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Court of Appeal File No. _____
Court File No. CV-10-8647 -00CL

COURT OF APPEAL FOR ONTARIO

R E : IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC., OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 9 OF THE AIRPORT TRANSFER (MISCELLANEOUS MATTERS) ACT, S.C. 1992, C.5 (APPLICATION BY THE GREATER TORONTO AIRPORTS AUTHORITY)

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 56 OF THE CIVIL AIR NAVIGATION SERVICES COMMERCIALIZATION ACT, S.C. 1996, C.20, AS AMENDED (APPLICATION BY NAV CANADA)

NOTICE OF APPEAL

MCAP Europe Limited ("MCAP"), IAI V, Inc. ("IAI") and Celestial Aviation Trading 23 Limited ("CAT 23") appeal to the Court of Appeal from the Order of the Honourable Mr. Justice Morawetz dated April 6, 2011, made at Toronto on a motion by IAI, MCAP, International Lease Finance Corporation ("ILFC"), Thomson Airways Limited ("Thomson"), (on behalf of CAT 23, GE Capital Aviation Air Services and ORIX Aviation Systems Limited), and Sunwing Tours Inc. ("Sunwing"), heard June 1 and June 16, 2010 (the "Motion") ordering that the applications of the Greater Toronto Airports Authority ("GTAA"), the Ottawa MacDonald-Cartier International Airport Authority ("OMCIAA"), and NAV Canada for the seizure and detention of certain aircraft are not affected by the stay of proceedings in these receivership proceedings (the "Stay"), are granted and are to be enforceable up to the full amount owing to GTAA, OMCIAA and NAV Canada and that the motions brought by MCAP, IAI and CAT 23, among other aircraft lessors, for the requested declaration in respect of GTAA, OMCIAA, the Winnipeg Airports Authority Inc. ("WAA" and, collectively with GTAA and OMCIAA, the "Airport Authorities") and NAV Canada are dismissed;

THE APPELLANTS ASK that the Order be set aside and that an Order be granted as follows:

1. ordering and declaring that the Airport Authorities and NAV Canada are not entitled to seize and detain the Aircraft (as defined below) and directing that physical

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possession of the Aircraft be delivered to MCAP, IAI and CAT 23 forthwith without payment of any amounts to the Airport Authorities and NAV Canada;

2. costs of this Appeal; and
3. such further and other relief as counsel may advise and this Honourable Court permit.

THE GROUNDS OF APPEAL are as follows:

1. The motion judge found, *inter alia*, that:
 - (a) all of the officers and directors of Skyservice Airlines Inc. ("**Skyservice**") resigned on March 30, 2010;
 - (b) the purpose of the receivership order, granted by the Honourable Mr. Justice Gans on March 31, 2010 at 11:00 a.m. (the "**Receivership Order**"), was to wind-up Skyservice and liquidate its assets;
 - (c) the Receivership Order authorized FTI Consulting Canada Inc., as receiver of the assets, undertakings and properties of Skyservice (the "**Receiver**"), to wind up but not operate the business of Skyservice. The Receiver indicated that it did not require and would not take possession of the Aircraft;
 - (d) on the morning of March 31, 2010, Skyservice issued a press release stating that it was ceasing operations;
 - (e) at or about the time of the granting of the Receivership Order, Transport Canada suspended Skyservice's air operator certificate and aircraft maintenance organization licences on the basis that Skyservice had ceased business and could no longer meet the requirements of its air operator certificate, including possessing or having authority or capacity to maintain or operate the aircraft, including one Boeing 757-28A aircraft, bearing manufacturer's serial number 32447 and Canadian registration marks C-GTBB on lease from CAT 23 to Skyservice (the "**CAT Aircraft**"), one Boeing 757236 aircraft, bearing manufacturer's serial number 24772 and Canadian registration marks C-GTSJ on lease from IAI to Skyservice (the "**IAI Aircraft**") and one Airbus A320-200 aircraft, bearing manufacturer's serial number

1411 and Canadian registration marks C-FRAA on lease from MCAP to Skyservice (collectively, the "Aircraft"), both of which were the subject of the Motion; and

- (f) after the granting of the Receivership Order, GTAA issued its notice of application on an *ex parte* basis pursuant to the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c.5 (the "Airport Transfer Act") and s.56 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, c. 20 ("CANSCA"), seeking an order authorizing it to seize and detain the Aircraft.
2. Accordingly, given that, *inter alia*, Skyservice had ceased operations; had no intention of recommencing operations; the Receiver had no powers to operate Skyservice's business and did not take possession of the Aircraft; Skyservice had abandoned the Aircraft such that it no longer had custody and control of the Aircraft when the Airport Authorities and NAV Canada, after the granting of the Receivership Order, brought *ex parte* applications seeking to seize the Aircraft pursuant to the Airport Transfer Act and CANSCA; the motion judge erred in law as follows:
- (a) by finding that Skyservice was still the registered owner of the Aircraft;
 - (b) by finding that Skyservice was still the operator of the Aircraft;
 - (c) by considering and focusing on when the lessors obtained a complete physical repossession of the Aircraft rather than when Skyservice gave up possession of or ceased to be "owner" or "operator" of the Aircraft;
 - (d) by not following and not properly applying the principles set out by the Supreme Court of Canada in *NAV Canada c. Wilmington Trust Co.*, [2006] 1 S.C.R. 865 ("*Canada 3000*") and the Alberta Court of Appeal in *Calgary Airport Authority v. Zoom Airlines Inc.* 2009 CarswellAlta 1427 (C.A.) (leave to appeal to SCC denied) ("*Zoom*");
 - (e) in particular, the motions judge erred in law by misapplying the principles in *Canada 3000* and *Zoom* by granting priority to the rights of the Airport Authorities and NAV Canada to seize and detain the Aircraft pursuant to their *ex parte* applications under the Airport Transfer Act and CANSCA on the basis that MCAP, IAI and CAT 23 had failed to complete a physical repossession of the Aircraft prior to the granting of the

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Receivership Order. The motions judge erred further by finding that no repossession by the lessors took place until April 15, 2010;

- (f) the motion judge also erred in law by misapplying the principles in *Canada 3000* and *Zoom* by granting priority to the Aircraft Authorities and NAV Canada based on the time that they brought their applications and not the time that the relief under such applications was granted;
- (g) the motion judge further erred in law by misapplying the principles in *Canada 3000* by finding that Skyservice remained "owner" or "operator" of the Aircraft as of April 6, 2010;
- (h) the motion judge further erred in law by misapplying the principles in *Canada 3000* by finding that, on policy grounds, lessors are in a better position to protect themselves from the default of an airline than the Airport Authorities and NAV Canada, notwithstanding the fact that in *Canada 3000* the Airport Authorities and NAV Canada could not accept deposits from the airline, while in this case the Airport Authorities and NAV Canada could have protected themselves by requiring deposits or other security from Skyservice;
- (i) by finding that the priority dispute between the Airport Authorities/NAV Canada and the lessors was identical to that in *Canada 3000* notwithstanding the fact that: (i) Skyservice was neither eligible to be the registered owner of the Aircraft nor was it the operator, as was found with respect to the debtor in *Canada 3000*; and (ii) that the debtor in *Canada 3000* initially sought to retain its aircraft in an attempt to restructure and continue its operations while, in this case, Skyservice ceased all operations and, in law, abandoned its fleet of aircraft well in advance of the Receivership Order, thereby distinguishing this case from *Canada 3000* in several material respects;
- (j) the motion judge further erred in law by finding that *Canada 3000* applied to the arguments advanced by MCAP, IAI and CAT 23 but then concluding that such arguments need not be fully considered;
- (k) by finding that stays of proceedings in receiverships, including the Stay in this case, can be equated with stays of proceedings under the *Companies' Creditors*

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Arrangement Act (Canada) or PART III of the *Bankruptcy and Insolvency Act* (Canada), even where the purpose of the receivership is, as with Skyservice, the liquidation of the debtor's assets;

- (l) by finding that the remedies which the lessors sought to enforce against Skyservice, including termination of the aircraft leases, was prohibited by operation of the Stay. The motion judge further erred by not, in the alternative, granting leave, *nunc pro tunc*, to lift the stay to permit the lessors to, *inter alia*, terminate the leases;
- (m) by finding that the relief sought by the Airport Authorities and NAV Canada pursuant to the Airport Transfer Act and CANSCA was not prohibited by the Stay. In particular, this finding is inconsistent with the motion judge's finding that the remedies sought to be enforced by the lessors were prohibited by the operation of the Stay;
- (n) the motions judge further erred in law by not considering and not properly applying the requirements of s.9(2) of the Airport Transfer Act and s.56 of CANSCA regarding the granting of a seizure order on an *ex parte* application. In particular, the motion judge erred in law by finding that he only had the discretion with respect to the terms of a seizure order, and not the discretion to decline to grant a seizure order where the statutory prerequisites had been satisfied. The motion judge further erred by finding that the statutory prerequisites had been met in this case, particularly given that the relief sought by the Airport Authorities and NAV Canada was done so on an *ex parte* application, which is only permissible where the aircraft in question are about to leave or be taken from Canada. There is no evidence that the Aircraft were about to leave or be taken from Canada and Skyservice had no capability or intention to do so. The motion judge also erred by finding that, in the alternative, if he had the discretion to decline to grant a seizure order, he would not exercise such discretion in favour of the lessors;
- (o) with respect to IAI, the motion judge erred in finding that the seizure order obtained by NAV Canada and the Airport Authorities applied to the IAI Aircraft given that as of 6:30 p.m. on March 31, 2010, the IAI Aircraft was not listed in the application materials of NAV Canada and the Airport Authorities;

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- (p) by misapplying the definition of and the requirements to be "operator", "owner" and "registered owner" of an aircraft under the *Canadian Aviation Regulations*; and
 - (q) by misapplying the definition of and the requirements to be "owned" or "operated" by the debtor airline as defined in the Airport Transfer Act and CANSCA.
3. CAT 23 originally leased the CAT Aircraft to Thomson. At the request of Thomson, CAT 23 subsequently suspended the lease of the CAT Aircraft to Thomson and leased the CAT Aircraft to Skyservice directly. Thomson and CAT 23 agreed that Thomson would bring the Motion on behalf of CAT 23 and Thomson. CAT 23 now appeals on its own account.
 4. Such further and other grounds of Appeal as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS: (i) sections 6(1)(b) of the *Courts of Justice Act* and 183(2) of the *Bankruptcy and Insolvency Act* (Canada) and Rule 61.04(1) of the *Rules of Civil Procedure*; (ii) the Order appealed from is final; and (iii) Leave to appeal is not required.

May 6, 2011

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IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC., of the City of Toronto, in the Province of Ontario

Court of Appeal File No.:
Court File No.: CV-10-8647-00C

AND IN THE MATTER OF AN APPLICATION pursuant to Section 9 of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c.5 (Application by the Greater Toronto Airports Authority)

AND IN THE MATTER OF AN APPLICATION pursuant to Section 56 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, Chapter 20, as amended (Application by NAV Canada)

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

NOTICE OF APPEAL

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Court of Appeal File No. _____
Court File No. CV-10-8647 -00CL

COURT OF APPEAL FOR ONTARIO

**RE : IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC.,
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO**

**AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 9 OF THE
AIRPORT TRANSFER (MISCELLANEOUS MATTERS) ACT, S.C. 1992, C.5
(APPLICATION BY THE GREATER TORONTO AIRPORTS AUTHORITY)**

**AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 56 OF THE
CIVIL AIR NAVIGATION SERVICES COMMERCIALIZATION ACT, S.C. 1996, C.20, AS
AMENDED (APPLICATION BY NAV CANADA)**

APPELLANT'S CERTIFICATE

**THE APPELLANTS, IAI V, Inc., MCAP Europe Limited and Celestial Aviation Trading 23
Limited, certify that the following evidence is required for the appeal, in their opinion:**

1. Decision of Justice Morawetz dated April 6, 2011
2. Notice of Application dated March 31, 2010
 - a. Affidavit of Karim Nensi sworn March 31, 2010
3. Pre-Appointment Report to the Court submitted by FTI Consulting Canada Inc., in its capacity as proposed Receiver
4. Receivership Order – March 31, 2010
5. Notice of Motion brought by the Winnipeg Airports Authority Inc. (Court File No. CI 10-01-65697) for an order to detain aircraft owned or operated by Skyservice Airlines Inc.
 - a. Affidavit of Mary Ellen McDonald sworn March 31, 2010
6. Ex-Parte Order – March 31, 2010 brought by the Winnipeg Airport Authority Inc. approving the detention of aircraft owned or operated by Skyservice Airlines Inc.
7. Notice of Motion brought by the Aircraft Lessors returnable April 9, 2010 for an order approving the Release Protocol Order
8. Release Protocol Order & Endorsement – April 9, 2010
9. Endorsement of Morawetz J. dated April 12, 2010 setting motion schedule
10. Notice of Motion brought by the Receiver returnable April 15, 2010 for an order approving the First Report, authorizing the Receiver and Skyservice to enter into an Aircraft Return Agreement and Aircraft Return Indemnity Agreement.
11. First Report Of The Receiver – April 14, 2010

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12. Order & Endorsement – April 15, 2010 approving the Aircraft Return Agreements, Aircraft Return Indemnity Agreements and Responsible Party Agreements
13. Notice of Motion returnable June 1, 2010 brought by International Lease Finance Corporation and C.I.T. Leasing Corporation
 - a. Affidavit of Serge G. Avakian, sworn April 23, 2010
 - b. Affidavit of Ira Finkelson, sworn April 26, 2010
14. Notice of Motion returnable June 1, 2010 brought by IAI V, Inc. and MCAP Europe Limited
 - a. Affidavit of Shigeru Kizawa sworn April 26, 2010
 - b. Affidavit of Mario Schuler sworn April 26, 2010
15. Notice of Motion brought by Thomson Airways Limited and Sunwing Tours Inc. returnable June 1, 2010
 - a. Affidavit of Thomas Chandler (unsworn)
 - b. Affidavit of Mark Williams (unsworn)
16. Affidavit of Mary Ellen McDonald sworn April 22, 2010 on behalf of Winnipeg Airport Authorities re payment to WAA from security held for it under the Protocol Order
17. Second Report Of The Receiver – June 10, 2010

May 6, 2011

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**TO: THE SERVICE LIST ATTACHED TO THE NOTICE OF APPEAL DATED
MAY 6, 2011**

IN THE MATTER OF THE RECEIVERSHIP OF SKYSERVICE AIRLINES INC., of the City of Toronto, in the Province of Ontario

AND IN THE MATTER OF AN APPLICATION pursuant to Section 9 of the *Airport Transfer (Miscellaneous Matters) Act*, S.C. 1992, c.5 (Application by the Greater Toronto Airports Authority)

AND IN THE MATTER OF AN APPLICATION pursuant to Section 56 of the *Civil Air Navigation Services Commercialization Act*, S.C. 1996, Chapter 20, as amended (Application by NAV Canada)

Court of Appeal File No.:
Court File No.: 09-7980-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding Commenced at Toronto

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