the aircraft is carried on board the aircraft.

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.

Interim Registration

202.36 (1) Subject to subsection (2), where any part of the legal custody and control of a Canadian aircraft is transferred and the new owner meets the requirements referred to in section 202.16, the aircraft is deemed to be registered with an interim registration in the name of the new owner.

(2) Where any part of the legal custody and control of an aircraft referred to in subsection (1) is transferred for a second time, the aircraft is not deemed to be registered with an interim registration in the name of the new owner even if the new owner meets the requirements referred to in section 202.16.

(3) The interim registration of an aircraft referred to in subsection (1) expires on the earliest of

- (a) the last day of the three-month period following the date of the transfer of any part of the legal custody and control of the aircraft,
- (b) the day on which there is a further transfer of any part of the custody and control of the aircraft, and
- (c) the day on which a continuing certificate of registration is issued in respect of the aircraft.

(4) Where there is a change in the registered owner's name, address or other information contained in the continuing certificate of registration, the aircraft is deemed to be registered with an interim registration if the requirements specified in the Aircraft Marking and Registration Standards are met.

(5) The interim registration of an aircraft referred to in subsection (4) expires on the earliest of

- (a) the last day of the three-month period following the date of the change or amendment,
- (b) the day on which there is a transfer of any part of the legal custody and control of the aircraft, and
- (c) the day on which a continuing certificate of registration is issued in respect of the

aircraft.

- (6) An interim certificate of registration may not be transferred.

Division VIII — Cancellation of Certificate of Registration

Conditions Where Certificate of Registration Is Cancelled

202.57 (1) In addition to the circumstances set out in subsections 202.15(5), 202.35(1), 202.37(3) and 202.58(2) and sections 202.59 and 202.60, the certificate of registration of a Canadian aircraft is cancelled where

- (a) an individual who is a registered owner of the aircraft dies;
- (b) an entity that is a registered owner of the aircraft is wound up, dissolved or amalgamated with another entity;
- (c) the lease termination date specified in the most recent lease received by the Minister and submitted in connection with an application for the registration of an aircraft referred to in section 202.16 is extended and the Minister is not informed of that fact in writing within seven days after that lease termination date;
- (d) a registered owner ceases to be qualified to be a registered owner of the aircraft under section 202.15; or
- (e) except in the case of an aircraft undergoing restoration or an ultra-light aeroplane, the aircraft has not been operated in flight during the last five years.

(2) Where the document pursuant to which a registered owner of an aircraft has legal custody and control of the aircraft ceases to be in effect, the certificate of registration of the aircraft is cancelled unless the registered owner

- (a) retains legal custody and control of the aircraft after the document ceases to be in effect; and
- (b) submits to the Minister, within seven days after the day on which the document ceases to be in effect,
 - (i) notification of the fact that the document is no longer in effect, specifying the day on which it ceased to be in effect, and
 - (ii) a copy of the new document under which the registered owner retains legal custody and control of the aircraft.

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.

702.08 An air operator certificate shall contain

- (a) the legal name, trade name and address of the air operator;
- (b) the number of the air operator certificate;
- (c) the effective date of certification;
- (d) the date of issue of the certificate;
- (e) the general conditions identified in Section 702.09;

- (f) specific conditions with respect to
 - (i) the areas of operation authorized,
 - (ii) the types of service authorized,
 - (iii) the types of aircraft authorized and, if applicable, their registration, and any operational restrictions, and
 - (iv) the main base and, if applicable, sub-bases; and
- (g) where the air operator complies with the Commercial Air Service Standards, operations specifications with respect to
 - (i) aircraft performance, equipment and emergency equipment requirements,
 - (ii) instrument approach procedures,
 - (iii) operations over a built-up area or in an aerial work zone,
 - (iv) the carriage of persons other than flight crew members and persons whose presence on board an aircraft is essential during flight,
 - (v) special weather minima authorizations,
 - (vi) authorizations concerning flight crew member complement,
 - (vii) navigation system authorizations,
 - (viii) pilot training and pilot proficiency checks,
 - (ix) special helicopter procedures,
 - (x) the air operator maintenance control system approved pursuant to Subpart 6,
 - (xi) leasing arrangements, and
 - (xii) any other condition pertaining to the operation that the Minister deems necessary for aviation safety.

SUBPART 5 — AIRLINE OPERATIONS

Division I — General

Application

705.01 This Subpart applies in respect of the operation by a Canadian air operator, in an air transport service or in aerial work involving sightseeing operations, of any of the following aircraft:

- (a) an aeroplane, other than an aeroplane authorized to operate under Subpart 4, that has a MCTOW of more than 8 618 kg (19,000 pounds) or for which a Canadian type certificate has been issued authorizing the transport of 20 or more passengers;

(b) a helicopter that has a seating configuration, excluding pilot seats, of 20 or more; or

(c) any aircraft that is authorized by the Minister to be operated under this Subpart.

Aircraft Operation

705.02 No air operator shall operate an aircraft under this Subpart unless the air operator complies with the conditions and operations specifications in an air operator certificate issued to that operator by the Minister pursuant to section 705.07.

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

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

COURT OF APPEAL FOR ONTARIO
(PROCEEDING COMMENCED AT TORONTO)

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