

**CITATION:** Skyservice Airlines Inc. (Re), 2011 ONSC 6369  
**COURT FILE NO.:** CV-10-8647-00CL  
**DATE:** 20111027

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**(COMMERCIAL LIST)**

**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)**

**BEFORE:** MORAWETZ J.

**COUNSEL:** Harvey Chaiton, for the Winnipeg Airports Authority

Clifton Prophet and Patrick Shea, for NAV Canada

Heather Meredith, for the Receiver, FTI Consulting Inc.

Donald G. Gray, Deborah S. Grieve and Auriol Marasco, for IAI V, Inc. and MCAP Europe Limited

Steven Weisz and Chris Burr, for Thomson Airways Limited and Sunwing Tours Inc.

Jane Dietrich, for International Lease Finance Corporation

Mary Paterson, for Thomas Cook Canada, Inc.

Allan D. Coleman and Shaun T. Irving, for Greater Toronto Airports Authority and Ottawa MacDonal-Cartier International Airport Authority

Pamela L. J. Huff for C.I.T. Leasing Corporation

**COSTS ENDORSEMENT**

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[1] In my Endorsement of April 6, 2011 [2011 ONSC 703], the applications (the "Seizure Applications") of the Greater Toronto Airports Authority ("GTAA"), the Ottawa MacDonald-Cartier International Airport Authority ("OMCIAA"), the Winnipeg Airports Authority ("WAA") and NAV Canada ("NAV Canada") for aircraft seizure and detention orders for amounts owed to them by Skyservice Airlines Inc. ("Skyservice") were granted. The opposing motions brought by Thomson Airways Limited ("Thomson"), Sunwing Tours Inc. ("Sunwing"), IAI V, Inc. ("IAI") and MCAP Europe Limited ("MCAP") (collectively, the "Lessors"), which sought declarations that none of GTAA, OMCIAA, or the WAA (collectively, the "Airport Authorities") or NAV Canada were entitled to seize or detain the aircraft were dismissed.

[2] Prior to the hearing of the Seizure Applications, the parties negotiated a protocol for the release of the aircraft that were the subject of the Seizure Applications and to provide alternative security, to be held by the Receiver, for the unpaid amounts and the costs of the Airport Authorities and NAV Canada in pursuing the Seizure Applications (the "Protocol").

[3] Under the Protocol, the Airport Authorities and NAV Canada are entitled to be indemnified for the payment of reasonable legal costs incurred by them in connection with their successful Seizure Applications, subject to assessment.

[4] The relevant provisions of the Protocol provide:

9. (a) Subject to paragraph 10, upon receipt by the Receiver of an amount equal to 110% of the Unpaid Amounts claimed by each of the Airport Authorities (in relation to each Airport Authority, the "Security Amount", as set out in Schedule "C" hereto, plus \$100,000.00 to secure any costs incurred by the Airport Authorities (as provided for below) in excess of the Security Amounts (the "Costs Fund", together with all Security Amounts, the "Security"), which Security shall be transferred as soon as possible to and held in a segregated interest bearing account and shall stand in lieu and in place of the Aircraft or any of them and shall be paid out by the Receiver strictly in accordance with paragraph 13 below, the Aircraft shall, on notice to the Airport Authorities by the Receiver that the Security has been received, be released from the Seizure Claims and any and all other claims of the Airport Authorities, which claims shall be secured and fully enforceable against the Security, in accordance with the terms of this Protocol and the order approving this Protocol.

....

13. The Receiver shall pay:

(a) to each Airport Authority from the Security held for each such Airport Authority, plus the interest earned on such Security while held by the Receiver:

(i) the Unpaid Amounts applicable to such Airport Authority, or such lesser amount as may be ordered by the Court or the Manitoba Court, as applicable, in respect of the Unpaid Amounts claimed by such Airport Authority (a "Proven Amount"), plus interest at the

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rate applicable for the Proven Amount by contract, regulation or statute ("Interest"), upon the making of a final order in favour of such Airport Authority providing for the seizure and detention of the Aircraft, or any of them, from which all rights of appeal in respect of any Aircraft have expired or been exhausted by way of final disposition (a "Final Seizure Order"); and

- (ii) in the event that a Final Seizure Order is obtained by an Airport Authority in respect of any Aircraft, the reasonable legal costs incurred by such Airport Authority in bringing its Seizure Application before the Court or the Manitoba Court, as applicable (including, without limitation, its reasonable legal costs incurred in connection with the negotiation and approval of this Protocol), subject to assessment, irrespective of whether such costs are awarded by the Court or the Manitoba Court, as applicable (a "Costs Amount"). If the total of the Proven Amount, the interest and the Costs Amount with respect to an Airport Authority exceed 110% of the Proven Amount for that Airport Authority, plus interest actually earned and paid on the Proven Amount while held by the Receiver, any such excess Costs Amount of that Airport Authority will be paid from the Costs Fund. If the total amount claimed by the Airport Authorities from the Costs Fund exceeds the amount of the Costs Fund, the respective amount to be paid to each Airport Authority shall be allocated by agreement between the affected Airport Authorities or by order of the Court.

In the event of any appeal of the decision of the court hearing the Seizure Application, an Airport Authority shall only be entitled to be paid its legal costs in connection with the appeal from the applicable Security if such appellate court awards costs to such Airport Authority. For greater certainty, any amount paid to an Airport Authority in respect of its costs shall not preclude such Airport Authority from seeking to enforce any costs award made against one or more of the Lessors in the amount of such costs award is not satisfied by the payment to such Airport Authority from the applicable Security. The amounts payable to an Airport Authority pursuant to this paragraph 13(a) shall constitute an "Awarded Amount"; or

...

In any case, no payments contemplated by this paragraph 13 will be made without the written request and direction of the Lessors and the applicable Airport Authority, or in accordance with a Final Seizure Order or other order of the Court.

For greater certainty, the Airport Authorities shall not be limited to calling only upon an amount posted as Security with the Receiver by a particular Lessor with

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respect to a particular Aircraft but shall be able to call upon the full Security Amount paid to the Receiver in favour of such Airport Authority upon a Final Seizure Order made in respect of the Aircraft or any of them and any allocation of liability for payment of a Security Amount among the Lessors *inter se* shall not be binding upon or prejudice the Airport Authorities. In the event of an appeal by a Lessor, at least NAV Canada shall respond to such an appeal.

[5] The Airport Authorities and NAV Canada take the position that any costs are first to be paid by the Receiver from the funds held by it pursuant to the Protocol. These parties claim that they are also entitled, however, to seek an award of costs from the court in their favour and to seek to recover from the Lessors directly any amounts so awarded that are in excess of the amounts recovered from the security held by the Receiver. This point is disputed by the Lessors who submit that any award of costs cannot exceed the Costs Fund as established under the Protocol.

[6] GTAA and OMCIAA submit that they are entitled to their costs on a substantial-indemnity basis and request that such costs be fixed in the amount of \$105,944.42 in respect of GTAA and \$59,415.92 in respect of OMCIAA, inclusive of fees, disbursements and HST.

[7] WAA is seeking payment of the sum of \$162,875.07, comprised of \$80,812.33 of Ontario counsel's fees and disbursements (including HST), and \$82,062.74 of Manitoba counsel's fees and disbursements (including HST). These amounts are calculated on a full-indemnity basis.

[8] NAV Canada seeks an award in the amount of \$196,398.14 inclusive of fees, disbursements and HST, calculated on a full-indemnity rate, taking the position that the provisions of the Protocol contemplate full indemnity for costs.

[9] MCAP and IAI submit that the amount of the costs claimed is inappropriate and that a scale based on either a full- or substantial-indemnity is unwarranted and unreasonable.

[10] MCAP and IAI further submit that:

- (i) the assessment of the Airport Authorities and NAV Canada's costs should be deferred until there has been a Final Seizure Order (as defined in the Protocol) in respect of the applications (IAI and MCAP have appealed the decision of April 6, 2011) or, in the alternative;
- (ii) that any costs that are to be awarded to the Airport Authorities and NAV Canada should be:
  - (a) calculated on a partial-indemnity basis, as set out in the response of Thomson, and
  - (b) limited to the amount of the Costs Fund.

[11] Thomson submits that costs should be awarded to the Airport Authorities and NAV Canada on a partial-indemnity basis, in the aggregate amount of \$275,000, alternatively, in any event, pursuant to the Protocol, the costs should be limited to, at most, the "Costs Fund" and

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other "Security" held by the Receiver in the aggregate amount of \$339,997.59 (plus interest accrued on such Costs Fund and other security from May 5, 2011). Thomson takes the position that the issue of costs was agreed to by the parties prior to the release of the relevant aircraft and memorialized in the Protocol and the Airport Authorities and NAV Canada should not now be permitted to seek more than they bargained for.

[12] International Lease Finance Corporation ("ILFC") and C.I.T. Leasing Corporation ("CIT") also filed submissions. ILFC and CIT each leased one aircraft to Skyservice. ILFC and CIT paid \$158,641.31 and \$345,088.30, respectively, for the release of their aircraft pursuant to the Protocol. Of those amounts, \$21,615 for ILFC and \$44,008.03 for CIT, was contributed to the costs reserve established by the Protocol. ILFC and CIT support and adopt the submissions filed by Thomson.

[13] The Airport Authorities and NAV Canada were entirely successful in the litigation and are entitled to their costs.

[14] The Airport Authorities and NAV Canada are of the view that they are entitled to costs on either a full-indemnity or substantial-indemnity basis. These parties submit that there was settled law directly on point; the provisions of the Protocol contemplate full indemnity (or the least substantial indemnity) for costs; the expectations of the parties concerning the costs of the application, given the relatively technical nature of the litigation and its importance to the parties justifies such an award; and the conduct and choices of MCAP and IAI in relation to steps taken in the litigation, justify costs on either a full- or substantial-indemnity basis. With respect to the conduct of litigation, counsel to NAV Canada specifically references MCAP and IAI as having taken steps which tended to increase the cost and complexity of the matter. By way of example, NAV Canada contends that MCAP and IAI proffered an affidavit sworn by an employee of their counsel's firm which was in such a form that necessitated a motion to strike the affidavit material.

[15] On the issue of the appropriate level of costs, I have not been persuaded by the arguments of the Airport Authorities or NAV Canada. Rather, I accept the submissions put forth by Thomson which are applicable to all of the Lessors. In their submission, Thomson points out that a normal rule is that costs are to be award on a partial-indemnity basis and that the overriding principle of a costs award is reasonableness (see *Davies v. Clarington (Municipality)* [2009], 312 D.L.R. (4<sup>th</sup>) 278 at paragraph 52 Ont. C.A.) where the court stated:

Rather than engage in a purely mathematical exercise, the judge awarding costs should reflect on what the court views as a reasonable amount that should be paid by the unsuccessful party rather than an exact measure of the actual costs of the successful litigant.

[16] Absent the Protocol, I have no hesitation in determining that costs should be awarded on a partial-indemnity basis. In my view, the participation of the Lessors in this litigation and the conduct of the Lessors did not reached a scale that would persuade me that a higher level of costs should be awarded in this case. (See *Young v. Young* [1993] 4 S.C.R. 3 at para. 251 on this point.)

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[17] With respect to the Protocol, it seems to me that the use of the phrase "reasonable legal costs, as assessed" in the Protocol by no means unequivocally expresses that the Lessors would be liable for costs on either a substantial- or full-indemnity scale. The phrase "reasonable legal costs" is more in keeping with an award on a partial-indemnity basis, which I consider to be appropriate in these circumstances.

[18] With respect to the submission of IAI and MCAP that the assessment of costs be deferred until there has been a Final Seizure Order, it seems to me that this provision relates to payment of such costs and not to the quantification of costs. Given that IAI and MCAP are the only parties to appeal, it is not necessary to defer consideration of this issue until the appeal has been determined. The assessment of costs can be addressed at this time with the payment of any costs allocated to IAI and MCAP being deferred pending the outcome of the appeal.

[19] Turning now to the quantification, a useful chart is contained at paragraph 15 of the Thomson submissions. Partial-indemnity calculations, using the information in the Airport Authorities' and NAV Canada's Bills of Costs and applying reasonable rates pursuant to the ranges provided for in the tariffs (calculated at 2/3 of the substantial-indemnity rates claimed) provide partial-indemnity totals as follows:

GTAA	\$ 70,922.39
OMCIAA	\$ 39,785.56
WAA	\$ 82,149.07
NAV Canada	<u>\$ 85,068.58</u>
TOTAL	\$277,925.60

[20] I have considered the submissions filed by the parties and I have also taken into account the facts enumerated under Rule 57, including the time spent, the results achieved and the complexity of the matter. In addition, I have also taken into account the principles set forth by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3rd) 291 (C.A.), specifically that the overall objective of fixing costs is to fix an amount that is fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant.

[21] In my view, the methodology set out by Thomson is appropriate in the circumstances and the calculations appear to be reasonable. Recognizing that partial-indemnity calculation is not an exact science, in my view, it is appropriate and reasonable for costs to be fixed on a partial-indemnity basis in the amount of \$277,925.60 inclusive of disbursements and HST, to be allocated as set out in [19] above.

[22] Finally, based on the submissions of Thomson, the aforesaid award of costs does not exceed the full amount of the balance of the security, which is calculated at \$339,997.59 plus interest from May 5, 2011. Accordingly, it appears that it is not necessary to address the issue of whether costs are limited to, at most, the "Costs Fund" and other "Security" held by the Receiver in this amount. To the extent that any party is of the view that this issue has to be determined,

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they can so advise the Commercial List Office and a supplementary endorsement on this point will be provided.



MORAWETZ J.

**Date:** October 27, 2011